REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1890.

VOLUME XXX.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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1891.

THE SUPREME COURT

OF

NEBRASKA.

1891.

CHIEF JUSTICE,

AMASA COBB.

JUDGES,

SAMUEL MAXWELL,
T. L. NORVAL.

OFFICERS.

ATTORNEY GENERAL,

GEORGE H. HASTINGS.

CLERK AND REPORTER,

D. A. CAMPBELL.

DEPUTY CLERK,

W. B. ROSE.

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JUDGES.

FIRST DISTRICT.

JEFFERSON H. BROADY.....Beatrice.
THOMAS APPELGET.....Tecumseh.

SECOND DISTRICT.

SAMUEL M. CHAPMAN.....Plattsmouth.

THIRD DISTRICT.

ALLEN W. FIELD.....Lincoln.
A. S. TIBBETS.....Lincoln.
CHARLES L. HALL.....Lincoln.

FOURTH DISTRICT.

ELEAZER WAKELEY.....Omaha.
GEORGE W. DOANE.....Omaha.
MELVILLE R. HOPEWELL.....Tekamah.
HERBERT J. DAVIS.....Omaha.
LEE S. ESTELLE.....Omaha.
A. N. FERGUSON.....Omaha.
FRANK IRVINE.....Omaha.

FIFTH DISTRICT.

EDWARD BATES.....York.
MATT MILLER.....David City.

SIXTH DISTRICT.

A. M. POST.....Columbus.
WILLIAM MARSHALL.....Fremont.

SEVENTH DISTRICT.

WILLIAM H. MORRIS.....Crete.

EIGHTH DISTRICT.

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

NINTH DISTRICT.

ISAAC POWERS, JR.....Norfolk.

TENTH DISTRICT.

WILLIAM GASLIN, JR.....Alma.

ELEVENTH DISTRICT.

T. O. C. HARRISON.....Grand Island.
E. M. COFFIN.....Ord.

TWELFTH DISTRICT.

FRANCIS G. HAMER.....Kearney.

THIRTEENTH DISTRICT.

JAMES E. COCHRAN.....McCook.

FIFTEENTH DISTRICT.

MOSES P. KINKAID.....O'Neill.
ALBERT W. CRITES.....Chadron.

STENOGRAPHIC REPORTERS.

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C. H. HOLMES.....Beatrice.
R. H. POLLOCK.....Pawnee City.

SECOND DISTRICT.

W. H. WHEELER.....Lincoln.

THIRD DISTRICT.

O. A. MULLON.....Lincoln.
BERT E. BETTS.....Lincoln.
F. E. BELL.....Lincoln.

FOURTH DISTRICT.

B. C. WAKELEY.....Omaha.
C. C. VALENTINE.....Omaha.
A. M. HOPKINS.....Omaha.
CHARLES A. POTTER.....Omaha.
H. M. WARING.....Omaha.
THOMAS P. WILSON.....Omaha.
WILLIAM S. HELLER.....Omaha.

FIFTH DISTRICT.

T. E. HAMILTON.....York.
W. S. BECKER.....David City.

SIXTH DISTRICT.

FRANK J. NORTH.....Columbus.
E. R. MOCKETT.....Fremont.

SEVENTH DISTRICT.

NORA BLOCK.....Harvard.

EIGHTH DISTRICT.

GEORGE COUPLAND.....Neligh.

NINTH DISTRICT.

EUGENE MOORE.....West Point.

TENTH DISTRICT.

F. M. HALLOWELL.....Kearney.

ELEVENTH DISTRICT.

C. W. PEARSALL.....Grand Island.
E. B. HENDERSON.....Albion.

TWELFTH DISTRICT.

J. W. BREWSTER.....Hastings.

THIRTEENTH DISTRICT.

E. A. CARY.....North Platte.

FOURTEENTH DISTRICT.

A. D. GIBBS.....McCook.

FIFTEENTH DISTRICT.

A. L. WARRICK.....O'Neill.
H. L. LAIRD.....Chadron.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOLUME XXIX.

ARTHUR E. BALDWIN.
M. M. HOUSE.
EDWIN M. LAMB.
WM. D. MCHUGH.
JAMES L. MCINTOSH.
W. A. MILES.
GEORGE ARTHUR MURPHY.
R. C. NOLEMAN.
W. A. PRINCE.
NELLIE M. RICHARDSON.
CORYDON ROOD.
W. G. SIMONSON.
ALONZO P. TARBOX.
ZARA A. WILSON.

RULE OF COURT.

ADOPTED SINCE THE PUBLICATION OF VOLUME XXIX.

28. [CHIEF JUSTICE MAY MAKE ORDERS UNDER BANKING LAW.]—WHEREAS, Questions arise under the banking law of the state which demand prompt attention in order to protect important business interests and valuable property, and which require the appointment of receivers and other officers. and

WHEREAS, Such questions are liable to arise at a time when the court is not in session,

Therefore, The chief justice is hereby authorized and empowered to pass on all questions presented to him which arise under said banking law, and make all orders which are by him deemed necessary during the time when this court is not in session.

The syllabus in each case was prepared by the judge writing the opinion, in accordance with rule 20.

A table of statutes and constitutional provisions cited, construed, etc., numerically arranged, will be found on pages xliii–xlv.

In Memoriam.

OLIVER PERRY MASON.

OLIVER PERRY MASON, chief justice of the supreme court from 1866 to 1873, died August 18, A. D. 1891.

At the session of the supreme court, October 6, 1891, the following proceedings, touching his decease, took place:

MR. ATTORNEY GENERAL HASTINGS:

MAY IT PLEASE YOUR HONORS: Your committee to whom was allotted the duty of presenting resolutions of respect to the memory of HON. OLIVER P. MASON, late deceased, beg leave to submit the following:

Resolved, That the bar of the state and the supreme court of Nebraska unite in the expression of profound regret on account of the death of our brother, HON. OLIVER P. MASON; his long and useful services as a lawyer, a legislator, and a judge, his great powers, his honest record in public and private life, his loyalty of friendship and nobility of character, make his name and fame the heritage of our state, and have endeared him to the people. We feel that the bar of this state has been honored and exalted by his life and example from the earliest territorial days of our commonwealth to the present time. We know that, as a public man and jurist, JUDGE MASON has as much to do with, and exercised as great an influence in, the formation of our civil government as a state, and in the organization and permanent establishment of our courts and judiciary on a high footing equal with that of any state of our American Union, as any public man of Nebraska.

Resolved, That in his life we recognize in the deceased a jurist possessed of a scope and power of legal acumen and analysis equal to, if not greater than, that possessed by any member of the bar of Nebraska.

He was a man of great force of character, great kindness of heart, and of great integrity.

As a judge upon the district and supreme bench of this state, his power was so marked and his individuality so great, that his every

decision and opinion was stamped thereby, regardless of research and argument before him. He knew the law, and his analysis and exposition of it adorned his opinion, clothing the law in its purity, unobscured by those personal and special influences which always surround the subject in controversy.

His was a rugged and picturesque character in the pioneer days of Nebraska, and in latter years left the strong imprint of his individuality on the legal and judicial history of the state.

As a lawyer he was painstaking and conscientious, true to his clients; he believed that they were entitled to the full exertion of all his abilities. He rested only when the end was reached. During the contest he neither sent nor received a flag of truce.

He thought for himself and spoke what he thought. He was loyal to his own convictions. He never, in the hope of selfish gain, agreed with the mistakes of majorities, but, regardless of consequences, pointed out and attacked their follies and prejudices.

He was an open, honorable, manly foe, a loyal, true friend. He wore no mask. He knew his friends—his enemies knew him.

He was the same at all times, in all places—the soul of honor. His integrity was never doubted. He was above corruption and suspicion. He neither bought nor sold. He has left his family a legacy grander than wealth—a good name, an untarnished reputation.

Resolved, That we condole with his family in their great loss, and that from an earnest desire to show every mark of respect due to the memory of a distinguished man and citizen, manifesting the high esteem he was held in by all classes of our citizens, we will report these resolutions to this honorable court, now in session, and suggest that they be spread at length upon the records of the court.

GEO. H. HASTINGS.
M. B. REESE.
GEO. B. LAKE.
T. M. MARQUETT.
M. L. HAYWARD.
J. M. WOOLWORTH.
E. WAKELEY.
S. M. CHAPMAN.
E. W. THOMAS.

In presenting these resolutions on behalf of the committee, I pause but to add, that the life and the labors of the distinguished lawyer and judge, whose death we all deplore, has become so closely blended with the history of this state, that to write the one of a necessity writes the biography of the other. His strong, sanguine, and potent touch has left its lasting impression on the court, the bar, and upon the trend of the constitution and legislative enactments since our

history as a territory and state began. No lofty bronze or marble shaft shall be his monument, no carved line upon the cold and pulseless stone, no sentiment we write, no words we speak shall be his epitaph. He has reared for himself a monument more lasting than brass or granite, by his life and by his work in the midst of the people. His epitaph is found upon each page of our history, fashioned by his own vigorous hand, guided by the magnificent capabilities of his genius and intellect. Let his life and his death admonish us each to

> "So live that when thy summons comes to join
> The innumerable caravan that moves
> To the pale realms of shade, where each shall take
> His chamber in the silent halls of death,
> Thou go not, like the quarry slave at night,
> Scourged to his dungeon, but, sustained and soothed
> By an unfaltering trust, approach thy grave
> Like one who wraps the drapery of his couch
> About him, and lies down to pleasant dreams."

HON. CHARLES O. WHEDON:

MAY IT PLEASE THE COURT: It is a befitting custom, peculiar to the members of the bar, that when, as to a member of the profession who has enjoyed the confidence and esteem of his fellows, final judgment that he go hence without day has been pronounced and executed, his brothers assemble to testify to his worth. It is a privilege enjoyed by the members of no other profession that we are permitted to enter these our testimonials as enduring monuments upon the public records of a court. It is proper that the ordinary proceedings of this tribunal, over which the late OLIVER P. MASON presided as chief justice, should be interrupted while we pay to his memory the merit of well-deserved praise.

I count it as one of the fortunate incidents of my life that in my early professional career I enjoyed the privilege of forming a partnership with JUDGE MASON, which continued from October, 1874, until the close of his active professional life. During these years I was associated with him upon terms of closest intimacy, and I came to know him so well, that I can speak with the assurance of accurate knowledge of those qualities in his character that now claim from his associates at the bar and from this court those tokens of respect and honor we here and now offer to his memory. His was no common

character. Nature, with a lavish hand, bestowed upon him the gifts of originality, intellectual power, and genius. Looking more frequently within than without for light, he was apt to rely more upon the inspiration of his own understanding and convictions than upon the teachings of others, and he was more given to making precedents than to seeking after them. He was a man of marked personality; strong in his likes and dislikes; he was ever a steadfast friend, an uncompromising enemy. The principle of treating his enemy as though he might one day become his friend, had no place in his creed, and he was ever ready to strike his opponents with the shafts of ridicule and sarcasm, weapons he always carried, and to the use of which he was not unaccustomed. He was honest in his convictions, both as to principles and men. An earnest and able advocate, in the trial of a cause he knew but one person in the whole world, and that person was his client. Before courts his arguments upon the law were concise, logical, and convincing, and the power he possessed of swaying juries and popular assemblies was surpassed by few. The dissenting opinion delivered by him in this court in Tennant's case stands as a monument to his keen perception of the powers and privileges of the several departments of the state government, his analytical powers of reasoning, and his vigorous use of language. He spoke and acted from the impulses of a warm and generous heart, and policy, in the common acceptation of the term, was an unknown art. He was a commoner and his sympathies were ever with the unfortunate. As tending to show his views of the duties of the state towards the poor, the debtor class of citizens, I here quote at length the report which he, as chairman of the judiciary committee of the house in the then territory of Nebraska, made to that body October 6, 1858, thirty-three years ago to-day. He said:

"The undersigned, to whom were referred various homestead exemption bills, have carefully examined and considered the same, and would respectfully report the accompanying substitute for the consideration of the house, and recommend its passage.

"Your committee would further state that in addition to the ordinary reasons and arguments in favor of the wisdom of legislative action protecting the homesteads of families from forced sale and execution, the peculiar situation of the people of this territory and their present circumstances urge this policy upon us with a force which we cannot resist, animated as we are by a desire to subserve the public good. But one year ago everything around us rejoiced in the sunlight

of prosperity and success. Enterprise was conducting our people through a thousand avenues, illuminated with the brilliant torchlight of hope, to individual and national wealth.

"The conquest of the wilderness went on like the work of magic; civilization was fast rearing her altars on the camp ground of the savage, and on every hand abounded the certain indications of thrift and contentment; but suddenly a cloud came upon the prospects of our people, and the gloom of midnight succeeded the brightness of noonday. A financial revolution, without parallel in the history of our country, has entirely deranged the affairs of our people, and the ruin of thousands of our citizens is inevitable unless they are upheld and sustained by the helping hand of legislation.

"The home of the settler, the scene and the result of his hardship and toil, must go to swell the fortune of the merciless speculator, and heartless and foreign money lender, unless the law, armed with justice, shall say to the avaricious and grasping creditor, "thus far shalt thou go and no farther." And unless this is done, I fear a spiritless inaction will succeed and take the place of that tireless energy and persevering industry which has hitherto characterized our young and vigorous population.

"Our people are not responsible for this state of things; no human sagacity could have averted the evil. It came upon us like an avalanche, and has swept away the prospect which encouraged our individual efforts, and abated the ardor of enterprise which guaranteed success.

"Your committee is clearly of the opinion that a liberal homestead law is more loudly called for by the wants of our people than any one other act of legislation. The passage of such a law would not only relieve our citizens from their present embarrassment, but would encourage immigration, offering, as it would, an inducement for settlement amongst us of that class who have felt the hand of adversity most severely in other parts of the country. Many a man of enterprise and possessed of good business qualifications would thus be induced to gather up the remnants of a broken fortune, and purchase a homestead among us, and here, upon our broad prairies and from our generous soil, would, in the enjoyment of his home, by the fostering care of legislation, rear a home which would be an ornament to our country and a proud heritage for his children.

"Another great benefit, universal in its application, which would result from the passage of a liberal homestead law, would be the blow that would be given to the credit system, that most dangerous of all systems, which destroys alike all who trust to the plaudits of its admirers.

"For these and other reasons equally and still more weighty, your committee would most respectfully urge the early passage of a liberal homestead exemption law."

It is not my purpose to review the public career of JUDGE MASON. To do so is to review the history of Nebraska as a territory and state. Suffice it to say that he was a member of the territorial legislature of the fifth, ninth, tenth, and eleventh sessions; president of the council when the constitution of 1866 was formed, a member of the constitutional convention of 1871, judge of the district court of the First district, and chief justice of this court from 1866 to 1873, and he also filled other public positions of lesser importance. That man has not lived in vain who has assisted in laying the foundation of a great state, in enacting and administering its laws, in forming its constitution, and by his counsels and labors aided in shaping its policy, and who, after performing every duty faithfully, has left a noble example and unsullied name.

For our deceased brother, death had no terrors. He regarded it as the natural, the inevitable consequences of life, to be feared neither too much nor too little, and when to him the inevitable period came, he met it with the fearlessness of a philosopher, leaving his future existence, in which he was a firm and undoubting believer, to that creative power which rules the universe. We laid his body in the cemetery near the scene of his earliest struggles and achievements, where he made his home when the savage and buffalo wandered at will over the site of this capital city. There, beside her, the companion of his earliest years, whose loss he never ceased to mourn, he sleeps. He will pass from the memory of men as those of his day and generation meet the common doom of humanity, but no true history of Nebraska will ever be written which will not contain a record of the public acts and services of OLIVER P. MASON.

HON. G. M. LAMBERTSON:

It is my privilege to add a few words to what has been already so fittingly said, before death's curtain falls forever between us and the familiar form of JUDGE MASON. In the near past death has been busy in our midst, but when it laid low our friend, it reaped one of its richest harvests. He fought death with rare courage and hope, but at last the weary struggle is over. "God's finger touched him and he slept." Those who knew him best will be his truest mourners. His dear friends were his near friends, and they were drawn very close to him.

Others have spoken of JUDGE MASON as a man, of his kindness of

heart. Certainly under his, at times, gruff exterior there was a heart as tender as a child's. He delighted in his home life, and the lovely family that he reared reciprocated to the fullest extent the unstinted and boundless affection that he lavished upon them. His reference to the days long gone, when the fires of domestic happiness burned brightly, his tribute of affection to the dear companion who preceded him to the realms beyond, melted all hearts.

Able as JUDGE MASON was generally, it seems to me that his great powers were never so splendidly exhibited as when he appeared as the tribune of the people or the advocate at the bar. Here his great powers were shown in their ripest perfection. He was the strongest personality and the most unique figure at the Nebraska bar. His individuality stamped everything it touched. Of massive proportions, of dignified, even ponderous mien, he at times swept everything before him in the forensic arena by his physical momentum. When with a voice of thunder "gathering his brows like a gathering storm," with tremendous physical action, the very incarnation of force itself, he swept down upon an opponent, an error, heresy, or fraud, there was as little chance of staying the onset as of stopping an avalanche by brandishing a pin in its pathway.

He had all the qualities of a great advocate—form, voice, rhetoric, humor, pathos, argumentative power, and that rare common sense that strikes the level of the common juror and wins the verdict when all else fails.

JUDGE MASON'S originality was such that his sayings have been household words among the bar for a quarter of a century. He had a soaring imagination, but if the wings of his fancy carried him to the heavens, his feet were always on the solid ground. However fervid might be his rhetoric, yet he was always rooted in the facts of the case. His tread was massive, his steps elephantine and path-finding. We shall not soon look upon his like again. Now that the ripening, bending heads, ready for the harvest are being so rapidly gleaned by the sickle of death, the warning again comes to us:

> "'Tis the wink of an eye, a draught of the breath,
> From the blossoms of health to the paleness of death."

HON. W. S. SUMMERS, DEPUTY ATTORNEY GENERAL:

It is my privilege to speak a few words to the resolutions of respect. I speak in behalf of the younger members of the bar.

In the history of mankind no one ever rose to prominence among his fellows without incurring the severe criticism and condemnation of the masses. However high the tide of civilization rolls, prejudice and jealousy always render unjust, to a greater or less degree, the judgment of the world. How often has the pathway of society been so obscured beneath the worthless fragments of an age that weary minds had to seek in vain for the hidden light.

At the present time there rises before us an individual who, early in life, passed proudly above the confusion of the day, fixed his gaze upon the great immortals and sought guidance from their shining lights. Humanity reveals itself in fragments. While one intellect towers pre-eminently above others and thus becomes the exponent of one kind of greatness, another, delving in an opposite realm of thought, may rise and shine like a star of the first magnitude in the firmament of creative minds. We appreciate the tireless efforts of each, and bestow the laurel crown on both.

Therefore, in virtue of a character such as has not been surpassed in this great commonwealth, OLIVER P. MASON, the eminent jurist, the eccentric citizen, deserves the epithet—great.

I am surrounded by men of my chosen profession. Many of you are older in years and larger in experience than am I. You have practiced at the bar before and with the subject of these resolutions. You know him as a lawyer. It has been my privilege to study him only as a citizen of a great, prosperous state. I express to you my idea of his ability and capability. When the shams of centuries are settling down like a dark pall upon the people, he comes forth and stands amidst the fury of contending factions. He scorns vain dreamers of idle tales and spinners of speculative cobwebs. He rebukes the teachers of unfeeling pride. He defends truth. To him falls the gigantic task, not of obeying, but of educating a people. Not sustained by the fire of passion, not inspired by a love for glory, he lifts a people by the force of his intellect, by the power of his logic, up into the atmosphere of his own mighty spirit, and infuses into their minds the fire of his own genius. He stamps indelibly upon the ideas and tendencies of a state the impress of his own individuality. To mankind he is an external conscience, whose judgment is at once courted and feared. His peculiar characteristic is his tremendous grasp on reality. We see his power in his fierce onslaught on social conventionalties; in the vivid lightning flashes with which he lights

up moments of history and makes the historic past as brilliant as the living present. He is intensely practical and thoroughly original. He is earnest, severe, and critical. He is impassioned, devoted, and heroic. His judgment is good. His intuition is a marvel. Man studies his fellows through eye-glasses stained by our own peculiar moods. Two men study his mental traits. What is the result? To the one he is pre-eminently liberal; to the other he is emphatically conservative. To the one he is profound, philosophic, and analytic; to the other he is acute, sagacious, and theoretic. To the one he is ardent, energetic, and sanguine; to the other he is cold, apathetic, and cynical. To the one he is a consummate master of details; to the other he abhors them. To the one he undertakes to demonstrate; to the other he attempts to conciliate. To the one he has no element of cunning duplicity; to the other he plans to subject everything to the beck and nod of his own caprice. To the one he is governed by principle; to the other he acts from policy. To the one he is a philanthropist; to the other he is misanthropic. The one says his actions spring from conscience; his method of procedure is the forcible presentation of facts; his aim to prove himself, beyond all question, in the right. The other says he relies on precedent, and that his weapon is that stinging sarcasm which he wields with such terrible effect. In that acuteness which comprehends at a glance, in that shrewdness of planning and dexterity of execution, he has few superiors. He towers like a bold and defiant cliff, rough and rugged in its greatness. Endowed with the power to pierce the secret springs of human nature and the faculty of sublimely unveiling his Titanic thoughts, he stands himself the embodiment of a mighty idea. He is a psychological contradiction. He might have been a philosophical monarch. But death touched his tired heart. He left behind him many bright gems and tangible realities on the great strand of human thought. Let us hope that the angel of genius will descend, and, hovering around the tomb of this eccentric citizen, will drop his laurel crown, and with tears for his misfortunes, with charity for his mistakes, with reverence for his majestic intellect, may it wave a radiant scepter for his glory, and, ascending, bear that glory to a fairer clime.

MR. CHIEF JUSTICE COBB arose and said:

In what has been said by the attorney general, by the gentlemen

at the bar, and in the resolutions reported in honor of the memory of the late JUDGE MASON, the court most sincerely concurs.

A natural sorrow exists in this court and among the legal profession of the state, on account of his unexpected death. His close connection with the constitution and laws and the administration of justice, during the earliest and most eventful history of the state, was so intimate, so useful to the public, and so honorable to the state and to himself, that its severance forever occasions a mournful pause, and is felt as a calamity. To maintain this high position in public estimation was the great aim of his life, the cherished aspiration of a mind and faculties well composed and fitted for every intellectual strife.

He was the first presiding officer of this court.

The Chief Justice, Gantt, though his junior in judicial service, had preceded him to the bar of that court, that last tribunal of impartial justice which we, for yet a little while, can comprehend only through the vision of faith.

I concur in all that has been so excellently well said here of JUDGE MASON'S learning and skill as a lawyer, his discernment and impartiality as a chancellor, and his equal eloquence as an advocate.

When he resumed the practice of law here he was not excelled by any counsel in the number and variety of important causes in which he has appeared.

His capability was reinforced from all the sources and branches of the law. He argued as to the proper functions of government, as to the strict intention of the constitution, the purview of codes of procedure, the construction of statutes, the rights of corporations, and the doctrines of the unwritten law, with equal fullness and learning and fairness of judgment. And in all these he seemed to equal the astuteness of those who had made each a special study; and each branch, as he argued it, seemed to be that which he had most perfectly mastered.

While my acquainticeship with JUDGE MASON was almost exclusively limited to the contentions of this hall, and to the time of my service here, that acquaintance grew from respect into high esteem and admiration for one who so nearly filled the measure of a perfect lawyer—"that honorable gentleman who speaks to every cause."

During a professional experience in two states, Wisconsin and this state, I have had the opportunity to observe the acquirements of many eminent lawyers; and when I bring to reflection their gifts as

professional leaders and advocates at the bar, it seems to me that the intellectual forms of RYAN and MASON rise up as two of the most conspicuous and exalted of the many.

But MASON has gone; gone in the very vigor of mental capacity, leaving the sweet savor of an endeared name. His contentions are past. But are we not privileged of the reflection that there is an excellence of public character over which death has no power and the grave no victory, but which still lives on to refresh the memory with its halo during the lapse of years?

Resuming his seat the CHIEF JUSTICE said:

The resolutions reported by the committee, the remarks of the members of the bar, and the reply of the court thereto, will be entered upon the journal and published in the appropriate volume of Reports, and as a further mark of respect to the deceased, the court will now adjourn.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1890.

PRESENT:

HON. AMASA COBB, CHIEF JUSTICE.
" SAMUEL MAXWELL, } JUDGES.
" T. L. NORVAL, }

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FARMERS' LOAN & TRUST CO. v. SIMON MONTGOMERY ET AL.

[FILED JULY 2, 1890.]

1. **Evidence:** IMPEACHMENT OF WITNESS. John Bell on December 31, 1886, mortgaged a brown mare colt to Emma Moore, who assigned the mortgage to defendant Maxwell. Subsequently J. B. gave a bill of sale of the mare and other property to his son Thomas Bell, who mortgaged the same to the plaintiff. After this, defendant Montgomery, as constable, took possession of the mare from T. B. and turned it over to Maxwell on the first mortgage. The plaintiff replevied the mare from the two last named. On the trial of the right of possession, T. B. was called by plaintiff to identify the property, and Montgomery by the defense to impeach his evidence by relating his former statement to him, inconsistent with his present testimony. The plaintiff's objection to this examination was overruled by the

court, and the statement given to the jury. *Held*, That the admission of the statement was error, without having first interrogated the witness as to whether he had made such statement and calling his attention to the time, place, and circumstances of the same. (*Hooper v. Browning*, 19 Neb., 428; *R. V. R. Co. v. Linn*, 15 Id., 234; *George v. State*, 16 Id., 321; *Frederick v. Ballard*, Id., 565.)

2. Instructions: NOT BASED ON EVIDENCE. On the further trial, the court charged the jury that if they found from the evidence that the plaintiff had any actual knowledge, at the time of taking its mortgage on the brown mare in controversy, that she was included in the defendants' Emma Moore mortgage, they should find for the defendants. *Held*, That as there was no evidence to the jury tending to prove that either the plaintiff or any of its agents had any notice or personal knowledge of the existence of the defendants' mortgage it was reversible error in the court to submit the proposition to the jury. (*City of Crete v. Childs*, 11 Neb., 253; *Bowie v. Spaids*, 26 Id., 635; *Sloan v. Coburn*, Id., 607; *Dunbier v. Day*, 12 Id., 596; *Bradshaw v. State*, 17 Id., 147; *R. Co. v. Fink*, 18 Id., 89; *Ballard v. State*, 19 Id., 609.)

ERROR to the district court for Madison county. Tried below before POWERS, J.

Wigton & Whitham, for plaintiff in error.

H. C. Brome, and *Burt Mapes*, *contra*.

COBB, CH. J.

This action of replevin was tried in the district court of Madison county. The plaintiff in error was plaintiff below, and the defendants were defendants below.

The property described, in which the plaintiff claims a special property, and claims the right of possession, was "one iron gray mare about three years old," which plaintiff claimed by virtue of a chattel mortgage, executed by Thomas Bell, May 10, 1887, and which, it was alleged, was wrongfully detained by the defendants. Their answer was a general denial, but the defense made was that of a chattel mortgage executed by John Bell, the grantor of

Thomas Bell, to Emma A. Moore, and by her assigned to R. H. Maxwell, and that defendant was the agent of Maxwell in the foreclosure of the last mentioned mortgage, executed December 31, 1886, and in which the mare in controversy was described as "one brown mare colt, two years old, valued at $100."

There was a trial to a jury, with a verdict and judgment for the defendant.

Upon bringing the case to this court on error the plaintiff assigns six substantial errors, which will be stated and considered in their order.

There were numerous witnesses examined on either side. The facts testified to by the witnesses on either side were generally consistent with the testimony of other witnesses of the same side, but were in sharp conflict with that of the other side. . The case turned upon the question whether the mare was properly described in the mortgage to Mrs. Moore, so that the record of her mortgage would be constructive notice to subsequent purchasers and mortgagees. The respect in which it was claimed that the description was insufficient for such purpose was as to color, and accordingly nearly all the testimony was directed to the color of the mare in question at the several stages of existence, from foal to that of the trial in the justice court at Battle Creek. All of the witnesses who had seen the mare a sucking colt agreed that she was then of a dark brown color. Some who had opportunities of observing testified that she "shed off" in the fall, others of equal opportunities testified that she did not "shed off" until the next spring; but all agreed that she did shed her coat, and when new hair came on she developed considerable white hair around her eyes, the root of mane and tail, and upon her flanks. It may be said to have been the concurrence of testimony that each time she shed her coat the new hair contained more white than the old, that her color was less brown, and approached nearer that of iron gray, gray

roan, gray brown, or strawberry roan. But nearly or quite all of defendants' witnesses who had seen the mare, at about the date of Mrs. Moore's mortgage testified that she was then "a brown mare," with a few white hairs upon different parts of her body. Many of the same witnesses also saw her at the time of the trial at the justice's court, and testified that she was then a brown mare.

On the other hand, many of the plaintiff's witnesses also saw the mare at and about the date of Mrs. Moore's mortgage, and were equally emphatic in their testimony that she was then an "iron gray mare."

There being, then, such a conflict of evidence upon the turning fact of the case, it was peculiarly a proper one for a jury to decide, and if it appears that no improper testimony was permitted to go before them, nor any erroneous or improper charge given them, their verdict must stand.

Upon the trial defendants called as a witness John Duncan, who testified that he resided in Madison county; that he was acquainted with John Bell in his lifetime, and resided about eighty rods distant from him; that he knew of Bell's having had in possession a brown mare colt two years old at that time; that he first saw the colt in the spring of 1885, about the time it was foaled; that he was sure it was foaled about that time; its color was brown; that he saw the same mare last spring, and then called her dark gray, or brownish gray, and saw her during the year 1886, and would then call her a brown with gray hairs around her eyes. Defendants' counsel put the following question: "State how this colt was generally described." Plaintiff's attorney objected to the question, as incompetent; that the mortgage was the best evidence of the description and color of the animal, and no foundation laid for the inquiry. The objection being overruled, exception was taken. The witness answered: "Well, the brown colt." The overruling of this objection and the witness's answer are assigned for error, and the assignment is well

taken. The witness had already stated what he had called the color of the colt to be. The inquiry was evidently intended to call out from him what others, the community, called the color of the animal; in other words, to prove the general reputation as to her color. This could only be done by calling persons of the community at large and interrogating them, and a large number was called for that purpose. The testimony of each was proper evidence to the jury for what it was worth, but it was contrary to the rules of evidence to question either one as to what the others, or the community, said of the disputed color of the mare outside of the court. By its ruling the court permitted hearsay evidence to go to the jury, which it is not necessary to characterize as unjustified and injudicious.

The defense called Simon Montgomery as a witness. It appears from the bill of exceptions that the defendant Montgomery was a constable and had taken the animal in controversy in foreclosing the Moore mortgage, then owned by the defendant Maxwell, and had the mare in possession at the commencement of this suit, and hence was made joint defendant. The witness testified in reply to the question, "State whether, at a short time after the taking of the mare in controversy, you had a talk with Thomas Bell in which he acknowledged to you that the mare was the one described as the small brown mare in the Moore mortgage." The question was objected to by plaintiff, as incompetent and no foundation laid. And the objection being overruled by the court, the witness answered: "I had such conversation."

Q. State what was said; did he say, at that time, that the mare was the one described in the Moore mortgage as the small brown mare?

The last objection was again made by the plaintiff and overruled by the court.

A. Yes, he did.

Q. State whether or not, a short time prior to this suit,

or to the trial, you had a conversation with Thomas Bell in which he asked you to release the little brown mare from the Moore mortgage, or to have Maxwell release it, and that he would supply you with another, a sorrel mare?

Objection made by plaintiff, as before, and overruled by the court.

A. I had that conversation with Bell; he asked me if I could have Maxwell release the mare, and he could get another sorrel mare that was described in the same Moore mortgage, and which we never got; that if we would release this mare that he would go with me where we could find that mare.

The plaintiff moved to strike out and exclude from the jury the last answer of the witness, as incompetent, not responsive, and improper mode of impeaching a witness, which was overruled.

This evidence was introduced ostensibly to contradict the witness, Thomas Bell, who had been called in rebuttal and examined by the plaintiff. On his cross-examination defendant's counsel asked, "Q. Did you not tell Simon Montgomery, shortly after he took the mare in controversy from yourself, that the mare that he took was the one described by John Bell, and known as the small brown mare?" To which was answered, "I did not." And the following, "Q. Within a month or so prior to the trial, did you not have a conversation with Robert Maxwell and Simon Montgomery, in which you acknowledged that the same mare here in controversy was the one that is described in the mortgage of Mrs. Moore as the small brown mare?" To which was answered, "No, sir." And the following, "Q. Did you not go to Maxwell and Montgomery and tell them that if they would release this mare from the Emma Moore mortgage that you would go and get another horse equally as good?" To which was answered, "I did not make any such statement."

Attention is called to the fact that it appears from the

bill of exceptions that the Emma Moore mortgage was executed by John Bell in his lifetime; that he afterwards executed a bill of sale to the animal in question, with other property, to Thomas Bell, who afterwards executed the mortgage under which the plaintiff claims title and possession; that, subsequently, during a period of sickness of Thomas Bell the property, including the animal in controversy, was taken from the Bell premises by Montgomery upon the Emma Moore mortgage, which had pre-previously been assigned to Maxwell.

Had the supposed conversation between the witness Bell and Montgomery occurred while Bell was in possession of the mortgaged property it is probable that any statement made by him as to the identity of the mare in question would have been admissible as evidence against his mortgagee, the plaintiff. But I deem it clear that any statement made by him after the property passed from his possession was inadmissible, immaterial, and not binding as against the plaintiff. Such being the case, while probably the defendant might be allowed to ask the questions of the witness, he was bound by his answer, and had not the right to call another witness to contradict his testimony. This point has been often decided in this court, following the law as laid down by Greenleaf, sec. 462, p. 561, especially in *Hooper v. Browning*, 19 Neb., 428; *R. V. R. Co. v. Linn*, 15 Id., 234; *George v. State*, 16 Id., 321; *Frederick v. Ballard*, 16 Id., 565, cited by counsel for plaintiff in error. The court, therefore, erred in overruling the objection of plaintiff to the questions put to the witness Montgomery for the purpose of contradicting the witness Bell.

Again, the defendant Maxwell being on the witness stand, on behalf of the defense, his counsel put to him questions in all respects similar to those put to his co-defendant Montgomery, as to the statements of the witness Bell. The same objection was made by the plaintiff as

made to Montgomery's answers, with the same ruling by the court, and a like answer by the witness as that of Montgomery. This, as we have seen, was cumulative error on the part of the court.

The plaintiff also assigns for error the giving by the court, of its own motion, the 6th and 7th paragraphs of instructions to the jury.

"6. If you find that the property in dispute is the same referred to and included in defendant Maxwell's mortgage, and the same was in said mortgage described sufficiently to enable a person to identify the property from such description, or from inquiry to be satisfied by such description, or, if you find that the plaintiff knew at the time of taking his mortgage that said property was included in defendant's mortgage, then you should find for the defendant.

"7. But if you believe from the evidence that said mare is not the one described and included in the defendant Maxwell's mortgage, or if you find that said property was so included but was not sufficiently described to enable the plaintiff at the time of taking his said mortgage to identify the property from the description of it contained in the mortgage, or from inquiries reasonably and naturally suggested by such description or mortgage, and that the plaintiff, at the time of taking his mortgage on said property, had no knowledge of the fact that defendants' mortgage included said property, then you should find for the plaintiff, provided you also find that said property was also included in the plaintiff's mortgage."

The objection by plaintiff to these instructions is that they submit the question to the jury whether the plaintiff had any actual knowledge, at the time of taking its mortgage on the mare in controversy, that she was included in the defendants' (or the Emma Moore) mortgage, and the jury were told that if the plaintiff had such knowledge they should find for the defendant. There certainly was

no evidence before the jury tending, in the least, to prove that the plaintiff, or any of its agents, had any personal knowledge on the subject.

On the trial the plaintiff called J. E. Simpson, who testified that he had transacted the entire business between the Farmers' Loan & Trust Company and Thomas Bell, in regard to the mare in controversy, and that no other agent of the company had anything to do with it.

"Q. State whether you had any knowledge or information that the mare in controversy was included in any other mortgage except the Hughes' mortgage." This question was objected to by defendants, as incompetent, irrelevant, and immaterial, and the objection was sustained by the court. The following question was then put to the witness: "Q. Was there anything ever said in your hearing about said animal being included in the Emma Moore mortgage, at any time?" This question was also objected to by defendants, as before, and the objection sustained by the court.

The objections to this testimony were doubtless sustained upon the ground that it was immaterial and unnecessary for the plaintiff to disprove knowledge on its part of the facts involved in the question, for the reason that there was no evidence tending to prove such knowledge, and upon this ground the evidence was rightly rejected. But I think it was error on the part of the court, after excluding the testimony, to submit to the jury the identical proposition to which the overruled evidence was applicable.

It has been held by this court in the cases cited by counsel for plaintiff in error, *City of Crete v. Childs*, 11 Neb., 253; *Bowie v. Spaids*, 26 Id. 635; *Sloan v. Coburn*, Id., 607; also in *Dunbier v. Day*, 12 Neb., 596; *Bradshaw v. State*, 17 Id., 147; *Railroad Co. v. Fink*, 18 Id., 89; *Ballard v. State*, 19 Id., 609, and *Marion v. State*, 20 Id., 246, that instructions to the jury must be based upon the evidence, and that if an instruction assumes the possible

existence of a state of facts which the jury have no right to find, there being no evidence, it is error. I see no escape from the application of this rule, so often laid down, to the case at bar.

It is not deemed important to further consider the assignments of error in the case.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

A. J. HALE v. GEORGE H. HESS & CO.

[FILED JULY 2, 1890.]

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1. **Contract: RESCISSION: MEASURE OF DAMAGES.** G. H. H. & Co. contracted to furnish the heating apparatus in complete working order, to a specified degree of temperature, for the newly erected building of A. J. H., for the sum of $450. The owner terminated the contract, and refused to allow the contractor to proceed when the furnace and fixtures were ready to be put in place. *Held*, That, under the evidence, the measure of damages to the contractor was the profits under the contract only.

2. ———: **EITHER PARTY MAY RESCIND: DAMAGES.** A party to an executory contract has the right to rescind the contract, and terminate it wholly, without the consent of the other party, who is in no fault; the first party becoming liable to the other in any damages he may have sustained, or any compensation he may have earned, by reason of the rescission.

3. ———: ———: ———: **PROBABLE PROFITS.** If a contract for particular work is partly performed, and the employer puts an end to it without fault of the contracting party, he is liable for the profits to be made under the contract as well as for compensation for work already done.

ERROR to the district court for Gage county. Tried below before BROADY, J.

A. Hardy, and *R. S. Bibb*, for plaintiff in error:

The contract was executory. (*Fletcher v. Peck*, 6 Cranch [U. S.], 136.) One party to such a contract may rescind it without the consent of the other. (Bishop, Contracts [2d Ed.], sec. 837; *Clark v. Marsiglia*, 1 Denio [N. Y.], 317.) The latter cannot sue as on a completed contract; his remedy is in damages for what he has suffered in not being permitted to perform. (*Butler v. Butler*, 77 N. Y., 472.) After rescission and notice, the party not in fault must not proceed further and cause needless expense. (Bishop, Contracts, sec. 841; *Dillon v. Anderson*, 43 N. Y., 231; *Strauss v. Meertief*, 64 Ala., 299–307; *Chamberlain v. Morgan*, 68 Pa. St., 168; Addison, Contracts, secs. 588, 593.)

W. S. Summers, contra:

The contract was not executory, as the furnace was shipped subject to Hale's order, and the title had passed., It is certainly the prevailing doctrine that it requires both parties to rescind a contract. (*Davidson v. Keep*, 61 Ia., 218; *Nebraska City v. Gas Co.*, 9 Neb., 339; *Derkson v. Knox*, 30 N. W. Rep., 49.) Where it is vendor's intention to pass title, and vendee's to accept, the sale is complete. (*Sewell v. Eaton*, 6 Wis., 479.) Where vendor takes necessary steps to pass title, he may recover contract price. (*Ganson v. Madigan*, 13 Wis., 75; *Webber v. Roddis*, 22 Id., 61; *Cain v. Weston*, 26 Id., 100.) Hess & Co., as they were ready to perform, were entitled to recover the whole amount agreed upon. (Benjamin, Sales, sec. 784; *Thompson v. Alger*, 12 Met. [Mass.], 428; *Thorndike v. Locke*, 98 Mass., 340; *Pearson v. Mason*, 120 Id., 53; *Shawhan v. Van Vest*, 15 Am. Law Reg. [N. S.], 153, 160 and note.)

COBB, CH. J.

George H. Hess & Co. sued A. J. Hale in the district court of Gage county. They alleged in their petition that the defendant was indebted to them in the sum of $450, with interest at seven per cent per annum from January 1, 1887, due upon a certain contract attached to their petition as an exhibit; that the plaintiffs shipped the furnace, described in the contract, to the defendant; that the same was delivered in accordance with the terms of the contract, and that in all respects the plaintiffs have complied, and are ready and willing to comply, with the terms of said contract; that the defendant refused to receive the furnace and fixtures and refused to allow the plaintiffs to place the same in his building according to the terms of the contract; that plaintiffs now are, and at all times have been, ready and willing to comply with and complete said contract and put in and set up said furnace in accordance with the terms of the same; that the defendant refuses to receive said furnace and denies these plaintiffs access to his premises, and refuses to permit them to fulfill their contract in any manner whatever; that by the refusal of defendant to comply with the terms of the contract to be by him performed, and to permit the plaintiffs to fulfill the terms of the contract to be by them performed, they, the plaintiffs, have been damaged in the sum of $450, no part of which has been paid; and they pray judgment in said sum, etc.

CONTRACT REFERRED TO AS AN EXHIBIT TO PLAINTIFFS' PETITION.

"BEATRICE, NEB., August 14, 1886.

"*A. J. Hale, Esq., Beatrice, Neb.:* We will furnish and place in your new store building one No. 80 Hess pure air steel furnace, together with five best black Japan registers, four connectings, with partition stacks and connecting pipes through the furnace, according to the plans and specifica-

tions of your architect, for the sum of four hundred and fifty dollars. The owner to furnish foundation and the necessary carpenter and brick work and provide a chimney with a good draft and proper ventilation for the building; we to supply such register faces for ventilation as are needed. The storeroom to have one large 30x30 register face and frame placed directly above furnace in floor, and each pipe to have damper, each pipe connected with register, and partition stacks to be of sufficient size to thoroughly warm rooms needed by same in most severe winter weather. It is understood that the work shall be of the best material and workmanship and fully up to our standard of custom jobs. As the success of heating depends so much upon the proper size and location of registers, pipes, furnaces, etc., it is understood that we are to have full direction and control of the work to be done in connection with our contract, and to have the right to supply another furnace of our own make, or one of larger size, at our own expense, or to make other changes as shall ensure successful heating. We therefore agree to heat the rooms connected with the furnace from 65° to 70° above in ten below zero weather when the house is finished and made reasonably tight. Complaints, if any, to be made within one year. It is understood that the furnace shall be operated and managed according to our printed directions.

"GEO. H. HESS & CO.,
"Per I. F. SEARLS.

"I hereby accept the above proposition and agree to pay for the same when the work is completed according to contract. A. J. HALE."

The defendant answered, denying that he was indebted to the plaintiffs as alleged in their said petition, in the sum of $450, or to any amount whatever. He also denied that plaintiffs delivered to him the furnace described in the petition, or that he, the defendant, ever accepted said fur-

nace. The defendant admitted that he signed the contract set up in the petition, but for a second defense he avers that the plaintiffs, contrary to the agreement and the contract, shipped said furnace direct to the said defendant, and defendant refused to take the same from the depot, or to become liable for the same, for that he was not to accept nor become liable for the same until he should have suitable opportunity to try the same, and ascertain whether or not it was as represented to be by the plaintiffs. And for a third defense the defendant averred that the plaintiffs have failed and neglected to perform the conditions of said contract by them to be kept and performed, and the defendant further denied each and every allegation of said petition not in said answer admitted.

The plaintiffs' reply was a general denial of every allegation of new matter contained in the answer.

There was a trial to a jury, with a verdict for the plaintiffs in the sum of $440. The defendant's motion for a new trial being overruled, judgment was rendered for the plaintiffs, and the cause is brought to this court on error. So many of the assignments of error as are deemed important will be examined in their order.

At the term of court at which the cause was tried, and before the same was called for trial, defendant's counsel applied to the court for a continuance of the cause to the next term, on the ground of the absence of the defendant from the state. Said application was based upon the affidavit of R. S. Bibb, one of the attorneys for the defendant, the substance of which affidavit was that before the commencement of said term W. S. Summers, one of the attorneys for the plaintiffs, came to said affiant and asked him if he would agree to continue the cause over said term of court; that affiant stated that he would; whereupon Mr. Summers stated that he would write to his clients; that thereupon affiant stated to A. J. Hale, defendant, that he had made said arrangement, and upon such statement Mr.

Hale left Gage county to go to Michigan upon a visit with his wife. That it was affiant's understanding that said cause would not be tried at said term of court, and that he was so led to believe from the statement of Mr. Summers, who came to affiant's office in regard to the matter; that it would be unsafe to proceed to trial without the attendance of the defendant, etc. The application was denied, which is assigned for error.

In the case of *Ingalls v. Nobles*, 14 Neb., 272, the court laid down the law of continuance as follows. I quote from the syllabus:

"Ordinarily, the decision of motions to continue causes is left to the discretion of the particular court to which they are addressed. It is only where such discretion has evidently been exercised unwisely or abused, to the prejudice of a party, that a reviewing court will interfere.

"2. The statement of facts in an affidavit for a continuance should be specific of acts done, or of excuses for not doing them, and given with such particularity that an indictment for perjury would lie in case of its being false."

Measured by the rule laid down in the second clause of the syllabus, the affidavit falls far short, but were the facts stated with never so great particularity it would have presented a case for the discretionary actions of the court. Moreover, it is apparent that, taking the most favorable view of the facts stated in the affidavit, they did not amount to more than a verbal stipulation made by counsel out of court; and I do not remember a case in which a reviewing court has held it error in a trial court to refuse to enforce a verbal stipulation made out of court.

Upon the trial the plaintiffs offered in evidence the contract or proposal and acceptance, attached as an exhibit to the petition. They introduced John A. Forbes as a witness, who testified that he was acquainted with the parties; that he was present at the signing of the contract; that he was acquainted with the building "into which the furnace and

fixtures were to go;" that he knew Mr. Colby, who was superintendent of the building, and who had "notified us that the building was ready, and to hurry up; or, rather, that they were anxious for us to have the furnace here;" that Armacost and witness were, at that time, agents for the plaintiffs; that defendant had told the witness at different times that to do anything that Colby ordered would be satisfactory, that he had left everything with Colby as to the building and furnace. Colby told witness that he was ready for the furnace, and was anxious to have it here and put in; that was some time before October 1, 1886, between the date of the contract and October following. It was before the furnace was received here, but witness did not know how long the furnace was on the road.

Plaintiffs here offered in evidence a letter, which was received and marked Exhibit B.

"BEATRICE, NEB., Oct. 20, 1886.

"*Geo. H. Hess & Co.:* DEAR SIR—The furnace has arrived at Beatrice for A. J. Hale's building. Send on your man to put it in as agreed.

"Y's respectf'y, J. S. COLBY, *Supt.*"

The witness Forbes, continuing his testimony, stated that soon after the date of the letter he had a conversation with Mr. Hale about the furnace, and about putting it in; that Hale stated that he bought the furnace and presumed it was all right; that he would admit that Gibbs was here as an expert to put it in, but inasmuch as they had sent him a bill of the furnace, which he construed to be a dun for the price of it, and had asked him to pay the freight on it, he would not receive it, and would not have it put up in his building; that he was aware that he was good for it, but he would not pay it until they got a judgment. This was in the presence of Gibbs, the expert, who had been sent on to put up the furnace.

It further appears from the testimony of the witness,

that the plaintiffs did not finally insist upon his paying the freight, but claim that that demand was originally made merely as a business memorandum. Witness further stated that the furnace was offered to be put up in defendant's building, but that he objected, and would not have it.

Plaintiffs also called F. M. Gibbs as a witness, who testified that he was a salesman and furnace setter in the employ of plaintiffs; that plaintiffs shipped the furnace of the size and number called for in the contract, marked Exhibit A, to Mr. Hale, the defendant, at Beatrice, Nebraska. It arrived in this depot, here, some few days before November 5, 1886; that witness was there in the employ of plaintiffs for the purpose of putting up the furnace; that he hired a dray, took the furnace up to the building, and defendant refused to have it put in. Witness inquired his reason for refusing; if the contract was not straight, and if he had not contracted for it, and he said he had, and that it was his signature shown him on the contract, which witness had, but that he was indignant over the matter of sending out the bill and charges for freight, and would not pay for the furnace nor allow it to be put up in his building. Witness told him it was customary, to a great extent, when shipping goods, to send the party consigned to, the bill of freight, to be deducted from the price. He replied "that might be our way and everybody else's, but he wouldn't do it." Witness told him that plaintiffs had already paid the freight, and that the statement might be torn up if he was not pleased with it; that there was no money to be paid until the furnace was placed, according to contract; that the plaintiff did not expect a dollar from it; that it was customary, if he paid the freight, to deduct it from the bill, as we had done with many customers.

The witness was asked what expense the plaintiffs were put to and answered, there is cartage of No. 80 casting, on board the cars; No. 80 furnace, $125; one register-face border, $5; four 10x14 registers and borders, $9; one

6x14 face, four 4½ face, $1; paid Searles the cost of selling, $45; freight to Beatrice, $28.65; two cartages, $4; that had witness set the furnace up, would have cost $50 more.

The witness Forbes was recalled by plaintiffs and testified that it was the understanding between Searles and Hale that the furnace should be shipped directly to Hale. He also stated that "that was the agreement," but did not state when, or by whom, the agreement was made.

The plaintiffs also introduced the deposition of John F. Searles, from which it appeared that he was agent for the plaintiffs from March 1, 1885, to February 1, 1887, and that on August 14, 1886, the deponent sold a furnace for the plaintiffs to the defendant, to be used in a new store building to be erected, not then completed; that the price agreed upon was $450, as per copy of the contract attached to the deposition, and the same as the original herein set forth. The deponent stated that the furnace was at Beatrice as soon as the defendant was ready for it; that deponent sent a man from Lincoln to put it up, and he telegraphed back that the defendant would not receive it; the man was F. M. Gibbs. On receipt of the telegram deponent went to Beatrice and found the building not completed, only the first rough flooring being laid on the ground floor; that deponent took the furnace and fixtures to the building and left them on the back porch, except the registers, which he placed on the inside of the building; that he went to the house of defendant to find out if he would allow him to put the furnace in, and asked the defendant if he had changed his mind as to having the furnace put in? He replied that he had not, and that the furnace was never going in there.

The court, of its own motion, instructed the jury as follows, which is assigned for error:

"I. The plaintiffs bring their action on the contract offered in evidence, and allege that they complied with their

part of the contract until defendant refused to permit them to further comply therewith, and that they were ready and willing to proceed in compliance with the contract to its completion, but that defendant wrongfully prevented their further compliance with the contract; that defendant refused to comply with his part of the contract; that plaintiffs are damaged by defendant's breach of the contract. The defendant in his answer denies all the averments of plaintiffs' petition, except the making of the contract attached thereto.

"II. The burden of the proof is upon the plaintiffs by a preponderance of the evidence. If they have proved the material averments of their petition by a preponderance of the evidence, they are entitled to recover, but unless they have done so, the defendant is entitled to a verdict.

"III. If the plaintiffs demanded of defendant payment of the freight on the furnace, that was something defendant was not obliged, by the contract, to do, and he had a right to refuse to do so, but that would not give him the right to refuse to permit the plaintiffs to proceed with a compliance on their part of the contract, nor would it give him a right to refuse to comply with his part of the contract.

"IV. The contract provided that the plaintiffs should place the furnace in defendant's storeroom. If defendant wrongfully prevented plaintiffs from putting the furnace in defendant's storeroom, and plaintiffs' men trying to do so, and actually did, except as wrongfully prevented by the defendant, comply with the contract, plaintiff had the right to take the furnace as near to the place as defendant would permit, in which case the defendant would not have the right to object because it was not taken nearer, nor because the plaintiffs did not take it anywhere else, provided the plaintiffs exercised such care and diligence in the handling and leaving of the property, for its preservation, as a person of ordinary care and prudence would do under like

circumstances. It is proper, however, to call your attention to the fact that the answer makes no claim of set-off or counter-claim on account of plaintiffs' negligence or mis conduct in handling the furnace. This matter then arises only so far as it is involved in the question as to whether plaintiffs are guilty of any breach of their contract.

"V. If the plaintiffs recover, they should recover the amount of the contract price less the reasonable cost of doing the part unperformed by them at the time they were prevented from proceeding further under the contract, with interest from that time at seven per cent per annum.

"VI. There is no question of rescission of contract raised in the pleadings. A contract cannot be rescinded by one party only. It takes two to make a contract, and two to rescind the same. A rescinder amounts to a new contract, that the former contract shall no longer be in force. One can make a breach of contract, but it takes both the parties to make a rescission of the contract. Neither the petition nor the answer alleges the rescission of the contract. The leading questions involved are whether the plaintiffs have complied with the obligations of the contract on their part to be performed, so far as the defendant would permit, and whether the defendant has made any breach of the contract on his part to be performed."

The following instructions were asked by the defendant and refused by the court, which is also assigned for error:

"I. The court instructs the jury that, if they believe from the evidence that any witness has willfully sworn falsely respecting any material matter in the case, then the jury may disregard the testimony of such witness, except as to matters wherein he is corroborated by other witnesses or testimony.

"II. That under the proofs and pleadings of this action the plaintiffs cannot recover, and that consequently you must find for the defendant.

"III. That when notice of the rescinding of a contract

is given to such an agent or employe of one of the parties as is authorized to stand in his place and represent him in his business, or in the particular branch of it connected with the subject-matter of the contract, it is sufficient, though such notice is not brought home to the party himself.

"IV. That after a contract has been entered into between two parties, and notice is given by one of them that the contract is rescinded on his part, he is liable for such damages and loss only as the other party has suffered by reason of such rescinding of the contract, and it is the duty of such other party, upon receiving such notice, to save the former, so far as it is in his power, all further damages, though the performance of this duty may call for affirmative action on his part.

"V. That if they believe that if the defendant notified the plaintiffs, or their authorized agents, before any attempt to deliver the furnace in question, or, at such attempt, that the defendant would not take and receive such furnace, and the plaintiffs thereafter, and without any acceptance of said furnace by defendant, left the same in the alley and allowed it to be injured by exposure, and its value deteriorated or destroyed, then the plaintiffs cannot recover for the contract price.

"VI. That notwithstanding they may believe that the plaintiffs shipped the furnace in question, under the contract, in evidence, in good faith, to perform their part, and still if they further find from the testimony that the defendant refused to take and accept the furnace, and refused to allow it to be placed in his building, and notified plaintiffs that he would not pay for it until the plaintiffs got a judgment therefor, this conduct on the part of the defendant was a breach of his contract, and notwithstanding this the plaintiffs could not then dump said furnace in the alley and allow the same to become worthless and then sue for the contract price thereof. They should have

stopped at once when notified, and they cannot recover for any expenses incurred or damages sustained after such notice.

"VII. That if they find from the evidence that the defendant committed a breach of the contract by refusing to accept the property, then the defendant is not liable for the contract price of the furnace in this action.

"VIII. If the defendant refused to comply with his contract, by refusing to let the plaintiffs put the furnace in his building, and by refusing to go on further with his contract, and this while the furnace was in plaintiffs' possession, then it was the duty of the plaintiffs to take care of the furnace and not suffer it to be lost or to become worthless through their acts, and if they did allow it to become of little or no value of their own accord, then they cannot recover the purchase price thereof in this action."

There are several important questions presented by this record. The case is not, as I understand it, an action for the sale and delivery of goods; neither is it for the manufacture of machinery by the plaintiffs for the defendant, but is rather upon a special contract to furnish and set up, in the building of the defendant, a furnace, with registers and fixtures for the purpose of heating the store-room and building.

It does not appear from the terms of the contract, or from the evidence, that this furnace and its fixtures were agreed to be, or were, in fact, manufactured by the plaintiffs specially for the defendant, but rather that the articles were on hand, in store, and in possession of plaintiffs at Chicago, and were agreed to be transported by them to defendant's building at Beatrice, Neb., there to be set up in the building, put in successful operation and made to heat the building, under certain conditions, to a stated degree of atmosphere. It is agreed that the plaintiffs performed their part of the contract up to a certain point, that they had the component parts of a furnace and heating appara-

tus, answering the general description of that they contracted to furnish, at the railroad depot at Beatrice, when the defendant sought to put an end to the contract and its further performance by peremptorily refusing to accept the furnace or to allow the plaintiffs to set it up in his building.

The questions upon which the case, as now presented, turns, as I view it, are: What were the rights of both parties under the circumstances? Could the defendant rescind the contract, refuse to go further under it, and, if so, what was the remedy and measure of damages to the plaintiffs on that account? Could they treat the furnace and fixtures as the property of defendant, and recover of him the contract price, less the cost of setting the same up, or must they recover, if at all, upon the breach of contract?

The court, in the instructions complained of as error, took the former views. It charged the jury in the sixth instruction that there was no question of the rescission of the contract raised in the pleadings, and stated to the jury "that a contract cannot be rescinded by one party only; that it takes two to make a contract, and two to rescind a contract; that a rescinder amounts to a new contract that the former shall no longer be enforced; that one can make a breach of a contract, but it takes both the contracting parties to make a rescission of the contract."

While there can be no doubt that the doctrine of this instruction is supported by many authorities and decisions, upon a careful review of all the authorities cited I am not able to agree with the court in its application to the case at bar. It is true that the defendant in his answer does not, in terms, allege that he rescinded the contract, but he does allege that the plaintiffs, contrary to the agreement of the parties, shipped the furnace direct to defendant, and that defendant refused to take the same from the depot, and became liable for it until he should have an opportunity to

try it and see that it was suitable as agreed upon by the plaintiffs. The plaintiffs in their evidence proved that while the furnace and fixtures were at the railroad depot defendant declared to their agents that, for the reasons imperfectly set out in his answer, he would not accept the furnace, nor permit it to be set up in his building. This, I hold, in law, amounted to a rescission of the contract, if it be competent, as it appears to be, for one party alone to rescind a contract.

Bishop, in his commentary on the law of contracts, sec. 837, says that "the proposition is sound in principle and sufficiently supported by authority, though more or less may be found in the books against it, that one party alone, with no consent from the other, who is in no fault, has, at law, the power—not to be exercised without liability for damages, but still the power—to rescind any executory contract. If this were not so, one might be ruined by an undertaking the carrying out of which a change in circumstances rendered highly inexpedient or practically impossible." This authority is cited by plaintiff in error. It commends itself to my judgment, is supported by the reasoning of the author, which follows the text cited, with the reference to many authorities, and is believed to be the true doctrine of the modern cases.

If the power to rescind exists in a party to a contract as a matter of law—bearing in mind that no rescission is claimed to be effectual to deprive another party to the contract of any right or compensation he may have earned by virtue of it, or of any damages to which he may be entitled by reason of the breach of the contract by the rescinder, if this right is one of law—then it would not be incumbent on the party exercising it to give any reason or excuse therefor. But, were reasons to be given, it does not appear that the defendant was entirely without one. The plaintiffs, as we have seen, had agreed, for a consideration in money, to furnish and place in successful opera-

tion the furnace and heating apparatus for defendant's building, reserving to themselves the right to supply another of their own make, or one of larger size, at their own expense, or to make other changes to insure successful heating, agreeing to heat the rooms in connection with the furnace from sixty-five to seventy degrees above in an atmosphere of ten degrees below zero. As appears from the bill of exceptions, after entering into this contract, and probably a half month before the arrival of the furnace at Beatrice, the plaintiffs sent to the defendant the following bill payable:

"CHICAGO, October 14, 1886.

"Bought of GEO. H. HESS & CO.

"MR. A. J. HALE, Beatrice, Neb.

"1 No. 80 Furnace, with Reg. and connections, as per contract, $450.

"All goods are shipped at 'Released rates of freight' at owner's risk of breakage, unless otherwise ordered.

"TERMS.—All accounts subject to sight draft at maturity."

The furnace and fixtures were shipped to the defendant at his expense for freight and railroad charges. This was at least an apparent departure from ordinary fair dealing by the plaintiffs, which challenged the suspicions of the defendant, as it was well calculated to do, that the plaintiffs were seeking an advantage over him. And where no legal justification is required, it would seem to have been a moral justification of the defendant in entering upon a prompt rescission of the contract, as he did, in such manner that while he subjected himself to compensation and damages to the plaintiffs for all that they had performed under their contract, he was rid of all further dealings and complications with them.

By the fifth instruction the court charged the jury that if the plaintiffs recover, they should recover the amount

of the contract price, less the reasonable costs of doing the part unperformed, at the time they were prevented from proceeding further under the contract, with interest from that time at seven per cent.

I take occasion to remark that the law of damages has been for a considerable period in the course of growth and expansion; its earlier rules of application have been subjected to frequent judicial review with the advantage of the experience of the past, and the suggestive aid of new interests demanding consideration, and new forms of injury seeking remedy and redress. Sutherland in a late work on Damages, vol. 1, page 132, thus states the condition of the law in such cases:

"If a contract for particular work is partly performed and the employer then puts an end to the undertaking, recovery may be had against him, not only for the profits the contractor could have made by performing the contract, but compensation also for so much as he has done towards performance. Preparations for performance, which were a necessary preliminary to performance, or within the contemplation of the parties as necessary, in the particular case, rest upon the same principle."

To this principle the author cites numerous cases, and among others, that of *Derby v. Johnson*, 21 Vt., 17. According to the syllabus in the case the parties entered into a contract in writing, by which the plaintiffs engaged to do all the stone work, blasting, and masonry upon three miles of railroad at certain specified prices by the cubic yard. The plaintiffs entered upon the performance of the contract, and, while so engaged, the defendants gave them an unconditional direction to leave the work, and to do nothing more under the contract; and the plaintiffs left immediately. It was held that this could not be treated as a mutual relinquishment of the contract, but as an exercise of a right, which by law belonged to the defendants, to put an end to the contract, leaving themselves

liable, of course, for all consequences resulting from such breach of the contract upon their part.

In such cases the plaintiffs may elect to treat the contract as still existing and binding upon the defendants, and may recover for the work performed at the contract prices, and for all damages incurred in consequence of the discontinuance of the contract by the defendants.

Also the case of *Danforth v. Walker*, 37 Vt., 239, where the plaintiffs contracted to deliver the defendant a quantity of potatoes during the winter, as called for by defendant. Before they were all purchased by plaintiffs the defendant notified them by letter not to purchase any more until they should hear from him, which order was not subsequently countermanded; and it was held that the letter was not a rescinding of the contract, but a refusal to receive any more potatoes upon it than the plaintiffs had on hand, or had already purchased. It was also held that in executory contracts a party has the power to stop the performance on the other side, by an explicit order to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part, at that point or stage in the execution of the contract.

And in *Friedlander v. Pugh*, 43 Miss., 111, the court, in the syllabus, state that it is by no means a sound doctrine of law, or of morals, that when one party to a contract is hindered from full performance by the other, the one obstructing can, in all cases, be held liable in damages to the extent of the entire price agreed upon for full performance. In such case the true rule, resting upon the best authority and the soundest reasoning, is that the just claims of the party so hindered are satisfied when he is recompensed for the part performed, and for his actual loss as to the part unperformed.

Also in the case of *Polsley v. Anderson*, 7 W. Va., 202, a case of interest to lawyers, as it concerns attor-

neys' fees. Polsley & Son entered into a contract with Anderson that they, with W. H. Tomlinson, Esq., all attorneys at law, would prosecute a certain suit in chancery pending in the circuit court, wherein defendant was complainant and the heirs at law of John Anderson, deceased, were defendants, for the enforcement of specific performance of a contract for the conveyance of land between John Anderson, in his lifetime, and the defendant. The defendant agreed that the plaintiffs and Tomlinson should be paid for their legal services $100 each, and if the result was in favor of defendant, $300 each; in all $600. The plaintiffs and Tomlinson prosecuted the suit and fulfilled their part of the contract in good faith. The defendant, of his own motion, caused the suit to be dismissed, without the consent of his counsel, and thereby hindered and prevented the further prosecution of it. The court charged the jury, in effect, that if they were satisfied, from the evidence, that the facts were as stated in the plaintiffs' declaration they should find for the plaintiffs in the sum of $300, the amount of the contract. The supreme court, by a lengthy opinion referring to many of the cases cited by our author Sutherland, reached the conclusion that there had been a misdirection of the jury in the court below, and reversed the judgment.

We have seen that, in our view, the defendant had the right to rescind, or to stop the further performance of the contract, and that he did so while the material of the furnace and accessories were still at the railroad depot, and that he refused to accept any part of the same. And while it will not be denied that the plaintiffs did what they could to deliver it, yet, as he refused to receive it, and so notified the plaintiffs before it was taken from the depot, he never did receive it, in law or in fact. As has been stated, the defendant, by pursuing this course, assumed the burden of paying all such sums as the plaintiffs had earned, and all damages which they had sustained in the execution of the contract, and consequent of its rescission.

We have also stated that in such a case the party hindered from going on with the contract was entitled to the profits which he would have realized had he been suffered to complete it. That is an important element in this instance, as it appears from the bill of exceptions that the profits under the plaintiffs' proposal were as more than two to one to the value of the articles to be furnished, or of the services to be rendered. The plaintiffs' witnesses testified that the furnace and all the accessories placed upon the cars at Chicago were worth, according to the plaintiffs' bill of prices, $140. The contract price for the furnace complete and in successful operation, was $450. Fifty dollars was the amount testified to by the plaintiffs' witness Gibbs as the pay he was to have received for setting up the furnace. Four hundred dollars may be then assumed as the price of the furnace and fixtures at the railroad depot. From this deduct the cost on cars at Chicago, $140, and $260 is the remainder, which, taking the furnace at Beatrice, where it was to be delivered, and accounting nothing "for released rates of freight on it from Chicago," is wholly profits on the contract. This, I think, is all that the plaintiffs are entitled to recover of the defendant in the transaction; and while their petition but imperfectly states such cause of action, yet, as the defendant's answer is likewise inexact, I think the plaintiffs are entitled to their option to accept that amount to avoid further litigation.

The 1st and 2d instructions asked by defendant were, I think, properly refused; the evidence not justifying the court in giving them. The other instructions asked for by defendant fairly present the law, as I understand it, and should have been given by the court.

The judgment of the district court will be reversed, and the cause remanded for further proceedings, unless the defendants in error shall, within sixty days from the date of the entry of this opinion, file in this court a remittitur in the sum of $180, as of the date of the judgment of the

district court, but in case such remittitur be filed within the time stated, the judgment will stand

AFFIRMED.

THE other judges concur.

MCPHEE & MCGINTY, APPELLANTS, V. Z. L. KAY, APPELLEE.

[FILED JULY 2, 1890.]

1. **Mechanics' Liens:** FAILURE TO FILE ACCOUNT. In proceedings to enforce a mechanic's lien by plaintiffs, as subcontractors, for material furnished to the contractor without authority of defendant, as the owner, no account of which under oath was made and filed with the register of deeds, under sec. 3, art. 2, of chap. 54, Comp. Stats., within sixty days after furnishing the material, *held*, not good.

2. ———: DISCHARGE: THE EVIDENCE examined, and *held*, sufficient to sustain the judgment below discharging the lien.

APPEAL from the district court for Red Willow county. Heard below before COCHRAN J.

Hugh W. Cole, for appellants.

W. S. Morlan, contra.

COBB, CH. J.

This action was brought in the district court of Red Willow county by McPhee & McGinty, plaintiffs, against Z. L. Kay, defendant. The cause of action, as set out in the petition, is, that on or about the 18th day of October, 1886, the plaintiffs entered into an oral contract with the defendant, by and through the defendant's agent, William

Lang, to furnish the defendant certain building and finishing material, therein particularly set out and described, at the agreed price of $195, for and in the construction of a dwelling house on lots 7 and 8, in block 2, in the original town of McCook, Red Willow county, in this state.

2. That in pursuance of said contract the plaintiffs furnished said material to the defendant for the erection of said house on the 18th day of October, 1886, for the said sum of $195.

3. That the defendant, at the time when, etc., was the owner of said lots 7 and 8 by virtue of a contract of purchase, etc.

4. That on the 1st day of February, 1887, and within four months of the time of furnishing said material, the plaintiffs made an account in writing, of the items of such material furnished defendant under said contract, and, after making oath thereto as required by law, filed the same in the office of the clerk of Red Willow county, Nebraska, on the 7th day of February, 1887, and within four months of the time of furnishing said materials, claiming a mechanic's lien therefor upon said lots and the building thereon.

5. That the sum of $195 and interest from the 18th day of October, 1886, now remains due and unpaid on said account, with prayer for a judgment for said sum and interest, together with costs of suit, and that said premises may be sold and the proceeds of such sale applied to the payment of such judgment, interest, and costs, and for general relief.

The answer of the defendant consisted of a general denial.

There was a trial to the court, a jury being waived, with a finding and judgment for the defendant.

The plaintiff's motion for a new trial was overruled and the cause brought to this court on appeal by the plaintiffs.

It appears from the evidence, as contained in the bill of

exceptions, that the plaintiffs reside in the city of Denver, Colorado, and were dealers in lumber and manufacturers and dealers in building material; the defendant resides at McCook, Red Willow county, in this state; also, that William Lang resides at Denver and is an architect. It further appears that in the summer and fall of 1886 the defendant erected a dwelling house at McCook; that preparatory to building, he, through correspondence, employed said William Lang as an architect to draw an elevation and prepare a plan and specifications of his said building; that pursuant to such employment Lang drew such elevation and prepared such plans and specifications, which were sent to defendant, at McCook, for his inspection, and finally approved and paid for by him. It also appears that the defendant employed and entered into a contract with one John F. Collins, of McCook, a carpenter and contractor, to furnish all materials and construct the said house complete, according to the plans and specifications furnished by the said architect. Collins entered upon the construction of the house, and pursued it to some state of completion, but to what extent does not appear, when he abandoned it, and the defendant purchased some materials for its completion and finished it himself. This appears from the testimony of the defendant, and, although he was cross-examined by plaintiffs' counsel, he was not examined, nor did he state, nor does it otherwise appear, what material he purchased, nor of whom. I quote his entire cross-examination:

Q. This woodwork and materials furnished went into the building, didn't they?

A. I suppose they did.

It also appears that the defendant overpaid Collins, the contractor, for the material furnished and work done by him, to a considerable amount.

The deposition of William Lang, the architect above referred to, taken at Denver, was offered by the plaintiff,

and read on the trial. After stating his residence and business, he stated that he was acquainted with the plaintiffs, and also acquainted with the defendant through correspondence with him. I quote:

Q. Have you had any business transactions in the past three years with the defendant, and, if so, what was the nature of that transaction?

A. I have; he employed me to make plans for a dwelling house he was building in McCook, Nebraska.

Q. Who hired you and paid you for your services in that transaction?

A. Z. L. Kay, the defendant in this case.

Q. During the time of that transacting of said business did you have any dealings with the plaintiffs with respect to the same, and, if so, state what you did in that regard and for whom?

A. I did; the defendant in this case wrote me requesting that I should get him prices on certain woodwork to be used in the construction of his house, such as glass, brackets for gables, porches, etc. I submitted the list sent me to Billings & Stewart and plaintiffs in this case, and received bids from them, which I sent to the defendant. Shortly after that—probably a week or ten days—I received a letter from them, saying, we want you to ship us those goods. I went to Mr. McPhee, who refused to ship the goods to Collins, but did ship them to Dr. Kay, the defendant, upon the strength of the letter which I had received from Kay, showing my authority to act in the premises.

Q. I will ask you whether or not these are the letters referred to? (Showing witness two letters.)

A. Yes, sir; except the Collins letter, which I cannot find.

Q. Did you receive these letters during the time referred to?

A. Yes, sir.

(Letters attached to deposition, marked Exhibits A and B.)

Q. Did you, at any time during the transaction before referred to, act or pretend to represent any other person than the defendant in respect thereto?

A. I did not.

Q. What, if any, instructions were given to McPhee & McGinty by you, referring to the shipping of the material so ordered by you?

A. I ordered them to ship the goods to Dr. Z. L. Kay, in care of John Collins.

The first of the above letters is dated McCook, Neb., August 14, 1886, and is entirely devoted to the sketch of the building which Lang had sent to Kay and certain proposed changes therein. The date of the second letter is torn off. It is also chiefly devoted to proposed changes in the plan, but closes with the following paragraph: "I expect I shall ask you to assist me in getting mantel, stained glass, brackets for gable, porch railing, etc.

The deposition of Charles D. McPhee, also taken at Denver, was offered in evidence by the plaintiffs and read at the trial. He stated that he was one of the plaintiffs and was not acquainted with the defendant. In answer to a question by plaintiffs' counsel he stated: "We were requested to make an estimate on a bill of materials by one William Lang, an architect, for a house that the defendant was building in McCook, Neb. We made the estimate and gave it to Mr. Lang, who said he was transacting this business for the defendant as his architect. In the course of eight or ten days Lang came back and wanted us to go on with the work as we were the lowest bidders; at the same time he showed us letters from Dr. Kay, the defendant, authorizing him to procure this material, and at the same time representing to me that Dr. Kay was a man of means and that he would pay the bill. That, upon the strength of such representations and the letters, they pre-

pared all the material according to the plans and details given us by said Lang, and on the completion of the work Mr. Lang examined the work and ordered the same shipped to Dr. Z. L. Kay, in care of John Collins at McCook, Nebraska, and at the same time ordered us to send a detailed statement of the items of the account to Dr. Kay, the defendant, which we did." He also stated that the letters referred to as having been shown to him by Mr. Lang are the same letters which are attached to his deposition in this case and marked Exhibits A and B; that said material was charged to Z. L. Kay, as appears from plaintiffs' books; that the contract price of said goods was one hundred and ninety-five dollars; that they had never received said amount, or any part thereof, from the defendant or from any other person in payment for the same; that they had sent monthly statements of said account to Z. L. Kay, McCook, Neb.; that the reason why the said goods were shipped in care of J. F. Collins was that Mr. Lang instructed them to ship in that way for the reason that the defendant was out of town a good deal of the time and he wanted his builders to be able to receipt for goods and to receive the same in case of the defendant's absence; and that plaintiffs never, directly nor indirectly, had any contract, agreement, or understanding with said Collins with reference to said transaction.

H. W. Cole was sworn as a witness for the plaintiff upon the trial and testified that he received the claim sued on from the plaintiffs for presentation to the defendant; that he presented it to Dr. Kay, "and he said these lumber and materials went into the house and should be paid by Collins. He said that he was not to pay for the lumber," etc.

A copy of a lien, as filed in the office of the county clerk, appears in the bill of exceptions. It appears by the writing on the face, over the signature of C. D. McPhee, to have been filed February 1, 1887, but it does not officially appear when it was filed.

It is the theory of the plaintiffs' case that the building material, for which their lien was filed and the action brought, was furnished directly to the defendant, and not to the contractor, nor through him. Indeed, their case ignores the existence of a contractor for furnishing the material and erecting the house. Had it been sought to establish a lien upon the house for material furnished for its construction through a contractor, the sworn statement of the material furnished by the plaintiff and the amount due them therefor from the contractor, must have been presented and filed in the office of the register of deeds of the county within sixty days from the date of the furnishing of the same. It is not claimed that such statement was presented or filed in this case until long subsequent to the expiration of that period.

As hereinbefore stated, the defendant employed and contracted with John F. Collins to furnish all material and to build the house, and it is apparent from the testimony on the part of the plaintiffs that, at the time of furnishing the material, this contractor was engaged in the erection of the house, so that the independent fact, if the same is proven or admitted, that the material furnished by the plaintiffs entered into the construction of the house, does not, of itself, establish the right of the plaintiffs to a lien upon the building or to a recovery against the defendant. Nevertheless, were it proved that the defendant ordered the material, and that it was delivered to him, or by his direction to the contractor, he would be liable, and this is what was evidently the intention and the efforts of the plaintiffs to prove. It is not claimed that he did this personally or directly, but that he did it through William Lang, the architect.

To establish the authority of Lang to order this material, two letters written by defendant are given in evidence, but these letters fall far short of establishing such authority, and the only clause in either of them which refers in a re-

mote degree to any material for the construction or finishing of the building is that hereinbefore quoted, in which the defendant says: "I expect I shall ask you to assist me in getting mantel, stained glass, bracket for gable, porch railing," etc. It need scarcely be said that these words fall far short of evidencing an agency on the part of Lang to contract for the plaintiff in the purchase of the articles therein named, to say nothing of the articles for which the lien is filed.

The witness Lang mentioned another letter which he says had been lost, but its loss was not established so as to admit of its contents being proved as evidence to the jury, and indeed there is no attempt to prove its contents; nor indeed does it appear that such letter was written by the defendant. In one instance the witness speaks of this lost letter as "the Collins letter." From the entire evidence it is apparent that the letter referred to as lost was written by Collins, and that upon his suggestion the material was purchased and shipped to McCook in such a way that he could receive it without the knowledge of defendant, and work it into the building as material furnished by him.

It appears as well from the testimony of Lang as of the plaintiff McPhee, and a copy of the bill of lading which was introduced in evidence and attached to the bill of exceptions, that the material was shipped to Z. L. Kay in the care of J. F. Collins, and this, according to the testimony of Lang, was that inasmuch as the defendant was absent from home a great portion of the time it was desirable that Collins could receive the material from the railroad company in his absence. There is therefore a failure to prove the furnishing of said material to defendant or that it entered into the construction of his building in such manner as to hold him chargeable to the plaintiffs therefor or to entitle the plaintiffs to a lien upon the building.

The judgment of the district court is

AFFIRMED.

THE other judges concur.

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FREMONT, E. & M. V. R. Co. v. MARGARET CRUM.

[FILED JULY 2, 1890.]

1. **Railroads: FIRES: DESTRUCTION OF TIMBER: MEASURE OF DAMAGES.** In an action by M. C., owner of premises adjacent to the right of way and track of a railroad, against the company for negligently permitting the fire, set out to clear its right of way of dry weeds and brush, to run over and beyond its right of way to adjacent premises, and to burn, injure, and destroy the natural growth of young trees and timber; and for negligently permitting the fires from its locomotives operating its railway to be communicated to adjacent premises and to burn, injure, and destroy the natural growth of young trees and timber, *held*, that the measure of damages is the amount of damage the trees and timber suffered by reason of the fire, and not the difference in the value of the land with the standing trees and timber before the fires and afterwards.

2. ——: ——: ——: ——. In determining the amount of damages, *held*, that the inquiry should be as to the value of the trees burned as standing timber, and not the market price for transplantation as shade or ornamental trees.

ERROR to the district court for Antelope county. Tried below before NORRIS, J.

John B. Hawley, for plaintiff in error, cited, on the contention that the measure of damages was the difference in value of land before and after fire: *B. & M. R. Co. v. Beebe*, 14 Neb., 463; *Drake v. R. Co.*, 63 Ia., 310; *Brooks v. R. Co.*, 34 N. W. Rep. [Ia.], 805; *Wallace v. Gooda l*, 18 N. H., 456; *Longfellow v. Quimby*, 33 Me., 457; *Chipman v. Hibberd*, 6 Cal., 162; *Van Deusen v. Young*, 29 Barb. [N. Y.], 9; *U. S. v. Taylor*, 35 Fed. Rep., 488; *Chase v. R. Co.*, 24 Barb. [N. Y.], 273–5; *Blakeley v. R. Co.*, 25 Neb., 207; *F., E. & M. V. R. Co. v. Marley*, Id., 138; *Rhodes v. Baird*, 16 O. St., 573.

Thos. O'Day, contra, cited, in reply to the contention:

Kolb v. Bankhead, 18 Tex., 229; 3 Sutherland, Damages, pp. 375, 381; *Foote v. Merrill*, 54 N. H., 490; *Wingate v. Smith*, 20 Me., 287; *Wetherbee v. Green*, 22 Mich., 311; *Grant v. Smith*, 26 Id., 201; *Davis v. Easley*, 13 Ill., 192; *R. Co. v. Maley*, 40 N. W. R., 948; *Whitbeck v. R. Co.*, 36 Barb. [N. Y.], 644; *Stockbridge Iron Co. v. Cone Iron Wks.*, 102 Mass., 80; *Forsyth v. Wells*, 41 Pa. St., 291; *Maye v. Yappen*, 23 Cal., 306; *Robertson v. Jones*, 71 Ill., 405; *McLean Coal Co. v. Long*, 81 Id., 359; *Adams v. Blodgett*, 47 N. H., 219; *Goller v. Fett*, 30 Cal., 481; *Longfellow v. Quimby*, 33 Me., 457; Herman, Executions, pp. 160, 235–6, 524; *Whipple v. Foote*, 2 Johns. [N. Y.], 418; *Lanning v. R. Co.*, 27 N.W. Rep., 478; *Campbell v. Crone*, 10 Neb., 571; *Goodman v. Kennedy*, Id., 275.

COBB, CH. J.

The plaintiff below alleged "that the defendant is an incorporated railroad company, owning and operating its line in said county near the plaintiff's land, described in her petition as amended by leave of the court as the north half of the north half of section 9, township 25, range 7 west.

"I. That on April 6, 1887, the defendant carelessly and negligently omitted to keep its right of way free and clear of dry and combustible materials, but permitted a large quantity of dry grass and weeds to accumulate upon its track near the premises of plaintiff, and that the agents and servants of defendants entered thereon, and upon the plaintiff's premises adjacent thereto, and set out a fire which destroyed 2,431 trees living and growing upon her land, to her damage $729.30.

"II. That on April 7, 1887, the defendant carelessly and negligently omitted to keep its right of way free and clear of dry and combustible materials, and the agents and servants of defendant, in running its engine over its line

of road at and near plaintiff's premises, negligently permitted the engine to cast out sparks and coals of fire into the dry grass and other combustible material on the defendant's right of way, and on the plaintiff's premises adjacent thereto, which caused a fire that spread to and over the plaintiff's premises and land, described in her amended petition as the east half of the southwest quarter of section four, township twenty-five, range seven west, and there burned up and destroyed 9,709 trees, living and growing upon her land, without any fault or negligence on her part, to her damage $2,912.70.

"III. That on October 6, 1887, the defendant carelessly and negligently omitted to keep its right of way free and clear of dry and combustible material, but permitted large quantities of dry grass and weeds to accumulate upon its track and right of way near the premises of plaintiff, and permitted its servants and agents to enter thereon and upon the premises of plaintiff, described in her amended petition as the southeast quarter of the southeast quarter of section four, township twenty-five, range seven west, in said county, and set out a fire that burned and destroyed 7,278 trees, living and growing on her said land and premises, without any fault on her part, to her damage $2.183.40."

The defendant's answer admitted that it was a corporation and denied all other allegations in the premises.

There was a trial to a jury, with verdict and judgment for the plaintiff for $2,751.30.

The defendant brings the case to this court on numerous errors, the first three against the verdict and judgment, fourteen as to instructions of the court either given to the jury or refused, one to allowance of evidence over defendant's objections, one to allowance by the court to plaintiff to reopen the case and introduce evidence after argument had been entered upon, one to allowance by the court to plaintiff to amend petition after argument had been entered upon, one to refusal by the court of defendant's motion for

continuance subsequent to the plaintiff's amendment, and one to the overruling of defendant's motion for a new trial.

There was evidence of damage to the growing trees of the plaintiff caused by three separate fires: the first, on April 6, 1887, by fire set out by section men in the employ of defendant engaged in burning off the right of way of defendant's track, escaping to and running over the plaintiff's timber land; the second, on April 7, 1887, was set out by sparks and coals escaping from one of defendant's engines, igniting the grass, weeds, and other combustible matter upon such right of way and track, running thence into plaintiff's timber land; and the third fire, on October 6, 1887, set out by sparks and coals escaping from one of defendant's engines, in like manner as the second, and running upon and burning the plaintiff's timber lands.

There was evidence that the first fire burned over and through and partially destroyed about forty acres of timber; that the second burned over and through and partially destroyed from thirty-five to forty acres of timber land, and that the third fire burned over and partially destroyed about ten acres.

A great deal of evidence is scattered through the 225 pages of the bill of exceptions, as to the quality and value of the timber destroyed by these fires. The plaintiff's husband testified, as to the first fire, that the trees were principally oak and white ash, in a good condition; that most of them had been trimmed up, the oak trees over twelve feet in height and of an average diameter of three to four inches. Upon cross-examination, the witness stated that of this timber there were some cottonwood, willow, and box-elder, but that the "principal heft of it" was white ash, and that portions of the ash trees grew in clusters, about half of them, some covering a rod and others five or six feet.

The plaintiff's son, D. C. McCartney, testified that the timber destroyed was ash, some few box-elder, and some

few of oak; that the oak did not amount to much, was mere bur-oak, such as we have in this county; that situate on the south side of the land they had trimmed, but did not know as to the north side. In answer to the "Q. State how the timber stood as to clusters," the witness answered: "I have counted some clusters with fourteen trees in them, and the biggest part of them were in clusters."

A. Bare testified that part of the ash trees grew single, and others in clusters of four to six feet in space.

The trees killed by the fires were examined and counted by the witnesses Bare, Yates, and Cooley, whose testimony was given. Yates testified that he counted 3,589 trees killed by the third fire; that he counted none under an inch in diameter, as instructed; that they were mostly ash, some oak, and would average three inches in thickness. Bare had counted 865 trees killed by the second fire, and 4,494 by the third, and 3,589 by the first, in all 8,948. George W. Cooley testified that he had examined and counted 490 of the trees killed by the first fire, and 5,215 by the second, and had counted none, thought to be killed, less than one inch in size, making a total of trees killed, as counted, of 18,242. These witnesses testified that each examined and counted the trees on ground separate from the others, and that neither went over the other's count.

The principal question of difficulty in the case arises from the application of the rule for the estimation of the plaintiff's damages. The plaintiff in error contends that the growing trees could only be regarded as a part of the realty, and that the measure of damages was the difference in the value of the land with the standing timber before the fire and afterwards. Were this rule conceded to be the true measure of damages, it is apparent that the plaintiff in error, having tried its case, submitted evidence, and procured the court to charge the jury upon a different principle, cannot now obtain a reversal for error of the court in

trying the case upon such other theory. But I think that the true measure of damages must be held to be the amount of damage the trees suffered by reason of the fire.

The principal effort, by the plaintiff, seems to have been to establish the value of the trees as living timber, and for this purpose several witnesses were sworn as to the value and price of shade trees in the town of Neligh, if sold singly, or in very small quantities. I am not prepared to say that this evidence was entirely inadmissible. It may be gathered from the testimony that some of the trees killed were susceptible of being taken up, carried to a distance, and transplanted for shade or ornamental trees.

J. F. Merritt, one of the most intelligent of the plaintiff's witnesses, having testified as to the sale of shade and ornamental trees in the market of Neligh, and having testified as to his knowledge of, and familiarity with, the plaintiff's premises, and the timber destroyed, stated, in answer to the "Q. What were the prices of such trees in the year 1887? A. I would explain that the most of those trees are larger than those generally sold on the market, but the smaller ones would be worth from $5 to $6 per dozen; a great many of the trees were large and it would be impracticable to set them out." They would therefore have a value in whatever market they might reach in a live and growing condition. But it is obvious that such testimony, without evidence of the cost and expenses of removing and transporting the trees, would be insufficient for the jury to fix their value growing in the forest on the banks of the Elkhorn. Even were this not so, it is established by evidence that a comparatively small and indefinite number of the trees, accounted killed, were susceptible of being taken up and transplanted, or were of the quality and growth required for transplanting. So that the jury would still be without accurate information for their verdict.

Again, while it is in evidence that there was some demand for shade and ornamental trees in that county, and

that such were being brought from a distance and sold there, yet the number of trees, such as those killed by the fires in question, throughout that and the adjoining counties was so great as to forbid the possibility of the plaintiff's finding a market for these trees at the retail prices testified to by her witnesses. It is to be regretted that none of them were examined, or testified, with a view of establishing the damage to the trees, as timber, by the fire, nor with a recognition of the fact that any of them possessed any value whatever after the fire had gone through the timber. But the jury were not left entirely without evidence as to their value for purposes to which they might be practically and conveniently applied, either before or after being damaged by fire.

James H. Smith, witness for defendant, testified that he is a farmer and land owner, resides in the same county with the plaintiff; is familiar with the land, timber, and trees in this suit, and owns eighty acres of similar land, covered with a similar growth of ash, oak, cottonwood, willow, and alder; had sold such trees for posts, ax handles, crutches, and the like, and that such were seldom sold for fuel, if alive; that, when dead, they were sold for fire-wood, and brought from one to two dollars per wagon load; that he had not used ash trees for posts when from four to five inches in size, but that they are so used from three to four inches; that dead ash, from two to three inches, is sometimes used for stays between posts in wire fence; that such timber for fire-wood is desired immediately after being killed, and of equal value after as before. This witness testified that some of the ash trees, four inches through, might make two fence posts, and such had been generally sold at fifteen cents each, but the cost to cut and sell them the witness could not say.

George H. McGee, witness for defendant, testified that for the last five or six years he had resided within three or four miles of the plaintiff, and is engaged in farming, survey-

ing, and milling; that he once owned the plaintiff's timber land, on which the fires occurred, and is acquainted with it, and with the timber on the Elkhorn throughout Antelope county; that the growth of timber such as that of the plaintiff's before the fire, of ash trees averaging from one to two inches thick, are worth from one to one and a half cents each; and young trees, from two to four inches, are worth five cents each, and willows two-thirds of that value, but larger ones about the same as ash.

Q. State, if you can, the difference in value of the trees in this burnt district just before and after the fire, classifying them as you have stated.

A. The smaller sizes, from one to two inches, would be almost wholly destroyed by the fire, the larger ones would be reduced in value not quite one-half. By the larger size I mean from two to four inches; if larger than four inches, the damage would be less.

M. A. DeCamp, witness for defendant, resided in Antelope county for seventeen years; engaged in farming and stock raising; is acquainted with the plaintiff's land and timber damaged by fire; owns a quarter section of similar land adjoining plaintiffs; that an ash stick, such as the body of the ash trees of plaintiff's before the fire, four inches thick, is worth fifteen cents, if an inch less, ten cents; that for stove wood, such trees, after the fire, would not be much different in value; they could be used for posts and stays without much loss for those purposes.

Considering the value of this evidence, and estimating one-half of the number of trees, accounted as damaged, to be three inches in thickness and over, and so worth fifteen cents each, and that one-half of their value was destroyed by fire, the damage to that number would be..... $684 07

Estimating the other half at one and a half cents and their destruction complete, the damage would be..... 273 63

Total loss on 18,242 trees of all sizes is... $957 70

It is not deemed necessary to set out the instructions of the court of its own motion, or on motion of the defendant. I will be content with remarking that a careful examination of the instructions to the jury fails to suggest any serious error, and that the rule of damages set out in the ninth paragraph, "that the measure of damages is the actual value of such trees as you find from the evidence were injured or destroyed by the fire; and in making up your verdict you will deduct from the value of such, when standing and alone just previous to the fire, their value, if any, in a charred and burnt condition after the fire, and the remainder will be the amount of damage which the plaintiff is entitled to recover," is the proper rule, and meets my approval.

It is here to be remarked that in the fourteenth paragraph of instructions, asked by defendant, the court again instructed the jury substantially as in that of the ninth, of which the plaintiff in error complains.

It appears from the bill of exceptions that after the closing of the evidence, and the counsel on either side had addressed the jury, the counsel for defendant asked the court to instruct the jury to find for the defendant, on the ground that the plaintiff had not shown by the evidence that any one of the three fires alleged were upon the land described in the petition. Thereupon counsel for the plaintiff moved to reopen the case, to which defendant objected, and counsel stated that he would be unable to proceed with the trial if the case was then opened; which objection was overruled, the case was reopened and the plaintiff allowed to re-examine witnesses as to the locality of the railroad and that of the burned premises. To this ruling of the court, assigned as error, we see no reversible error in the action of the court; but it is not doubtful that it was within the discretion of the court, and tended to the impartial administration of justice and to the economy of litigation.

It also appears from the bill of exceptions that after the closing of the evidence the plaintiff moved to amend her petition so as to conform to the proof, in showing that the first fire occurred on the north half of section 9, instead of section 4, and that the second and third fires occurred on section 4 instead of section 9, in the same township and range; to which the defendant objected and moved that, in consideration that the plaintiff had been allowed to reopen her case, and to introduce new and important evidence, and also to amend her petition to conform to the proof, the jury be discharged and the cause continued; which motion of defendant was overruled.

The plaintiff also moved for leave to amend the first paragraph of her petition, the first cause of action, by inserting on the margin of the original, made so to read, the north half of the north half of section No. 9; to which the defendant objected, for the reason that the trial had been closed on both sides, and the arguments addressed to jury by each; which objection was overruled and the motion to amend the petition allowed.

By the same motion the plaintiff asked leave to amend the second paragraph of her petition, the second cause of action by inserting on the margin of the original, made so to read, the east half of southwest quarter of section 4; to which defendant objected for the reason that the amendment changes the nature of the cause of action and sets up a new cause of action after the evidence is closed and both parties rested, and the defendant prevented from meeting any new claims contained in the plaintiff's petition; which objection was overruled and the plaintiff's amendment was allowed.

On the same motion the plaintiff was allowed by the court to amend the third cause of action by inserting on the margin of her petition, so as to read, the southeast quarter of the southeast quarter of section 4, over the defendant's objections as before stated; which several rul-

ings of the court are assigned as errors to be reviewed. There is no reversible error in the court allowing these several amendments to the plaintiff's petition in the manner stated and excepted to, but the same was within its discretion as provided by the statute.

The errors assigned, (1) that the verdict is contrary to the evidence and is not sustained, (2) that it is contrary to law, and (3) that it is excessive, appearing to have been given under the influence of passion and prejudice so far as they relate to the amount of the verdict, are well taken. As has been shown, there was evidence before the jury to sustain a recovery for $957.70, and no more. For the reason of the excessive amount of the verdict the judgment will be reversed and the cause remanded for further proceedings unless the plaintiff shall, within sixty days from the filing of this opinion, enter a remittitur in this court, as of the date of the original judgment herein, for the sum of $1,793.60, but upon the entry of such remittitur within the time limited the judgment is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

FIRST NATIONAL BANK OF BLUE HILL V. MARGARET M. TURNER.

[FILED JULY 2, 1890.]

1. **Garnishment:** BANKS: SERVICE ON BOOK-KEEPER. In garnishment proceedings against a bank, where the president and cashier are absent, notice and a copy of the order of attachment served upon the book-keeper thereof during business hours is sufficient.

2. ———: DELIVERY BY GARNISHEE TO DEFENDANT. A garnishee duly served with notice and a copy of the order of at-

tachment against a defendant, who, after such service, delivers money or property then in his possession to the defendant, will not thereby be released from liability to the plaintiff in the attachment.

ERROR to the district court for Webster county. Tried below before GASLIN, J.

Hastings & McGintie, for plaintiff in error.

A. M. Walters, contra, cited, as to the service on the book-keeper: Code, sec. 73; *Mathews v. Smith*, 13 Neb., 190; *Porter v. R. Co.*, 1 Id., 15.

MAXWELL, J.

The cause of action in this case is stated as follows:

"The plaintiff complains of the defendant and says that on the 30th day of September, 1886, she recovered a judgment against one M. H. King for $150 debt, and $9.55 costs, before H. D. Ranney, a justice of the peace of Webster county, Nebraska; that the suit against said King, in which the said judgment was obtained, was aided by an order of attachment, by virtue of which the defendant in this cause, viz., The First National Bank of Blue Hill, was summoned as garnishee to appear before the said H. D. Ranney, justice of the peace, and answer such interrogations as might be propounded to it touching their indebtedness to the said M. A. King, and any property, rights, or credits in its hands and belonging to him; that the said garnishee summons required the said First National Bank to appear before said Ranney, justice, on the 30th day of August, 1886; that the said First National Bank failed, neglected, and refused to appear before the said Ranney, justice, on the 30th day of August, 1886, as required by the said garnishee summons, and failed, neglected, and refused to appear before said Ranney and make answer as such garnishee at any time.

"Plaintiff alleges that at the time the summons in garnishment was served upon the First National Bank, to-wit, on the 24th day of August, 1886, it had in its possession money, property, rights, and credits of the said M. H. King of the value of several thousand dollars; that notwithstanding the service of the garnishment summons as aforesaid upon it, the said First National Bank, in violation of the law, and this plaintiff's rights, paid money to said King, and turned over to him property in its possession belonging to him, made a final settlement of its dealings with him, all of which was done subsequent to the time the garnishment summons was served upon it, the said bank, and subsequent to the time the said bank was required to appear before the said Ranney, and subsequent to the time when the said bank failed, neglected, and refused to appear before said Ranney and answer as such garnishee as aforesaid; that at the time plaintiff recovered her judgment against said King, and caused the said bank to be garnished, he, the said King, was insolvent and a non-resident of the said state of Nebraska; that the said King has at all times since the 24th day of August, 1886, down to the present time been a non-resident of the state of Nebraska, and has had no property in the state subject to execution or attachment except that in the possession of the said bank; that defendant is a corporation organized under the laws of the United States, and its only place of business is in Blue Hill, Webster county, Nebraska; that no part of the plaintiff's judgment against said King has ever been paid; that the said First National Bank has never in any manner been released or discharged as garnishee; that said bank has at all times since the 24th of August, 1886, down to the month of January, 1887, had funds of the said King with which to pay plaintiff's judgment against him, and have been authorized by said King to pay said judgment provided a discount of the said judgment could be obtained; that the said bank and the said King

have colluded to delay the plaintiff in the collection of her judgment against the said King; that the defendant is justly indebted to the plaintiff in the sum of $159.55, with interest thereon from the 30th day of September, 1886, at the rate of seven per cent per annum, no part of which has been paid."

To this petition the bank filed an answer as follows:

"Now comes said defendant and wholly denies the issuance of order of attachment and service of notice of garnishment thereon upon this defendant in any action between said plaintiff and any party; and this defendant further denies that there was any lawful action pending before H. D. Ranney, justice of the peace in and for Webster county, Nebraska, on August 30, 1886, wherein said plaintiff was plaintiff, and defendant wholly denies that it ever received any notice of garnishment in any such action; and defendant, further answering, denies that it, the said defendant, was, on the 24th day of August, A. D. 1886, or ever thereafter, indebted to one M. H. King in any sum, nor did this defendant have, on said 24th day of August, or ever thereafter, any property, rights, or credits of said M. H. King in its possession or under its control.

"2d. This defendant, further answering, says, that any pretended proceedings and judgment had before said justice of the peace in a certain pretended action wherein said plaintiff M. H. King was sought to be made defendant, and said plaintiff was sought to be made plaintiff, were wholly void and without any jurisdiction on the part of said justice of the peace in the matter of issuing said pretended attachment, and without any jurisdiction over the person of any defendant in said action.

"3d. That as to the matters and things in plaintiff's petition not hereinbefore specifically denied, this defendant has no knowledge as to the truth thereof, and therefore denies and demands proof thereof."

On the trial of the cause the jury returned a verdict for

the plaintiff below for the sum of $183.44, upon which judgment was rendered.

The testimony shows that in the action against King he was personally served with summons and also with a copy of the writ of attachment; that no property was found whereon to levy the attachment, whereupon an affidavit for garnishment was duly made and filed, the docket entry being:

"Plaintiff filed affidavit that she has reason to believe, and does believe, that the First National Bank of Blue Hill has property of and is indebted to the defendant in an amount to her unknown.

"Issued order and notice to garnishee to appear on the 30th day of August, 1886, at 1 o'clock P. M. and answer as to property of the defendant under his control and as to his indebtedness to the defendant M. H. King.

"Garnishee entered indorsed as follows:

"'I hereby certify that I served on the First National Bank a true copy of the within garnishee notice.

"'(Signed) A. SHEETS, *Constable.*'

"Order for attachment returned indorsed as follows:

"'August 24, 1886, received this writ, and not being able to come at the property of M. H. King, claimed to be in the possession of First National Bank of Blue Hill, Nebraska, I on the same day at 3 o'clock P. M. served on Edward Morse, book-keeper of said First National Bank, there being no other officer of the bank present, a copy of this order and also a written notice to appear and answer as therein required. A copy of which notice is hereunto attached.

"'(Signed) A. SHEETS, *Constable.*'"

The garnishee did not appear and answer, and it is claimed that the service was insufficient.

Sec. 935 of the Code provides that "The copy of the order and the notice shall be served upon the garnishee as

follows: If he be a person, they shall be served upon him personally, or left at his usual place of residence; if a corporation, they shall be left with the president or other head of the same, or the secretary, cashier, or managing agent thereof." The book-keeper of the bank, as far as appears, was the managing agent thereof. He was the only person that the officer found in the bank upon whom service could be made, and service upon him during business hours at the place of doing business was sufficient.

Sec. 936 of the Code provides that "The garnishee shall appear before the justice in accordance with the command of the notice, and shall answer, under oath, all questions put to him touching the property of every description and credits of the defendant in his possession or under his control, and he shall disclose truly the amount owing by him to the defendant, whether due or not, and, in case of a corporation, any stock therein held by or for the benefit of the defendant, at or after the service of the notice." It thus became the duty of the garnishee to appear and answer all questions in relation to the property of King in its possession or under its control, and as it is evident that it had more or less of such property after the notice of garnishment was served, it has no cause of complaint; in other words, it failed to answer at its peril, and as it made no attempt in the garnishee proceedings to exonerate itself from the charge that it was in possession of property of King, the presumption is that the affidavit of garnishment is true, and as the amount of such property seems to have exceeded the judgment in this case, the judgment is right and is

AFFIRMED.

THE other judges concur.

BEATRICE SEWER PIPE CO. V. THOMAS ERWIN.

[FILED JULY 2, 1890.]

Continuance: ABSENCE OF WITNESS: DILIGENCE. An action was brought November 10, 1887, and on the 5th of the following March a demurrer to the petition was overruled, and on the 12th of that month an answer was filed, and seven days thereafter the cause was continued. At the June term, following, a motion for a continuance was filed because of the absence of a material witness, and this was supported by an affidavit showing the materiality of the testimony and the diligence used. *Held*, That the June term was the first at which the case was ready for trial, and that a continuance should have been granted.

ERROR to the district court for Gage county. Tried below before BROADY, J.

R. S. Bibb, and *Griggs & Rinaker*, for plaintiff in error, cited, as to the motion for a continuance: *Williams v. State*, 6 Neb., 334; *Johnson v. Dinsmore*, 11 Id., 394; *Hair v. State*, 14 Id., 503; *Newman v. State*, 22 Id., 355; *Parks v. Council Bluffs Ins. Co.*, 28 N. W. Rep., 424.

Pemberton & Bush, *contra*, cited on the same point: *Stevenson v. Sherwood*, 22 Ill., 238 [annotated, 74 Am. Dec., 140].

MAXWELL, J.

This action was brought in the district court of Gage county by the defendant in error against the plaintiff in error to recover $5,000 damages for an injury which it is claimed Thomas Erwin sustained to his right hand while feeding one of the plaintiff in error's presses for the manufacture of tile. The alleged negligence consists in the neglect of one Charles Huggins, the pressman, who, at the time of the accident, was in charge of the press and work-

ing with the defendant in error, in failing to instruct the latter as to the danger in clearing clay from the steam piston used to press the tile, etc.

On the trial of the cause the jury returned a verdict for $2,500, in favor of the defendant in error, upon which judgment was rendered.

Immediately preceding the trial the plaintiff in error sought to continue the case to the next term of the court, and in support of such motion filed the following affidavit: "R. S. Bibb, being first duly sworn, on oath states that he is the attorney for the defendant above named. Affiant further states that said defendant is a corporation organized under the laws of the state of Nebraska, and doing business in the city of Beatrice, Gage county, in said state, said business being the manufacturing of tiling, sewer pipes, brick, etc; that said defendant cannot safely proceed to trial in the above entitled cause at the present term of court on account of the absence of one Charles Huggins, a material and important witness on the part of the said defendant, and that said witness is now a resident of the state of California, the exact place in California where said witness is residing being unknown to affiant, although he has made diligent inquiries in the endeavor to find out the postoffice address of said Charles Huggins, as have also the officers of said defendant; that said Charles Huggins formerly resided in the city of Beatrice, Gage county, Nebraska, but left for California before the commencement of this action. That the said defendant expects to prove by the said Charles Huggins (who is the pressman referred to in plaintiff's petition) that on or about the 5th day of September, 1887, he, the said Charles Huggins, was in the employment of defendant, engaged in the running of the press mentioned in said petition; that when the said plaintiff commenced to work upon said press, in company with said Charles Huggins, the said plaintiff was fully and completely and properly instructed as to the proper manner of

performing the duties of his position, and avoiding the dangers of his said occupation, and that plaintiff was fully advised in the premises; that plaintiff was injured by his own gross carelessness and fault, and not through the fault, carelessness, or neglect of him, the said Charles Huggins, the defendant, or any of the other of its employes; that said plaintiff was injured by carelessly thrusting his hand into the cylinder mentioned, when and while the piston therein was rising, notwithstanding the fact that said plaintiff had been instructed and warned to keep his hands out of said cylinder when said piston was rising, and that immediately upon the happening of the injury complained of the said plaintiff stated, in the presence of the said Charles Huggins, "that it was his (plaintiff's) own fault that he had been injured." That he knows of no other person or persons by whom the above stated facts can be proven; and affiant further states that when he was employed as attorney for the defendant, he supposed that the present pressman at defendant's works was the one who was working there when plaintiff was injured, and that it was only a short time ago, and since the commencement of this term of court, or immediately prior thereto, that he discovered otherwise; that this affiant and the officers of said defendant have used due diligence, by making every inquiry possible to find the whereabouts of said Charles Huggins, and have asked all of those who would be likely to know here what his postoffice address is, but could get no further information than that he was in California.

"Affiant further says that he expects to procure the testimony of said Charles Huggins at the next term of this court; that it would be dangerous for defendant to proceed to trial in said action without the testimony of said witness, and affiant further says that this application for continuance is not made for delay, but that justice may be done."

This motion was overruled, and this ruling of the court is the first error assigned.

On the part of the defendant in error it is contended, as a justification for the ruling of the court, that there had been a continuance of the case at the former term, and that the second continuance was for delay. An examination of the record shows that the petition was filed November 10, 1887; that on March 12, 1888, an answer was filed, and that on June 29, 1888, a reply was filed, a slight amendment by interlineation having on that day been made to the answer.

The record shows that on the 5th of March, 1888, a demurrer to the petition was overruled, and that on the 19th of that month, seven days after the answer was filed, the cause was continued. The case was not at issue and ready for trial, therefore, at the March, 1888, term of the court, and the June term of that year was the first term at which, under the statute, the cause, except by consent of both parties, could have been tried.

That the testimony of Huggins is material in this case is unquestioned, and sufficient diligence was shown to authorize the continuance of the case.

It is unnecessary to consider the other errors assigned.

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

REVERSED AND REMANDED.

THE other judges concur.

CHAMPION MACHINE CO. v. FRED. GORDER.

[FILED JULY 2, 1890.]

Instructions as applied to the facts of the case, *held*, to state the law correctly.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

Geo. W. Covell, and *Allen Beeson*, for plaintiff in error.

J. B. Strode, and *Byron Clark*, *contra*.

MAXWELL, J.

This action was brought by the plaintiff in error against the defendant in error to recover a balance of $314.85, with interest thereon, due on account for farm machinery sold by plaintiff to the defendant.

The defendant by his answer admits the indebtedness of said amount for said machinery, but by way of counterclaim alleges "that on the 27th of September, 1885, plaintiff and defendant entered into a written contract, by which plaintiff delivered to defendant fourteen light harvesters and binders of six-foot cut and that defendant paid plaintiff therefor. The plaintiff represented and warranted each of said machines to be made of superior material and superior workmanship to any other harvester and binder in the market, and to do as good work under all circumstances as any other harvester and binder in the market, and agreed if any of said machines were not as represented and warranted, or could not be made to work as represented and warranted, then the defendant could return said machines to plaintiff and his payments made therefor would be refunded to him by plaintiff, together with all freight charges upon such machines, paid by defendant.

"That two of the machines delivered under said contract failed to comply with the terms of the warranty and were utterly worthless; that defendant duly notified plaintiff of such failure, and offered to return said two machines and that plaintiff refused to receive them. The defendant had previously paid plaintiff for said two machines, and had also paid $20 freight on each one; that defendant paid plaintiff the purchase price of said two machines and the freight paid thereon, amounting to the sum of $282.50;

that he was unable to sell, during the season of 1886, all of the said fourteen machines and was compelled to carry eight of them over to next season, upon which he claims a rebate, under said contract, of $150 on account of a reduction in prices made by plaintiff on said machines."

The plaintiff filed reply denying the breach of warranty as alleged by defendant, and denies that plaintiff was ever notified of any such failure of warranty, or that defendant ever offered to return said machines to plaintiff.

That by the terms of the written contract it was agreed by the defendant that said machines were to be sold by defendant upon written orders from the purchasers, and to be warranted to the purchasers as per plaintiff's printed warranty furnished to the defendant, but that the defendant sold said two machines without taking any written order therefor and without giving the printed warranty of plaintiff, but that he sold them on his own verbal warranty.

Plaintiff further alleges that if said machines had been properly set up and operated they would have fulfilled the warranty; that said machines were never returned or tendered to plaintiff.

Plaintiff also avers that the eight machines carried over by defendant were worth as much during the year 1887 as they were during 1886.

The jury returned a verdict in favor of the defendant for the sum of $97.15, upon which judgment was rendered.

The principal error complained of is in the giving of certain instructions. The instructions are very long and but few of the paragraphs were excepted to.

The court, after stating the issues, gave the following: "Defendant alleges that the plaintiff represented and warranted said machines to be made of superior material and workmanship to any other harvester and binder in the market, and warranted them to do as good work under all circumstances as any other machine in the market, and agreed if any of the machines so sold failed to comply with

said warranty, the plaintiff would refund the money paid, with freight paid by defendant; that two of said machines failed to comply with the representations and plaintiff was notified of said facts, and defendant offered to return said machines, which plaintiff refused to accept. Defendant asks to be allowed upon his counter-claim the sum of $282.50, the price paid for said machines and freight. Defendant further says that he is entitled to a credit of $150 for eight machines defendant was obliged to carry over to the season of 1887 by reason of the reduction of the price of like machines for the season of 1887. Defendant asks to be allowed upon his counter-claim $262.50 for the two machines, $20 for freight paid, and $150 for rebate, as above set forth.

"Third—For a reply to the answer of the defendant the plaintiff denies that the two machines were not made of superior material and workmanship; denies that said machines would not do as good work as represented and warranted; denies that defendant notified plaintiff of the failure to work of said two machines; denies that defendant offered to return said machines or that plaintiff refused to allow defendant to return the same.

"Plaintiff further says that by the contract with defendant all machines were to be sold upon a printed warranty as furnished by plaintiff; that the two machines were sold without such written warranty, but upon the verbal warranty of the defendant that the machines would work to the satisfaction of the purchasers; that the two machines sold and referred to in the defendant's answer if properly put up and operated would have fully complied with the terms of the written warranty; that the purchaser refused to allow the agent of plaintiff to adjust said machines so as to operate; that the defendant nor any other persons for him ever offered to or did return the machines to plaintiff or its agents. Upon which plaintiff denies that defendant is entitled to any credit for said two machines.

"Plaintiff further says that by agreement between the parties hereto said defendant was not to sell any other machines in Cass county; that in violation of this agreement defendant did sell other machines and so could not sell the eight machines bought of plaintiff; that the eight machines carried over were worth as much during the year 1887 as in 1886 and defendant is entitled to no credit therefor by the terms of the contract.

"Fourth—Your verdict in this action will be somewhat out of the ordinary form, and by it you will first find how much there is due the plaintiff upon the cause of action, and state in your verdict the amount. Then you will determine if any is due to the defendant upon the counter-claim or set-off, and state the amount in your verdict. Then you will find for the plaintiff or defendant, according as your finding for one exceeds the other, and for such excess.

"Fifth—As to your finding upon the amount due the plaintiff upon its cause of action, you are instructed that the amount is agreed to be $314.85, with interest at seven per cent, from September 7, 1887, which you will compute and find as the amount due upon the plaintiff's claim.

"Sixth—You are instructed that upon the counter-claim of the defendant the burden of proof is upon the defendant to establish by a preponderance of the evidence every material allegation of his answer concerning such counter-claim or set-off.

"Seventh—To entitle the defendant to recover for the two machines sold and alleged to have failed to work, as represented, you are instructed that the burden is upon defendant to establish by a preponderance of the evidence:

"1st. That the warranty was such as is authorized by the contract between plaintiff and defendant.

"2d. That defendant notified plaintiff or its agents of the failure of said machines to work as represented.

"3d. That plaintiff, by its agent or agents, was given

a fair opportunity to adjust and operate said alleged defective machines, as provided for by the terms of the warranty authorized by plaintiff.

"4th. That upon such trial by the plaintiff's agent the said machines, or either of them, failed to work as represented and warranted, and as set forth in said written warranty.

"5th. That thereafter the defendant returned, or offered to the plaintiff to return, such machines, and plaintiff refused to accept the same.

"If defendant has failed to establish any one of the above propositions by a preponderance of the evidence, he cannot recover for said machines or either of them. If, on the other hand, defendant has established each of said propositions as to either or both of said machines, you should allow him in your verdict for the amount paid, including freight for such machine or machines.

"Eighth—Upon the second claim of defendant for a rebate or credit because of the reduction of the price of machines for the season of 1887 by the plaintiff you are instructed that the burden of proof is upon the defendant to establish his claim by a preponderance of the evidence. The contract, offered in evidence, between plaintiff and the defendant provides if the defendant, after making faithful effort to sell the machines included in the contract during the season of 1886, the plaintiff would carry said machines left unsold over, and extend time of payment until the following year. The contract further provides if any change is made by us for the season of 1887, advancing or reducing the list price of any of the differerent kinds of Champion machines enumerated in our current price list (No. 23) herein referred to, the aggregate difference in the list price of the machines for which payment may be extended in accordance with the provisions of this agreement, less the discount herein named, shall be credited or charged to the party of the second part, and settled in connection

with the business of the succeeded year on the basis of cash September 1, 1887. The evidence shows that the eight machines upon which defendant asks a rebate were included in the list prices (No. 23), and the evidence also shows that no list price was ever issued afterwards upon these machines, and that plaintiff ceased to manufacture said machines after 1886. The evidence further shows that for the year 1887 the plaintiff did manufacture another machine with iron frame instead of wood, otherwise different from the machine of 1886.

"You are instructed if you find from the evidence that the machine, manufactured by the plaintiff for the season of 1887 were in fact the same machines with slight improvements only upon the machines of 1886, and intended for the same trade as were the machines manufactured for the year 1886, and were in fact listed at a lower price, then defendant would be entitled to credit for the difference in the list prices. On the other hand, if you find from the evidence that the plaintiff abandoned the manufacture of the kind of machines sold to the defendant after the season of 1887 and entered upon the manufacture of a new and different machine from the machine manufactured for 1886, then defendant would not be entitled to any credit, even though the new machine may have been listed at a lower price than the old one."

A number of instructions were asked and refused upon which no point seems to be made and they need not be noticed here. The instructions seem to state the law correctly as applied to the facts of this case, and there is no material error in the record.

The judgment is therefore

AFFIRMED.

THE other judges concur.

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LOUIS BRADFORD, APPELLANT, V. EMILY C. PETERSON, APPELLEE.

[FILED JULY 2, 1890.]

Mechanics' Liens: WIFE'S PROPERTY: AGENCY OF HUSBAND. Where a husband erects a dwelling on land the title of which is in the name of his wife, and she is aware that such building is being erected and in some cases gives directions to the workmen, the agency of the husband will be presumed and the property will be subject to a mechanic's lien.

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

Congdon, Clarkson & Hunt, for appellant, cited: *Collins v. Megraw*, 47 Mo., 497; *Anderson v. Armstead*, 69 Ill., 453; *Jones v. Pothast*, 72 Ind., 158; *McCormick v. Lawton*, 3 Neb., 452.

Albert Swartzlander, contra, cited: *Doolittle v. Goodrich*, 13 Neb., 296; *Willard v. Magoon*, 30 Mich., 273; *Newcomb v. Andrews*, 41 Id., 518; *Laur v. Bandow*, 43 Wis., 563; *Flannery v. Rohrmayer*, 46 Conn., 558; *Wendt v. Martin*, 89 Ill., 139; *Price v. Seydel*, 46 Ia., 696; *Jones v. Walker*, 63 N. Y., 612; *Spinning v. Blackburn*, 13 O. St., 131; *Wright v. Hood*, 49 Wis., 235.

MAXWELL, J.

In May, 1887, Edward T. Peterson and Emily C. Nelson were engaged to be married. Peterson caused plans to be prepared for the construction of a dwelling house in which they would live when married, and submitted the same to Miss Nelson. When the plans were submitted, it had not been determined on what particular lot the house should be erected, but it was Peterson's intention to secure

a lot for the purpose, which, by virtue of its location or otherwise, after the erection of the house, he could easily dispose of. Peterson was a real estate dealer, and had in his hands for sale, as the agent for one Hobbie, lot 17, in block 16, in Hanscom Place, an addition to the city of Omaha. After consulting with Miss Nelson, he, for her, on June 2, 1887, purchased the lot in question, the consideration being the sum of $2,500. This deed was drawn by Peterson and executed by Hobbie. The grantee named in the deed was Miss Nelson. About $800 in cash was paid down. Of this amount, something like $300 was contributed by Miss Nelson, and the remainder of the cash payment, $500, by Peterson. Miss Nelson assumed the payment of a mortgage made by Hobbie to one Palmer, and gave to Hobbie notes secured by a second mortgage for the balance of the consideration. Four days after the purchase of the lot, and on June 6, 1887, Peterson contracted in his own name with Nielson & Baxter for the erection of a house upon the lot in accordance with the plans submitted to Miss Nelson. Immediately thereafter Nielson & Baxter undertook the erection of the house. Both Peterson and Miss Nelson visited the house while in course of construction. Prior to its completion, and on August 10, 1887, Peterson and Miss Nelson were married. After their marriage their visits to the house were repeated, and on one occasion Mrs. Peterson inquired of a workman concerning the construction of the pantries. In the early part of September, 1887, the house was completed, and Mr. and Mrs. Peterson moved into the same. Nielson & Baxter were not paid by Peterson; and learning that the title to the lot stood in the name of Mrs. Peterson, on the 5th day of October, 1887, they filed their lien, setting forth that they constructed the house under and by virtue of a contract made with Peterson as the agent of Mrs. Peterson, and with her knowledge and consent. Nielson & Baxter purchased the lumber that was used in the construction of

the house from Louis Bradford, and on the 8th day of November, 1887, as security for Bradford's claim against them, assigned the lien to him.

While the Petersons were living in the house, Mrs. Peterson and her husband joined in a deed of conveyance of the property to Peterson's father as security for money advanced by him for Mrs. Peterson by way of payment of one of the notes which was assumed or made by Mrs. Peterson, and for money advanced to Peterson. This deed was never recorded. Pending this action Mrs. Peterson died and left, surviving her, an infant daughter.

The court below held that in the construction of the house Peterson was not his wife's agent and that Bradford was not entitled to a lien upon the premises. Bradford appeals.

In a number of cases this court has held that where a husband constructs a house on the land of his wife, of which fact she has full knowledge, the agency of the husband will be presumed; in other words, the wife, by her silence where she should speak, in effect admits that the work is being done for her benefit. (*McCormick v. Lawton*, 3 Neb., 449; *Scales v. Paine*, 13 Id., 521; *Howell v. Hathaway*, 28 Id., 807.) The wife must be aware while a building is being erected upon her land that it is being erected for her benefit, and that mechanics and materialmen who contribute to the erection of the building are entitled to compensation for such labor and material, and honesty and fair dealing require that, as she knowingly receives the benefit, she shall take the burden with it. The property in question is subject to the mechanic's lien.

The judgment of the district court is reversed and a decree will be entered in this court for the plaintiff.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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HENRY HALL v. FIRST NATIONAL BANK OF FAIRFIELD.

[FILED JULY 2, 1890.]

1. **National Banks:** USURY. Where a national bank loans money at a usurious rate, which is included in the note, in an action to enforce that contract the interest is forfeited. Where illegal interest has been charged, but not paid, an action cannot be maintained to recover it back.
2. ——: ——: PAYMENTS APPLIED ON PRINCIPAL. Where payments are made, generally to a national bank, on a promissory note which includes unlawful interest, they will be applied on the principal.
3. **Trial:** PRACTICE. If there is no evidence in a case presenting questions of fact, it is not error for the trial court to take it from the jury.

ERROR to the district court for Clay county. Tried below before MORRIS, J.

J. L. Epperson, and *Robert Ryan*, for plaintiff in error, cited: *Schuyler Nat. Bank v. Bollong*, 24 Neb., 828; *Monongahela Nat. Bank v. Overholt*, 96 Pa. St., 327.

Geo. W. Bemis, and *E. E. Hairgrove, contra*, cited: *Brown v. Bank*, 72 Pa. St., 209; *F. & M. Bank v. Dearing*, 91 U. S., 29; *Barnett v. Bank*, 98 Id., 555; *Pence v. Uhl*, 11 Neb., 322.

NORVAL, J.

The plaintiff in error brought this action against the defendant in error to recover the penalty under section 5198 of the Revised Statutes of the United States, for knowingly receiving usurious interest. The answer denies all charges of usury. Upon the trial the court directed a verdict for the defendant.

A statement of the facts, as shown by the record, will be necessary to a correct understanding of the case. On June 1, 1886, the defendant bank commenced business, being the successor of the Fairfield Bank. The defendant purchased from the Fairfield Bank notes of the plaintiff aggregating $3,300. On the 17th day of June, 1886, the plaintiff, being indebted to the defendant on said notes, and having made a sale of cattle to one John Lansing, drew two drafts on him, one for $1,500 and the other for $23.50, which were deposited in the defendant's bank, to be applied, when paid, on his indebtedness. On July 3, 1886, these drafts were paid, and the whole amount was applied on plaintiff's notes. On August 3 the bank held, among others, the following notes against the plaintiff: one for $32.75, dated January 28, 1886, due in sixty days, with ten per cent after maturity; one for $1,000, dated January 28, 1886, due in ninety days, bearing ten per cent from maturity, with an indorsement June 7 for $480.25 and interest paid to June 15, and another for $1,167 dated January 28, 1886, due June 12, with interest from maturity at ten per cent.

The plaintiff testifies, on direct examination, that he paid on the notes, in addition to the drafts, $519.75, on July 3, and that on August 3 he gave to the defendant his note for $730.66, and took up his three notes. The amount due July 3, 1886, on the three notes, including interest from maturity at ten per cent, was as follows: On the $32.75 note, $33.46; on the $1,000 note (after deducting the credit of $480.25), the sum of $532.62, and on the note for $1,167, the sum of $1,173.62, making, in the aggregate, $1,739.70. The cash payment of $519.75, which plaintiff claims to have made, the amount of the two drafts, and a note of $730.66, make a total of $2,773.91, or $1,034.21 more than the total balance due upon the three notes taken up.

Counsel claim in the brief that this excess was usurious

interest. There is in the bill of exceptions absolutely no testimony tending to show that when the notes were given that the plaintiff contracted to pay usurious interest. Nor does the testimony disclose that the question of interest was ever mentioned by the parties. It does not appear that the plaintiff made any claim to the bank, before the bringing of this suit, that he had been charged more than the legal rate. It is, indeed, strange that the plaintiff should have paid over $1,000 as usurious interest, as he contends, without making complaint at the time. If this sum was paid as interest on these three notes, as the plaintiff claims, it makes the rate charged more than one hundred and fifty per cent per annum. But counsel have overlooked the plaintiff's testimony on cross-examination. After considerable of an effort the plaintiff was forced to admit that when he gave the defendant his note of $730.66 in settlement, the bank surrendered to him two other notes—one for $71, the other for $250. We are unable to compute the exact amount that was then due on these notes because their dates and the rate of interest they bore are not in the record. Their amount without interest, $321, which sum added to the amount of the three notes before referred to and surrendered at the same time, make $2,060.70, or $7.45 more than the aggregate amount of the drafts, and the alleged payment of $519.75. The defendant insists that there was also another note of $75 taken up at the same time.

It also appears from the testimony of the plaintiff on cross-examination that shortly after the settlement of August 3d the plaintiff went to the bank and informed Mr. Joslin, the cashier, that a mistake had been made in the amount of the note given in settlement and that Mr. Joslin also denied that the plaintiff had made the cash payment of $519.75. The testimony shows that this item was the real controversy between the parties and is the cause of this litigation. It cannot be doubted that if by

mistake a sum in excess of the legal rate is collected by a national bank, it does not taint the transaction with usury. It is only where such a bank knowingly charges unlawful interest that it is liable for the penalties provided for in the act of congress. We are unable to discover any testimony which would have authorized a finding that the defendant had knowingly taken or received interest in excess of the legal rate. If this disputed item, $519.75, was paid as the plaintiff insists, then the note he gave the bank in settlement was for a sum greatly in excess of the amount due. If there is any usury in the transaction between the parties it is in this note which the defendant yet holds. The plaintiff, however, insists that if the notes were not wholly paid by the drafts and cash payments, that these payments should have been applied to extinguish usurious interest, and that double the amount thereof would be recoverable. The case of *Davis v. Neligh*, 7 Neb., 78, is cited to sustain this position. That case holds that in the computation of interest where partial payments are made, the payment is applied first to discharge the interest, and the surplus, if any, goes to reduce the principal. A different rule, however, obtains where a payment is made on a usurious loan. The law is not so inconsistent as to apply a payment on such a loan to the discharge of usurious interest and at the same time exact as a penalty the forfeiture of double the amount. This indeed would be a reproach upon the law.

If it be conceded that the note given to the bank by the plaintiff at the time of settlement includes unlawful interest, can it be recovered, the entire note being unpaid? Section 5198 of the Revised Statutes of the United States provides "That the taking, receiving, or reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest, which the note, bill, or other evidence of debt carries with it, or which has been

agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representative, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

It is apparent that this section covers two classes of cases. The last clause provides that when illegal interest has been paid to a national bank, double the amount so paid may be recovered back, while, under the first clause of the section, if usurious interest has been knowingly charged but not paid, a recovery can only be had for the amount borrowed; in other words, where illegal interest has been added into the note but not paid, it cannot be recovered in an action brought for that purpose. (*Brown v. Second National Bank*, 72 Pa. St., 209.)

We have considered the case solely upon the plaintiffs own testimony, without taking into consideration the testimony of defense, which very much tended to explain the transaction of the parties. As there was no evidence in the case upon which the jury could have found for the plaintiff, it was not error for the trial court to take it from the jury.

The first and second assignments in the petition in error relate to the exclusion of certain testimony, but as these errors are not referred to in the brief filed, they must be considered waived.

The judgment of the district court is

AFFIRMED.

THE other judges concur.

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FIRST NATIONAL BANK OF MADISON v. H. H. CARSON.

[FILED JULY 2, 1890.]

1. **Burden of Proof:** ACTION ON PROMISSORY NOTE. In an action on a promissory note, where the answer is a general denial, the burden of proof is upon the plaintiff to show that the defendant executed the note. This burden does not shift to the defendant after the note is introduced in evidence, but remains with the plaintiff through the entire trial.

2. **New Trial:** IRRELEVANT TESTIMONY. The admission of irrelevant testimony on a jury trial, to the prejudice of the adverse party, is good ground for a new trial.

3. **Evidence:** SPECIFIC OBJECTIONS. Objection to testimony on the ground that it is "incompetent, irrelevant, and immaterial," is specific enough to apprise the trial court of the real grounds of objection to the testimony.

4. **Appeal:** COUNTY TO DISTRICT COURT: NEW ISSUES RAISED: WAIVER. Where a cause is appealed from the county court, the case should be tried in the district court upon the same issues that were presented to the lower court. If the appellee goes to trial in the appellate court without objection, upon new issues, it is a waiver of the error.

5. ———: ———: ———. An action was brought in the county court upon a promissory note for less than $200. No affidavit was filed in said court denying that the note was made, given, or subscribed by the defendant, as required by section 1100*a* of the Code. On appeal to the district court, the answer of the defendant was a general denial, and a specific plea of forgery. *Held*, That the answer tendered a different issue in the appellate court from that presented in the court of original jurisdiction.

6. **Instructions.** The fourth instruction given at the request of the defendant, *held*, to be based upon the testimony, and rightly given.

7. ———. *Held*, Error to refuse an instruction warranted by the testimony and which contains a correct statement of the law of the case, if the principles of which have not been covered by the charge of the court.

ERROR to the district court for Madison county. Tried below before POWERS, J.

S. O. Campbell, and *John B. Barnes*, for plaintiff in error:

The execution of the note was not an issue before the county judge, and, therefore, could not be made one in the district court. (*O'Leary v. Iskey*, 12 Neb., 137; *Baier v. Humpall*, 16 Id., 128; *Fuller v. Schroeder*, 20 Id., 636; *Ruddick v. Vail*, 7 Ia., 44.) As to the fourth instruction asked by defendant: *Newton Wagon Co. v. Deirs*, 10 Neb., 292; *Turner v. O'Brien*, 11 Id., 108; *U. P. R. Co. v. Ogilvy*, 18 Id., 639. As to the testimony of Wohlford: *Dunbier v. Day*, 12 Neb., 600; *Cropsey v. Averill*, 8 Id., 158; *High v. Bank*, 6 Id., 157.

Allen, Robinson & Reed, contra:

An objection to evidence as "immaterial, irrelevant, and incompetent," is not specific enough to warrant an appellate court in reviewing a ruling adverse thereto. (*Byard v. Harkrider*, 9 N. E. Rep., 294; *McKinsey v. McKee*, Id., 772; *R. Co. v. Falvey*, 3 Id., 392; *Davis v. R. Co.*, 2 S. E. Rep., 555.) The burden was on plaintiff to establish the genuineness of the note (*Donovan v. Fowler*, 17 Neb., 247); and so continued throughout the case (2 Am. & Eng. Encyc. of Law, 650, and note).

NORVAL, J.

This action was commenced in the county court of Madison county, upon a promissory note, of which the following is a copy:

"$150. MADISON, NEB., Nov. 12, 1887.

"On the first day of June, 1888, I promise to pay Thos. E. Hall, or order, one hundred and fifty dollars, for

value received, negotiable and payable without defalcation or discount, with 8 per cent interest from date.

"(Signed) H. H. CARSON."

Indorsed on the back: "Thos. E. Hall, E. B. Place."

While both plaintiff and defendant appeared before the county court at the trial, the defendant offered no testimony. A judgment was entered against the defendant for $159.80 debt, and costs taxed at $3.55. The defendant thereupon removed the cause to the district court by appeal, where the plaintiff filed a petition founded upon the note in question. The defendant answered denying the allegations of the petition, and further answering alleged "that the instrument sued on in this case is a forgery, and not the genuine promissory note or obligation of the defendant." The plaintiff presented a motion to strike from the answer the specific plea of forgery, which motion was overruled by the court. A reply was filed and a trial had to a jury, which resulted in a verdict for the defendant.

The first error is assigned upon the ruling of the court upon the plaintiff's motion to strike from the answer the allegation of forgery. It is claimed that this motion should have been sustained, because that part of the answer presented a new and different issue from that on which the case was tried in the county court. The defendant made no defense in that court, nor did he file an affidavit denying the genuineness of the note.

Sec. 1100*a* of the Code provides: "That in all actions before justices of the peace, in which the defendant has been served with summons in this state, it shall not be necessary to prove the execution of any bond, promissory note, bill of exchange, or other written instrument, or any indorsement thereon, upon which the action is brought, or set-off or counter-claim is based, unless the party sought to be charged as the maker, acceptor, or indorser of such bond, promissory note, or bill of exchange, or other written instrument, shall make and file with the justice of the

peace before whom the suit is pending an affidavit that such instrument was not made, given, subscribed, accepted, or indorsed by him."

The provisions of this section apply to causes brought in a county court, upon any instrument referred to in the section, and which are cognizable before a justice of the peace. It is obvious that the genuineness of the note was not in issue before the county court. In order to have put in issue before that court the execution of the note, it was necessary for the defendant to have filed an affidavit, stating therein that it was not subscribed by him. The answer filed in the district court, therefore, raised an issue of fact that was not presented in the court from which the appeal was taken. When an appeal is taken to the district court from a county court the case should be tried upon the same issues that were presented in the lower court. The motion to strike from the answer the allegations of forgery was well taken, and should have been sustained. (*O'Leary v. Iskey*, 12 Neb., 137; *Fuller et al. v. Schroeder*, 20 Id., 636.) Had the motion been sustained it would have been no advantage to the plaintiff, for the obvious reason that under the general denial contained in the answer, the execution of the note was put in issue. The plaintiff made no objection to the general denial, but went to trial on the issue thus tendered. It thereby waived the error committed in trying the cause upon a different issue from that on which the case was heard in the county court.

Upon the trial the defendant testified that he did not sign the note, but that the same was a forgery. The plaintiff's testimony tended to show that the defendant's genuine signature was appended to the instrument. At the close of the testimony the court on its own motion instructed the jury as follows:

"1. The plaintiff's action is based upon a certain promissory note, with the name of the defendant signed to the same as maker, of the date November 12th, 18[illegible], for the

sum of $150 and interest; payable to the order of one Thomas E. Hall, and indorsed to the plaintiff.

"2. Defendant denies the execution of said note.

"3. And under the issues as joined it is incumbent upon the plaintiff to prove by a preponderance of the evidence that the note in suit was executed by the defendant as alleged, that the plaintiff is the owner of same, and that said note is now due and unpaid.

"4. If you believe from the evidence that the note in controversy was not executed by the defendant—that is, that he never signed the same, or authorized his name to be placed thereto by any one, but that his signature was placed to said note without his knowledge or consent, then you should find for the defendant, although such note may have passed into the hands of a *bona fide* holder before maturity.

"5. The note sued upon is in the form of a negotiable instrument, and a holder of negotiable paper who takes it before maturity, for a valuable consideration, in the usual course of business, without knowledge of facts which impeach its validity as between antecedent parties, is deemed a *bona fide* holder.

"5½. In order to defeat a promissory note in the hands of a *bona fide* holder it is not enough to show that such note was without consideration, nor is it sufficient to show that such purchaser took it under circumstances calculated to excite suspicion. To defeat such note in the hands of a *bona fide* holder it must appear, by a preponderance of the evidence, that such purchaser was guilty of a want of honesty, or of bad faith, in acquiring it. A party purchasing a promissory note is under no obligation to call upon the maker and make inquiry as to possible defenses which he may have, but of which the purchaser had no notice, either from something appearing on the face of the paper or from facts communicated to him at the time, nor to make inquiry as to the identity of the indorser, in order to recover from the maker of such note.

"6. If you believe from the evidence that the defendant executed and delivered the note in question as alleged, and you further find from the evidence that the plaintiff purchased the same before maturity in the usual course of business, and for a valuable consideration, without knowledge of any facts which might impeach its validity, as between the said Carson and the person to whom the note was given, then the plaintiff is entitled to recover, although you may believe from the evidence that said Carson never received any consideration for said note.

"7. If you find from the evidence that defendant executed and delivered the note in suit, and that the plaintiff purchased the same before maturity for a valuable consideration, and without a knowledge of facts which might impeach its validity, as between Carson and the person to whom the note was given, the plaintiff is entitled to recover in this suit, although you may believe from the evidence that the defendant was swindled in the transaction, and received no consideration for said note. And the plaintiff, if it purchased the note as aforesaid, was not required in law to call upon and inquire of the defendant if he had a defense to said note, but might rely upon the genuineness of the maker's signature to the note as a right to recover thereon.

"8. If you find that he did so execute said note as aforesaid, he must suffer the loss, if any, he has sustained thereby, because it is a maxim of the law, that where one of two persons must be made to suffer from the fraud or misconduct of another, the one who placed within the power of such person to perpetrate the fraud or to do the wrong must bear such loss.

"9. The credibility of witnesses that have been examined in your hearing is for you to determine, and where witnesses have testified directly the opposite to each other, it is your duty to say, from the appearance of such witness while so testifying, their manner of testifying, their appar-

ent candor and fairness, their apparent intelligence, or want of candor, intelligence, and fairness, their interest or want of interest in the result of the litigation, and from these and all the other surrounding circumstances appearing on the trial, which of such witnesses are the more worthy of credit, and to give credit accordingly.

"10. If you find for the defendant, you will so state in your verdict.

"11. If you find for the plaintiff, the measure of its damage will be the amount of said note and interest, as shown thereon.

"12. When you have retired to your jury room, you will select one of your number foreman, who will, when you have agreed upon a verdict, sign the same, and you will then return into court with such verdict."

No complaint is made to the giving of any of these instructions. Objection is made to the fourth instruction given at the request of the defendant, which is as follows:

"As applied to this case, forgery would consist in the false making of the instrument sued on, with intent to damage and defraud any person or persons, body politic or corporate, and if you find from the evidence that the instrument sued on was not executed by the defendant, or by any other authorized person in his name, but was executed in the name of the defendant by Thomas E. Hall, or any other person having no authority to so execute it, with intent to negotiate it and defraud thereby some other person, it would be forgery, and the plaintiff cannot recover."

The criticism made to this instruction is, that no testimony was given on the trial which tended to show that Thomas E. Hall signed the defendant's name to the note. The testimony discloses that the defendant and Hall, at about the date of the note, entered into a contract whereby Hall undertook to furnish the defendant a patent stove burner to sell on commission. Soon after the note turns up in E. P. Place's hands, containing Hall's indorsement.

If, as the defendant testified, he did not execute the instrument, it must have been forged. We find sufficient evidence in the bill of exceptions to warrant the jury in finding that the note "was executed in the name of the defendant by Thomas E. Hall, or some other person having no authority to do so."

The plaintiff asked the court to instruct the jury that "If you find from the evidence that the defendant signed the note sued upon in this action, and that the plaintiff purchased it, you will find for the plaintiff." The refusal to give this request is assigned as error. The only issue made by the pleadings was, Did the defendant sign the note and did the plaintiff purchase it? If the jury found both in favor of the plaintiff, as they could have done under the evidence, then the plaintiff was entitled to a verdict. That this request stated the law correctly cannot be questioned. The defendant insists that the doctrine of the request is contained in the general charge of the court, and for that reason no error was sustained. The sixth and seventh paragraphs of the court's charge were not so favorable to the plaintiff. In those instructions the jury were told, that before they could find for the plaintiff they must find not only that the note was genuine, but that the plaintiff purchased it, "without knowledge of facts that might impeach its validity as between Carson and the person to whom the note was given." The want of consideration, or whether the bank was an innocent purchaser, were not in issue in the case. The sixth and seventh paragraphs of the instructions were therefore too favorable to the defendant and should not have been given and the plaintiff's prayer should have been granted.

The plaintiff in error also makes the point, that the court erred in refusing to give its third request, as follows:

"3. After the note was admitted in evidence, the burden of proof was upon the defendant to establish forgery, and it must be established by a preponderance of the evidence."

This instruction was properly refused. The burden was upon the plaintiff to establish the genuineness of the note by the preponderance of the evidence. This burden did not shift to the defendant after the note was introduced in evidence, but remained with the plaintiff through the entire trial. (*Donovan v. Fowler*, 17 Neb., 247; *Holmes v. Riley*, 14 Kan., 131.)

The plaintiff called as a witness A. W. Whulford, the president of the plaintiff bank, who testified on direct examination, that he purchased the note for the plaintiff from a Mr. Place, and that he was acquainted with the defendant's handwriting, had seen him frequently write his name, and that the signature to the note was that of the defendant Carson. On cross-examination the witness Whulford testified in answer to questions as follows:

Q. Did you take the precaution to see Mr. Carson and inquire of him before buying the note?

A. I did not before buying the note.

Q. Had Mr. Place been introduced to you by any reputable business man?

A. No, sir.

Q. Did you make any inquiry outside of Place himself as to who he was and what he was doing?

A. I cannot say.

Q. What is your best recollection about it?

A. I don't think that I made any inquiry about it. I compared the signature on the note with signatures on other notes.

The plaintiff objected to each question, as incompetent, irrelevant, and immaterial, and took an exception to the ruling of the court.

This testimony did not in any manner tend to throw any light upon the issue the jury were called upon to try. Whether or no the bank was an innocent holder of the note was immaterial. The evidence bearing upon the genuineness of the note was very conflicting, and the testimony

objected to had a tendency to prejudice the jury against the plaintiff. Doubtless the jury were led by this testimony to believe that the bank was negligent in purchasing the paper, without making inquiry of the defendant if he had a defense to the note.

It is claimed on behalf of the defendant, that the objection to the testimony on the ground that it is "incompetent, irrelevant, and immaterial," is not specific enough to present any question for review. A number of decisions are cited from the supreme court of Indiana sustaining this position. While we entertain a high opinion for the decisions of that court, we cannot follow them on this question of practice. The objection was specific enough to apprise the trial court of the plaintiff's real ground of complaint.

As there must be a new trial we will not express an opinion on the sufficiency of the evidence to sustain the verdict.

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

REVERSED AND REMANDED.

THE other judges concur.

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DORSEY B. HOUCK v. JOSEPH H. GUE.

SAME v. DANIEL C. HURLEY.

[FILED JULY 2, 1890.]

1. **Trial**: DIRECTING VERDICT. If a trial court directs a verdict for either party, in a case where the testimony is conflicting upon a material fact, it is error.

2. ——: RIGHT OF ARGUMENT. In a case tried to a jury, where a material fact is in dispute, either party has an absolute right to have his counsel argue the question of fact to the jury.

3. The instructions requested by the defendant were properly refused.

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

John L. Webster, for plaintiff in error, cited, as to directing the verdict: *Hilliard v. Goold*, 34 N. H., 230; *Inloes v. Bank*, 11 Md., 173; *Way v. R. Co.*, 35 Ia., 587; *Ellis v. Ins. Co.*, 4 O. St., 628; *Johnson v. R. Co.*, 18 Neb., 696; *Aultman v. Stout*, 15 Id., 586; *A. & N. R. Co. v. Baily*, 11 Id., 332; *Deitrich v. Hutchinson*, 20 Id., 52. As to the right of argument: Code, sec. 283; *Douglas v. Hill*, 29 Kan., 527.

Estabrook, Irvine & Clapp, contra.

NORVAL, J.

These causes being alike in the facts, by consent were tried together. The defendant in error Gue sued the plaintiff in error Houck and one Alexander Benham in the district court to recover the sum of $274 and interest, claimed to be due him for keeping and boarding eight head of horses. The cause was tried to a jury, with a verdict and judgment in favor of Gue and against both Houck and Benham. In the second case Hurley sued Houck and Benham to recover $240 and interest for care and board of seven horses. The verdict and judgment in the case were against both defendants. In each case Houck prosecutes a petition in error.

In May, 1887, the plaintiff in error, Dorsey B. Houck, was a constable of the city of Omaha, and in his official capacity executed a writ of replevin placed in his hands, commanding him to take and deliver to one J. H. McShane a certain building then occupied by Alexander Benham as a livery stable. In executing the writ the con-

stable removed from the building several horses owned by Benham, and tied them in the street near the stable, where they remained several hours without water or food. Benham having refused to take possession of the horses, Houck took eight of them to the stables of Gue and seven to the stables of Hurley. Gue and Hurley both testify that they were not aware when they received the horses that they belonged to Benham, or that they had been abandoned by the owner. Shortly afterwards they learned that the horses belonged to Benham, who called frequently to see them, but did not offer to take them away. There is no dispute as to the value of the care and feed bestowed by the plaintiffs.

The plaintiffs called as a witness the defendant Dorsey B. Houck, who testified that when he took the horses to the plaintiffs, he informed them that he had replevied Benham's barn, and that the horses belonged to him; that they had been taken out of the barn and tied in the street. The witness further testified that he told the plaintiffs that he had no interest in the horses, but desired to put them in some place, to get them out of the street.

The defendants introduced no testimony. Houck's attorney attempted to argue the case to the jury, when he was stopped by the court, and instructed the jury to find for the plaintiffs.

The most of the brief of counsel on either side is devoted to the discussion of the liability of a constable for feed and care bestowed by a third party at his request, upon property received by him in his official capacity. We do not think that question is presented by the record before us. Houck had no writ for these horses and he did not have charge of them as an officer. He had a writ of replevin for the barn, but that did not authorize the officer, in executing the process, to engage food and care for the stock he removed from the building. Whether Houck was personally liable for the attention bestowed by the

plaintiffs was a question of fact to be determined by the jury from all the evidence.

If it be true, as the plaintiffs testify, that Houck did not disclose who was the owner of the stock when it was committed to their care, and that the plaintiffs did not know whose property it was, then doubtless Houck would be liable in his action. But, on the other hand, if Houck at the time informed the plaintiffs the circumstances under which he received the horses and that he had no interest in them, but that they belonged to Benham, and to let him have them when called for, then there was testimony from which the jury could have found that Houck was not liable. The evidence is conflicting, and certainly does not conclusively show that there was an implied contract that the feed bill should be charged to Houck. As there was testimony before the jury tending to establish the nonliability of the defendant, he was entitled to have it submitted to and weighed by the jury. The court, therefore, erred in directing the jury to find for the plaintiffs. (*Hall v. Varnier*, 6 Neb., 85; *Grant v. Cropsey*, 8 Id., 205.)

The learned district judge who presided at the trial doubtless overlooked the testimony of Dorsey B. Houck, or the jury would not have been instructed to find for the plaintiffs.

The defendant Houck requested the following instructions, which were refused:

"1. The defendant, Dorsey B. Houck, cannot be held liable in these cases unless the jury find from the evidence that there was a present understanding between the plaintiffs and defendant Houck, at the time the plaintiffs received the horses, that Houck should be held liable for the keeping of the same.

"2. If the jury find from the evidence that the plaintiffs received the horses from defendant Houck in his official capacity as constable, then the plaintiffs are not entitled to recover in this action against Dorsey B. Houck, as he is sued as an individual and not as such officer."

The court did not err in refusing these requests. It is not claimed that there was an express agreement that Houck should pay for the keeping of the stock, but the contention of the plaintiffs is that the facts were such that the law would imply an obligation to pay. The first request was therefore misleading. The second request was objectionable on the same ground. Houck in taking the stock to the plaintiffs was performing no official act. It would have been error to have granted either of the defendant's requests.

The court refused to permit the counsel for the defendant to argue the facts to the jury. This ruling, we presume, was made upon the theory that there was no evidence upon which a verdict for Houck could have been sustained. Had such been the case, the refusal to allow any argument would have been proper. But as the testimony was conflicting upon a material matter in issue, the defendant had an absolute right to have his counsel argue the facts to the jury. (*Douglass v. Hill*, 29 Kan., 527, and cases there cited.)

The judgment of the district court will be reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

THE other judges concur.

A. E. ALEXANDER v. CITY OF PLATTSMOUTH.

[FILED JULY 2, 1890.]

Tax-Liens: EMINENT DOMAIN: DAMAGES: LIMITATIONS. In September, 1871, M. purchased certain lots situated in the city of Plattsmouth, at treasurer's tax sale. On September 5, 1873, he surrendered to the county treasurer the certificates of purchase

and received a tax deed for the lots. The deed failed to convey the title by reason of the treasurer omitting to attach his official seal. M. subsequently conveyed the lots to the plaintiff. In 1872, the authorities of the city of Plattsmouth located and opened a street diagonally across the lots, leaving undisturbed a portion of each. The damages sustained on account of the location and opening of the street was appraised and paid to the respective lot owners in 1872. Neither M. nor the plaintiff was notified of the appraisement proceedings. In 1888 this action was brought to recover damages for lessening of plaintiff's security. *Held*, (1) That as the value of the parts of the lots not taken by the city exceeded the amount of the tax lien, the action could not be maintained; (2) That the suit is barred by the statute of limitations.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

S. P. & E. G. Vanatta, for plaintiff in error, cited: Jones, Mortgages, sec. 710; *Otoe County v. Mathews*, 18 Neb., 466; *Forgy v. Merryman*, 14 Id., 513.

Byron Clark, contra, cited: Mills, Eminent Domain, secs. 65, 74; Desty, Taxation, pp. 1, 2, 6, 7; *Severin v. Cole*, 38 Ia., 463; Jones, Mortgages [2d Ed.], secs. 708, 1625-31; *Graham v. Flynn*, 21 Neb., 232, and cases; *Merriam v. Coffee*, 16 Id., 451.

NORVAL, J.

On the 4th day of September, 1871, S. N. Merriam purchased at tax sale certain lots situated in the city of Plattsmouth, for the taxes of 1870. Subsequently he paid the taxes on the lots for the years 1871, 1872, 1873, and 1874. The lots not having been redeemed on September 5, 1873, Merriam surrendered to the county treasurer the certificates of purchase, and the treasurer executed and delivered a tax deed for the lots to Merriam, who afterwards conveyed to the plaintiff.

The deed issued by the treasurer failed to convey the

title to the lots, by reason of the treasurer failing to attach his official seal thereto.

On the 21st day of February, 1872, the mayor and city council of the city of Plattsmouth passed an ordinance creating Chicago and Washington avenues, and the city condemned and appropriated a part of each lot purchased at the tax sale by Merriam, for the purpose of opening these avenues. The damages sustained by reason of the location and opening of these avenues were appraised, as required by law, on March 28, 1872, and notice was given to the lot owners, but not to Merriam or the plaintiff. The damages awarded were paid to the respective lot owners. The avenues were located diagonally across the lots, and a large portion of each lot was left undisturbed. The fractional lots left are of sufficient value to satisfy the plaintiff's claim. The city authorities, in 1872, took possession of that part of the lots taken for street purposes, and the same has ever since been used by the public.

On February 14, 1888, this action at law was commenced to recover damages the plaintiff claims to have sustained by reason of the defendant appropriating a portion of each of said lots for public streets. The cause was tried to the court, who entered judgment for the defendant.

It will be observed that this is not an action to foreclose a tax lien, but one to recover damages for lessening plaintiff's security. Unless the plaintiff has been injured by reason of the opening of these streets for public use, it would seem clear that the plaintiff has no just cause for complaint. The undisputed testimony is, that the value of the portion of each lot not condemned by the city, is much greater than the amount of the tax lien claimed by the plaintiff. That being true, the plaintiff has not been damaged. No suit has been brought by the plaintiff to enforce his lien against that part of the lots not condemned. The defendant in any event would only be liable for any deficiency remaining after the plaintiff had exhausted the other secu-

rity. Had the lot owners sold to an individual that portion of the lots appropriated by the city, the plaintiff would have been compelled to exhaust the part unsold before he could enforce the lien against the portion sold. That the defendant acquired the property under the law of eminent domain does not change the rule. (*Severin v. Cole*, 38 Ia., 463.)

Again, this action is barred by statute of limitations. If the plaintiff's security has been diminished, by the appropriation of a part of the lots for public use, the injury occurred in 1872, or more than fifteen years before this suit was instituted. If a cause of action ever existed, it accrued at the time the streets were located and opened.

The judgment of the district court was right and is

AFFIRMED.

THE other judges concur.

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SAMUEL WALKER V. PATRICK HAGGERTY.

[FILED JULY 2, 1890.]

1. **Promissory Note:** CONSIDERATION: PAROL EVIDENCE REGARDING. While parol testimony may not be received to contradict or vary the terms of a promissory note, yet the consideration for which it was given may be established by parol testimony.
2. **Instructions:** OBJECTIONS to the giving of instructions will not be considered by the supreme court unless assigned in the motion for a new trial.
3. ———. It is error to give an instruction not warranted by the pleadings and evidence.
4. ———: FALSE TESTIMONY. The jury was instructed "that if any witness has willfully testified falsely as to any material fact in the case, you are at liberty to disregard the entire testimony

of such witness unless his testimony be corroborated by other evidence." *Held*, Correct as an abstract proposition of law, and that it was justified by the evidence.

ERROR to the district court for Cuming county. Tried below before NORRIS, J.

Thos. O'Day, and *Lancaster, Hall & Pike*, for plaintiff in error, cited, as to the admission of testimony regarding the consideration: *Ervin v. Saunders*, 1 Cow. [N. Y.], 249 [13 Am. Dec., 520]; *Thompson v. Ketcham*, 8 Johns. [N. Y.], 190 [5 Am. Dec., 330]; *Stackpole v. Arnold*, 11 Mass., 27 [6 Am. Dec., 150]; *Harrison v. Morrison*, 40 N. W. Rep. [Minn.], 66; *Curtice v. Hokanson*, 38 N. W. Rep. [Minn.], 694; *Miller v. Edgerton*, 15 Pac. Rep. [Kan.], 894; *Parker v. Morrill*, 3 S. E. Rep. [N. C.], 511; *Dolsen v. DeGanahl*, 8 S. W. Rep. [Tex.], 321; *Armstrong v. Scott*, 36 Fed. Rep., 63; *Gallery v. Bank* 2 N. W. Rep. [Mich.], 193; 2 Parsons, Notes and Bills, p. 501; *Gridley v. Dole*, 4 Comst. [N. Y.], 486; *Hunt v. Adams*, 7 Mass., 518; *Pitt v. Ins. Co.*, 100 Mass., 500; *Jones v. Jeffries*, 17 Mo., 577; *Hoare v. Graham*, 3 Camp. [Eng.], 57; *Anspach v. Bast*, 52 Pa. St., 356; *Harris v. Galbraith*, 43 Ill., 309; Benjamin, Sales, [4th Ed.], sec. 452; *Campbell v. Flemming*, 1 Ad. & E. [Eng.], 40; Parsons, Contracts, [7th Ed.] p. 208; *Shields v. Petlee*, 2 Sandf. [N. Y]., 262; 3 Randolph, Com. Paper, sec. 1899; *St. Louis Ins. Co. v. Homer*, 9 Metc. [Mass.], 39; *Eaves v. Henderson*, 17 Wend. [N. Y.], 190; *Clark v. Hatt*, 49 Ala., 86; *Featherston v. Wilson*, 4 Ark., 154; 2 Phil., Evid., 673, n. 495.

Hall & McCulloch, contra.

NORVAL, J.

This suit is upon a promissory note for $5,800 with ten per cent interest, bearing date May 15, 1883, given by the defendant to A. N. Schuster & Co., and by them indorsed

after maturity to the plaintiff. The defendant has made the following payments upon the note:

June 23, 1883, $500; July 12, 1883, $800; September 1, 1883, $500; October 16, 1883, $500; May 31, 1884, $400; June 21, 1884, $25; making a total of $2,725.

The answer admits the execution of the note, the making of the above payments, and pleads that the note was given to close up an unsettled account between the defendant and A. N. Schuster & Co.; that at the time the note was given, the payees promised to forward to the defendant goods to the full amount of the difference in the account, amounting to the sum of $3,075, which the payees have wholly failed and refused to do, and that said note was given for no other or greater consideration than the sum of $2,725, which sum has been fully paid to the said A. N. Schuster & Co. The answer alleges that the plaintiff received the note after maturity. The reply was a general denial.

A jury was impaneled to try the cause, who, after hearing the evidence, the argument of counsel, and instructions of the court, returned a verdict for the defendant, whereupon the plaintiff presented a motion for a new trial, which was overruled, and a judgment was rendered for the defendant. The plaintiff brings the case here for review, assigning the following errors:

1. The court erred in allowing any evidence on the part of the defendant to be introduced at the trial of this cause, because the answer fails to state facts sufficient to constitute a defense.

2. The court erred in allowing the defendant over the objection of the plaintiff, to introduce parol evidence to contradict or change the terms of the note.

3. The court erred in giving paragraph sixth of the instructions given by the court on its own motion.

4. The court erred in giving paragraphs 3, 4, 5, and 6 of the instructions asked by the defendant.

5. The verdict is not sustained by sufficient evidence.

6. The court erred in overruling the motion of plaintiff for a new trial.

Prior to the examination of the witnesses for the defense, the plaintiff objected to the introduction of any testimony on the part of the defendant for the alleged reason that the answer fails to state a defense. While the answer does not contain a full statement of the facts, yet sufficient facts are pleaded to constitute a defense against the note. The answer charges that the only consideration the defendant ever received for the note was the sum of $2,725, and which amount it alleges has since been fully paid. For the balance of the amount expressed on the face of the note, to-wit, $3,075, it is averred that A. N. Schuster & Co. agreed to send to the defendant goods for that amount and that they had failed and neglected to do so. If the allegations of the answer are true, it is clear that there is not due the plaintiff the amount claimed in his petition.

The testimony of the defendant tends to show that he was engaged in the mercantile business and had from time to time purchased on credit from the payees of the note goods to the amount of several thousand dollars. This note was given in settlement of the account. The defendant further testifies that when the note was executed, he claimed a credit on the account for $2,900 or $3,000 for goods that had been sent contrary to orders and that were unsalable, and that the agent of A. N. Schuster & Co. at the time agreed to credit the note for the amount claimed. The plaintiff objected to the receiving of this testimony on the ground that it contradicted the terms of the note. The testimony was not offered for that purpose, nor did it have that effect. The object of this testimony was to show the real consideration for the note sued upon. If the defendant was entitled to a credit upon the account for the amount claimed by him, then he was not indebted to the plaintiff in the sum of $5,800, and the note did not truly express the

amount of the defendant's indebtedness to the payees. While parol testimony cannot be received to contradict the terms of the note, it was clearly admissible to show the true consideration for which it was given.

Charles M. Edwards testifies that he was the person who took the note from the defendant; that at that time there was a balance of $5,879.75 due from defendant to A. N. Schuster & Co. on an account for goods sold and delivered; that the defendant made no claim at the time the note was given for any damages, or that the goods had not been received, but on the contrary admitted the goods had been received in good condition; that the only thing that he mentioned was that some frock suits sent to the Rose Bud Agency could not be sold to the Indians. The witness further states that he and the defendant checked the account over with the defendant's books, and found that there was due from him the sum of $5,879.57; that the defendant paid in cash $69.30, and that the witness made him a credit of $10.27 in full for all claims made by him, and, to close up the balance of the account, the defendant gave the note in suit.

The bill of exceptions contains other testimony which tends to corroborate the witness Edwards.

As we view the case, it will not be necessary for us to determine which side has the preponderance of the evidence, for it is apparent that the testimony produced on behalf of the defendant fails to support the verdict returned by the jury. If, as the defendant claims, he was entitled to a credit for $3,000, then at the date of the giving of the note he was indebted to A. N. Schuster & Co. in the sum of $2,800. At various times during the thirteen months following the execution of the note the defendant paid thereon sums aggregating $2,725. Thus, according to the defendant's own testimony, there was due the plaintiff at least $75 and interest. Yet the jury found for the defendant.

True, something is said in brief of counsel for the de-

fendant about too much interest being charged on the account and included in the note. The statement of the account in evidence shows $491.25 was allowed as interest. No complaint is made in the answer in regard to the item of interest, nor does the defendant in his testimony claim that the proper amount of interest was not charged. The larger part of the account had been due nearly a year before the giving of the note and the payees were entitled to receive interest thereon.

The third assignment in the petition in error is based upon the sixth paragraph of the instruction given by the court on its own motion, which reads:

"You are instructed that if at the time the note in suit was given Charles M. Edwards, the agent of A. N. Schuster & Co., the payees of said note agreed with defendant that said A. N. Schuster & Co. would make to defendant the allowance as claimed by defendant, on account of unsalable goods, and goods not ordered by defendant, charged against defendant by said A. N. Schuster & Co. in the account for which said note was given and thereby obtained said note from defendant, such agreement is valid and binding against said A. N. Schuster & Co., and defendant is entitled to set-off any amount the evidence may show to be due from A. N. Schuster & Co. to defendant on account thereof against the amount due upon the note sued on in this action."

While the defendant took an exception to this instruction when given, yet having made no complaint in his motion for a new trial of the giving of the instruction, we cannot now consider it here. Errors in giving or refusing of instructions must be pointed out in the motion for a new trial. (*Schreckengast v. Ealy*, 16 Neb., 514; *Nyce v. Shaffer*, 20 Id., 509; *Sherwin v. O'Connor*, 24 Id., 605.)

The court, at the request of defendant, told the jury:

"That a principal cannot accept such parts of an agent's contract as are beneficial to him and disclaim such as are

to his disadvantage, but must accept or reject all. And if he retains the benefits of the agent's bargain he must complete the contract on his part."

This request contains a fair statement of the law upon that subject and was based upon the testimony in the case. The rule undoubtedly is that a principal cannot accept a part of the acts of his agent and reject the balance. Edwards settled with the defendant and took his note and turned it over to the payees therein named, A. N. Schuster & Co., who accepted and retained it. The payees therefore were bound by the agreement of Edwards made when the note was taken.

By the fourth request given on behalf of the defendant the jury were instructed:

"That if A. N. Schuster & Co.'s agent procured the note on Patrick Hagerty for $5,800 upon an agreement to allow a credit for unsalable goods, and not ordered, or to send new goods of equal value, that they cannot retain the note and refuse to carry out the agreement upon which it was obtained."

There is not a scintilla of testimony in the record tending to show that the note was procured upon any agreement that the payees should send to the defendant new goods in the place of unsalable goods or goods not ordered. While that issue was presented by the answer, there was no proof to sustain it. The instruction was therefore misleading and assumed a fact not proven.

Exception is taken to the fifth instruction given on the defendant's motion, which informed the jury "that if any witness has willfully testified falsely as to any material fact in the case, you are at liberty to disregard the entire testimony of such witness unless his testimony be corroborated by other evidence." It is not claimed that this is not a correct statement of the maxim *falsus in uno, falsus in omnibus*, but it is urged that there was no evidence before the jury to which it could apply. It is conceded that

the maxim cannot be applied to immaterial testimony. The witness Edwards and the defendant Haggerty contradict each other in almost every particular, as to the conversation that occurred between them when the note was given. The plaintiff insists that this testimony was immaterial. As stated elsewhere in this opinion, the testimony relating to the agreement of the parties at the time of the execution of the note was material, and therefore the above instruction was applicable. It would have been error to have refused it for another reason. Plaintiff's witness Edwards testifies that the defendant made a claim for offsets in the sum of $10.27 for some unsalable frock coats and that he gave the defendant credit for that amount on the account. The plaintiff read the deposition of one Johnson, the bookkeeper of A. N. Schuster & Co., who stated that the account attached to his deposition was a true account between the defendant and A. N. Schuster & Co. While the account balances, it contains no credit for $10.27. This evidence before the jury made the instruction proper.

At the request of the defendant, the jury were instructed "that the legal rate of interest on the accounts, as shown in the evidence and under the proof, is seven per cent, and the plaintiffs, A. N. Schuster & Co., could not charge defendant more than that upon their account up to the time the note was given." The question of interest upon the account was not put in issue by the pleadings, and the court erred in submitting it to the jury.

The larger part of plaintiff's brief is devoted to the rulings of the district court upon the admission of testimony, but as not a single error in that respect is assigned in the petition in error, we are precluded from considering the same.

It follows from what has been said that the judgment of the district court must be reversed and the cause will be remanded for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

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34	384
30	128
37	650

GEORGE E. BANKS, ASSIGNEE, v. OMAHA BARB WIRE CO.

[FILED JULY 2, 1890.]

Assignment for Creditors: PRIOR PREFERENCES. If an insolvent debtor, within thirty days before the making of a general assignment for the benefit of his creditors, with a view to give a preference to a creditor, gives a real estate mortgage and collateral notes to secure an indebtedness created more than nine months before, and the creditor has at the time a reasonable cause to believe that the debtor is insolvent, *held*, that such security was given in fraud of the assignment laws of this state, and is void.

APPEAL from the district court for Hitchcock county. Heard below before COCHRAN, J.

Thos. Colfer, and *Bartlett, Baldrige, Ledwich & Crane*, for appellant.

H. W. Cole, and *W. S. Morlan, contra.*

Citations of counsel are, in the main, referred to in opinion.

NORVAL, J.

This action was brought by the plaintiff, George E. Banks, as assignee of Mrs. E. H. Richardson, an insolvent debtor, to set aside a real estate mortgage alleged to have been given by said Richardson to the defendant in preference to her other creditors, and in fraud of the insolvency laws of this state, and also to recover certain collateral notes alleged to have been delivered by Richardson to the defendant for the same purpose. A decree was entered in the district court in favor of the plaintiff, and the defendant appeals.

For more than a year prior to the 4th day of September, 1886, Mrs. E. H. Richardson was engaged in the hardware business in the town of Stratton, in Hitchcock county, and on that day she made a general assignment to the sheriff of said county, of all her property for the benefit of all of her creditors, which assignment was duly recorded on the day of its date. The sheriff took immediate possession of the assigned property. The plaintiff, being elected as assignee of the assigned estate, accepted the trust, gave the required bond, and entered upon his duties as assignee. On the 1st day of October, 1885, Mrs. Richardson became indebted to the Omaha Barb Wire Co. in the sum of $905, for goods purchased of it at that time. To secure this indebtedness, Mrs. Richardson, on the 25th day of August, 1886, executed and delivered to the defendant a mortgage on lot 7, block 9, in the town of Stratton, and also delivered to the defendant, as collateral security to said indebtedness, several promissory notes owned by her, and amounting to several hundred dollars. The collateral notes and the real estate were included in the deed of assignment. The defendant has since collected on these collaterals $251.82. At the time of the execution of the mortgage Mrs. Richardson was insolvent and contemplated making an assignment for the benefit of her creditors, in case she was pressed by them to make payment. The above facts are undisputed.

The plaintiff introduced testimony tending to show that the defendant, when it received the mortgage and collateral notes, had a reasonable cause to believe that Mrs. Richardson was insolvent and that it accepted the security in fraud of the law relating to assignments. The plaintiff called as a witness C. W. Shurtleff, who testified that in 1886 he was engaged in the banking business at Stratton; that prior to the execution of the mortgage the defendant sent to the witness for collection its claim against Mrs. Richardson, and being unable to collect the same, it was returned

to the defendant; that shortly before the mortgage was given, Mr. Sherlock, as agent of the defendant, called upon Mr. Shurtleff at his place of business in Stratton and inquired as to Mrs. Richardson's circumstances, who was then informed that she was in close financial circumstances; that the bank had a good many accounts against her which she was unable to pay, and that there was no immediate prospect of her paying the defendant's claim.

Mrs. Richardson testified that she gave the notes and mortgage because the agent and attorney of the defendant said they would make trouble by closing up the business at once if she did not secure the claim, but if she would give the security, the mortgage should not be placed upon record, and that they promised to keep the matter quiet so as to prevent any one else from making her trouble. This witness further testified that she owed on August 25, 1886, between $4,000 and $5,000, and knew she was then insolvent and unable to pay her debts; that she stated the condition of her affairs to Sherlock and Cordeal, who represented the defendant.

George H. Sherlock and Joseph A. Cordeal each in their testimony expressly deny having any conversation with Mrs. Richardson; that they had conversation only with her husband out of her presence. Mr. Sherlock denies having the conversation testified to by Shurtleff. It is impossible to reconcile the testimony of the witnesses. If the testimony of Mrs. Richardson and Shurtleff is true, there can be no doubt that the agent of the defendant was aware of the insolvency of Mrs. Richardson when the security was taken. The district court found this point against the defendant, and we are not prepared to say that it was not justified in so finding.

It is claimed that under the repeated decisions of this court, a debtor in failing circumstances has a right to secure, by mortgage or otherwise, a part of his creditors to the exclusion of others, and that such preference will not in-

validate the security. The following cases are cited by the appellant to sustain that position: *Nelson v. Garey*, 15 Neb., 531; *Lininger v. Raymond*, 12 Id., 19; *Bierbower v. Polk*, 17 Id., 268; *Grimes v. Farrington*, 19 Id., 48; *Dietrich v. Hutchinson*, 20 Id., 52. While these cases recognize the general rule to be that an insolvent debtor may prefer one or more of his creditors, they do not decide the point herein involved. It is not disputed that a creditor, having no knowledge at the time of the insolvency of the debtor, may accept security for his debt. The question, however, presented by this record is this, Is a mortgage valid given by an insolvent debtor within thirty days prior to his making of a general assignment, with a view of giving a preference to the creditor, when the latter had reasonable ground to believe that his debtor was insolvent? The determination of this point involves the construction of the law relating to assignments.

Sections 42, 43, and 44 of chapter 6 of the Compiled Statutes are as follows:

"Sec. 42. If a person, being insolvent, or in contemplation of insolvency, within thirty days before the making of any assignment, makes a sale, assignment, transfer, or other conveyance of any description, of any part of his property to a person who then has reasonable cause to believe him to be insolvent, or in contemplation of insolvency, and that such sale, assignment, transfer, or other conveyance is made with a view to prevent the property from coming to his assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or in any way to impair, hinder, impede, or delay the operation and effect of, or to evade any of said provisions, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the assets, of the insolvent. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor,

that fact shall be *prima facie* evidence of such cause of belief.

"Sec. 43. If a person, being insolvent, or in contemplation of insolvency, within thirty days before the making of the assignment, with a view to give a preference to a creditor or person who has a claim against him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent, or in contemplation of insolvency, and that such payment, pledge, assignment, or conveyance is made in fraud of the laws relating to insolvency, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it or so to be benefited.

"Sec. 44. Nothing in this act contained shall be construed so as to prevent any debtor from paying, or securing to be paid, any debt, not exceeding the sum of one hundred dollars, for clerks' or servants' wages, or from paying or securing any debt which shall have been created within nine months prior to the date of such payment, or securing or to affect any mortgage or security made in good faith to secure any debt or liability created simultaneously with such mortgage or security, provided any such mortgage shall be filed for record in the proper office within thirty days from its date."

The evident purpose of the legislature, in enacting these provisions, was to prevent an insolvent debtor from disposing of his property in favor of some of his creditors to the exclusion of others and to secure an equal and just distribution of his property among all his creditors. Many of the provisions of sections 42 and 43 are alike. They differ mostly as to the purpose for which the sale or transfer is made. To

render a conveyance void under section 42 it must appear that it was made to prevent the property from going into the hands of the assignee, or to prevent the same from being distributed under the assignment laws, or to evade the provisions of such laws. It is apparent that the security in this case was not taken for any of the purposes specified in this section, but falls under and is governed by the provisions of section 43. In terms, that section controls cases where a transfer or conveyance of property is made with a view of giving a preference to a creditor. Under either section the creditor, at the time of making the sale or giving of the security, must be insolvent or in contemplation of insolvency, and the person receiving the conveyance or security must have reasonable cause to believe that the debtor is insolvent or is in contemplation thereof, in order to render such sale or security void. The prohibited acts must have taken place within thirty days before making of an assignment. If no general assignment follows, the transfer is valid, or if the transaction falls under any of the exceptions contained in the above quoted section, 44, it will be upheld. But, on the other hand, if it does not come within any exception recognized by this section and all the requisites of section 43 are found to exist, then the conveyance is conclusively presumed to have been made in fraud of the assignment law, and is void. There is no claim that the facts in the case we are considering, bring it within the provisions of section 44, as the mortgage and collateral notes were taken to secure a debt which was incurred more than nine months prior to the giving of the security, and the assignment was made within thirty days after the mortgage was executed. The mortgage and collaterals operate to give the defendants a preference over the other creditors of Mrs. Richardson. Such a preference would have been valid, however, had not the insolvent, within thirty days, made an assignment for the benefit of creditors.

Section 1693*a* of the Revised Statutes of Wisconsin is almost identical with section 43 above quoted. The supreme court of that state has frequently had that section of the Wisconsin statute under consideration, and has invariably adopted the same construction that we now give to our statute. (*Anstedt v. Bentley*, 21 N. W. Rep., 807; *Batten v. Smith*, 22 Id., 342.)

In *Abbott, Assignee, v. Shepard*, 6 N. E. Rep., 826, the supreme court of Massachusetts had under consideration a case similar in its facts to the one at the bar. The statute of that state is like our assignment law. That action was brought by an assignee of an insolvent debtor, to recover certain notes transferred by the assignor to the defendant as an alleged preference. The court instructed the jury that the plaintiff must prove: "First, that, at the time of the payment or transfer in question, Abbott was insolvent, or in contemplation of insolvency; second, that the payment or transfer in question was made with a view to give a preference to the defendants over other creditors; third, that, at the time of the payment or transfer in question, the defendants had reasonable grounds to believe that Abbott was then insolvent, or in contemplation of insolvency; and, fourth, that the transfer of the notes in question was made in fraud of the laws relating to insolvency; and that if the jury found the first, second, and third propositions, above stated, affirmatively established, that would authorize the finding 'that the transfer was in fraud of the insolvent laws.'" The court held that this instruction was correct.

Both upon principle and authority, the decree of the district court canceling the mortgage, and rendering judgment for the amount collected by the defendant on the collateral notes, was right and is therefore

AFFIRMED.

THE other judges concur.

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HARTFORD FIRE INS. CO., APPELLANT, V. MEYER ET AL., APPELLEES.

[FILED JULY 8, 1890.]

1. **Judgment:** SUIT TO ENJOIN. In an action to enjoin a judgment upon the grounds that the plaintiff has a valid defense to the same, and that it was rendered through a breach of duty of his attorney, the facts constituting the alleged defense must be pleaded so that it may appear that on a re-examination of the case the result would probably be different.
2. **Insurance:** PROOF OF LOSS: OBJECTIONS to proof of loss on a policy of insurance must be specific and not general—as the proof or any part thereof may be waived.
3. **Review.** Upon the pleadings and proof, *held*, that the judgment was right.

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

J. R. Webster, *E. P. Holmes*, and *S. P. Vanatta*, for appellant.

J. B. Strode, and *Byron Clark*, *contra*.

MAXWELL, J.

This is an action to enjoin a judgment rendered in the district court of Cass county. It appears from the record that in 1883 one Wm. R. Carter was engaged in the mercantile business in Cass and had his stock insured in the Hartford company for the sum of $650; that during the spring of that year, and while said policy was in full force, the goods were greatly injured or destroyed by fire; that the firm of Cook, Phillips & Wells had a chattel mortgage on said stock for the sum of $228, and after the loss they filed a petition in equity enjoining the plaintiff from adjusting the loss and paying the same to Carter or the

defendants, and praying in effect that a sufficient amount of the insurance be assigned to them to satisfy their claim. The defendants employed a firm of attorneys to defend their rights in the premises, and the plaintiff employed the senior member of said firm to protect its rights. The attorneys named procured a dissolution of the temporary injunction and on the trial of the main issue amended the defendant's answer, which was in the nature of a cross-bill, by adding "and thereupon, as by said policy of insurance required, within the time file fully verified proofs of his loss, amounting to about $650, with their agent, D. H. Wheeler, and that he complied in all respects with the conditions of said policy of insurance," and also amended the prayer, and in the answer to the petition for the injunction took judgment against the plaintiff and in favor of the defendant, as assignee of the policy, for the sum of $300. This is the judgment which is now sought to be enjoined. The grounds upon which this relief is sought, as set forth in the petition, are as follows:

"Plaintiff further avers that it had a full and complete defense to said action as against said policy of insurance and was under no obligations to repay the same; that the said Carter had obtained said policy by fraud and misrepresentations, and that said loss was not a *bona fide* loss, of all which facts they informed their said attorneys (giving names) and instructed and directed them to plead and so make appearance in said cause; that said Carter failed to furnish to said company proper proofs of said loss as required by the rules of said company and by the terms and conditions of said policy of insurance; that said insurance company was fully prepared to successfully defend said claim of said Carter of said loss and fully intended to do so, and so instructed their said attorneys."

It will be observed that there is no statement of facts showing the nature of the defense of the plaintiff against the payment of the loss. This was necessary in order to

entitle the plaintiff to relief. Where a court of equity proceeds to set aside a judgment at law, it proceeds upon equitable considerations only. If the judgment rendered is not inequitable as between the parties, no matter how irregular the proceedings may be, a court of equity will not interfere. (10 Am. & Eng. Ency. of Law, 898.)

It must appear that on a re-examination and retrial of the cause the result would probably be different. (3 Pom., Eq., sec. 1364; *Bradley v. Richardson*, 23 Vt., 720; *Tomkins v. Tomkins*, 3 Stockt. [N. J.], 512, 514; *Reeves v. Cooper*, 1 Beasl, [N. J. Eq.], 223; *Dawson v. Merch., etc., Bk.*, 30 Ga., 664; *Saunders v. Albritton*, 37 Ala., 716; *Way v. Lamb*, 15 Ia., 79, 83; *Stokes v. Knarr*, 11 Wis., 389; *Payne v. Dudley*, 1 Wash. [Va.], 196; *Sauer v. Kansas*, 69 Mo., 46; *Lemon v. Sweeney*, 6 Ill. App., 507.)

Neither the statement of facts in the petition nor the proof is sufficient to show that the judgment is unjust or that the plaintiff had any defense to the action. So in regard to the proofs of loss. It is not stated wherein they are defective, nor that the plaintiff has not waived the defect.

There is testimony in the record tending to show that the plaintiff had no defense to the action and simply employed attorneys to secure a dissolution of the injunction, and that the contest was really between creditors of Carter. These were disputed questions of fact which were submitted to the trial court, and the evidence being nearly equally balanced, the judgment must be sustained.

We desire to say, however, that if the plaintiff had a defense to the action on the policy, the attorneys for the defendant, nor either of them, could consistently appear for the plaintiff and should not have done so, but in the condition of the record this fact cannot be determined.

The judgment of the district court is

AFFIRMED.

THE other judges concur.

46-243

B. F. MIZER v. C. N. BRISTOL.

[FILED JULY 8, 1890.]

1. **Evidence** examined, and *held*, to sustain the verdict.
2. **Trial**: RIGHT TO OPEN AND CLOSE. Where upon the issues joined the plaintiff is required to introduce any evidence in support of his case, he will be entitled to open and close.

ERROR to the district court for Webster county. Tried below before GASLIN, J.

J. N. Rickards, for plaintiff in error.

Case & McNeny, contra.

MAXWELL, J.

This action was brought by the defendant against the plaintiff to recover the sum of $500 for money had and received, and on the trial of the cause the jury returned a verdict in his favor for the sum of $225, upon which judgment was rendered. The plaintiff in error in his answer alleges that "the money mentioned and described in plaintiff's petition was received by defendant from plaintiff under the following state of facts, to-wit:

"On the 2d day of December, 1886, plaintiff and defendant entered into a certain written agreement, by the terms of which this plaintiff was to purchase of defendant and defendant was to sell to plaintiff his entire stock of queensware, groceries, provisions, and fixtures, and further, the said plaintiff was to rent of said defendant the storeroom and cellar situate on lot nine of block five, Red Cloud, Nebraska, at an annual rent of $800 per year, payable in monthly installments of $66.67 per month. A true copy of said written agreement is herewith filed attached to this (answer) and made a part hereof.

"That in pursuance of said agreement the plaintiff, at the completion of said agreement, paid to defendant the $500 as a part payment of said stock of goods, and in no other manner, and thereafter and on or about the — day of December, and about the time the invoice mentioned in said contract was nearly completed, the plaintiff, without any just cause and without any fault on the part of this defendant, voluntarily abandoned said agreement and refused to further proceed under the same and refused to accept said goods and pay the balance due therefor as per the terms of said agreement.

"This defendant did and performed all the terms and conditions to be done and performed by him under said agreement, and at the time of the breach aforesaid was ready and willing to fully perform his part of said agreement.

"This defendant, by reason of the plaintiff's failure, neglect, and refusal to perform said agreement, has sustained damages in the sum of $1,000 over and above the amount so received. The same is now due and wholly unpaid."

The reply need not be noticed.

The contract referred to is as follows:

"This agreement, entered into by and between Benjamin F. Mizer, of the first part, and Charles N. Bristol, of the second part, both of Red Cloud, Nebraska, witnesseth: The said Mizer agrees on his part to sell and convey to said Bristol, free and clear of incumbrance, his entire stock of groceries, queensware, produce, and fixtures now owned by him and kept in storeroom and cellars situate on lot nine of block five of Red Cloud, Nebraska.

"The said Bristol, agrees on his part, to purchase said goods and take same as follows: Queensware and groceries to be taken at invoice and to be invoiced at first cost thereof, and in addition thereto said Bristol is to pay an amount equal to twelve and one-half per cent of said invoice to cover freight, drayage, and other expenses. Fixtures to be agreed upon by the parties hereto. The price of all

home produce to be first cost thereof. Said Bristol agrees on his part to pay cash the sum of $500 upon the completion of this agreement, $1,000 upon completion of invoice herein mentioned, $500 to be paid in thirty days after possession is given under this agreement, and $500 each and every thirty days till said stock is fully paid for. The invoice above mentioned is to be made between the 15th and the 20th of December, 1886, and possession to be given as soon as invoice is completed and the payment above mentioned made. It is understood and agreed that all deferred payments above mentioned shall draw ten per cent from date of delivery of possession.

"When possession is delivered as above specified said Mizer agrees on his part to execute and deliver to said Bristol a written lease for said premises for three years (giving said Bristol the option to hold said premises thereunder for two additional years) for the annual rental of $800, payable in monthly installments of $66.67 per month.

"In witness whereof, we have hereunto set our hands, this second day of December, 1886.

"Witness: B. F. MIZER.
"J. N. RICKARDS. C. N. BRISTOL."

The testimony tends to show that at the date of the contract the plaintiff in error was conducting a grocery in Red Cloud and that the defendant in error had made a proposition to purchase the same. The testimony also tends to show that when the defendant in error inquired of the plaintiff in error as to the value of his stock of goods he stated that it was about $5,000.

The defendant in error testifies that he thereupon informed him that the stock was of greater value than he was able to purchase; that soon afterwards the plaintiff in error stated to him that he had examined his invoices and looked over his stock and that it would not exceed in value $3,800 to $4,000, and that with that understanding he

entered into the contract above set forth, and that upon the signing of the contract he paid the plaintiff in error $500; that thereupon they proceeded to invoice the stock and it was found to amount to $5,000 or more, and that thereupon he declined to complete the contract.

The plaintiff in error denies that he stated to the defendant in error that the stock was of less value than $5,000.

There are a number of matters, however, testified to by the defendant in error and his witnesses which he fails to explain, and it is evident that he did make representations of the kind charged. The clear weight of testimony also shows that after it was found that the goods invoiced were of the value of $5,000 or more, and more than the defendant in error felt able to pay for, the plaintiff in error promised to refund the $500 which he had received. This was coupled with a proviso, "as soon as I hear from my brother-in-law." This was a recognization of the debt and obligation to pay the same; but without such recognization the defendant in error under the proof would be entitled to recover. It is apparent that the defendant in error is entitled to the whole $500 with interest thereon, but as he is not complaining that matter cannot be considered.

The plaintiff in error complains that he was entitled to open and close on the trial of the cause. In this, however, he is mistaken, as it was necessary for the plaintiff below to offer proof to sustain his action. The rule is that if anything remains for the plaintiff to prove affirmatively, he is entitled to open and close. (*Lexington Ins. Co. v. Paver*, 16 Ohio, 324; *Vifquain v. Finch*, 15 Neb., 505.)

There is no error in the record by which the plaintiff in error has been prejudiced. The judgment is therefore

AFFIRMED.

THE other judges concur.

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F. B. DONISTHORPE ET AL., APPELLANTS, V. FREMONT, E. & M. V. R. CO., APPELLEE.

[FILED JULY 9, 1890.]

1. **Right of Way: REPRESENTATIONS OF INTENDED USE: PAROL EVIDENCE.** Where the agent of a railway company negotiating for the right of way for the proposed road across certain lots on which the plaintiff resided, stated to him that the property sought for right of way was designed for the main line and not for side tracks, and thereupon the plaintiffs executed a deed for such right of way. Afterwards three side tracks were laid along said line past the plaintiff's residence. *Held*, That the purpose for which the deed was executed might be shown.

2. ——— : ——— : **DAMAGES.** That if the plaintiffs sustained special damages by reason of the construction and operation of the side tracks near their house, they may recover for any excess of damages over those which would arise from the operation of the main line.

APPEAL from the district court for Fillmore county. Heard below before MORRIS, J.

F. B. Donisthorpe, and *Robert Ryan*, for appellants, cited as to fraudulent representations of intended use of land: *Barber v. Lyon*, 15 Ia., 37; *Richardson v. Bleight*, 8 B. Mon. [Ky.], 584; *Rumph v. Abercrombie*, 12 Ala., 64; *Wyche v. Greene*, 16 Ga., 49; *Walker v. Hunter*, 27 Id., 331; *Hileman v. Wright*, 9 Ind., 126; *Woodruff v. Water Power Co.*, 10 N. J. Eq., 489; *Abbott v. Abbott*, 18 Neb., 505; Bishop, Contracts, sec. 665; *Clark v. Tennant*, 5 Neb., 556; *Carpenter v. R. Co.*, 9 C. E. Green Ch. [N. J.], 249.

John B. Hawley, and *J. Jensen, contra*, contending that the deed embodied all agreements between the parties, and that their rights could not rest partly in writing and partly in parol, cited: *McClure v. Campbell*, 25 Neb., 58-9; *Mar-*

shall v. Gridley, 46 Ill., 250; *Purinton v. R. Co.*, Id., 297, 299, 300; *Waldron v. R. Co.*, 55 Mich., 420; *Druse v. Wheeler*, 22 Mich, 442, 443; *Cedar Rapids, etc., R. Co. v. Boone Co.*, 43 Ia., 45; *Conwell v. R. Co.*, 81 Ill., 232; Pierce on Railroads, p. 133, n. 2; 520.)

MAXWELL, J.

This action was brought by the plaintiffs against the defendant to abate certain stock yards near their residence as a nuisance and to enjoin the defendant from using certain side tracks near their residence for the same cause; or, in case an injunction would not be granted, then to recover damages.

On the trial of the cause the court below granted an injunction in effect abating the stock yards, but found for the defendant as to the side tracks, and rendered judgment accordingly. Other matters were presented to the court below which do not seem to be involved in the issues before us and therefore will not be considered. No appeal has been taken from the judgment abating the stock yards, so that the only question presented for consideration is the correctness of the judgment as to the right of way.

It appears from the record that in the spring of 1887 the defendant was anxious to extend its road to Geneva and beyond, and after various conferences with the citizens of Geneva they entered into a written guaranty that the right of way from "the east line of the northeast quarter of section 36, township 7 north, of range 3 west, of the sixth principal meridian, and for station grounds at Geneva certain lots and alleys, and a portion of Lincoln street in said Geneva" should not cost to exceed $13,500; that one Stanley was the right of way agent of the defendant and he exhibited to the plaintiffs a map purporting to show the line of the road through the town of Geneva and across their lots. He stated in effect that the side tracks would not extend to the plaintiff's place, and evidently

relying upon this assurance the citizens of the town made similar statements. The B. & M. R. R. runs south through the tier of blocks next west of the plaintiff's residence, the side tracks, however, being some distance away. The testimony shows that the wife of F. B. Donisthorpe, one of the plaintiffs, stated that if she could be assured that the side tracks of the defendant would also be placed away from near their residence, she would execute the deed as desired. Upon securing such assurance she thereupon with her husband executed a deed as follows;

"This indenture, made this 8th day of April, A. D. 1887, between Frederick B. Donisthorpe and Laura V. Donisthorpe (his wife), in her own right, of the county of Fillmore, in the state of Nebraska, party of the first part, and the Fremont, Elkhorn & Missouri Valley Railroad Company, a corporation duly organized under the laws of the state of Nebraska, party of the second part, witnesseth:

"That whereas the said Fremont, Elkhorn & Missouri Valley Railroad Company, party of the second part, is now constructing a railroad, which said railroad is to pass through the county of Fillmore, in said state of Nebraska, and the said party of the first part, being desirous of the construction of said railroad and to aid the same by the grant herein made, in consideration of the premises and the sum of $750 to them in hand paid, the receipt whereof is hereby acknowledged, have given, granted, bargained, sold, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, convey, and confirm, to the said party of the second part, and to its successors and assigns, forever, for the purpose of constructing a railroad thereon, and for all uses and purposes connected with the construction and use of said railroad, a strip of land fifty feet in width, being fifty feet in width on west side of the center line of said railroad where the same has been definitely located over and across lots 15, 16, and 17, in W. J. Tate's first addition to the village of Geneva, Fillmore county, Ne-

braska, of the sixth P. M., and the said party of the first part, for the consideration aforesaid, do hereby release and discharge the said party of the second part, its successors and assigns, from all costs, expenses, and damages which the said party of the first part has now sustained, or shall at any time hereafter sustain, in any way by reason of the construction, building, or use of the said railroad; to have, hold, and enjoy the lands above conveyed, with the appurtenances and privileges thereto pertaining, and the right to use the said land and material of whatsoever kind within the limits of the said fifty feet above conveyed, unto the said party of the second part, the Fremont, Elkhorn & Missouri Valley Railroad Company, and to its successors and assigns, forever, for any and all uses and purposes connected with the construction, preservation, occupation, and enjoyment of said railroad; *Provided*, That if said railroad shall not be located and graded within ten years from the date hereof, or if, at any time after said railroad shall have been constructed, the said party of the second part, its successors or assigns, shall abandon said road, or the route thereof shall be changed so as not to be continued over said premises, the land hereby conveyed and all rights in and to the same shall revert to the said party of the first part, their heirs and assigns.

"And the said party of the first part do for themselves, their heirs, executors, administrators, and assigns, covenant and agree to and with the said party of the second part, its successors, and assigns, that they are the true, lawful, and rightful owners of all and singular the above granted and described premises, and every part and parcel thereof, with the appurtenances, and are now lawfully seized and possessed of the same as a good, perfect, and absolute estate of inheritance in fee simple; and that the same or any part thereof at the time of signing and delivery of these presents are not in any manner incumbered; and also that the said party of the first part and their heirs will and shall

warrant and forever defend all and singular the lands and premises hereby conveyed unto the said Fremont, Elkhorn & Missouri Valley Railroad Company, the said party of the second part, its successors and assigns, forever, against the lawful claims and demands of all and every person and persons, free and discharged of and from all manner of incumbrances whatsoever.

"In testimony whereof, the said party of the first part have hereunto set their hand the day and year first written above. F. B. DONISTHORPE.

"LAURA V. DONISTHORPE.

"Signed and delivered in presence of

"JNO. D. CARSON."

Upon the construction of the line, three side tracks were built by the defendant, which extend beyond the plaintiff's residence, and such residence being so near the side tracks is greatly affected by the switching of cars thereon. As there must be a new trial to ascertain the amount of damages which the plaintiff has sustained, and as no question is involved as to the rule for estimating the damages, we will not discuss that branch of the case.

The attorneys for the defendant insist that the deed merged all prior conversations and statements of the parties and therefore the plaintiffs cannot now complain, as there is no reservation in the deed. This is true, but notwithstanding the rule, the purpose for which the deed was made may be shown. (*Collingwood v. Merchants Bank*, 15 Neb., 121.) This rule is constantly applied where an absolute conveyance is made as security for a debt. In such and like cases the entire transaction may be shown in order to determine the effect of the conveyance. So in the case at bar. Here the professed purpose of the agent was to obtain a conveyance of the right of way for the line of the road—not for depot grounds and side tracks. It is well known, too, that the grounds required for a station and the consequent side tracks are usually much wider than along

the line of the road away from the station. This, however, is a mere circumstance, which to have any weight must be supported by other circumstances showing that the company usually required more than 100 feet in width for side tracks at its stations. While every reasonable facility should be given a railway company organized under the laws of the state to acquire the right of way, and to construct its road, yet the land and lot owners over which its line is located have rights in the premises which must be considered and protected, and the damages which they each sustain by reason of the location, proper construction, and careful operation of the road must be paid or deposited with the county judge. Justice and fair dealing require that a fair compensation be paid, and that there shall be no secret reserve in favor of the party acquiring the right of way. The side tracks having been constructed, an injunction will not be granted, but the plaintiffs will be entitled to recover damages for the injury sustained in excess of those which arise from the proper use of the principal line of the road.

The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1890.

PRESENT:

HON. AMASA COBB, CHIEF JUSTICE.
" SAMUEL MAXWELL, } JUDGES.
" T. L. NORVAL, }

WILLIAM HAWKE, APPELLANT, V. LOGAN EUYART, APPELLEE.

[FILED SEPTEMBER 16, 1890.]

Wills: REPUBLICATION: A CODICIL ratifying and confirming a will, in whole or in part, will amount to a republication of the will, bringing down its words and causing it to speak as of the date of the codicil.

2. ——: CONDITIONS: REFORMATION OF DEVISEE. A devise in a father's will in favor of a son addicted to the intemperate use of intoxicating liquors, and who had intermarried with one Mrs. G. against his father's will, made in form to the executors of the will, directing them at the end of ten years from his death, in case the son and legatee should have, in their judgment, thoroughly reformed of his intemperate habits, of his immoral consortings, and evil associations, and should then be living, with

evident promise so to continue during life, a virtuous, temperate and commendable life, to convey the lands and trust funds devised, to the son and legatee. *Held*, That in so far as the devise was conditional on the reformation of the son and devisee the same would be upheld.

3. ———: RESTRAINT OF MARRIAGE. But a subsequent provision that such trust property and funds should not be transferred until the executors should have satisfactory proof that the devisee "has permanently freed himself from all influence, connections, associations, cohabitations, and relations of every name, character, and description of and with Mrs. G., and her relatives, friends and intimates," *held*, to be a condition against public policy, and void; and that upon the first condition, exempt from the second, the devisee will be entitled to the transfer and conveyance of the land and trust funds of the legacy.

APPEAL from the district court for Otoe county. Heard below before FIELD, J.

John C. Watson, *Frank P. Ireland*, and *L. W. Billingsley*, for appellant:

A condition annexed to a devise which discourages or interferes with the marriage relation is void. (*Potter v. McAlpine*, 3 Demarest [N. Y. Sur. Rep.], 108; *Conrad v. Long*, 33 Mich., 78; *Wren v. Bradley*, 2 De Gex & Sm. [Eng.], 49; *Brown v. Peck*, 1 Eden [Eng.], 140; *Tennant v. Braie*, Tothill [Eng.], 241; 1 Story, Eq. Jur., sec. 291, and note; *Keily v. Monck*, 3 Ridgw., Parl. [Ir.], 205, 244, 247, 261; *Morley v. Rennaldson*, 2 Hare [Eng.], 570; *Crawford v. Thompson*, 91 Ind., 266; *Wilkinson v. Wilkinson*, L. R. 12 Eq. [Eng.], 191; 2 Redfield, Wills, sec. 285; 2 Jarman, Wills, 57, 58; Schouler, Wills, sec. 604.) An illegal condition precedent defeats the devise, while an illegal condition subsequent is void and the devise stands. (Williams, Exrs. [6 Am. Ed.], 1372; 2 Redfield, Wills, p. 285; 20 Am. L. Rev., p. 510, sec. 10, and note; 1 Roper, Legacies, ch. 13, sec. 11; *Randall v. Marble*, 69 Me., 310; *Parker v. Parker*, 123 Mass., 585; *Merrill v. Emery*, 10 Pick. [Mass.], 597; 4 Kent, Com., 130.) The condition in this case is an

evasion of, and fraud upon, the law. (*Scott v. Tyler*, 2 Dick [Eng. Ch.], 720; *Harvey v. Aston*, 1 Atk. [Eng.], 379; *Richardson v. Baker*, 2 Id., 321; *Marples v. Bainbridge*, 1 Madd. [Eng.], 590.)

M. L. Hayward, contra:

The condition is one precedent and not impossible (2. Jar., Wills, pp. 520–1); and until it has been performed no estate can vest (*Van Horne v. Dorrance*, 2 Dall. [U. S.], 317; *Finley v. King*, 3 Pet. [U. S.], 375). A condition that a legatee must first learn to live and conduct himself properly is valid (*Den v. Messenger*, 4 Vroom [N. J.], 499; *West v. Moore*, 37 Miss., 114); likewise one that no estate shall pass until legatee's debts are paid (Redfield, Wills, vol. 2, 300; vol. 3, 496; Lewin, Trusts, 135; 2 Jarman, Wills, pp. 548–9; *Nichols v. Levy*, 5 Wall. [U. S.], 441; *Bramhall v. Ferris*, 14 N. Y., 41; 1 Otto [U. S.], 16). While it is true that a condition in *general* restraint of marriage is void, a special restraint as to marriage with a particular person, imposed for the welfare of the legatee, is valid. (Story, Eq. Jur., secs. 274, 277, 281, 285; 2 Redfield, Wills, sec. 30, ch. 11; *Collier v. Slaughter*, 20 Ala., 263; *Finlay v. King*, 3 Pet. [U. S.], 346; 2 Jarman, Wills, 513, 564–6, and notes 28–31; *Garrett v. Scouten*, 3 Denio [N. Y.], 334; *Luigart v. Ripley*, 19 O. St., 24; *Pringle v. Dunpley*, 53 Am. Dec., 110; *Snider v. Newsom*, 24 Ga., 139; *Cooper v. Remsen*, 5 Johns. Ch. [N. Y.], 459; *Bostick v. Blades*, 59 Md., 231; *Graydon v. Graydon*, 23 N. J. Eq., 230.) Where the condition becomes impossible, no estate will vest. (Coke, Litt., 206 *a*, I 376, 206 *b*; Jarman, Wills, vol. 1, pp. 575, 677, 796, 805; vol. 2, p. 520; 4 Kent [5th Ed.], 125; *Moankley v. Riggs*, 19 Johns. [N. Y.], 14; *Taylor v. Bullen*, 6 Cow. [N. Y.], 627; *Wells v. Smith*, 2 Edw. Ch. [N. Y.], 78; *Davis v. Angel*, 8 Jur. [N. S.], 1024.) If the condition is void, it will not benefit the devisee. (*Taylor v.*

Mason, 9 Wheat. [U. S.], 350.) A legacy whose conditions have not been complied with, does not vest because of the absence of a reversionary clause. (*Parsons v. Winslow*, 6 Mass., 180.)

COBB, CH. J.

The appellant alleged in his petition to the county court of Otoe county that he was the son and heir at law of Robert Hawke, late of said county, deceased, whose last will was offered for probate by Logan Euyart and George W. Hawke, executors named therein, and that he appeared and objected to the probate of said will for the reasons:

I. That no citation of notice was issued or served upon him.

II. That the paper purporting to be the last will and testament of deceased was not his will, but was obtained and procured by circumvention and by ruse on the part of Logan Euyart, one of the executors; that the will is void so far as appellant is concerned, as in absolute restraint of marriage and against public policy, and that deceased was not, at the time of making it, of sufficient testamentary capacity to make a will, and that the contingency upon which its bequest to appellant was to take effect was too remote.

The appellant asked that if the will be admitted to probate, the estate depending upon the marriage condition of appellant be ordered to immediately take effect, absolved from the condition imposed, and that he be entitled to the property willed to him.

Notice having been given by publication of the motion to admit the will to probate, there was a hearing in the county court on June 20, 1887. Nathaniel Adams and William F. N. Houser were sworn and examined as witnesses to the will, and the court found that the will and the several codicils thereto were duly executed by Robert Hawke, who was, at the time of executing the same, of full age, of sound mind and memory, and not under restraint

or under influence of any kind, and was competent in all respects to devise real and personal estate; that said instrument is the last will and testament of said deceased and ought to be allowed as such, and that the persons therein named as executors are appointed as such upon giving bond in the sum of $30,000, with sufficient sureties in accordance with the statute.

To all of which the appellant objected and took his appeal to the district court.

There was a stipulation by the parties, proponents and contestant, that the appeal should apply and extend only to the matter of the bequest to William Hawke, and should not in any way affect the other devisees and legatees of the estate, the contestant asking no greater amount than is given him in the will, and he appeals only from the conditions and restrictions attached to such bequest.

There was a trial in the district court, July 10, 1888, in which the proceedings of the county court were affirmed, and the petition of the appellant was dismissed, to which exceptions were taken, and the appeal brought into this court.

The bequest to appellant under the will dated February 16, 1884, is as follows:

"Item Third. I give devise and bequeath to the executors of this my will, hereafter nominated and appointed, and to the survivors or survivor of them, all that certain piece or parcel of land situate in the county of Otoe, and state of Nebraska, known and described as the northwest quarter of section six, township eight north, of range fourteen east, of the sixth principal meridian, containing one hundred and seventy-four and one-half acres, more or less, together with the tenements, hereditaments, and appurtenances to the same belonging, or in anywise appertaining, and the sum of ten thousand dollars in money in trust, nevertheless, and to and for the uses, interests, and purposes hereinafter limited, described, and declared; that is

to say, upon the trust that my said executors, the survivors or survivor of them, shall, within six months after my decease, enter into and upon the above mentioned and last described lands and tenements, and lease and to farm let the same to a good, careful, capable, honest, and industrious tenant or tenants, on such terms and conditions as my said executors, or the survivors or survivor of them, shall deem meet and just, and out of the rents and profits arising from said lands, first, pay and discharge all taxes, revenue, duties, and assessments of every name and nature legally imposed, levied, and assessed thereon.

"Second. Make all necessary and proper repairs to the buildings, fences, and enclosures, including painting of buildings and pruning of all orchards, trees, and shrubs growing on said premises, and embracing the replanting of fruit trees if destroyed by the elements, to the extent of preventing the premises deteriorating in value or going to waste; and any balance of such rents, issues, and profits remaining to invest in some good six per cent interest bearing security issued by Otoe county, in the state of Nebraska, or in securities issued by said county legally bearing a greater rate of interest than six per cent per annum; and in like securities my said executors, or the survivors or survivor of them, are hereby directed to invest the said sum of $10,000 and the income thereupon, less such sum or sums as shall be required to pay the taxes and assessments levied and assessed on the trust funds so held by them as aforesaid, to be in like manner invested from time to time for the period of ten years from the time of my decease. In the event my executors shall not be able to procure the class of securities above mentioned for the investment of such trust funds, then they, or the survivors or survivor of them, may invest such trust funds and the accumulations therefrom in bonds or other securities legally issued by the state of Nebraska, bearing at least six per cent per annum interest, or in bonds or promissory notes secured

by a first mortgage on lands situate in Otoe county, under improvement, as farms, of at least double the value of the amount of the mortgage, exclusive of the buildings, fences, and enclosures, bearing interest at not less than seven per cent per annum, payable annually. And in case, at the end of ten years from my decease, my son William Hawke shall have become, in the judgment of my said executors, the survivors or survivor of them, permanently and thoroughly reformed of his intemperate habits, of his immoral consortings and evil associations, and shall then be living with evident promise to continue so to live, during the remainder of his life, a virtuous, industrious, temperate and commendable life, then and thereupon, within twelve months after the expiration of ten years from my decease, my said executors, the survivors or survivor of them, are hereby directed and required to convey the lands and premises hereinabove last mentioned in item third of this my last will and testament, with the tenements and appurtenances, to my said son William Hawke, and pay over, assign, transfer, set over, and deliver to him, my said son William Hawke, the securities held by them, or by either of them, together with all moneys, rents, interest, and profits, representing the said sum of $10,000 held in trust as aforesaid, and the unexpended income arising therefrom, and the net rents, issues, and profits of said real estate during said period; *Provided, nevertheless, further*, That such trust property and funds shall not be transferred by my said executors, or by the survivors or survivor of them, until my said executors, or the survivors or survivor of them, shall have satisfactory proof and evidence that my said son William Hawke has permanently freed himself from all influence, connections, associations, cohabitations, and relations of every name, character, and description of and with a certain notorious and disreputable woman known by the name of Mrs. Sadie Gladstone, and with all relatives, friends, and intimates of that woman. It being my imperative command

that no part, parcel or portion of such trust funds, or of any other part or portion of my worldly goods or estate, shall come to the hands of, or be used, or applied for the use or benefit of said woman Sadie Gladstone under any circumstances or conditions whatsoever.

"'*And provided further*, That in the event my said son William Hawke should, at any time before the expiration of ten years from my death, through illness or otherwise, become so impoverished as to be liable to become a public charge, then my executors, or the survivors or survivor of them, are authorized and empowered out of the rents, issues, and profits, and the income of said trust property and trust funds, from time to time to afford and provide him such reasonable, necessary support and raiment as they shall deem just and proper under the circumstances, but they are not to furnish any money or other means to gratify the cravings for intoxicating liquors or for immoral associations. * * *

"But in the event of my said son William Hawke shall leave issue of his body him surviving, born of a respectable maternal parent in lawful wedlock, and not born of the said Mrs. Sadie Gladstone, then I order, direct, and require my said executors, the survivors or survivor of them, to use, from time to time as they may deem proper, out of the rents, issues, and profits and income of said trust property and trust funds, to afford a comfortable support, including raiment and education for such child or children of my said son William Hawke, until such child or children shall attain the age respectively of twenty-one years, and upon reaching that age, or marrying, if a female or females, my executors are authorized and empowered to make such reasonable advancement, in their discretion, as the circumstances and position in life of such child or children of my said son William Hawke shall seem to justify out of the profits and income which have arisen from such trust property and trust funds, and upon attaining the age of thirty-

three years respectively, said real estate and funds so held in trust as aforesaid to be divided, share and share alike, less any advancement made, from each share respectively, between such children of my said son, and their heirs by representation; *Provided, always*, That my executors, or any of them, shall not, with any funds, money, or property coming from my estate, aid, maintain, or support, or assist therein, directly or indirectly, any child or children by my son begotton on the body of the said notorious and disreputable woman Mrs. Sadie Gladstone, whether born in lawful wedlock or not.

"And if the heirs of his body surviving my son William Hawke shall be born of the body of the said Sadie Gladstone, then said trust property and trust funds shall be distributed and disposed of by my said executors, as hereinabove directed, the same as if my said son William Hawke had died without issue, him surviving.

"In the event my son William Hawke should fail to reform his intemperate habits, and from his immoral consortings and evil associations, or otherwise refuse to comply with the conditions upon which my executors are authorized and required to convey the real estate described and the $10,000, with the net rents, issues, profits, and income thereof mentioned in this item third of my last will and testament, then and in that case it is my will and I order and direct my said executors to hold said premises and trust funds with the net accumulation therefrom invested and rented as aforesaid, and out of the proceeds thereof, from time to time as required, use sufficient, if my said son's circumstances shall require it, to pay and discharge the expenses for a comfortable maintenance and support during his natural life, or until he shall have complied with all the conditions and furnished the evidence to entitle him to a conveyance and assignment from my said executors to said trust property and trust funds with the accumulation thereof, as is hereinabove provided and directed, when,

although more than ten years shall have passed since my decease before the conditions aforesaid have been complied with by my said son William Hawke, my said executors, the survivors or survivor of them, will and shall convey and assign said trust property and trust funds and the accumulations therefrom upon the express condition, however, that such conveyance and assignment of said property and trust funds and the accumulations therefrom shall be void, and the property thereby conveyed and assigned shall revert to my said executors, the survivors or survivor of them, or to my said wife and daughters, if all my executors shall than be dead, they thereupon shall be repossessed thereof, the same as if said conveyance and assignments had never been made, if my said son William Hawke shall, at any time after the execution and delivery of said conveyance and assignment, marry or cohabit with the said notorious and disreputable woman Mrs. Sadie Gladstone, and he, my said son William Hawke, having failed or refused to comply with such conditions, and failed to receive a conveyance and assignment of such trust property and trust funds, after the death of my said son William Hawke, my said executors, the survivors or survivor of them, are directed and required to distribute such trust property and trust funds, with their accumulations, to my wife, Elizabeth A. Hawke, and daughters, Ella Spencer, Lulu Hawke Rector and Minnie Hawke, and to their heirs by representation, share and share alike, at the time and in the manner hereinabove directed; *Provided*, No part thereof shall descend to the heir or heirs of my son William Hawke begotten on the body of the said Sadie Gladstone."

The first codicil to the will of Robert Hawke was executed on July 29, 1885, and the second and last codicil is dated March 8, 1887, so that the last date is the completion and publication of the will. It will be observed that the devises to, and provisions in favor of, the appellant are made to depend upon certain conditions. These are, first,

that at the expiration of ten years from the death of the testator the appellant should have become, in the opinion and judgment of the executors, permanently and thoroughly reformed of intemperate and evil habits, his immoral consortings and associations, and should then be living with evident promise to continue to live, for the remainder of his life, a virtuous, temperate, and commendable life.

Second, that the executors should have satisfactory proof and evidence that the appellant had permanently freed himself of all influences, connections, associations, cohabitations, and relations of every name, character, and description with Mrs. Sadie Gladstone.

After the argument of this case, and at the consultation of the court, we were all of the opinion that the first conditions imposed in the testator's will were valid and binding on the executors and on the legatee; but that those of the second class, in view of the facts and circumstances given in evidence, were void as against the public policy of the state and could not be sanctioned.

While the will itself was executed and bears date of February 16, 1884, there is a codicil to it, which, to all intents and legal purposes, republished and executed the will on the 29th day of July, 1885.

It appears from the bill of exceptions, and is not disputed, that the appellant was married to Mrs. Sadie Gladstone on the 16th of September, 1884. It is to be mentioned, not as a controlling fact, that while there is an entire absence of direct evidence on the subject, yet from all the evidence, and from the legal inferences to be drawn, there is a strong presumption that the marriage of the appellant with Mrs. Gladstone was known to the testator at the time of the last publication of his will. That condition had taken its place for two years and six months prior to the last fact. As to the rule in this instance, see *Van Cortlandt v. Kip*, 1 Hill, 590: "Where a codicil is so

executed as to operate a republication of the will, both should be read and construed together as one entire intrument." See, also, *Brimmer v. Sothier*, 1 Cushing, 118; *Neff's Appeal*, 48 Pa. St., 501; *Snowhill v. Snowhill*, 3 Zabriskie, 447.

The question then is not wholly whether the exactions of the will that the appellant shall have freed himself of all the influences and associations of Mrs. Gladstone, but are in restraint and in the continuation of the marriage relation, the same having been entered into as stated.

I think there can be no doubt, either as a question of reason from moral premises, or of legal authority, not only that such condition is void, but having been declared void it leaves the bequest of the testator operative the same as though the condition had not been sought to be made by will. (See *Roper on Legacies*, 757, and cases cited; *Conrad v. Long*, 33 Mich., 78; *Wren v. Bradley*, 2 De Gex & Smales, 49; *Brown v. Peck*, 1 Eden, 140; *Tennant v. Braie*, Tothill [Ed. 1820], 77.)

These authorities, cited by counsel for appellant, are directly to the point stated and seem to be conclusive of it. Had the devisee not been lawfully married at the date of the last publication of the will of the testator, I should be of the opinion that, under the arguments and authorities of the counsel for appellees, the peculiar conditions of the will here considered would be upheld; but wholly otherwise when the marriage had been solemnized before the publication of the will.

The decree of the district court is reversed and the cause is remanded with a direction to that court to enter a decree in accordance with this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ELLIS L. BIERBOWER v. JOHN F. MILLER.

[FILED SEPTEMBER 16, 1890.]

Removal of Causes: LOCAL PREJUDICE: AMOUNT IN CONTROVERSY. The right of a non-resident defendant to remove a suit from any state court to the circuit court of the United States, upon the ground that from prejudice or local influence he will not be able to obtain justice in such state court, etc., is confined to cases in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

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

Montgomery & Jeffrey, for plaintiffs in error:

The application for removal was properly made to the federal court. (*Fisk v. Henarie*, 32 Fed. Rep., 422; *Malone v. R. Co.*, 35 Id., 628; *Kaitel v. Wylie*, 38 Id., 865.) The right to remove accrues to any non-resident defendant, when there is a controversy between him and a citizen of a state where suit is brought (*Fisk v. Henarie, supra*); and the right is not confined to cases where the controversy is separable (*Whelan v. R. Co.*, 35 Fed. Rep., 849.)

G. M. Lambertson, contra:

The cause was not removable under the act of 1887, because (1) intervenors cannot remove when the state court alone had jurisdiction at the commencement of the action (*Ohlquist v. Farwell*, 13 Fed. Rep., 305; *Allin v. Robinson*, 1 Dill. [U. S. C. C.], 119, and citations; *Houston, etc., R. Co. v. Shirley*, 111 U. S., 358; *Cable v. Ellis*, 110 Id., 396; *Thorn, etc., Co. v. Fuller*, 122 Id., 535; *Phelps v. Oaks*, 117 Id., 236; *Stewart v. Dunham*, 115 Id., 64; *Bronson v. Lumber Co.*, 35 Fed. Rep., 634); (2) not all defendants are non-residents, nor did all join in the application for

removal (*Sewing Machine Cases*, 18 Wall. [U. S.], 553; *Vannevar v. Bryant*, 21 Id., 41; *Hancock v. Holbrook*, 119 U. S., 586); (3) it could not have been commenced originally in the circuit court (*McNeil Co. v. Howland*, 99 N. Car., 202 [6 Am. St. Rep., 513]; *King v. Cornell*, 106 U. S., 395; *Smith v. Lyon*, 133 Id., 315; *Malone v. R. Co.*, 35 Fed. Rep., 625); (4) the amount is less than $2,000 (*Malone v. R. Co., supra*). The interests of defendants in such actions are not severable (*Louisville R. Co. v. Ide*, 114 U. S., 52; *Putnam v. Ingraham*, Id., 57; *Pirie v. Tvedt*, 115 U. S., 41; *Sloane v. Anderson*, 117 Id., 275; *Thorn, etc., Co. v. Fuller*, 122 Id., 535.)

COBB, CH. J.

The plaintiff in the court below alleged that on November 11, 1886, he was the owner and in possession of a general stock of goods and merchandise in Deloit, Holt county, consisting of dry goods, clothing, hats and caps, boots and shoes, hardware, groceries, fruits and candies, powder and shot, paints and varnishes, trunks, and such other goods as are kept in a country store, also counters, show cases, lamps, and other fixtures, with books and book accounts, in all of the value of $3,200, as per schedule attached, Exhibit A; that on said day Ellis L. Bierbower, who is made defendant, wrongfully, forcibly, and unlawfully took said goods from the possession of the plaintiff and converted them to his own use, to the plaintiff's damage $3,250.

II. And for a second cause of action alleged that on said day he was engaged in a large and profitable retail business of buying and selling general merchandise at Deloit, Holt county, and was the owner and in possession of the goods and stock of merchandise hereinbefore mentioned.

That on said day the defendant forcibly, wrongfully, and unlawfully took possession of all of said goods and chattels, and converted them to his own use.

III. That prior to said day the plaintiff had borne a good character as a merchant, and was in good financial credit and standing.

IV. That by the wrongful acts of the defendant in taking possession of said goods and converting them to his own use the plaintiff has been greatly injured in his good name, credit, and business standing insomuch that various merchants and persons who formerly dealt with him have ceased to do so, and he is no longer able to buy goods on credit of foreign merchants as he was formerly accustomed to do, whereby he has lost gains which otherwise would have accrued in his business; that by said wrongful acts his business has been broken up and destroyed by the defendant, to the damage of the plaintiff $3,250, of which there has been paid $1,287, leaving a balance due of $1,963, with interest at seven per cent per annum from November 11, 1886, for which he asks judgment.

The defendant made his special appearance in the suit for the purpose of objecting to the sufficiency of the service of the summons, and to the jurisdiction of the court over his person, for the reason:

"That he is a resident of Douglas county, and was at the time of the service of the summons, and now is, and long had been marshal of the United States circuit and district courts for this state, and as such was under an order in pursuance of the duties of his office, and was required to be in attendance upon the sessions of the January term, 1888, of said circuit and district courts, by law held at Lincoln, in Lancaster county, at the time of the service of the summons upon him, and that the pretended service of the same upon him was while he was so in the discharge of his official duties at and in Lancaster county, in attendance upon said courts as required by law, and is wholly void, and he should not be further required to answer or obey said summons."

On April 20, 1888, at the February term of the court

below, the motion to quash the service of summons on defendant was heard and argued and was overruled, to which the defendant excepted on the record.

On June 9, 1888, at the May term of the court below, the motion of William Groneweg and John Schoentgen for leave to intervene as parties defendant was heard and argued and was sustained; and for answer to the plaintiff's petition they state:

"That they deny each and every allegation in the petition contained.

"Count II. They admit that on November 11, 1886, they directed the United States marshal to levy upon a certain stock of merchandise in the town of Deloit, Nebraska, the taking of which is the seizure complained of, but whether Exhibit A is a correct list of the property taken defendants are unable to say, but deny the same and leave plaintiff to his proof. They allege that plaintiff's claim to the property is based upon a pretended purchase made from D. L. Cramer and D. V. Coe, or one of them, without consideration and with the purpose and intent on the part of all of them to hinder, delay, and defraud these defendants and other creditors of Cramer and Coe, who were at the time of said pretended sale greatly embarrassed financially, and unable to meet their obligations, and were insolvent, all of which was then well known to the plaintiff, by reason of which defendants allege the plaintiff's claim is fraudulent and he cannot recover.

"Count III. For further answer defendants aver that on November —, 1886, they commenced their action in the circuit court of the United States for the district of Nebraska, claiming of D. L. Cramer and D. V. Coe $1,800, upon certain promissory notes of theirs, in pursuance of which a writ of attachment was issued and levied upon the property as stated in count II of this answer; that on December 4, 1886, the plaintiff herein filed in said cause in said circuit court his petition as follows:

"'Comes now John F. Miller, as intervenor, and informs this court and avers that the property attached herein belongs to him, and so belonged at the time it was seized and levied upon by virtue of the order of attachment herein, and at the time of making said levy said property was in the possession of said intervenor in the county of Holt, in this state, and was wrongfully, unlawfully, and forcibly taken from his possession without his consent.

"'II. Since the taking of said property from his possession he has demanded of the marshal a return of the same, and said marshal has refused to return or in any manner account for the same. He prays that said attached property be returned to him and that he have judgment for his costs.'

"That on February 23, 1887, at a term of the United States circuit court, then being held at Lincoln, the plaintiff's claim was tried and submitted to a jury, upon which was the following verdict:

"'GRONEWEG AND SCHOENTGEN,
v.
D. L. CRAMER ET AL., DEFENDANTS,
JOHN F. MILLER, INTERVENOR.

"'We, the jury, find that at the time of the taking of the property herein attached, the title to the property, and the possession of the same was in the intervenor, John F. Miller, and was then of the value of $2,800, and the price at which the same was sold by the marshal was $1,260.'

"The plaintiff thereupon elected to take, and did take and receive from the United States marshal the amount in his hands realized by the sale of said attached property, which is the sum of $1,287, mentioned in the second count of plaintiff's petition.

"And defendants allege that all the claim of the plaintiff against them, arising out of said attachment, was fully adjudicated and settled in said intervening proceedings, and plaintiff cannot now relitigate the same."

On June 29, 1888, at said May term of the court below, leave was given defendant Bierbower to answer instanter and answer was filed as follows:

"The said defendant says that in whatever he did in the premises he did in his capacity of United States marshal, under the direction of Groneweg and Schoentgen, and has no interest in the controversy; that said defendants are wholly responsible, if anybody, for whatever damage, if any, was sustained by plaintiff on account of said levy and seizure and attachment complained of. Defendant denies each and every allegation in said petition contained."

The plaintiff replied to the respective answers of defendants, denying each and every allegation therein contained not expressly admitted.

"II. He admits that he purchased the property levied on by defendant Bierbower at the instance of the other defendants, but denies that the same was made with any fraudulent intent, or with intent to defraud Groneweg or Schoentgen, or any of the creditors of the vendor. On the other hand, such purchase was *bona fide* and for a valuable consideration. He denies that Cramer and Coe were financially embarrassed and that he had full knowledge of that fact at the time he made the purchase.

"III. He admits the allegations in the third count of the answer respecting the intervention of the plaintiff in a suit in the circuit court of the United States by Groenweg and Schoentgen against Cramer and Coe, being that in which the attachment was issued, except the plaintiff's rights were absolutely concluded in that proceeding, and by the decree of that court they were barred from prosecuting this action. Plaintiff denies that his intervention in this action and the proceedings and judgment that followed are a bar to the proceedings of this action. On the other hand plaintiff avers that by the verdict and judgment of the circuit court, the title and ownership of the property in question were conclusively found to be in him,

and the defendants are thereby barred and estopped from setting up the defense and claim that the plaintiff is not the owner of the property in question, or that the sale to him was a fraudulent one, as all those matters were put in issue by the answer of the defendants filed therein in reply to intervenor's petition as follows:

"'GRONEWEG AND SCHOENTGEN, PLAINTIFFS,
v.
CRAMER AND COE, DEFENDANTS, AND
JOHN F. MILLER, INTERVENOR.

"'They admit that at the time of the levy, said intervenor was in the possession of the property attached, and that the marshal refused to return to him the property taken, and they deny every other allegation in his petition contained.

"'II. Plaintiffs allege that they are informed and believe and charge that the intervenor claims the title to said property by virtue of a pretended sale thereof, made by D. V. Coe, and plaintiffs allege that said pretended sale is void for the reason that the same was without consideration; that at the time said Coe was largely indebted to plaintiffs and other creditors, of which the intervenor had notice; that said pretended sale was made with the fraudulent purpose and intent to hinder, delay, and defraud the creditors of said Coe, in collecting their claims against him, and said conveyance was received by the said intervenor with the fraudulent intent and purpose to assist Coe in hindering, delaying, and defrauding his creditors.

"'III. Plaintiffs further say that they are informed and believe and charge that at the time of the said pretended sale of the said property there was no delivery thereof, nor did said intervenor take possession until a long time thereafter, nor was any instrument conveying said property, nor copy thereof, filed in the office of the county clerk of O'Neill county, where said Coe then resided, and by reason of such fact the pretended conveyance is absolutely void by force

of the statute in such cases, and no rights in or to said attached property accrued to said intervenor thereunder.'

"The plaintiffs aver that while the title to the property in question was adjudged in that proceeding to be in the plaintiffs, yet the court by its final judgment simply ordered the payment of the amount realized at the marshal's sale, instead of the full value of the goods found by the jury, and expressly reserved to these plaintiffs in said judgment the right to prosecute this action against the defendant for the full damages occasioned by the levy of the attachment, as appears by the judgment of the circuit court of the United States for the district of Nebraska as follows:

"'GRONEWEG AND SCHOENTGEN
v.
CRAMER AND COE, DEFENDANTS, AND
JOHN F. MILLER, INTERVENOR.

"'This cause was heard on the motion for a new trial and in arrest of judgment, and the motion of the intervenor to correct the judgment entered in this action, and it is ordered and adjudged that the marshal and clerk pay over to the intervenor the amount of money now in their hands realized upon the sale of the goods and property claimed by the said intervenor, to-wit, the sum of $1,289.34, and seized by the marshal by virtue of a writ of attachment issued in this cause.

"'This order to be without prejudice to the rights of John F. Miller to bring suit against the marshal or the plaintiffs for the recovery of damages caused by the illegal seizure and detention of the goods and property seized under said writ of attachment, and for the recovery of the full value of the same.

"'It is further adjudged that the intervenor recover the costs of his intervention herein, and that the plaintiffs pay all costs of the seizure and sale of the goods and property levied upon by the marshal under the writ of attachment and now adjudged to be the property of the intervenor.

It is ordered that the motion for a new trial and arrest of judgment be overruled.'

"Wherefore plaintiff asks that the prayer of the petition be granted, and judgment be allowed for the amount prayed for therein.

"STIPULATION OF THE PARTIES IN THE COURT BELOW.
FILED NOVEMBER 22, 1888.

"It is hereby stipulated that this case shall not be tried before December 15, 1888, and not then except by agreement of parties, and in consideration the defendants agree that they will make no application to remove the cause to the federal court, but that the same shall be tried in this court.

"It is further stipulated that the original files marked by the clerk of the circuit court of the United States, in the cause of Groneweg and Schoentgen against Cramer et al., including the petition of intervention of John F. Miller, and the answer thereto, and the reply to the answer, may be used and treated on the trial of the cause the same as copies duly certified by the clerk of the circuit court.

"At a session of the circuit court of the United States at Omaha, on May 13, 1889, before Hon. Elmer S. Dundy, U. S. district judge, the cause of John F. Miller, plaintiff, against William Groneweg and John Schoentgen, defendants, was heard upon the defendants' petition for the removal of the cause from the district court of the state of Nebraska, for Lancaster county, to the circuit court of the United States for the district of Nebraska, and upon the proofs offered in support thereof, and it having been made to appear that from prejudice and local influence the said defendants will not be able to obtain justice in the court in which this action is pending, or in any other state court to which said defendants may on account of such prejudice or local influence have a right under the laws of the state of Nebraska to remove this cause, and it further appearing that this suit is one properly removable under

the acts of the congress of the United States to the said circuit court, it is hereby ordered that the said suit be, and the same hereby is, removed from the said state district court of Nebraska within and for the county of Lancaster into the circuit court of the United States for the district of Nebraska."

On May 22, 1889, there was a trial in the court below to a jury and verdict for the plaintiff for $1,780, with judgment for that sum and costs, $41.15.

Subsequently the defendants filed their motion to vacate the judgment, set aside the verdict, and grant a new trial for the reasons:

I. Because the verdict is not sustained by the evidence and the law in the case, and was rendered by the jury without authority to render it, because the court was without jurisdiction to try the cause at the time it was tried.

II. Because the verdict is contrary to law, the court and jury being without jurisdiction to try the cause and render the verdict.

III. Because of error at law occurring at the trial and excepted to by defendants, and especially because the court had no jurisdiction of the cause or right to try it at the time of trial, which motion was heard and overruled.

The plaintiffs in error assign the following causes for review:

I. The district court was without jurisdiction to try the cause.

II. The court erred in overruling defendants' objection to the trial of the cause prior to the trial and to the impaneling of the jury.

III. The court erred in overruling defendants' objection to the introduction of evidence.

IV. In rendering final judgment in favor of the plaintiff below.

V. In overruling defendants' motion for a new trial.

The above assignments all resolve themselves into a

single proposition of law, to-wit, that the cause having been removed from the district court of the state of Nebraska to the circuit court of the United States, the former tribunal was, at the date of the trial and judgment complained of, without jurisdiction to hear or determine the cause, and therefore said judgment is erroneous. Doubtless if the premises be true both in fact and in law, the conclusion follows. If the action had been, pursuant to the law of the land, removed from the district court, then its judgment is void and should be reversed. But it is quite conceivable that certain forms of law may have been gone through with for the purpose of removing said cause, and the circuit court may have assumed jurisdiction of it when in law the case remained with the district court, and this is the case whatever steps were taken, if the cause is not one of those of which the circuit court of the United States has jurisdiction under the law, and the removal of which from the state to the federal courts has been provided for by law, and that it is not, is the contention of the defendants in error.

In disposing of the case I will give the act of congress of March 3, 1887, such examination as is deemed necessary in order to express my views of its application to the case at bar, but will make no attempt to reconcile the conflicting opinions of the courts in respect thereto. The title of the act is "An act to amend the act of congress approved March 3, 1875, entitled 'An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from state courts and for other purposes, and to further regulate the jurisdiction of circuit courts of the United States and for other purposes.'" By the act of which this is amendatory it was provided that the circuit courts of the United States should have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeded, exclusive of

costs, the sum or value of five hundred dollars and arising under the constitution or laws of the United States, or treaties made or which should be made under their authority, or in which the United States were plaintiffs or petitioners, or in which there should be a controversy between citizens of different states. By the amendatory act it is provided that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid.

It clearly appears from the language of the first section of the amendatory act that where there is a controversy between citizens of different states, the circuit court of the United States has jurisdiction, provided the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and it is as certain, although not expressed in words, that such court has not jurisdiction if the matter in controversy, exclusive of costs, does not exceed the sum or value of two thousand dollars. It is equally certain from the reading of the first section that the matter in controversy shall exceed, exclusive of interest and costs, the sum or value of two thousand dollars, as it is that the controversy must be between citizens of different states. The jurisdiction of the federal court is as much dependent upon one of the facts as it is upon the other; in the absence of either that court has not jurisdiction of the cases mentioned in the third provision of the first section of the amendatory act. In the enactment of the amendatory law the intent of congress was to raise the minimum sum or value of the matter in dis-

pute from five hundred dollars, exclusive of costs, to two thousand dollars, exclusive of interest and costs.

The second section of the amendatory act provides:

"That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be, brought in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought in any state court in which there is a controversy between a citizen of the state in which the suit is brought, and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which said defendant may under the laws of the state have the right, on account of such prejudice or local influence, to remove said cause."

Under this section it is claimed that a defendant may, where there is a controversy between citizens of different states, remove a pending cause into the circuit court of the United States for the proper district, regardless of the sum or value of the matter in dispute. That no application for a removal need be made to the state court, and that no petition for a removal need be filed in the state court, and that no bond is required of the party removing.

It is clear that under section 2 of the amendatory act only those suits are removable to the federal court ot which that court was given jurisdiction by the preceding section (section 1 of the amendatory act). In other words, only such suits can be removed into the circuit courts as could originally have been commenced there. The clause of section 2, which authorizes a defendant to remove a suit into the circuit court on account of prejudice or local influence, simply gives the right of removal at any time before the trial and dispenses with petition and bond, while in other cases of removal the petition or application therefor must be filed in the state court at or before the time that the defendant is by the state law or rule of the state court required to answer or plead. But this clause of the second section is to be construed with the preceding clause of the same section, which requires, as a prerequisite to removal, that the matter in dispute shall exceed the specified amount.

In the enactment of this amendatory act congress evidently had in view the fact that if a party desired to remove a case on the ground of citizenship alone he could as well make his application therefor on or before the answer day as thereafter, but that he might not be aware of the existence of prejudice or local influence which would prevent his obtaining justice in the state courts, until after issues were joined, and hence a party who might be willing to litigate in the state courts provided he could obtain justice therein, if he afterwards and before the trial was able

to make it appear that on account of prejudice or local influence he could not obtain justice in any state court, should have the right to remove the case into the federal court at any time before the trial; but a reasonable interpretation of the statute does not lead to the conclusion that a defendant could remove a case where the amount in controversy did not exceed two thousand dollars; and hence of a class of cases of which jurisdiction had not been conferred upon the federal courts. It is the first section alone of the amendatory act which gives the federal court jurisdiction; the second and third sections simply provide the manner in which causes shall be brought within that jurisdiction. Had it been the intent of congress to authorize a defendant to remove a suit in which was involved less than the prescribed amount, the first section of the act, the section giving jurisdiction, would have conferred upon the circuit courts of the United States jurisdiction, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, in which there was a controversy between a citizen of the state in which the suit was brought and a citizen of another state, without regard to the sum or value of the matter in controversy, whenever it should be made to appear to said circuit court that the defendant in such suit, not being a citizen of the state where the suit is brought, could not, on account of prejudice or local influence, obtain justice in any state court. That congress did not, in terms, confer such jurisdiction regardless of the amount involved argues strongly against the contention that a defendant may under the last clause of the second section remove a suit into the federal court regardless of the amount involved.

The position that the last clause of section 2 relates merely to the time when the defendant may make his application for removal, and dispenses with the petition or bond, is strengthened by the first part of section 3, which reads as follows: "Sec. 3. That whenever any party entitled

to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety for his or their entering in such circuit court on the first day of its then next session a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail, if special bail was originally requisite therein."

It thus appears from the third section that in all cases, except those mentioned in the last clause of section 2, viz., "those where the defendant may remove on the ground of prejudice or local influence, the party entitled to remove must file his petition on or before the answer day, and must file therewith the prescribed bond; while in the cases mentioned in the last clause of the second section the application for removal may be made at any time, and the cause may be removed at any time before trial, provided it be made to appear to the circuit court that by reason of prejudice or local influence the defendant will not be able to obtain justice in the state courts. Before it can be held that the purpose of congress was to confer upon the federal courts jurisdiction of suits between citizens of different states, regardless of the sum or amount in controversy, under a statute the first section of which confers such jurisdiction, there must be something in the section which confers jurisdiction showing that intent. There being, as

I conceive, nothing either in the letter or spirit of the statute, I conclude that no such jurisdiction was conferred.

The act of September 24, 1787, conferred jurisdiction "of all suits of a civil nature, at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state." This provision remained undisturbed until the passage of the act approved March 3, 1875, in which act jurisdictional language somewhat different is used, but so far as the limitation of such jurisdiction to suits where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars is concerned, it is substantially the same. And the act of 1875 contains a repealing clause by which all acts and parts of acts in conflict with the provisions of said act are thereby repealed. The act of March 3, 1887, is, as we have seen, amendatory of the act of 1875, and its provisions, including the jurisdictional clause, are made expressly to take the place of the provisions of said act. So that, as I conclude, there is no act of congress now in force conferring jurisdiction upon the circuit court unaccompanied by the limitation of two thousand dollars.

It is probably unnecessary here to meet the possible objection that the judicial power of the United States, having been declared by the 1st clause, 2d section, of 3d article of the constitution of the United States, to "extend to * * controversies * * * between citizens of different states," that jurisdiction exists in the circuit court by virtue of that instrument. This question was before the supreme court of the United States in the case of *Sheldon v. Sill*, 49 U. S., 440, where it was expressly held that (I quote the syllabus): "Courts created by statute can have no jurisdiction but such as the statute confers." The circuit court of the United States, thus having been created by act of congress, received and retains its jurisdiction in such terms and

with limitations as congress has expressed and imposed. The circuit court therefore being without jurisdiction to order the removal of the cause from the district court of this state to the circuit court of the United States for the district of Nebraska, for the reason that the matter in dispute did not exceed, exclusive of interest and costs, the sum or value of two thousand dollars, the district court of this state was not divested of jurisdiction to hear and determine said cause, notwithstanding the record presented in the case.

The judgment of the district court is

AFFIRMED.

NORVAL, J., concurs.

MAXWELL, J., dissenting.

I concur in the opinion of Judge COBB so far as the points stated in the syllabus are involved. I am unable, however, to agree with him that the petition for removal on the ground of bias or prejudice is to be filed in the federal court. We must remember that the state and federal courts are of concurrent jurisdiction in cases where the defendant is a non-resident of the state and the amount involved, exclusive of interest and costs, exceeds the sum of $2,000. In such case the defendant may remove the case into the federal court. Ordinarily his petition must be filed before the time to answer. In case of alleged bias or prejudice, however, he may file the petition at any time before trial. And this in my view is the exception in the third section of the act—that is, that in all cases except those where bias or prejudice are shown the petition must be filed before the answer day, while in cases of alleged bias or prejudice it may be filed at any time before the trial. If the petition shows a *prima facie* case for removal, the state court should, and, so far as I am advised, invariably has ordered the cause removed.

If the plaintiff disputes the charge of bias or prejudice he may then appear in the federal court and contest the charge. In this respect the act of 1887 differs from that of 1867. Under the former act, upon the proper affidavit being filed in the state court, although false in fact, the case was ordered removed. Under the present statute, however, it requires more than a *prima facie* case to justify the retention of the case by the federal court. There must in fact be bias or prejudice shown so that it would prevent a fair trial.

The mere fact of a petition being filed in the state court and the cause ordered removed, will not prevent the plaintiff from appearing in the federal court and contesting the truth of the charge. The language of the statute is somewhat vague, but this is the evident purpose. The object of the statute was to restrict the right of removal, not to extend it, and this fact must be kept in view. In other words, the act is not remedial in the sense of extending the jurisdiction of the federal courts, but was intended to curtail such jurisdiction. It does not create a new mode of removal, but in many respects limits the old.

Section 61 of the Code of Civil Procedure provides: "That in all cases in which it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, or where the judge is interested or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or is otherwise disqualified to sit, the court may, on application of either party, change the place of trial to some adjoining county wherein such impartial trial can be had; but if the objection be against all the counties of the district, then to the nearest county in the adjoining district." In order to show cause for removal it must be alleged in the petition, and, if denied, proved, that a fair and impartial trial cannot be had in the county where the suit is pending or *other counties in the district;* or, if the objection applies to

all of the counties of the district, then to the nearest county in an adjoining district to which the objection does not apply.

It is of the utmost importance that there should be no clashing of jurisdiction between the state and federal courts. From the necessity of the case the supreme court of the United States is the ultimate arbiter in all cases of doubt, and in its decision the state courts cheerfully acquiesce. It would be a sad spectacle, however, to witness a race between the state and federal courts for the commencement or retention of business in either of said courts. This, no doubt, has been felt by both courts and every effort made to avoid a conflict; and on the part of the state court of this state at least many cases have been surrendered, or rather permitted to be removed, while the papers on their face did not show the right of removal. This, in my view, should not be permitted, as the court should not surrender its jurisdiction except upon a showing that another court is entitled to exercise it. In many cases an improper removal operates as a great wrong upon the party against whom it is made, by subjecting him to great and unnecessary costs.

This is not a question of courtesy between courts, but must be determined by the law as it exists. The prejudice act of 1867 arose out of matters connected with the war; it has never had any solid foundation in this state.

There are twenty-one judges of the district courts of this state. Many of these judges had held important offices of trust and profit for many years before being called to the bench. They are capable lawyers whose integrity is unquestioned. In an equity case how can an affiant swear that these twenty-one judges are biased or prejudiced against *him*? They are men of whom he has no personal knowledge in all probability, and they probably have no knowledge of him whatever.

It is very plain that an oath that they are all biased or

prejudiced against him, borders very closely upon perjury; and even where the oath is predicated upon the prejudice or bias of the people of a particular county, no one can truthfully assert that the people in the more than ninety counties of this state are prejudiced against the affiant.

There are many reasons why the district court should not surrender its jurisdiction until a proper showing is made in that court. Suppose an action is brought for less than $2,000 and the case is removed into the federal court, and judgment or a decree of foreclosure rendered for a sum less than that fixed by statute authorizing the removal of the cause, how can the validity of such judgment be upheld? Not by the statute, certainly, for that only authorizes a removal where the amount claimed exceeds $2,000, exclusive, etc. The effect would seem to be that the decree of foreclosure, or judgment and all the proceedings thereunder, would be null and void.

The supreme court of the United States has held that the circuit court was a court of limited jurisdiction and had cognizance only of a few cases specially circumstanced, and that the fair presumption was that the cause was without its jurisdiction till the contrary appeared. (*Turner v. Bank of North America*, 4 Dallas, 8; *Turner v. Enrille*, Id., 7; *Bingham v. Cabot*, 3 Id., 381.) Being a court of limited jurisdiction as to parties and amounts, like any other court of that kind, it must act within its powers. I do not care to make a comparison with other courts of limited jurisdiction where judgments in excess of their powers, as to amounts, have been held to be void; but it is well known that such is the law. It is necessary, therefore, to set forth in the record the facts and circumstances which give jurisdiction. The importance of taking the necessary steps to oust the state court of jurisdiction, therefore, plainly appear, and until such steps are taken by filing a proper petition and other papers in the state court, it should proceed with the case.

In *Boyden v. Burke*, 55 U. S., 576, it was held by the

supreme court of the United States that a lawful demand must be made in a respectful manner. Surely the same rule will be applied where it is sought to oust a court having lawful jurisdiction of an action.

More than one hundred years ago the original act for the removal of cause was passed, one of the requisites of which was that a petition showing the necessary facts to entitle the petitioner to remove the cause, together with a bond, should be filed in the state court. This law is still in full force and applies to all cases.

In *Trafton v. Nougues*, 4 Central Law Journal, 230, in a case before the United States circuit court of California, Judge Sawyer says:

"I think it is of the highest importance to the rights of honest litigants, and to the due and speedy administration of justice, that a petition for transfer should state the exact facts and distinctly point out what the question is and how and where it will arise which gives jurisdiction to the court so that the court can determine for itself from the facts whether the suit does really and substantially involve a dispute or controversy properly within its jurisdiction. Whenever, therefore, the record fails to distinctly show such facts in a case transferred to this court it will be returned to the state court."

I fully concur in all that is said above, but unless a *prima facie* case is made for removal, it is the duty of the state court to proceed with the trial, and it should not surrender its jurisdiction unless a proper application is made to it showing the necessary facts for that purpose, while, if a *prima facie* case is made for removal, the cause should be ordered removed.

If upon such petition being filed the state courts refused to transfer the case, there might be a just cause of complaint, but no such case has occurred in this state, so far as this court is advised, and the respect due to the state no less than the federal court requires that the proceedings be conducted in an orderly manner and in conformity to law.

M. E. GANDY ET AL. v. J. M. EARLY.

[FILED SEPTEMBER 16, 1890.]

Trial: ORDER OF PROOF: VARIATION. The statute prescribes the order of proof on the trial of a cause. This, however, may be varied by the court where it will work no injustice to the parties. If a plaintiff fail to introduce all his evidence in chief in opening his case and afterwards, when offering evidence to rebut the defendant's proof, introduces evidence in chief, the defendant has a right to offer proof to deny, modify, or explain such new evidence.

ERROR to the district court for Richardson county. Tried blow before APPELGET, J.

E. W. Thomas, for plaintiffs in error.

F. Martin, and *E. A. Tucker*, *contra*.

MAXWELL, J.

This action was brought in the district court of Richardson county by the defendant in error against the plaintiffs in error to recover the possession of certain personal property, or, in case the same could not be recovered, of the value thereof, which is to be alleged to be the sum of $350. The answer is a general denial.

The property was not taken under the order of replevin and the action proceeded as one for damages.

On the trial of the cause the jury rendered a verdict in favor of the defendant in error and against the plaintiffs in error for the sum of $350, for which judgment was rendered.

The plaintiff in error in support of the motion for a new trial filed the following affidavit:

"I, E. W. Thomas, being duly sworn, say I am attorney for defendant in the above action and was so when the

same was tried March 8th and 9th last week. On the trial of said cause, after plaintiff had introduced his evidence tending to prove that one of the notes offered in evidence by plaintiff (to-wit, the note for $95.50) had been paid by plaintiff and his brother turning over and giving to defendant two timber claims. I called James L. Gandy and attempted to prove by him that said note had never been paid either in whole or in part, and I then asked said Gandy a question to that effect, but the court refused to allow said question to be asked and, as I understood the matter, the court ordered that said question should not be taken down by the reporter, with my exceptions to the rulings of said court about the same. Thereupon I presented to the court the following offer of proof in writing, to-wit:

"'Defendant now offers to prove by the testimony of James L. Gandy and others that the promissory note, which is in evidence, dated May 27, 1886, for $95.90 signed by James M. Early and W. D. Early in favor of M. E. Gandy, or order, has never been paid either in whole or in part.'

"The court, however, refused to allow me to put in the said proof, or to examine the witnesses thereon. To all which ruling I at the time excepted. Thereupon the court stated positively that if I should ask any more questions of my witnesses on any other point than on the question whether the said larger chattel mortgage had been changed since it was executed and delivered I must retire from the case, or the court would fine me for contempt. I at the same time asked of witness E. D. W. Sheckell, whom I then had on the stand, whether or not he had heard James W. Early, on December 1, 1887, at a certain restaurant nearly opposite the Filson house in Humboldt, Nebraska, say that he (Early) was then justly indebted to M. E. Gandy in the sum of $150.

"In asking the said question I attempted to put to the

witness the same question I had asked, and about the same matter on which I had cross-examined plaintiff when upon the stand as a witness for himself. The court refused to permit said question to be asked, to which ruling I then excepted. The court, as I understood the matter, ordered that my objections and exceptions do not appear upon the reporter's record. To all of which I at the time excepted. The court ordered positively, and under a threat of fine for disobedience, that I should not ask any questions whatever, except such as might tend to prove that said chattel mortgage had not been altered since it was made. By the said order of the court I was prevented from contradicting by my witnesses statements which had been made by plaintiff and his witnesses when presenting their case.

"The said testimony was rejected and said procedings took place while defendant was offering his testimony after plaintiff had last examined his witnesses. I make this affidavit for the purpose of getting the above facts upon the record, and with all due respect for the court. I obeyed the order of the court, and thereupon asked no further questions than concerning the alleged change of the chattel mortgage. E. W. THOMAS."

On pages 98–99 of the record J. L. Gandy, being called as a witness, testified as follows:

Q. Where was that mortgage made?

A. At my office.

Q. At what place?

A. At my office in Humboldt, Nebraska. After I made the mortgage I read it over carefully to Mr. Early, and he took the mortgage himself and read it; then after reading it he said, "It is all right, but I want it understood that I can sell the stock and you will take the notes to pay on the mortgage;" and I told him it would be all right.

Q. I believe Mr. Early stated yesterday that all he got for that was $30. What about that? (Objected to, as im-

material and not proper redirect examination. Sustained. Defendants except.)

Q. Was the consideration for which the note was given only $30, as stated by Mr. Early?

A. It was not.

Q. What was the consideration then? (The court here objected to going into this case in chief and orders that no questions shall be asked witnesses on any subject but as to the alteration of the mortgage. Defendants except.)

Q. Was the note dated May 27, 1886, for $95.90, signed by James M. Early and W. D. Early, paid? (The court rules the question inadmissible. Defendants except.)

Q. Defendants offer to prove by the testimony of J. L. Gandy and others that the note in evidence dated May 27, 1886, for $95.90, signed by James M. Early and W. D. Early in favor of M. E. Gandy, or order, has never been paid, either in whole or in part. (The court rules the question inadmissible and orders that the only thing the witness can be questioned about is, whether the mortgage of October 29, 1886, was ever changed. To which ruling and order the defendants except.)

The action was brought by Early against the Gandys to recover certain personal property mortgaged by him to them, or in case the property could not be found, then to recover the value thereof. His right to recover depended on the fact that he had paid the debt. In his proof in rebuttal he introduced evidence which should have been given in chief, and this is the evidence which the plaintiffs in error sought to deny or explain. The statute provides the order of proof on the trial of a case but gives the court a discretion in admitting evidence out of its proper order. If, therefore, the court permits a party to introduce material evidence out of the proper order, the adverse party must be permitted if he so desire to introduce proof on that matter. The law gives to both parties the right to be heard—that is, each party may present his proof and sub-

mit it to the court and jury—have his day in court so to speak, and submit his own side of the controversy, and he cannot be deprived of this right by the failure of the plaintiff to introduce all the evidence on which he relies on the opening of the case. The law favors a full inquiry into the merits of a controversy so that justice may be done in the case. Both parties, therefore, must have a fair opportunity to offer their proof. This seems to have been denied in the case at bar.

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

REVERSED AND REMANDED.

THE other judges concur.

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G. L. VALLINDINGHAM ET AL. v. W. G. SCOTT.

[FILED SEPTEMBER 16, 1890.]

1. **Bill of Exceptions:** AFFIDAVITS used on the hearing of a motion for a new trial must be preserved in the bill of exceptions to be available in the supreme court, and cannot be attached as an exhibit to an assignment of error in the motion for a new trial.
2. **Evidence** *held* to sustain the verdict.

ERROR to the district court for Richardson county. Tried below before BROADY, J.

E. W. Thomas, for plaintiffs in error.

Frank Martin, and *E. A. Tucker, contra.*

MAXWELL, J.

This action was brought in the district court of Richardson county to recover the possession of three mules.

The property not being taken on the writ, the action proceeded as one for damages, and on the trial of the cause a verdict was rendered in favor of the defendant in error for the sum of $305. A motion for a new trial having been overruled, judgment was entered on the verdict.

The first error assigned in this court is the order compelling the plaintiff in error to proceed with the trial of the cause in the absence of their attorney. To this assignment there is an affidavit of their attorney attached to the motion for a new trial as an exhibit, but is not certified by the judge before whom the trial was had nor included in the bill of exceptions. Under these circumstances the affidavit cannot be considered, and there being no evidence in support of the assignment it must be overruled.

Second—There are a number of assignments of error in the petition in error which may be grouped together as containing but one proposition, viz.: That the verdict is against the weight of evidence.

The defendant in error is a son of Wm. F. Scott, and claims to be the owner of the property in dispute. His testimony upon the question of ownership is clear, direct, and explicit, and he is corroborated by a number of witnesses and not directly contradicted by any.

The father, Wm. F. Scott, who, it is claimed, executed a chattel mortgage to Gandy, denies that he ever executed such mortgage. The only evidence in support of the mortgage is that of Gandy himself. There is no proof whatever that Wm. F. Scott owned the mules in controversy at the time the mortgage in question was executed, while, personally, he denies such ownership.

It is difficult to perceive, therefore, how the jury could have rendered a different verdict in the case. There is no material error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

GUST. UPPFALT, APPELLEE, V. AUGUST WOERMANN ET AL., APPELLANTS.

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[FILED SEPTEMBER 16, 1890.]

Ejectment: A COUNTER-CLAIM based on a contract of purchase, being in the nature of a cross-action, the defendant is not compelled to interpose it in an action of ejectment as a defense. If he so elect he may bring a separate action to enforce the contract, subject, however, to a liability to pay the costs in the second case.

APPEAL from the district court for Cuming county. Heard below before POWERS, J.

T. M. Franse, for appellants, cited, on the point that appellee was estopped from asserting an equitable title, since in the ejectment suit he had remained silent in reference thereto: *Niven v. Belknap*, 2 Johns. [N. Y.], 573; *Hall v. Fisher*, 9 Barb. [N. Y.], 17; *Bank v. Bank*, 50 N. Y., 575; *Blair v. Wait*, 69 Id., 113; *Chouteau v. Goddin*, 39 Mo., 229; *Dickerson v. Colgrove*, 100 U. S., 578; *Jamison v. Miller*, 64 Ia., 402; *Tiffany v. Anderson*, 55 Id., 405; *Beebe v. Wilkinson*, 30 Minn., 548; *Pitcher v. Dove*, 99 Ind., 175. The subject matter is *res adjudicata: Fischli v. Fischli*, 1 Blackf. [Ind.], 360; *Stockton v. Ford*, 18 How. [U. S.], 418; *Doty v. Brown*, 4 Comst. [N. Y.], 71; *Babcock v. Camp*, 12 O. St., 11; *Cromwell v. Sac County*, 94 U. S., 351; *Case v. Beauregard*, 101 Id., 688.

Bruner & Lewis, in reply to the latter contention, cited: *Cromwell v. Sac County, supra; Wilch v. Phelps*, 16 Neb., 515; *Brigham v. McDowell*, 19 Id., 407; *Russell v. Place*, 4 Otto [U. S.], 606; *Nims v. Vaughn*, 40 Mich., 356.

MAXWELL, J.

This is an action to enforce specific performance of a contract. The petition is very long and need not be specially referred to. The principal defense relied upon is a prior adjudication, which is set forth in the answer as follows:

"The defendants further allege that on or about the 29th day of September, 1883, the defendant John Nelson commenced in the district court in and for Cuming county, Nebraska, a court having jurisdiction of the parties and of the subject-matter of the action, a suit in ejectment against the plaintiff Gust. Uppfalt to recover possession of the land described in plaintiff's petition herein, and that said suit was based upon the same title and claim of title set forth in the petition herein as existing in the defendants Scranton, Olson, and Nelson; that said Uppfalt appeared in said action and based his defense upon the same contract and equitable rights thereunder set up by him as the basis of this action; that such proceedings were had in that case, that final judgment was in due time, and before the commencement of this action, rendered therein, awarding the possession of said premises to defendant Nelson, plaintiff in said action; and defendants allege and ask this court to adjudge that said judgment so rendered is and constitutes a bar to this action, and that all the questions involved herein are *res adjudicata* in the suit so prosecuted to final judgment.

"That in said suit in ejectment the defendant therein, plaintiff in this action, on or about May 25, 1886, made application to the said district court to be compensated for the same improvements and upon the same premises as are set forth in the petition in this suit, and that said application was heard by said court, and on the 27th of July, 1886, final judgment rendered thereon, denying said application; that said application was based upon the same

equities as are set forth in the petition herein and made the basis of this action, and defendants allege and ask this court to decree that said judgment rendered upon said application estops plaintiff from prosecuting this action and is in law a bar thereto.

"That defendant Olson held a contract of purchase of the premises in question prior to the contract of plaintiff; that said contract of purchase was from defendant Scranton and was a legal and valid contract, and was duly filed for record in the clerk's office of Cuming county, Nebraska, on the 23d day of November, 1881, prior to the contract of plaintiff, which was made December 22, 1882, and that plaintiff had notice of the same when he took his said contract, and at all times after February 12, 1883, had notice that the defendant Olson held a warranty deed of said premises.

"That the defendant Scranton is amply responsible financially and that if plaintiff has any claim or right under his contract with said Scranton said plaintiff has an ample and adequate remedy at law to enforce the same."

On the trial of the cause the court found as follows:

"1st. That plaintiff on the 7th day of December, 1880, bought of Wm. W. Scranton, executor of the last will of Joseph H. Scranton, deceased, the owner thereof, the following property to-wit: the N. ½ of the S. W. ¼ of section 23, township 22, range 7 east, in Cuming Co., Neb., the premises in controversy in this action, for the agreed price of four hundred and eighty dollars ($480) by an agreement in writing of that date duly executed by the said Wm. W. Scranton and said plaintiff.

"2d. That plaintiff paid to said Scranton on said contract the sum of eighty dollars ($80) on December 1, 1880, and twenty-four dollars ($24) on December 1, 1881, and on December 1, 1882, the sum of one hundred and twenty-four dollars ($124), and also the taxes assessed on said land for the years ———, amounting to eleven dollars

($11), and took possession of the same in June, 1882, under said contract and retained such possession until June, 1886.

"3d. That plaintiff has made improvements on the land since the execution of the contract, of the value of two hundred and fifty dollars ($250).

"4th. That said premises were unoccupied and unimproved at the time of such purchase by plaintiff.

"5th. That on the 22d day of December, 1882, the plaintiff had his said contract duly acknowledged and recorded in the numerical index of lands in said county.

"6th. That at the time of making the contract the plaintiff had no notice of any claim or interest in said premises by the said defendants, or any of them, and knew nothing of such claim or interest until some time in June, 1882.

"7th. That plaintiff tendered the balance due on said contract at the time and in the manner therein provided, and that plaintiff has complied or offered to comply with the the terms of said contract.

"8th. That defendant Niels M. Olson entered into an agreement for the purchase of said lands, together with other lands, with the said Wm. W. Scranton on the 23d day of October, 1880.

"9th. That said contract of Olson was not ackowledged or proven, but that on the 23d day of November, 1881, was spread upon the miscellaneous record of said county and was entered upon the numerical index of lands therein.

"10th. That on January 30, 1883, said Olson paid for said land in full under his said contract to said Scranton and obtained a deed in fee for said premises, which deed was placed upon record February 12, 1883.

"11th. That said Olson conveyed the premises by deed to defendant Nelson on February 9, 1883, who, in turn, sold and conveyed to defendant Woermann June 23, 1886, and on May 10, 1886, defendant Nelson mortgaged the same to defendant Renard, and on June 26, 1886, defend-

ant Woermann mortgaged the premises to his grantor, Nelson.

"12th. That on June, 1886, the plaintiff was ousted from the possession of said premises by the defendant Nelson, and as a conclusion of law, that the plaintiff, by virtue of his contract as aforesaid, had an equity or interest in said premises superior to that held by defendant Olson, under his contract, and that, at the time of making final payment for said premises and accepting a deed therefor, the said Olson had notice of plaintiff's interest in said premises, and took title thereto subject to such interest; that the said defendants Nelson, Woermann, and Renard acquired their several interests in said land with at least constructive notice of plaintiff's rights in such premises, and that the conveyances of the same from said Scranton to said Olson, and from Olson to Nelson, and from said Nelson to defendant Woermann were in effect an assignment of said Scranton's interest under said contract with plaintiff to said parties, and that said defendant Woermann took and now holds the legal title to said premises in trust for said plaintiff, and it is therefore considered and adjudged that, upon payment, or tender of payment, to the said Woermann of the balance due and to be paid by the said plaintiff to said Scranton, under said contract, together with interest thereon, as provided in said contract, and all taxes paid on said land by the said defendants, or either of them, and interest on said amounts then paid, amounting, in the aggregate, to five hundred and $\frac{30}{100}$ dollars ($530.30), the said Woermann is to execute a conveyance of said premises to the said plaintiff, and upon his failure or refusal so to do for the space of twenty (20) days after such payment or tender of payment, then this decree to stand as and for such conveyances, and that the said mortgage deeds from the said Woerman to said Nelson, and from said Nelson to said Renard, be canceled and held for naught to the extent that they cover said premises and that the plaint-

iff have and recover his costs from defendants, taxed at $45.48."

The principal question in this case is, whether or not the former action in ejectment is a bar to the prosecution of this action.

The case of *Uppfalt v. Nelson*, 18 Neb., 533, was brought by Nelson against Uppfalt to recover the possession of the land in controversy. The answer in that case was a general denial and the judgment was in favor of Nelson. The question of the equitable rights of Uppfalt under his contract was not pleaded in that action, although proof tending to show such rights was admitted. The proof, however, in that case, so far as the conclusiveness of the judgment is concerned, could go no farther than the pleadings, and the pleadings not being amended to conform to the proof, it was unavailing. The rule is well established "that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar; or as evidence, conclusive between the same parties, upon the same matter directly in question in another court; second, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question though within their jurisdiction, nor of any matter incidently cognizable, nor of any matter to be inferred by argument from the judgment." This rule was adopted and approved by Story, J., in *Harvey v. Richards*, 2 Gall., 229, and by Chief Justice Gibson in *Hibshman v. Dulleban*, 4 Watts [Pa.], 191.

The question arose in this court in *Gayer v. Parker*, 24 Neb., 643. It was held that a former verdict and judgment are conclusive only as to all the facts directly in the issue, and do not extend to facts which may be in contro-

versy and which rest upon evidence and are merely collateral. That case was carefully examined and it is believed that the decision is right. In ejectment under the statute the defendant under a general denial may prove an equity which negatives the plaintiff's right to the possession (*Dale v. Hunneman*, 12 Neb., 221); but can obtain no affirmative relief (*The Duchess of Kingston's Case*, 20 Howell's State Trials, 538).

Where he seeks affirmative relief by setting up a contract which will give him the right to demand specific performance, this must be done by answer in the nature of a counter-claim. In such case he becomes an actor in fact, and plaintiff, in the matter therein set forth, and such counter-claim does not come under the term defense. In effect, it is a cross-action in which the defendant seeks affirmative relief. He is not compelled to seek this relief in an action of ejectment any more than he is required to set up a set-off or counter-claim in other cases. The failure to set up the counter-claim may be ground upon which the court may tax the plaintiff with the costs of the second action, upon the principle that had the matter been submitted in the first action the extra cost would have been avoided.

There is no claim or pretense that the matter now in controversy was in issue in the former case and no case has been cited under a statute like our own holding that a defendant must set up his counter-claim in an action against him to recover the possession of land or be barred of the right to recover, and we cannot so hold. The other points in the case are not seriously urged and there is no error in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

R. R. TINGLEY ET AL., APPELLEES, V. J. S. GREGORY ET AL., APPELLANTS.

[FILED SEPTEMBER 16, 1890.]

Homestead: VALUE EXCEEDING STATUTORY LIMIT: LIENS. In an action in the nature of a creditor's bill to collect a judgment on premises held as a homestead the value of which exceeded $2,000 subject to certain liens, *held*, that a decree applying the excess over $2,000 subject to the liens existing against the homestead prior to the commencement of the action was supported by the weight of testimony.

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

George E. Hibner, and *J. S. Gregory*, for appellants.

Robert Ryan and *Thomas Ryan*, for appellee Tingley.

MAXWELL, J.

This is an action in the nature of a creditor's bill brought by the plaintiffs against John S. Gregory and E. Mary Gregory to subject certain real estate in the city of Lincoln, which is occupied as a homestead by said Gregory and wife, to the payment of a judgment. The petition is in the usual form and alleges the recovery of the judgment for deficiency after the sale of certain mortgaged premises, the issue of an execution thereon returned unsatisfied, and that the property in controversy belongs to J. S. Gregory and wife and exceeds in value $2,000.

W. W. Gregory is a son of J. S. Gregory and wife and purchased the property while this action was pending. In what way a deficiency judgment came to be rendered against the wife does not appear. The only question as to her liability raised by the answer is in connection with her hus-

band. If she was simply surety for him, the right to render a deficiency judgment against her is very doubtful. As the question is not raised by the pleadings it is probable that the debt was incurred in relation to her own separate estate, and that, therefore, she is liable as principal.

On the trial of the cause in the court below the issues were found in favor of the plaintiff and a decree rendered accordingly. A pretty careful reading of the testimony convinces us that the decree is the only one that should have been rendered, as it is in accord with the clear weight of testimony. The excess in value of the homestead over $2,000 is subject to valid liens which existed against it at the commencement of this action. Such liens will be paid in the order of their priority.

JUDGMENT AFFIRMED.

THE other judges concur.

BLACK ET AL. V. CHICAGO, B. & Q. R. CO.

[FILED SEPTEMBER 16, 1890.]

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1. **Common Carriers:** LIVE STOCK: ACT OF GOD. A common carrier of live stock is not an insurer against injuries unavoidably resulting from the inherent nature or propensities of the animals, or against loss caused by the act of God. While a carrier, when overtaken by an occurrence known as the act of God, is not bound to the highest degree of diligence to preserve the property from injury, yet, in such an emergency, he is required to bestow such care as an ordinarily prudent person or carrier would use under like circumstances, and if he fail to do so and loss results therefrom, he is liable.

2. ———: ———: ———. A snow storm of such violence as to prevent the moving of trains is an act of God.

3. **The instructions** given and refused considered, and *held*, properly given and refused.

ERROR to the district court for Kearney county. Tried below before GASLIN, J.

L. W. Hague, and *Stewart & Rose*, for plaintiffs in error, cited: *A. & N. R. Co. v. Washburn*, 5 Neb., 122; *Kinnick v. R. Co.*, 29 N. W. Rep. [Ia.], 772; *Lindsley v. R. Co.*, 33 N. W. Rep. [Minn.], 7; *Wilson v. Hamilton*, 4 O. St., 722; *K. P. R. Co. v. Nichols*, 9 Kan., 235; *St. L. & S. R. Co. v. Dormon*, 72 Ill., 504; *Agnew v. Costa*, 27 Cal., 425; *Clark v. R. Co.*, 4 Kernan [N. Y.], 570; *Maslin v. R. Co.*, 14 W. Va., 180; Angell, Carriers [5th Ed.], sec. 214; Lawson, Contracts of Carriers, sec. 16.

Marquett & Deweese, and *J. L. McPheely, contra*, cited: *Parrish v. State*, 14 Neb., 60; 1 Am. and Eng. Ency. of Law, 174, 177; *Phil., etc., R. Co. v. Anderson*, [6 Am. & Eng. R. Cases, 407] 94 Pa. St., 351; *R. V. R. Co. v. Fink*, 18 Neb., 93; *Gleeson v. Va. M. R. Co.*, 28 Am. and Eng. R. Cases, 202; *Balt., etc., R. Co. v. Sulphur Springs, etc., Dist.*, 96 Pa. St., 65; *Nugent v. Smith*, L. R. 1 C. P. D. 19, 423.

NORVAL, J.

On the 16th day of November, 1886, the plaintiffs delivered to the defendant at Minden, in this state, 136 hogs to transport to Omaha. On account of a severe wind and snow storm, the train on which the hogs were being shipped, was blockaded at Hastings for more than a day. When the cars arrived in Omaha, sixteen of the hogs were dead. Plaintiffs brought suit to recover the sum of $126.62 as their damages sustained. The defendant, in its answer, admits the receipt of the hogs, the loss of sixteen, and the value thereof as claimed by the plaintiffs. The answer also alleges "that after said hogs were received for shipment, and while in transit, there occurred a very severe,

unusual, and extraordinary snow storm, on account of which it was impossible for the defendant to move its cars, and make said shipment as promptly as it ordinarily would, and said hogs were conveyed to Omaha in the shortest possible time; that whatever damage the plaintiffs sustained, on account of the injury to the said hogs, and the death of the same, was caused on account of said storm and extreme cold weather." The answer also denies that the defendant was guilty of any negligence in the matter. The trial was had to a jury, resulting in a verdict for the company. The case is now before us on error.

The testimony discloses that it was storming when the hogs were started from Minden on the morning of the 16th of November, that they arrived in Hastings between ten or eleven o'clock the same forenoon, and at that time the snow was drifting, and the wind blowing a gale. The train was immediately made up to go east, when advices were received that the road was blockaded, and the train was abandoned. The hogs remained in the cars until the next forenoon, when they were unloaded, and it was discovered that eleven were dead and six crippled.

The principal question presented by the record for our consideration is, Did the defendant's employes exercise such diligence as to relieve the company from liability for damages as a common carrier? There is no conflict in the testimony as to the character and severity of the storm, or as to the efforts that were made to protect the hogs from the effects of the storm. J. K. Painter, who was agent of the company at Hastings, testified that the train carrying plaintiffs hogs arrived at Hastings during a blizzard, the wind was blowing a gale and the snow was falling; that the train was made up to go east, and waited for advices as to how the storm was along the road. The train was then reorganized with a less number of cars, when orders were received to wait until afternoon. Then they got advices not to start a train out that day. The train was aban-

doned on account of the severity of the storm, the road east of Hastings being blockaded. The yards in Hastings at that time were impassable on account of the depth of the snow, and the high wind. Drifts had formed that were difficult for a man to pass through, some as tall as an ordinary sized man. After the train was abandoned, an effort was made to get the cars to the stock yards. The yards being full of snow, an attempt was then made to put grain doors up to the sides of the cars; that was a failure on account of the wind. The next morning the yards were shoveled out, and as soon as possible the cars were taken to the yards and the hogs unloaded, fed, and given bedding. They were kept until the morning of the 18th, when they were forwarded on the first train leaving for the east, after the storm. On the evening of the 16th the stock yards were filled with snow, the fence on the north side was covered up, and the wind was blowing very hard. On the morning of the 17th the yards were in such condition that the switch engine could not reach the cars until they were shoveled out. The witness testified further, on cross-examination, that it began snowing early on the morning of the 16th and continued into the night; that it was very cold; that an effort was made to get the hogs to the stock yards on the 16th; that the switch engine stuck in the yards and remained out all night; that the storm was the most severe the witness had seen during four years he had been with the road.

G. H. Hartsaugh testified that at noon of the 16th there was a "blizzard," and that it continued during the afternoon and evening. It was a very severe storm, snowing very hard, wind from the north and cold towards evening; that he had seen one or two storms in the course of a number of years, just as bad, but had never seen a worse one. It was growing worse all the time.

Albert Gains testified that his business was checking cars and taking care of the stock yards at Hastings; that

he remembers the cars containing plaintiff's hogs; that when they arrived it was snowing, blowing, and getting colder; that they were put into a train made up to go east, and it was abandoned on account of the severity of the storm. Nothing was done with the cars containing the hogs that afternoon, for the reason that the snow had drifted too bad. By three o'clock in the afternoon it had drifted underneath the cars solid. He tried to put up grain doors on the north side to keep the wind off, but the wind blew so hard that he failed in the attempt. He says, "the one I had the wind blew it away from me, then I helped another man with his; we got about ten feet further and had to stop; there were four of us trying with the doors." The weather was cold and getting colder. The cars quit moving through the yards and switches about noon of the 16th.

John Glennan testified that it was snowing and blowing hard on the 16th; that the hogs were unloaded on the forenoon of the 17th, and were watered and fed. Before unloading it was necessary to get them out of the drift. Some of the cars were nearly covered, and the stock yards were pretty nearly covered up.

G. M. Rogers testified that the storm was severe and cold; that he tried to carry grain doors and tack them on north side of the cars, but could not possibly do so as the wind was so strong; that at noon the snow in the yards was deep and getting deeper.

George Jacobs testified that on the 16th it was impossible to see a house an either side of the street on account of the snow and wind. Witness states that he saw four persons trying to carry the grain doors to the cars, and that they got a few feet with them but could not get any further.

W. G. Melson, called as a witness for the plaintiff, testified that in cold, stormy weather, hogs once put in motion in cars, at the first delay will begin to "pile up" away from

the doors, and are likely to smother those underneath; that the proper thing to do when they cannot be unloaded is to put a man there to keep them from piling up; that while the cars are in motion there is no such danger. The witness was then asked this question upon cross-examination: "You would probably been standing there frozen to death covered with snow in the morning, with a stick in your hands?" The witness answered, "I guess so."

The plaintiff Jeppa Jorgenson testified that the hogs were in good condition when delivered to the defendant. The remainder of his testimony was the same as the witness Melson's, except that he did not think he would have been frozen to death had he remained with the hogs and given them the proper care.

That the storm which overtook the train containing plaintiff's hogs was unprecedented cannot be doubted. On account of the drifting snow it was impossible for the train to leave Hastings for Omaha on the afternoon of November 16; that the snow had so drifted as to blockade the cars in the yards at Hastings, and filled the stock pens with snow so that the hogs could not be unloaded. All reasonable efforts were put forth by the employes of the defendant to nail grain doors on the north side of the cars containing the hogs, for the purpose of protecting them from the storm.

It is contended by the plaintiffs that some one should have remained with the hogs and prevented them from smothering each other. It was for the jury to say whether in view of the severity of the storm such care should have been given. After a careful reading of the testimony we are satisfied that there was sufficient evidence to warrant the jury in finding that the defendant was not guilty of negligence in that respect.

Objections are made to certain instructions given by the court on its own motion, and to the refusal to give the instructions requested by the plaintiffs.

The fourth, fifth, and sixth of the instructions given are as follows:

"Fourth—If you find the loss of the sixteen hogs and damage was occasioned by the snow storm and said cold weather and the elements, the defendant using the ordinary care in protecting and caring for said hogs and shipped them as soon as practicable, under all circumstances you will find for the defendant.

"Fifth—If you find the defendant did not use ordinary care in protecting, caring for, and transporting the said hogs, under the circumstances you will find for the plaintiffs, assessing their damages at such sum as you think the evidence warrants, not exceeding the amount sued for in the petition.

"Sixth—Unless you find from the evidence the loss and damage complained of was occasioned by the act of God, or, in other words, the severe storm and cold, which could not have been prevented by use of ordinary care, under the circumstances you will find for the plaintiffs, bearing in mind the burden is upon the defendant to show the loss was occasioned by the storm and cold which ordinary care could not prevent, and it would require a greater degree of care; or, in other words, greater care and caution in caring for the hogs would be required in a snow storm than in ordinary fair weather."

The plaintiffs requested the following instructions, which were denied:

"First—In transporting the hogs in question the defendant, being a common carrier, was an insurer of the safe delivery of the property and was bound to use all care and precaution for their safety while in transit, so far as human vigilance and foresight and care would go. The defendant would be absolutely liable to plaintiffs for all injuries sustained by the hogs in question while in their possession from the time they were received at Minden, Nebraska, until they were delivered to the consignee at Omaha, Ne-

braska, except only for such injuries as may have been 'unavoidable' from the essential nature of the property itself, the nature and propensity of the hogs, and except further such injuries as may have resulted from the act of God or the public enemy.

"Second—To excuse the defendant from liability on the ground that the injury to the hogs in question was caused by the act of God, the burden of proof is upon the defendant to prove to you by a preponderance of evidence that the act of God was the immediate cause of the injury. By the term 'act of God' is meant superhuman, or something beyond the power of man to foresee or guard against."

"Third—If you believe from the evidence that the loss of the hogs in question was caused by the 'piling up' and thus suffocating or being otherwise injured while the cars were standing in the yards at Hastings, Nebraska, and if you further believe from the evidence that such loss could have been prevented by the defendant unloading them into the stock pens, and while in such pens given them good bedding, care, and personal attention, or if you believe from the evidence that the defendant could have prevented the hogs in question from piling up in the cars while standing in the yards at Hastings, by vigilant watching, and thus prevented the loss, and that the defendant negligently failed to do either, then you will find for the plaintiffs, for under such circumstances the act of God was not the cause of the loss, in such sense as to exempt the defendant from the liability."

In passing upon the rulings of the district court on the giving and refusing of these instructions, we must necessarily determine the extent of the defendant's liability as a common carrier. The rule seems to be that a carrier of live stock is an insurer of the safety of the property while it is in his custody, subject to certain well defined exceptions. He is not liable for injuries resulting unavoidably from the nature and propensities of the property, nor for

damages resulting from the act of God, or the public enemy. The evidence brings this case within the exception to the general rule. An unprecedented snow storm of such violence as to obstruct the moving of trains falls within the term act of God. (*Ballentine v. N. M. R. Co.*, 40 Mo., 491; *Pruitt v. H. & St. J. R. Co.*, 62 Id., 527.) While carriers are not insurers against loss occasioned by the act of God, they cannot, on the happening of such an event, abandon the property. What degree of care and diligence at such a time is required in caring for and protecting the property from injury and loss? The plaintiffs insist that the carrier is required to bestow the highest degree of care, and if he fails to exercise all possible diligence, and injury occurs by reason thereof, he is liable.

In *Gillespie v. St. L., K. C. & N. R. Co.*, 6 Mo. App., 554, the court, in considering the degree of diligence required of a common carrier as against an act of God, say:

"By these instructions the difference between the responsibility of the carrier as against the act of God, and as against these perils which the carrier is answerable for, is ignored. The carrier is held by the instructions to the highest degree of foresight and care as against an act of God. But the law imposes on him no such liabilty. It has been truly said there is hardly any act of God, in a legal sense, which an exhaustive circumspection might not anticipate, and supposable diligence not avert the consequence of. So that the doctrine would end in making the carrier responsible for acts of God, when by law the passenger and not the carrier assumed the risk. It has been said that to make the rule a working rule, and give to the carrier the practical benefit of the exemption which the law allows him, he must be held, in preventing or averting the effect of the act of God, only to such foresight and care as an ordinarily prudent person, or company in the same business, would use under all the circumstances of the case."

We have carefully examined the numerous authorities bearing upon the question, and the rule established by the adjudicated cases is that the carrier is required to exercise ordinary or reasonable care and diligence to secure the property committed to his custody from loss or damage in order to protect himself from injury arising from the act of God. If his negligence contributes to the injury, he cannot claim exemption from liability. (*Morrison v. Davis*, 20 Pa. St., 171; *Railroad v. Reeves*, 10 Wall., 176; *Nashville, etc., R. R. v. David*, 6 Heisk., 261; *Denny v. N. Y. Cent. R. Co.*, 13 Gray, 481; *Sweetland v. R. Co.*, 102 Mass., 276; *R. Co. v. Anderson*, 6 Am. & Eng. R. Cases, 407; *Gleeson v. V. M. R. Co.*, 28 Id., 202; *Ballentine v. N. M. R. Co.*, 40 Mo., 491; *Pruitt v. H. & St. J. R. Co.*, 62 Id., 527; Hutch., Carr., secs. 201, 202.)

In the instructions given the rule is stated that if the defendant did not use ordinary care in protecting, caring for, and transporting the hogs, it was liable. We were at first inclined to believe that the instructions were faulty, on account of the using of the word ordinary; but after further consideration we are satisfied that there is no substantial difference between ordinary care and reasonable care. It seems that the words are interchangeably used. (*Kendall v. Brown*, 74 Ill., 232; *Fallon v. City of Boston*, 3 Allen, 38; *Neal v. Gillett et al.*, 23 Conn., 436.)

Under the testimony, there was but one controverted fact to submit to the jury, and that was whether the defendant was guilty of negligence. The instructions taken as a whole, stated the law applicable to the case, and fairly submitted to the jury the question of negligence. The only conclusion that could have been drawn from the testimony was that the storm was extraordinary and unprecedented for that season of the year. While the charge of the court did not state, in so many words, that the act of God must have been the immediate or proximate cause of the loss, in order to excuse the company from liability, yet

that was the plain purport of the language used in the fifth paragraph. The jury could not fail to understand from that instruction that if the defendant did not use ordinary care, the negligence of the defendant was the proximate cause of the loss, and that the plaintiffs were entitled to damages.

The plaintiffs in error further contend that "there was no evidence to justify the submission to the jury by instructions the question as to whether the loss was occasioned by the act of God." True the loss occurred by the hogs "piling up," and thereby smothering those underneath, yet the propensity to do this was only while the cars were standing. If it were not possible to unload the hogs on account of the drifting snow, as the testimony tends to show, and if the defendant's employes omitted nothing that a prudent person or carrier would have done under the circumstances to avert the loss, then the loss must be attributed to the storm.

By the first instruction requested by the plaintiffs the defendant was held responsible if it failed "to use all care and precaution for the safety of the hogs while in transit, so far as human vigilance, foresight, and care would go." This was a higher degree of diligence than the law demanded of the defendant. The second request was substantially covered by the sixth instruction given. By it the jury were told that the burden was upon the defendant to establish that the loss was occasioned by the storm, and it also stated, in language easily understood, that the severe storm and cold was an occurrence known as the act of God.

The third request held the defendant liable, if, by vigilant watching, the hogs could have been prevented from smothering in the cars. It was not to be expected that any one would remain in such a storm and care for the stock.

The plaintiffs allege error on the part of the court in

making certain remarks in the presence of the jury. The judge, in ruling upon an objection made to the testimony, stated: "I shall instruct the jury that the defendant, to avoid liability, must show that it used all reasonable means to care for this stock." Subsequently, the jury were so instructed. We do not see how the language of the court could have been prejudicial to the plaintiffs.

The plaintiff, Jeppa Jorgenson, was asked this question: "You may state, from your experience in handling hogs and shipping them, if there is any danger, while a car is standing still, of their piling up." Counsel for the defendant objected, as improper, incompetent, and no foundation laid. The attorney for the plaintiffs then stated what he considered proper testimony, and the court, in reply, said: "I will allow the gentleman to prove anything he wants. I will instruct the jury what the law is when we get to that." The objection was sustained and exceptions were taken to the ruling, and to the language of judge. By sustaining the defendant's objections to the succeeding questions propounded to this witness, and to the plaintiffs' offer of testimony subsequently made, the jury could not have understood that the court intended to permit immaterial or improper testimony to be received, if offered by the plaintiffs. Better, it would have been, had the remarks not been made, yet we have no doubt that they did not influence the verdict.

The remaining assignment of error consists in sustaining the defendant's objection to this question asked by plaintiffs of the witness Melson: "State whether, from your experience, fat hogs, when in cars, would freeze to death when the thermometer was at zero or a few degrees above." The error, if any, in sustaining the objection was subsequently cured by allowing plaintiffs to fully prove the fact sought to be elicited by the question, which testimony was not controverted by the defendant.

There is no reversible error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

EDWARD F. DAVIS v. H. W. GIDDINGS ET AL.

[FILED SEPTEMBER 16, 1890.]

1. **Conditional Sale.** The evidence examined, and *held*, not to establish a conditional sale.
2. **The instructions** requested by the defendant, not being based upon the testimony, were properly refused.

ERROR to the district court for Gage county. Tried below before BROADY, J.

R. W. Sabin, for plaintiff in error, cited: *McCormick v. Stevenson*, 13 Neb., 72; *Romberg v. Hughes*, 18 Id., 581; *Rawson Mfg. Co. v. Richards*, 35 N. W. Rep. [Wis.], 40; *Thomas v. Richards*, Id., 42; *Hoagland v. Van Etten*, 22 Neb., 681.

R. S. Bibb, contra.

NORVAL, J.

This was an action of replevin, brought by the defendants in error to recover the possession of a bay mare which the plaintiff in error, as sheriff of Gage county had taken under a writ of attachment issued out of the county court of said county, in an action wherein one I. L. Curley was plaintiff and A. N. Wilcox was defendant. The case was tried before a jury, who found the right of property and right of possession to be in the plaintiffs below.

The first assignment of error is that the verdict is not sustained by the evidence. It is claimed by the plaintiff in error that in May, 1886, the mare was sold by one of the defendants in error, H. W. Giddings, to Wilcox upon certain conditions, and that neither the judgment creditor, Curley, nor the sheriff, at the time the mare was attached, had any notice of the conditions of such sale. On the part of the defendants in error it is urged that the mare was owned by them, and that Wilcox never bought or owned her. The only testimony bearing upon the question of ownership was given by H. W. Giddings. He testified that the mare was the property of the defendants in error. His explanation of how the mare came into the possession of Wilcox is as follows:

"About the 20th of May, 1886, Wilcox came to me and wanted to buy a team; I could not spare a team; I told him if he could get along a week or ten days I could spare one critter; in a few days he came back, and he had lost one horse and he said he wanted one horse badly to work on his mill that he ground mortar for brick. I told him I had one, if it suited, I could spare after the 1st of May, but I did not know whether it would suit him; it was rather an inferior critter about some business, work well some places, and some it would not; I told him I would let him try it and if it suited him he might have it for so much; he appointed a day I should bring it over, which I did; we hitched it up and put it on the sweep and I told him I thought it would work all right; I think it was about nine o'clock we hitched on, and I staid until about eleven; he seemed to be satisfied it was all right, and in case it was all right he said he would give me $90 for it and give E. C. Saulsbury for security for sixty days; he rather pay the money, he had it earned but could not get it then, and if I would get along with that he would take it. Well, about the time we got ready to leave, Saulsbury came in a buggy—this was on the 10th day of June, but we had

talked about the way it should be paid in case the critter suited him, before that several days. Saulsbury was called to sign the note, and he had quite a long talk with this gentleman, and he refused to sign it; the man said he didn't know what he was going to do, he wanted a horse and I wanted my pay, and he proposed to give me a mortgage on the horse for that amount and wait on him sixty days; I told him I could not do that, that he owed me then considerable money and I wanted it, and if I couldn't get any money on the horse I proposed to keep the horse; he said he didn't know but he might pay me some the next week, I think this was Tuesday or Wednesday, and he said by Saturday I will let you know what I can do; I left with this understanding if he paid me what he owed me and made enough more to make fifty dollars—he finally agreed to pay me $25 on this mare and give me a note for the balance back.

Q. What was he to do in the meantime?

A. In case he did do that he was to pay me twenty-five cents a day for the use of this horse, and if he did I was not to receive anything from this time until he did that business.

Q. State whether or not he ever paid any money.

A. On this horse? No, sir.

Q. Did he ever give that note and mortgage?

A. No, sir.

* * * * * * *

Cross-examination:

Q. You and Wilcox agreed on the price?

A. Yes, we didn't disagree on anything.

Q. What was the price?

A. Ninety dollars.

Q. Under that agreement you left the horse in his possession?

A. That is the price named.

Q. Under the agreement that he should give you a note in the future, you left the horse with him?

A. No; the agreement was he was to pay me $90; twenty-five dollars in cash and the balance a note to make it up to $90.

Q. You said that he was to give you a note with Saulsbury on it?

A. He was to give me $90 for the mare.

Q. He was to give you a note of $90 on Saulsbury?

A. That was the first contract.

Q. And under that you left the horse in his possession?

A. No, sir.

Q. Do you mean to say Saulsbury was there the day you took the horse over?

A. Yes, he was there and failed to sign the note.

Q. Then you made another agreement with him?

A. I was going to take the mare home.

Q. Then you left it there under the agreement that he was to pay you $25 and give a mortgage on the mare for the difference?

A. Here is what I done. When he failed to give that note with the man as security, I asked if he could pay some money, and I would sell the mare on time if he paid enough money, and he said he couldn't do it, he hadn't enough money. I said, "Won't Saulsbury get the money and let you have $24?" He says, "I don't know just how I stand with Saulsbury; we are in rather a muss about brick and I don't know what damage he is going to call on me for;" he says, "I will tell you what I will do, I will pay you what I can." What he would do he said he would do by the first of July. I says, "If you can pay me enough money now so I am sure of the balance you and I can trade yet." He asked what I would do. I says, "Pay what you owe me now, about $18 or $19, and enough to make it $50, or $25 on the mare, and then I will take a note and your brother-in-law for security."

Q. Was there any time fixed?

A. He was to do that by the first day of July.

* * * * * * *

Q. And if he didn't it was to be your mare?

A. If he didn't do it, it was to be my mare and he was to pay for the use of it.

Q. Well, under that agreement you left the mare in his possession?

A. I left the mare in his possession.

Q. As I understand, if he came up to the agreement it was a trade, and if he did not it was not a trade?

A. If he filled that agreement it was a trade, if he didn't it was not a trade, the horse was mine; that was my understanding and I know it was his.

The testimony also shows that Wilcox absconded about the 23d or 24th day of June, leaving the mare in controversy on the place where he had resided, and that she was immediately attached to pay a claim against Wilcox. The testimony falls very far short of establishing a conditional sale. There was but an offer to sell, and Wilcox had until July 1 to comply with the terms of the proposition by paying $25 in cash and giving a secured note for the balance of the agreed price. Wilcox having never accepted the offer, no title to the mare ever passed to him. She was therefore not subject to attachment for the debts of Wilcox.

Complaint is made of the refusal of the court to give certain instructions requested by the plaintiff in error. The first request was as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiffs made a conditional sale of said horse in controversy to the attachment debtor, A. N. Wilcox—that is, in the fore part of June, 1886, made a contract of sale to said Wilcox of said horse upon condition that he (Wilcox) would on the first day of July following pay plaintiffs twenty-five dollars and give plaintiffs his secured note for the difference between that and ninety

dollars in payment of said horse, but with the further agreement between them that the ownership of the horse should remain in plaintiffs until said Wilcox should pay said money and give said note, and in case he should do so by the first of July, as above stated, the horse should be his property, but if he did not, to pay twenty-five cents a day for the use of her while he had her, and that thereupon the plaintiffs delivered the possession of said horse under said agreement to said Wilcox—the court instructs you that if you find these facts to exist from the evidence, that this was a conditional sale of said horse from plaintiffs to said Wilcox; and the court further instructs you that if you find from the evidence said conditional sale to exist as above set forth, and find from the evidence that the defendant, as sheriff, levied the attachment in evidence on said horse on the 28th day of June, 1885, while the said property was still in the possession of said Wilcox under said agreement, without notice on the part of the sheriff or I. L. Curley, the attachment creditor, of any claim of ownership to the horse by plaintiffs, then you should bring in a verdict for the defendant."

It is apparent that it would have been error to have given this request. It, in effect, held that the evidence established a conditional sale and that Wilcox had possession of the mare under such an agreement. As has already been stated no such an inference could properly be drawn from the testimony.

The plaintiff in error's second request was an instruction to find for the defendant. Under the testimony the defendant was not entitled to have the jury so instructed. Instead of the evidence being all on the side of the defendant, it fully sustained the position of the plaintiffs below.

The third request of the plaintiff in error, which was denied, was in language as follows:

"The court instructs the jury that actions must be prosecuted in the name of the parties in interest, and the evi-

dence in this case having disclosed the fact that the plaintiff Harvey Giddings, at the commencement of this suit, had no interest in the property in controversy more than being the husband of the real party in interest, the court instructs you the plaintiffs were improperly joined, and must fail. You are therefore directed to bring in a verdict for the defendant."

There is in the bill of exceptions testimony tending to show that the mare was owned jointly by both of the plaintiffs, and there is likewise testimony from which the inference could be drawn that Mrs. Giddings was the sole owner. In view of this conflict in the testimony the court had no right to assume in an instruction that one of the plaintiffs, Harvey Giddings, had no interest in the property. It was for the jury to say, under all the testimony, who owned the property at the commencement of the action.

Finally, it is urged that the court erred in refusing to submit special findings to the jury. It nowhere appears in the record before us that the defendant made a request for special findings. This point, therefore, cannot be considered. The judgment is

AFFIRMED.

THE other judges concur.

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CHICAGO, B. & Q. R. CO. v. PAUL KRISKI.

[FILED SEPTEMBER 17, 1890.]

1. **Malicious Prosecution: PROBABLE CAUSE.** In an action of P. K. against the C., B. & Q. R. Co. for malicious prosecution in the arrest and trial of the plaintiff for the larceny of railroad ties, on the oath and evidence of B. F. P., the agent of defendant, *held*, that if, from the evidence, the agent had reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief

that the accused was guilty of the offense, and that the agent believed that he was guilty, then there was probable cause for the prosecution of the accused, and therefore malice was not to be presumed on the part of defendant or its agent.

2. ———: ———: NEW TRIAL. The court below having so instructed the jury upon the trial, and the evidence clearly warranting the instructions given, and the jury having returned a verdict for the plaintiff, *held*, error in overruling the defendant's motion for a new trial.

ERROR to the district court for Platte county. Tried below before POST, J.

J. B. Strode, *Marquett & Deweese*, and *M. Whitmoyer*, for plaintiff in error, cited: *Dunbier v. Day*, 12 Neb., 596; *Meyer v. R. Co.* 2 Id., 342; *Turner v. O'Brien*, 5 Id., 543; Cooley, Torts, 210, 211, 213; *Ross v. Langworthy*, 13 Neb., 495; 1 Addison, Torts [6th Ed.], 225 and cases cited.

George G. Bowman, and *Sullivan & Reeder*, *contra*, cited: *Johnson v. Miller*, 29 N. W. Rep. [Ia.], 743; *Ross v. Langworthy*, 13 Neb., 492; *Chapman v. Dunn*, 56 Mich., 31; *A. & N. R. Co. v. Bailey*, 11 Neb., 333; *Moller v. Moller*, 22 N. E. Rep. [N. Y.], 169.

COBB, CH. J.

This action is brought on error to the district court of Platte county.

The plaintiff alleged in the court below that the defendant falsely and maliciously, and without reasonable or probable cause therefor, caused the plaintiff to be charged before a justice of the peace of Platte county, with having on the 20th day of May, 1887, unlawfully and feloniously stolen and carried away twenty-five railroad ties, of the value of $5, the property of defendant; that said charge was reduced to writing and sworn to by Benjamin Pinneo, an employe of defendant who at the time was in the service of defendant, and in making said charge was acting within

the scope of his employment and authority; that the defendant, through said employe, on the 23d day of May, 1887, caused said justice to make out a warrant for the apprehension of plaintiff, and falsely and maliciously, and without reasonable and probable cause therefor, caused plaintiff to be arrested on said charge, and to be imprisoned against his will in the common jail of said county; that a trial was had and that plaintiff in this action was acquitted and discharged; that he was innocent of the charge so made against him; that by reason of the premises, plaintiff was greatly injured in his credit and reputation, and brought into public scandal, infamy, and disgrace, and has suffered great anxiety and pain of body and mind, and has been damaged in the sum of $1,900, for which said sum he asks judgment.

Defendant in its answer in the lower court alleged that on or about the 20th day of May, 1887, railroad ties belonging to it, of the value of $5, had been stolen, taken, and carried away from it, in said Platte county; that two persons, believed to be Peter Kriski and Paul Kriski, father and son, the latter the plaintiff in this action, were seen at said date loading, taking, and carrying away from defendant's track in said county said railroad ties, and hauling and taking them to the residence of the said Peter Kriski; that Benjamin Pinneo, having good and probable cause to suspect and believe that said Peter and Paul Kriski committed said offense, made complaint before J. C. Cowdry, a justice of the peace in and for said county, charging them jointly with stealing said ties, upon which charge said Peter and Paul were arrested as alleged, held in custody for trial, and on the 25th day of May, 1887, tried, and said Peter was found guilty by a jury, and Paul was found not guilty; that the said complaint was made without malice and upon reasonable and probable cause for believing that the plaintiff, Paul Kriski, was guilty as charged.

The plaintiff replied denying each and every allegation of new matter contained therein.

There was a trial to a jury March 29, 1889, with a verdict for the plaintiff for $250.

The defendant's motion for a new trial was overruled, and judgment entered upon the verdict, and upon which the plaintiff in error assigns errors for rehearing:

"1. The court erred in admitting the testimony offered by the defendant herein, which was objected to by the plaintiff herein, as shown by the record and the rulings of the court excepted to at the time.

"2d. The court erred in rejecting testimony offered by the plaintiff herein, which error the plaintiff herein excepted to at the time.

"3d. For errors of law occurring at the trial and duly excepted to by the plaintiff herein.

"4th. The court erred in overruling the motion of the plaintiff herein to set aside the verdict of the jury and for a new trial.

"5th. The court erred in giving the 9th paragraph of its instructions to the jury.

"6th. The court erred in giving the 10th paragraph of its instructions to the jury, as not applicable to the issues, and misleading."

On the trial the plaintiff called B. F. Pinneo who testified that he resided in Lincoln, Nebraska, in May, 1887, and that he then was, and still is, in the employ of defendant; that it was in the line of his duty to protect the company from thefts and to prosecute thieves and like characters; that he had been in the employ of the company since June, 1881, and that he made the complaint against the defendant in error before J. C. Cowdry, justice of the peace of Platte county, in May, 1887. This witness was afterwards recalled by defendants, in the district court, and testified that he was the same who signed the complaint against Peter and Paul Kriski, charging them with steal-

ing railroad ties from the defendant; that at the time stated he received a letter from the company's superintendent, McConniff, of the B. & M. division, written by the section foreman, David McDuffy, giving information of the loss of ties, with directions for witness to pay attention to the business. Witness went with the letter to Columbus, and there saw McDuffy, and his son John, and John Mitcek, who informed witness of the stealing of railroad ties from the line of the road; that they had seen two persons loading ties on a wagon, start and drive on north from the line of the road; that John McDuffy had been sent to observe where and by whom the ties were taken, and had followed the parties up to the house of Peter and Paul Kriski, who were in the yard unhitching their team from the wagon on which the ties were then loaded. On hearing this circumstantial account of the apparent theft of the ties, the witness procured Geo. Harmon, a deputy sheriff, to accompany him to Peter Kriski's house; that coming within a short distance of the place they saw a son of Peter Kriski herding cattle, who told them, in answer to inquiries, that his father and older brother had hauled some railroad ties, and pointed in the direction of both the lines of the B. & M. and U. P. roads. The witness asked where his elder brother was, and the boy said he was up at the house, about the horses. Witness and the deputy sheriff then went to where Paul, the plaintiff, was engaged with the horses, near the house, and asked him about the ties; he said "they had got some ties and flood-wood about the bridge," pointing the same way, to the lines of both roads mentioned; that the boy, Paul, told conflicting stories as to where the ties came from; they then went to the house and had quite a talk with Peter Kriski, who said he got the ties on the railroad; there were from seven to fifteen ties on the wagon, and ties were scattered all around the yard. Witness asked Peter Kriski if he wanted to buy the ties, and he replied with

the inquiry what was wanted for them, and was told thirty cents each. Kriski said they were old and rotten and not worth that; there was no one present except deputy sheriff, Peter Kriski, and witness.

It appears that at this time neither the witness nor the deputy sheriff could converse in German or Polish, nor could Kriski speak or understand English but imperfectly; that Pinneo and Harmon returned to the town of Columbus and, procuring an interpreter, went again to Kriski's and told him, through the interpreter, that he would have to pay thirty cents each for the ties, which he refused. After returning to town and procuring a warrant the deputy sheriff arrested Peter Kriski and his son Paul and brought them before J. C. Cowdry, a justice of the peace. Witness had no other conversation or intercourse with the parties arrested than that stated, and had never before seen or heard of either one of them; that he had no ill feeling towards either, and his only motive in causing their arrest was the same as in all other cases of punishment for crime, and was a matter of duty only with him.

By counsel for defendant:

Q. State whether you believed they were the parties who had taken the railroad ties.

A. I did fully believe it, or would not have made the complaint. I was acting in good faith in the prosecution of the complaint.

Returning to the evidence of the plaintiff, Charles Schroeder testified that he knew Benjamin Pinneo, by sight, and knew Peter Kriski, knew of his arrest for stealing railroad ties; that he speaks the German tongue as also does witness; that witness interpreted between Pinneo and Kriski shortly before the latter was arrested and tried.

By counsel for plaintiff:

Q. Was there anything said in that conversation as to where Kriski got the ties found at his place?

A. (Over the objections of defendant.) Yes, sir; Kriski

stated that he had not stolen them, and that they had not been stolen from the B. & M. railroad at all; that he had received them from the U. P. Co.'s section boss; that a young fellow had been working under the boss and brought them there; that his name was Peters, and that one Barnish had taken the ties from the river.

John Herbert, a witness for the plaintiff, testified that he lived at Benton in the year 1887; that he was employed as section foreman on the Union Pacific railroad; that L. Peters worked for the company, under him, at several different times, and nearly every season part of the time; that he lived at different places while working under witness, and that for the last two years with his father-in-law, Peter Kriski, prior to May, 1887, and for a short time on the Bowman farm; that Kriski's was two miles west and a little north from Benton; remembers that in May, 1887, it was alleged that railroad ties were stolen from the B. & M. railroad. Witness cannot say if Peters worked with him just at that time, but he did shortly afterwards, and during the time that he worked and lived at his father-in-law's, Kriski's, witness let him have some ties from time to time; that witness saw Pinneo, at Benton, a year and a half ago when he was down to see us for a witness, claiming that ties had been stolen from the B. & M. road. It was the case before J. C. Cowdry at Columbus; that Pinneo had some conversation with Peters and witness and asked witness if he had given Peters any railroad ties, and witness told him that he had, and there was something said about new ties, and witness told him that he had given Peters a new tie that was broken which he took away; didn't remember that he told Pinneo at the time that the old and new ties he had seen at Kriski's had come from the U. P. Co.'s road; this was the forenoon of the day of the trial which was heard after noon.

George Hoagland, a witness for plaintiff, testified that he lived in Colfax county, distant two and a half miles

west and a little north of Benton, on the farm adjoining to Kriski's; remembers that it was said there had been railroad ties stolen from the B. & M. road in May, 1887; that during that morning he saw Peter Kriski (but did not see Paul) planting corn, with a planter, a little eastward of his house, sometime towards noon-day, at which time young McDuffy came to his house and made inquiries as to who lived at the house below, their names and appearance, etc. Witness hesitated to reply, and asked him his business, etc.; he said they had been stealing ties from the B. & M. road; that he had followed them up, and described their team; witness told him he was mistaken, that he had just come up from there, and saw the old man planting corn that forenoon.

Peter Kriski was sworn and examined for the plaintiff and testified through an interpreter; that he lived in Colfax county in May, 1887; that he knows B. F. Pinneo, who visited him in that month and year, at his farm; that he could not talk with him, and had an interpreter brought by Pinneo, who told him he should pay $40.

Q. For what?

A. For railroad ties.

Q. What ties?

A. Old ties.

Q. Where were they?

A. In my yard.

Q. Did he say what he would do with you if you did not pay the forty dollars?

A. He would arrest me; and wanted to get me arrested.

Q. Did you pay him, and why not?

A. No. Should I pay him any money, if I was innocent?

Q. Did he make any charges or accusations against you there?

A. He accused me of having me arrested if I did not want to pay.

Q. Did he accuse you of any crime?

A. He charged me with being a thief, that I had stolen ties.

Q. What did you tell him?

A. That the ties were from my son-in-law, L. Peters; that was when I refused to pay the $40. Pinneo went away and afterwards the same sheriff who was with Pinneo returned and arrested him and his son Paul, bringing them to Columbus before the justice of the peace late in the evening.

The testimony of the witness as to what occurred in and about the justice's court, and especially as to what was said and done by Schroeder, the interpreter, is not important to report, but he stated that while he told his story to the interpreter, the interpreter did not talk with Pinneo at all. The witness knew the young man McDuffy, saw him in May, 1887, but did not talk to him; that he, McDuffy, talked to witness in regard to the Barnishes, father and son, who were there, "and came there to his yard" with a wagon and team; witness was planting corn when he saw them, on Friday; on Tuesday following witness was arrested; had not been to the river that day, nor had his son Paul; that his son-in-law, Peters, had hauled ties from the Bowman farm with a mule team.

It appeared from his cross-examination that the interpreter mentioned as accompanying Pinneo and the deputy sheriff to his house was a shoemaker from Columbus, named Garbert, whose whereabouts were unknown at the time of the trial.

The plaintiff was sworn in his own behalf and testified, that he remembered the day that McDuffy came to his father's house, in May, 1887, about noon; that on that morning he had been hauling wood for his brother-in-law, L. Peters, and helping him move from the Bowman place to his father's; that they had a mule team, and had some railroad ties in their wagon brought away from the Bow-

man place to "our place"; that when they got to his father's house Theo. Barnish and Steve Barnish, his son, came along there, after witness, from the direction of the river; they had a wagon and team; witness's father had been planting corn that morning; the Barnishes had an iron gray and bay horse in their team; his father had a white mare and dark brown horse, not resembling the other team much; saw young McDuffy come up there after the Barnishes came, from the same direction, on foot; he went down to Barnish's wagon, and showed something, and said something; Barnish and his son were in their wagon; McDuffy talked to them, but not to witness or to his father; he saw witness unhitching the team but said nothing to him; that Barnish does not look like the witness's father, nor does witness look like Barnish's son; that Pinneo asked him where they got the ties, and he told him they were not their ties but belonged to Peters; that Joe Garbert was sitting in the buggy, but witness talked to Pinneo and not with Garbert. Witness was arrested, taken to Columbus, at 9 P. M. and put in jail.

L. Peters, a witness for the plaintiff, testified that he resides in Colfax county; that his business is working on the U. P. railroad as section hand under one Herbert as his boss; that he lived with his father-in-law, Peter Kriski; had every year got section ties from his railroad boss, and while living at the Bowman place, when he moved from there he moved the ties to Kriski's. Herbert gave him the ties. In May witness moved to Richland; had ties at that time, and left them at Kriski's. The day it was claimed that somebody had stolen ties witness was moving from the Bowman place. Paul Kriski was with him, and they had a mule team, a cross between bay and yellow; remained at Kriski's until noon; when unhitching the team, Barnish and his son Steve came up; we had some float-wood on the wagon; their team was an iron gray and bright bay; old man Kriski was planting corn, his team was a white

mare and dark brown horse; witness was talking to Barnish when young McDuffy came up from the south, the same direction that Barnishes came; Paul Kriski was then unhitching the team in the yard; McDuffy did not talk with either of the Kriskis; neither one resembles the Barnishes; Barnish has gray whiskers, a bald head, and is nearly fifty years old; witness knew Pinneo, saw him first when he came to subpœna witness on the Kriski trial; he told witness and Herbert that Kriski had stolen the ties; witness said not; that the ties were his, that he left them there; and he said these are new ties, but there were but two new ties, split and broken, and were given to witness by the section boss, who was present and told him so; this talk with Pinneo was the same day before the trial.

Upon the trial, one David McDuffy testified on behalf of the defendant, in the court below, that he was a section foreman in the service of defendant at the time of the prosecution complained of; that he as such section foreman had charge of the railroad ties belonging to the defendant and on his section of defendant's road; that a short time prior to the arrest and prosecution of plaintiff and his father, he had piled two piles of railroad ties belonging to the defendant on the right of way, ready for loading onto cars, and that all in one of the piles, containing more than 200 ties, were stolen; that about the 20th day of May, 1887, he saw two men with a team loading some of these ties a few rods west of the railroad bridge across the Platte river; that the men would load on a few ties and then get up on the road-bed and look around as if watching to see if any one saw them; that they loaded on ties and drove away; that he sent one of his section men, John McDuffy, his son, to follow the team and see where they were going with the ties; that he got on top of the hand car and watched the team closely, and saw it plainly, and that it was driven into the grove at Peter Kriski's place, that being the home also of Paul Kriski, a son of Peter Kriski; that John

McDuffy reported to him and told him it was Peter and Paul Kriski who loaded and hauled the ties; that he reported to defendant's superintendent at Lincoln that ties and bridge timber belonging to defendant were being stolen; that the superintendent sent Mr. Pinneo to look after the matter; that he saw Pinneo within a very few days; that they were on the defendant's railroad track, near where the ties had been taken from, and that he pointed out to Pinneo the place to which the ties had been taken; that he told Pinneo all he had seen himself and also what John McDuffy, who followed the wagon, had reported to him; that he told Pinneo that it was Peter and Paul Kriski who had stolen the ties.

John McDuffy testified that he was employed as a section hand upon defendant's railroad, and was working on the section with his father, David McDuffy, who was section foreman; that the section hands had been missing ties, and one day while at work on the road, at some distance from the bridge, they noticed a team and two men near the bridge at the place where the ties were piled up; that the men would load on ties a short time, and then get on the track and look about them, and go back and load on more ties; that when they got loaded they started off, and at his father's request he followed them to Kriski's house; that while following them he could see that the wagon was loaded with ties; that at Kriski's house he saw Peter and Paul Kriski unhitching the team from a wagon on which twenty or thirty ties were loaded, and that there were ties scattered around the yard; that after he left Kriski's house we went to a neighbor of the Kriskis and described the two men who were unhitching the team at Kriski's house, and that the neighbor said it was Peter Kriski and his son; that he then reported to his father what he had seen, and that he afterward told Pinneo all he had observed; that he did all this before the commencement of the criminal prosecution against the Kriskis; that

he told Pinneo that Peter and Paul Kriski had stolen the ties of the defendant.

John Mitcek, a witness on behalf of the defendant, testified that he was employed by the defendant and was working under section foreman David McDuffy, and was with him at the time the two men were seen loading ties on defendant's right of way, in May, 1887; that the team was driven in the direction of Kriski's grove, and that John McDuffy followed it; that ties were missing from the place where they had been piled; that they were stolen that day or the day before. On cross-examination he said these men with the team stood right where the ties were and that he saw them put some of them on the wagon.

Benjamin Pinneo, upon whose action in prosecuting plaintiff this action is based, testified that he received a letter from defendant's superintendent (which had been written by Mr. McDuffy to the said superintendent) with directions to attend to the matter; that within a few days he went to Columbus and there saw David McDuffy, John McDuffy, and John Mitcek, the witnesses whose testimony is hereinbefore abstracted; that David McDuffy told him that there had been a lot of defendant's railroad ties stolen, and told him the direction they went, and pointed out the place they had been taken to; told him that his son, John McDuffy, had followed them to the house. He further testified that John McDuffy also told him that "he was down there with his father working on the section, and they saw somebody loading ties down the track, and his father started him cornerways, and gave him instructions to follow them if it took a week, and he told me he followed that team up the road to that house in the grove, and that Paul Kriski and Peter Kriski were there in the yard; I think he said they were unhitching the team from the wagon; I asked him very particular about it; I didn't want to make any mistake;" that he then went and got the deputy sheriff to go with him to Kriski's place; that

before they reached the house they saw a son of Peter Kriski's herding cattle near the road; that this boy told him and the deputy sheriff that his father and older brother had hauled some ties, and pointed in the direction from whence the defendant's ties were taken when asked where they got them; that he and the deputy sheriff then went to where Paul, the plaintiff, was engaged, near the house, and asked him about the ties; that "he said they had gotten some ties and flood-wood at the bridge, and I asked him where, and he pointed the same way;" that the boy Paul told different stories in trying to tell them where the ties came from; that he then went to the house and that he and the deputy sheriff had a talk with Peter Kriski; that they asked him where he got the ties, and he said he got them on the railroad; that he then asked Kriski if he wanted to buy them, and that Kriski asked the price; that when he was told the price was thirty cents a tie, he said they were not worth that; that he (Pinneo) then went back to town (Columbus) and got an interpreter and took him out to Kriski's house and told him that he wanted thirty cents apiece for the ties, and that Kriski said he wouldn't pay for them; that Peter Kriski told several different stories about the ties, and that his last story was that he bought them from the U. P. foreman; that he then went back to town and made complaint before the justice of the peace, charging the said Peter and Paul with the larceny of said ties. The witness further testified that he had never seen or heard of the plaintiff or his father before he went to look after this matter; that he had no ill feeling toward them; that he believed these parties were the parties who had taken the ties; that his only motive was to punish them for the crime charged. In rebuttal to the testimony of plaintiff's witness, Schroeder, Pinneo said he had never spoken to Schroeder nor had Schroeder spoken to him, and that Schroeder had not told him anything about the old man Kriski having said he received the ties from the U. P. R. R.

Geo. Harmon, a witness on behalf of the defense, testified that he was deputy sheriff of Platte county at the time of the arrest of the Kriskis, and that he made the arrests; that before any complaint was made or warrant issued, he went with Pinneo to Kriski's house; that before they reached the house they talked with one of Kriski's boys, who said his father and a brother had hauled the ties; that he and Pinneo then went to where the plaintiff was and talked with him, and that he, plaintiff, said they got the ties over at the bridge; that they then went to and talked with Peter Kriski about where he got the ties, and that he told two or three different stories about the matter. "I think he said some one gave them to him the first time, and then he said he had bought them of the U. P. section foreman."

The defendant also called J. C. Cowdry, Esq., as witness, who testified that he was the justice of the peace of Platte county in May, 1887, before whom Peter and Paul Kriski were charged with stealing railroad ties, and were tried by a jury; that the entries of that trial were on pp. 8, 9, of his docket of that year, which he had with him, and by which proof was offered of the conviction of Peter Kriski of the offense charged, which, being objected to by plaintiff's counsel, was sustained by the court, and the offer of evidence overruled.

The giving of the paragraphs 9 and 10 of the court's instructions to the jury is assigned as error:

"9. The mere belief of Pinneo in the guilt of the plaintiff will not of itself justify the prosecution complained of. He could not close his eyes to facts within his knowledge which tended to prove plaintiff's innocence. On the other hand, he was not required, at his peril, to accept as true the denial of defendant or other parties. If all the known facts in the case, including such denial, were sufficient to induce a reasonable ground of suspicion of plaintiff's guilt, then you could not find that the prosecution was without probable cause.

"10. Should you find that the witness Pinneo demanded $40, or any other sum of money, from the plaintiff, or his father, for which sum he agreed to not prosecute said witness, or the plaintiff, such fact may be considered by you in determining whether or not said Pinneo acted maliciously; but such demand, if made, would be no evidence of want of probable cause, and should not be considered for that purpose."

The first three errors assigned are neither of them presented in the brief of counsel, and it is not, therefore, deemed of importance to further consider them here.

The cogent argument of the brief is directed to the assumption that the verdict was contrary to the instructions to the jury, and is not sustained by the evidence. This proposition is somewhat embarrassed by the unusual circumstance that it is not directly presented in an assignment of error, but may be entitled to be considered under the fourth error, that the court erred in overruling the defendant's motion for a new trial. Its application will be seen in the following instructions of the court:

"4. If the preponderance is with the defendant, or if the testimony is evenly balanced upon any one or more of the material questions in this case, you will have to find for the defendant.

"5. The material allegations which are put in issue by the pleadings herein, and which the plaintiff is required to establish by a preponderance of testimony are:

"First—That the witness Pinneo, in instituting the prosecution complained of, was acting as the agent of the defendant and within the scope of his authority as such agent.

"Second—That said Pinneo had no just or reasonable cause for such prosecution, or for believing the plaintiff guilty of the crime of larceny.

"Third—That said Pinneo in the said prosecution acted maliciously; that is, was actuated by motives of malice toward the plaintiff.

"6. That Pinneo was acting for the defendant in some capacity appears to be undisputed from the testimony; hence, on that branch of the case you will confine your inquiry to the question whether or not he was acting within the scope or line of his employment or agency. If you find from the testimony that Mr. Pinneo was authorized by the defendant company to institute the prosecution against the plaintiff for stealing its ties, then it would appear that he was acting within the scope of his authority.

"7. Probable cause for criminal prosecution is defined to be a reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged.

"8. If the plaintiff has satisfied you that the defendant's agent had no such reasonable ground for suspicion of plaintiff's guilt, as explained in this charge, you will be justified in finding that no probable cause existed for the prosecution complained of. The question of probable cause in this case does not, however, depend upon whether or not the plaintiff actually stole ties from the defendant; neither does the question of probable cause depend upon the question of malice of defendant's agent; but the question is: Were the facts and circumstances within the knowledge of such agent, and upon which he acted, sufficient in themselves to raise a reasonable ground of suspicion in the mind of an ordinarily cautious man, and did such agent believe plaintiff guilty of stealing said ties? If such reasonable ground of suspicion existed within the knowledge of defendant's agent who instituted the prosecution, and if he actually believed plaintiff guilty, then he had probable cause therefor, and you should find for the defendant, even if you should find also that plaintiff did not in fact steal said ties.

"9. The mere belief of Pinneo in the guilt of the plaintiff will not of itself justify the prosecution complained of.

He could not close his eyes to facts within his knowledge which tended to prove plaintiff's innocence. On the other hand, he was not required, at his peril, to accept as true the denial of defendant or other parties. If all the known facts in the case, including such denial, were sufficient to induce a reasonable ground of suspicion of plaintiff's guilt, then you could not find that the prosecution was without probable cause."

Does the evidence, viewed in the light of these instructions, sustain the verdict? If this can be so considered, the court was justified in overruling the motion for a new trial, but, if otherwise, it was the duty of the court to have set aside the verdict.

Pinneo, as the agent of defendant, was acting in an useful and necessary capacity under the general instructions of the superintendent of the railroad company, and was located at a point nearly 100 miles distant from the plaintiff, who was an utter stranger to him. The witness McDuffy was a local section foreman of the company, near to the residence of the plaintiff and to the scene of the transactions testified to by all the witnesses. McDuffy informed McConniff, the superintendent and immediate superior of Pinneo, that railroad ties, the property of the defendant, had been recently stolen from the line of the road, and directed Pinneo to investigate the depredation, ascertain the guilty parties, and, if possible, bring them to justice, with such reparation to the company as his general instructions implied. Under these orders he proceeded to Platte county to the section of the road under McDuffy's charge, and was informed by that official "that there had been a lot of railroad ties stolen, and pointed out the direction and place to which the property had been taken, and that his son, John McDuffy, had followed the property and the parties to the house;" and was further informed by John McDuffy "that he and his father, while working on the section under their charge, saw somebody loading ties

down on the track; that his father directed him to follow them, and that he did follow the team up the road to the house in the grove, and discovered that Paul Kriski, the plaintiff, and Peter Kriski, his father, were there in possession and were then unhitching the team from the wagon loaded with ties." The agent testifies that he questioned these informants narrowly as to circumstances detailed in order that he should make no mistake as to his own action. He then, accompanied by the deputy sheriff, went to Kriski's place, and, before coming to the house, saw the younger brother of the plaintiff herding cattle near the road, who told them, in answer to inquiries, "that his father and older brother had hauled some railroad ties," and when asked where from, pointed to the direction whence the defendant's ties had been taken. The plaintiff also said to the deputy sheriff that "they had got some ties and floodwood at the bridge," and when asked where from, pointed out the same direction that the younger brother had, and upon further inquiry told conflicting stories about the ties. The father, Peter Kriski, being asked where he got the ties, said that he got them on the railroad, and upon an offer to sell them to him at thirty cents each, refused to buy them at that price, but gave different accounts as to their possession. The last one was that he had bought them of the U. P. Company's foreman.

At the Kriski place there was found a large amount of said railroad ties of the kind and quality of those stolen from defendant according to the information received by the agent, and in possession of them the agent found the Kriskis, both father and son. Upon these apparent facts Peter Kriski and his son Paul were charged by the agent Pinneo with the larceny of the ties. The agent testified that they were total strangers to him, and that he was free of any malice or ill-will in their prosecution.

In rebuttal of the testimony of Schroeder for the plaintiff, the agent testified that he had never spoken to that

witness, and had not told him anything about old man Kriski having gotten the ties of the U. P. Railroad Company. This evidence is corroborated by Kriski, who stated that he talked with Schroeder only, and that Schroeder did not talk with Pinneo for him at the time stated by that witness.

From the commencement of the prosecution forward, the testimony is conflicting. Pinneo heard statements from the elder Kriski, from the son-in-law, and probably others, in explanation of the possession of the property and casting doubt as to the accuracy of the information previously given as to the guilt of the parties.

The court charged the jury in the 9th instruction that the agent "was not required, at his peril, to accept the denial of the defendant or other parties; that if all the known facts in the case, including such denial, were sufficient to induce a reasonable ground of suspicion of plaintiff's guilt, it could not be found that the prosecution was without reasonable cause."

It is undoubtedly one of the most usual circumstances attending accusations of crime that the accused should deny their guilt and endeavor to explain away any suspicious facts leading to their arrest. And notwithstanding the small confidence placed in such assertions, the absence of such denial or explanation is liable to be regarded as tending to a confession. Can it be said that the agent Pinneo, with a due regard to his duty to his employer, could have, after receiving the information from the McDuffys, seemingly confirmed by the possession of the property by the Kriskis, part of it upon the wagon as if lately hauled upon the premises, accepted, as conclusive and sufficient to turn him back from the pursuit of the property, the denial of these persons as to their guilt or their conflicting explanations of their possession of it? But we may not be put to this inquiry, but rather rest upon the fact that the court in its charge held that no such duty was incumbent upon him.

The question then recurs whether the court was bound to enforce the law thus laid down, but this depends upon the conclusion of that court, and of this, as to the sufficiency of the facts communicated to the agent, and within his knowledge, to establish the existence, or the absence of probable cause for the arrest and prosecution of the plaintiff.

The court in its seventh instruction correctly charged the jury that probable cause for criminal prosecution is a reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty of the offense charged.

From the information, circumstances and facts presented to the agent Pinneo by the McDuffys, and his own ocular demonstration of the property in the possession of the Kriskis, can it be said that he was not warranted, as a cautious man, in the belief that larceny had been committed, and that those in possession of the property, and not accounting for it, were the guilty parties? If this question be answered in the negative, the justification of the defendant is clear, because the agent, who alone could testify as to his belief, testified that he believed the plaintiff to be guilty, and the court instructed the jury, and we believe properly, that the agent was not bound to accept, at his peril, the denials of the accused, or of other parties, and such denials were the only circumstances in evidence which tended in any degree to disprove or contradict the strong presumption of guilt under the criminating circumstances of the case.

The legal and logical reasons, therefore, seem to me to be unquestionable that a verdict for the plaintiff upon such grounds and evidence, and under such instructions as the jury were charged with, should have been set aside on motion, and that the court erred in overruling the defendant's motion for a new trial. Having reached this conclusion the

fifth and sixth assignments of the plaintiff in error will not be further considered in this opinion. The judgment of the district court is reversed and this cause is remanded for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

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HENRY M. BROWN V. SAMUEL H. RICE ET AL.

[FILED SEPTEMBER 17, 1890.]

1. **Jurisdiction: SPECIAL APPEARANCE TO CHALLENGE.** In an action under sections 51 and 77 of the Code of Civil Procedure where service was by publication, and the plaintiff's affidavit omitted to state that the defendants, or some of them, resided out of the state, *held*, that it was competent for the defendant to appear specially in support of a motion challenging the jurisdiction of the court, or to quash a juridical paper without further appearing as a defendant in the case. (*Porter v. Chicago & N. W. R. Co.*, 1 Neb., 14; *Cleghorn v. Waterman*, 16 Id., 226.)
2. **Final Order.** A ruling of the court sustaining the defendant's motion to quash the service against him by publication, without a judgment of record, is not such a final order determining the plaintiff's rights of action as will be reviewed on error. (*Brown v. Edgerton*, 14 Neb., 453.)

ERROR to the district court for Madison county. Tried below before CRAWFORD, J.

William V. Allen, for plaintiff in error:

All objections to jurisdiction must be made by the party in person and cannot be raised by counsel. (1 Bouvier, L. D., title "Appearances;" 1 Chitty, Pleadings [10th Am. Ed.], 428; *Knox v. Summers*, 3 Cranch [U. S.], 496.) The tendency of this court's holdings has been against special ap-

pearances. (Maxwell, Just. Pr., 90.) The motion sought to call into exercise the power of the court to reconsider its judgment as to the service, and this made the appearance a general one. (*Cropsey v. Wiggenhorn*, 3 Neb., 108; *Crowell v. Galloway*, Id., 220; *Porter v. R. Co.*, 1 Id., 14; *Johnson v. Jones*, 2 Id., 136; *Kane v. People*, 4 Id., 512; *Newlove v. Woodward*, 9 Id., 504; *White v. Merriam*, 16 Id., 96; *Warren v. Dick*, 17 Id., 246; *Marsden v. Soper*, 11 O. St., 503.) The affidavit, while perhaps incomplete, is not void. (*Fulton v. Levy*, 21 Neb., 481; *Britton v. Larson*, 23 Id., 806.)

Wigton & Whitham, contra:

An appearance for the purpose of objecting to jurisdiction is not a general one. (*Cleghorn v. Waterman*, 16 Neb., 226; *Crowell v. Galloway*, 3 Id., 220.) The affidavit is defective in not alleging that defendant is a non-resident. (*Atkins v. Atkins*, 9 Neb., 200; *Fulton v. Levy*, 21 Id., 482; *Britton v. Larson*, 23 Id., 806.)

COBB, CH. J.

The plaintiff in error exhibited his petition in the district court of said county against the defendants Rice and his wife, and Mary J. Brown, the petitioner's wife, setting up that on September 30, 1875, he purchased the west half of the southeast quarter of section 30, township 22, range 4 west, in said county, for $400, the fee simple title to which, "to pacify his wife," was conveyed to her, in trust, for his use and benefit; that on April 16, 1878, she mortgaged the land to defendant Rice to secure her note of that date to him for $79, due in sixty days, bearing twelve per cent interest; that on January 20, 1879, the mortgage was foreclosed against her in said court and the land sold to the mortgagee and judgment creditor, and sheriff's deed made to him June 7, 1889, and that he had

since paid taxes thereon of $58.42. The plaintiff seeks to redeem the land of the mortgage, interest, and costs, and the subsequent taxes, and to quiet his title.

Mesne process was not served on the parties, but on November 25, 1885, the plaintiff's attorney filed his affidavit for service by publication, stating "that service of the summons in this case cannot be made within the state on the said defendants or either of them, and that this is one of the cases mentioned in section 77 of the Code of Civil Procedure." Accordingly it was ordered "that service upon the defendants be made by publication in the manner required by law." Notice to the defendants by publication was given, dated November 27, 1885, and proof of publication in the Madison *Chronicle*, a weekly newspaper printed and published in said county, and of general circulation therein, for four consecutive weeks, was made March 9, 1886, and on the same day default was taken and entered in open court against the defendants.

On March 25, and subsequently on November 28, 1887, the defendants being still in default, it was ordered that the petition be taken as confessed; that the sale of the land to defendant Rice, and the sheriff's deed to him, be set aside and canceled; that the petitioner's title to the land be restored and quieted, and he be permitted to redeem the same from the foreclosure and sale, and for that purpose a referee was appointed to ascertain what mortgage and tax liens existed against the land, from which the plaintiff should be required to redeem, and the case was continued for further hearing on the referee's report.

On October 8, 1888, the defendant Rice appeared, by his attorneys, specially for the purposes of his motion only, and moved to quash the service by publication on him for the reasons:

First—That the affidavit for service by publication is not sufficient in law to authorize such service, in that it fails to state that this defendant is, or was at the making

or filing of the affidavit, a non-resident of the state of Nebraska.

Second—That this defendant is, and ever since the commencement of this action, and the filing of the petition, has been, a resident of this state, and service of summons could at any time have been had upon him in this state, as shown by the affidavit of defendant in support of the motion, and which motion upon hearing was sustained by the court, and to which the plaintiff excepted.

On October 11, 1888, the plaintiff filed a motion for a new trial:

First—Because the decision is contrary to law.

Second—Because of error of law occurring at the trial.

Third—Because the court erred in sustaining the special appearance, and in setting aside the judgment, entered in this case.

Fourth—Because the question raised by the special appearance adheres and passed into the judgment, and the defendant's remedy was a motion or petition for a new trial.

This motion for a new trial was overruled, to which the plaintiff excepted.

The plaintiff in error assigns in his petition as causes for review:

First—That the court erred in sustaining the special appearance of defendant Rice, and in setting aside the service and judgments made and entered in the cause.

Second—That the court erred in making a final order setting aside, for want of jurisdiction, the judgment, entered in the cause.

The first question presented on the record, is that of the sufficiency of service on the defendant Rice by publication of notice. The action was brought under the first clause of section 51 of the Code, "for the recovery of real property, or of an estate, or interest therein." Constructive service is provided for by publication in actions brought

under section 51, by the first clause of section 77, "where any or all of the defendants reside out of the state."

The affidavit required to be made under section 78, before service can be had by publication, stating that service of a summons cannot be made within this state on the defendants, and that they, or some of them, reside out of this state, omitted the last material fact, and its sufficiency was traversed by the defendant Rice, without denial by the plaintiff. On the special appearance and motion of the defendant, for that purpose only, the service by publication was set aside. That it was competent for the defendant to appear specially at any stage of the proceedings, in open court, in support of a motion which directly challenged the jurisdiction of the court, or quashed a juridical paper, without making any further appearance as a defendant, is not doubted. It was so held in the case of *Porter v. Chicago & Northwestern Railroad*, 1 Neb., 14, and in *Cleghorn v. Waterman*, 16 Neb., 226, which have not been overruled or modified, and which are adhered to.

The second error assigned, that the court erred in making a final order setting aside the judgment, for the want of jurisdiction, does not appear, in fact, in the record. No judgment in form, or final order, is to be found in the record before us affecting the plaintiff's rights or determining the action in the court below, not even a judgment for the defendant's costs which may be supposed to have followed the motions to quash the service, and for a new trial. (See *Brown v. Edgerton*, 14 Neb., 454.) Both the plaintiff and his petition, so far as the record shows, are *recti in curia*, where the case may be still pending.

There seems to be nothing in second error to be reviewed, reversed, or affirmed, and the petition in error will be

DISMISSED.

THE other judges concur.

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UNION P. R. CO. v. IRA D. MARSTON.

[FILED SEPTEMBER 17, 1890.]

1. **Common Carriers:** INJURIES TO GOODS: VERBAL AGREEMENT: BILL OF LADING: VARIANCE. M. applied to an agent of the Rock Island & Peoria R. Co., at one of its stations in the state of Illinois, to ship certain office furniture, including a stove, to Kearney on the line of defendant's road in this state. The agent informed M. that the custom was for shippers to release stoves, but advised him not to do it for reasons given, but to pay the additional expense of sending it at carrier's risk. To this M. assented, and offered to pay the freight to said agent, who informed him that he could as well pay it at the end of the route. The agent placed the goods into a car of a freight train which proceeded on its way. Four or five hours afterwards the agent handed him a paper, saying that it was a receipt for the goods shipped. This paper M. put in his pocket without examining it, and which proved to be a bill of lading of the goods, containing, *inter alia*, the condition, "stoves at owner's risk of breakage." The goods were received at C. B. from the R. I. R. Co., by defendant and carried to K. Upon arrival the stove was found to have been broken en route. In an action by M against the U. P. Railway Company for damages for injury to stove, *held*, that, as between M. and the R. I. & P. R. Co., the stove was carried at carrier's risk.
2. **Certain instructions** given as requested, and others modified and given as modified, set out with such modifications in the opinion, *held*, rightly given, and rightly given as modified.
3. **Trial:** VIEW: THE EVIDENCE *held* to sustain the verdict, especially in view of the fact that upon the trial the jury were ordered and permitted by the court, at the request of the defendant, to go out in charge of a bailiff and examine the stove in its broken and damaged condition.

ERROR to the district court for Buffalo county. Tried below before HAMER, J.

J. M. Thurston, *W. R. Kelley*, and *J. S. Shropshire*, for plaintiff in error:

Defendant in error, having accepted the shipping receipt

and brought suit upon it, was bound by its terms. (*Whitworth v. R. Co.*, 87 N. Y., 413; *Carsure v. Harris*, 4 G. Greene [Ia.], 516; Hutchinson, Carriers, secs. 240, 241, 243, 248, 265.) As the testimony shows that the loss did not occur on defendant in error's line, it is not liable. (*Jenneson v. R. Co.*, 5 Pa. L. J. Rep., 409; *Morse v. Brainerd*, 41 Vt., 550; *Burroughs v. R. Co.*, 100 Mass., 26.) Defendant in error, as a connecting line, had a right to rely upon the bill of lading exempting the carrier from liability. (*St. Louis Ins. Co. v. R. Co.*, 3 Am. & Eng. R. R. Cases, 271; *Kiff v. R. Co.*, 18 Id., 618; *Hot Springs R. Co. v. Trippe*, Id., 562 [42 Ark., 465]; *L., etc., R. Co. v. Corcoran*, Id., 602 [40 Ark., 375].) Reduced cost of transportation is a good consideration for a clause in a bill of lading, limiting liability. (*Sprague v. R. Co.*, 23 Am. & Eng. R. R. Cases, 685; *Grogan v. Exp. Co.*, 30 Id., 9.)

Ira D. Marston, contra:

A bill of lading given subsequently to a verbal agreement with less stringent terms, does not bind the shipper unless known to and approved by him. (2 Rorer, Railroads, p. 1320; *Bostwick v. R. Co.*, 45 N. Y., 712; Comp. Stats., 1887, p. 558, sec. 5; Const., art. 11, sec. 4.) The legislature carrying out the constitutional provision cited, has provided for just such cases as the one at bar. (Comp. Stats., ch. 16, sec. 111; *A. & N. R. Co. v. Washburn*, 5 Neb., 120–1.)

COBB, CH. J.

The plaintiff below alleged that the defendant is a railway corporation under the laws of the United States, doing business in this state as a common carrier of freight and passengers; that on December 30, 1885, by itself and its duly authorized agent, it received at Cambridge, Illinois, for transportation to Kearney, Nebraska, one hard coal base

burner stove of the value of $40, and thereby agreed, in consideration of $1.52 per hundred weight, to safely transport and deliver the same to the plaintiff at Kearney. That no part of said agreement was in writing, but that the defendant, by its said agent, delivered to the plaintiff a certain receipt or bill of lading, a true copy of which is attached hereto, but that its conditions were not brought to the plaintiff's notice or accepted by him; on the contrary, it was expressly agreed that said goods should be shipped at the carrier's risk, and the rate of freight demanded for transportation at carrier's risk was paid to the agent.

It is alleged that the weight of the stove was 340 pounds; that he paid the defendant for transportation to Kearney, one and fifty-two hundredths dollars per 100 pounds; that the defendant did not safely transport the stove, but negligently and carelessly broke and destroyed the same while in its possession as such common carrier, and has not delivered it as it was bound to do, to the damage of the plaintiff of $40, with interest from January 12, 1886, and asks judgment therefor, and costs of suit.

EXHIBIT D.

"ROCK ISLAND & PEORIA RAILWAY COMPANY,

"CAMBRIDGE, ILL., Jany. 1, 1886.

"Received of Ira. D. Marston, by the Rock Island & Peoria Railway Co., the following property in apparent good order (except as noted), marked and consigned as in the margin, which they agree to deliver, with as reasonable dispatch as their general business will permit, subject to the conditions mentioned below, in like good order (the dangers incident to railroad transportation, loss or damage by fire while at depots or stations, loss or damage of combustible articles by fire while in transit, and unavoidable accidents excepted) at Rock Island station, upon the payment of charges. The company further agrees to forward the property to the place of destination, as per margin, but are not to be held liable on account thereof after the same

shall be delivered as above. The company, however, guarantee the through rate of freight, as designated below.

"CONDITIONS: The company do not agree to carry the property by any particular train, nor in time for any particular market. Oils and all other liquids at owner's risk. Liquids in glass or earthen, drugs and medicines in boxes, glass and glassware in boxes, looking glasses, marbles, stoves, stove plates, and light castings, earthen or queensware, at owner's risk of breakage.

"Agricultural implements, cabinetware and furniture not boxed, and carriages at owner's risk of breakage or damage by chafing. Oysters, poultry, dressed hogs, fresh meat, and provisions of all kinds, trees, shrubbery, fruits, and all perishable property at owner's risk of frost and decay.

"It is a part of this agreement that all other carriers transporting the property herein receipted for, as a part of the through line, shall be entitled to the benefit of all the exceptions and conditions above mentioned; and if carried by water, he is entitled to the further benefit of exception from loss or damage arising from collision, and all other damages incident to lake and water navigation. All freight not taken away on arrival will be stored free for twenty-four hours, after which regular storage rates will be charged.

"MARKS AND CONSIGNEES: Ira D. Marston, Kearney, Neb.

"Agents will sign this form of shipping receipt, and no other, unless authority is given by the general freight agent. Agents will be particular to number both receipt and shipping bill, which must be alike.

"RATE: 152 per cent from Cambridge, Ill., to Kearney, Neb.

"ARTICLES: 5 bx. books; one desk, boxed; 1 blank case bks; 1 office chair, 1 stove; 1940 weight (subject to correction). G. A. COOPER, *Agent.*

"STATE OF ILLINOIS, }
HENRY COUNTY. } ss.

"On this twelfth day of August, 1886, personally appeared before me, G. A. Cooper, the signer of a copy of the bill of lading on the reverse side hereof, and, being duly sworn, says that the said copy is a true copy of the original bill of lading as shown by the books of the Rock Island & Peoria Railroad Co. at their station.

"Cambridge, Ill., August 13, 1886.

"G. A. COOPER.

"Subscribed and sworn to before me, this 13th day of August, 1886. W. H. SHEPARD,

"*Notary Public.*"

The defendant answered that it is a railway corporation organized under the laws of the United States and that it has a defense to this action arising under said laws. Denying generally the allegations of the plaintiff, it says "that the plaintiff entered into a contract with the Rock Island & Peoria Railway Company, for a certain price, whereby the said company agreed to transport the said stove; that neither the said railway company nor the Rock Island & Pacific Railroad Company, or either of them, were the agents of defendant at Cambridge, Illinois, or that they acted as its agents in receiving and delivering the said stove; that the defendant herein has no line of road in the state of Illinois, and did not receive the stove, as alleged, from the plaintiff at Cambridge, and made no contract or agreement of any kind in respect to transporting and delivering said stove. It has no knowledge other than that derived from the plaintiff's petition that the 'Exhibit D' attached thereto is a true and accurate copy of the bill of lading or agreement between the plaintiff and the Rock Island & Peoria Railway Company, and therefore denies the same.

"Defendant says that the said stove was not injured,

broken, or destroyed on its line of road, and was not damaged in any way while the same was in its possession."

The plaintiff replied denying each and every allegation in the answer contained.

There was a trial to a jury, with findings for the plaintiff and damages assessed at $40.

At the request of the defendant the jury returned special findings as follows: "That the stove was broken between Cambridge and Kearney on the Union Pacific railroad, in the defendant's possession, by reason of the negligence of the defendant."

The defendant's motion for a new trial being overruled, judgment was entered upon the verdict, to which the defendant excepted on the record and brings it to this court on the assignments of error as follows:

"1. That the verdict is contrary to law and is not sustained by the evidence.

"2. That it is excessive, appearing to have been rendered under the influence of passion and prejudice.

"3. For errors of law occurring at the trial and duly excepted to by the defendant.

"4. In modifying instructions Nos. 1, 2, 3, and 4, offered by defendant, and which should have been given without modification.

"5. In refusing instructions Nos. 6 and 7 asked by defendant.

"6. In giving plaintiff's instructions Nos. 3 and 5.

"7. Because each of the special findings of the jury is not supported by sufficient evidence, and is contrary thereto.

"8. Because the plaintiff was permitted to amend his petition by striking out the words 'as per usual bill of lading.'

"9. In overruling the defendant's motion for a new trial."

It is clearly established by the pleadings and evidence that the defendant in error, being about to remove from

Cambridge, in the state of Illinois, to the city of Kearney, in this state, went to the office of the Rock Island & Peoria Railroad Company, at Cambridge, taking with him certain office furniture, including a hard coal base burner stove, and procured the same to be shipped over the said railroad and its connections to Kearney; that the station agent, in charge of said station, through and by whom said goods were received and shipped, then and there, and as a part of the *res gestæ*, informed the defendant in error that the custom was for shippers to release stoves when they shipped them, but advised him not to do it, as his goods were going a long distance, he had better pay the additional expense of sending it at carrier's risk; whereupon defendant in error replied that that was just what he proposed to do, etc., and asked the agent what would be the extra charge on the stove at carrier's risk; the agent figured it up and replied, "seventy-five cents;" defendant in error replied "Very well, I shall pay you;" the agent said "No, you can pay at the end of the line," and also explained to defendant in error the arrangement of paying the freight on the goods over the roads over which it should go; that at or about the time this conversation occurred the stove had been received by the said agent and pronounced to be in perfect condition for shipment; and very shortly afterwards the car in which the goods, including the stove, were placed proceeded on its way as a part of the west bound freight train. Some five or six hours afterwards, as defendant in error was taking the passenger train, for Kearney, the said agent came out of the station house and handed him a paper saying, "Here, Marston, here is your receipt for your goods." This paper Marston put into his pocket and never looked at it until some time after his arrival at Kearney, when he received notice that the stove had arrived there in a broken condition.

It appears that the paper handed to Marston by said station agent was a receipt for the goods shipped by Mars-

ton including "1 stove, 1940," and contained the following, amongst other conditions: "Liquids in glass, * * stoves, * * * at owner's risk of breakage." The question here arises, and it is the leading one in the case, Was the shipper, the defendant in error, under the facts and circumstances above stated, bound by the above condition of the receipt or bill of lading as it is usually called? To this defendant in error cites section 5 of chapter 72, Compiled Statutes. I here copy the section: "No notice, either express or implied, shall be held to limit the liabilities of any railroad company as common carriers unless they shall make it appear that such limitation was actually brought to the knowledge of the opposite party and assented to by him, or them, in express terms before such limitation shall take effect." He also cites 2 Rorer on Railroads, 1320, and *Bostwick v. B. & O. R. Co.*, 45 N. Y., 712. Upon a consideration of these authorities it seems very clear to me that, as between Marston and the Rock Island & Peoria R. Co., the stove was carried at the carrier's risk. But whether the contract of shipment between said railroad company and the shipper was binding upon the defendant, as the owner of the connecting line of railroad that received the stove at Council Bluffs, and carried it from thence to Kearney, I do not deem it necessary to decide in the case under consideration.

This brings me to the consideration of the instructions. Those given at the request of the plaintiff, defendant in error, are as follows:

"3. That if you believe from the evidence that the stove in question was damaged, and that such damage occurred on the line of the defendant and through the negligence or carelessness of its agents or employes, and while the goods were in defendant's possession, you will find for the plaintiff, and assess his damages at such sum as the evidence shows him entitled to, not, however, exceeding forty dollars.

"5. That when it is proven that the goods in question were in the possession of the defendant and were damaged at some place on the route, then the burden of proof is upon the defendant to show that the damage occurred on some other than its line, and unless you believe from the evidence that the goods, if damaged, were damaged on some other line than that of the defendant, you will find for the plaintiff."

The defendant, plaintiff in error, then asked seven instructions. The fifth was given as asked, as follows:

"If you shall find that the rate as fixed in the shipping receipt, and as paid by the plaintiff, for the transportation of this stove, was what is designated as 'owner's risk' rate, and that this defendant received the stove from the connecting line with that understanding, and carried it at that rate, then the plaintiff cannot recover, unless you shall find that the stove was broken through the negligence of the defendant on its line of road."

The instruction numbered 1, asked by the defendant, was as follows:

"The jury are instructed that if you find that the agent at Cambridge, Illinois, issued and delivered to the plaintiff a bill of lading or shipping receipt for the goods in controversy, and that he accepted the same without any objection, that, so far as this defendant is concerned, it became and was the only contract of shipment, and by the acceptance thereof the plaintiff became bound by the terms and conditions therein contained. (Modified thus:) Except so far as such conditions by their terms may have undertaken to release the railroad from the consequences of negligence and carelessness. Any arrangement or agreement entered into by the plaintiff and said agent before the delivery of said bill of lading to said plaintiff cannot be binding upon this defendant, so far as such agreement contradicted the terms of, or was at variance with, said bill of lading or shipping receipt. (Modified thus:) If the agent at Cam-

bridge called the attention of the plaintiff to the conditions of the receipt, or otherwise notified the plaintiff that the paper he gave him contained the contract of shipment.

"II. The jury are instructed that the mere fact that the plaintiff's stove was delivered in a broken condition does not establish the plaintiff's right to recover from the defendant, but in order to entitle the plaintiff to recover, it must appear that the stove was broken and damaged while in the hands of the defendant, and by its negligence, so that, unless you shall find that the stove was broken on the defendant's line of road and through its negligence, your verdict must be for the defendant. (Modified thus:) If the stove was damaged because of the negligence or carelessness of the carrier when it arrived at Kearney, the burden of proof is upon the defendant to show that the damage did not occur upon its line.

"III. You are instructed that where a carrier receives and carries goods at a reduced rate, it is a sufficient consideration for limiting its liability, so that if you shall find that the rate paid by the plaintiff for the shipment of the stove was a reduced rate made for the purpose of limiting the liability of the carrier for damage for breakage, then the plaintiff, under the terms of his shipping receipt, cannot recover, unless you shall further find that the stove was broken while in the possession of this defendant, and that it was so broken by means of some actual negligence of this defendant. To hold the defendant guilty of negligence it must appear to your satisfaction that it failed to exercise ordinary care in the handling of the stove. (Modified thus:) Yet if the stove was broken when it reached Kearney because of the negligence and carelessness of the carrier, the burden of proof is upon the defendant to show that the damage occurred on another line than defendant's.

"IV. You are instructed that if you shall find that the plaintiff's stove was received from the connecting line by the defendant at Council Bluffs in the broken condition in

which it was when delivered at destination, then for any damage resulting to the plaintiff by reason of the breaking of said stove, this defendant would not be liable. (Modified thus:) If, however, the stove was damaged when it arrived at Kearney because of the negligence and carelessness of the carrier, then the burden of proof is upon the defendant to show that the damage did not occur upon its line."

It does not appear from the record whether the sixth and seventh instructions asked were given or not, and no exception being noted thereon, they will not be considered.

At the request of the defendant, plaintiff in error, the court submitted to the jury the following questions for special findings of fact:

"1. On what part of the route between Cambridge and Kearney was the stove broken?

"2. Was the stove broken in any manner while in this defendant's possession?

"3. Was the stove broken by reason of any negligence of the defendant?"

With a general verdict for the plaintiff and assessing his damages at $40, the jury returned special findings as follows:

"1. On what part of the route between Cambridge and Kearney was the stove broken? Answer. Broken on the U. P. R. R.

"2. Was the stove broken in any manner while in this defendant's possession? Answer. Yes.

"3. Was the stove broken by reason of any negligence of the defendant? Answer. Yes."

It appears from the bill of exceptions that the stove, although one that had been used two winters, was, at the time it was shipped at Cambridge, Illinois, in good condition; that there was evidence tending to prove that at the time it arrived at Council Bluffs, the end of the Chicago, Rock Island & Pacific R. R. line, it was broken or

cracked at the base, and in this condition received by the defendant, and that when it arrived at Kearney, the place of destination, it was also broken at the top, was rusty, and covered with snow. It does not appear from the evidence, to which one of these breaks the damage to the stove, which destroyed its value, should have been attributed; but this question is set at rest by the fact which appears of record, that upon the trial, at the request of the defendant and the order of the court, the jury, under the charge of a special bailiff, proceeded to the place where the stove was and viewed the same. The jury, after this view of the property, were, also at the request of the defendant, instructed to find, specially as we have seen, whether the stove was broken upon the line of the defendant while in its possession and through the negligence of its servants. The breaking here spoken of was doubtless intended by the court and understood by the jury to be that which, under the evidence, caused the damage to the stove for which the suit was brought, and there is nothing in the case to show that any other breaking was considered by them in making up the verdict.

Under the instruction, number 5, given at the request of the defendant, independent of those given at the request of the plaintiff, or the modifications of the others requested by the defendant and given as modified, I think the jury were justified in finding for the plaintiff, if such finding, as must be presumed, was confined to such damage to the stove as was caused after it was transferred to the defendant's cars at Council Bluffs. This, it is true, depends upon the correctness of the proposition contained in the fifth instruction given at the request of the plaintiff: "That when it is proven that the goods in question were in the possession of the defendant, and were damaged at some place on the route, then the burden of proof is upon the defendant to show that the damage occurred on some other than its line." This is admitted to be the law at p. 10 of the brief of plaintiff in error.

The question of excessive damages is not discussed for the reasons: (1) That the evidence on that subject is conflicting; the evidence of the plaintiff and one other witness sustaining the verdict as to the amount of damages, and that of some of the witnesses for defendant fixing the damages at a much lower sum; and (2), for the reason that by procuring the court to order the jury to go out under the charge of a bailiff and examine the stove, the defendant introduced into the case an element of evidence which was not, and could not be, presented to this court by bill of exceptions, and without which any analysis of the testimony as to the extent of the damage to the property must be incomplete.

The questions whether the defendant company was bound to carry the plaintiff's goods under the terms of the oral contract made between plaintiff and the agent of the Rock Island & Peoria R. R. at Cambridge, or whether, having carried them in ignorance of such oral contract, it was not upon notice thereof, and that plaintiff claimed that the goods were shipped at carrier's risk, entitled to charge its schedule rate for such carriage over its portion of the route, for goods of that class carried at carrier's risk, do not arise in the case, and are not considered.

The judgment of the district court is

AFFIRMED.

THE other judges concur.

W. H. ASHBY ET AL. v. DAVID GREENSLATE ET AL.

[FILED SEPTEMBER 17, 1890.]

Replevin: WIFE'S PROPERTY: INCUMBRANCE BY HUSBAND. In an action of replevin based on an agreement of the husband for the sale or incumbering of personal property, the testimony showed that the wife was the owner of the property and that the hus-

band had no authority to sell or incumber the same. *Held*, That a verdict in favor of the wife for the value of the property was right and should be sustained.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Griggs & Rinaker, for plaintiffs in error.

L. M. Pemberton, contra.

MAXWELL, J.

This is an action of replevin brought by the plaintiffs against the defendants to recover the possession of the following described property, to-wit: "Seventeen bedsteads, seventeen bed-springs, seventeen wool mattresses, two husk mattresses, seventeen washstands, twelve wooden chairs, and one Charter Oak range cooking stove with all its furniture, also one Mosler, Bohman & Co. fire proof safe."

The answer is a general denial.

On the trial of the cause the jury returned a verdict as follows:

"We, the jury duly impaneled and sworn in the above entitled case, find the right of property and the right of possession at the commencement of the action of a part of the said property, consisting of all but the safe, to be in the said defendants, and assess the value of the goods at $375, and assess defendant's damages at $10, and we, the jury, further find the right of property and right of possession of the safe in the plaintiffs."

A motion for a new trial having been overruled, judgment was entered on the verdict.

The plaintiffs' right to recover is based on the following agreement:

"This agreement, made this January 31st, 1882, between David Greenslate, of the first part, and W. H. Ashby and Samuel Wymore, of the second part, witnesseth: That for

the consideration of the covenants of the said Ashby and said Wymore, hereinafter contained, the said Greenslate sells and conveys to the said Ashby and said Wymore lots 11 and 12, in block 28, in the town of Wymore, Gage county, Nebraska; and he hereby assigns the lease of the said premises to S. W. Jacobs to the said Ashby and Wymore; and said Greenslate also sells to the said Ashby and Wymore all the personal property, goods, and chattels, furnitures and fixtures now in said hotel on said premises, except such as belong to S. W. Jacobs, and warrants the title to the same; and the said Ashby and Wymore agree, in consideration of the performing of the foregoing agreements on the part of said Greenslate, or to his order, at any time after April 10, 1882, to convey lots 4, 5, 6, 7, 8, and 9, in block 15, in Ashby's addition to the town of Wymore, Gage county, Nebraska, and also to convey to said Greenslate, or order, on demand, the north one-half of lot 5, in block 26, in Wymore's addition to the town of Wymore, Gage county, Nebraska; and said Ashby and Wymore are to assume the payment of the claim of Jones & Magee against the conveyed premises for $235, and the said Ashby and Wymore are to pay said Greenslate, on demand, at any time after ten days, $500; and said Greenslate covenants and agrees that there are no claims against said property except the lien of Jones & Magee aforesaid, and agrees that if there shall turn out to be any claims against said property not now mentioned, that said Ashby and Wymore shall pay the same out of the said $500 to secure themselves, and that shall be held to be the payment for that amount on said $500.

"Witness, this 31st day of January, 1882.

"DAVID GREENSLATE.
"W. H. ASHBY.
"SAMUEL WYMORE.

"In presence of
"DANIEL MCGUIRE."

The testimony shows beyond question that the property in controversy, although included in the above agreement, which was signed by David Greenslate, the husband, was nevertheless the property of his wife, and that he had no authority to sell or incumber the same. This being the state of the proof, no other verdict than one in favor of the wife could be sustained.

It is unnecessary to examine at length the various errors assigned. There is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

G. W. CURRY v. H. C. METCALF.

[FILED SEPTEMBER 17, 1890.]

Review: EVIDENCE. Where the only error assigned is that the verdict and judgment are against the weight of evidence, and the witnesses on each side having equal means of knowledge testify to a contradictory state of facts, a new trial will not be granted.

ERROR to the district court for Hamilton county. Tried below before NORVAL, J.

Agee & Stevenson, for plaintiff in error.

Hainer & Kellogg, contra.

MAXWELL, J.

This action was brought by the plaintiff against the defendant in the district court of Hamilton county. The cause of action is stated in the amended petition as follows:

"The plaintiff complains of the defendant and for cause of action alleges, that on the 20th day of July, 1885, there was at the village of Hampton, Hamilton county, Nebraska, an association of persons formed for the purpose of carrying on, and engaging in the business of operating a steam flouring mill at said village, in said state, under the firm name of Metcalf & Grafe, and not incorporated; that while said association was so engaged in carrying on business under said firm name of Metcalf & Grafe, the said plaintiff, at the instance and request of said firm of Metcalf & Grafe, sold and delivered to said Metcalf & Grafe 637 bushels of wheat at the agreed price of sixty-eight cents per bushel, and for which the said Metcalf & Grafe promised to pay the plaintiff the sum of $433.16 on the 20th day of August, 1885. Said plaintiff says that Metcalf & Grafe never paid the said sum of money, nor any part thereof. The plaintiff further alleges, that after said sum of money became due and payable and while the same was due and payable, to-wit, on or about the — day of ——, 1886, the said firm of Metcalf & Grafe was indebted to divers other persons in various sums of money, the amounts of which are to the plaintiff unknown; that on or about the — day of ——, 1886, and while said firm of Metcalf & Grafe was so indebted to the plaintiff and to various other persons, the said firm of Metcalf & Grafe sold and delivered all their interest in the said flouring mill, including all the stock on hand, goods, chattels, merchandise, notes, accounts, rights, and credits of every nature belonging to said Metcalf & Grafe, of great value, to-wit, of the value of more than $2,000, to the defendant, Horace C. Metcalf, who then and there took possession of the same, and every part thereof, and converted the same to his own use and benefit. And said plaintiff says that in consideration of the sale and delivery of said goods, chattels, wares, and merchandise, stock on hand, notes, accounts, rights, and credits as aforesaid, the said defendant promised, undertook,

and agreed to pay all the then outstanding indebtedness of said firm of Metcalf & Grafe, including the amount so, as aforesaid, due the plaintiff; but plaintiff says said defendant, notwithstanding the promises, failed and refuses to pay the amount so as aforesaid due the plaintiff, and has converted all of said property, rights, and credits to his own use without paying the consideration therefor as he had agreed to do, and that there is now due the plaintiff from said defendant the sum of $433.16, with interest thereon from the 20th day of August, 1885."

There is a general denial and a number of defenses set forth in the answer which need not be noticed. On the trial of the cause the court found the issues in favor of the defendant and dismissed the action. The sole ground of error in this court is that the finding and judgment are against the weight of evidence.

The testimony shows that in the year 1884 H. C. Metcalf sold to A. J. Metcalf, E. F. Grafe, Samuel Grafe, and David Grafe a grist mill for the sum of $6,000, which mill was to be removed to Hampton, in Hamilton county, and there erected and put in running order; that H. C. Metcalf was to and did furnish a large amount of money which was expended on the mill. On the 5th of February, 1886, the amount owing H. C. Metcalf by A. J. Metcalf and the Grafes for the original price of the mill and money furnished by him and interest thereon was about $31,000, and the proof shows that the mill property at that time was worth only about $20,000.

On the 5th day of February, 1886, A. J. Metcalf and the Grafes sold their interest in the mill to H. C. Metcalf and he assumed certain specified debts owing by the mill to various customers thereof, but he denies that he assumed the debt due to the plaintiff in this case, and in this he is corroborated by two witnesses who were present when the contract was made.

The plaintiff's claim is supported by the testimony of

two witnesses, who testify in a general manner that H. C. Metcalf did assume the plaintiff's debt. Their testimony, however, is exceedingly vague and indefinite and does not seem to be of equal weight with that of the defendant.

The judgment, therefore, is not against the weight of evidence and is

AFFIRMED.

COBB, CH., J., concurs.

NORVAL, J., did not sit.

W. H. RICKARDS v. SIMON HENE.

[FILED SEPTEMBER 17, 1890.]

1. **Partnership.** In an action on an account for goods sold and delivered to R. & Co., one W. H. R., before the delivery of part of the goods, purchased the interest of R. in the firm business and assumed his share of the debts. As testified to by one of the witnesses, "he stepped into the shoes" of R. *Held*, That the testimony shows that W. H. R., as a member of the new firm, assumed the debts of R. in the firm of R. & Co.
2. **Variance.** That there was no material variance therein as between the case brought in the justice court and that tried in the district court.
3. **The evidence** *held* **to sustain the verdict.**

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

Pound & Burr, for plaintiffs in error.

Cornish & Tibbetts, contra, cited: *Humphries v. Spafford*, 14 Neb., 488; *Homan v. Steele*, 18 Id., 652; *McKeighan v. Hopkins*, 19 Id., 33; *Carmichael v. Dolan*, 25 Id., 335; Code, secs. 144, 145.

MAXWELL, J.

This action was brought by Hene against Rickards & Co. to recover for goods sold and delivered.

The bill of particulars is as follows:

"SIMON HENE
v.
RICKARDS & Co., a partnership doing business under firm name in Lancaster county, Neb.; WILLIAM H. RICKARDS and L. C. RICKARDS.

"The plaintiff for cause of action states that plaintiff sold and delivered to defendant at defendant's request goods and merchandise in description, amount, and value as follows, to-wit:

April 28, 1887, cigars	$165 00
June 14, 1887, cigars	30 00
	$195 00

which defendants agreed to pay; that said account has not been paid, nor any part thereof, and there is now due and payable from defendants to plaintiff upon said account the sum of $195 and interest thereon from the 28th day of June, 1887, for which amount plaintiff asks judgment, together with costs of action."

On the trial before the justice judgment was rendered against L. C. Rickards and F. W. Kenzie for the sum of $195 and costs, and the action was dismissed as to W. H. Rickards. The cause was then taken to the district court, where the following amended petition was filed:

"The plaintiff for cause of action states that Wm. H. Rickards and F. W. Kenzie were copartners, doing business in Lancaster county, state of Nebraska, under firm name and style of Rickards & Co., and that said copartnership was so formed on or about the 1st day of July, 1887; that prior to said time, to-wit, July 1, 1887, the said

firm was composed of defendants L. C. Rickards and F. W. Kenzie; that on or about the dates hereafter mentioned the plaintiff in this action sold and delivered to Rickards & Co. goods and merchandise as follows, to-wit:

April 28, 1887, cigars	$165 00
June 14, 1887, cigars	30 00
	$195 00

"For which said defendants agreed to pay; the said goods were worth the sum of $195; that thereafter the defendants F. W. Kenzie and W. H. Rickards succeeded to the business of L. C. Rickards and W. H. Rickards, and F. W. Kenzie assumed and agreed to pay said account for a valuable consideration to them in hand paid. That plaintiff agreed to take said defendants for said account; that said account has not been paid, nor any part thereof, and there is now due and payable from said defendants to plaintiff upon said account the sum of $195, and interest thereon from July 1, 1887, for which amount plaintiff asks judgment, with costs of action."

Issues joined thereon and on the trial of the cause judgment was rendered in favor of Hene against W. H. Rickards and F. W. Kenzie for the sum of $195, and in favor of L. C. Rickards.

The plaintiff in error now insists, first, that the action brought in the district court was not the same as that brought before the justice.

There is testimony tending to show that L. C. Rickards and F. W. Kenzie were in partnership in business in a restaurant in Lincoln; that about July 1, 1887, W. H. Rickards purchased the interest of L. C. Rickards in the business, and assumed the liabilities of L. C. Rickards in said firm and received the credits due L. C. Rickards, a member of said firm. In the language of one of the witnesses, W. H. Rickards "stepped into the shoes" of L. C. Rickards in the firm business.

It is clearly shown that a part of the purchase price of the business was the assumption by W. H. R., as a member of the new firm, of the debts of L. C. Rickards. It is also shown that a part of the goods purchased from the defendant in error were not delivered until after plaintiff in error became a member of the firm.

There is no such variance between the case as brought before the justice and that brought in the district court as to defeat the plaintiff's right to recover. While the goods were not sold directly to the plaintiff in error, yet he assumed the payment of the same as a member of the new firm. The plaintiff in error assumed these debts as a part consideration for the restaurant and its business. He has not paid the debt and therefore is liable thereon.

Second—The evidence fully sustains the judgment of the district court, and there is no material error in the record.

The judgment of the district court is

AFFIRMED.

THE other judges concur.

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PRENTISS D. CHENEY v. WILLIAM WAGNER.

[FILED SEPTEMBER 17, 1890.]

1. **Error Proceedings: MOTION FOR NEW TRIAL: THE FAILURE TO FILE** a motion for a new trial in the court below, while it will prevent a review of the errors occurring at the trial, is no cause for striking the petition in error and transcript from the files.

2. ———: **NO EXCEPTION** is necessary to a final judgment.

3. ———: **PETITION IN ERROR AND TRANSCRIPT** filed within one year from the date of the trial will be retained as an error case.

MOTION to strike transcript and petition in error from files.

S. P. Davidson, for the motion.

Charles E. Magoon, contra.

MAXWELL, J.

This is a motion to strike the petition in error and transcript from the files: first, because no motion for a new trial was filed in the court below; second, no exceptions taken to the final judgment, and, third, because the transcript was not filed "within the time allowed by law for taking and docketing appeals."

The failure to file a motion for a new trial, while it will prevent an examination of the proceedings occurring on the trial, is no ground for dismissing a case filed in this court, as the errors complained of may be apparent from the pleadings and judgment. Neither is the second ground of the motion well taken. No exception is necessary to a final judgment. (*Morrow v. Sullender*, 4 Neb., 375; *Black v. Winterstein*, 6 Id., 224; *Parrat v. Neligh*, 7 Id., 459; *Jones v. Null*, 9 Id., 256; *Welton v. Beltezore*, 17 Id., 401.)

The third objection is unavailing. Final judgment was rendered on the 24th of December, 1887, and the transcript and petition in error filed in this court December 13, 1888, being within one year from the rendition of the judgment. As an error case it was filed in time. The motion is

OVERRULED.

THE other judges concur.

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JOSEPH WATSON v. ORANGE A. ROODE.

[FILED SEPTEMBER 17, 1890.]

1. **Warranty**: PLEADING: PRESUMPTION. Where an action is brought on a contract of warranty, and the petition is silent as to whether the contract is in writing, there is no presumption that it exists in parol, and the written warranty is admissible in evidence at the trial.

2. ———: PURCHASER MUST RELY UPON. The purchaser of personal property must have relied upon the statements made by the seller, as to the quality of the article sold, in order to maintain an action for a breach of the warranty.

3. ———: MAY INCLUDE PATENT DEFECTS. The vendor is liable for patent defects in the property sold, if it is so stipulated in the warranty.

4. ———: PAROL VARIATION: EVIDENCE. In an action for a failure of a written warranty given on the sale of a horse, which guaranteed that the horse was registered in the Stud Book of England, *held*, incompetent for the seller to prove by parol testimony that prior to the sale he informed the purchaser that the horse was not registered.

5. **Evidence.** Plaintiff's Exhibit B, copied into the opinion, *held*, not proper rebutting testimony, but should have been introduced in chief.

6. ———: SUBSTITUTION. Before a copy of a letter can be received in evidence over the objection of the opposite party, it should be made to appear that the original is lost or destroyed.

7. **Instructions**: ERROR: WAIVER. Where no exception is taken to the giving of an instruction until after verdict, it is a waiver of the error, if any, in giving such instruction.

8. **Witnesses**: TESTIMONY DISREGARDED. When the general reputation of a witness for truth and veracity in the neighborhood where he resides is proven bad, the jury may entirely disregard the testimony of such witness, except in so far as he is corroborated by other credible testimony.

ERROR to the district court for Gage county. Tried below before MORRIS, J.

R. S. Bibb, and *J. E. Bush*, for plaintiff in error:

A contract not alleged to be written will be presumed to be verbal. (*Carr v. Hays*, 110 Ind., 408; *Burrow v. Terre Haute, etc., Co.*, 107 Id., 432; *Langford v. Freeman*, 60 Id., 46; *Goodrich v. Johnson*, 66 Id., 258; *Dorrington v. Meyer*, 8 Neb., 215; *B. & M. R. Co. v. Kearney County*, 17 Id., 511, and cases cited.) A written warranty does not extend to defects which are visible or known to the vendee. (*Long v. Hicks*, 2 Humph. [Tenn.], 395 [41 Am. Dec., 214]; Benjamin, Sales, 616.) As to the extent of warranties in cases similar to this: *Richardson v. Brown*, 1 Bing. [Eng.], 344; *Budd v. Fairmaner*, 8 Id., 48, and citations; *Anthony v. Halsted*, 37 L. T. [N. S.], 433; Benjamin, Sales [1889 Ed.], 815, sec. 935. A false statement in good faith and believed to be true is not actionable. (8 Wait's Act. & Def., 273; *Taylor v. Leith*, 26 O. St., 428.) An actionable warranty must have been relied upon. (*Halliday v. Briggs*, 15 Neb., 219, and cases; *Proctor v. McCoid*, 14 N. W. Rep. [Ia.], 208; Abbott, Tr. Ev., p. 349, sec. 87; *Schuyler v. Russ*, 2 Caines [N. Y.], 202; *Chandler v. Lopus*, 1 Smith L. C., 299–320; *Nye v. Alcohol Works*, 51 Ia., 129; *Bennett v. Buchan*, 76 N. Y., 386; *Leland v. Stone*, 10 Mass., 459; *McCormick v. Kelley*, 9 N. W. Rep. [Minn.], 675; *Marshall v. Drawhorn*, 27 Ga., 275.) As to the instructions requested: the first, Greenleaf, Ev., sec. 461; *Bowers v. People*, 74 Ill., 418; *Gill v. Crosby*, 63 Id., 190; *Gottlieb v. Hartman*, 3 Colo., 60; the fifth; *Halliday v. Briggs*, 15 Neb., 219; *McCormick v. Kelley*, 9 N. W. Rep., 675, and cases; the ninth, Benjamin, Sales, [1889 Ed.], 817, sec. 938; *Brown v. Bigelow*, 10 Allen [Mass.], 242; *Mulvany v. Rosenberger*, 18 Pa. St., 203; *Vandewalker v. Osmer*, 65 Barb. [N. Y.], 556.

Griggs & Rinaker, and *Hazlett & Bates*, *contra:*

A written warranty is to be construed most strongly against the maker of it. (Benjamin, Sales, p. 611.) The instrument in this case, fairly interpreted, insures the horse as valuable for the stud. (Benjamin, Sales, sec. 613, note; *Little v. Woodworth*, 8 Neb., 283; *Patrick v. Leach*, Id., 536.) The injury was one whose effect was internal and hidden, and plaintiff is not chargeable with notice thereof. (*Shewalter v. Ford*, 34 Miss., 417; *Fisher v. Pollard*, 2 Head [Tenn.], 314; *Thompson v. Botts*, 8 Mo., 710; *Callaway v. Jones*, 19 Ga., 277; Benjamin, Sales, p. 611.) A warrantor may bind himself against visible and known defects. (*Pinney v. Andrus*, 41 Vt., 631; *First National Bank v. Grindstaff*, 45 Ind., 158; *Fletcher v. Young*, 69 Ga., 591.)

NORVAL, J.

This action was commenced by Orange A. Roode to recover damages for an alleged breach of warranty given by Joseph Watson on the sale by him to Roode of a stallion. The amended petition alleges "that on the 18th day of November, 1884, the defendant, as an inducement to plaintiff to purchase from him a certain imported black stallion called "Knight of the Shires," for the sum of $2,000, warranted the said horse to be a foal-getter, and sound in every respect except an enlargement of said horse's bag, which was caused by a kick, and represented the said horse as being then and there sound; that the title to the same was clear, and that the said horse was registered in the Stud Book of England, as well as his sire and dam, and would furnish the secretary's receipt for such pedigree; and plaintiff, relying upon said warranty and statements, purchased said horse from the defendant for the sum of $2,000, then duly paid.

"Plaintiff avers that said horse at the time of said sale

was unsound in this: that the enlargement of said horse's bag was hernia at the time of said sale, and in no way was he free from difficulty or trouble, and was of no value whatever; that one testicle of said horse was mashed and completely ruined, and was of no benefit to the said horse, and on account of said hernia, mashed testicle, and urethral gleet, all of which the said horse had at the time of the purchase, combined to cause the death of said horse, to-wit, on the 16th day of June, 1886.

"Plaintiff avers that the pedigree of said horse was not as warranted by the defendant, and that the said defendant never has furnished the secretary's receipt for such pedigree, as agreed to have been done on the part of the defendant.

"Plaintiff avers that said horse was not a good foal-getter, and by reason of above premises plaintiff has sustained damages in the sum of $5,000."

The answer of the defendant admits the sale of the horse to the plaintiff, and denies all the other allegations of the amended petition.

On the trial of the case to a jury a verdict was returned for the plaintiff, assessing his damages at $1,476.50. The defendant filed a motion for a new trial, containing thirty-two assignments of error, which motion being overruled, judgment was rendered upon the verdict. Eight of the assignments are based upon the rulings of the trial court upon the admission and exclusion of testimony. The plaintiff upon the trial offered in evidence the following instrument:

"DILLER, NEB., Nov., 1884.

"In consideration of $2,000, receipt whereof is hereby acknowledged, I have this day sold my imported black English draft horse, 'Knight of the Shires,' to O. A. Roode, and hereby agree to warrant and defend the title to said horse from all claims whatsoever, and I also guarantee said horse to be a foal-getter; and I further state that the

enlargement of said horse's bag was caused by a kick and in no way troubles him; and I further guarantee the said horse to be registered in the Stud Book of England, also his dam as well as his sire, and will furnish the secretary's receipt for such pedigree. It is further agreed that if said O. A. Roode is unable to pay a note bearing even date with this agreement, from the proceeds of the first year's services of said horse, he shall have the privilege of another year's time on $200. JOSEPH WATSON."

The defendant objected to the receiving in evidence of this paper, as incompetent, irrelevant, immaterial, and inadmissible under the pleadings, which objections were overruled, and the defendant took an exception. It will be observed that it is nowhere alleged in the amended petition, that the warranty upon which the action is founded was in writing, nor is a copy of the instrument attached to the pleading.

It is claimed by the plaintiff in error that, as the pleading does not aver that the warranty was in writing, the presumption is that it existed in parol, and that it was incompetent to prove a written warranty. The Indiana cases cited by counsel sustain that view, but they are believed to be contrary to the weight of authority. The rule as laid down in the decisions and in the works on pleadings is, that in an action upon a written contract it is not absolutely necessary that the plaintiff should allege in his pleading that the contract is in writing, and that on the trial under such a pleading the writing is admissible in evidence. (Maxwell, Pleading and Practice, 99; Stephen, Pleading, 33; Abbott's Trial Ev., 522; *Tuttle v. Hannegan*, 4 Daly, 92; *Tuttle v. Hannegan*, 54 N. Y., 686; *Marston v. Swett*, 66 Id., 206.)

Where the contract is one that the law requires to be in writing, and the pleading based thereon is silent as to whether it is in writing or not, the law presumes that a written contract was intended; but where the contract is

valid, whether it be in writing or in parol, there is no such presumption. Under the allegations of the petition in this case the written warranty was competent evidence. The defendant had an undoubted right, had he moved at the proper time, to have required the plaintiff to make his petition more certain and specific by stating that the warranty was a written one, and by attaching a copy thereof to the petition.

The plaintiff on rebuttal introduced in evidence the following paper, signed by the defendant, and marked "Exhibit B:"

"BEATRICE, NEB., April 24, 1885.

"To whom it may concern:

I, Joseph Watson, upon honor state that I have known the imported horse 'Knight of the Shires' since he was imported in 1882, by Mr. B. Holmes, of Moline, Ill., and know him to be a good and sure foal-getter, as compared with the best of horses, and any reports to the contrary are without foundation, and malicious. His colt owned by Mr. Thomas McLaughlin, Moline, Ill., took first premium at the Fairbury, Ill., fair, and I will deposit ten dollars with any man that he can show at the Gage county fair five of best colts sired by any horse in the county.

"JOSEPH WATSON."

The defendant objected to the receiving of this paper in evidence, as being immaterial, irrelevant, and not proper rebutting testimony. This objection was overruled. No testimony had been introduced by the defendant that made this paper competent rebutting testimony. It is urged by the defendant that as the writing was made by the defendant and delivered to the plaintiff several months after the purchase of the horse, it therefore could not be relied upon by the plaintiff as a warranty of the horse, for the obvious reason that no new consideration passed for the giving of this writing. Had this paper been made the basis or foundation of the suit, the position of the de-

fendant would be well taken, for the rule undoubtedly is that where the warranty of an article is given after the sale has been fully made and the property delivered to the purchaser, it must be based upon a new consideration. (Benjamin on Sales, sec. 930; *Morehouse v. Comstock*, 42 Wis., 626.) But this paper was not claimed by the plaintiff to be the warranty declared upon, nor was it received in evidence for that purpose.

It was contended by the defendant on the trial in the lower court that the meaning of the term "foal-getter," as used by the defendant in the written warranty given at the time of the sale, was, that the horse was capable of producing a foal, and did not mean, and was not so understood by the parties at the time, that the horse was a sure foal-getter. The sole purpose and object in introducing this paper in evidence was to show what the defendant meant by the term "foal-getter," and to show what construction the defendant had given the term used in the warranty. It should have been given in evidence in chief and not on rebuttal. The horse was purchased for the stud, as the defendant at the time fully understood, and it is not reasonable to suppose that either party to the agreement at the time expected that the purchaser was paying $2,000 for a horse that was totally unfit for the purpose for which he was bought. The horse, prior to the sale, had received a kick, which caused an enlargement of the bag. The defendant by his warranty guaranteed that this injury in no way troubled him. In other words, that it did not injure him as a "foal-getter." The warranty, when read in the light of the construction subsequently placed thereon by the defendant, and in view of the purpose for which the horse was purchased, and the price paid, is in effect a guaranty that the injury caused by the kick did not unfit the horse for the stud and that he was capable of producing the usual percentage of foals. The testimony fully establishes that the injury unfitted the horse for breeding

purposes, and that he subsequently died on the 16th day of June, 1886, from the effects of the injury he had received prior to the sale to the plaintiff. During the season of 1885 the horse was bred to some eighty mares, and out of the number only fifteen mares were with foal, and but nine of these had living colts. The testimony likewise shows that the usual percentage of foals is two-thirds of the number of mares covered.

The defendant insists that the defect in the horse was plain and noticeable at the time of the sale; that it was of such a character as to require the plaintiff to take notice of its extent and effect, and that the injury being plain and visible to the buyer, the warranty did not cover such defect. It is true that the evidence discloses that the blemish on the horse was apparent, and was observed by the plaintiff prior to the sale, yet it was impossible for him to tell whether the defect was of such a character as to injure the horse as a foal-getter. The defendant by his contract warranted against this hidden imperfection, and he cannot escape liability because the injury was one that left an external blemish, plainly visible. While a general warranty does not extend to imperfections known to both parties, yet it is equally well settled that the seller may bind himself as against patent defects, if the warranty is so worded. (*Pinney v. Andrus*, 41 Vt., 631; *Bank v. Grindstaff*, 45 Ind., 158.) The contract of warranty in the case at bar expressly stipulates that "the enlargement of the horse's bag in no way troubled him," and is a guaranty against the extent of the injury. The defendant having by his contract expressly warranted against the defects of the horse, he cannot relieve himself of liability by showing that the plaintiff was aware at the time of the sale that the horse was injured.

It was admitted by the defendant on the trial that the horse was not registered in the Stud Book of England. That the horse was warranted to be so registered is not de-

nied. The defendant on the trial sought to escape the force and effect of this clause of his written warranty, by attempting to show that at the time of the sale he informed the plaintiff that the horse was not registered. Upon the cross-examination of the plaintiff Roode, he was asked by the defendant's counsel this question. "At the time the writing was made (being the warranty in question) I will ask you to state to the jury whether or not Watson didn't tell you that the horse was not registered in the Stud Book of England?" The plaintiff's objection to the witness answering the question was sustained and the answer was not taken. This ruling of the court is now assigned for error. The testimony sought to be elicited, had it been received, would have contradicted and varied the written agreement of the parties. It is too well established to require the citation of authorities, that parol testimony cannot be received to contradict or vary a written contract. It is claimed by the defendant that the purpose of this testimony was to show that the defendant had knowledge that the horse was not registered, and that the defendant could not have relied upon the statement in the warranty that the horse was registered, and therefore no claim for damages can be based upon the fact that the horse was unregistered. While it is true that in a suit on a breach of warranty against defects in the article sold the seller may prove that the defects were of such a character that the purchaser must have known of their existence, or that the buyer knew of them prior to the sale, for the purpose of showing that the plaintiff did not rely upon the warranty, yet it does not follow that it is competent to prove that the seller, during the negotiations leading up to the sale, made representations to the purchaser directly contradictory of his written warranty subsequently made. No case has been cited by counsel for plaintiff in error holding the doctrine contended for by him in this case, nor have we been able to find such a case reported in the books.

To permit such testimony to be received would violate the familiar rule of evidence above referred to. There was, therefore, no error in sustaining the plaintiff's objection to the question propounded.

After the defendant had closed his case the plaintiff put in evidence, over the objection of the defendant, what purported to be a copy of a letter written by the plaintiff to the defendant on the 24th day of February, 1886. Among the objections made by the defendant at the time, were that no foundation had been laid for its introduction, and that no notice was served upon the defendant or his attorneys to produce the original. No foundation was laid for the introduction of the copy. It does not appear that the original could not have been produced at the trial, nor was it shown that the paper offered was a correct copy of the original.

Numerous other errors are assigned in the brief of counsel for the plaintiff in error, based upon the rulings of the trial court upon the admission of testimony, which we will not take the time to notice, as many of them are disposed of by what we have said in this opinion, and the other errors are not likely to occur upon a retrial of the case.

Nine assignments in the petition in error are predicated upon the giving of certain instructions to the jury, but as they are not referred to in the brief of plaintiff in error, these assignments are abandoned. The record, however, discloses that no exception was taken to any paragraph of the charge of the court until after the verdict was returned into court. A party cannot wait until after he learns that an unfavorable verdict has been received, and then except to the charge of the court, and assign for error the giving of such instructions. An exception must be taken when the instructions are given, in order to have the same considered by the reviewing court.

The defendant requested twelve instructions to be given

to the jury, all of which were refused. These requests are quite lengthy and it is not deemed important that they should all be copied into the opinion. The first and twelfth requests correctly stated the rule, that the burden of proof was upon the plaintiff. The substance of these requests is contained in the third paragraph of the charge given by the court on its own motion, and no error was committed in refusing them.

The second request is as follows:

"The court instructs the jury that if they believe from the evidence, that the plaintiff Orange A. Roode is a person of bad reputation for truth and veracity in the neighborhood where he resides, then, as a matter of law, this fact tends to discredit his testimony, and the jury may entirely disregard it, except in so far as he is corroborated by other credible testimony, or by facts and circumstances proved on the trial."

The defendant introduced several witnesses who testified that the plaintiff's reputation for truth and veracity in the neighborhood where he lived was bad. In view of this testimony the jury should have been told what weight should be given to the plaintiff's testimony. The request contained a correct statement of the law, and as it was not covered by the instructions given it was error to refuse it.

The substance of the third request is that the warranty made by the defendant on the 27th day of April, 1885, after the contract of sale was concluded, being without consideration, is not binding on the defendant. There is in the record no testimony tending to show that a warranty was made on that date. Doubtless the defendant meant Exhibit B, that was made on April 24. As heretofore stated, this exhibit was in no way relied upon as a warranty, or made the foundation of the action, and the request was not applicable to the testimony.

Request No. 4 was rightly refused. It, in effect, stated that if the horse was capable of producing a single foal,

then there was no breach of the warranty upon that point. The defendant was not entitled to so favorable an instruction.

The defendant's fifth prayer reads "That although the defendant warranted in writing the stallion 'Knight of the Shires' to be registered in the Stud Book of England, also his dam as well as sire, and that defendant would furnish the secretary's receipt for such pedigree, still if the jury further believe from the evidence that at said time the defendant informed plaintiff that said horse was not registered, but simply eligible to registry, and that said plaintiff knew that said horse was not registered and did not rely on said warranty in making his purchase of the said horse, the plaintiff could not recover for a breach of said warranty, as in law it would be no warranty unless the plaintiff relied upon it in making the purchase." No testimony was given that the defendant informed the plaintiff that the horse was not registered. Such testimony was excluded, and, we think, rightly so.

The sixth and ninth instructions refused stated, in substance, that defects or blemishes which are known to the purchaser must be expressly warranted against to make the seller liable for such defects. We find no fault with the statement of the law in these instructions. The plaintiff did not seek to recover for defects that were visible at the time of the purchase, and that were not expressly covered by the terms of the warranty. The plaintiff claimed damages because the horse was unregistered, and on account of the injury which the horse had received prior to the sale. Both of these matters were expressly covered by the warranty. The eleventh request covers the question of reliance by the purchaser upon the warranty. It is as follows:

"11. The court further instructs the jury, to entitle the plaintiff to recover in the suit, it is not only necessary for the jury to find from the evidence that the plaintiff war-

ranted the animal in question, as alleged in the petition, but it must further appear from the evidence that the plaintiff relied upon said warranty in making the purchase of the horse, and was induced to make said purchase by said warranty; and it must also appear from the evidence that the horse was not as warranted at the time of the sale; and unless all of these facts appear from the evidence, the jury should find for the defendant."

The law undoubtedly is, and has so been declared by this court, that the purchaser of personal property must have relied upon the statements of the seller as to the quality of the article sold in order to make the representations a warranty. (*Little v. Woodworth*, 8 Neb., 281; *Halliday v. Briggs*, 15 Id., 219.) This instruction stated the law correctly, and not being covered by any of the instructions given should not have been refused.

For the errors pointed out the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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OMAHA & N. P. R. CO. v. JOHN JANECEK.

[FILED SEPTEMBER 17, 1890.]

Railroads: ABUTTING PROPERTY: SPECIAL DAMAGES. Where a railroad company constructs its road in front of a person's tract of land, and in close proximity to his residence, *held*, in an action to recover damages by the owner against the railroad company, that he can recover for any damages he may have sustained in respect to his property not suffered in common by the public generally. Injuries resulting from smoke, soot, and cinders from passing engines are proper elements of damage.

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

W. S. Russell, and *Marquett & Deweese*, for plaintiff in error.

Phelps & Sabin, contra.

Cases cited by counsel are in the main referred to in opinion.

NORVAL, J.

The defendant in error brought this action in the district court of Colfax county to recover damages for the depreciation in value of his property, caused by the construction and operation of the Omaha & North Platte railroad in front of his premises. The case was tried to the court, who rendered a judgment for the plaintiff for the sum of $1,500.

It is fully established by the testimony, that the railroad company purchased blocks 2 and 15 in the town of Schuyler, and constructed its main track and switches thereon; that on the east part of block 15 it erected an engine house, a turntable, and a coal shed. At the time of the location of defendant's road the plaintiff was the owner of block 16, which is immediately east of block 15, being separated by Atlantic street. The plaintiff also owns between three and four acres of land adjoining said block 16 on the south. The plaintiff's residence is located on the west part of said block 16, and within eighty feet of the engine house. No part of Atlantic street was taken by the railroad company for any purpose. All the evidence shows that in moving trains over the main and side tracks, and at the roundhouse, noises are made by the ringing of the bells, and sounding of the whistles; that the engines of the defendant throw soot, smoke, and cinders upon plaintiff's

property, and that the passing of trains shakes plaintiff's house, which damaged and depreciated the value of his property. The evidence establishes that the property has been depreciated in value in the sum of $1,500, by reason of the construction and operation of the railroad in such close proximity to plaintiff's premises.

The plaintiff's right to recover is based upon section 21, article 1, constitution of this state, which provides that "The property of no person shall be taken or damaged for public use without just compensation therefor." It has become the settled law of this state, that under this provision of our constitution it is not necessary that any part of an individual's property should be actually taken for public use in order to entitle him to compensation. If the property has been depreciated in value by reason of the public improvement, which the owner has specially sustained, and which is not common to the public at large, a recovery may be had. In the case at bar the plaintiff's property is depreciated in value by the noise caused by the operation of the defendant's engines and cars in front of his premises and in close proximity to his house, by the casting of soot, smoke, and cinders upon his property, and by the vibration of his house. The plaintiff has sustained special damages by the construction and operation of the railroad near his premises, in excess of that sustained by the community at large. Smoke, soot, and cinders are not thrown upon property situate a few blocks from the road, nor does the moving of trains jar buildings that are distant from the track. The fact that the property of a dozen or more owners in the town is materially injured by the location of the defendant's roads, does not affect the plaintiff's right to compensation for the depreciation in value of his property. If, in consequence of the building of a railroad into a town, new towns spring up which divert trade from the old town, and property therein depreciates in value, for such depreciation no recovery can be

had. It is an injury or damage each property holder has sustained in common with the public generally.

It is claimed that the district court allowed this kind of damages in this case, and none other. True, there is testimony in the record before us tending to show that property generally in the town of Schuyler, since the construction of the road, has depreciated in value, but this falling off in value was not taken into consideration by the court in assessing damages in this case. The evidence fails to disclose that any such general depreciation had taken place immediately after the construction of the defendant's road, and that is the date the witness estimates the value of the property, and not at the date of the trial. Had the value of plaintiff's property at the time of the trial been given, then there would have been just grounds for complaint.

A similar question was considered in the case of *Blakeley v. C., K. & N. R. Co.*, 25 Neb., 207, where it was held that it was competent to take into consideration noise and confusion incident to the operation of trains, in estimating the value of real estate after the construction of the road.

The *C., K. & N. R. Co. v. Hazels*, 26 Neb., 364, was an action to recover damages alleged to have been sustained by Hazels by the reason of the construction of a railroad in close proximity to his property. Smoke, dust, and soot from engines, the ringing of bells, sounding of whistles, and noise of the trains depreciated the value of his property. It was held in that case that all elements caused by the construction of the road which tend to diminish the value of property could be taken into consideration.

This view is supported by *Railroad Co. v. Combs*, 10 Bush., 382; *Railway Co. v. Eddins*, 60 Tex., 656; *Lahr v. Railway Co.*, 104 N. Y., 268; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S., 317; *Cogswell v. N. Y., N. H. & H. R. R. Co.*, 8 N. E. Rep., 537; *K. C. & E. R. Co. v.*

Kregelo, 5 Pac. Rep., 15; *Drucker v. Manhattan R. Co.*, 12 N. E. Rep., 568; *C. & W. I. R. Co. v. Ayres*, 106 Ill., 511.

In *Columbus, H. V. & T. R. Co. v. Gardner*, 45 O. St., 316, the supreme court of Ohio, in considering the question involved in the case at bar, says: "While it may be conceded that in estimating the plaintiff's damages the jury would not be permitted to take into account the consequences of the operation of the railroad which were common to the community at large, no sound reason exists for excluding from their consideration such elements of inconvenience, annoyance, danger, and loss as result to the property, its use and enjoyment, from the smoke, noises, and sparks of fire occasioned by running of locomotives and cars along the track in front of the same, if it be shown that these caused special injury and depreciation to the property."

The rule established by the decisions of this court, and by the recent adjudicated cases of most of the other states, is to the effect that if the property of an individual has been depreciated in value by reason of smoke, soot, and cinders being thrown upon his property by passing engines, he may recover the damages thus sustained.

The judgment of the district court is

AFFIRMED.

THE other judges concur.

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JAMES MYERS v. JOHN BEALER.

[FILED SEPTEMBER 17, 1890.]

1. **Pleading.** When the facts constituting a cause of action or defense are stated in a pleading as a matter of information and belief, and not positively, an objection to this mode of statement cannot be raised by demurrer, nor by objecting to the introduc-

tion of testimony at the trial. The objection can only be taken by motion. (*Stoutenburg v. Lybrand et al.*, 13 O. St., 228.)

2. **Negotiable Instruments**: EQUITABLE DEFENSE: NOTICE. Where a purchaser of negotiable paper, before maturity, takes it with knowledge of facts which impeach its validity between antecedent parties, or with a belief based upon circumstances brought to his knowledge before the purchase that the maker had a defense to the note, such purchaser is not an innocent holder, and the paper is subject to the defenses existing between the maker and payee.

3. **Evidence**: SUBSTITUTION. Before the contents of a written instrument can be established by oral testimony, the loss of the instrument must be accounted for.

ERROR to the district court for Gage county. Tried below before BROADY, J.

R. W. Sabin, for plaintiff in error, cited: Maxwell, Pl. & Pr. [2d Ed.], 71; *Harden v. R. Co.*, 4 Neb., 523; *Hanson v. Lehman*, 18 Id., 564; *Sch. Dist. v. Shoemaker*, 5 Id., 36; *Dillon v. Russell*, Id., 484; *Smith v. Columbus State Bank*, 9 Id., 31; *Dobbins v. Oberman*, 17 Id., 163; *Johnson v. Way*, 27 O. St., 374; *Smith v. Livingston*, 111 Mass., 345; *Murray v. Lardner*, 2 Wall. [U. S.], 110; *Knowlton v. Parsons*, 10 Neb., 502; *Organ Co. v. Boyle*, Id., 409.

Pemberton & Bush, contra, cited: *Stoutenburg v. Lybrand*, 13 O. St., 228; *Bennett v. Leeds Mfg. Co.*, 110 N. Y., 150; Maxwell, Pl. & Pr. [2d Ed.], 355; Pom., Remedies, sec. 552 and note; *Treadwell v. Com'rs*, 11 O. St., 187; *Tod v. Wick*, 36 Id., 370; *Lay v. Wissman*, 36 Ia., 305; *Murray v. Beckwith*, 48 Ill., 391; *Dobbins v. Oberman*, 17 Neb., 163.

NORVAL, J.

This action was brought upon a promissory note of $164, given by John Bealer, payable to the order of the Standard Machine Company and by it indorsed to the plaintiff.

The answer filed by the defendant in the lower court admits the execution of the note, and alleges that it was given for the purchase price of a mill and grinder of the Standard Machine Company's manufacture; that at the time of the purchase, and before the execution of the note, the company warranted the said mill and grinder; that the same was durable and would do the best of work; that the defendant, relying upon said representation, purchased said mill and grinder of said machine company, and made and delivered the note in question upon the sole consideration of said warranty.

The defendant further alleges that the said mill and grinder was not durable and would not do the best kind of work, which the said machine company well knew at the time of the sale of the same; that the said mill and grinder was of no value whatever, and the defendant has received no consideration for said note.

The defendant further answering said petition alleges, upon information and belief, that the plaintiff purchased said note after the same had become due, and with full knowledge of defendant's rights in said matter, and with full knowledge of the warranty and the breach of the same. All the allegations of the answer were denied by the reply. Upon a trial of the issues joined, to a jury, a verdict was returned for the defendant.

At the commencement of the trial the plaintiff objected to the defendant introducing any testimony because the answer did not state sufficient facts to constitute a defense. The objection being overruled, an exception was noted and the testimony was received. The ruling is made the basis of the seventh assignment in the petition in error, but being the first error in point of time of occurrence, it will be first noticed. The point is made, that the allegations of the answer relating to the purchase of the note by the plaintiff are stated as from information and belief and not positively. This objection goes to the form of the answer

and not to the substance and can be reached only by motion. Doubtless the plaintiff upon motion might have had stricken from the answer, as redundant, the words "upon information and belief." Had the objectionable words been omitted, the allegations of the answer would have been complete. The usual and proper mode is for the party pleading to state the facts constituting his cause of action or defense positively, yet if the pleading should state that the allegations are made from belief, it will not be sufficient grounds for demurrer or the exclusion of evidence at the trial. (*Stoutenburg v. Lybrand et al.*, 13 O. St., 228; *Treadwell v. Commissioners*, 11 Id., 183.)

The next point discussed in the brief is, that the verdict is not sustained by sufficient evidence and is contrary to law. It is fully established by the testimony that the note sued upon was given for a corn sheller and grinder bought of the payee named in the note, and that the machine was warranted to the defendant. There is evidence tending to show that the warranty has failed. The material question is, Did the plaintiff purchase the note before maturity in the usual course of business, without notice of the equities of the defendant? The note was given September the 2d, 1884, and payable eight months after date. The plaintiff testified that he bought the note of the Standard Machine Company on the 20th day of October, 1884, paying therefor $130. He claims to have made the payment by a draft drawn by himself as cashier of the First Commercial Bank of Odell, Nebraska, on the First National Bank of New York city. The draft was put in evidence at the trial. A copy is in the bill of exceptions, containing the indorsement of the Standard Machine Company and the Cleveland National Bank of Cleveland, Ohio. The plaintiff further testified that when he bought the note he did not know what it was given for, or that there was any defense to the note.

The defendant testified that he had a conversation with

the plaintiff in February, after the note was given, while the note was in the plaintiff's possession, and that he told Myers that the machine was worthless, and that the plaintiff replied, "he hadn't a dollar in the note; that it was there for collection." The defendant further testified that he called upon the plaintiff about the note shortly after it fell due, and in the conversation Myers said he didn't own it; only had it for collection.

Q. Do you know what he done with the note then, with reference to whether he retained it there or sent it back to the machine company?

A. The next I heard of it when I went into the office and asked about it about the time it was due, he said "the company ordered it out of his hands," and Sabin notified me he had it for collection. I came to Beatrice to see him.

J. K. Langdon testified that in the fall of 1884, or early in 1885, the plaintiff gave him the note to sell, and told him that the Standard Machine Company was the owner of the note; that while the witness had the note in his possession, he learned that Bealer was not satisfied with the working of the machine, which information he states he conveyed to the plaintiff.

James Myers, the plaintiff, admitted, when upon the witness stand, that the defendant, after the maturity of the note, called at the bank, of which the plaintiff was cashier, and that plaintiff told the defendant that when he gave Langdon the note, it belonged to the Standard Machine Company, and that he bought the note while it was yet in Langdon's hands. The plaintiff denies that he told the defendant that he did not own the note.

If it be true that the plaintiff informed the defendant in February, before the maturity of the note, that he held it for collection and did not own it, and that the defendant then informed the plaintiff that the note was given for a grinder and mill and that it was worthless, then if the

plaintiff ever purchased the note, he did so with knowledge of the defense existing against it. The testimony justified the jury in finding that the plaintiff was not an innocent holder for value, and that the machine was worthless. If the plaintiff actually purchased the note in October, before it fell due, as he contends, he was very unfortunate in stating to the defendant afterwards that "he did not have a dollar in the note; that it was there for collection."

It is claimed that the court erred in giving paragraphs 1 and 2 of the instructions requested by the defendant. They are as follows:

"1. If the jury believe from the evidence that the plaintiff, before he purchased the note sued on in this action, knew, or, as an ordinarily prudent man, had reason to believe from circumstances brought to his knowledge before he purchased it, that the defendant had, or claimed to have, a defense to the note, or to some part of it, then the plaintiff is not an innocent holder of said note.

"2. The jury are further instructed, that if they believe from the evidence that the plaintiff is not an innocent holder of the note sued on in this action, as explained in these instructions, then the defendant is entitled to set up the same defense to it that he could have set up if suit had been brought by the payee of said note."

It is claimed by the plaintiff in error that the first instruction in effect informed the jury that if the plaintiff purchased the note under circumstances which would excite suspicion in the mind of a prudent man, he was not an innocent holder. If the language of the instruction is capable of such a construction, it should not have been given, for, as said by the court in *Murray v. Lardner*, 2 Wall., 110: "Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross neglect on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part." It

may be observed that the element of suspicion is not included in the instruction. On the other hand, the jury were told, in effect, that to impeach the plaintiff's title the circumstances brought to the plaintiff's knowledge before he purchased the note must have been of such a character as to cause a prudent man to believe that the defendant had or claimed a defense to the note. The law is when a purchaser of negotiable paper takes it under circumstances showing bad faith, or without knowledge that the maker has or claims a defense to the paper, the holder is not an innocent purchaser. (*Dobbins v. Oberman*, 17 Neb., 163, *Johnson v. Way*, 27 O. St., 374.)

It is contended that there is no evidence in the record tending to show that the plaintiff had any knowledge, or reason to believe from circumstances brought to his knowledge before he purchased the note, of any warranty, or of any breach of the same. Counsel for plaintiff in error assume that it is conclusively proven that the note was purchased October 20, 1884. While the plaintiff so testifies, he is contradicted, as we have already shown by the testimony of the defendant. Besides, the plaintiff's testimony as to the date of the purchase is very much weakened by his admission made to the defendant after the maturity of the note, that he then held it for collection. The plaintiff admits that at that time he knew that the defendant claimed to have a defense against the note. We find sufficient testimony in the bill of exceptions upon which to base the first instruction. The second instruction was properly given. The rule undoubtedly is that when a suit is brought upon a note by one not an innocent holder, the maker can urge the same defense thereto that he could have made if the suit had been brought by the payee. This proposition is so firmly settled as not to require the citation of authorities.

It is conceded that the warranty made upon the machine, for which the note in suit was given, was in writing. The

defendant was permitted to testify as to the contents of this writing. This is made the basis of the 8th assignment of error. The question is, Was the loss of the instrument properly accounted for, so as to make competent oral testimony of its contents? The record shows that on the trial of the cause in the county court the warranty was introduced in evidence, and after the trial it was left in the custody of the county judge. To account for the loss of the papers J. N. Bush was called and sworn, and testified as follows: "In regard to the warranty, I would state that it was introduced in evidence as an exhibit there on the other trial, and I have been unable, since the trial of the case in the county, to find any exhibits in the case—I mean the papers in the lower court; had the county judge search for them; I have been through all the papers there and have been unable to find any papers or exhibits we had. The other papers I found in Sabin's office; our exhibits I have been unable to find."

The foregoing is all the testimony in the case explaining the failure to produce the original warranty. It does not appear that the paper is not in existence. It was left with the county judge and he was not called to testify what search, if any, he had made for the missing paper.

For all that appears from this record, it is where the county judge can place his hands upon it at any time. The person in whose custody the paper was left should have been called to establish that it was lost, before receiving oral testimony of its contents. For this error the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

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GERMAN INS. CO. v. HEIDUK & SKIBOWSKI.

[FILED SEPTEMBER 17, 1890.]

1. **Insurance: ADDITIONAL POLICIES: CONDITIONS FORBIDDING: AGENT NOT AUTHORIZED TO WAIVE.** The policy in suit provides that the insured must obtain the written consent of the company for all additional insurance on the property insured, or he shall not recover in case of loss; and further provides that "the use of general terms, or anything less than a distinct specific agreement, clearly expressed and indorsed on the policy, and signed by a duly authorized agent of the company, should not be construed as a waiver of any printed condition of the policy, and no notice to, and no consent or agreement by any local agent should affect any condition of the policy, until such consent or agreement is indorsed thereon." The insured subsequently procured further insurance, of which the local agent was notified, and orally consented thereto, but such agreement was not indorsed on the policy. The property was destroyed by fire. *Held*, That the notice to, and the oral consent of, the local agent did not bind the company, and that the additional insurance obtained without the written consent stipulated in the policy rendered the policy void.

2. ———: ———: **LOSS: MEASURE OF DAMAGES.** In an action on a policy containing a provision that in case of other policies the insured shall recover no greater proportion of the loss than the sum insured by the policy bears to whole amount of the policies, it was admitted that there was other insurance on the property amounting to $900, and there was before the jury testimony tending to show that the entire loss was less than the whole amount of insurance. *Held*, That it was error to instruct the jury that the measure of damages was the market value of the goods destroyed.

ERROR to the district court for Cuming county. Tried below before NORRIS, J.

Dickey & Heiskell, Uriah Bruner, and *J. C. Crawford*, for plaintiff in error:

The insured were bound to know that additional insurance in violation of the terms of the contract would

prevent a recovery. (*Havens v. Ins. Co.*, 111 Ind., 90; *Cleaver v. Ins. Co.*, 32 N. W. Rep. [Mich.], 660; *Cook v. Anamosa*, 66 Ia., 427; *Russell v. Ins. Co.*, 42 N. W. Rep. [Ia.], 654; *Clarke v. R. Co.*, 5 Neb., 314.) Any violation of lawful conditions imposed by the insurer, releases him from liability. (*Wood v. Ins. Co.*, 13 Conn., 533; *Worcester v. Ins. Co.*, 11 Cush. [Mass.], 265.) The powers of an agent may be limited, and those who deal with him, knowing of such limitations, must observe them. (*Thomas v. Osborn*, 19 How. [U. S.], 22; *Payne v. Potter*, 9 Ia., 549; *Baxter v. Lamont*, 60 Ill., 237; *Morris v. Watson*, 15 Minn., 212*; *N. E. Mtge. Co. v. Hendrickson*, 13 Neb., 165; *Hankins v. Ins. Co.*, 70 Wis., 1; *Engebretson v. Ins. Co.*, 58 Id., 301; *Knudson v. Ins. Co.*, 43 N. W. Rep. [Wis.], 954; *Hartford Ins. Co. v. Wilcox*, 57 Ill., 182; *Martin v. Farnsworth*, 49 N. Y., 555; *Wilson v. Wilson*, 26 Pa. St., 393.) Agent and insured are bound by the terms of the policy and the former can waive them only in the mode provided. (*Enos v. Ins. Co.*, 67 Cal., 621; *Ins. Co. v. Wilkinson*, 13 Wall. [U. S.], 222; *Baer v. Ins. Co.*, 4 Bush. [Ky.], 242; *Stevenson v. Ins. Co.*, 14 Ins. Law Journal, 65; *Phœnix Ins. Co. v. Stevenson*, 78 Ky., 150; *Shuggart v. Ins. Co.*, 55 Cal., 408; *Silverberg v. Ins. Co.*, 67 Cal., 36; Story, Agency [7th Ed.], sec. 76.) Notice to an agent without authority to waive conditions, is not notice to the company. (*Russell v. Ins. Co.*, 42 N. W. Rep. [Ia.], 665.) A modification of a policy, to be binding, must be supported by a new consideration. (*Bishop v. Busse*, 69 Ill., 403; *Hewitt v. Brown*, 21 Minn., 163; *McGrann v. R. Co.*, 29 Pa. St., 82; *Titus v. R. Co.*, 8 Vroom [N. J.], 98; *Low v. Forbes*, 18 Ill., 568; *Haynes v. Fuller*, 40 Me., 162.) Additional insurance increases the risk (*Hutchinson v. Ins. Co.*, 21 Mo., 97; *Obermeyer v. Ins. Co.*, 43 Id., 573); even if no loss results (*Gardiner v. Ins. Co.*, 38 Me., 439; *Merriam v. Ins. Co.*, 21 Pick. [Mass.], 162; *Lyman v. Ins. Co.*, 14 Allen [Mass.], 329; *Mead v. Ins. Co.*, 7 N. Y.,

530; *Glen v. Lerrs*, 8 W. H. & G. [Eng.], 607). In *Westchester Ins. Co. v. Earle*, cited by defendant in error, the policy made no such limitation upon the agent's authority as in this case.

T. M. Franse, E. K. Valentine, and *M. McLaughlin, contra:*

The agent had authority to waive orally the conditions as to further insurance. (*Westchester Ins. Co. v. Earle*, 33 Mich., 143; *Kitchen v. Ins. Co.*, 23 N. W. Rep. [Mich.], 616; *Silverberg v. Ins. Co.*, 67 Cal., 36; *Schoener v. Ins. Co.*, 7 N. W. Rep., 544; *American Cent. Ins. Co. v. McLanathan*, 11 Kan., 533; *Carroll v. Ins. Co.*, 40 Barb. [N. Y.], 292.) Notice to the agent was notice to the company. (*Brandup v. Ins. Co.*, 7 N. W. Rep. [Minn.], 735, and citations; *Westchester Ins. Co. v. Earle, supra; Havens v. Ins. Co.*, 111 Ind., 90, and citations; *Indiana Ins. Co. v. Capehart*, 108 Id., 270; *Bartlett v. Ins. Co.*, 41 N. W. Rep. [Ia.], 601.) An insurance agent, as distinguished from an insurance broker, is the general agent of the company, and may waive conditions, notwithstanding a provision in the policy to the contrary. (Mechem, Agency, sec. 931, and numerous authorities there cited.) If the company or its agent had actual knowledge of additional insurance and made no objection, it cannot afterwards be insisted that such notice and assent thereto should have been in writing. (*Thompson v. Ins. Co.*, 52 Mo., 469; *Hayward v. Ins. Co.*, Id., 181; *Viele v. Ins. Co.*, 26 Ia., 9; *Van Bories v. Ins. Co.*, 8 Bush. [Ky.], 133; *Peck v. Ins. Co.*, 22 Conn., 584; *Halton v. Ins. Co.*, 16 Up. Can., 316; *National Ins. Co. v. Crane*, 16 Md., 260; *Warner v. Ins. Co.*, 14 Wis., 345; *Miner v. Ins. Co.*, 27 Id., 693; *Killips v. Ins. Co.*, 28 Id., 472; *Boehen v. Ins. Co.*, 35 N. Y., 131, and citations; *Cobb v. Ins. Co.*, 11 Kan., 93; *Carrugi v. Ins. Co.*, 40 Ga., 135.)

NORVAL J.

This is an action upon a policy of insurance issued by the defendant June 1, 1887, for one year. The insurance was for $1,500 upon the plaintiffs' stock of clothing and gents' furnishing goods, situated at West Point, Nebraska. On the 26th day of November, 1887, while said policy was in full force, the property was totally destroyed by fire. The petition is in the usual form. The policy sued on is attached to the petition and contains this written clause: "$400, other insurance concurrent herewith only permitted." The defendant by its answer admits the execution and delivery of the policy, and denies all other allegations of the petition. The defendant, as a second defense, alleges "that said policy of insurance, described in the petition, is in the regular form of policies issued by this defendant, and that the plaintiffs accepted and received said policy with a full knowledge of the contents thereof.

"'Defendant further avers that said policy contains a certain provision in the following words and figures, to-wit: '$400, other insurance concurrent herewith only permitted;' and defendant further avers that on or about the 1st day of June, A. D. 1887, these plaintiffs placed the full amount of said concurrent insurance allowed by the terms of the policy issued by this defendant, with the Germania Insurance Company, which company issued to these plaintiffs their certain policy of insurance for the sum of $400 on said stock, and $100 on fixtures in said store, which said policy was in full force and effect from the date thereof to the time and date of said loss by said fire.

"Defendant further avers that said policy of insurance issued by this defendant contains a certain clause in the following words, to-wit: 'The insured, under this policy, must obtain consent of this company for all additional insurance or policies, valid or invalid, made or taken before or after the issue of this policy, on the property

hereby insured, and for all changes that may be made in such additional insurance, and have such consent indorsed on this policy, otherwise the insured shall not recover in case of loss.

"Defendant further avers that said plaintiffs, with full knowledge of the said printed terms, and also of the specific written terms of said policy, purposely and knowingly, and without the knowledge or consent of this defendant company, and in violation of said express terms and provisions, did, on the 25th day of October, A. D. 1887, make application to the Orient Insurance Company, of Hartford, Conn., for a policy of insurance for the sum of $500 on the stock of goods insured by the policy issued by this defendant, and described in the petition, and that on said 25th day of October, A. D. 1887, said Orient Insurance Company issued and delivered to said plaintiffs their certain policy, No. 302,988, for the sum of $500, insuring their stock of goods mentioned in defendant's policy, and described in the petition, against loss or damage by fire, for one year from the date thereof. Said policy so issued by the Orient Insurance Company was in full force and effect at the time said fire occurred, to-wit, on the 26th day of November, A. D. 1887.

"Defendant further avers that the said plaintiffs, by virtue of the foregoing allegations and averments, released this defendant from all obligations and liability under the terms of said policy, No. 528, and the same was void from and after October 25, A. D. 1887."

The plaintiffs filed the following reply:

"1. The plaintiffs, for reply to defendant's answer in the above action, deny each and every allegation of new matter contained therein.

"2. The plaintiffs allege that the defendant had notice of the additional insurance complained of in its said answer, immediately prior to the issuing of said additional policy of insurance, and the defendant, with full knowledge

of all the facts, gave to the plaintiffs its unqualified consent.

"3. That immediately after said policy was issued and delivered to the plaintiffs, they applied to defendant's agent, who issued, signed, and delivered the policy upon which this suit was brought, and requested him to indorse the amount of said additional insurance upon said policy, and said agent then and there assured the plaintiffs that such indorsement was not necessary, and that the policy was all right, and as binding upon the defendant company as though the additional insurance were indorsed thereon.

"4. The defendant is estopped to dispute its liability upon said policy of insurance, or to claim a forfeiture of said policy because of the facts set out in paragraphs 2 and 3 of this reply."

To the new matter stated in the reply the defendant interposed a general demurrer, which was overruled by the court. Upon a jury trial the plaintiffs recovered a judgment for $1,596.25.

The record discloses that the policy in suit was issued by one D. J. Drebert, the local agent of the defendant at West Point, and that at the same time the plaintiffs took out a policy in the Germania Insurance Company for $400 on the same property, and that subsequently, on the 25th day of October, 1887, the Orient Insurance Company, of Hartford, Conn., at the plaintiffs' request, issued its policy for the sum of $500 on the stock of goods insured by the policy in suit. The plaintiffs, over the defendant's objections, introduced testimony tending to prove that prior to the issuing of the policy by the Orient company, Drebert, the local agent of the defendant, verbally consented to such additional insurance, and that after said last policy was written, the plaintiffs exhibited the policy issued by the defendant, to Drebert, and requested him to indorse the amount of the additional insurance thereon, and that Drebert replied that "that makes no difference; the policy is good, it need not be changed."

The testimony introduced by the defendant tends to establish that neither the defendant nor Drebert had any knowledge that such additional insurance had been written until after the fire, and did not verbally or otherwise consent to such insurance.

On the question of waiver by the defendant of the conditions of the policy relating to additional insurance, the court on its own motion gave the following instructions:

"7. In the policy sued on is a provision permitting $400 other concurrent insurance, and the condition that the insurer must obtain the consent of the company for all additional insurance taken before or after the issue of said policy, on the property thereby insured, and have such consent indorsed on the policy, otherwise the insured shall not recover in case of loss. The court instructs you that if you find from the evidence that the plaintiffs, after receiving the policy from the defendant, and before the loss in question occurred, obtained other insurance in addition to the $400 concurrent insurance permitted by said policy upon the property, which had not expired at the time of the fire, and that no notice thereof was given defendant, its agents or officers, before the fire, or to which the company did not consent, then plaintiffs' policy would be void, and he cannot recover in this suit, and your verdict must be for the defendant.

"8. If you believe from the evidence that Daniel Drebert was the agent of the defendant at West Point, for taking applications for insurance and for writing, issuing, and delivering policies for the defendant company, and that he was notified by the plaintiffs of the additional insurance placed on plaintiffs' property, and that he did not object to the same, or suggest any breach of the condition of the original policy in consequence thereof, then the defendant is estopped from now setting up such additional insurance in avoidance of its policy.

"9. If you believe from the evidence that prior to the

time of taking of the additional insurance the plaintiff notified the said Daniel Drebert of his intention to take additional insurance, and the said Daniel Drebert made no objections thereto, but on the contrary told him it was all right, and gave his consent thereto; and if you find from the testimony that immediately after the plaintiff had procured the additional insurance, he went to the said Daniel Drebert and informed him that he had taken such additional insurance and requested the said Daniel Drebert to indorse the amount of the same on the defendant's policy, and that the said Daniel Drebert thereupon told the plaintiffs that it was unnecessary to indorse the amount of said additional insurance on said policy, that it was all right without said indorsement, or words to that effect, and that neither the said agent nor any one else on behalf of the defendant objected to said additional insurance, or notified the plaintiffs that such additional insurance, without the consent of the company being indorsed on the policy, would render or had rendered the policy void, then the defendant must be deemed to have waived the condition in the policy regarding such additional insurance."

To the giving of each of these instructions the defendant took an exception. The main points in this case are those raised by the demurrer to the reply, the admission of testimony to establish a waiver of the terms of the policy by the defendant, and the instructions given by the trial court on that branch of the case. The questions thus presented are: Did Drebert, the local agent of the defendant, have any authority to verbally waive the provisions of the policy relating to additional insurance, and did the notice to such agent estop the defendant after the loss from setting up as a defense the taking of additional insurance?

This court has frequently decided that the conditions inserted for the benefit of the company in a policy of insurance may be waived by it. (*Ins. Co. v. Lansing*, 15

Neb., 494; *Schoneman v. Ins. Co.*, 16 Id., 404; *Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb., 572.) We adhere to these decisions. In each of those cases, however, the waiver of the terms of the policy was made by an agent who had authority to so bind the company. In this case it is contended that the policy in express terms limits and restricts the authority of the local agent in waiving the conditions of the policy. In addition to the provisions of the policy set out in the defendant's answer, it contains this clause: "The use of general terms or anything less than a distinct specific agreement, clearly expressed and indorsed on this policy and signed by a duly authorized agent of this company, shall not be construed as a waiver of any printed condition or restriction herein, and no notice to, and no consent or agreement by, any local agent shall affect any condition of this policy until such consent or agreement is indorsed hereon in writing."

It is insisted by the plaintiffs that, notwithstanding the express terms of the policy, Drebert had power to consent by parol to the subsequent insurance. Such authority is not to be found in the printed conditions of the policy. On the contrary, the parties expressly stipulate that "no notice to, and consent or agreement by, any *local agent* shall affect any condition of the policy until such consent or agreement is indorsed hereon in writing." This language is clearly a direct limitation upon the power of the local agent to bind the company after the delivering of the policy. He was only authorized to waive, change, or modify the policy in a specified manner. The parties agreed that no notice to the local agent should affect the conditions of the policy. The notice given to the agent of the procuring of other insurance did not therefore bind the company. To hold that it did would be to ignore the plain contract of the parties. Had the local agent conveyed the information to the managing officer of the company, doubtless the defendant would have been bound, for unquestion-

ably an officer or agent of the defendant whose powers are not limited can waive the terms of the policy without indorsing the same thereon in writing. It cannot be questioned, however, that an insurance company, as well as an individual, may limit or restrict the powers of its agent, and when such restrictions are 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. (*Havens v. Home Ins. Co.*, 111 Ind., 90; *Cleaver v. Traders Ins. Co.*, 32 N. W. Rep. [Mich.], 660; *Russell v. Cedar Rapids Ins. Co.*, 42 Id. [Ia.], 654; *Hartford Ins. Co. v. Wilcox*, 57 Ill., 182; *Hankins v. Ins. Co.*, 70 Wis., 1; *Knudson v. Hekla Ins. Co.*, 43 N. W. Rep., 954; *Cleaver v. Traders Ins. Co.*, 39 Id., 571; *Merserau v. Phœnix Mut. Life Ins. Co.*, 66 N. Y., 274; *Gladding et al. v. Ins. Co.*, 4 Pac. Rep., 764; *Enos v. Sun Ins. Co.*, 8 Id., 379.)

In *Cleaver v. Traders Ins. Co.*, 32 N. W. Rep., 660, the policy provided that "if the insured should procure any other or further insurance upon the property insured without the consent of the company written upon the policy, the policy shall become void." The policy also contained this provision: "It is further understood, and made a part of the contract, that the agent of this company has no authority to waive, modify, or strike from the policy any of its printed conditions; * * * nor, in case this policy shall become void by reason of the violation of any of its conditions, * * * has the agent power to revive the same." After the delivery of the policy, on representation of the agent issuing the same that it would be all right, additional insurance was placed on the property. The consent of the company to the taking of the additional insurance was not indorsed on the policy. The supreme court of Michigan held that the defendant was not estopped to deny its liability. It is stated in the opinion of Mr. Justice Morse that "When the policy of insurance, as in this case, contains an express limitation upon the power of the

agent, such agent has no legal right to contract as agent of the company with the insured, so as to change the conditions of the policy, or dispense with the performance of any essential requisite contained therein, either by parol or writing, 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 limitations and restrictions in the policy."

In *Knudson v. Hekla Fire Ins. Co.*, 43 N. W. Rep., 954, the policy contained the usual stipulation found in insurance policies, requiring the assured, in case of loss, to render to the company proofs of loss within thirty days. No proofs of loss were ever furnished the company, the insured claiming that the same were waived by parol. The policy also provided that "Agents have no authority to make any verbal agreement whatever for or on behalf of this company, and this company will not be liable for any such agreement except such as shall be indorsed, signed, and dated in writing on this policy." The court held that the verbal waiver of a condition in the policy, by the local agent, who issued the same, is void.

A policy of insurance contained a provision that the property insured should not be incumbered without the written consent of the secretary of the insurance company. Afterwards the insured mortgaged the property, the local agent agreeing to waive the conditions of the policy prohibiting such mortgage. Suit was brought upon the policy, and the supreme court of Wisconsin held that the attempted waiver by the local agent did not bind the company. (*Hankins v. Rockford Ins. Co., supra.*)

We have carefully examined the cases cited by the defendants in error, and find that while many of them are based upon policies containing some of the provisions found in the policy in this case, yet the policies in none of the cases cited in brief of counsel contain an express stipulation limiting the legal effect of a notice given by the

insured to the local agent. One of the strongest cases cited by plaintiffs is *Gans v. St. Paul. F. & M. Ins. Co.*, 43 Wis., 108. That policy contained a stipulation that it should be void if the building should become unoccupied without the consent of the company indorsed on the policy. The agent who issued the policy was informed before the fire that the building was unoccupied, and knew that it remained so until it burned. The company refused to pay the loss, because no consent was indorsed on the policy. The policy also contained these conditions:

"The use of general terms, or anything less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

"It is further understood, and made a part of this contract, that the agent of this company has no authority to waive, modify, or strike from this policy any of its printed conditions, nor is his assent to an increase of risk binding upon the company until the same is indorsed in writing on the policy, and the increase premium paid."

The court held that notice to the agent was notice to the company. The court in the opinion says:

"We find no stipulation in the contract limiting or attempting to limit the legal effect of notice to the agent. The limitations therein contained go only to the acts of the agent. He may not vary, modify, or strike out the printed conditions of the policy, nor assent to an increase of the risk, unless the same is indorsed on the policy and the increased premium paid. * * * But there is no stipulation that notice to the agent of a fact relating to the policy shall not operate as notice to the company. What would be the legal effect of such a stipulation we are not called upon to determine, and do not determine."

The difference between the provisions of the policy in the Wisconsin case and those in the case before us is apparent. In our case it is expressly provided that no notice

to, and no consent or agreement of any local agent should affect any condition in the policy until such consent or agreement is indorsed thereon. This language limits the effect of a notice given to the local agent, and of his authority to waive any of the terms of the policy.

In this case it is not shown that the company had any notice that the local agent had been notified of the additional insurance. The testimony offered by plaintiffs to prove that Drebert, the local agent, consented by parol to the additional insurance before it was written, and was notified afterwards that it had been written, was insufficient to bind the defendant without showing that such facts were brought to the knowledge of the company. It follows, from the views already expressed, that instructions 7, 8, and 9, given by the court on its own motion, should not have been given.

It is believed that the second paragraph of the reply, though not a model pleading, alleges sufficient facts to avoid the defense stated in the answer. The substance of that part of the reply is, that prior to the taking out of the additional insurance the defendant had notice thereof and consented thereto, with a full knowledge of all the facts. The language used does not suggest that the local agent gave such consent. The fair construction of the allegation is, that the proper officer or agent of the defendant was notified. The evidence, however, fails to sustain the allegation. The other averments of the reply, as to what was said by Drebert after the additional insurance was written, do not state sufficient facts to constitute a waiver of the conditions of the policy.

It is urged that the reply states facts inconsistent with the averments of the petition. The answer pleaded a breach on the part of the plaintiffs of certain stipulations contained in the policy. The reply alleged matters showing a waiver of these conditions by the company. The plaintiffs' pleadings are consistent.

The plaintiffs, upon the trial, introduced testimony to show that the value of the property insured at the time of the fire was at least $3,000. To show that the value at the time was not so large the defendant put in evidence the proofs of loss made by the plaintiffs to the Orient Insurance Company, in which they placed the total value of the property insured at the time of the fire at $1,564.78.

The court in the 13th paragraph of the charge instructed the jury that "the measure of damages is the fair market value of the goods destroyed at the time and place of the fire." This is the correct rule where the loss equals or exceeds the total amount of insurance upon the property destroyed. The insurance on the property in all three of the companies amounted to $2,400. The policy in suit provides that "in case of any other policies, whether made prior or subsequent to the date of this policy, the insured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby bears to the whole amount of the policies thereon." Under the evidence, the jury could have found that the total value of the property destroyed was only $1,564.78, which was much less than the entire insurance. The jury should therefore have been instructed that if they found that the loss was less than the whole insurance, the plaintiffs were not entitled to recover a greater part of the loss than the sum covered by the policy in suit bears to the total amount of insurance.

A point was made on the trial in the lower court that the plaintiffs were not the owners of the policy at the commencement of the suit. On the question of the assignment of the policy the evidence was conflicting. The instructions given at the defendant's request fairly submitted this branch of the case to the jury.

The other errors complained of are either disposed of by the views herein stated, or are such as will not be likely to arise on a new trial of the case, and therefore will not be noticed in this opinion.

The judgment of the district court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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F. R. NORMAN, APPELLEE, v. DANIEL M. WAITE ET AL., APPELLANTS.

[FILED SEPTEMBER 18, 1890.]

1. **Negotiable Instruments: TRANSFER: DEFENSES: NOTICE.** Where, in an action upon a promissory note bought by an indorsee, the defendant in the answer alleged that the note was made and delivered to the payee to be held by him as security and guaranty that one W., whom the payee had agreed, for the consideration of $1,500, to take into equal partnership in his business, the same to be paid out of W.'s share of the net proceeds of the business, would remain in said partnership and faithfully perform his duty as such partner until said sum of $1,500 should be fully paid by the application of W.'s share of the net proceeds, and that said W. had faithfully performed, etc., and alleging notice of such defense to the plaintiff at the time of the purchase of said note; upon the pleadings and evidence, *held*, that the plaintiff could not recover without proof that he both bought and paid for the note before the receipt by him of notice of such defense.

2. **Conveyance.** The paper writing, purporting to be an article of agreement, set out in the opinion, *held*, not to convey title to the land described.

3. **———: WRITTEN CONTRACT: NOVATION.** The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constitutes a condition on which the performance of the written contract or agreement is to depend.

APPEAL from the district court for Hamilton county. Heard below before NORVAL, J.

J. H. Smith, and *Agee & Stevenson*, for appellants, cited: *Bank v. Luckow*, 35 N. W. Rep., 434; *Whiting v. Steer*, 16 Pac. Rep. [Cal.], 134; *Thudium v. Yost*, 11 Atl. Rep. [Pa.], 436; *Wolff v. Mathews*, 12 S. W. Rep. [Mo.], 211; *Collingwood v. Merchants Bank*, 15 Neb., 121; *Howard v. Stratton*, 64 Cal., 487; *Dorrington v. Minnick*, 15 Neb., 403; *Austin v. Pickler*, 4 S. E. Rep., 35; *Michels v. Olmstead*, 14 Fed. Rep., 219; *Skaaraas v. Finnegan*, 16 N. W. Rep., 456; *Westeman v. Krumweide*, 15 Id., 255; *Cullmans v. Lindsay*, 6 Atl. Rep., 332; *Callender v. Drabelle*, 35 N. W. Rep. [Ia.], 240; *Hooker v. Hammill*, 7 Neb., 235; *Williams v. Townsend*, 31 N. Y., 416; *Dakin v. Williams*, 17 Wend. [N. Y.], 447; *Fletcher v. Daugherty*, 13 Neb., 224; *Lowenstein v. Phelan*, 17 Id., 430; *Harper v. Ely*, 56 Ill., 179; *Palmer v. Palmer* 36 Mich., 487; *Pope v. Hooper*, 6 Neb., 178; *Bank v. Peck*, 8 Kan., 660; *Round v. Donnel*, 5 Id., 56; *Stanclift v. Norton*, 11 Id., 218; *Bennett v. Stevenson*, 53 N. Y., 508; *Ellwood v. Wolcott*, 4 Pac. Rep., 1056; 2 Jones, Mortgages, secs., 1181, 1186; *Dart v. Sherwood*, 7 Wis., 446; Daniel, Neg. Inst., 156, 789, 795, 835; *Story v. Lamb*, 52 Mich., 525; *Smith v. Blarcom*, 45 Id., 371; *Brooks v. Hargreaves*, 21 Id., 254; *Fralick v. Norton*, 2 Id., 130; Edwards, Bills, 141; *Lincoln Nat'l Bank v. Davis*, 25 Neb., 376; *Warner v. Whittaker*, 6 Mich., 133; *Dixon v. Hill*, 5 Id., 404; *Fox v. Bank*, 30 Kan., 446; *Thompson v. Kellogg*, 23 Mo., 285; *Tyler v. Safford*, 24 Kan., 580; *Merchants Nat'l Bank v. Hanson*, 21 N. W. Rep. [Minn.], 849.

Hainer & Kellogg, contra, cited: *Brown v. Wiley*, 20 Howard [U. S.], 412; *Brown v. Spofford*, 95 U. S., 474; *Dickson v. Harris*, 13 N. W. Rep. [Ia.], 335; *Linderman v. Disbrow*, 31 Wis., 465; *Tomlinson v. Nelson*, 6 N. W.

Rep., 366; *Dobbins v. Oberman*, 17 Neb., 163; *Johnson v. Way*, 27 O. St., 374; *Kelley v. Whitney*, 45 Wis., 110; *Fox v. Bank*, 1 Pac. Rep., 789; *Lowenstein v. Phelan*, 17 Neb., 429; *Long v. Allen*, 2 Fla., 403; *Carman v. Pultz*, 21 N. Y., 547; *Trask v. Vinson*, 20 Pick. [Mass.], 105; *Chapman v. Eddy*, 13 Vt., 205; *Bank v. Caldwell*, 16 Ind., 469; 1 Dan., Neg. Inst., sec. 187; *Adams v. Saule*, 33 Vt., 538.

COBB, CH. J.

This action was brought in the Hamilton county district court by F. R. Norman, plaintiff, against Daniel M. Waite, Mira A. Woods, and Austin J. Rittenhouse, defendants, for the purpose of foreclosing a mortgage of real property made by said Mira A. Woods for the security of two promissory notes executed and delivered by the said Daniel M. Waite and Mira A. Woods to said Austin J. Rittenhouse, and by him indorsed to the plaintiff. The petition is in the usual form, with the allegation that the said notes were, before the same became due by the indorsement of the said defendant Austin J. Rittenhouse, for a valuable consideration, "indorsed, assigned, transferred, and delivered to the plaintiff, who is now the lawful owner and holder thereof; that no part of the principal or interest of said notes has been collected or paid, although the $1,000 note has long since become due and payable;" also, that the said Mira A. Woods did not keep the said premises insured as required by the covenants of said mortgage, but wholly failed to do so; that the said Mira A. Woods also wholly failed to pay the taxes due on said premises for the year 1885, amounting to $9.15, as required by the covenants of said mortgage, but made default therein, and on October 29, 1886, the plaintiff, to protect his security and to prevent a sale of said premises for said taxes, paid the same, amounting, with interest, to the sum of $9.15, no part of which has been paid to the plaintiff.

The defendant Mira A. Woods by her answer admitted that she executed and delivered the notes and mortgage in plaintiff's petition described, and that said mortgage was recorded as therein alleged. She further alleged that her co-defendant, Daniel M. Waite, is her son and had just prior to the execution and delivery of said notes and mortgage been admitted to practice as an attorney and counselor at law of said court; that at said time Austin J. Rittenhouse, the payee of said notes, had for more than seven years been an attorney and counselor at law of said court and for two years then last past had been the tutor of said Daniel M. Waite; that prior to the execution and delivery of said notes and mortgage said Austin J. Rittenhouse proposed to her, the said defendant and her said son, to take him, the said Daniel M. Waite, into a copartnership with him, the said Austin J. Rittenhouse, in the business of the practice of law and buying and selling real estate on commission, making collections, loaning money, and doing such other business as said Rittenhouse had theretofore been doing at Aurora, Nebraska, as an equal partner, provided said Waite would pay him, the said Rittenhouse, the sum of $1,500 for a half interest in said business and in the office furniture and library which he, the said Rittenhouse, then owned; that said Rittenhouse, in order to induce said defendant to execute and deliver said notes and mortgage, fraudulently and falsely represented to her that the firm of Rittenhouse & Chambers, in which he was then a copartner with one Walter Chambers in the business aforesaid, was doing a business which paid them $3,000 over and above all expenses, and that said Waite's share of the net proceeds of the business of said Rittenhouse & Waite, in case such partnership should be formed, would in one year be more than sufficient to pay him, the said Rittenhouse, the said sum of $1,500, and that at the time said Rittenhouse made such representations he well knew the same to be false, and well knew that the net

proceeds of the business of said firm of Rittenhouse & Chambers did not exceed the sum of $1,500, and said representations were made for the purpose of inducing said defendant to execute and deliver said notes and mortgage.

She further alleged that it was expressly agreed between her and the said Rittenhouse, which said agreeement was by parol, that in case he and said Waite should enter into said copartnership, then upon the execution and delivery of said notes and mortgage by defendant the same should be held by said Rittenhouse as security that the said Waite would remain in copartnership with him, the said Rittenhouse, and perform his part of the duties of said copartnership and permit his share of the net proceeds of the business thereof to be applied to the payment of said sum of $1,500, to be paid to the said Rittenhouse until the same should be fully paid, and that it was expressly agreed that said answering defendant should not be called upon to pay any portion of said sum of $1,500, but that the same should be paid out of said Waite's share of the proceeds of the business of said copartnership, and that said Rittenhouse should hold said notes and mortgage for security merely, that said Waite would not abandon said copartnership and that said notes and mortgage would not be transferred to any other person or persons. And defendant alleged that she relied upon the representations of the said Rittenhouse, and, believed them to be true when in fact they were false, and, being desirous of assisting her said son, she made, executed, and delivered the notes and mortgage aforesaid as a guaranty that said Waite would not abandon said copartnership without cause, before said sum of $1,500 should be paid to said Rittenhouse, and that said Waite would perform, to the best of his ability, his duties as a member of said copartnership, and would permit his share of the net proceeds of the business thereof to be applied to the payment of said sum to said Rittenhouse until the same should be paid, and for no other pur-

pose whatever. She further alleged that her said son and Rittenhouse entered into said copartnership on or about the 1st day of April, 1886, and that her said son has duly performed each and every agreement on his part and each and every duty as a member of said copartnership, but that on or about the 15th day of June, 1886, the said Rittenhouse abandoned the business of said copartnership and left the city of Aurora, Nebraska, where said business was to be carried on, went to the city of McCook and formed a copartnership for the practice of law with one J. S. LeHew and has wholly abandoned and neglected the business of the firm of Rittenhouse & Waite, and fraudulently, and for the express purpose of cheating and defrauding defendant, transferred said notes and mortgage to said plaintiff, contrary to his said agreement with defendant.

She further alleged that by the terms of said notes and mortgage the same became due on the first day of May, 1886, and had long been due when transferred to said plaintiff, and that at the time the said plaintiff purchased the same he well knew that the defendant had a good and valid defense to the same and that the same had been obtained by fraud, and defendant denied that said plaintiff received said notes and mortgage in good faith before maturity and for value, and denied every allegation contained in said petition and not in said answer admitted.

The defendant Daniel M. Waite, by his separate answer, admitted the execution and delivery of the notes sued on in the said case, but denied that the plaintiff received the same before due, and alleged that the said plaintiff was not an innocent holder of said notes, but that he took the same with information and knowledge that the same had been obtained through fraud, and with information and knowledge of the defense of him, the said defendant, hereinafter set out, to the payment of said notes; that on the 19th day of February, 1886, said defendant entered into an agree-

ment with the payee of said notes to enter into a copartnership with said Rittenhouse, in the practice of law, and the doing of a general loan, collecting, insurance, and real estate business; that just prior to the time of the execution and delivery of said notes he, the said defendant, had been admitted to practice at the bar of said district court as an attorney and counselor at law; that the payee of said notes, Austin J. Rittenhouse, in order to induce said defendant to enter into a copartnership with him, represented and stated to him, said defendant, that the firm of Rittenhouse & Chambers, a copartnership composed of said Austin J. Rittenhouse and one Walter Chambers, then doing business at Aurora, Nebraska, in the practice of law, and buying and selling real estate on commission, and as loan, insurance, and collecting agents, had, during the year then last past, made in their said business, over and above all expenses, $3,000, when in truth and in fact, as said Rittenhouse well knew, said firm had not, during said year, made to exceed $1,500 over and above all expenses; that said Rittenhouse proposed to dissolve the copartnership existing between him and said Chambers, and to buy the interest of said Chambers in the business of said firm, and to then take defendant into copartnership with him as an equal partner, defendant to have one-half interest in all office furniture and library then in the office, or belonging to the said firm of Rittenhouse & Chambers, provided this defendant would pay him, the said Rittenhouse, out of his, this defendant's, share of the net proceeds of the firm, which was to be known as the firm of Rittenhouse & Waite, as the same should be received, the sum of $1,500, with interest at ten per cent until paid, and in order to induce the defendant to enter into such copartnership and agree to pay him said sum, made the fraudulent and false representations aforesaid. This defendant, relying on said representations and believing them to be true, was induced to enter into a copartnership with said Rittenhouse for the practice

of law, and in doing a general loan, collection, and insurance business, and in buying and selling real estate on commission, said business to be carried on in Aurora, Hamilton county, Nebraska, and to begin on the 1st day of April, 1886; and it was expressly agreed and understood that said copartnership was to continue until said sum of $1,500, and the interest thereon, should be paid out of this defendant's share of the net proceeds of the business of said firm, and that the said notes should be held by said Rittenhouse merely as a guaranty that said defendant would not abandon said copartnership without cause before said sum of $1,500 should be paid as aforesaid, and that defendant should perform his part of said agreement.

And defendant further alleged that it was agreed and understood that each of said parties should devote all his time, energy, skill, and ability to the prosecution of said business; that said Rittenhouse and defendant, in pursuance of said agreement, did enter into said copartnership on the 1st day of April, 1886, and that defendant has ever since duly performed on his part every condition and agreement in said contract, and has fully complied with all of his agreements in said contract, but that said Rittenhouse has wholly neglected and refused to comply with said agreement on his part, and on or about the 15th day of June, 1886, wholly abandoned said copartnership, and removed from said city of Aurora and formed a copartnership with one J. S. Le Hew, at McCook, Nebraska, for the practice of law at said place, which said place is more than one hundred and fifty miles from said city of Aurora, and has neglected and refused to perform any service as a member of said firm of Rittenhouse & Waite, and has wholly neglected the business of said firm, and thereby caused persons who had employed said firm of Rittenhouse & Waite to refuse to continue said employment, and to employ other counsel in such cases. And defendant alleged that he had received no consideration for

said notes except the half interest in the library and office furniture aforesaid, which did not exceed in value the sum of $350. And defendant alleged that the plaintiff had information of the fact and well knew before he purchased said notes what said notes were given for, and that said Rittenhouse had abandoned his contract with defendant, and that the consideration therefor had failed, and before said plaintiff had paid anything for said notes defendant notified him of the facts hereinbefore stated, and warned him, the said plaintiff, not to buy said notes of said Rittenhouse. And defendant further alleged that it was agreed that his share of the net proceeds of the business of said firm of Rittenhouse & Waite should be applied to the payment of said $1,500, and that said Rittenhouse had received large sums of money, the exact amount of which is to defendant unknown, which belonged to said firm, and in excess of the expenses of said firm, which should be applied to the payment of any amount which may be found due on account of defendant's purchase of an interest in said library and furniture as aforesaid, and that there has never been any settlement of the accounts or business of said copartnership; with prayer that said Austin J. Rittenhouse be made a party to said action, that an accounting be had touching all of said copartnership business, and that any money received by said Rittenhouse belonging to the firm of Rittenhouse & Waite, in excess of the amount to which said Rittenhouse is entitled, as his share of the net proceeds of said business, may be applied to the payment of any amount due on account of his interest received by defendant in said library and office furniture, and for general relief.

The replies of the plaintiff to the separate answers of the defendants are, substantially, general denials.

There was a trial to the court, with general findings for the plaintiff as to the execution and delivery by the defendant Mira A. Woods to Austin J. Rittenhouse of the mort-

gage deed set forth in the petition, the making and delivery by the defendants to the said Rittenhouse of the notes described in the petition; that the notes were due; that there was then due thereon $1,764.50 with ten per cent interest from date; that said Austin J. Rittenhouse sold, transferred, and assigned said mortgage and notes to the plaintiff, who was then the holder and owner thereof; also, that the plaintiff, in order to protect his security, paid the taxes levied and due on the mortgaged premises, amounting to $9.15; that no part thereof had been repaid and that the plaintiff was entitled to a foreclosure of said mortgage as prayed for. There was the usual judgment of foreclosure and sale, and the cause appealed to this court by the defendants Mira A. Woods and Daniel M. Waite.

There are two principal questions presented by the record:

1. Is the plaintiff such an indorsee, owner, and holder of the notes secured by the mortgage and declared on in the petition as entitles him to recover the contents thereof from the makers, although they have a defense thereto as against the payee? and,

2. Under the pleadings and upon the evidence, were the action between the payee and the makers of the notes, could the former recover?

Appellants, in the brief of counsel, present two grounds upon both of which they claim that the plaintiff is not an innocent holder of the notes, so as to cut off a defense thereto existing against the payee.

1. That the notes and mortgage were due when the plaintiff obtained them. This proposition is claimed to be based upon a clause of the mortgage which reads as follows: "It is further agreed that if said mortgagor shall fail to pay such taxes or procure such insurance, the said mortagee may pay such taxes and procure such insurance, and the sum so advanced, with interest at ten per cent, shall be repaid by the said mortgagor, and this mortgage shall stand as security

for the same; that a failure to pay any of said money, either principal or interest, when the same becomes due, or a failure to comply with any of the foregoing agreements, shall cause the whole sum of money herein secured to become due and collectible at once."

It appears, both from the petition and bill of exceptions, that the defendant, Mira A. Woods failed to pay the taxes of 1885, which became delinquent May 1, 1886, upon the mortgaged property. Upon these premises counsel for appellants contend that the notes were due and dishonored at the time of their transfer by Rittenhouse to the plaintiff, so as to charge the latter with notice of all infirmities and defenses. I am inclined to differ with counsel upon this point, especially in its application to the evidence in the case at bar, but will refrain from a discussion of the authorities cited to sustain it, in view of the second ground, which is, that the plaintiff received notice of defendant's defense to the notes before he parted with the consideration which he paid therefor. It appears from the bill of exceptions that the consideration which the plaintiff paid for the said notes and mortgage consisted of a tract of land in Hamilton county, which plaintiff held and was in possession of by virtue of two certain contracts of sale executed and issued by the Union Pacific Railway Company; that the contract between plaintiff and Rittenhouse was made on the 18th day of September, 1886; that the said contracts were then in the possession of plaintiff's father, in the state of Ohio, and were not delivered to the said Rittenhouse until about ten days thereafter. But on the day of the trade plaintiff executed to Mrs. Rittenhouse, wife of Austin J. Rittenhouse, doubtless at the request of said Austin J. Rittenhouse, and as a part of the transaction between Rittenhouse and Norman for the transfer of the said notes and mortgage, an instrument in writing, which was put in evidence upon the trial and which I here copy:

"ARTICLES OF AGREEMENT.

"I, F. R. Norman, party of the first part, have this day assigned and transferred all my right, title, and interest in and to the west one-half of the northwest one-fourth of section No. 11, township No. 9 N., of range No. 6 west, in Hamilton county, Nebraska, to Louisa J. Rittenhouse party of the second part for and in consideration of the sum of fifteen hundred dollars, the receipt whereof is hereby acknowledged, and I do hereby sell, assign, and transfer to her all my right, title, and interest in the two Union Pacific Railway Company's contracts of sale Nos. 40140 and 40141, which I now own and hold for said land, and I represent that I am the owner of said contracts by assignment from J. H. Stokesbury, and that I will deliver said Louisa J. Rittenhouse said contracts, numbered as aforesaid, with the assignments of said J. H. Stokesbury to said contracts thereon, written in due form; that I will deliver said contracts within ten days from this date. I, Mary E. Norman, wife of F. R. Norman, do hereby relinquish all my right of dower in the above described land." Signed by F. R. Norman, and Mary E. Norman, witnessed and acknowledged before a notary public.

The acknowledgment is dated the 18th day of September, 1886, which is the only date the paper contains.

It appears from the evidence that the transfer of the notes by Rittenhouse to Norman, and the execution and delivery of the above paper by Norman and wife to Rittenhouse, occurred on Saturday, after or shortly before the close of business hours, and there were circumstances of haste and precipitation connected with the transaction, as detailed by the plaintiff when on the stand, and by Rittenhouse in his deposition, which were calculated to have put the plaintiff on his guard in trading for the notes. But there is no direct evidence of the plaintiff having had actual notice of defendant's defense to the notes and mort-

gage until the Monday following, when the defendants, Mrs. Woods and Waite, together with their counsel, went to the office of the plaintiff and informed him of their defense and requested him to retain matters in *statu quo*. The Union Pacific railroad certificates were then still in Ohio, and, so far as Rittenhouse was concerned, still under the control of the plaintiff. No legal title to the land ever having been in the plaintiff, of course none passed from him to Mrs. Louisa J. Rittenhouse by virtue of the paper above copied, and whatever equities passed to her were burdened with the superior equity of Mrs. Woods, if her theory of the transaction between her and Rittenhouse is sustained by the evidence. The plaintiff, a business man, knew that he could not convey title to the land, at all events he made no attempt to do so; but entered into an agreement to deliver the certificates with the assignment of the original holder thereon and thus enable Mrs. Rittenhouse or her husband to obtain title to the land from the railroad company where it still remained. It is not deemed of importance that the writing contains some words of grant. It is headed "Articles of Agreement" and even had the title to the land been in the plaintiff, which it was not, this paper would occupy no higher grade than that of an agreement to convey. (See *Jackson v. Myers*, 3 Johnson's R., 387.) Granted that the plaintiff was an innocent purchaser of the notes and mortgage so far as such purchase had proceeded up to Monday, the 20th day of September, when he received the notice above stated, he had then not parted with the consideration, which was the delivery of the Union Pacific railroad certificates "with the assignments of J. H. Stokesbury to said contracts thereon." It has been often held in cases of the transfer by indorsement of commercial paper to which there was a defense while in the hands of the payee, but not as against a *bona fide* holder for value without notice, that in order to make a reply to the defense to

such note setting up the *bona fide* purchase of such note by the plaintiff and its indorsement to him for value before maturity and without notice, such plaintiff must allege and prove that he not only bought, but also paid for, the note before notice of fraud or other defense. (See Daniel on Negotiable Instruments, sec. 789*a*, and case there cited; see also, 35 cases cited in note 2, Devlin on Deeds, sec. 736.)

The plaintiff had bought, but had not paid for the notes and mortgage, when he received actual notice from the makers, of the facts which they then and now claim constitute a defense thereto. By reference to the several answers of the defendants, Mrs. Woods and Waite, as set out in the statement, it will be seen that the defense to the notes and mortgage consisted in the allegation that, contemporaneous with the execution and delivery of the notes and mortgage, and as the true and only consideration for the execution and giving thereof, the said Waite and Rittenhouse entered into a copartnership for the practice of law and collecting agency, etc., and that as a consideration and compensation to Rittenhouse, who was already established in said business, Waite, who had just finished his course of study in the office of Rittenhouse, and had then lately been admitted to practice as an attorney at law, was to pay to Rittenhouse out of his share of the net earnings of the firm, as fast as the same should be realized, the sum of fifteen hundred dollars, and that the said notes were executed by Waite and his mother, Mrs. Woods, and delivered to Rittenhouse, and the mortgage executed by the latter upon her house and lot to secure said notes, the whole to be a guaranty or security to Rittenhouse for the faithful performance by Waite of his part of said contract, to the extent that he would continue and act as a member of said partnership until his half of the net proceeds of the earnings thereof should be sufficient to pay the said sum of fifteen hundred dollars, and pay the same to said Rittenhouse,

or allow him to draw and appropriate the same. Also, that shortly after the formation of said copartnership and the giving of said notes and mortgage, the said Rittenhouse abandoned the said partnership and business, left the city of Aurora, and county of Hamilton, where the same had been and was to be carried on, entered into partnership with another party, and commenced and thereafter practiced law and carried on business in another and distant part of the state. In support of the position that the above facts constitute a defense to the action, or would, had the same been instituted by Rittenhouse, appellants cite the cases of: *Austin v. Pickler* (a North Carolina case), 4 So. Rep., 35; *Michels v. Olmstead*, 14 Fed. Rep., 219; *Bank v. Luckow*, 3 N. W. Rep., 434; *Skaaraas v. Finnegan*, 16 Id., 456; *Westeman v. Krumweide*, 15 Id., 255; *Cullmans v. Lindsay*, 6 Atl. Rep., 332; *Dorrington v. Minnick*, 15 Neb., 403; *Hooker v. Hammill*, 7 Id., 235. These cases are mostly in point and tend to establish the proposition as above stated. They are not met by citations of cases, or authorities to the contrary. I cite the following cases to the same point: *Thudium v. Yost*, 11 Atl. Rep., 436; *Wood v. Matthews*, 73 Mo., 477; *Howard v. Stratton*, 64 Cal., 487; *Whiting v. Steer*, 16 Reporter, 134.

I do not remember to have seen the law on this subject so clearly stated elsewhere as by Judge Krekel, United States district judge of the western district of Missouri, in his charge to the jury in the case of *Michels v. Olmstead, supra*, in the following words: "When parties, without any *fraud* or *mistake*, have deliberately put their engagements in writing, the law declares the writing to be not only the *best*, but the *only evidence* of the agreement; but this does not prevent parties to a written agreement from proving that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitutes a condition on which the performance of the written agreement is to depend."

The making of the oral agreement substantially as set out in the answers was sworn to by Mrs. Woods and Waite as witnesses on the trial, and although it is denied by Rittenhouse in his deposition, it cannot be denied or doubted that the weight of evidence is very largely in favor of the truth of the answers. But even if there had been no oral agreement as set up in the answer, and testified to by the litigating defendants, could Mr. Rittenhouse or his indorsee, with notice, have enforced the collection of these notes either in a court of law or equity? I think not. Viewed in the light most favorable to the plaintiff in that event, the consideration for the notes was the taking by Rittenhouse, a lawyer of many years' practice, of Waite, a young man just admitted to practice, into partnership with him in the practice of law and its kindred pursuits. This clearly implied the continuation of such relationship and its advantages to Waite for a series of years, unless sooner terminated by the death of one of the partners, or the forfeiture by Waite of his right to such relationship by misconduct; and it appears from the whole case, and is undisputed, that within less than three months after entering into such relationship, and without any disclosed cause or reason, Mr. Rittenhouse abandoned the city, county, and judicial district in which the business of such partnership was, and was to be carried on, and withdrawing himself to a distant part of the state, entered into business relations inconsistent with the further relation of partnership with Waite, which relationship, as is contended, constituted the consideration for which the notes were given. This is not met by the possible suggestion that it was to Waite's advantage that the entire business was abandoned to him. The purchase or sale of the entire business and practice of Rittenhouse was not contemplated by either party when the notes were given, and the withdrawal of Rittenhouse was as much a violation of the contract of partnership as would have been the forcible exclusion of

Waite therefrom. In either case the result would be a failure of the consideration for the notes, if, as contended by plaintiff, such consideration was the taking of Waite into partnership by Rittenhouse.

I therefore reach the conclusion that the findings and judgment of the district court are neither of them sustained by the case or the law applicable thereto.

The judgment and decree of the district court is

REVERSED, AND CAUSE DISMISSED.

MAXWELL, J., concurs.

NORVAL, J., having tried the case in the court below, did not sit.

OMAHA & R. V. R. CO. V. JOHN H. SEVERIN.

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[FILED SEPTEMBER 18, 1890.]

1. **Railroads: FARM CROSSINGS: STATUTES CONSTRUED.** Section 106 of chap. 16, Comp. Stats., construed, and *held*, that the "causeway or other adequate means of crossing," which railroad corporations are required to make and keep in repair, when any person owns land on both sides of any railroad, and when requested so to do, is an adequate means of crossing such railroad track and right of way by such owner on foot or horseback, with wagon or carriage, or with domestic animals under his control, but is not required to be adequate to the free passage of unherded cattle or other domestic animals wandering unrestrained from one side of the railroad to the other.

2. ——: ——: ——. Section 1 of chapter 72 construed, and *held*, that the railroad corporations to which the provisions of said section apply are required, under the penalty of the liabilities therein specified, to erect and maintain fences on both sides of their railroad "suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, ex-

cept at the crossings of public roads and highways, and within the limits of towns, cities, and villages;" that this includes the space on either side opposite to private or farm crossings of the railroad, at which points such corporations are required to make or leave openings in such fence with gates or bars to close and secure such openings; but are not required to put in cattle guards at such private or farm crossings.

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

John M. Thurston, and *W. R. Kelley*, for plaintiff in error.

W. M. Woodward, contra.

Cases cited by counsel are referred to in opinion.

COBB, CH. J.

The plaintiff was the owner of a farm consisting of a square tract of 160 acres of land according to the government surveys.

The defendant, being engaged in constructing a line of railroad, and having the right to apply for an exercise of the power to condemn and use the right of way over and upon the plaintiff's land, upon the refusal of the owner of such real estate to grant the same for a price stipulated by the parties, applied to the plaintiff to purchase the real estate necessary for its right of way, and by mutual agreement and contract the defendant purchased of the plaintiff, and the plaintiff conveyed by deed to the defendant, in consideration of $240, "a strip of land through the southeast quarter of section 26, township 7, range 6 east, one hundred feet in width, being fifty feet on either side of the center line of the road of said company as located or to be located by the engineer of the said railroad company for the construction of the same," with a proviso for the rever-

sion of the land to the grantor, and his heirs, in case of the abandonment of the route by the railroad company.

Afterwards the defendant located its line and constructed its railway on and across the said tract, in a direction nearly north and south and nearly equally bisecting the same, leaving the dwelling house, barn, corral, and pasture and other outbuildings and well on the east half. As understood from the evidence, only fields and a calf pasture, and that uncertain, are on the west side of the railroad. A public road leading to the village of Firth forms the south boundary of plaintiff's land; also a public road on the east side about ten rods from the plaintiff's dwelling house. Before the conveyance of said right of way and the location of the railroad plaintiff had made and used a private road running east and west across his farm, and crossing the line afterwards occupied, by the railroad, some three or four rods south of the center of the quarter section tract; to use plaintiff's language, in crossing his farm from east to west on this particular track, "because he had to put in a culvert over a little draw."

Some time after defendant had constructed and operated its railroad line, the plaintiff served a notice requiring it to fence its track and right of way, "and put in the necessary cattle guards." The defendant thereupon erected fences on each side of its right of way, and at the point where the railroad crosses the private farm road, that being, as testified to by plaintiff, the most convenient place for a crossing, and doubtless pointed out by him to defendant as the point where he desired the crossing to be placed, made openings in the fence on either side, with gates, but placed no wing fences, nor constructed any cattle guards in its track. The defendant also planked the space between the rails so as to provide for its being crossed with wagons.

The plaintiff brought his action in the nature of *mandamus* to compel the defendant railroad company to put in cattle guards, including wing fences, so that gates might

be left open or removed and cattle allowed to pass from that part of the farm on one side of the railroad track and right of way to the other side of the same unattended and unwatched, without danger of their going upon the railroad track off of the said crossing directly, or of their first wandering off said crossing along the right of way, and thence getting upon the railroad track. Upon the trial there was evidence that one way from said crossing, about forty rods distant, there is a cut made by the railroad some seven or eight feet deep, and the other way the plaintiff had set out trees for a windbreak, near the railroad, which prevented trains approaching from either way being seen in time to enable the plaintiff to drive his cattle from one part of his farm across the railroad track to the other. The court found for the plaintiff, that the defendant is bound by law to maintain an adequate crossing at the point designated by plaintiff; that what is an adequate crossing is to be determined by the facts of the case; that in this case an adequate crossing is not provided without cattle guards to complete it; and there was a judgment that the defendant construct and put in place at the crossing in question, within thirty days from the date of the judgment, a good and sufficient cattle guard on both sides of the crossing, *said cattle guards to be of the kind usually built by defendant at such points*, etc., with judgment for costs.

The cause being brought to this court on error by the defendant, fairly presents the question whether any law or statute is in force in this state which makes it the duty of railroad companies to construct cattle guards at private or farm crossings. But one section of statute is cited by defendant in error, sec. 106, chap. 16, Comp. Stats. of Nebraska, as follows: "When any person owns land on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same." This chapter of the statutes is entitled "Corporations,"

and is divided into twenty-one subdivisions. The eighth, in numerical sequence, is entitled "Railroad Companies." The fifty sections composing it, including sec. 106, above quoted, were taken by the compiler from an act of the territorial legislature of Nebraska, entitled "An act to create and regulate railroad companies," approved February 8, 1864.

We are cited to no case where the language of section 106 has been construed, nor do I know of any. There is nothing in the context, or in any other section of the act, tending to indicate the sense or meaning in which the word "causeway" is there used; nor does the definition of it from dictionaries and cyclopedias give much assistance. Webster defines it: "A way raised above the natural level of the ground by stones, earth, timber fascines, etc., serving as a dry passage over wet or marshy ground, or as a mole to confine water to a pond or restrain it from overflowing lower ground," and such is substantially the definition of the Century dictionary, and of the cyclopedias. The words of the statute, "one causeway, or other adequate means of crossing the same," indicate the legislative judgment that a causeway, whatever it may be, when applied to a railroad, is an adequate means of crossing its track. If the section only applied to such a part of a railroad as is known as a fill, where the road-bed is raised by an embankment above the natural level of the land, it would be reasonably clear that the causeway intended was a raising of the cross-road adjacent to the railroad track with gradients on either side for the convenience of crossing with carriages, wagons, and by horsemen. And I can conceive of no other sense in which the language could have been used in the present instance. Surely the word is not to be confounded with *viaduct or bridge*, as that means of crossing a railroad could only be cheaply or economically used where there is a very deep cut, which is not common to railroads in this state. This section applies as well to uncultivated as to cul-

tivated land, and to that uninclosed as well as to that which is fenced. The ownership of land, on both sides of the railroad, gives the right to the *causeway*, or other adequate means of crossing, and not the ownership or possession of live stock by the land-owner. The right of an owner of land on both sides of a railroad to an adequate means of crossing from one part of the land to the other, doubtless within the meaning of the statute, implies the right of such owner to such means of crossing, with any domestic animals under his control. But a careful reading of the fifty sections of the sub-chapter, fails to indicate that it was in the legislative mind to provide for unherded animals wandering from one side of a railroad to the other. Neither cattle nor animals are mentioned in the statute, and, as we have seen, the ownership nor possession of cattle adds to the right of an owner of lands to adequate means of crossing; the conclusion is therefore not only logical but irresistible that a means of crossing that is adequate for one owner of land on both sides of a railroad is, in contemplation of the statute, adequate for all such owners. If not, then such adequacy depends upon the character of the railroad track and right of way between the lands of such owners, whether level, cut, or fill, not upon the use of the land on either side of the railroad, nor upon the possession of cattle by such owner.

There is one other provision of the statute applicable to this question: "An act to define the duties and liabilities of railroad companies," approved June 22, 1867. This act has been several times amended, but in so far as its provisions are involved in the present question they remain unchanged, and the act now constitutes the first article of chap. 72 of the Compiled Statutes of 1889. The object of this act was to compel railroad companies to fence their lines, defining their duties in that respect, and their liabilities in case of failure to perform them. By its provisions every railroad company whose lines, or any part thereof,

were then open for use, was required, within six months after the passage of the act, and every one formed, or to be formed, whose lines were not then open for use, within six months after the lines of such railroad should be open, to erect, and thereafter to maintain, fences on the sides of their said railroad, or the part thereof so open for use, suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, with opens or gates or bars at all the farm crossings of such railroads for the use of the proprietors of the lands adjoining such railroad, and that they should also construct, where the same had not already been done, and thereafter maintain, at all road crossings then existing, or thereafter established, cattle guards suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting on to such railroad. The section further provides that so long as such fences and cattle guards shall be made, after the time therein prescribed therefor shall have elapsed, and when such fences and cattle guards, or any part thereof, are not in sufficiently good repair to accomplish the object for which the same was therein prescribed and intended, such railroad corporation and its agents, should be liable for any and all damages which should be done by the agents, engines, or trains of any such corporation to any cattle, horses, sheep, or hogs thereon; and also, that when such fences and guards shall have been fully and duly made and shall be kept in good and sufficient repair, such railroad corporation should not be liable for any such damages unless negligently or willfully done.

By the above provisions railroad companies are required, under the penalty of certain liabilities, to erect and maintain, on the sides of their respective railroads, fences suitably and amply sufficient to prevent live stock, of the kind therein specified, "from getting on the said railroad except

at the crossings of *public roads* and highways and within the limits of towns, cities, and villages." It cannot be claimed that this language will bear the construction that private or farm crossings might be left unfenced, and cattle guards or pits dug in the bed of the railroad on each side of such crossing substituted for a fence. The sole object of the required fence is to prevent cattle, horses, sheep, and hogs from getting on the railroad; but the necessities of travel required that an exception should be made as to public roads and highways. No such necessity was recognized by the framers of the statute in regard to private or farm crossings; so that by the letter of the law such fence was required to be erected "suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad" at private or farm crossings. In other words, the entire railroad is required to be fenced with the exception of certain places; private or farm crossings not being within such exception, the general requirement to fence applying to them.

But the words of the statute, immediately following those last above quoted, must be considered in connection therewith. They are, "with opens, or gates, or bars, at all the farm crossings of such railroads for the use of the proprietors of the lands adjoining such railroads, and shall also construct, where the same has not already been done, and hereafter maintain, at all railroad crossings now existing, or hereafter established, cattle guards suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting to such railroad." That part of the sentence quoted, consisting of the first twenty-six words, and which should be followed by a semi-colon, but is not, if taken literally would be satisfied by the erection of a fence with either an open or opening without either gate or bars, or a gate or bars without an opening at the farm crossings. But when these words are considered in connection with the remainder of the section, and especially the purpose and object of the statute requir-

ing railroads to be fenced, and also in view of the purpose and object of requiring either opens, gates, or bars at farm crossings, it seems clear to my mind that the statute requires an opening in the fence, and such opening to be secured by a gate, or bars, at all farm crossings. Were there any ground for doubt as to the above construction, such doubt must, I think, be satisfied by the consideration of the residue of the section preceding the proviso. This part of the section requires all railroad corporations, when the same had not already been done, to construct, and thereafter to maintain, at all road crossings, cattle guards suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting on to such railroad. Thus the statute recognizes a clear distinction between "road crossings," which words are evidently here used as the equivalent of "public roads and highways," as designated in the forepart of the section, and farm crossings. In the one case it requires the construction of cattle guards, and in the other opens, gates, or bars, or, as we have seen, openings in the fence secured by gates or bars.

Neither the time nor space at my disposal will admit of an exhaustive review of the cases decided under statutes similar to that of ours. Some reference to them, however, is deemed necessary. A statute of the state of New York was enacted in 1850, entitled "An act to authorize the formation of railroad coporations and to regulate the same," a part of one section of which I quote:

"Sec. 44. Every corporation formed under this act shall erect and maintain fences on the sides of their road, of the height and strength of a division fence required by law, with openings, or gates, or bars therein, and farm crossings of the road for the use of the proprietors of lands adjoining such railroad; and also construct and maintain cattle guards at all road crossings suitable and sufficient to prevent cattle and animals from getting on to the railroad."

Under this statute the case of *Brooks v. N. Y. & Erie R.*

Co., 13 Barb., 594, arose, which was an action to recover for the killing of two cows of the plaintiff by the engine and cars of the company upon the railroad track. The cattle had entered upon the right of way and track of the railroad through a gate in the fence, between the right of way and the grounds of a third person, which gate had been habitually left open. The plaintiff claimed to recover on the grounds of the absence of fences and of cattle guards at said point, which was a private or farm crossing. The opinion of the supreme court, not a court of last resort, was delivered by Mr. Justice Shankland. After discussing two points, not necessary to be noticed here, the opinion proceeds:

"I am also of the opinion that the true reading of the section does not require the company to construct and maintain cattle guards at *farm* crossings of the road, but only at *road* crossings. The first clause of the section before the period (semicolon, in fact) relates to farm crossings only; and the last clause relates to public crossings only.

"The cattle guard was thought not necessary at farm crossings where fences, gates, or bars would be sufficient to keep cattle within the adjoining fields, except when driven across by the owners; but road crossings, where cattle running at large in pursuance of town regulations, or other lawful cause, were liable to pass in and upon the track of the railroad, required the additional protection afforded by the cattle guards mentioned in the statute."

The judgment for the plaintiff in the lower court was reversed.

The above act was amended in 1854, by which sec. 44 of the original act was substantially re-enacted as sec. 8 of the amendatory act. The language of the two sections is so nearly identical as to render the reproduction of the second as quite superfluous. Under the amendatory act the case of *Jones v. Seligman.*, 81 N. Y., 190, was

brought to the court of appeals. This was a bill in equity against the defendants as acting trustees of the bondholders of a railroad company, asking that the defendants be adjudged to specifically perform the duties imposed upon them by law, in respect to the matters set forth, and that they be required to build and maintain fences on each side of the lands taken by them from the plaintiff for railroad purposes, and described in the complaint, on which their railway is constructed through the plaintiff's farm, in the manner required by law, and also a farm crossing under said railroad.

After the above statement of the case, the opinion of the court by Mr. Justice Miller continues: "Section 8 of the general railroad act [chapter 282, Laws of 1854] requires that every railroad corporation * * * shall, before the lines of such railroad are opened, erect, and thereafter maintain, fences on the sides of their roads, of the height and strength of a division fence, as required by law, with openings, or gates, or bars for the use of the proprietors of the land adjoining such railroad, and to construct and maintain cattle guards at all said crossings, and declares that so long as such fences and cattle guards shall not be made, and when not in good repair, the corporation and its agents shall be liable for all damages; and when such fences and cattle guards shall have been made and kept in good repair, such corporation shall not be liable for any such damages, unless negligently and willfully done." The learned judge then goes on to construe the statute, holding that it imposes upon railroad corporations the duty of putting in cattle guards at all farm crossings, and that in the case before him the plaintiff was entitled to a crossing under the railroad.

It will be observed that the opinion only quotes a part of the first sentence of the section. The quotation stops at a comma, and that which follows is only a construction placed upon the balance of the sentence, and with all due

respect to the judge who wrote, and the court which adopted, the opinion, I must say that such construction was not justified by the language of the sentence. The succeeding words are, to continue the quotation where it stops in the opinion, "and shall also construct, where the same has not already been done, and hereafter maintain, cattle guards at all road crossings suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting on to such railroad."

This opinion, being thus so manifestly based upon a misconception of the statute, thus construed, cannot be received as an authority by this court.

The Compiled Statutes of the state of Missouri (1879) article 2, section 809, provide that "every railroad corporation * * * shall erect and maintain lawful fences on the sides of the road where the same passes through, along, or adjoining inclosed or cultivated fields, or uninclosed lands with openings and gates therein, to be hung and have latches or hooks, so that they may be easily opened and shut at all necessary farm crossings of the road, for the use of the proprietors or owners of the land adjoining such railroad, and also to construct and maintain cattle guards, where fences are required, sufficient to prevent horses, cattle, mules, and all other animals from getting on the railroad; and until fences, openings, gates, and farm crossings and cattle guards, as aforesaid, shall be made and maintained, such corporations shall be liable in double the amount of all damages which shall be done by its agents, engines, or cars to horses, cattle, mules, or other animals on said road, or by reason of any horses, cattle, mules, or other animals escaping from or coming upon said lands, fields, or inclosures, occasioned in either case by the failure to construct or maintain such fences, or cattle guards," etc. Under this statute arose the case of *Dent v. The St. Louis & Iron Mountain Railway Company*, 83 Mo., 496. This was an action for the recovery of double damages for stock killed by a train of cars in consequence

of the alleged failure of the road to construct cattle guards at plaintiff's farm crossing. From a judgment of the circuit court for the plaintiff the cause was taken to the supreme court, on appeal, and reversed. The opinion, by Chief Justice Henry, held that the statute did not require the construction of cattle guards at farm crossings, citing with approval the decision in *Brooks v. N. Y. & E. R. Company, supra.*

The Revised Statutes of the state of Illinois (1875) contained the provision as a part of chap. 114, sec. 37, * * * "That every railroad corporation shall * * * erect, and thereafter maintain, fences on both sides of its road, or so much thereof as is open for use, suitable and sufficient to prevent cattle, horses, sheep, hogs, or other stock from getting on such railroad (except at the crossings of public roads and highways, and within the limits of cities and incorporated towns and villages), with gates or bars at the farm crossings of such railroad, which farm crossings shall be constructed by such corporation when and where the same may become necessary for the use of the proprietors of the lands adjoining such railroads; and shall also construct, where the same has not already been done, and thereafter maintain, at all road crossings now existing, or hereafter established, cattle guards suitable and sufficient to prevent cattle, horses, sheep, hogs, and other stock from getting on such railroad," etc. Under this statute, the case of *P. P. & J. R. Co. v. Barton*, 80 Ill., 72, arose. In the court below, Barton sued the railrway company for the value of stock belonging to him that had been killed by the engine and cars of the defendant at two different times and places. One of the animals for which the plaintiff recovered was killed in the town of lower Peoria, at a point where it was not the duty of the railroad company to have fenced its track. I quote from the opinion of the supreme court by Chief Justice Scott, that "the other stock was killed on the defendant's road where it passes through a

common field, consisting of several square miles, owned by different persons, some of whom resided therein, and was fenced only on the outside. The railway company, although its road had been open for use more than six months, had not fenced its track entirely through the inclosure. Within the limits of this common field, and near where the stock was killed, there was a crossing which defendant insists was a 'public road crossing,' and that the company could not lawfully fence across it. It was used principally by parties residing within the inclosure, and was not a public road in any just sense; but if it was, it would not release defendant from liability for the stock killed near that point. The stock was not killed exactly on the crossing. Had it been a public crossing, it would have been the duty of the company to have placed 'cattle guards' there to prevent stock from getting upon the track; and if a private 'farm crossing,' as it really was, it was the duty of the company to place there bars, or gates, for the protection of stock that might lawfully run at large within the common field. The company had erected neither 'cattle guards' nor 'bars or gates,' and it was therefore clearly liable for the stock killed." The judgment was reversed because the plaintiff had been allowed to recover also for one animal killed when, under the declaration and proof in the case, there was no liability on the defendant; otherwise it would have been affirmed.

The General Statutes of the state of Minnesota (1878), at chap. 34, secs. 54-5, provide that "all railroad companies in this state shall, within six months from and after the passage of this act, build, or cause to be built, good and sufficient cattle guards at all wagon crossings, and good and substantial fences on each side of such road.

"Sec. 55. All railroad companies shall be liable for domestic animals killed or injured by the negligence of such companies; and a failure to build and maintain cattle guards and fences, as above provided, shall be deemed an act of negligence on the part of such companies."

In the case of *Sather v. Chicago, Milwaukee & St. Paul R. Co.*, 40 Minn., 91, in the opinion of the court, by Judge Vanderburgh, this statute is construed that *wagon crossings* "means established wagon roads intersecting railroads. The statute does not name or include 'private ways,' or 'farm crossings, so called. The former are to remain open and are protected by cattle guards and wing fences, while the adjacent farms or lands are required to be separated from the right of way *by fences on each side of said road;* and if farm crossings are reserved or secured by adjacent land-owners for private convenience, the gates and bars for the openings are understood to be a part of the fence, and hence sufficient to protect stock and keep it from going upon the track, except when taken across the same by or under the authority and direction of the owner; and the provisions of the statute as made do not reach such cases. In other words, the statute requires railroad companies to fence along their right of way where it can do so, but it cannot fence across highways, the protection there required, in order to keep cattle off the track, is the maintenance of cattle guards; and, in the absence of special or other statutory provisions than is provided in the chapter referred to, we think the road is fenced, as respects the farm crossings, where safe and proper gates are erected and maintained." The court cites the cases of *Brook v. N. Y. & E. R. Co., supra,* and *Cook v. Milwaukee & St. Paul R. Co.*, 36 Wis., 45. The judgment for the plaintiff in the lower court was reversed.

An act of the legislature of the state of Wisconsin, entitled "An act in relation to railroads and the organization of railroad companies," approved March 22, 1872, provided sec. 30, that "every railroad company or other party having the control or management of a railroad, the whole or any part of which shall be located in this state, shall and is hereby required to erect and maintain good and sufficient fences on both sides of such road (depot grounds excepted)

of the height of four and a half feet, with openings, or gates, or bars therein, and suitable and sufficient farm crossings of the road for the use of the proprietors of the lands adjoining such railroad; and also construct and maintain cattle guards at all highway crossings to prevent cattle and other animals from getting on to such railroad." It is further provided that until such fences and cattle guards shall be constructed, such railroad company, or other party, should be liable for all damages done by the agents or engines to cattle, horses, or other animals thereon; and it was further provided that when such fences should be duly made and maintained the railroad company should not be liable for any such damages unless willfully or negligently done.

In the case of *Cook v. M. & St. P. R. Co.*, *supra*, the supreme court in the opinion by Judge Lyon construes the said statute, from which opinion I quote: "The only negligence which the complainant imputes to the defendant is the failure to put in the additional cattle guard; and the loss of or injury to the horses of the plaintiff is attributed solely to the absence thereof. The action is predicated upon the hypothesis that the defendant was under a legal obligation to put in the cattle guard, and hence is liable for all damages suffered by the plaintiff in consequence of its neglect to do so. Unless this hypothesis is correct, the complaint fails to show a cause of action against the defendant. The controlling question is, therefore, was the defendant under a legal obligation to put in such cattle guard? The complainant does not allege that the defendant ever agreed to do so, but it is argued that this is a public duty, the performance of which is obligatory upon the defendant without any such agreement. It is quite true (and the court has so held) that the defendant, as lessee in possession of the railroad, holds it subject to all duties imposed on its lessor for the benefit and protection of the public. (*McCall v. Chamberlain*, 13 Wis., 637.) But the

extent of such public duty in respect to cattle guards is fixed and determined by the statute on that subject, which does not require railway companies to construct cattle guards at farm crossings, but only highway crossings"—citing the statute as above. The judgment of the lower court overruling a demurrer to the complaint was reversed.

The Indiana decisions, while in line with the cases cited, are not considered as authority in this state; the statute of that state in regard to the duty of railroads to fence their lines being so different from our own.

The only cases cited by either party in the briefs of counsel, in the case at bar, are *Boggs v. C., B. & Q. R. Co.*, 6 N. W. Rep., 744, and *Gray v. Burlington & Mo. R. Co.*, 37 Ia., 119. The decisions and opinions in these cases are founded upon sec. 1936 of the Code of Iowa, that "when any person owns land on both sides of any railway the corporation owning the same shall, when requested so to do, make and keep in good repair one cattle guard and one causeway or other adequate means of crossing the same, at such reasonable place as may be designated by the owner." (Iowa Code, vol. 1, p. 490.)

The cases cited, as well as others of the supreme court of Iowa, decided under the above law, hold that it is the duty of railroad companies, under the circumstances contemplated by the language of the section, to put in cattle guards when requested so to do by the owner of lands situated on both sides of the railroad. I do not doubt the correctness of such holdings, but the statute under which they were made is so radically different from our own that they cannot be followed here.

I therefore reach the conclusion that the provisions of our statute above quoted, either by their language analyzed and fairly construed, or in the light of the construction placed upon similar statutes by the courts of other states, did not impose upon the defendants the duty of putting in cattle guards at the private or farm crossings on the plaint-

iff's land; and that the findings and decree of the district court are unsustained by the law and the facts of the case. The judgment of the district court is reversed and the cause is dismissed.

REVERSED AND DISMISSED.

NORVAL, J., concurs.

MAXWELL, J., dissenting.

Being unable to concur in the decision of the majority of the court, I deem it my duty to state the reasons for such non-concurrence. The plaintiff's railway runs between the defendant in error's residence and the public road, and he has applied under the statute to require the company to leave an open way between his residence and the public road. On the trial of the cause in the court below judgment was rendered in his favor, from which the railway company brings the cause into this court.

Sec. 106, chap. 16, Compiled Statutes, provides: "When any person owns land on both sides of any railroad the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other *adequate* means of crossing the same."

Sec. 1, art. 1, chap. 72, Compiled Statutes, provides: "That every railroad corporation whose lines of road or any part thereof is open for use, shall, within six months after the passage of this act, and every railroad company formed or to be formed, but whose lines are not now open for use, shall, within six months after the lines of such railroad or any part thereof are open, erect, and thereafter maintain, fences on the sides of their said railroad, or the part thereof so open for use, suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, WITH

OPENS, or gates, or bars at all the farm crossings of such railroads for the use of the proprietors of the lands adjoining such railroad."

These statutes are *in pari materia* and are to be construed together. It will be observed that, under sec. 106, chap. 16, the railway company is required, when requested so to do, to make and keep in good repair one causeway or other adequate means of crossing the railway. The compound word "causeway" appears to be derived from the Latin words *via calciata*—a way paved with limestone. The present meaning of the word is a way raised above the natural level of the ground by earth, stones, etc., and when applied to a railway crossing it evidently means a suitable passage way across the track and right of way. If it would be inconvenient to construct a causeway, then the railway company must provide other adequate means of crossing the track and right of way. Sec. 1 of chap. 72 requires farm crossings of railroads to be *with opens*, gates, or bars. There are three classes of cases therefore provided for by statute and the question of what is an adequate crossing is a question of fact, considering all the circumstances of each case. If a crossing is but little used, then bars may be sufficient and would be an adequate provision. If the crossing is used to a greater extent, then gates may be sufficient, but if the crossing is in constant use—as where the railway intervenes between the public road and the residence of the land-owner, then an adequate crossing would be an open way. The words "with opens" are evidently designed to apply to cases of that kind, otherwise they have no meaning whatever.

Railways have become a matter of public necessity, and under the statutes of this state there is but little restriction upon the right of a railway corporation to construct roads wherever its inclination may suggest. From the necessity of the case the property of private individuals must sustain injury by the running of such roads. This, however,

is borne by the land-owners because of the public necessity for railways. In many cases it is unavoidable in constructing the roads to cut off access from the highway to the residence of the land-owners. The law, therefore, has provided a safeguard in the land-owner's favor and reduces his inconvenience and damage to his property to the minimum by requiring the company to furnish adequate means of crossing the railway and access to the public road. And where gates or bars would not furnish the adequate conveniences, then the company must leave an open way so that the owner of the land may pass and repass without the delay and danger incident to taking down and putting up bars or opening or shutting gates. The trifling cost to the company of putting in a crossing of that kind is as nothing compared to the benefit derived by the occupier of the land. It would be intolerable to require a land-owner, whose land was cut off from communication with the public road and who had occasion to cross the railway many times each day, to open and shut gates each time that he crossed the same. His rights should be considered as well as those of the railway company. No person would desire to purchase a farm on which to reside where it was necessary to open and shut two gates and cross a railway track in order to reach the dwelling house; and such a farm would be practically unsalable at the price of lands adjoining not intersected by a railway. Compared to the loss of the land-owner the expense of the company in maintaining an open way for his convenience is but a trifle, and it is but reasonable to suppose that such crossing was within the contemplation of the parties when the right of way was acquired.

The court below found that the open way was the only adequate means of crossing, and this court cannot say, as a matter of law, that such way is not required. The words "with opens" are entirely ignored in the majority opinion, although they evidently refer to a class of cases not

provided for where gates or bars would be a sufficient means for a farm crossing.

The judgment of the court below in my view is right and should be affirmed.

WILLIAM L. DETWILER ET AL., APPELLEES, V. MATILDA DETWILER ET AL., APPELLANTS.

[FILED SEPTEMBER 18, 1890.]

Resulting Trusts: FRAUDULENT CONVEYANCES. J. B. D. bought certain city lots, paying for them with his own means, and by his direction the deed therefor was made by the vendor and grantors to M. A. D., mother of J. B. D. *Held*, That a trust in said lots resulted in favor of J. B. D. But if the title was thus directed to be made to M. A. D. for the purpose and intention of defrauding the creditors of J. B. D., he, being insolvent and contemplating bankruptcy, could not enforce such trust by action, but the legal title afterwards acquired by him was received free of any equitable claim of other heirs of M. A. D., she being deceased.

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

Bartlett & Cornish, and *Savage, Morris & Davis*, for appellants, cited: Pom., Eq. Jur., vol. I, secs. 401–4, vol. II, secs. 19, 418, 419, 609, 610, 649, 664, 687, 818; *Bleakley's App.*, 66 Pa. St., 187; *Van Cott v. Prentice*, 10 N. E. Rep. [N. Y.], 257; Rapalje & Lawrence's Law Dic., 268; Herman, Estoppel, 1216, sec. 1085; *Goodspeed v. Fuller*, 46 Me., 141; *Draper v. Shoot*, 25 Mo., 197 [69 Am. Dec., 462]; *Hammond v. Woodman*, 41 Me., 177 [66 Am. Dec., 219]; *Bobb v. Bobb*, 4 S. W. Rep. [Mo.], 511; *Parker v. Kuhn*, 21 Neb., 425–26; 1 Washburn, R. P. [4th Ed.], ch. 2; 3

Wait's Act. & Def., secs. 99, 102; 6 Id., secs. 2, 10; *Turner v. Hall*, 60 Mo., 271; *Putnam Free Sch. v. Fisher*, 34 Me., 172; *Sch. Dist. v. Benson*, 31 Me., 381 [52 Am. Dec., 218]; *Brandt v. Ogden*, 1 Johns. [N. Y.], 156; *Jackson v. Parker*, 9 Cow. [N. Y.,] 74; *Kirke v. Smith*, 9 Wheat. [U. S.], 241; *Fugat v. Pierce*, 49 Mo., 441; *Ewing v. Burnett*, 11 Peters [U. S.], 41.

George W. Covell, and *E. H. Wooley*, *contra*, cited: *Cutler v. Tuttle*, 4 C. E. Gr. [N. J.], 549; *Shroser v. Isaacs*, 1 Stew. [N. J. Eq.], 320; *Slocum v. Marshall*, 2 Wash. C. C., 397; *Newton v. Preston*, Pr. Ch. [Eng.], 103; *Wright v. King*, Harr. Ch. [Del.], 12; *Enos v. Hunter*, 4 Gilm. [Ill.], 211; *O'Hara v. O'Neil*, 2 Eq. Cas., Ab. [Eng.], 745; *Cottington v. Fletcher*, 2 Atk. [Eng.], 155; *Ambrose v. Ambrose*, 1 Cox P. Wm. [Eng.], 321; *Bolt v. Rogers*, 3 Paige [N. Y.], 156; *Starkes v. Littlepage*, 4 Rand. [Va.], 372; *Hershey v. Weiting*, 14 Wright [Pa. St.], 244; *Freeman v. Sedwick*, 6 Gill [Md.], 28, 39; *Stewart v. Iglehart*, 7 Gill & J. [Id.], 132; Rapalje & Lawrence, Law Dic., 96–7; *Hall v. Sawyer*, 47 Barb. [N. Y.], 119; Story, Agency, secs. 3, 25, 126 (and note 3), 133 (and notes 1 and 2); Perry, Trusts, secs. 1, 783; *Dupont v. Wertheman*, 10 Cal., 354; *Mott v. Smith*, 16 Id., 536–557; *Blum v. Robertson*, 24 Id., 140; *Mch. Bk. v. Bk. of Columbia* 18 U. S., 326; *Beals v. Allen*, 18 Johns. [N.Y.], 363; *Hubbard v. Elmer*, 7 Wend. [N. Y.], 446; *Rossiter v. Rossiter*, 8 Id., 494; *North River Bank v. Aymar*, 3 Hill [N. Y.], 263; *Cox v. Robinson*, 2 Stew. & Porter [Ala.], 91; *Stow v. Wyse*, 7 Conn., 214; *Ins. Co. v. Poe*, 53 Md., 28 [13 Am. Law Reg., 663]; *Mechanics Bk. v. Schaumburg*, 38 Mo. 228; *Nesbitt v. Helser*, 49 Id., 383; *Sanford v. Handy*, 23 Wend. [N. Y.], 260; *Brantly v. S. Life Ins. Co.*, 53 Ala., 554; *Wickham v. Knox*, 33 Pa. St., 71; *Watson v. Hopkins*, 27 Tex., 637; *Thurman v. Wells-Fargo Ex. Co.*, 18 Barb. [N. Y.], 500; *Holtsinger v. Corn Ex.*

Bk., 6 Abb. Pr. [N. S.], 292; *Spadone v. Manvel*, 2 Daly [N. Y.], 263; *Clark v. Meigs*, 10 Bosw. [N. Y.], 337; *Munn v. Com. Co.*, 15 Johns. [N. Y.], 44; *Davenport v. Buckland*, Hill & D. [N. Y.], 75; *Fellows v. Northrup*, 39 N. Y., 117; *Cuyler v. Merrifield*, 5 Hun [N. Y.], 559; *Hetzel v. Barber* 69 Barb. [N.Y.], 1; *Hoyt v. Hoyt*, 17 Hun. [N. Y.], 192; *Nixon v. Hyserott*, 5 Johns. [N. Y.], 58; *Allen v. DeWitt*, 3 N. Y., 276; *Dunshen v. Goldbacher*, 56 Barb. [N. Y.], 579; *Haywood v. Thomas*, 17 Neb., 237, 241; *Gatling v. Lane*, 17 Id., 77; *Jackson v. Woodruff*, 1 Cowen [N. Y.], 276; *Jackson v. Luquere*, 5 Id., 221; *Hull v. C., B. & Q. R. Co.*, 21 Neb., 373; *Bailey v. Irby*, 2 Nott & McCord [S. Car.], 343; *Union Canal Co. v. Young*, 1 Whart. [Pa.], 426; *Parker v. Kuhn*, 21 Neb., 413.

COBB, CH. J.

The plaintiffs and appellees in this cause exhibited their bill, in the court below, against the appellants, for the purpose of setting aside a deed executed by William H. Detwiler, as attorney in fact of plaintiffs, to John B. Detwiler, of lots 3 and 4 of block 256, in the city of Omaha, on the ground of fraud, and to establish the plaintiffs' rights as heirs of Mary A. Detwiler, deceased, to said lots.

The plaintiffs set up that William L. Detwiler, Mary Jane Parkins, and Josephine Clinton were the children and heirs of Mary A. Detwiler, deceased; that Joseph F. Parkins was the husband of Mary Jane; that Fred. Clinton was the husband of Josephine, and that they were the only heirs of said Mary A. Detwiler, except Emma DeLora Gallagher and John B. Detwiler, deceased; that said Emma and her husband, John Gallagher, were made defendants to the suit because they refused to join as plaintiffs; that Matilda A. Detwiler was the widow of John B., deceased, and that Augustus K., Caroline, and Grace Det-

wiler were his children and only heirs at law. The relationship of the parties to the suit appears in the following table:

PARENTS:	William H. Detwiler and Mary A. Detwiler.
CHILDREN:	John B. Detwiler, deceased. William L. Detwiler, plaintiff. Mary Jane Parkins, plaintiff. Josephine Clinton, plaintiff. Emma DeLora Gallagher, defendant.
PARENTS:	John B. Detwiler, deceased, and Matilda A. Detwiler, defendant.
CHILDREN:	Augustus K. Detwiler, defendant. Caroline Detwiler, defendant. Grace Detwiler, defendant.
HUSBANDS OF PLAINTIFFS:	Joseph F. Parkins, plaintiff, and Fred. Clinton, plaintiff.

The plaintiffs set up that Mary A. Detwiler died intestate in the year 1874, seized in fee simple of said lots; that in said year John B. Detwiler procured the title by fraud; that his deed was executed by William H. Detwiler without authority of the plaintiffs or any of them; that they never discovered that fact until within the year prior to the commencement of this suit; that no consideration was paid by said John B. to William H. Detwiler, or to any of the plaintiffs, or to the grantors in said deed, and that said William H. had no knowledge that he was signing a deed to said lots; that his signature was procured by said John B. by false and fraudulent representations that the said instrument was a power of attorney or other instrument necessary in some business transaction, and which the said William H. supposed he was signing as an instrument other than and different from a warranty deed of said premises; that he did not discover that he

had made said deed until within the year prior to the commencement of this suit, and that he signed the same relying upon the representations of said John B. Detwiler; and praying that the court decree the plaintiffs each one-fifth interest in said real estate.

The defendants answered, denying that Mary A. Detwiler owned said real estate, and setting up that the same was purchased by John B. Detwiler, in his lifetime, and conveyed to said Mary A. in trust for the benefit of said John B. and his heirs, all of which was known to the plaintiffs at the time of said Mary A.'s death, and alleging that said Mary A. held the title to said lots in trust for the use and benefit of John B. Detwiler and his heirs, and that Mary A., after receiving said conveyance, agreed to execute the trust by reconveying the lots to John B. and his heirs, and before the execution thereof, in the year 1874, the said Mary A. died suddenly, leaving the legal title in her, and that, for the purpose of executing said trust, the plaintiffs, in 1874, executed to said William H. Detwiler, their father, the husband of Mary A., deceased, a power of attorney, authorizing him to make the conveyance, which is claimed by them to have been procured by fraud; that by virtue of said power of attorney, and with their full knowledge, the property was conveyed to John B. Detwiler by William H. Detwiler on October 7, 1874.

The answer further sets up that the claim of the plaintiffs is for the purpose of defrauding the said Matilda A. Detwiler and her children out of their title to said real estate; and further interposes the statute of limitations.

The plaintiffs replied, alleging that the said property was purchased by said John B. Detwiler, as agent of said Mary A. Detwiler.

Upon the argument and hearing of this cause it was referred by the court to A. N. Ferguson, Esq., to take testimony and report what sums have been paid by J. B. Detwiler in his lifetime, or by his heirs or legal represen-

tatives since his death, for taxes or assessments on lots 3 and 4, in block 256, in Omaha, or improvements thereon, or pertaining thereto, and the amount, with legal interest; by which it was found that the sum of $717.84 had been so taxed, assessed, and paid.

Subsequently, on March 28, 1888, the cause which was tried to the court at the September term, 1887, and taken under advisement, came on to be decided and was found generally, upon pleadings and evidence, in favor of the plaintiffs; and it was further specially found that Mary A. Detwiler, the mother of William L. Detwiler, Mary H. Parkins, Josephine Clinton, Emma DeL. Gallagher, and John B. Detwiler, died seized of the legal and equitable title of lots 3 and 4, in block 256, in the city of Omaha, as designated and described on the surveyed plat of said city, and that said lots descended to her said children and heirs at law, subject to the curtesy right of her husband, William H. Detwiler. That each of her said children inherited from her the undivided one-fifth of said lots subject to the life estate, or tenancy by the curtesy, of the said William H. Detwiler, and that her said children were tenants in common of said real estate.

And it was further found that in May, 1874, shortly after the death of Mary A. Detwiler, her said children and heirs at law, made, executed, and delivered to William H. Detwiler, their father, a joint power of attorney, dated May 29, 1874, recorded October 8, 1874, in book 17 of deeds of the records of said county, on pages 5, 6, and 7, empowering him "to bargain, sell, and convey" the said real estate for them and in their names; that said power of attorney was not obtained by fraud, and was a valid instrument in all respects; that under this power of attorney, William H. Detwiler, as attorney in fact of the heirs of Mary A. Detwiler, and in the names of four of them, on October 7, 1874, made, executed, and delivered to one of his sons, John B. Detwiler, and one of said heirs, a vol-

untary conveyance of said real estate, without consideration, which was recorded October 8, 1874, in book 17 of deeds of the records of said county, on page 7; that said attorney in fact had no authority to make such conveyance without consideration, under the power granted to him; that the grantors of the power were tenants in common of the property, and the attorney undertook to convey to one of them, without consideration, the undivided interest of the others, which was in violation of his authority and was voidable.

And was further found that the obtaining of the said conveyance was, in contemplation of law, a fraud and cloud upon the title of the plaintiffs and heirs at law of Mary A. Detwiler, deceased, and that they are entitled to the decree of this court adjudging it void.

And was also further found that none of the plaintiffs had actual knowledge of the conveyance having been made by their attorney in fact to their co-tenant until shortly before bringing this suit, and that they are not shown to have come to the knowledge of any facts indicative thereof, until recently, within less than four years before bringing this action, and that the statutes of limitation have not barred the same.

And was also further found that John B. Detwiler in his lifetime, and his estate since his death, have paid taxes and special assessments for improvements pertaining to said real estate, amounting with interest to $717.84, as reported by the referee, and that the plaintiffs should pay to the estate of John B. Detwiler, deceased, the undivided three-fifths thereof, amounting to $430.71, which sum is made a perpetual lien on the interests of the plaintiffs in said real estate, with interest thereon until paid by them; and that the said Emma DeL. Gallagher should pay to said estate the undivided one-fifth thereof, amounting to $143.57.

It was decreed that the conveyance to John B. Detwiler,

of said lots in the name of the heirs of Mary A. Detwiler, deceased, by their attorney in fact William H. Detwiler, be set aside and canceled, and that on the payment by the plaintiffs to the legal representatives of John B. Detwiler, deceased, of the undivided three-fifths of said sum so paid for the special assessments and taxes on said real estate, being $430.71, with interest, the perpetual lien therefor be canceled.

It was also decreed that the cloud upon the title of the plaintiffs, by said conveyance, be removed on the condition stated, and the deed canceled, and the plaintiffs recover the costs.

To all of which the defendants excepted on the record, and appealed to this court.

From an examination of the pleadings, and the bill of exceptions, and the points of decision attached to the record of the district court, the case turns upon two propositions of law and evidence.

The lots in controversy were owned by Andrew B. Moore. He testified upon the trial, on part of defendants, that he sold the lots to John B. Detwiler; that he received the entire consideration from him, and that by his direction he executed the deed of conveyance to Mary A. Detwiler, a copy of which was put in evidence, and is exemplified in the bill of exceptions, from which it appears to have been executed by Andrew B. Moore and Mary A., his wife, to Mary A. Detwiler, dated and acknowledged April 22, 1867, with covenants of general warranty and consideration of $257, for lots Nos. 3 and 4, in block 256, in the city of Omaha.

There is a large amount of testimony on the part of plaintiffs to the effect that Mary A. Detwiler placed the sum of $300 in the hands of John B. Detwiler at or about the time of the execution of this deed for the purpose of being invested by him, for her, in lots in Omaha. But it does not seem that this testimony was sufficient to satisfy

the trial court to adopt the theory that the purchase of these lots was made pursuant to that investment, but rather that the lots were purchased by John B. Detwiler for himself, and the title placed in Mary A. Detwiler for the purpose of defrauding his creditors in contemplation of bankruptcy. A careful examination of all the testimony at the last term of the court, by each member then present, failed to convince either of us of the fallacy of this theory so far as it concerned the purchase of the lots by John B. Detwiler for himself, and the placing of the title in the name of his mother Mary A. Detwiler for his own convenience and purposes.

The honorable judge in the points of decision says, regarding the resulting trust claimed by the defendants in favor of John B. Detwiler, by reason of his having paid the consideration to Andrew B. Moore, "that, upon all the authorities, the evidence of such payment must be clear, definite, and satisfactory, although it seems probable that the immediate consideration to Moore was the cancellation of his indebtedness to the Bracken firm," etc. While we agree with this proposition that, in order to establish a resulting trust, the evidence of the payment of the consideration by the person claimed to be the *cestui que trust* must be clear and definite, we are all of the opinion, from the evidence before us, that the full and entire consideration for the purchase of the lots in question was made with the means of John B. Detwiler. Moore himself is the only witness to this point, and his evidence to that effect appears to be clear and definite, and we think it satisfactory. In saying this we do not seek to ignore the fact that, as above stated, there is a large amount of conflicting testimony as to whether or not the alleged trustee, Mary A. Detwiler, placed in the hands of her son John B., at or about the time of this transaction, a sum of money to be invested in town lots in Omaha. But this conflicting testimony, in our view, fails to reach the point and to render

less certain and more indefinite the testimony of Moore that the consideration for the deed to Mary A. Detwiler was actually paid and delivered to him by John B Detwiler; and there is no evidence whatever to connect any moneys delivered, or claimed to have been delivered, to John B. Detwiler by his mother with the bill for groceries which Moore swears was the consideration for the deed. But we were, and still are, unable to follow the trial court in its conclusion, that such placing of the title in the name of Mary A. Detwiler was for the purpose of defrauding the creditors of John B. Detwiler in contemplation of bankruptcy, or that such intent and purpose on his part is proved with that clearness and certainty required in the present action, where advantage is sought to be taken of such circumstance by parties not creditors of John B. Detwiler, and where the effect would be to work a forfeiture in favor of parties not interested in the bankrupt's estate.

But if it be conceded that the purpose of John B. Detwiler, in having the deed to the lots made to his mother, Mary A. Detwiler, was in contemplation of his taking the benefit of the bankrupt law, and to prevent the property from passing to his assignee in bankruptcy, and thereby tending to defraud his creditors, this, as I understand the law, did not prevent the creation of a resulting trust arising upon such conveyance; did not prevent Mary A. Detwiler taking and holding the lots as a trustee, and not as an absolute owner. Granted that it would create an impassable barrier to either John B. Detwiler or his heirs prosecuting an action for the enforcement of such trust, this would not prevent the trustee, Mary A. Detwiler, or her heirs at her decease, from divesting themselves of such trust, and thereby allowing the title to pass to John B. Detwiler or his heirs.

It appears from the bill of exceptions that John B. Detwiler filed a petition in bankruptcy on May 30, 1868.

There is no evidence that he contemplated this proceeding at the date of the deed. The law is stated by Perry on Trusts, sec. 126: "Where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration is given or paid by another, the parties being strangers to each other, a resulting trust immediately arises from the transaction and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds." By referring to sec. 144, following, it will be seen that the word "strangers," as used in the section quoted, embraces the mother of the *cestui que trust*. In sec. 165, following, the author says: "If the voluntary conveyance is made for some illegal or fraudulent purpose, whether it is a common law or modern conveyance, no trust will result to the grantor; as, if the voluntary conveyance is made to delay, hinder, and defeat creditors."

Of the fifteen examples cited in support of this authority not one of them comes up to the proposition involved in this case. It will be admitted, nevertheless, that, were it established that the title to the property was placed in Mary A. Detwiler by John B. Detwiler for the purpose of defrauding his creditors, or for any unlawful purpose, and such title remained in her and her heirs, an action by him or his heirs could not be maintained against her or them therefor.

The learned judge, in his points of decision, says: "Detwiler's repeated statements on oath in his bankruptcy proceedings are in direct conflict with the theory of the alleged trust; the failure to request or demand a conveyance from his mother in his lifetime is strongly against it. Whatever may seem to be the probability, the evidence is not sufficiently strong and decisive to warrant the holding that there was a resulting trust, but it is not deemed necessary to determine whether there was or not." This point is quoted for the purpose of showing that the court below did

not decide that there was no resulting trust, and did not decide against the evidence introduced by defendants for the purpose of establishing such trust. We are therefore relieved of the embarrassment of deciding adverse to the finding of the trial court upon a question of fact when we express the opinion that the evidence establishes the purchase of, and payment for, the lots by John B. Detweiler for himself, and with his own means. The court in its points of decision continues: "The only reason suggested by the proofs for putting the title in his mother's name is that he contemplated bankruptcy proceedings and wished to conceal his ownership. No court could aid him in enforcing a trust originating in such a motive; the heirs might voluntarily execute it. The question remains whether they did so."

It is not necessary to defendants' case that any reason should be suggested or indicated for John B. Detwiler putting the title in his mother's name; nor do I think that anything is suggested or indicated by the proofs to that effect worthy of serious consideration. This brings us to the consideration of the second point which is indicated by the clause of the points of decision last quoted, that, although it were conceded that "no court could aid him in enforcing a trust originating in such a motive," the heirs of Mary A. Detwiler having conveyed the title to John B. Detwiler, in recognizing this fact a court of equity does not enforce the trust but simply recognizes its enforcement by the parties upon whom the trust title was cast by descent.

But it is contended that, as the power of attorney by virtue of which the deed of the plaintiffs and Mr. and Mrs. Gallagher to John B. Detwiler of these lots did not in terms empower the attorney therein named to convey land, except upon bargain and sale, no title whatever passed by such deed; that such deed is absolutely void, and therefore the case stands as though no such conveyance had been made. We cannot agree to this proposition. The power

of attorney, executed by all of the original parties, empowered their attorney, William H. Detwiler, for and in the name, place, and stead of the persons executing it, to bargain, sell, and convey to such person or persons, and for such price or prices, on such terms of credit as he might see fit, all or any portion of the real estate, lands, tenements, and hereditaments of which the said Mary A. Detwiler died seized, and situate in the county of Cass, in this state, or elsewhere, and in their names make, execute, and deliver such deed or deeds as might be necessary to convey their respective interests in and to said lands.

Before entering upon the inquiry whether, in legal strictness, this power of attorney, upon its face, empowered William H. Detwiler, the attorney therein named, to convey the lots in question without bargaining for the sale thereof, and receiving a consideration therefor in money, I will briefly examine into the facts and circumstance of the execution and delivery of the instrument as shown by the evidence. It appears from the testimony of William H. Detwiler, and inferentially that of the other witnesses than Mrs. Matilda A. Detwiler, that at the time of the death of Mary A. Detwiler the homestead property of the family at Weeping Water stood in her name, and that all of the sons and daughters and daughters' husbands were willing to execute a quit-claim deed of the same to their father, William H. Detwiler; also to turn over to him all the personal property and effects of the deceased which had not been divided up amongst themselves. Mrs. Matilda A. Detwiler testified that she was present at the funeral of Mary A. Detwiler at Weeping Water, together with her husband, John B. Detwiler, and that a day or two after the funeral, as witness and her husband were about going to the depot to return home, the plaintiff, Mrs. Josephine Clinton, her husband and William L. Detwiler, all stood at the wagon which was to take them to the depot, when it was mentioned and acquiesced in by all present that papers were to be made out

by which the said property was to go into the hands, possession, and control of William H. Detwiler; that there had previously been a general talk, after the funeral, in regard to fixing up those matters; that her husband, John B. Detwiler, said to his father as they stood around the wagon, "Father, come up, and we will attend to those papers."

It appears that subsequent to this William H. Detwiler went to Omaha, and returned to Weeping Water with the power of attorney drawn up and signed by John B. Detwiler and Matilda A. Detwiler; that it was afterwards executed by the other parties to it. There is a large amount of confusing testimony introduced for the purpose of showing that the power of attorney, as drawn up, was not understood by the parties who executed it, especially as to the clause embracing other property of the deceased than that in Cass county. But we agree with the trial court that the evidence does not establish fraud on the part of William H. Detwiler in obtaining the power of attorney, that he made no effort to conceal the terms of the instrument, and that all the signers had ample opportunity to know them and should be held to them.

It is very clear from the whole case that this power of attorney was not executed by any of the parties in the view or for the purpose of making William H. Detwiler their attorney to bargain and sell the property described, or any part of it, and account to them for the proceeds, but was intended as a method of placing the Cass county property in his hands, under his control, for the purposes of his support and maintenance; and, as William H. Detwiler testified on the trial, it may be reasonably inferred that this was intended to apply also to any other property which it might be found the deceased owned, or, as he expressed it, "that might be found to come under her jurisdiction." This being the intent and purpose of the power of attorney, was it a fraud on the part of William H. Detwiler to make the conveyance of the lots in question to his son John B. Detwiler,

under whose roof he expected to live the remainder of his life—such a fraud as would render the conveyance absolutely void? We think not.

As to the consideration, I do not doubt that had this deed been executed by the parties, without the intervention of an attorney in fact, in the terms in which it was executed, although no consideration was received, it would have conveyed the legal title.

From these considerations I come to the conclusion that although executed by an attorney under a power to bargain, sell, and convey, it did carry the legal title to the property conveyed.

It will not be overlooked that the defendants did not come into court asking relief, but only when brought by the plaintiffs to defend their title.

The decree of the district court is

REVERSED AND THE BILL DISMISSED.

THE other judges concur.

MANGER BROS. V. MILTON SHIPMAN.

[FILED SEPTEMBER 18, 1890.]

Review. *Held*, That there is sufficient testimony to sustain the verdict.

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

J. L. Caldwell (*J. R. Webster* and *E. P. Holmes* with him), for plaintiffs in error, cited: *Jennings v. Simpson*, 12 Neb., 564; *Cooper v. Marshall*, 1 Burr. [Eng.], 259; Bacon's Abr., "Game"; *Bowlston v. Hardy*, 5 Cro. Eliz.,

547; 1 Chitty, Pleading, 94; *Hardy v. Keene*, 52 N. H., 378; *Baker v. Kinsey*, 38 Cal., 634; *Dickson v. McCoy*, 39 N. Y., 400; *Hewes v. McNamara*, 106 Mass., 281; *Bennett v. Ford*, 47 Ind., 264; *Tupper v. Clark*, 43 Vt., 200; Cooley, Torts, 349; *Park v. Obrion*, 23 Conn., 339.

W. Henry Smith, contra, cited: *McKone v. Wood*, 5 C. & P. [Eng.], 1; 1 Hale P. C., 430; *May v. Burdett*, 16 L. J. N. S. [Eng.], 64; Pollock, Torts, 317, 406; *Wilkinson v. Parrott*, 32 Cal., 102, 103; *Cummings v. Riley*, 52 N. H., 369; *Cook v. Pickrel*, 20 Neb., 433; *Frammell v. Little*, 16 Ind., 251; Cooley, Torts, 410–12.

MAXWELL, J.

This action was brought in the district court of Lancaster county to recover damages caused by the bite of a wolf, which the defendant in error alleges was harbored and retained by the plaintiffs in error. He alleges in the petition that "the above named plaintiff, Milton Shipman, who sues in this action by his next friend, John Shipman, and states to the court: That this action is begun for the sole benefit of the above named plaintiff, Milton Shipman; that the defendants Manger Bros. are partners doing business in the city of Lincoln, Lancaster county, Nebraska; that the defendants August Manger, Wm. Manger, and P. Manger, whose first full name is unknown, are the members and the only members of said partnership of Manger Bros.; that on the 4th day of March, 1888, and for a long time prior thereto, the said defendants were the owners of and in charge of, and were wrongfully, willfully, and injuriously keeping and harboring a vicious, wild animal, to-wit: A wild wolf in the city of Lincoln, Lancaster county, Nebraska; and that on the said 4th day of March, 1888, in the city of Lincoln aforesaid, the said defendants did so wrongfully and injuriously and negligently keep said wild and vicious wolf, knowing the nature of

said wild and vicious animal; that the said wolf was running at large on the streets in the city of Lincoln aforesaid; that on the said 4th day of March, 1888, while this plaintiff was walking on the streets of the city of Lincoln aforesaid, the said wolf did, while so running at large as aforesaid, attack this plaintiff with his teeth and claws, and did there and then bite, claw, wound, and lacerate this plaintiff on or about the legs and arms, and did greatly injure this plaintiff on or about the body as aforesaid, because of which this plaintiff became sick, sore, and lame, and so remained and continued for a long period of time, to-wit, for the space of six weeks, during which time he, the said plaintiff, suffered great bodily pain and suffering and anguish of mind and mental suffering, and that during all of the time from said injury up to the beginning of this suit, this plaintiff, because of such injury and laceration as aforesaid, has and still is suffering great anguish of mind and mental pain; that this plaintiff has sustained damages by reason of the aforesaid biting, wounding, and lacerating and the bodily pain and suffering and the mental anguish caused thereby, in the sum of $3,000, no part of which has been paid."

Service was had upon the plaintiff in error, who appeared and answered by a general denial. On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of $560, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The principal error relied upon in this court is that the verdict is not sustained by sufficient evidence.

The testimony shows that there are five of the Manger Bros., and that Austin and Philip were in business in Lincoln during the years 1887 and 1888. There is a claim that Philip was not a partner during the winter and spring of 1888. The testimony upon this point is very unsatisfactory, and in view of the circumstances a jury would be

warranted in disregarding it. During the year 1887 a young brother of the Mangers obtained a pet wolf or coyote. This he kept for some months, when he removed to Indiana, and being unable to take the wolf with him left it in the care of his brothers, and it was tied in the back yard adjoining their place of business in Lincoln. In a few instances it seems to have been tied in front of their place of business, and was known to have bitten at least one person before the plaintiff, and seems to have been regarded as dangerous. The plaintiffs in error were notified by the city marshal that the animal was dangerous and that they must kill it. They disclaimed ownership and made no effort apparently to have the animal destroyed. August Manger testifies that he gave the animal to one Beha, an employe, and that he knew nothing of it thereafter. The testimony, however, shows that the animal was kept on the grounds back of their place of business and fed with scraps from the butcher shop. There was in fact, therefore, no change in the persons who cared for the wolf. It is true the Mangers testify that they had no knowledge that the wolf was kept in the back yard, but the question of their credibility was one for the jury, and the jury seem to have regarded that testimony as unreliable.

That the injuries inflicted on the defendant in error were of a very serious character is shown by all the testimony, and that these were inflicted by the wolf in question, and it is clearly shown that this wolf was kept on the premises of the Manger Bros. and fed with meat from the shop. These were circumstances which it was the duty of the jury to weigh with the testimony of the Manger Bros., as showing what was actually done by them in the premises, either personally or by their employes. The damages are not excessive and there is sufficient testimony to sustain the verdict. The judgment is

AFFIRMED.

THE other judges concur.

NATIONAL LUMBER CO. v. CITY OF WYMORE.

[FILED SEPTEMBER 18, 1890.]

1. **The instructions** must be predicated upon the testimony in the cause, and if not based thereon, although correct abstract propositions of law, the error may be sufficient to cause a reversal of the case.

2. **Cities: CLAIMS AGAINST: CONDITIONAL ALLOWANCE.** The allowance of a claim by the city council with the condition annexed to it "to be paid when there is money in the treasury to pay with" is binding on the city, and the condition will not defeat an action to recover a judgment thereon.

ERROR to the district court for Gage county. Tried below before APPELGET, J.

A. Hardy, for plaintiff in error, cited: *Bellows v. West Fork*, 30 N. W. Rep. [Ia.], 582; *Skinner v. Dayton*, 19 Johns. [N. Y.], 573*; *Gaines v. Miller*, 111 U. S., 395; *Com. Bank of Buffalo v. Warren*, 15 N. Y., 577; *Herrmans v. Clarkson*, 64 Id., 171; 1 Dillon, Mun. Corp., sec. 463; *Hoyt v. Thompson*, 19 N. Y., 207; *Olcott v. Tioga R. Co.*, 27 N. Y., 546; *Medomak Bank v. Curtis*, 24 Me., 38; *Whitnel v. Warner*, 20 Vt., 425; *Essex Turnpike v. Collins*, 8 Mass., 292; *Lyndeborough Glass Co. v. Mass. Glass Co.*, 111 Id., 315; *Sandwich Mfg. Co. v. Shiley*, 15 Neb., 109.

T. D. Cobbey, contra, cited: *Fulton v. Lincoln*, 9 Neb., 363; *Wheeler v. Plattsmouth*, 7 Id., 279; *Merriam v. Otoe Co.*, 15 Id., 413; *Omaha Nat'l Bank v. Omaha*, Id., 334.

MAXWELL, J.

This action was brought by the plaintiff against the defendant to recover for building material used in the erec-

tion of a calaboose in that city. The defendant filed an answer as follows:

"The defendant, in answer to the petition of the plaintiff, admits that the plaintiff is a corporation doing business in said county, and that the defendant is a municipal corporation in the said county, but denies each and every other material allegation in the plaintiff's petition set forth; that this action is brought to recover for a certain bill of lumber furnished by the plaintiff to one Peter S. Darling, a builder and contractor, with whom the defendant, the then village of Wymore, by its chairman and board of trustees, through a committee, consisting of two members of said board of trustees, had made a verbal contract for the erection of a calaboose; that the said contract was for the building complete and the turning over to the then village of Wymore, in a finished condition, the said calaboose building at a stipulated contract price—the said contractor Darling to purchase material and hire labor in his own discretion and on his own responsibility; that pursuant to said contract, the said builder, Darling, proceeded to erect the said calaboose, hired his own help, purchased lumber and hardware in his own discretion without any interference or control on the part of the defendant; that said building was never completed, nor turned over to the defendant, nor accepted by the defendant, but was burned before completion and before acceptance by the defendant, and defendant has never had any use or benefit thereof, nor control or dominion over it, nor any connection whatever therewith, and therefore denies any and all responsibility therewith or therefor, and prays for judgment for costs against the plaintiff herein."

The reply is a general denial.

On the trial of the cause one J. R. Boggs testified that in 1883 he was a member of the board of trustees, and that he was a member of the building committee (to erect a calaboose); "that they built one while I was a member of

the board. The contract was let to a man by the name of Darling."

Q. What arrangement, if any, was made about the city paying the National Lumber Company for its material furnished to build the calaboose?

A. The contract was let by taking sealed bids. The contract of Mr. Darling being considerably lower than any of the others, he was given the contract, and when he went to make arrangements with the National Lumber Company they would not let him have the lumber unless the city would guarantee or stand good for its payment. He reported to the board, and they, at a regular meeting, voted to guarantee that the National Lumber Company should receive their pay; in other words, that the city would stand good for the payment of the money. They also authorized the chairman of the board, Mr. A. J. Dales, and myself to go and inform the National Lumber Company of the action of the board, which we did.

Q. Who made the arrangements, and what position did they hold?

A. The chairman of the board, Mr. A. J. Dales, and myself; I was one of the building committee.

Q. State fully all you know about this, and who was to pay the company for the materials.

A. I have stated as fully as I now remember it. The city of Wymore was to pay the company for the materials.

The court instructs the jury "that the defendant, being a municipal corporation, can do no act or make any contract except by ordinance or resolution passed by the village board or council of such village or city.

"The court further instructs you that, as a matter of law, any committee or sub-committee, appointed by the city board or council of a municipal corporation, can only exercise such powers as are delegated to it by the board or council that creates it.

"The court further instructs you that if you find from

the evidence that the building committee did, prior to the delivery of the lumber by the plaintiff, guarantee the payment of said lumber, and that the plaintiff, relying upon said guarantee, did deliver said lumber to said city or to some other person under direction of said committee, then you will find for the plaintiff and assess its damages at the amount you shall find from the evidence to be the value of the lumber so sold and delivered, with interest at seven per cent, unless you shall further find from the evidence that said committee had not been authorized by the city board to make such guarantee.

"The court further instructs you that if you shall find from the evidence that said building committee did not guarantee the payment of the lumber, as claimed in the plaintiff's petition, before the delivery of the same, or if you shall further find from the evidence that the said building committee has not been authorized by the city board to make such guarantee, then you will find for the defendant."

The testimony shows that the city council allowed one of the bills for the labor in building the calaboose. They also allowed all or nearly all of the bill for hardware used in the building, the entry being as follows: "The calaboose bill was then taken up, and upon motion of trustee Snuffin, seconded by Boggs, it was moved that the sum of $61.27 of said bill, being the work and labor upon said building, be allowed, and a warrant ordered drawn upon the general fund for the same. Upon roll call, trustees Boggs, McGuire, and Snuffin voted in favor of said motion, and the chairman *pro tem.* declared the same carried. It was also recommended that the balance, viz., $128.73, the material used in said building, be paid when there is money in the treasury to pay with."

It will be seen that the plaintiff's bill for material was recommended to be allowed. It is true the council attached a condition to the recommendation of allowance, viz., "when there is money in the treasury to pay with." The

action of the council, however, will not prevent the plaintiff from recovering a judgment for the debt. The instructions of the court, therefore, although correct as abstract propositions of law, perhaps, are not predicated upon the testimony and therefore are erroneous.

Certain questions were raised in this court as to the power of the city to contract for the construction of the calaboose, also to incur an indebtedness for the same, it being alleged that there were no estimates made to incur such indebtedness. It will be observed, however, that those questions are not raised in the trial court, and, therefore, will not be considered.

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

JUDGMENT ACCORDINGLY.

THE other judges concur.

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B. F. FRANS V. F. M. YOUNG.

[FILED SEPTEMBER 18, 1890.]

1. **Schools: A MODERATOR of a school district is not required to take an oath of office.**
2. **———: OFFICERS DE FACTO. When a person elected to the office of moderator of a school district fails to file with the director of the district his written acceptance of the office, but immediately after his election enters upon the discharge of his official duties, by presiding at school district meetings, countersigning school orders, and performing all other duties required by law of such officer, without objection from any one, for more than a year, *held*, that the failure to file a written acceptance did not forfeit his title to the office.**

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

Beeson & Root, for plaintiff in error, cited: *May v. Sch. Dist.*, 22 Neb., 205; *B. & M. R. v. Lancaster Co.*, 4 Id., 293; *Creighton v. Commonwealth*, 83 Ky., 142; *Hamlin v. Kassafer*, 15 Or., 456; Rapalje & Lawrence, Law, Dic., 845.

B. S. Ramsey, and *Polk Bros.*, *contra*, cited: *Beach v. Leahy*, 11 Kan., 23; Angell and Ames, Cor. [9th Ed.], sec. 24; *Dist. No. 3 v. Malcolm*, 4 Wis., 79*; *Bassett v. Fish*, 75 N. Y., 312; *People v. Bennett*, 54 Barb. [N. Y.], 480; *Sch. Dist. v. Cowee*, 9 Neb., 53; *State v. Stone*, 40 Ia., 547; *State v. Bates*, 23 Ia., 96; *Barret v. Reed*, 2 O., 409; *Atty. Genl. v. Churchill*, 41 Mo., 41; *Wescott v. Holly*, 12 Wend. [N. Y.], 481; *Blenkenship v. Co. Court*, 44 Mo., 230; *Metz v. Anderson*, 23 Ill., 63.

NORVAL, J.

On the 18th day of September, 1889, the county attorney of Cass county having consented thereto, the relator filed in the district court of said county an information in the nature of a *quo warranto*, to try the right of the respondent to the office of moderator of school district No. 6 of Cass county.

It is alleged in the petition that on the 4th day of April, 1887, the relator possessed all the qualifications required by law to entitle him to hold the office of moderator for said school district; that at the annual school election, held on said day in said school district, the relator was elected to the office of moderator for said school district for the term of three years from said date; that immediately thereafter he entered upon the discharge of the duties of said office as moderator, and continued to discharge the duties thereof, by presiding at school district meetings of said district, countersigning warrants and orders on the county and school district treasurers for moneys belonging to said

district, and performing all and singular the duties imposed by law on moderators of school districts; that the relator continued to discharge the duties of moderator of said district for the period of two years, and has one year of his said term of office to serve from and after the second Monday of July, 1889, and that he has not removed from said district, nor has he resigned said office of moderator.

The petition further alleges that the respondent, Benjamin F. Frans, on or about the second Monday of July, 1889, and from thence continually hitherto, without any legal warrant, claim, or right, has used and exercised, and still does unlawfully use and exercise, and pretends to discharge the duties of the office of moderator in said school district No. 6 for the aforesaid term of office of the relator, and claims to be the moderator of said district in place of the relator. The relator prays judgment that the respondent be ousted from said office and that the relator be declared entitled to the same.

For answer to the petition the respondent "denies that the relator was elected to the office of moderator of said school district in the year 1887, but alleges the truth to be that at the annual meeting of said district, in April, A. D. 1888, the relator was elected to the office of moderator of said district, but that he failed to qualify or to file his written acceptance of said office in the time required, or at any other time, and so respondent charges that relator never was moderator *de jure* of said district, but that he assumed to act and did act as moderator of said district from said meeting in April until the regular annual meeting of said district in June, 1889, at which time the respondent was duly elected to the office of moderator of said district for two years, and that he duly qualified as such moderator and entered upon the discharge of the duties of said office, and that he now holds such office by virtue of such election and qualification."

A general demurrer was filed to the answer, which was

sustained, and a judgment of ouster was entered against the respondent. That decision is assigned for error.

It is insisted by the respondent that the relator was not an officer *de jure*, because he never took the usual oath of office, and failed to file with the director of the school district his written acceptance of the office of moderator.

It is conceded by the respondent that the school law contains no provision requiring a person elected to the office of moderator of a school district to take an oath of office. But it is claimed that section 1 of chapter 10 of the Compiled Statutes requires school district officers to take the usual oath of office. That section provides that "all state, district, county, precinct, township, municipal, and especially appointed officers, except those mentioned in section 1, article 14, of the constitution, shall, before entering upon their respective duties, take and subscribe the following oath, which will be indorsed upon their respective bonds," etc. The word "district," as used in this section, refers solely to judicial district officers, and unless school district officers are municipal officers, it is apparent that they are not controlled by the provisions of said section. While the law makes every organized school district in this state a body corporate, with power to sue and be sued, yet they are merely *quasi*-corporations, created for the purpose of education, and are not, strictly speaking, municipal corporations. The officers of all incorporated villages, towns, and cities are municipal officers and it is to these officers that the word "municipal" refers. (1 Dillon's Municipal Corp., sec. 10; *Beach v. Leahy*, 11 Kan., 23.) We are clearly of the opinion that school district officers are not required to take an oath of office.

Did the failure of the relator to file his written acceptance of the office within ten days, create a vacancy in the office? Section 3 of subdivision 3 of the school law reads as follows: "Within ten days after the election, these several officers shall file with the director a written acceptance of

the office to which they shall have been respectively elected, which shall be recorded by said director." The section contains no provision that the office shall become vacant if the acceptance is not filed. In this respect it differs from section 5 of subdivision 14 of the same act, relating to the qualification of the members of the board of education in cities. Said section 5 provides that the failure to take and subscribe the usual oath of office creates a vacancy. Section 15 of chapter 10 of the Compiled Statutes declares that if any person elected to office shall fail to execute and file his bond within the time fixed by law, his office thereupon *ipso facto* becomes vacant. It is evident that it was not the intention of the legislature that the failure of a school district officer to file his acceptance, should create a vacancy.

The object and purpose of the law requiring school district officers to file written acceptance was to apprise the public that the person elected intended to discharge the duties of the office. The pleadings show that the relator, immediately after his election, entered upon the performance of the duties of moderator, by presiding at school district meetings, countersigning orders on the county and school district treasurer for moneys belonging to his district, and discharging all other duties required of him by law for more than one year, without objection from any one. This was as much an acceptance of the trust as would have been the filing of a written acceptance. The relator therefore was a *de jure* officer and no vacancy existed at the time the respondent was elected. The judgment of the district court was right and is

AFFIRMED.

THE other judges concur.

FITZGERALD ET AL. V. A. A. RICHARDSON.

[FILED SEPTEMBER 18, 1890.]

1. **Evidence:** THE PREPONDERANCE of evidence is not determined alone by the number of witnesses testifying to a particular fact. In determining upon which side the evidence preponderates, the credibility of the witnesses, their situation, interest, means of knowledge, and manner of testifying, should be considered.
2. ——. *Held*, That the verdict, to the extent of $361.75, is unsupported by the evidence, and contrary to the instructions given.

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

Marquett, Deweese & Hall, for plaintiffs in error.

Billingsley & Woodward, contra.

NORVAL, J.

The plaintiff in the court below alleged that on April 1, 1886, he entered into the service of the defendants, at their request, as agent, to find purchasers of brick, at a commission of fifty cents per thousand for the brick so purchased; that plaintiff found purchasers for 1,248,000 brick, under said contract, and there is due him therefor as commissions, at said rate, $624, with legal interest from April 1, 1886, no part of which has been paid.

The defendants answered by a general denial.

There was a trial to a jury, with finding and verdict for the plaintiff for $530.58.

The defendants' motion for a new trial was overruled and judgment entered on the verdict. The cause is brought to this court on the following assignments of error:

"I. The verdict was given under the influence of passion or prejudice, and is contrary to law.

"II. Errors of law excepted to at the trial.

"III. The verdict is contrary to instructions numbers 1, 2, and 5, requested by plaintiffs in error.

"IV. In refusing to give instructions Nos. 3, 4, and 6 requested by plaintiffs in error.

"V. In giving instructions Nos. 3, 4, 6, and 8 requested by the defendants in error.

"VI. In giving instructions Nos. 2, 3, and 4 of the court's own motion.

"VII. The verdict is not sustained by sufficient evidence."

But three of these assignments are relied on in the brief of plaintiffs in error, which are I, III, and VII, and none others will be considered by us in this opinion.

It appears in evidence that the plaintiffs in error were engaged in the manufacture of brick at West Lincoln, and that the defendant in error was an hydraulic engineer, engaged in drawing plans and specifications for water works for several cities and towns in this state. Richardson contends that he was employed by the plaintiffs in error to find purchasers of brick, and was to receive a commission of fifty cents per thousand on all brick sold. Early in the year 1886, and at the time it is alleged that the contract was entered into, Richardson was preparing plans, or had just completed the same, for a system of water works at Hastings. It is admitted that Christianson, one of the plaintiffs in error, had a conversation with Richardson on the subject of the sale of their brick, and agreed to pay him a commission of twenty-five cents per thousand on all their brick he could sell or caused to be used, in the construction of the Hastings water works. Richardson insists that there was no limitation as to the place of sale.

A. A. Richardson, the plaintiff below, testified that he met Mr. Christianson on the train from Lincoln to Omaha and the latter showed some samples of brick he had with him. Christianson stated "If you will get customers for

us we will allow you fifty cents a thousand." This is the first time he made a bargain. Before, he said he would allow a good thing, and now he said "we will allow you fifty cents a thousand if you will get us customers." He showed witness the brick he had. Witness criticised them because they were checked. Christianson stated that they had some samples in the yard that were better and he would send them to Richardson's office. Christianson asked how many brick it would take to do the Hastings work. Richardson replied that he could not tell how many, but thought six hundred or seven hundred thousand; that it wanted hard brick for the wells, the balance of the brick for the house and stacks it did not matter whether they were burned so hard.

Q. When he said they would give you fifty cents a thousand, what did you say to that?

A. I told him "all right. I would do what I could for them—sell brick for them."

Q. Did he know then you were doing work at Hastings?

A. Yes, I told him right then and there about it. He asked me if I could not put them in the specifications—put in the specifications for their brick. I told him I would not do it, it would give them a leverage and there would be no use for any other bidders—it would not be fair; I could not put them in, but if they would make good brick I would take them down there and show them to the council and do all I could to sell them. He said, all right, we will give you fifty cents a thousand for all the customers you can get.

Mr. Richardson further testified, that he afterwards went to Mr. Christianson and told him that a large number of brick would be used in the construction of the court house at York, suggesting that the West Lincoln brick might be worked in, and inquired the price they would furnish them at. An approximate price was given and samples of the

brick furnished Richardson, which he took to York and exhibited to the county commissioners.

John Christianson testified that he was one of the firm of Fitzgerald, Christianson & Co., and that the only conversation he had with Richardson was on the train going to Omaha. The witness states: "I was sitting in the car, when Richardson came in and commenced talking with me. He was at that time making plans for the Hastings water works, he had plans and specifications with him, and was going to Omaha, and he was telling me about his plans and about the work to be carried on at Hastings, and in the general conversation he said a good many brick would be used or wanted there at Hastings, and I took occasion to ask him if he could not do anything for us to dispose of our brick for that work. He said that some 600,000 would be wanted there for some large proposed deep well, which, however, afterwards was not put in, but that was at that time the plan, which would take a large amount of brick, and then I showed him the samples which I had with me and asked him if such brick would answer his purpose; he said yes, they would. And I asked him if he could not ask if there were any good brick made there in Hastings, and he said he thought not; the brick were soft, mud brick, unsuitable for hydraulic work. And I asked him thereupon whether or not he could not specify our brick in his specifications. He said he could not do so. The conversation was short; before dropping it I told him if he could sell or cause our brick to be used there, that we would pay him twenty-five cents a thousand commission."

The testimony fully establishes a contract of agency, and that Richardson was to receive a commission on all brick manufactured by the defendants that he should sell or be instrumental in selling. The parties disagree as to the amount of compensation. That material point in the case was settled by the verdict of the jury in favor of the plaintiff below.

It is insisted that Richardson has not shown by a preponderance of the evidence that he was to receive a commission of fifty cents a thousand, for the reason that only one witness testified that the compensation agreed upon was fifty cents a thousand and another witness testified that it was twenty-five cents a thousand. The preponderance of the evidence is not determined alone by the number of witnesses testifying to a particular fact. In determining upon which side the evidence preponderates the jury had a right to take into consideration the credibility of the witnesses, their situation, interest, means of knowledge, and their manner of testifying. This conflict in the evidence was intrusted to the jury to settle, and when they have done so without passion or prejudice, a reviewing court will not interfere. (*Cook v. Powell*, 7 Neb., 284; *A. & N. R. Co. v. Jones*, 9 Id., 71; *Gibson v. Cleveland Paper Co.*, 13 Id., 277; *Potvin v. Curran*, 13 Id., 303; *Converse v. Meyer*, 14 Id., 191; *Murphy v. State*, 15 Id., 385; *Dutcher v. State*, 16 Id., 31; *Sycamore v. Grundrab*, 16 Id., 537; *O. & R. V. R. Co. v. Brown*, 29 Id., 492.)

It is fully established by the evidence that the A. L. Strang Co. was awarded the contract for the construction of the water works at Hastings, and that Richardson and one E. H. Calloway, then a member of the firm of Fitzgerald, Christianson & Calloway, went to Hastings in the spring of 1886, for the purpose of selling the brick manufactured by the plaintiffs in error, taking with them samples of the brick. Mr. Calloway was introduced by Richardson to a Mr. McConnell, the secretary of the A. L. Strang Co., and Calloway, in behalf of his firm, put in a bid to furnish all the brick for the Hastings job. Subsequently the contract was awarded to the plaintiffs in error, and they furnished under the contract 280,432 brick of their own manufacture. Richardson was instrumental in obtaining the contract and is entitled to receive the stipulated commissions thereon.

The principal controversy in the case is over a claim for commissions on the alleged sale by Richardson of 1,248,000 brick to be used in the construction of a court house in York county. The contract for the erection of this building was let to D. B. Howard. Richardson went to Howard and informed him that he was representing the plaintiffs in error in the sale of their brick, and tried to sell him the brick for the building. Not succeeding, he gave Howard a letter of introduction to the plaintiffs in error, which was afterwards presented. Finally the plaintiffs in error took the contract from Howard to furnish the brick and lay them in the wall, and desired to have their West Lincoln brick specified in the agreement. Howard would not consent to this, as is disclosed by the following admission made by the defendant in error on the trial in the lower court: "It is admitted on the part of the plaintiff, that at the time D. B. Howard let the contract to these defendants, (being now plaintiffs in error) for doing the brick work and setting the stone in connection with the building of the York court house, that the defendants desired to specify in the contract that the brick manufactured in West Lincoln should be used in connection with said work, but that the contractor, D. B. Howard, refused to have any specification put in the contract."

It is in evidence that before the contract was signed Mr. Calloway went to York and made arrangements for the purchase of brick there. The contract with Howard was then entered into, and at the time it was definitely understood that the brick used should be of the York manufacture and the contract was made with that view. There were some 800,000 of the York brick used and only one car load, or 7,000, of the West Lincoln brick. Richardson contends that he is entitled to commission on the York brick and that it is immaterial where the brick that went into the York court house came from. That, doubtless, would be true, had Richardson found a purchaser for the

West Lincoln brick, and the York brick had afterwards been substituted. Howard, however, never contracted for the West Lincoln brick—in fact he refused to contract for them. The agreement between the plaintiff and defendants had reference to the handling of the brick manufactured at West Lincoln by the plaintiffs in error and none others. This is admitted by Mr. Richardson on his cross-examination, and there is no evidence in the record to the contrary. Under the proof the defendant in error was not entitled to a commission on the brick purchased by the plaintiffs in error at York, and used by them in the erection of a court house at that place. The court on this branch of the case instructed the jury as follows:

"1. If the jury find from the evidence that there was a conversation between the plaintiff and the defendants concerning the sale of brick by the plaintiff for the defendants, and the jury further find that the said conversation resulted in a contract or an agreement by which the plaintiff was to sell brick for the defendant at a stipulated price per thousand, and you further find from the evidence that the parties, at the time of the making of the contract or agreement, had reference to the sale of the brick manufactured or to be manufactured by the defendants' own brick works at West Lincoln, and you further find that the defendants were not engaged in handling or selling any other brick than those of their own make, then, before the plaintiff is entitled to recover in this action, it is incumbent upon him to show that he sold or found a purchaser for the brick of the defendants, manufactured by them at their yards in West Lincoln. And in determining the fact as to what brick the plaintiff was employed to sell, if any, it is competent for you to take into consideration the fact that these defendants were engaged in the manufacture of brick at West Lincoln; that they were handling no other brick; that they never furnished to

the plaintiff samples of any other brick than those manufactured by them at their yards in West Lincoln.

"2. If the jury find from the evidence that D. B. Howard, the contractor of the York county court house, entered into a contract with these defendants, subletting to them all of the brick work and the setting of the stone in the York county court house, and that at the time said contract was entered into these defendants had made arrangements to use York brick in connection with the erection and construction of said York county court house, and that said York brick were used by these defendants, then the plaintiff is not entitled to recover commission on said brick used by defendants.

"5. If the jury believe from the evidence that the plaintiff and defendants made a contract whereby the plaintiff was to sell brick for the defendants, and you believe from all the evidence, by the term 'brick,' was meant the brick manufactured by the defendants, then, before the plaintiff can recover, he must show that he sold, or caused to be sold, for the defendants, their brick manufactured at West Lincoln."

Had the jury followed these instructions, which it was their duty to do, a verdict would not have been returned for commissions on the York brick. There were 7,000 West Lincoln brick used in the York court house, and 280,432 brick at Hastings, making in all 287,432 brick, on which the defendant in error was entitled to a commission of fifty cents a thousand, or $143.71. To this amount should be added $25.12 for interest thereon until the date of the verdict.

The amount found due the plaintiff by the jury, to the extent of $361.75, is not sustained by the evidence, and is contrary to the instructions. Unless the defendant in error shall file a *remittitur* with the clerk of this court within thirty days from the filing of this opinion, as of date of the judgment entered in the lower court, for the

sum of $361.75, the judgment of the district court will be reversed and the cause remanded for further proceedings; but if such *remittitur* shall be filed within the time named, the judgment will be affirmed for the sum of $168.83, and the costs in this court will be taxed to the defendant in error.

JUDGMENT ACCORDINGLY.

THE other judges concur.

J. C. PETERSEN ET AL., APPELLEES, V. ALFRED TOWNSEND ET AL., APPELLANTS.

[FILED SEPTEMBER 18, 1890.]

1. **Adverse Possession.** The plaintiffs having been in the open, notorious, exclusive, continuous, adverse possession of the real estate in controversy for more than ten years as owners, they thereby became vested of the absolute title to the premises.
2. ———: THE EVIDENCE examined, and *held*, to sustain the decree of the district court.

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

S. P. & E. G. Vanatta, for appellants, cited: *Liggett v. Morgan*, 11 S. W. Rep. [Mo.], 241.

W. L. Browne, contra, cited: *Horbach v. Miller*, 4 Neb., 32; *Gatling v. Lane*, 17 Id., 83; *Haywood v. Thomas*, Id., 240; *Mayberry v. Willoughby*, 5 Id., 368; *Campau v. Dubois*, 39 Mich., 274; *Tex v. Pflug*, 24 Neb., 667; *Levy v. Yerga*, 25 Id., 766; *Middlesex v. Lane*, 21 N. E. Rep., 228; *Frick v. Sinon*, 17 Pac. Rep., 439; *Riggs v. Riley*, 15 N. E. Rep., 253; *Byers v. Sheplar*, 7 Atl. Rep., 182.

NORVAL, J.

On the 17th day of September, 1888, this suit was commenced in the district court of Cass county, by John C. Petersen *et al.*, to quiet the title to lots 1, 2, 3, and 4, in block 21, Duke's addition to the city of Plattsmouth. The plaintiffs claim that they and their grantors have been in the actual, open, continuous, adverse possession of said lots for more than ten years prior to the commencement of the action. The defendant Bennett denies that the plaintiffs have held adversely for the statutory period. The case was tried to the court, and a decree was rendered quieting the title to all the lots in the plaintiffs, and from the decree, so far as it relates to lots 3 and 4, the defendant Bennett appeals.

The testimony shows that Alfred Townsend owned the land before it was laid out into lots, and that he conveyed it to one J. S. Duke, who laid it out and platted it, as Duke's addition to Plattsmouth. Duke died in 1872, and the appellant, as administrator of his estate, claims to have procured a license from the district court of Douglas county to sell said real estate. Said lots 3 and 4 were sold by the administrator to one E. B. Lewis on the 20th day of October, 1874, and a deed was subsequently executed to said Lewis by said administrator. On the 18th day of June, 1885, Lewis and wife conveyed, by deed of quit-claim, the lots to appellant Bennett.

It appears in testimony that one Arthur Robinson in September, 1875, purchased an outstanding certificate of tax sale against the lots; that about the 1st of April, 1876, he went into possession of the property claiming it as his own, and lived in the house on lot 2, and made the property his home until sold by him to plaintiffs on the 11th day of August, 1888, when the plaintiffs took possession as owners and have ever since occupied the property. When Robinson went into possession there were no improvements

on lots 3 and 4, but in June, 1876, he enclosed them with a fence. Subsequently he plowed and cultivated the lots, and planted them to crops. During all the time both Lewis and Bennett resided in Plattsmouth and asserted no right to the property, nor were the plaintiffs or their grantor Robinson disturbed in their possession. The plaintiffs and their grantor Robinson have paid the taxes levied upon the property for more than ten years.

It is conceded by the appellant that the plaintiffs, and their immediate grantor, have been in the exclusive possession of the property for more than twelve years prior to the bringing of this suit, but it is urged that they did not hold adversely, but recognized the appellant as holding the legal title. This contention is based upon the fact that at one time Robinson had in view a sale of the premises to one Taylor, and in order to satisfy the contemplated purchaser, Robinson offered Bennett $50 to make him a quit-claim deed to the lots. Bennett having demanded $75, the negotiations ended. This, according to the testimony of both Bennett and Robinson, occurred about two years before the 29th day of March, 1889, the date of the trial in the lower court. Robinson's possession of the property dates from April 1, 1876, or thirteen years before the trial. The statute of limitations had therefore run at the time the proposition was made to Bennett. It is true that Bennett testifies that he had another conversation with Robinson some five years before the trial, about the lots, in which the latter expressed a desire to purchase his title. This was before Bennett had purchased from Lewis. Robinson denies under oath having had any such conversation and the findings of the trial court settle all conflict in the testimony in favor of the appellees.

Again, the evidence does not show that the appellant ever had any valid title to the lots. He claims through an administrator's deed to Lewis. There is an entire lack of proof showing that the estate of Duke was administered

upon in Douglas county, so as to give the district court of that county jurisdiction to grant a license to the administrator to sell the real estate. Neither the papers upon which the license was granted, nor the decree authorizing the administrator to make the sale, are in the bill of exceptions.

It is fully established, by the testimony, that the appellees and their grantor have been in the actual, open, notorious, exclusive, adverse possession of the lots for more than ten years, claiming to be the owners thereof; whatever rights the appellant may have had are barred. The decree of the district court quieting the title to the lots in the plaintiffs was right and is therefore

AFFIRMED.

THE other judges concur.

30 376
31 533
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44 147
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51 188
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CLARK WARD ET AL. V. PARLIN ET AL.

[FILED SEPTEMBER 18, 1890.]

1. **Evidence:** TRIAL TO COURT: IMMATERIAL TESTIMONY. Following the cases of *Willard v. Foster*, 24 Neb., 213, and *Richardson v. Doty*, 25 Id., 424, *held*, that a cause tried to the court without a jury will not be reversed for the admission of immaterial testimony.
2. **Pleading:** AMENDMENT. *Held*, That the permitting of the plaintiffs to amend their petition on the trial was not an abuse of discretion.
3. **Husband and Wife:** CONVEYANCES BETWEEN. A husband may lawfully give his wife a deed or mortgage to secure a pre-existing *bona fide* debt owing to her, and such conveyance is not fraudulent as to his other creditors, if taken in good faith, and without any fraudulent purpose.
4. ———: ———: FAILURE TO RECORD. The failure of the wife to immediately record her conveyances does not estop her from claiming under them, when it appears that the plaintiffs were not misled, or in any manner prejudiced by her neglect.

ERROR to the district court for Red Willow county. Tried below before COCHRAN, J.

S. R. Smith, for plaintiffs in error, cited: *First Nat'l Bank of Omaha v. Bartlett*, 8 Neb., 319; *Van Deuzer v. Peacock*, 11 Id., 245; *Dice v. Irwin*, 11 N. E. Rep. [Ind.], 488; *Chapman v. Summerfield*, 14 Pac. Rep. [Kan.], 235; *Gerald v. Gerald*, 6 S. E. Rep. [S. Car.], 290; *Hoes v. Boyer*, 9 N. E. Rep. [Ind.], 427; *Kennedy v. Powell*, 34 Kan., 22; *Rudershausen v. Atwood*, 19 Ill. App., 58; *Payne v. Wilson*, 41 N. W. Rep. [Ia.], 45; *Popendick v. Frobenius*, 33 N. W. Rep. [Mich.], 887; *Dull v. Merill*, 36 Id., 677; *Rockford Boot & Shoe Co. v. Mastin*, 39 N. W. Rep. [Ia.], 219; *Buhl v. Peck*, 37 N. W. Rep. [Mich.], 876; *Miller v. Krueger*, 13 Pac. Rep. [Kan.], 641; *Bailey v. Kan. Mfg. Co.*, 32 Kan., 73; *Clemens v. Brillhart*, 17 Neb., 336; *Hedge v. Glenny*, 39 N. W. Rep. [Ia.], 818; *Citizens Nat'l Bank v. Webster*, 41 Id., 47; *Wooden v. Wooden*, 40 N. W. Rep. [Mich.], 460; *Moorman v. Gibbs*, 39 N. W. Rep. [Ia.], 832; *Cornel v. Gibson*, 16 N. E. Rep. [Ind.], 130; *Tomlinson v. Mathews*, 98 Ill., 178.

Rittenhouse & Starr, contra, cited: *Willard v. Foster*, 24 Neb., 213; *Richardson v. Doty*, 25 Id., 424; *Hedges v. Rooch*, 16 Id., 674; *Brown v. Rodgers*, 20 Id., 547 *Grimes v. Sherman*, 25 Id., 843.

NORVAL, J.

This action was brought in the court below to set aside, as fraudulent, deeds of transfer from Clark Ward to Sarah J. Ward, his wife, of lots Nos. 23 and 24, in block 38, of the town of Indianola, and lots Nos. 2 and 3 of block 8 of Springdale addition to the town of Bartley.

The plaintiffs alleged that on September 5, 1888, they had judgment in the county court of Red Willow county,

against Clark Ward, for the sum of $986.60, and $6.35 costs of suit; that a transcript of said judgment was filed with the clerk of the district court of said county, upon which execution was issued September 5, 1888, to the sheriff of said county, and duly served and returned "*Nulla bona*," but which was levied upon the real estate above described, which, on the 13th day of August, 1888, prior to plaintiffs' judgment, had been conveyed by the judgment debtor to his wife without consideration, and for the purpose of hindering and defrauding the plaintiffs and other creditors of Clark Ward; that the deed therefor was filed for record on September 6, following, and subsequent to the date of the filing of the transcript of plaintiffs' judgment and issuing the writ of execution; that at the same time the defendant Clark Ward filed instruments of conveyance to all his personal property, dated back at various times prior to the rendition of the judgment, which property, if free from incumbrance, is worth about $1,500, but by reason of said fraudulent conveyance from Clark Ward to his wife rendering the title acquired by the purchaser at a sale under the execution uncertain, and prevents it being sold at a fair price.

The prayer is for the cancellation of the conveyance from Clark Ward to his wife, that the lots be sold and the proceeds applied to the satisfaction of plaintiffs' judgment.

The defendants answered, admitting the judgment, the filing of the transcript in the office of the clerk of the district court, and the making of the conveyances to the real estate. The defendants for further answer deny that the conveyances described in the petition were given without consideration, but were given for a good, valid, and subsisting consideration, were made in good faith and without any intention of hindering, delaying, or defrauding the plaintiffs or any other creditors; deny that Clark Ward is insolvent, and that the conveyances of personal property named in the petition were dated back, but aver that they

were made at the time they bear date. The answer further states that part of the property mentioned in the petition was purchased with the sole and separate money of the defendant Sarah J. Ward; that the conveyance was made to Clark Ward through a mistake, and that all the property transferred from said Clark Ward to his wife, was in payment for money previously loaned by Sarah J. Ward to Clark Ward, and prior to the contracting of the debt on which plaintiffs' judgment was rendered.

The reply was a general denial.

A trial was had to the court, with a decree for the plaintiffs, setting aside the conveyance, and subjecting the real estate, set forth in the petition, to the payment of plaintiffs' judgment.

The defendants' motion for a new trial was overruled and the case was brought to this court for review on eight assignments of error. The first, second, third, and fifth errors are based upon the rulings of the court in admitting evidence claimed to be incompetent and immaterial.

The rule is established in this state, that when a cause is tried to a court without a jury, the admission of incompetent evidence on the trial will not be sufficient grounds for reversing the case. (*Willard v. Foster*, 24 Neb., 213; *Richardson v. Doty*, 25 Id., 424.) We have, however, examined each of the rulings complained of, and find the evidence material and competent.

The fourth assignment of error is that the court erred in allowing the plaintiffs to amend their petition. Upon the trial the plaintiffs offered in evidence the deed from Clark Ward to Sarah J. Ward, for lots 23 and 24, in block 38, in the town of Indianola. The defendants objected to its introduction, as not covering the property in controversy. The lots were described in the petition as being in block 28, and the court permitted the petition to be amended, by interlineation, by changing from block 28 to block 38. The amendment was in furtherance of justice, and there

was no abuse of discretion in permitting the pleading to be changed. (*Hedges v. Roach*, 16 Neb., 674; *Brown v. Rogers*, 20 Id., 547.)

The remaining errors assigned are that the judgement is not sustained by sufficient evidence, the judgment is contrary to law, and error in overruling the plaintiffs' motion for a new trial.

The defendant Clark Ward was a dealer in agricultural implements at Indianola, and on the 29th day of October, 1887, gave to the plaintiffs his promissory note for $951.30, on which judgment was rendered in the county court of Red Willow county, on September 5, 1888, for $986.60. A transcript of the judgment was filed on the following day in the district court of that county, an execution was issued thereon and placed in the hands of the sheriff, who indorsed the same "no goods," and levied the writ upon lots 23 and 24, in block 38, in the town of Indianola, and on the south half of lot 2 and the north half of lot 3, in block 8, Spring Dale addition to the town of Bartley. On the 13th day of August, 1888, Clark Ward conveyed by warranty deed the Indianola lots to Sarah J. Ward, the consideration expressed therein being $800, and on the same day Ward made a quitclaim deed to the lots in the town of Bartley to his wife. Those deeds were filed for record September 6th, 1888. The following instruments were put in evidence by the plaintiffs: A bill of sale from Clark Ward to Sarah J. Ward, dated January 7, 1888, for thirty-four horses and twenty yearlings and colts; a chattel mortgage from Clark Ward to his wife, dated May 9, 1888, on certain farm machinery, to secure $340; a chattel mortgage from Clark Ward to the First National bank of Indianola, dated September 5, 1888, on his entire stock of agricultural implements, to secure the sum of $2,829.20; a chattel mortgage from Clark Ward to M. D. Welch, dated September 6, 1888, on three hundred head of cattle and his stock of agricultural implements, to secure

a note of $1,255, and also a bill of sale from Clark Ward to his wife, dated October 20, 1888, on a jack, subject to two other mortgages. All of these instruments were filed September 6, 1888, except the last bill of sale, which was filed October 20, 1888.

Leander Starbuck testified that while the execution was in his hands for service, he asked Clark Ward if he had any property to turn out on the note; he replied that there was personal property on his place, but it was in such shape that the officer could not get it, and that he had no real estate that could be levied on.

W. S. Starr testified, in substance, that he had for collection the claim, on which the judgment was afterwards rendered, and about August 20, 1888, before bringing suit for the plaintiffs in the county court, he had a conversation with Mr. Ward in which Ward proposed to secure the claim by a mortgage on the lots in Bartley and Indianola, stating that they belonged to him individually, were free from incumbrance, and he had no other property which he could turn out to secure the claim. Starr replied that he would not take mortgages without consulting with the plaintiffs, and that he wrote them and they replied not to accept the proposed security. Mr. Starr further testified that Mr. Ward told him that the claim was secured by collateral notes amounting to $1,300, and that if the plaintiffs would accept a mortgage and extend the time for six months he thought he would be able to collect the collaterals and pay by that time. But a small amount of the collateral notes have been paid and the bulk of them are worthless.

Harlow W. Keyes testified that about August the 1st, 1888, Mr. Ward stated to him that he had plenty of property and of ample value to pay all his indebtedness; that about the 14th or 16th of the same month, in another conversation, Mr. Ward said to him: "There is another matter that I desire to counsel with you in regard to. I

am owing one large note to a firm, and it is quite probable that you will receive it for collection. I would like your advice a little on the matter." My recollection is that I asked Mr. Ward what firm it was, or if it was one I had been doing business for, and he said it was Parlin, Orendorff & Martin Co. "I am owing something between $900 and $1,000, and I presume the note will be sent to you or some other attorney for collection." I then said, "Mr. Ward, if that note comes to me for collection of course I would be their attorney and not yours; I presume it will come to me, and if they order it sued I will be obliged to sue it." I asked him if he was having any trouble about any goods that he had bought, and he said "No, that it was a just indebtedness, but I have got collateral notes to secure it." He said there might be some way that I could prevent them suing with the collateral security—having the collateral security. I says, "I am quite positive that they could do that." He said that he didn't want to be sued, and that he desired to put the payment off as long as possible, until he could get his business matters straightened up; that he had ample property to pay all his indebtedness, but wanted time to straighten up his business. He said he was willing to secure the claim to get an extension of the time of payment.

Clark Ward, one of the defendants, being examined as a witness by the plaintiffs, testified that Sarah J. Ward was his wife, and that they were married in 1861.

We have given substantially all the testimony introduced by the plaintiffs. Both of the defendants were called and sworn as witnesses in their own behalf. It appears from their testimony, that Mrs. Ward has, ever since their marriage, had money and property in her own right, and frequently Mr. Ward borrowed money from her, some of which he had repaid. It is undisputed that she inherited from her mother's estate some land in Illinois, which was sold and the money loaned to her husband.

She sold some property in Canada in 1885, the proceeds of which, amounting to $1,200, were borrowed by Mr. Ward and used in his business. When Mrs. Ward came west she brought $5,000 in cash, which she deposited in the bank in her own name. Mr. Ward, in 1883, owned a ranch and dealt in stock. About this time he invested some $3,400 for his wife in horses, and put them on his ranch with nearly the same number he bought for himself. The Wards had separate brands and her stock were marked with her own brand. The proceeds arising from the sale of his wife's stock were paid to her. In 1884, all the horses purchased for Mrs. Ward the year before, were sold, excepting some twenty-three, and she received the money. Mrs. Ward owned stock to the amount of $500 in a mill, which was disposed of in 1886, and Mr. Ward used the money. She also owned in her own right a farm of 160 acres, on which she obtained a loan of $1,200 for her husband, he using the money in his business. The testimony discloses that he frequently borrowed money of her and did not always pay it back.

Each of the defendants testified that the bill of sale given in January, 1888, was to close up the horse deal, to settle for the twenty-three head of horses and increase, and that the chattel mortgages, and the deed to the Indianola property, were given as security for money borrowed by Mr. Ward from his wife.

In regard to the lots in Bartley, the undisputed evidence is that they were bought for her and paid for with her money, but through mistake the deed was made to her husband. The quitclaim deed from Mr. Ward to his wife was made to correct this mistake. There is no dispute but what the mortgages given by Ward to the First National Bank of Indianola, and to M. D. Welch, were given in good faith to secure actual *bona fide* debts. The plaintiffs offered no testimony in rebuttal. If the defend-

ants did not testify to the truth, there should not have been any difficulty in proving it.

We have read and scrutinized the evidence in this record with care, and it appears to us that the defendants' testimony is consistent and reasonable. We are convinced that Mrs. Ward acted in perfect good faith. True, she knew that her husband was being pressed by his creditors, and asked him to secure her. She had a perfect right to make good her claim, notwithstanding she knew she was being preferred to other creditors of her husband, if the security was accepted in good faith, and without any fraudulent purpose on her part. (*Hill v. Bowman*, 35 Mich., 191; *Jordan v. White*, 38 Id., 253; *Dice v. Irvin*, 11 N. E. Rep., 488; *Rockford Boot & Shoe Mfg. Co. et al., v. Mastin*, 39 N. W. Rep., 219; *Miller v. Krueger*, 13 Pac. Rep., 641; *Chapman v. Summerfield*, 14 Id., 235; *Cornell v. Gibson*, 16 N. E. Rep., 130.)

It is insisted that the conveyances were concealed by Mrs. Ward and kept from the records of the county until after the plaintiffs obtained their judgment, and for that reason they were fraudulent and void; there is no proof that they were purposely withheld from record. Besides the note, on which the plaintiffs took judgment, was given in October, 1888, long before any of the conveyances complained of were made. It does not appear that the plaintiffs extended credit to Mr. Ward on the faith that he was the owner of the Bartley property. In fact, there is no proof that this property was conveyed to Mr. Ward prior to his becoming the debtor of the plaintiffs. Parlin, Orendorff & Martin Co. therefore were not induced to become creditors by withholding the conveyance from record, nor were they in any manner prejudiced by the failure to record sooner. To create an estoppel the plaintiffs must have been misled by the conduct of Mrs. Ward. (*Payne v. Wilson*, 41 N. W. Rep. [Ia.], 45; *Citizens Nat'l Bk. v. Webster*, Id., 47.)

The decree of the district court is reversed and the cause is remanded for further proceedings.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOHN AINSFIELD ET AL., APPELLEES, V. ANDREW B. MORE, APPELLANT.

[FILED SEPTEMBER 23, 1890.]

1. **Review.** The pleadings and evidence examined, and *held*, to sustain the judgment.

2. **Deeds:** CORRECTION: LIMITATIONS: WHEN THE STATUTE BEGINS TO RUN. In a suit where the relief demanded consists in the correction of a mistake in the drafting or recording of a deed conveying lands thirty years before the commencement of such suit, and the correcting of the mistake involves no change of actual possession or disturbance of investments made by the party against whom the correction is sought, and leaves the enjoyment of the property to go on in harmony with the prior acts of the parties in interest, the statute of limitation being pleaded, *held*, that the statute began to run upon the discovery of the mistake, or of such fact or facts as would put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery. (*Ormsby v. Longworth*, 11 O. St., 653.)

APPEAL from the district court for Douglas county. Heard below before GROFF, J.

Gregory, Day & Day, and *George S. Smith*, for appellant, cited: *McClelland v. Sanford*, 26 Wis., 595; *Miner v. Hess*, 47 Ill., 170; *Harter v. Christoph*, 32 Wis., 247; *McTucker v. Taggart*, 29 Ia., 479; *Strayer v. Stone*, 47 Id., 336; *Ivinson v. Hutton*, 8 Ott. [U. S.], 79; Story, Eq. Juris.,

sec. 164; *McGoren v. Avery*, 37 Mich., 120; *Else v. Kennedy*, 67 Ia., 376; *Welton v. Merrick Co.*, 16 Neb., 83; Hill, Trusts, 265*; *Burke v. Smith*, 16 Wallace [U. S.], 390; *Godden v. Kimmell*, 99 U. S., 201; *Ware v. Galveston*, 111 Id., 170; *Bank U. S. v. Daniel*, 12 Peters [U. S.], 52*; *Lewis v. Marshall*, 5 Peters [U. S.], 470*.

W. J. Connell, for appellee Ainsfield.

E. W. Simeral, for appellees Rosewater *et al.*

COBB, CH. J.

John Ainsfield, Marcus Rosenwaser, and Andrew Rosewater exhibited their petition in the district court of said county alleging that they and their grantees are in the actual possession of the following described real estate in said county, to-wit: Beginning at the southwest corner of the southeast quarter of the southwest quarter of section 26, township 15 north, of range 13 east, of 6th P. M., thence north 6 chains, thence east 8 91 chains, thence south 10½ degrees east 4.39 chains, thence south 1.44 chains to the south line of section 26, thence west 9.33 chains to the place of beginning, containing 5½ acres, more or less.

The plaintiffs allege that Andrew B. More, defendant, claims an interest and estate in said premises adverse to them; that on December 24, 1857, he, for a valuable consideration, by deed in due form, conveyed said real estate, with other land, to Lucy A. Goodwill, under whom plaintiffs derive title, but that by mistake in recording said deed, or in writing the description of the land intended to be conveyed, the word east, after the words "thence north 72½ degrees," was inserted in place of the word west, by reason of which the defendant is wrongfully and unlawfully claiming title to said land, to the injury and prejudice of plaintiffs. That the correct description of the land intended to be conveyed by defendant to Goodwill, and which

includes the real estate now owned by plaintiffs, is as follows: Beginning at a point 2.72 chains north 71 degrees west from the quarter section corner between sections 26 and 35 (magnetic variation 11¼ degrees east), thence south 17 degrees east 10.15 chains to a black oak, thence north 60 degrees west 1.33 chains, thence north 72½ degrees west 1.83 chains, thence north 57 degrees west 6.20 chains, thence north 75 degrees west 5.65 chains, thence north 82 degrees west 6.64 chains, thence north 21.22 chains, thence east 7.80 chains, thence south 10 degrees west 4 20 chains, thence south 10½ degrees east 14.70 chains, thence south 86½ degrees east 7.90 chains to the place of beginning, containing 23.65 acres, in sections 26 and 35, in township 15 north, of range 13 east. That the plaintiffs and their grantees have been in the actual, continuous, notorious, and adverse possessson of said land for more than fifteen years last past, paying all taxes levied or assessed against it and claiming to be the owners thereof. Plaintiffs pray to be declared to be the owners in fee simple of said land, that their title thereto may be quieted, and that the deed of defendant to Goodwill, and the record thereof, be corrected and reformed by inserting the word west in place of said word east, and that said defendant be forever enjoined from interfering with the possession of said land, or making claim of title thereto, and be forever barred of all right, title, interest or claim in said land and be required to pay the costs of this action, and for further relief.

On motion to the court, and for cause shown, the defendant was allowed to file a cross-bill herein and make C. E. Hawver, Harriet L. Hawver, and Frank J. Kasper additional parties defendant to this action, as follows: "That he admits that he is the owner of the lands mentioned and has asserted ownership thereof; but expressly denies each and every other allegation in the petition contained, and expressly denies that any mistake was at any

time made, either in writing or recording of the deed referred to, or that the plaintiffs, their grantees or grantors, have been in actual, notorious, and adverse possession of said lands or any part thereof for the fifteen years last past, and further denies that plaintiffs have had or been in possession in any manner whatever except by willful and wrongful entry thereon within the past five years from this date and not prior thereto.

"5. The defendant further alleges that he was and is, and during all the time mentioned has been, the absolute, owner of land lying and situate upon the west side of the southeast quarter of the southwest quarter of section 26 and in the northern portion of the northeast quarter of the northwest quarter of section 35, all in township 15 north, of range 13 east, of 6th P. M., as covered by the claim under the pretended mistake in deed, holding the same by good, perfect and indefeasible title from the United States.

"6. On August 24, 1874, Lucy A. Goodwill, without claim or color of title, but to the injury and wrong of defendant, made a pretended conveyance of the same to George G. Earle.

"7. On March 22, 1878, George G. Earle and wife made a pretended conveyance of the same to C. E. Hawver.

"8. On October 14, 1885, C. E. Hawver and wife made a pretended conveyance to Frank J. Kasper and Andrew Rosewater of the special portion set up and claimed by plaintiffs, and on June 15, 1886, Hawver and wife made another pretended conveyance to plaintiffs.

"9. Defendant alleges that each and all of said pretended conveyances were made without color of ownership in said pretended grantors; that defendant at no time parted with his title or interests, either equitable or legal, in said lands.

"10. That said pretended conveyances create a cloud upon plaintiffs' title and estate therein; that they be held for naught and the parties be forever barred from setting up any claim of title thereto and the defendant have complete relief," etc.

On the 29th of June, 1887, Frank J. Kasper was allowed to answer instanter, and Frank Shoull was made defendant, and answered denying that said More is the owner of the property, denying that the conveyance by Lucy A. Goodwill to George G. Earle was made without claim or color of title, and denying that the other conveyances referred to in the cross-petition were without claim or color of title, but alleging that on December 24, 1857, said More was the owner of the following land: Beginning at a point 2.72 chains north 71 west from the quarter section corner between sections 26 and 35 (magnetic variation 11¼ east), thence south 17 east 10.15 chains to a black oak, thence north 60 west 1.33 chains, thence north 72½ west 1.83 chains, thence north 57 west 6.20 chains, thence north 75 west 5.65 chains, thence north 82 west 6.64 chains, thence north 21.22 chains, thence east 7.80 chains, thence south 10 west 4.20 chains, thence south 10½ east 14.70 chains, thence south 86½ east 7.90 chains to the beginning, containing 23.65 acres, in sections 26 and 35, township 15 north, range 13 east, of 6th P. M., in said county. That on said day he conveyed the same to Lucy A. Goodwill, but either in the deed itself, or the record of it, there was a mistake in the description of the land in the words "thence north 72½ west 1.83 chains." The word east was inserted instead of west, as the direction of variation, the description reading "thence north 72½ east 1.83 chains." Defendant alleges that it was the intention of the grantor to convey the said land described, and that the insertion of the word "east" in place of west in the third course of description was a clerical error and mistake in drawing the deed; that on August 24, 1874, Goodwill conveyed by warranty deed to George G. Earle the following: Beginning at a point 2.72 chains north 71 west from quarter section corner between sections 26 and 35, thence south 17 east 40 chains, thence west 17.55 chains to a point 50 links north of southeast corner of southwest of

southwest section 26, thence north 19.50 chains to northeast corner of said southwest of southwest section 26, thence east 7.80 chains, thence south 10 west 4.20 chains, thence south 10½ east 14.77 chains, thence south 86½ east 7.70 chains to the point of beginning; that on March 22, 1878, said Earle conveyed by warranty deed said last described tract to Carrie E. Hawver; that in the year 1878 she died, having devised to her husband, Samuel Hawver, said property; that on October 14, 1885, Samuel Hawver and his then living wife (he having remarried) conveyed by warranty deed to Andrew Rosewater, plaintiff, and to this defendant the following: Beginning at northwest corner of southeast southwest section 26, township 15, range 13, thence south 14 chains, thence east 4.18 chains, thence north 14 chains, thence west 4.18 to the beginning, being 5.85 acres; that afterwards Rosewater conveyed his interest in said land to Frank Shoull, who, being a party defendant, makes this his answer to the cross-petition as well as the answer of Kasper. They allege that they are the owners in fee simple of said last described land, and with their grantors have been in actual possession for —— years last past, and are now in peaceable possession, having large improvements thereon.

The defendants pray that the description in the deed from More and wife to Goodwill may be reformed and corrected, according to the facts, to express the intention of the parties thereto, and that it may be adjudged and decreed that they are the owners in fee simple of the last described tract of land; that said More has no interest, title, or claim thereto, and that the title thereto be quieted in these defendants, and that A. B. More pay the costs of this action, etc.

On March 5, 1888, More made an amendment to his original answer and cross-bill, and further setting up as additional grounds of defense that the deed which he made to Lucy A. Goodwill, referred to, was made and delivered

in the year 1857, and that any alleged mistake in the deed, or the recording of it, arose more than ten years prior to the bringing of this action and is barred by the statute of limitations, and that each and all of the pretended claims of plaintiff, and of the other defendants hereto, are without any color of right.

On March 5, 1888, defendants Kasper and Shoull replied to the answer of More, and denied each and every allegation therein, except the date of the Goodwill deed, and alleged that they had no knowledge of any claim to said property by More, and had no knowledge that there was any error in the Goodwill deed until the year 1886, when More first claimed the ownership of the same, and these defendants first learned of the mistake in said description.

The plaintiffs replied to the answer of More, denying that their cause of action arose more than ten years prior to the commencement of this suit, and denying that their action is barred by the statute of limitations. They allege that neither they nor their grantees had any knowledge of the mistake in description set forth in said petition, or had any knowledge that More claimed any adverse title or interest in the lands in controversy, until within two years next before the commencement of this action; they further deny every allegation contained in said answer, except that certain deeds were executed, but deny that the deed executed by Hawver to Kasper and Rosewater covered the special portion set up and claimed by plaintiffs herein.

The defendant More replied to the answer and cross-bill of Kasper and Shoull denying each and every affirmative allegation therein not admitted or set forth in his answer and cross-bill herein, and says that the deed made by him to Lucy A. Goodwill was made and delivered in the year 1857, and more than ten years have elapsed since the alleged mistake, as the grounds of defense and cause of action in said cross-bill, arose, and that the same is barred by the statute of limitations, and that plaintiffs are guilty of laches herein.

The defendant also moved the court for leave to correct his testimony heretofore given in his own behalf, on the ground that at the time of so testifying he was laboring under great physical pain and suffering, affecting for the time being his memory, and preventing him from recalling the facts as clearly as he otherwise might have done; that he now recollects of executing a deed to Lucy A. Goodwill which was presented to him by one Byers; that he objected to the deed as not properly describing the land theretofore claimed by Goodwill, under the claim club law, and the deed was then and there altered by changes and erasures in red ink by Byers, who claimed it reduced the quantity of land to fourteen or fifteen acres, the amount claimed by Goodwill, and the deed did not include, nor was it intended to include, the land in controversy, or any portion thereof; and he would say that if there was any mistake in the deed, it was that it did in fact contain a greater number of acres than was represented to him by Byers at the time he signed the same; which motion was overruled by the court and exceptions were taken.

On April 20, 1888, there was a final decree in the court below, finding that the several allegations in the plaintiffs' petition were true, as therein alleged, and that the plaintiffs were entitled to the relief in their petition prayed, and that the several allegations in the answer of Kasper and Shoull are true, and that at the time of the execution of the deed by Andrew B. More to Lucy A. Goodwill, on December 24, 1857, said More was the owner in fee simple of the land hereinafter described, and that it was the intention of said More to convey to said Goodwill the said land as described herein, but by mistake in writing the description of said land in said deed, or by mistake in recording said deed, the word "east," after the words and figures "thence north 72½ degrees," was inserted in place of the word "west," and that the correct description of said land is as follows: Beginning at a point 2.72

chains north 71 degrees west from the quarter section corner between sections 26 and 35 (magnetic variation 11¼ degrees east), thence south 17 degrees east 10.15 chains to a black oak, thence north 60 degrees west 1.33 chains, thence north 72½ degrees west 1.83 chains, thence north 57 degrees west 6.20 chains, thence north 75 degrees west 5.65 chains, thence north 82 degrees west 6.64 chains, thence north 21.22 chains, thence east 7.80 chains, thence south 10 degrees west 4.20 chains, thence south 10½ degrees east 14.70 chains, thence south 86½ degrees east 7.90 chains to the place of beginning, containing 23.65 acres, in sections 26 and 35, in township 15 north, of range 13 east, in said county. It is therefore ordered and decreed that the plaintiffs and their grantees, to whom they may have executed deeds in due form, are the owners of said land, in their petition first described, beginning at the southwest corner of the southeast one-fourth (S. E. ¼) of southwest one-fourth (S. W. ¼) of section twenty-six (26), township fifteen (15) north, of range thirteen east, of sixth principal meridian, thence north six (6) chains, thence east eight and ninety one-hundredths ($8\frac{90}{100}$) chains, thence south ten and one-half ($10\frac{1}{2}$) degrees east four and thirty-nine hundreths ($4\frac{39}{100}$) chains, thence south one and forty-four one-hundreths ($1\frac{44}{100}$) chains to the south line of section twenty-six (26), thence west nine and thirty-three one hundredths ($9\frac{33}{100}$) chains to the place of beginning, containing five and one-half ($5\frac{1}{2}$) acres, more or less.

"That said plaintiffs are the owners in fee simple of such portion of said land as they have not already lawfully conveyed, and that the grantees of said plaintiffs are the owners in fee simple of such portions of such land, respectively, as may have been duly conveyed to him, and the title of said plaintiffs and their said grantees is hereby quieted and confirmed.

"It is further ordered and decreed that the defendants Frank J. Kasper and Frank Shoull are the owners in fee

simple of the following described portion of the land hereinbefore described, and the title thereto is hereby quieted and confirmed in them: Beginning at the northwest corner of the southeast quarter of the southwest quarter of section 26, township 15 north, of range 13 east, thence south 14 chains, thence east 4.18 chains, thence north 14 chains, thence west 4.18 chains to the place of beginning, being 5.85 acres in said county.

"It is further ordered and decreed that the defendant, Andrew B. More, has no interest, right, title, or equity in or to said lands herein described, or to any part or portion thereof, and that he be and hereby is forever enjoined and estopped from making any claim to said land or any portion thereof, and that he pay the costs of this action; to which findings and decree the defendant excepts and appealed his cause to the supreme court."

I find considerable difficulty in presenting, to my own satisfaction, the questions involved in this case. This difficulty, if not caused by, is greatly augmented in, the fact that the original deed from Andrew B. More to Lucy A. Goodwill is not set out in the record, nor does it appear that the deed, or the record of it, was produced at the trial. The original deed appears to have been lost. It is not believed that, as a question of law, the production of the record was indispensably necessary upon the trial, for the reason that the execution and recording of the deed, as alleged in the petition, are admitted in the amended answer of the defendant More. There were probably important legal advantages obtained by the plaintiffs, or, at least, perplexing difficulties obviated, by refraining from offering the record of the deed in evidence, and probably, as it was uncertain whether the mistake or error, sought to be corrected by these proceedings, was a mistake or error in the draughting of the deed, or in the recording of it, it was deemed expedient to withhold the record from the evidence; yet certain it is, that its production would

have assisted the inquiries of the court and insured an earlier disposal of the case. It is in evidence that this deed was executed and acknowledged on December 25, 1857. There was introduced in evidence a deed from Andrew B. More and wife to Moses F. Shinn, executed July 3, 1857. This deed described the land lying easterly of, or from the easterly boundary of, a portion of the land claimed by the plaintiffs. This line commencing at the point A on the plat of the lands introduced in evidence as Exhibit A, running S. 17° E. 10.15 chains to a black oak, marked B on the plat, which point is testified to by witnesses on the trial, and upon whose testimony we must rely for evidence as to the contents of the deed sought to be corrected, as the first boundary line set out in said deed. According to the same witnesses' testimony the next course of the same description is N. 60° W. 1.33 chains. This course is claimed to be correct, but at that point the difficulty as to the description begins, in the deed to Mrs. Goodwill, as testified to. The next course is thence N. 72½° E. 1.83 chains. This would extend diagonally across the first course of the description, and a little more than 90 chains into and upon the land formerly deeded to Shinn, whereas the correct description, as claimed and satisfactorily shown, would be thence N. 72½° W. 1.83 chains to the point D on said line, thence N. 57° W. 6.20 chains to the point E, thence N. 75° W. 5.65 chains to the point F, thence N. 82° W. 6.64 chains to the point G, thence N. 21 chains to the point H, thence E. 7.80 chains to the point I, thence S. 10° W. 4.20 chains to the point J, thence S. 10½° E. 14.70 chains to black letter K, thence S. 86½° E. 7.90 chains to the place of beginning. To follow further the description, as contained in the Goodwill deed, we go back to the erroneous course before described, and commencing at the point marked with a red letter D on the plat, thence N. 57° W. 6.20 chains to red E, thence N. 75° W. 5.65 chains to red F, thence N. 82° W. 6.64 chains to red G.

At this point the line turns due north, falling short of the point in the true description, marked black G, a distance corresponding exactly with the sum of the two distances from the black oak to the point C and from the point C to either point D. Taking up the description in the Goodwill deed at the point marked with a red G, it runs due north 22 chains, striking the north boundary of the track as claimed by the plaintiffs, at red H on the plat, thence E. 7.80 chains to the point marked red I, thence S. 10° W. 4.20 chains to the point marked red J, thence S. 10½° E. 14.70 chains to the point marked with a red K, thence S. 86½° E. 7.90 chains.

It will thus be seen that the north boundary is the same in both descriptions, except as to the limits east and west, and that the east boundaries of the northern, or what we we will term the upright portion of the tract, are identical in the two descriptions, except that the south point of the line of the Goodwill deed is substantially the same distance east of the corresponding point in that which is claimed as the true description, as is the distance between the red G and the black G on the plat, and the last course carries us the same distance past and east of the place of beginning.

It appears from the record that on January 25, 1866, A. B. More and wife deeded to John H. Green twenty-three acres of land immediately east of what is designated the northern or upright portion of the land in controversy. The description of this land as contained in the deed of Green commences "at N. E. corner of the S. E. quarter of the S. W. quarter of section 26, township 15, thence W. 12.20 chains, thence S. 10° W. 4.20 chains, thence S. 10½° E. 14.70 chains, thence S. 86½° E. 10.30 chains, thence N. 19.26 chains to the place of beginning." In the conveyance from More to Green there is also another tract conveyed, described as "beginning at the S. W. corner of the N. E. ¼ of the N. W. ¼ of sec. 35, in the same township

and range, thence N. 18 chains 78 links, thence S. 82° E. 6 chains 64 links, thence S. 15° W. 18 chains 35 links, thence W. 1 chain 75 links to the place of beginning, containing six acres, more or less."

It will be observed that the north line or boundary of this piece, or the second course of the description, is identical with that part of the line of the tract in controversy as claimed by the plaintiffs and marked by the black line between the black letters F and G, leaving a narrow strip between the north boundary of this tract conveyed to Green and the west end of the south boundary of the tract described in the deed from More to Goodwill.

By reference to the plat it will be seen that if the northwest corner of the north or upright plat of the land is at the point marked by a red H, as claimed by defendant More, and not at the point of black H, as claimed by plaintiffs, then the land conveyed to Green would fall short in quantity about one-third, as the west boundary of it, as marked by the red line of the plat, would be about four chains further east than the west line called for in the description.

The defendant More, having been examined on the trial as a witness, testified upon cross-examination that he was the owner of the southeast quarter of the southwest quarter of section 20, township 15, range 13, at the time of the making of the deed to Mrs. Goodwill; and in reference to the deed which he had subsequently made to Green, stated that he did not intentionally or knowingly convey to him any land which he had previously conveyed; that he probably made two deeds to Green, but recollected of making one to him, and probably deeded to him fifty-eight or sixty acres, "he didn't recollect, the deeds would show;" that he intended to sell him what was in the deeds, no more and no less; that the same was also true in regard to Shinn, he intended to sell him whatever was covered by the deed, no more and no less; that in no case had he in-

tended to sell or to deed anything which he had previously conveyed; that he did not know, as a matter of fact, that what was to be conveyed to Mrs. Goodwill runs over into the ground subsequently conveyed to Green; that he did not know that he claimed that it is correctly surveyed at all; that when he made the conveyance to Mrs. Goodwill he did not intend that the east line should run over something like 200 feet into the tract sold to Green.

Q. You intended, when you made your conveyance to Mrs. Goodwill, that the east line should come square up to the west line of the tract you subsequently sold to John Green, didn't you?

A. I think that is correct.

Q. And when you sold to John Green you intended his west line to come square down and touch the east line of the tract that you had previously sold to Mrs. Goodwill, didn't you?

A. Well, I believe that was the intention.

Q. And the west line of the tract you sold to John Green would come about to where John Green subsequently put up the fence, wouldn't it?

A. I don't know where his fence is; the description in the deed will show.

Q. The west line of the piece you sold to John Green would be about the place you pointed out to him where the line would be, wouldn't it?

A. Yes, I suppose it would.

He was also asked:

Q. In describing the Goodwill tract was there any intention on your part to jog back to the east?

A. No, sir.

Q. Over the tract previously sold to Shinn?

A. No, sir.

Q. There was no intention of throwing a little wedge piece in the Shinn tract?

A. No, sir.

Q. If you owned that, and claimed to own it, why did you leave it in that kind of shape?

A. I never put it in that shape.

Q. Well, who did?

A. I don't know; somebody who didn't know much about surveying. My impression is that that is the true line; this line here (indicating, while examining the plat, the black line); and there is a stake which should be somewhere near Goodwill's G. That is the only surveying I ever did. We started there, at that time; I lived here somewhere; started over to the spotted tree, and then we came down to another spotted tree (B) and went to several other lines (E and F); we didn't know where the government lines were. This deed was made by claim club lines, and didn't have any reference to the section lines whatever.

Q. Your idea is that the true south line of the Goodwill tract is the black dotted line, and not the red line which would jog back over in here?

A. Didn't jog nothing about it. That dog's head of a thing, there, has no business there; there is a point, I am not positive, but I think *that* is the point (designating it on the plat).

Q. You claim the true south line should be the dotted black line running due west, and not jogging back at any time towards the east?

A. Running due west, or northwest.

Q. Due west, and not jogging back at any time towards the northeast?

A. No, sir; and there should be a stake running down here somewhere to an oak tree, and then across, perhaps, here, I don't know, to another oak tree down here, and there, to the place of mine. This is what Mrs. Goodwill claims; I want you to understand that.

This evidence sufficiently establishes the allegation of the petition that by a mistake in recording the deed, or in writing the description of the land intended to be conveyed,

the word *east*, after the words and figures "thence north 72½ degrees," was inserted in place of the word *west*, and that the true intent and purpose of the deed of Moore to Goodwill was to convey the land as hereinbefore stated and described: "Beginning at a point 2.72 chains north 71 degrees west from the quarter section corner, between section 26 and 35 (magnetic variation 11¼ degrees east), thence south 17 degrees east 10.15 chains to a black oak, thence north 60 degrees west 1.33 chains, thence north 72½ degrees west 1.83 chains, thence north 57 degrees west 6.20 chains, thence north 75 degrees west 5.65 chains, thence north 82 degrees west 6.64 chains, thence north 21.22 chains, thence east 7.80 chains, thence south 10 degrees west 4.20 chains, thence 10½ degrees east 14.70 chains, thence south 86½ degrees east 7.90 chains to the place of beginning, containing 23.65 acres, in sections 26 and 35, in township 15 north, of range 13 east."

The plaintiffs also introduced a deed from Lucy A. Goodwill to George G. Earle, executed August 24, 1874, conveying what has been designated as the north or upper portion of the land in controversy. Also a deed from Earle and wife to C. E. Hawver executed March 22, 1878, which, with the other lands, conveyed the same tract conveyed by Mrs. Goodwill to Earle. Also the record of the probate court of Douglas county, Nebraska, showing the probate of the last will and testament of Lucy A. Goodwill, deceased, with a copy of the will, from which it appears that Carrie E. Goodwill was made the sole legatee of the real and personal property of which her mother, Lucy A. Goodwill, died seized. Also a record of the same court showing the probate and record of the last will and testament of Carrie E. Hawver, late of said county, deceased, by which, after various specific bequests, she bequeathed to her husband, Samuel Hawver, all of her property of every kind whatsoever.

The record of the court below also contains the deed of

Samuel Hawver and Harriet L., his wife, to John Ainsfield and Marcus Rosenwaser and Andrew Rosewater, executed June 15, 1886, conveying the following described land: Beginning at the S. W. corner of the S. E. quarter of the S. W. quarter of section 26, township 15, range 13 east, thence north 6 chains, thence east 8.90 chains, thence south 10½ degrees east 4.39 chains, thence south 1.44 chains to the south line of section 26, thence west 9.33 chains to the place of beginning, containing five and one-half acres, more or less. Also a deed from Andrew Rosewater and wife to Frank Shoull executed January 13, 1887, describing the same lands as that last mentioned.

Neither of the parties, nor either of the grantors of the appellees, direct or remote, appear to have been in the actual physical possession of the land which ought to have been described, but was not, in the deed from More to Goodwill.

According to the bill of exceptions, this land consisted of brush and timber; that from a date shortly after the execution of the deed from More to Goodwill, the latter during her lifetime, and, after her death, her daughter and devisee Mrs. Hawver during her lifetime, and, upon her death, her devisee Hawver, up to a late period, occasionally sent persons in their employment to cut and haul wood from said land, and who did, as so employed, cut trees and timber for firewood and other purposes. There is no evidence that any portion of said land was ever enclosed, cultivated, or occupied otherwise than as above stated by Mrs. Goodwill and the Hawvers cutting trees and brush thereon. No act of ownership was exercised over any part of the land in controversy by the appellant since the fall of 1867, or the spring of 1868, and the evidence that any act of ownership was exercised by him after the date of the Goodwill deed is vague, indefinite, and unsatisfactory.

Counsel for appellants assume, and apparently take it as granted, that the deed from More to Goodwill was a quit-

elder states. I state from the syllabus: "In a case purely equitable, and not cognizable in a court of law, where, in an otherwise proper case, it is sought, on the ground of mistake, to reform and enforce an agreement for the conveyance of real estate, and the correcting of the mistake involves no change of possession, no disturbance of investments made by the party against whom the correction is sought, and leaves the enjoyment of the property to go on in harmony with the prior acts of the parties in interest, the lapse of time applied by courts of equity, in analogy to the statute of limitations, will be reckoned only from the time of the discovery of the mistake."

In the case of *McIntosh v. Saunders*, 68 Ill., 128, the court in the syllabus says: "In case of fraud or mistake, in equity, the statute of limitations will begin to run from the time of discovery of the fraud or mistake, and not before."

In *Crane v. Prather et al.*, 4 J. J. Marshall, 75, the premises were significant with those in the case at bar. There the chief justice, in the opinion delivered, after commenting upon the relation of courts of equity to the statute of limitations, stating views of the law in that behalf, generally entertained a half century ago, but which are not entertained by the courts of the present day, said: "Supineness and negligence will not receive countenance in a court of equity. But if a complainant shall have filed his bill within a saving time after his discovery of his claim to relief, and shall have made the discovery as soon as a man of ordinary diligence could have been expected, by the use of reasonable means, to have made it, he will not be barred merely because it might have been possible to have detected the cause for complaint sooner than it was ascertained. One of the most fatal effects of fraud is, that it conceals itself from its victims. If it should succeed in doing so until remedy for its perpetration should be barred by time, this alone being one of the injurious consequences,

and perhaps one of the aims of the fraud, should give the chancellor jurisdiction of the case, for the purpose of relieving from the effects of the delusion.

"The same reason does not apply with equal force to mistake. And it may be, and generally must be, difficult to prove, satisfactorily, when the mistake was discovered, and when it might have been ascertained by the exercise of ordinary vigilance. And hence, the equitable qualification of the legal limitation has not been applied as frequently to cases of mistake as to those of fraud. But it will apply in a proper case."

The rule was applied to that case and controlled it; and that case was followed by that of *Grundy's Heirs v. Grundy et al.*, 12 B. Mon., 269; *Adams v. Guerard*, 29 Ga., 651; *Smith v. Fly*, 24 Tex., 345; *Andrews et al. v. Gillespie*, 47 N. Y., 487; *Brooks et al. v. Harris*, 12 Ala., 557; *Ferris v. Henderson et al.*, 12 Pa. St., 49; *Emerson v. Navarro*, 31 Tex., 334.

In the case of *Parker v. Kuhn*, 21 Neb., 413, which was one of alleged fraud, and not of accident or mistake, this court held that "An action for relief on the ground of fraud may be commenced at any time within four years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery."

A full consideration of the cases cited leads me to the conclusion that a case of relief from the effect of accident or mistake, like that at bar, comes within the same rule of limitation. It appears from the record that there has been no actual, physical occupation of the land in controversy by either of the parties to this action since the execution of the deed, the mistake in which is the foundation of this suit, occurred, until within a recent period, and at no time by the appellant; that, therefore, there is no possession to be changed by a rectification of the mistake, nor

does a correction of the mistake involve any disturbance of investments made by the party against whom the correction is sought; but such correction will leave the property to go on in harmony with the prior acts of all the parties in interest. The case is therefore within the prinples and equities of the decision in *Ormsby v. Longworth, supra.* The judgment of the district court is

AFFIRMED.

THE other judges concur.

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HENRY BRUGMAN v. C. C. BURR.

[FILED SEPTEMBER 23, 1890.]

1. **Counter-claim:** DISTINCT CAUSES OF ACTION: LANDLORD AND TENANT. The plaintiff was owner of a storehouse in L., of which defendant was tenant under a written lease, the rent payable monthly. The rent being in arrears about four months, the defendant gave plaintiff three short time, interest bearing, negotiable notes therefor. Afterwards, the plaintiff desiring to enlarge his storehouse, the parties entered into a new agreement which was indorsed on the lease, and by which defendant relinquished all his right, title, and interest in said lease, reserving the right to remove his stock within fifty days from the date thereof; Burr to have the right to go on with improvements. Within the fifty days the plaintiff pulled down the rear wall, removed a part of the roof, took up the sidewalk, and made excavation for an area in the front. The notes having become due, suit was brought thereon. The defendant set up a counter-claim: 1. Damage to his stock of hardware, kept in the store, by plaintiff's removing the roof and allowing the rain to enter and flood the storeroom. 2. Damage to his business by reason of taking up the sidewalk and excavating in front of the store. *Held*, That such damages were not the subject of counter-claim, not arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, nor connected with the subject of the plaintiff's action.

2. ———: PLEADING. Before replying to the answer plaintiff moved to strike out the words of the second clause of the counter-claim as inadvertent and irrelevant, which motion was sustained. *Held*, Not reversible error.

3. ———: ———: THE OBJECTION that a counter-claim fails to state facts sufficient to constitute a cause of action, or defense to the action, may be taken at any stage of proceedings, or upon error, or appeal.

MAXWELL, J., dissents upon the first point.

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

J. C. Johnston, and *J. E. Philpott*, for plaintiff in error.

Samuel J. Tuttle, contra, cited: Code, secs. 1011, 1012; *Berggren v. R. Co.*, 23 Neb., 620.

COBB, CH. J.

This cause comes to this court on error from the district court of Lancaster county. The plaintiff in that court in and by his petition alleged the making, execution, and delivery to him, by the defendant, of three, several promissory notes, two for $200 each, and one for $210, dated February 8, 1886, and due, respectively, April 8, May 8, and June 8, 1886, and demanding judgment in the sum of $576, with interest.

The defendant, in and by his amended answer, paying no attention to the allegations of the petition, nor troubling himself as to any distinction between defense, set-off, and counter-claim, alleged that on the 28th day of December, 1883, the plaintiff, by his deed, duly executed and delivered, leased to the defendant lot 14, in block 42, in Lincoln, for a term commencing the 1st day of January, 1884, and ending December 31, 1889, for the consideration of $8,100, to be paid by the defendant to the plaintiff in installments of $135 on the first business day of each and

every month thereafter; that the consideration for the said notes sued on is for a part of the said installments so to be paid for, and on said rent and no other; that on the 30th day of April, 1886, the defendant then being in the quiet and peaceable possession and enjoyment of the said lot, and the tenements thereon, under the covenants of said lease, and then and there being engaged in the carrying on a general retail business in hardware, woodenware, tinware, and cutlery, and the plaintiff then and there desiring and intending to build an addition to the rear east end of the building on said lot, the building so occupied by the defendant, the defendant, at the instance and request of the plaintiff, executed and delivered, by his certain writing on the back of said lease, his certain deed of release, as follows, to-wit:

"For value received, I hereby relinquish to C. C. Burr all my right, title, and interest in the within lease, reserving right to remove stock within fifty days from date hereof, Burr to have right to go on with improvement in meantime. April 30, 1886."

That the word "improvement" used in said release means the taking out of the rear end of said building and the construction to said building of the said addition and no other matter or thing; that the word "stock" used in said release means the defendant's said goods and chattels, then used and employed by him in his said retail business; that on or about the 4th day of May, 1886, and while the defendant was occupying the said lot and tenements thereon, and so engaged in his said business, and thereafter up to the 14th day of June, 1886, the said plaintiff, in violation of the defendant's right to the peaceable possession and quiet enjoyment of the said premises, so to occupy the same, and in disregard of the covenants of said assignment, did wrongfully, against the protest of the defendant, enter upon said premises and remove the roof on said building, and wrongfully, and against the protest of the de-

fendant, tore to pieces and carried away the sidewalk of the immediate front of said building on the west side thereof, and did then and there dig an excavation twenty-five feet by sixteen feet, and seven feet deep, and then and there wrongfully and negligently did leave the defendant's said stock of goods exposed to the elements and exposed and subject to be stolen and carried away, and then and there for twenty days, by reason of said excavation, the defendant and his servants and the public were wholly prevented from going in and out of the front entrance and door of said building; that the defendant had a stock of goods in said building during the time of the committing of said grievances by the plaintiff, of the value of $3,000; that by reason of the said wrongful acts of the plaintiff, in so removing the said roof and so exposing the said goods to the elements, the said goods were rained upon and damaged in the sum of $600; that by reason of the said wrongful acts of the plaintiff in so exposing said goods to be feloniously stolen, without fault or negligence of the defendant, there were feloniously stolen and carried away of defendant's said stock, goods of the value of $100, no part of which the defendant has ever since recovered or received, to his damage in the sum of $100; that by reason of the plaintiff's so wrongfully removing the said sidewalk, and the said excavation, and so preventing said egress and ingress to the said building, through said front door, to himself, his servants, and the general public, he was, for said twenty days, wholly prevented from carrying on his said business, to his damage in the sum of $500; with prayer for judgment for his said damages after the taking out thereof of the amount which may be found due the plaintiff on the said notes.

The plaintiff replied to the above answer of the defendant, in which he denied that the plaintiff on the 30th day of April, or at any other time, desired or intended to build an addition to the storeroom mentioned in said counter-

claim and to the rear east end thereof only, but alleged that at that time he intended and desired to repair the said storeroom in the manner in which he did so repair the same, and that it was on that account he procured the release mentioned by paying to the said defendant a full and complete consideration therefor. He denied that the new improvements mentioned in the counter-claim meant only the taking out of the east end of the building and the construction of the addition to the east end of said building as alleged; but that it was used in its ordinary sense and included all the improvements made upon said store building, or to the same as actually done and performed thereafter, as in the summer of 1886. He further denied that the said plaintiff removed the roof from said building between the 4th day of May and the 17th day of June, 1886, but alleges the fact to be that said roof was removed long after the elapsing of the fifty days mentioned in said release and not before. He admitted that before the elapsing of the said period of fifty days he did remove the said walk in front of the said store building and dug the excavation mentioned in said counter-claim, but said plaintiff further alleges that he caused said excavation to be covered with plank at his own expense, so that neither the said defendant, nor his servants, nor the public were in any manner deprived of free ingress into or egress from said store building. And the plaintiff denies each and every allegation in said counter-claim contained as to the fact and amount of damages claimed by said defendant, and alleges that if he suffered any damages whatsoever it was occasioned by his own fault and negligence, and not by the fault or wrong of the plaintiff.

There was a trial to a jury, with a verdict and judgment for the plaintiff. After unsuccessful motion for a new trial, the defendant brings the cause up on error.

Before filing his reply, the plaintiff moved the court for an order striking from the defendant's answer and counter-

claim the following words: "And wrongfully and against the protest of the defendant tore to pieces and carried away the sidewalk in the immediate front of said building on the west side thereof, and did then and there dig an excavation twenty-five feet by sixteen feet, and seven feet deep." Also the following: "That by reason of the plaintiff so wrongfully removing the said sidewalk and making the said excavation, and so preventing said egress and ingress to the said building through said door to himself, his servants, and the general public, he was for said twenty days wholly prevented from carrying on his said business, to his damage in the sum of $500." And also the following: "And then and there for twenty days, by reason of said excavation, the defendant, and his servants, and the public were wholly prevented from going in and out of the front entrance and door of said building." Which motion was upon argument sustained and the said order passed. This order and judgment of the court constitute the first error assigned.

This assignment involves the entire answer and counter-claim of the defendant. Section 100 of the Code provides that "The defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off as he may have. Each must be separately stated and numbered, and they must refer in an intelligible manner to the cause of action which they are intended to answer;" and section 101, as follows: "The counter-claim mentioned in the last section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

It will be remembered that "the contract or transaction, set forth in the petition as the foundation of the plaintiff's claim," was the giving of three several promissory notes

by the defendant to the plaintiff, and while it is alleged in the said answer or counter-claim that the consideration of the notes sued on was for a part of the installments of rent agreed to be paid by the defendant to the plaintiff upon the store house or building, yet, taking the whole answer or counter-claim together and in connection with the dates of said notes, it is apparent that the notes were given for installments of rent which had been earned and were past due before the execution of the release set out in the counter-claim. It is, moreover, quite apparent that all of the grievances or causes of action, set out in the said answer or counter-claim, transpired after said notes had been given as for money due and payable, and after the said lease had become released. While it is admitted for the purposes of the argument of the point now being considered, that the defendant had a cause of action against the plaintiff for tearing off and removing the roof of the storeroom occupied by the defendant, and thereby allowing the rain to enter, and wet and damage defendant's stock of hardware, and another different and distinct cause of action for tearing up the sidewalk and digging an excavation in front of said storeroom, and thereby injuring defendant's trade and business, for which defendant could have maintained one or more suits against the plaintiff, yet it does not follow that either or both of these causes of action could be pleaded and maintained as a counter-claim against the action of the plaintiff. These causes of action were, as described in the pleading, one of them a trespass, and the other, if not a trespass, was a tort of the nature of a trespass. Neither of them arose out of the contract or transaction in the petition as the foundation of the plaintiff's claim, nor were they connected with the subject of the action.

The language of the corresponding section of the Code of New York is identical with that of our own, and those of most of the Code states, and, without citing the cases, I assume that, under the construction given the Code by the

courts of New York, the counter-claim now under consideration would not be sustained. And I admit that many able courts and text-writers give the provision a broader and more liberal construction, yet I am unable to find any case that goes far enough to cover the one at bar.

The principle decided in the case of *Loomis, Campbell & Co. v. The Eagle Bank of Rochester*, 10 O. St., 327, appears to me quite applicable to the case at bar. In that case, to state it shortly, E. Gilbert & Co., of Rochester, in May, 1855, sold to Loomis, Campbell & Co., of Cincinnati, one thousand kegs of blasting powder, at $3.20 per keg delivered on board at Rochester. Five hundred kegs were delivered on board as contracted, and Loomis, Campbell & Co., being advised forthwith, returned a negotiable note at six months from date of shipment, for the contract price of the 500 kegs, but the other 500 kegs were never shipped. In August, following, the note was discounted by the bank for G. & Co., one of the discount committee being aware of the terms of the sale and of the fact that the last lot of 500 kegs had not been shipped. The note was not paid and suit was brought thereon by the bank against L., C. & Co., who set up, by way of counter-claim, damages for the non-delivery of the 500 kegs of powder. The bank having obtained judgment in the trial court, upon an error in the supreme court, it was held, (1) That the stipulations as to the two lots of powder are to be treated as distinct and several agreements, and not as one entire contract; (2) that a claim for damages for the non-delivery of the last lot, cannot be set up as a counter-claim to an action on the note given for the first lot, brought by the indorsee for value and before maturity, even though he had notice of the breach of the second contract at the time of his purchase. This case was followed by the same court in the late case of *Myers v. Croswell*, 45 O. St., 543.

Upon looking into the record before us, it appears that upon the 8th day of February, 1886, the defendant was

indebted to the plaintiff in the sum of six hundred and ten dollars for rent money due under the lease held by the said defendant for the store house in question. For this rent money, then in arrear, the three promissory notes sued on were given. These notes were negotiable and to draw interest at ten per cent from date. On the 30th day of April following, nearly three months after the giving of these notes, the parties entered into the contract expressed in the release, indorsed on the lease, under which the defendant held the said store building. By the terms of this contract the defendant relinquished and surrendered all of his right, title, and interest under the lease, with the single reservation of the right to remove his stock of goods therefrom within fifty days from the said date. The taking up of the sidewalk, and the making of the excavation in front of the store, and the removal of the roof of the store occurred some length of time after this. No rent was accruing at the time of the commission of these acts, and so the entire subject of rent, and more especially the rent that had accrued by monthly installments and been settled and capitalized and notes given for, months before, had been, and was entirely segregated from the relations and transactions between the parties subsequent thereto. The tortious acts of the plaintiff, set out in the counter-claim, are therefore not connected with the subject of the action within the meaning of the Code.

The question then arises, In what manner ought the plaintiff to have taken advantage of the want of a sufficient defense, counter-claim, or set-off to the cause of action set up in his petition? The usual course in such cases has doubtless been to demur to defendant's pleading, but I have made a long and fruitless search, in the wilderness of cases and text-books, for satisfactory reasoning or authority on that point, as applicable to our Code. Section 109 of the Code provides that "the plaintiff may demur to one or more of the defenses set up in the answer, stating in his

demurrer the grounds thereof; and where the answer contains new matter, the plaintiff may reply to such new matter denying, generally or specially, each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition constituting a defense to such new matter in the answer." A counter-claim is, in one sense, a defense; yet in most cases, as in the one at bar, it leaves the cause of action set up in the petition unscathed, but seeks to set up a more or less independent cause of action to meet, and, in whole or in part, overbalance it. The Code provides, at section 94, specifically upon what grounds a defendant may demur to a petition, but does not specify or limit, in terms, the grounds upon which a plaintiff may demur to the defenses set up in the answer. The reason for this distinction probably is, that it was the intention of the framers of the Code to confine the operation of that part of section 109, which provides for a demurrer, to such answers as are technical defenses, and hence demurrable on any ground in which they fail to constitute a defense to the cause of action set up in the petition to which they are applicable, and that a counter-claim or set-off is, for the purposes of demurrer, regarded as a petition.

In this view of the law it may well be doubted that demurrer would have lain to the counter-claim in the case at bar. Under neither of the six specific grounds of demurrer set out in the 94th section, would demurrer lie to this counter-claim, considered as an independent petition. It does state facts sufficient to constitute not one only but two causes of action; my objection to it being that such causes of action are not "arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

Under the practice formerly prevailing in equity, where

the answer contained no defense to the plaintiff's bill, the plaintiff might have the cause heard on bill and answered, and, unless the defendant applied for leave to amend, obtain the relief prayed for in his bill. Somewhat similar is the present practice in New York; or, in that state where the complaint does not state facts sufficient to constitute a cause of action, the objection is available on trial upon motion to dismiss the complaint. (*Tooker v. Arnoux*, 76 N. Y., 397.)

The case of *Kurtz v. McGuire*, 5 Duer, 660, was, in some of its features, much like the case at bar. The complaint stated a sale and delivery by the plaintiff to the defendant of liquors at an agreed price of $290.20, and claimed a balance of $208.06. The answer denied that he had received the quantity of liquors stated, or that they were worth, or that he agreed to pay the price named, and averred that they were worth about $200 and no more. It then proceeded thus: "And this defendant further says that on or about the 20th of October, 1856, the said plaintiff, without the knowledge or consent of the defendant, took and appropriated to his own use 87½ gallons of whisky belonging to this defendant, of the value of $2.75 per gallon, which this defendant claims to set off against the plaintiff's claim herein, and also five gallons of gin worth the sum of $1.50 per gallon, and this defendant denies that he is indebted to the plaintiff in any sum or amount; wherefore he demands that the complaint be dismissed. The plaintiff moved to strike out this part of the answer as "irrelevant and redundant," because it is not matter constituting a counter-claim or a defense, either total or partial. The general term held that the matter moved to be stricken out did not give a right of set-off, not being a demand arising on contract; and that it did not constitute a counter-claim, because it does not arise out of contract nor out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, nor is it

connected with the subject of the action. The motion was allowed.

It must be admitted that in the case at bar the matter stricken from the answer is no more irrelevant nor immaterial than that which is left; but this objection could scarcely be urged by the defendant; nor does the Code (sec. 125), which provides that redundant, scandalous, or irrelevant matter, when inserted in any pleading, may be stricken out on motion, require that all matter of that character be included in the motion.

I conclude, therefore, that there is not sufficient reason, nor is there any authority which I am able to find which would justify us in holding that the court erred in sustaining the motion to strike the matter from the answer. The action originated in the county court and was thence appealed to the district court by the defendant, which facts, not appearing from the pleading, or briefs of counsel, were not referred to in the statement. It also appears that after the appeal was perfected, the defendant, in the absence of the plaintiff and without notice, moved the district court to dismiss the appeal, which motion was allowed and the appeal dismissed at the cost of the defendant, and the cause remanded to the county court for further proceedings, as though no appeal had been taken. And then two days thereafter, and at the same term, the plaintiff filed his motion in said court for an order reinstating said appeal therein for the reason that the same was so dismissed without the plaintiff's consent, and contrary to law; which motion was allowed, the said first order was set aside and vacated, and the appeal reinstated. Which said last order and judgment of the court is the ground of the second error assigned.

The Code, at sections 1011 to 1015, makes ample provisions applicable to cases where the appellants or both parties fail, or neglect, to perfect the appeal, but there is no provision for the voluntary dismissal of an appeal by the

appellant, after the same is perfected, nor in any case without the consent of the appellee. Even were there such a provision it would be within the power of the court at the same term to set aside an order allowing such dismissal, upon being satisfied that it had been unlawfully or improvidently made.

The brief of counsel on the part of the plaintiff in error, in so far as it is not devoted to the points above considered, is confined to the discussion of the verdict, its insufficiency under the evidence, and its illegality. Neither the assignment of error involving one of the instructions of the court, nor the one alleging that the verdict is contrary to the sixth paragraph of the instructions, is discussed or presented in the brief; neither is the one of errors of law occurring at the trial. I here copy the verdict:

"We, the jury, * * * do find that there is due from the defendant to the plaintiff upon the cause of action set forth in his petition the sum of $671.25, and we further find that there is due from the plaintiff to the defendant upon his cause of action and defense the sum of $200. We therefore find that there is due from the defendant to the plaintiff a balance amounting to the sum of $471.25, which we assess as the amount of his recovery."

This was evidently a compromise verdict.

There was a great deal of sharply conflicting testimony. The defendant himself testified that he was absent from the city Monday, June 14, 1886; that returning Tuesday morning following he found the tin roofing torn off of the store, and it having rained the night before, the two stories and the basement of the store were flooded with water and the goods damaged, in his opinion, to the amount of five or six hundred dollars. He also testified that it continued to rain more or less during the entire day of the 15th. He also testified that his stock of goods shortly before this date was of the value of six thousand dollars. He was subjected to a cross-examination, in which his replies to

questions could not have failed to convince the jury that his estimate of the damage was but a guess. Palmer Way, a fellow hardware dealer, who was acquainted with the stock, and was called in to examine it after the rain, agreed with defendant in his estimate of damage, but fixed the value of the stock before the damage at just half the sum fixed by him. F. E. Newton, who had formerly been in the hardware business, and who had been in defendant's store quite often, for a long time before the damage, a witness for defendant, estimated the value of the goods before the damage at from "two to three thousand dollars; twenty-five hundred, possibly." As to the amount of damage to the goods he agreed substantially with the other two. Neither of these witnesses gave such reasons, as the bases of their judgment, as would probably be satisfactory or convincing to the jury. There was no evidence as to the kind, number, or value of the different articles damaged, except as to a few stoves and packages of grass and garden seeds, in the testimony of the defendant.

On the part of the plaintiff, James Tyler testified that he was the superintendent in charge of the work of making the improvements upon the store in question; that the main roof of the old building was removed some time after the 21st day of June, 1886; that the part of the roof just over the elevator was removed prior to that time; that the shaft of the elevator was built of four corner posts and was enclosed with ⅞ flooring and had sliding doors. On cross-examination he testified that he was on the building once or twice every day during the week commencing Monday, the 14th day of June; that during that week none of the roof was or had been removed, except the roof immediately over the elevator, and that the roof was broken in the back part where the rear wall had been taken down; that he saw the workmen commence taking off the roof on Tuesday, the 22d day of June. The theory upon which this evidence was introduced,

doubtless, was that the rain which did the damage, entered the building by the elevator and the rear of the building where the wall had been removed, and the roof broken in by such removal. What effect it may have had upon the jury can only be surmised from the verdict.

At the trial, and before any witness was sworn, the plaintiff objected to the introduction of any evidence on the part of the defendant in support of his answer, for the reason that it did not contain facts sufficient to constitute a set-off, counter-claim, or any other defense. We often see this proceeding in bills of exceptions, but I do not remember any case where effect was given it. Where a petition, and so, also, doubtless, a cross-petition, setting up a counter-claim, fails to state facts sufficient to constitute a cause of action, the defendant in the one case and the plaintiff in the other, waives nothing by failing to make objection either by answer or demurrer, but this objection, as well as that the court has no jurisdiction of the action, may be taken at any stage of proceeding. (See Code, sec. 96.)

By taking the verdict of a jury, the admitted claim of the plaintiff was cut down from $671.25 to $471.25 by a cross-bill which contained no legal counter-claim. The defendant now asks for a new trial on the ground that plaintiff's claim was not cut down enough. I think that it would be both illogical and idle to grant it.

The judgment of the district court is

AFFIRMED.

NORVAL, J., concurs.

MAXWELL, J., dissents as to first point of syllabus.

GEORGE MARTIN V. STATE OF NEBRASKA.

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[FILED SEPTEMBER 23, 1890.]

Liquors: UNLAWFUL SALE: IN AN INFORMATION for the sale of intoxicating liquors, the names of the persons to whom liquors were sold, if known, should be alleged, or the fact of their being unknown be averred in excuse.

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

Chas. E. Magoon, and *J. E. Philpott*, for plaintiff in error, cited, on the contention that the complaint was defective: *State v. Pischel*, 16 Neb., 490, 608; *State v. Doyle*, 11 R. I., 574; Bishop, Statutory Crimes, sec. 1037, and cases cited in note 2.

Wm. Leese, Attorney General, G. M. Lambertson, and *H. J. Whitmore, contra:*

The same strictness is not required of a complaint as of an indictment. (*Bayard v. Baker*, 76 Ia., 220; *Kingman v. Berry*, 40 Kan., 625; *Ex parte Maule*, 19 Neb., 273; *Ex parte Eads*, 17 Id., 145; *Parker v. State*, 4 O. St., 565; Bishop, Crim. Pro., sec. 230.) The objection is to the form of the complaint, which can only be made by a motion to quash. (Crim. Code, sec. 440; *State v. Pischel*, and *Parker v. State, supra; Brown v. State*, 16 Neb., 660.) Failing to do so, plaintiff in error waived defects. (Crim. Code, 444.) Even had the objection been in the proper form in the district court, it was too late; the police court was the proper place. (*Dist. v. Rubert*, 17 Wash. L. Rep., 361; 4 Gen. Dig., 494, sec. 88.)

MAXWELL, J.

The plaintiff in error was convicted in the police court of the city of Lincoln of the offense of selling intoxicat-

ing liquor on Sunday. The case was taken on error to the district court, where the judgment of the police court was affirmed. The first objection is that the complaint is defective in failing to state to whom the liquor was sold or that the party was unknown.

The complaint is as follows:

"In the police court of the city of Lincoln, Lancaster county, Nebraska.

"THE STATE OF NEBRASKA
v.
GEORGE MARTIN.

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

"The complaint and information of Lena Grant, of the county of Lancaster, made before me, A. F. Parsons, judge of the police court within and for the city of Lincoln, Lancaster county, Nebraska, on this 13th day of June, A. D. 1887, who being duly sworn, on her oath says that George Martin, of said last named county and city, on or about the 12th day of June, A. D. 1887, in the county last named, and within the corporate limits of the city of Lincoln, then and there being a person licensed to sell malt, spirituous, and vinous liquors under the ordinance of said city of Lincoln, did unlawfully, by himself or clerk, sell or give away intoxicating liquors, to-wit, several glasses of beer and whisky on said 12th day of June, it being the Sabbath day, commonly called Sunday, contrary to the ordinance in that behalf provided, and against the peace and dignity of the state of Nebraska.

"MRS. LENA GRANT.

"Subscribed in my presence, and sworn to before me, this 13th day of June, A. D. 1887.

"A. F. PARSONS,
"*Police Judge of the City of Lincoln.*"

In *State v. Pischel*, 16 Neb., 608, this court held that the names of the persons to whom liquor was sold, if

known, should be alleged, or the fact of their being unknown should be averred in excuse. (Bishop on Statutory Crimes, sec. 1037; *State v. Steedman*, 8 Rich. [S. Car.], 312; *Capritz v. State*, 1 Md., 569; *State v. Faucett*, 4 Dev. & Bat., 107; *Dorman v. State*, 34 Ala., 216; *State v. Walker*, 3 Harr. [Del.], 547; *State v. Jackson*, 4 Blackf., 49; *State v. Allen*, 32 Ia., 491–493; *Wilson v. Commonwealth*, 14 Bush, 159; *State v. Schmail*, 25 Minn., 368–369; *State v. Doyle, supra; Wreidt v. State*, 48 Ind., 579; and see *Commonwealth v. Cook*, 13 B. Mon., 149; *State v. Carter*, 7 Humph., 158; *Commonwealth v. Smith*, 1 Gratt., 553; *Commonwealth v. Taggart*, 8 Id., 697; *Hulstead v. Commonwealth*, 5 Leigh, 724; *State v. Stinson*, 17 Maine, 154; *Commonwealth v. Blood*, 4 Gray, 31; *State v. Nutwell*, 1 Gill, 54; *State v. Cox*, 29 Mo., 475; *Commonwealth v. Trainor*, 123 Mass., 414; *Commonwealth v. Crawford*, 9 Gray, 129; *Commonwealth v. Remby*, 2 Gray, 508; *State v. Wentworth*, 35 N. H., 442.)

The decision in *Pischel v. State* in our view is correct and will be adhered to. A party accused of violating the law by selling or giving away intoxicating liquors on Sunday, and thereby subjecting himself to the penalties of the law and his license to forfeiture, has a right to insist upon a reasonable degree of certainty in the charge as to the persons, if known, to whom the sale was made, so that he may defend against the charge. If, however, such persons are unknown, then, from the necessity of the case, the charge must conform to the fact, and this excuse should be alleged. The information, therefore, is defective in the respect named.

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

REVERSED AND REMANDED.

THE other judges concur.

30 424
38 862
30 424
43 413
30 424
45 891
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48 611
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49 752
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30 424
62 283

LORINDA SEEBROCK ET AL., APPELLANTS, V. MARGARET A. FEDAWA, APPELLEE.

[FILED SEPTEMBER 23, 1890.]

1. **Wills: PROBATE: TESTAMENTARY CAPACITY: THE BURDEN** is upon the proponent of a will, both in the county court and in the district court on appeal, to prove, not only the execution of the will, but the capacity of the testator.
2. ———: ———: **RIGHT TO OPEN AND CLOSE.** The proponent is entitled to open and close the argument to the jury.
3. ———: **UNDUE INFLUENCE: BURDEN OF PROOF.** Where it is alleged that the execution of a will was procured by undue influence, the burden is upon the party alleging it to establish that the testator was induced by improper means to dispose of his property differently from what he intended.
4. **Instructions: REITERATION.** The supreme court will not reverse a case on the ground that the trial court repeated in the instructions the same proposition of law, where it does not appear that the purpose was to mystify and confuse the jury, and that the jury was misled by reason thereof.
5. **Evidence,** *held*, to sustain the verdict and judgment.

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

Lamb, Ricketts & Wilson, for appellants:

Sanity of a testator is presumed. (1 Jarman, Wills, 104; Schouler, Wills, sec. 174; 1 Redfield, Wills, 32; *Rush v. Megee*, 36 Ind., 69; *Moore v. Allen*, 5 Id., 521; *Herbert v. Berrier*, 81 Id., 1; *Sloan v. Maxwell*, 2 Green, Ch. [N. J.], 563; *Chandler v. Ferris*, 1 Harr. [Del.], 454, 460; *Thompson v. Kyner*, 65 Pa. St., 368; *Egbert v. Egbert*, 78 Id., 326; *Baxter v. Abbott*, 7 Gray [Mass.], 71; *Banker v. Banker*, 63 N. Y., 409; *Chrisman v. Chrisman*, 18 Pac. Rep. [Ore.], 6; *Elkinton v. Brick*, 15 Atl. Rep. [N. J.], 391; *Cotton v. Ulmer*, 45 Ala., 378; *Meeker v. Meeker*, 75 Ill., 266; 1 Williams, Exrs., 20;

Groom v. Thomas, 2 Hagg. [Eng.], 433.) Hence contestants were entitled to open and close. (*Bates v. Bates*, 27 Ia., 110; *Moore v. Allen, supra; Turner v. Cook*, 36 Ind., 129; *Herbert v. Bereier*, 81 Id., 1; 1 Thompson, Trials, secs. 237, 239; *Rogers v. Diamond*, 13 Ark., 475; *McDaniel v. Crosby*, 19 Id., 533; *Tobin v. Jenkins*, 29 Id., 151; *Edelen v. Edelen*, 6 Md., 288; *Brooke v. Townshend*, 7 Gill [Md.], 10; *Higgins v. Carlton*, 28 Md., 115; *Marshall v. Davies*, 78 N. Y., 414.) Most of the cases cited on this question by appellee present different issues from this case, or were rendered under statutes arbitrarily fixing the procedure. The instructions as to the wife's right to influence a testator should have emphasized the fact that the will must represent his wishes at the time when it was made. (Schouler, Wills, 227, 228, 236; *Turner v. Cheesman*, 15 N. J. Eq., 243, 264; *Gardiner v. Gardiner*, 34 N. Y., 155; *Dean v. Negley*, 41 Pa. St., 312; *Haydock v. Haydock*, 33 N. J. Eq., 494; *Marx v. McGlynn*, 88 N. Y., 357; *Baldwin v. Parker*, 99 Mass., 79, 84; *Rollwagen v. Rollwagen*, 63 N. Y., 504.) Especially should the conduct of a second wife, charged with unduly influencing a testator, be scrutinized. (Cases last cited, and *Mullen v. Helderman*, 87 N. Car., 471; Schouler, Wills, sec. 236.) The instructions are vicious because of reiterations. (*Olive v. State*, 11 Neb., 30, 31; *Parrish v. State*, 14 Id., 60; *Kerkow v. Bauer*, 15 Id., 150; *Kopplekom v. Huffman*, 12 Id., 95; *Marion v. State*, 16 Id., 349.) As to the refusal of the twelfth and thirteenth instructions asked: Schouler, Wills, 226, 236; 1 Redfield, Wills, 510; *Haydock v. Haydock, supra; Griffith v. Diffenderffer*, 50 Md., 466; *Mooney v. Olsen*, 22 Kan., 69; *Bates v. Bates, supra; Lynch v. Clements*, 24 N. J. Eq., 431–5; *Rollwagen v. Rollwagen*, 63 N. Y., 504; *Gay v. Gillilan*, 5 S. W. Rep., 7; *Harvey v. Sullens*, 46 Mo., 147; *Reynolds v. Adams*, 90 Ill., 134. As to the exclusion of the expert testimony: *In re Norman's Will*, 33 N.W. Rep. [Ia.], 374;

Schneider v. Manning, 12 N. E. Rep. [Ill.], 267; *Kempsey v. McGinniss*, 21 Mich., 123.

Pound & Burr, Billingsley & Woodard, attorneys for appellees, and *N. C. Abbott*, guardian *ad litem:*

Under a statute like ours, the executor must prove capacity of testator. (*Taff v. Hosmer*, 14 Mich., 309, 318; *Kempsey v. McGinniss*, 21 Id., 123; *Aikin v. Weckerly*, 19 Id., 482; *Williams v. Robinson*, 42 Vt., 663; *Roberts v. Welch*, 46 Id., 164; *Comstock v. Hadlyme*, 8 Conn., 254; *Knox's Appeal*, 26 Id., 22; *Robinson v. Adams*, 62 Me., 369; *Sutton v. Saddler*, 3 C. B. N. S. [Eng.], 87; *Brooks v. Barrett*, 7 Pick. [Mass.], 96; *Crowninshield v. Crowninshield*, 2 Gray [Mass.], 524; *Baxter v. Abbott*, 7 Id., 83; *Syme v. Boughton*, 85 N. Car., 367; *Delafield v. Parish*, 25 N. Y., 9, 29, 34; *Boardman v. Woodman*, 47 N. H., 120; *Beazley v. Denson*, 40 Tex., 425; *Evans v. Arnold*, 52 Ga., 169, 182; Schouler, Wills, secs. 170, 184; *Will of Silverthorn*, 68 Wis., 372; 1 Whart., Ev., sec. 530; 1 Greenleaf, Ev., sec. 77; 1 Jarman, Wills, notes by R. & T., 105; Schouler, Exrs. & Admrs., sec. 73; *McMechen v. McMechen*, 17 W. Va., 683; *Gerrish v. Nason*, 22 Me., 438; *Hardy v. Merrill*, 56 N. H., 227; *Carpenter v. Calvert*, 83 Ill., 63, 71; *Baldwin v. Parker*, 99 Mass., 79; *Kerr v. Lunsford*, 31 W. Va., 679; *Hathaway's Appeal*, 46 Mich., 327.) As to the effect of drunkenness on testamentary capacity: *Peck v. Cary*, 27 N. Y., 9; *Pierce v. Pierce*, 38 Mich., 412; *Estate of Gharky*, 57 Cal., 274; *Estate of Johnson*, Id., 530; *Schramm v. O'Connor*, 98 Ill., 541; *Van Wyck v. Brasher*, 81 N. Y., 262. As to what constitutes testamentary capacity: *Will of Silverthorn*, 68 Wis., 372; *Meeker v. Meeker*, 75 Ill., 266; *Rutherford v. Morris*, 77 Id., 410; *Trish v. Newell*, 62 Id., 197; *Carpenter v. Calvert*, 83 Id., 63, 71; *Chafin's Will*, 32 Wis., 557; *Lewis's Will*, 51 Id., 101; *Jackman's Will*, 26 Id., 104; *Will of Sarah Blakely* 48 Id., 300; *Kempsey v. Mc-*

Ginniss, 21 Mich., 140; *Higgins v. Carlton*, 28 Md., 115; 1 Jarman, Wills, 112; *Thompson v. Kymer*, 65 Pa. St., 368; *Harvey v. Sullens*, 46 Mo., 247; *Bundy v. McKnight*, 48 Ind., 502; *Aikin v. Weckerly*, 19 Mich., 482; *Horn v. Pullman*, 72 N. Y., 269. As to the value of expert testimony on testamentary capacity: *Will of Sarah Blakely*, 48 Wis., 305; *Fraser v. Jennison*, 3 N. W. Rep., 882; *Kempsey v. McGinniss*, 21 Mich., 139; *Pierce v. Pierce*, 38 Id., 417; *Parish Will Case*, 29 Barb. [N. Y.], 627; *Carpenter v. Calvert*, 83 Ill., 62. Bequest of another's property is not positive evidence of incapacity. (1 Jarman, Wills, 113; *Schneider v. Koester*, 54 Mo., 500; *Snow v. Benton*, 28 Ill., 306.) Nor is an unequal division of the property. (1 Jarman, Wills, 112; *Coleman v. Robertson*, 17 Ala., 84; *Gamble v. Gamble*, 39 Barb. [N. Y.], 373; *Trumbull v. Gibbons*, 2 Zab. [N. J.], 117; *Rutherford v. Morris*, 77 Ill., 397.) The instructions are well supported by authority. (*Pierce v. Pierce*, 38 Mich., 412; *Latham v. Udell*, 38 Id., 238; *Wallace v. Harris*, 32 Id., 380; *Harring v. Allen*, 25 Id., 505; *Brick v. Brick*, 66 N. Y., 145; *Children's Aid Society v. Loveridge*, 70 Id., 387, 394; *Gardiner v. Gardiner*, 34 Id., 155; *Monroe v. Barclay*, 17 O. St., 302; *Rabb v. Graham*, 43 Ind., 1; *Carpenter v. Calvert*, 83 Ill., 62; *Roe v. Taylor*, 45 Id., 485; *Pingree v. Jones*, 80 Id., 177; *Yoe v. McCord*, 74 Id., 33; *Tawney v. Long*, 76 Pa. St., 106; *Jackman's Will*, 26 Wis., 104; *McKeone v. Barnes*, 108 Mass., 344; 1 Jarman, Wills, 36, 131, 144; *McIntire v. McConn*, 28 Ia., 480; *Rankin v. Rankin*, 61 Mo., 295; *Latham v. Schaal*, 25 Neb., 535; *Bradford v. Vinton*, 26 N. W. Rep. [Mich.], 401; *Rutherford v. Morris*, 77 Ill., 410.

NORVAL, J.

In 1888, Margaret A. Fedawa presented to the county court of Lancaster county, for probate, the last will and

testament of John A. Fedawa, deceased. Due notice was given, as required by law, to all persons interested. J. A. M. Fedawa, Milton Fedawa, and Lorinda Seebrock, children of the deceased, contested the will. N. C. Abbott, Esq., was appointed by the county court the guardian *ad litem* of Tilly May Fedawa, Flora Belle Fedawa, Florence Dale Fedawa, and Jay Gould Fedawa, minor children and heirs of the deceased. Upon the hearing, the county court admitted the will to probate and record. The contestants appealed from this order and judgment to the district court, where issues were formed. The contestants, in their answer, admit the execution of the will, but allege that it is invalid, for two reasons: First, because the testator, at the time of its execution, was incompetent to make a valid will, caused by long, continued, and excessive use of intoxicating liquors. Second, because its execution was procured by fraud and undue influence. At the May, 1889, term of the district court, the case was tried to a jury. A verdict was returned that the paper produced was the last will and testament of John A. Fedawa, deceased. The contestants filed a motion for a new trial, which was overruled, and a judgment was entered authorizing the probate of the will, and awarding costs against the estate. The contestants prosecute a petition in error to this court.

The testator, John A. Fedawa, died about the 1st day of February, 1888, leaving a widow, the proponent of the will, and seven children, three by his first wife, the contestants, and four by the proponent. In 1861 the mother of the contestants procured a divorce from the deceased, in the state of Michigan. The contestants remained with their mother, and the deceased subsequently went into the army. He came to Lincoln, Nebraska, in 1867 or 1869, where he resided until his death. In September, 1873, he was married to the proponent in the city of Lincoln. He then had but little property. At the time of his marriage to the proponent, Mrs. Fedawa had $500, which shortly

afterwards she gave to her husband. Subsequently he purchased the National hotel, situated on P street, in the city of Lincoln, for the stipulated price of $5,000, paying down $500, and gave a mortgage on the property for the balance. He moved into the hotel with his family, made it his home, and carried on the hotel business there until his death. He also invested in other city property, improving the same, which rapidly increased in value. Mrs. Fedawa, being industrious and economical, his accumulation of property was, in part, due to her efforts. The deceased, for several years prior to December, 1886, was a hard drinker; at times he was so dissipated that he neglected his business. When intoxicated he was ill-tempered and quarrelsome, making it necessary at times to call the police officers to care for him. In 1883 Mr. Fedawa gave a mortgage to pay for some improvements upon the property. To induce his wife to execute the mortgage he gave her a bill of sale of some furniture, and an assignment of the rents of certain other property. In March, 1886, he gave another mortgage, and to induce his wife to join with him in its execution, he assigned her the rentals on the restaurant and the barber shop for a period of five years. Mr. Fedawa then had left as income the rentals of a lunch stand and part of the moneys from the hotel. In 1883 he made a will giving all of his property to his wife, of which fact she was afterwards informed. In January, 1887, Mr. Fedawa went to the Hot Springs, Arkansas. Before going he made another will, the one offered for probate, which bears date December 29, 1886. By this will he gave his wife, the proponent, his personal estate, also the real estate, during her widowhood, or until his son Jay Gould reaches his majority, then the real estate was to be divided equally between the four children by his last wife. It also gave $25 to each of the contestants, the children by his first wife.

After the jury was selected and sworn, and before the

introduction of any testimony, the contestants requested that they be allowed to open the case to the jury, and to first introduce their testimony, also to open and close the argument on the issues joined. The court denied the application and the contestants excepted.

The proponent called A. F. Parsons and F. C. Harrison, the subscribing witnesses, who testified to the execution of the will and the mental capacity of the testator. The proponent then rested her case. The contestants thereupon asked that she be required to put in all her testimony, as to the testamentary capacity of the testator, before the contestants introduce any testimony. The order asked for being refused, the contestants took an exception, and then put in their testimony, which tended to show the incapacity of the testator when the will was executed, and that the wife procured its execution by undue influence. After the contestants rested, the proponent, over their objection and exception, offered general evidence to sustain the will. These rulings of the court are assigned for error.

Whether the order of proof adopted by the trial court was the proper one, depends upon the correct answer to the question, Was the burden upon the proponent to prove the execution of the will and the sanity of the testator?

Sec. 123 of chapter 23 of the Compiled Statutes of 1889 provides: "Every person of full age and sound mind, being seized in his own right of any lands, or any right thereto, or entitled to any interest therein descendable to his heirs, may devise and dispose of the same by his last will and testament, in writing; and all such estate not disposed of by will shall descend as the estate of an intestate, being chargeable in both cases with the payment of all debts."

It cannot be doubted from the reading of this section that to entitle a person to dispose of his property by will, it is essential that at the time he should be of sound mind. It is urged by the contestants that as the law pre-

sumes sanity until the contrary is established, the proponent was not required to offer any testimony until after this presumption was overcome by competent evidence. In other words, had no testimony been offered by either party, the will was entitled to probate. In determining this question, it is necessary to consider the provisions of the statute governing the probate of wills.

Section 140 makes it the duty of the county court having jurisdiction of the same, to fix a time and place for the proving a will and to cause public notice thereof to be given.

Section 141 provides: "If no person shall appear to contest the probate of a will at the time appointed for that purpose, the court may, in its discretion, grant probate thereof on the testimony of one of the subscribing witnesses only, if such a witness shall testify that such will was executed in all the particulars as required in this chapter, and that the testator was of a sound mind at the time of the execution thereof."

Section 142: "If none of the subscribing witnesses shall reside in this state at the time appointed for proving the will, the court may, in its discretion, admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will, and, as evidence of the execution of the will, may admit proof of the handwriting of the testator, and of the subscribing witness."

Thus it will be seen that, under the provisions of the sections above quoted, a will cannot be admitted to probate, even when no contest is entered, until it is established by the testimony that at the time of its execution the testator was of sound mind. The fact that the will is contested certainly does not change the burden, and require a contestant to first offer testimony as to the insanity of the testator. It is the duty of the proponent in the first instance to offer sufficient testimony of the capacity of the testator to make out a *prima facie* case. The contestant

will then introduce his proof to show the invalidity of the will; after which the proponent may introduce further testimony to sustain the will, as well as rebutting testimony. During the entire trial the burden of proof remains with the proponent. Unless the sanity of the testator be established by a preponderance of the testimony, the will cannot be admitted to probate and record.

The order of proof in this kind of a case is not different from that in an action upon a promissory note, when its execution is denied. The plaintiff, when the execution of the note is contested, is only required in the first place to make a *prima facie* case, prove the formal execution. He is not compelled to produce in the opening all of his testimony in support of his case, but after the defendant has put in all his evidence tending to show that he did not execute the note, the plaintiff may go fully into the question with his evidence, and the defendant may then reply by rebutting testimony. The burden, however, is upon the plaintiff to establish the making of the note. (*Donovan v. Fowler*, 17 Neb., 247; *First Nat'l Bank v. Carson*, *ante*, 104.)

The rule undoubtedly is that, in actions upon contracts, the law presumes the sanity of the parties, and no proof of sanity is required until evidence of unsoundness of mind has been given, and the same rule would obtain in this class of cases, were it not for the express provisions of the statute. The legislature regarded this legal presumption alone insufficient to admit a will to probate. Counsel contend that the same rule does not obtain on appeal to the district court as exists at the hearing in the county court. We do not consent to this. The appeal vacates the judgment of the county court, the case is tried in the district court *de novo*, and if no proof is offered by the proponent, she must fail. Before the close of the trial, the contestants evidently became convinced of the unsoundness of their position, for they asked the court by their third request, to instruct the

jury that the burden of proving the sanity of the testator was upon the proponent. This instruction was given as requested.

A similar question arose in the case of *Kerr v. Lunsford*, 31 W. Va., 679. The court in the opinion says: "But inasmuch as in issues *devisavit vel non* the burden of proving the sanity of the testator is on the proponent of the will, and the issue being 'whether the paper writing is the last will and testament of the testator,' and as the will may be assailed on any and all the grounds, which would show it invalid, it would not promote justice to apply the rule applicable to ordinary law issues. How are the proponents to know what kind of testimony, and how much, the contestants have to prove their general charges of want of capacity and undue influence? What particular objections and evidence may be offered to sustain such general charges can only be known as the evidence is developed. * * * In the trial of an issue *devisavit vel non*, it is the proper course to pursue for the proponents to offer the will and the evidence of its due execution, and the competency of the testator at the time it was executed, and then, having made a *prima facie* case, to rest; and after the contestants have offered their evidence against the validity of the will, it is proper to permit the proponents to offer other evidence to sustain the will, as well as evidence in rebuttal of the evidence of the contestants."

Williams v. Robinson, 42 Vt., 658, was an appeal from the decree of the probate court, admitting to probate an instrument purporting to be the last will and testament of one John Robinson, deceased. The contestants claimed that the testator was of unsound mind. On the trial in the appellate court the jury was instructed that the burden of proof as to the incompetency of the testator was upon the contestant. This instruction was held by the supreme court to be erroneous.

The supreme court of Michigan, in *Taff v. Hosmer*, 14

Mich., 309, *Aiken v. Weckerly*, 19 Id., 482, and *Kempsey v. McGinniss*, 21 Id., 123, sanctioned the rule adopted by the trial court in this case.

The statutes of wills in Massachusetts declare that a person must be of sound mind in order to make a valid will. In *Crowninshield v. Crowninshield*, 2 Gray, 527, the supreme court of that state had under consideration the question upon whom was the burden of proof, and in the opinion says: "When therefore a will is offered for probate, to establish it, to entitle it to such probate, it must be shown that the supposed testator had the requisite legal capacities to make the will, to-wit, that he was of full age and of sound mind, and that in the making of it the requisite formalities have been observed. The heirs at law rest securely upon the statutes of descents and distribution, until some legal act has been done by which their rights under the statutes have been lost or impaired. Upon whom then is the affirmative? The party offering the will for probate says in effect: 'This instrument was executed with the requisite formalities by one of full age and of sound mind, and he must prove it; and this is to be done, not by showing merely that the instrument was in writing, that it bears the signature of the deceased, and that it was attested in his presence by three witnesses, but also that it was signed by one capable of being a testator, one to whom the law had given the power of making disposition of his property by will.'"

Beazley v. Denson, 40 Tex., 416, was a contested will case. The trial court charge the jury that "every man is presumed by law to possess a sound mind until the contrary be shown by evidence." This instruction was held erroneous. Mr. Justice McAdoo, in delivering the opinion of the court, observes: "In matters of probate, under our law, no such presumption is indulged. On the contrary, in order to establish any will it must affirmatively appear that the deceased was of sound mind when he signed the will.

This affirmative testimony would be necessary if there were no contest, and the law does not justify the imposition of a new rule when by a contest the soundness of the testator's mind is in issue."

In *Potts et al. v. House*, 6 Ga., 324, the court says: "The real question to be decided in both courts in this case was, whether there was a valid will. The executor and those who claim under it, hold the affirmative. They must not only prove, therefore, that the instrument purporting to be a testamentary paper was formally executed, but, also that the testator was of sound and disposing mind and memory. The necessity for this proof imposes the burden on the propounder to begin and close; and when the case is carried up to the superior court by appeal it is to be proceeded with in the same manner as though it had been brought there directly without having been before any inferior tribunal. The executor and those who claim under the will, are as much bound to establish it in the superior court, after the appeal, as they were before the appeal in the court of ordinary. In both they take the affirmative."

That the burden is upon the proponent of a will to prove the sanity of a testator is fully sustained by the following authorities: *Knox's Appeal*, 26 Conn., 20; *Gerrish v. Nason*, 23 Me., 438; *Robinson v. Adams*, 62 Id., 369; *Evans v. Arnold et al.*, 52 Ga., 163; *Delafield v. Parish*, 25 N. Y., 9; *Perkins v. Perkins*, 39 N. H., 163; *Syme v. Broughton*, 85 N. Car., 367; *Renn v. Samos*, 33 Tex., 760; *Williams, Executor, v. Robinson*, 42 Vt., 658; *Runyan v. Price*, 15 O. St., 6.

We concede that the numerous authorities cited in the brief of the plaintiffs in error, hold that the burden is upon the contestant to establish the insanity of the testator. An examination, however, of the cases disclose that many of them are from states having no statutory provisions like ours, while others were actions brought to set aside a will

after it had been admitted to probate. They are, therefore, not applicable to the case we are considering.

It is insisted by the plaintiffs in error, that, as the petition fails to allege the competency of the testator at the time the will was executed, the proponent was not called upon in the first instance to offer proof that the deceased was of sound mind. It was not necessary that the petition should allege specifically that the testator possessed the testamentary capacity to make a will. That is covered by the allegation in the petition "that said instrument is the last will and testament of said John A. Fedawa, deceased, and that the same was duly executed," etc. Unless Fedawa was of sound mind, the instrument was not his will. (*Hathaway's Appeal*, 46 Mich., 327.)

Again, the record discloses that there are three minor heirs of the deceased who appear by guardian *ad litem*. They did not, nor could they, waive proof of the execution of the will and the sanity of the testator. This is an additional reason why the proponent was required in this case to make the statutory proof.

Having reached the conclusion that the affirmative was upon the proponent to prove the sanity of the testator, then it follows that she was entitled to open and close the argument to the jury. (Code, sec. 1010*a*; *Vifquain v. Finch*, 15 Neb., 507; *Osborne v. Kline*, 18 Id., 351; *Brooks v. Dutcher*, 22 Id., 655; *Olds Wagon Co. v. Benedict*, 25 Id., 375; *Mizer v. Bristol*, *ante*, 138.)

The giving of the proponent's 14th request is assigned for error. By it the jury were told "that the fact that the testator, Fedawa, devised property which he did not own should not prevail as positive evidence showing incompetency." It was admitted upon the trial that Fedawa never owned lot 4, described in the will, but did own lot 3 in the same block which was not included in the will. The criticism offered upon the instruction consists in the using of the word positive. That the will describes lot 4 which the tes-

tator did not own, and omitted lot 3 which he did own, was not a very strong circumstance, if any, supporting the theory of the incompetency of testator. Mistakes in drawing contracts and papers are of frequent occurrence among the shrewdest of business men. The fact that the will contained a misdescription of the lot is certainly not conclusive evidence of the insanity of the testator. By instruction No. 11½, given at the request of the contestants, the jury were informed that they could take into consideration the fact that the testator did not own lot 4 mentioned in the will, in determining his capacity to make a valid will. Taking the two instructions together we do not see how the jury could have been misled by the use of the word "positive," in the instruction complained of.

No other particular instruction is objected to. Some criticisms are made upon the charge as a whole. It is claimed by the contestants that none of the instructions stated what would constitute undue influence. A very good definition of the term is to be found in paragraph 6 of the instructions, given by the trial court on its own motion. It states that "undue influence is that which compels or induces the testator to do that which is against his will, from fear, the desire of peace, or some feeling which he is unable to control. The influence which will vitiate a will on the ground of undue influence, must amount to such a degree of restraint and coercion as to destroy the testator's free agency." This was in substance repeated in the fifth, ninth, tenth, and twelfth requests of the proponent. Besides, the contestants' ninth request specifically mentioned some of the acts relied upon in this case to show undue influence, and it informed the jury that if such acts were established by the testimony the will should be rejected. The jury were fully informed what would and what would not constitute undue influence. It runs through the instructions that, if the proposed will did not represent the free and voluntary wishes of the testator, but

those of some other person, it was inoperative and void. To vitiate a will on the ground of undue influence, it must appear that such influence forced the testator to make a different disposition of his property from what he intended, and that such influence was exercised for that purpose. (*Latham et al. v. Schaal*, 25 Neb., 535; *Bradford v. Vinton*, 26 N. W. Rep., 401; *Jackman's Will*, 26 Wis., 104; *Monroe v. Barclay*, 17 O. St., 302; *Gardiner v. Gardiner*, 34 N. Y., 155; *Pierce v. Pierce*, 38 Mich., 412.) The instructions fully and fairly submitted to the jury the question of undue influence, and the contestants have no just cause of complaint in that respect.

In some of the instructions it was stated, in substance, that influence acquired over the testator by kindness and wifely attention, will not vitiate the will. It is insisted that there is no evidence in the record on which to base such an instruction. True, there is a great mass of testimony conducing to show that at times the domestic relations of Fedawa and his wife were not of the most pleasant character; that they sometimes quarreled, and that the police had to be called to quell the disturbance. It also appears that these difficulties generally occurred when Fedawa was under the influence of liquor. When sober, the family relations were peaceable and pleasant, and the proponent treated him with kindness and affection. That the testator and his wife had a strong attachment for each other, clearly appears from the letters in the record written by him to her from the Hot Springs, shortly after the making of the will. They are full of expressions of love and affection for the proponent and her children. There was ample testimony before the jury making the instructions criticised, pertinent and proper.

We are asked to reverse the case because the same proposition of law was more than once stated in the court's charge to the jury. While the instructions contain some repetitions, it does not appear that the purpose was to mys-

tify and confuse the jury, or that the jury could have been misled by reason thereof.

The contestants claim that the district court erred in refusing to give to the jury their twelfth and thirteenth requests, which are as follows:

"12. The jury are instructed that undue influence is a variable term. What would be undue influence, where the testator's mind was impaired, might not be undue influence if the testator possessed the full vigor of mind and body. It depends upon the power of the testator to resist. To be undue it requires greater or less influence in each particular case, according to the condition of the testator, or his power to resist. In case the testator's mind is seriously impaired from any cause, slight influence, if sinister or selfish, would be undue. If the provisions of the will are found to be unnatural or unusual, this should be taken into consideration in determining whether or not it is the product of undue influence, and if the party or parties, in whose interest the alleged undue influence was exerted, are found to be liberally provided for, to the exclusion of others who were the natural objects of the testator's bounty, this would be one indication of the presence of undue influence, and if followed up by evidence tending to show that advantage was taken or improper influence brought to bear upon the testator at and prior to the time of making the alleged will, this would justify you in finding that it was not his will.

"13. A proposed will which is partial and unjust in its provisions and devoid of natural duty and affection towards natural objects of the testator's bounty is by the law regarded with jealousy and suspicion, even though the testator may possess sufficient capacity to make a valid will, if left to himself."

The substance of the first part of the twelfth request was incorporated in the seventh instruction given on the court's own motion, which directed the jury, in determin-

ing whether or not the will was obtained by undue means, to consider all the testimony bearing upon the mental and physical condition of Fedawa when he executed the instrument, and all the circumstances surrounding him at that time. The last part of the twelfth, as well as the thirteenth requests were fully covered by the contestants' eighth instruction. It stated that the second wife and her children having been provided for in the will, and the children of the former wife being neglected, was strong evidence of undue influence. We do not desire to be understood as indorsing the proposition, that where a testator has liberally provided for some of his children by his will, to the exclusion of others, it is an indication that the will was the result of undue influence. A testator has a perfect legal right to dispose of his property as he sees fit. It is for him alone to determine who shall be the recipient of his bounty. As the twelfth and thirteenth requests were no more favorable to the contestants than the instructions given, it is unnecessary to determine whether the fact that the contestants were practically disinherited, and the proponent and her children get the bulk of the property, is any evidence that the testator was unduly influenced.

It is insisted that the court erred in sustaining the proponent's objections to the hypothetical questions propounded to Dr. Lane, calling for his opinion as to the mental capacity of Fedawa on the facts assumed by the interrogatories. When the objections were sustained, the contestants should have stated to the trial court what facts the witness, if permitted, would testify to, and preserved the same in the record. Not having done so, we are unable to determine whether any error was made in not permitting the witness to answer the interrogatories propounded.

It is finally insisted that the verdict is not sustained by the evidence. The testimony in the record before us, bearing upon the incapacity of the testator and the charge of undue influence, is very voluminous, consisting of sev-

eral hundred type-written pages. To give a synopsis of the entire testimony, or to discuss it in detail, would greatly extend this opinion beyond its now unreasonable length. It must suffice to briefly refer to some of the material parts of the testimony as indicative of the nature of the testimony that was before the jury.

The will bears date December 29, 1886. Prior to that time Fedawa drank to excess, and when intoxicated was incapable of transacting his ordinary business. It is claimed by the contestants that the will was executed on the day it bears date, which is denied by the proponent. Considerable testimony was introduced by the contestants tending to show that on the 29th day of December, 1886, Fedawa was arrested for an alleged assault, and was taken before the police judge at 2 o'clock P. M. that day; that being too drunk to be tried, he was committed to jail until the following day, and that at no time on that day, nor for some time prior thereto, was he capable of transacting business, on account of his drunken condition. It is pretty clear that if the will was executed on the day that it bears date, it is invalid. The proof offered by the proponent, tends to establish that the will was executed after December 29; that when Fedawa signed the will he was sober though weak and nervous, had perfect possession of his mental faculties, and understood the nature of the business he was transacting.

A. F. Parsons, one of the subscribing witnesses, testified that he was present when the instrument was signed; that Fedawa was very nervous, his hands trembled while signing his name; that he conversed as a person of sound mind and understanding, as intelligently as any one; that his mind was perfectly clear; that he was not intoxicated, and understood what he was doing. The witness further states that Fedawa was brought before him as police judge on December 30, and plead guilty to an assault, and that the will was signed two or three days afterwards.

The testimony of F. C. Harrison, the other subscribing witness, fully corroborates the testimony of the witness Parsons. There appears in the bill of exceptions, the testimony of Mrs. Fedawa and numerous other witnesses, sustaining the capacity of the testator to make a valid will. The testimony fully justifies the conclusion that the will was executed after the day it bears date, and after Fedawa was discharged from jail. There was likewise before the jury testimony given by credible disinterested witnesses, sufficient to authorize the jury in finding that when the will was executed the testator was sober, comprehended what he was doing, and was capable of making a valid will.

The only remaining question is, Did the proponent induce her husband by undue influence to dispose of his property contrary to his wishes and desires? It devolved upon the contestants to establish, by a preponderance of the evidence, their charge of undue influence. (*Baldwin et al. v. Parker et al.*, 99 Mass., 79; *Hardy v. Merrill*, 56 N. H., 227; *Tyler v. Gardiner*, 35 N. Y., 559; *McMechen v. McMechen*, 17 W. Va., 683.)

It appears from the testimony that shortly prior to the execution of the will, Fedawa expressed a desire to go to the Hot Springs for treatment, he being at that time almost a physical wreck. He did not have the money to pay the expenses of the trip, his creditors were pressing him, his property was incumbered, and most of his income had been assigned to his wife. She had then nearly $3,000 in the bank. After the will was executed, the proponent furnished Fedawa $550 with which to pay the expenses of the trip, and to lift some claims against him that were being pressed for payment. There is considerable testimony tending to show that she refused to furnish the money unless he willed his property to her and her children, and that the disposition made of the property by this will was contrary to the previously expressed wishes

of the testator. Numerous witnesses were called by the proponent, who testified that they had frequently heard the testator say that his wife had helped earn the property; that he wanted it to go to the proponent and her children, and that he would not give the contestants any part of his estate. It is undisputed that Fedawa in 1882 or 1883 made a will by which he gave all his property to the proponent. This will was left with C. C. Burr for safe keeping. At that time it is certain that Fedawa was of sound mind, and it was not the result of any improper influence. A year or two after its execution, Mr. Burr informed the proponent that her husband had willed her all of his property. The proponent denies under oath that she asked him to make the will, or that she refused to let him have the money if he did not give her and the children his property. While her testimony is contradicted by some of the contestants' witnesses, she is corroborated by many circumstances disclosed by the testimony.

Prior to the making of the instrument offered for probate, the first will had not been revoked or destroyed. It was far more favorable to the proponent than the last one. It is not likely that she coerced Fedawa to make one less favorable to her. Again, if the last will did not truly express his wishes, why did he not make another? He lived several months after it was executed, and had ample opportunity to revoke or change it. He could have done so while at the Hot Springs, away from the influence of his wife. Not having revoked it, is a strong circumstance in favor of the validity of the will. The testimony is very conflicting. The testimony offered by the proponent was sufficient to warrant the jury in finding that the testator was of sound and disposing mind when he made the will, and that the making of it was not brought about by any undue influence. There was sufficient testimony offered by the contestants, if believed, to have sustained a verdict in their favor, had one been returned. The jury having

given credit to the testimony of the proponent and her witnesses, and the judge who presided at the trial having indorsed the finding of the jury, by refusing to set the verdict aside, we are not justified under the evidence in disturbing it. The judgment is

AFFIRMED.

THE other judges concur.

SOUTH OMAHA NATIONAL BANK, APPELLEE, V. J. O. CHASE ET AL., APPELLANTS.

[FILED SEPTEMBER 24, 1890.]

1. **Supreme Court:** OBJECTIONS NOT RAISED BELOW. The objection that the plaintiff, which sought to establish a lien upon certain personal property in the hands of D. as the property of C., a judgment debtor of the plaintiff, was, as to the property, only a general creditor of C., it not having attached the same, the question not having been raised in the trial court; *held*, that it would not be heard when raised for the first time, in this court on appeal.
2. **Chattel Mortgages:** FRAUD. In view of the finding and judgment of the trial court, the evidence of the defendant D. *held* to be insufficient to remove the presumption of fraud cast upon the chattel mortgage executed by C. to D., by the provisions of section 11 of chapter 32, Comp. Stats.
3. **Construction:** THE STIPULATION between the parties, set out at length in the opinion, *held* to recognize the right of D. to bid off any property at the sale the same as any bidder, and that it was the money represented by such bid, and not the property sold, that he was required to hold upon the same terms that the proceeds of the sale were to be held by the bank.
4. **The decree** modified accordingly.

APPEAL from the district court for Fillmore county. Heard below before MORRIS, J.

Maule & Sloan, and *Harwood, Ames & Kelly*, for appellants, cited: *Tootle v. Dunn*, 6 Neb., 93; *Parmer v. Keith*, 16 Id., 91; *Hinde's Lessees v. Longworth*, 11 Wheat. [U. S.], 213*; *Stoll v. Gregg*, 23 Neb., 231; *Stoddard v. McLane*, 56 Mich., 11; *Newman v. Willetts*, 52 Ill., 98; *McKibben v. Barton*, 1 Mich., 213; *Jones v. Green*, 1 Wall. [U. S.], 331; *Weil v. Lankins*, 3 Neb., 385; *McElwain v. Willis*, 9 Wend. [N. Y.], 549; *Chicago Dock Co. v. McKenzie*, 49 Ill., 289; *Eiseley v. Malchow*, 9 Neb., 174; *Rickards v. Cunningham*, 10 Id., 417; *Cahill v. Bigelow*, 18 Pick. [Mass.], 369; *Hall v. Soule*, 11 Mich., 494; *Bohannon v. Pace*, 6 Dana [Ky.], 194; *Garrett v. Garrett*, 27 Ala., 687; *Huffman v. Ackley*, 34 Mo., 277; *Houser v. Lamont*, 55 Pa. St., 311; *Beal v. Brown*, 13 Allen [Mass.], 114; *Standley v. Miles*, 36 Miss., 434; *Marden v. Babcock*, 2 Met. [Mass.], 99; *Emerson v. Slater*, 22 How. [U. S.], 28; *Clopper v. Poland*, 12 Neb., 69; *Nelson v. Boynton*, 3 Met. [Mass.], 396; *Fitzgerald v. Morrissey*, 14 Neb., 199; *Mills v. Brown*, 11 Ia., 314; *Mallory v. Gillett*, 21 N. Y., 412.

Charles Offutt, contra, cited: *Downie v. Ladd*, 22 Neb., 534; Maxwell, Pl. & Prac. [4th Ed.], 607; *Lounsbury v. Catron*, 8 Neb., 477; *Burnham v. Doolittle*, 14 Id., 217; *Carty v. Fenstemaker*, 14 O. St., 461; *Brashear v. West*, 7 Pet. [U. S.], 608; Drake, Attachment [4th Ed.], 453; *Burlingame v. Bell*, 16 Mass., 318; *Swett v. Brown*, 5 Pick. [Mass.], 178; 2 Wade, Attachments, 331, 333; *Smith v. Sands*, 17 Neb., 498; 2 Pomeroy, Eq. Juris., 745, 785; Wharton, Ev. [3d Ed.], 1014; *Clopper v. Poland*, 12 Neb., 70; *Nelson v. Boynton*, 3 Met. [Mass.], 396; *Fish v. Hutchinson*, 2 Wils. [Eng.], 94; *Jackson v. Rayner*, 12 Johns. [N. Y.], 291; *Robison v. Uhl*, 6 Neb., 328; *Uhl v. Robison*, 8 Id., 272; *Eiseley v. Malchow*, 9 Id., 180; *Lloyd v. Strobridge*, 10 Chicago Leg. News, 1; *Ely v. Ormsby*, 12 Barb. [N.Y.], 571; *Davis v. Caverly*, 120 Mass., 415; *Mallory v. Gillett*, 21 N. Y., 412; *Farley v. Cleve-*

land, 4 Cow. [N. Y.], 432; *Wills v. Brown*, 118 Mass., 138; *Case v. Citizens Bank*, 2 Woods [U. S.], 23; *Gatch v. Fitch*, 34 Fed. Rep. [U. S.], 566–70; *Irons v. Nat'l Bank*, 6 Bissell [U. S.], 301; *U. S. v. Knox*, 102 U. S. S. C. Rep., 422; Ball, Nat'l Bks., 231; *Kennedy v. Gibson*, 8 Wall. [U. S.], 506; *Hooker v. Hammill*, 7 Neb., 235; Wait, Fraud. Con., 223; *Seymour v. Wilson*, 19 N. Y., 418; *O'ivet v. Moore*, 23 O. St., 479; *Starr v. Starr*, 1 O., 321; Bump, Fraud. Con., 76–100; *Gregory v. Whedon*, 8 Neb., 377.

COBB, CH. J.

1. The South Omaha National Bank was a creditor of Julius O. Chase and J. W. Walters, and obtained a judgment against them, in the district court of Douglas county, for the sum of $2,967.48, with costs. On the 3d day of November, 1888, an execution was issued upon said judgment to the sheriff of said county, which was on the 26th day of said month returned by said sheriff wholly unsatisfied, for the want of property whereon to levy the same.

2. On the 5th day of November, 1888, a transcript of said judgment was filed in the office of the clerk of the district court within and for the county of Fillmore, and docketed and indexed, that being the county in which the said Chase and Walters resided and still have their residences. On the last named date an execution was issued thereon to the sheriff of said county of Fillmore, and the same was by said sheriff afterwards, and before the return day thereof, by the said sheriff returned "No property found;" no part of said judgment having been paid, except the sum of $186.90, as of November 7, 1888, and the further sum of $300.15 as of January, 1889, and the costs and increased costs on said judgment have amounted to $75, and the remainder of said judgment remained wholly due and unpaid.

3. On the 21st day of March, 1889, the plaintiff caused another alias execution to issue on said judgment, directed to the sheriff of Fillmore county, and the same was by said sheriff, before the return day thereof, returned "No property found."

4. On the 15th day of March, 1889, the plaintiff caused a precept to be issued by the clerk of the district court of Fillmore county, under the seal thereof, directed to the sheriff of said county, commanding him to notify William H. Cooksey, Julius O. Chase, William S. Hogaboom, Hattie E. Chase, O. M. Druse, and J. W. Walters, defendants, that they have been sued by the South Omaha National Bank, plaintiff, in the district court of the fifth judicial district in and for said county of Fillmore, and that unless they answer on or before the 15th day of April, 1889, the petition of said South Omaha National Bank, filed against them in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly. Said sheriff was ordered to make due return of said summons on or before the 25th day of March, 1889. Said precept was indorsed as follows: "The relief sought is equitable, and on attachment by garnishment after judgment, and return of no property on execution, in the event of failure to answer, the plaintiff will take judgment for $2,967.48, with 10 per cent interest from September 17, 1888, until paid, credited by $186.90 paid November 2, 1888, and $300.15 paid January 12, 1889, and, in addition, for $53.73, increased cost and the costs of this action," and was returned by the said sheriff personally served on the said William S. Hogaboom, Harriet E. Chase, O. M. Druse, J. W. Walters, William H. Cooksey, and the said Julius O. Chase, by leaving a certified copy at his usual place of residence. And on the 25th day of March, 1889, the said bank also caused another precept to be issued by the clerk of said court, and under the seal thereof, directed to the sheriff of said county, in and by which said sheriff was

commanded to notify O. M. Druse, Harriet E. Chase, and William S. Hogaboom to appear in the district court of Fillmore county on the 28th day of May, 1889, to answer under oath questions touching the goods and chattels, rights and credits of Julius O. Chase in their possession or under their control, which precept was indorsed the same as the one hereinbefore set out, and was returned by the sheriff of said county as personally served by copy on each of O. M. Druse, William S. Hogaboom, and Harriet E. Chase, and also that he served upon each of said persons a written notice to appear on the 28th day of May, 1889, and answer as in said precept required.

On the 28th day of May, 1889, the said plaintiff filed its amended petition in the said district court of Fillmore county, in and by which it set out and stated the several facts and matters and things which are stated in the three first paragraphs of this opinion, and in addition thereto the following, in substance: That the defendants Julius O. Chase and J. W. Walters, and each of them, are wholly insolvent and have no property whatever liable to execution to satisfy the same; but, as plaintiff believes, they have moneys, rights, credits, and equitable interests in property, both real and personal, and which they, and each of them, unjustly refuse to apply in satisfaction of plaintiff's judgment.

That on the 11th day of September, 1888, the defendant Julius O. Chase made a certain chattel mortgage of that date, which, on the 12th day of the same month, was filed in the office of the clerk of Fillmore county, in and by which he undertook to mortgage to his co-defendant, O. M. Druse, in order to secure an alleged indebtedness of $3,600, payable on September 11, 1889, the following described personal property, to-wit: Sixty-five thoroughbred Hereford cows, bulls, and calves; twenty colts; one-half interest in one Cleveland bay stallion, Coachman 2d; one black stallion named Bertie McGregor; one sorrel gelding, Charlie.

That on the 6th day of December, 1888, the defendant Julius O. Chase made a certain chattel mortgage of that date, which was, on the 7th day of the same month, filed in the county clerk's office of said county, in and by which he undertook to mortgage to his co-defendant O. M. Druse, aforesaid, in order to secure an alleged indebtedness of $1,500, payable December 6, 1889, the following described property, to-wit: One black stallion named "Bertie McGregor;" one sorrel trotting horse named "Charlie;" one light bay mare; one black mare; twenty sucking colts; one-half interest in one Cleveland bay stallion, "Coachman 2d;" one Hereford bull, "Grove 4th A. 13733; sixteen head of Hereford calves; one top buggy; seven sets harness; one economizer, ten-horse power engine and boiler.

That the two above described mortgages, and each of them, were made without valuable consideration, and the defendant Julius O. Chase was not then indebted to the defendant Druse in the sum of $3,600 and $1,500, or any part of either of said sums; that said mortgages, and each of them, were made with the fraudulent intent to cheat, hinder, and delay the creditors of the said Julius O. Chase, and especially the plaintiff, and were absolutely null and void, and the defendant O. M. Druse did not, on the execution of said mortgage or any time thereafter, take possession of said mortgaged property, or any part thereof, until a few days next before the date of the presentation of said petition, when the said Druse fraudulently and unlawfully took forcible possession of said property.

(Several paragraphs in said amended petition are devoted to allegations involving charges against one Edmund McIntire, in connection with said Druse, but, as these allegations and claims and charges against the said McIntire were withdrawn and dismissed upon the trial, said paragraphs are omitted here.)

That said O. M. Druse has the property as above described in his possession, and claims the same as his own,

and refuses to permit the plaintiff to subject any part thereof to the satisfaction of its said judgment; that the same in fact and in equity belongs to the defendant Julius O. Chase, but cannot be sold under execution, because no one will bid for or buy the same, on account of the claim and possession of the defendant O. M. Druse thereof; that the plaintiff has good reason to and does believe that the said defendants, and each of them have property and are indebted to the judgment debtors, Julius O. Chase and J. W. Walters, in addition to the property in said petition before described, but that plaintiff is unable to give a more accurate description thereof; with prayer that the defendants O. M. Druse, Julius O. Chase, and J. W. Walters, and each of them, be required to answer, and disclose upon their several corporal oaths, what money, property, rights, credits, chattels, or other equitable interests, they, or either of them, have in their possession or under their control, belonging to the defendants Julius O. Chase and J. W. Walters, or either of them, or in which they, or either of them, have any right, title, or interest, legal or equitable, and that the same may by proper orders be subjected to the payment and satisfaction of the plaintiff's judgment aforesaid; that the said mortgages to the defendant, Druse, described in said petition, one dated September 11, 1888, and the other dated December 6, 1888, may be, each of them, held fraudulent, null, and void, and be canceled, set aside, and held for naught, and the property described and included in said mortgages as therein before named might be, each and every part thereof, adjudged the property of the defendant, Julius O. Chase, and liable for the satisfaction of the plaintiff's said judgment; that the defendants, and each of them, might be charged with whatever property, or legal or equitable interests in property, which they may have in their possession or under their control, in which the defendants, Julius O. Chase and J. W. Walters, or either of them, have any interest or claim, and for costs.

This petition was sworn to in positive form, by Chas. Offutt, as attorney for the plaintiff.

The defendant O. M. Druse made and filed his separate answer to said petition, in which he denied all of the allegations therein contained, except as to the corporate character of the plaintiff, and such allegations thereof as might be in his said answer thereafter admitted to be true. He alleged that the said Julius O. Chase was justly indebted to him in the sum of $3,500, and to secure said indebtedness, executed the mortgages mentioned in paragraphs four and five of the plaintiff's petition; that said mortgages were given in good faith and to secure a *bona fide* indebtedness; and that both of said mortgages were, immediately upon the execution thereof, filed in the office of the county clerk of Fillmore county; that there was then due the said defendant, from the said Julius O. Chase, on said indebtedness, the sum of $3,000; with prayer for judgment and costs.

The plaintiff replied to the answer of the defendant O. M. Druse, in which it denied that the defendant Julius O. Chase was justly or in anywise indebted to the defendant O. M. Druse in the sum of $3,500, or any other sum. It denied that, to secure said indebtedness, or any other indebtedness of the said Chase to the said Druse, the mortgages, or either of them, described in paragraphs four and five of the petition, were executed. It denied that said mortgages, or either of them, were given in good faith, or that they, or either of them, were given to secure *bona fide* existing indebtedness, and denied the answer generally.

On the 3d day of June, 1889, the plaintiff filed a supplemental petition, in which it alleged that after filing the original petition, to-wit, on the 16th day of March, 1889, the defendant O. M. Druse was about to sell a large portion of the chattels described in the original petition in foreclosure of said mortgages, dated September 11 and December 6, 1888, made by the defendant Julius O. Chase

to the defendant O. M. Druse, and had advertised the said property as provided by law, and the sheriff of Fillmore county, pending said chattel mortgage sale, had levied upon certain of said property, in satisfaction of state and county taxes; that then and there the plaintiff, being present by its attorney, made protest and objection to the said sale, or any part thereof taking place, whereupon the defendant O. M. Druse executed and delivered to the plaintiff a writing in words and figures as follows: "It is agreed that the property advertised for sale this day under chattel mortgage shall be sold as advertised by O. M. Druse and an account of each sale accurately kept, and that the proceeds, notes, and cash shall be deposited in the Capital National Bank at Lincoln, to remain there until the rights of the Omaha National Bank and O. M. Druse to each and every part thereof are finally determined and settled in suits in the Fillmore district court, which the undersigned agree to try at the coming May term of court. Said bank is not to pay out or dispose of any portion of said money or notes without the consent of all the undersigned. Out of the proceeds the actual expenses of this sale shall be at once paid by O. M. Druse before deposit. Neither party concedes or waives any right by this agreement. Any property bid off by O. M. Druse shall be held by him in the same terms with the notes and cash aforesaid in bank." Signed by the South Omaha National Bank, by its attorney, and by O. M. Druse, and dated March 16, 1889. That thereupon the said defendant proceeded with the said sale, and the following of said property was sold for the prices hereinafter named: (Here follows an itemized list of live stock and other chattels, together with the price at which each article was sold, followed by the allegation that shortly thereafter, to-wit, on the 26th day of April, 1889, the defendant O. M. Druse rendered to the plaintiff the following itemized statement of expenses incident to said sale, to-wit, tax, $151.39; constable's fee and expenses,

$24.80; printing, $15; metx (*sic*), $10; Druse for feed, $15; men for driving cattle in, $4.

That the defendant O. M. Druse received into his possession all the money aforesaid, amounting to the total sum of $130.75; that the said Druse received into his possession the joint note of the aforesaid * * * and * * * for $385; that the said Druse also bid off and took into his possession, of the aforesaid property, the following, that is to say: One bay mare; one horse, Charlie; one horse called Bertie McGregor; twelve colts, and four Hereford bulls, all of which he received, together with said cash and note, by virtue of the agreement thereinbefore set out (see copy); that since receiving the aforesaid property, the defendant Druse has retained the possession of all the said cash and the said note, except so much thereof as was used in paying the expenses and taxes aforesaid, and the defendant Druse, since said time, has sold and disposed of certain of the personal property so bid off by him, that is to say, the horse Bertie McGregor, for the sum of $600; whether any more, plaintiff is unable to state; that the defendant Druse acquired the possession of said property under and by virtue of the said written agreement, dated March 16, and that the same was included within the chattel mortgage made by defendant Chase to defendant Druse, as stated in the petition; that said mortgages, and each of them, were without any consideration made by the defendant Chase when he was insolvent, and when Druse knew him to be insolvent, and made by Chase with the intent to cheat, hinder, and defraud his creditors, and in fraud of their rights, and especially were they made to cheat and defraud the plaintiff, and which was well known to defendant Druse; with prayer for the relief prayed in the original petition, and that the defendant Druse may be compelled to account for all property bid in by him at the chattel mortgage sale, as stated, and to turn over to the plaintiff the amount of the consideration received by him

for any of said property which he may have sold since the 16th of March, 1889; that Druse in like manner may be charged with the amount of cash and notes received by him, as the proceeds of the chattel mortgage sale, and that an account may be taken between the plaintiff and the defendant Druse, under the agreement of March 16, 1889, as entered into, and for general relief.

The defendant Druse, in answer to the supplemental petition, admitted the first, second, and fourth paragraphs thereof, and in answer to the fifth paragraph stated that he sold the horse Bertie McGregor for $600, on time, and took a note or notes secured by mortgage.

There was a trial to the court, with findings that the judgment note of Hodges and Blanchard for $385, on deposit in the Capital National Bank at Lincoln, be delivered to the plaintiff to pass as a credit of that amount on its judgment debt of March 16, 1889, and that the remainder of the property enumerated, twelve colts, one bay mare, and four Hereford bulls, are the property of defendant J. O. Chase; and that the plaintiff has a lien thereon for the amount of its judgment debt, and that the same is liable to the satisfaction thereof; that the sheriff is ordered to sell said property, as upon executions at law, and bring the proceeds thereof into this court subject to the further order of the court, and a judgment for the plaintiff for the sum of $791.56, which was appealed to this court by the defendant Druse.

The third paragraph of appellant's brief is devoted to the proposition that neither the facts of the petition and supplemental petition, nor those proved on the trial, are sufficient to support the judgments, or, in the words of counsel, "support a creditor's bill." The ground of objection is two-fold: That the plaintiff made no levy of its writs of execution, or either of them, upon the chattels, the title to which it questions and seeks to have settled by its bill; that, in respect to such property, it is only a general cred-

itor of the defendant Chase, and that, under the adjudications of this court, and other courts, which it has followed, a plaintiff who is only a general creditor cannot maintain a creditor's suit. That this was the law, was well understood by the bank and its attorney, and for that reason it sought to give itself the character of an attachment creditor; but it is doubted that it carried its proceedings sufficiently far to avail itself of any resultant advantage, as it does not appear from the record that the defendant Druse, or any of the defendants, were ever called before the district court to make disclosures as garnishees; nor does it appear that the affidavit required as the foundation of proceedings in garnishment, either before or after execution, was made on behalf of the plaintiff. However, these observations are only made preliminary to the fact that the defendant Druse, whose rights only are involved in this appeal, seems to have waived all objection to the form of this action, and to all insufficiency in its inception, the nature of the remedy chosen by the plaintiff, indeed, everything, so far as the district court was concerned, and raises such objection only in the appellate court.

While it is not conceded that in a cause where the petition fails to state a cause of action the answer and defense of a party would waive such objection, yet that objection is not made here, much less in the court below, and especially as the point is not raised we will consider the petition as stating a cause of action; and therein will observe that in what respect these ancillary proceedings can be considered as helping it out is not perceived; but in view of the failure of defendant to make objection, or take any step in the trial court to test the sufficiency of plaintiff's proceedings, it will in this court, where the question is presented for the first time, be held that the point that the plaintiff was but a general creditor, and had obtained no special lien upon the chattels of J. O. Chase, does not arise.

In the case of *Shellenbarger v. Biser*, 5 Neb., 195, there was a principle involved akin to the present question, as to which this court, in the opinion by Mr. Justice MAXWELL, held that "a person claiming adversely to the title of the mortgagor, and prior to the execution of the mortgage, cannot properly be made a party, for the purpose of trying the validity of such adverse claim of title. But this rule does not exclude one who claims title, and, also, claims to hold a mortgage on the same premises, who submits his claims to the adjudication of the court, and asks that in case the court finds his title to the premises invalid, that he may have a decree for the amount due on the mortgage. These defenses are inconsistent, and, had a motion been made at the proper time, the defendant would have been compelled to elect on which he would rely. But the plaintiff joined issue with the defendant, denying the facts stated in his answer; and testimony has been taken by both parties, to establish the truth or falsity of the issues raised. It is therefore the duty of the court to consider all the questions at issue." This example was followed by *Lounsbury v. Catron*, 8 Neb., 469, and that of *Downey v. Ladd*, 22 Neb., 531, and is adhered to.

The following facts from the testimony of O. M. Druse appear from the bill of exceptions: In the year 1888, and for some time prior to that, J. O. Chase resided in Fairmont, Fillmore county, engaged in banking and breeding live stock. O. M. Druse resided in Lincoln, engaged in dealing in live stock, and was a shareholder in, and secretary of, the Lincoln Driving Park Association. They had been acquainted for five or six years, or longer. At this time Chase was the president, manager, and owner of a majority of the stock of the First National Bank at Fairmont. I quote directly from the testimony of Druse, as the shortest method of stating what is regarded as the facts in the case:

Q. Will you tell the arrangement and what occurred between you and Chase in regard to this land?

A. I was at Chase's place in June, 1886, and he told me he had a very fine piece of land, 240 acres, adjoining Fairmont on the southeast, and had been thinking of starting a horse ranch, but feared he had so much to handle that it was going to be a burden to undertake it, although he had an idea of running it if he could get some good man to take hold of it, and should like to have me. I remarked at the time that if I was able I would buy the place. He said that he would trade me the place if I had anything to trade for it. I said, "All I have is a little place here; my home, and my stock in the Driving Park." He asked what my home was worth, and I said, "I think about $3,000;" and he asked what the driving stock was worth, and I said from four to five thousand dollars. He said he would make a little inquiry about it and let me know. He went out and came back in a little while and said: "I will trade the farm for the stock in the Driving Park, and your home in South Lincoln; you can make the deed to the place out there, and you come to Fairmont and we will close the trade."

Q. What was said by him previously in regard to the deferred payment on the land?

A. That he would make the payment of that himself.

Q. Now at any of these conversations did he say anything about the bank?

A. No, sir, he never mentioned it; I made out the deed for the house and lot in South Lincoln; my wife had to sign the deed; I made the deed to J. O. Chase; I took it and went up to Fairmont, and he said, "We will take the deed and go up to Sloan's office and make out the papers." We went to Sloan's office, and Chase and I repeated the contract in agreement as near as we could to Sloan, and he drew up this contract (referring to defendant's Exhibit D); when I handed Chase the deed to the property in South Lincoln he looked at it and said, "I want you to make that deed to the bank;" so I put the deed in my

pocket and said I would make it to the bank when I got home, which I did, and sent it up there.

Q. Go right on, and tell what occurred in Sloan's office in regard to this contract.

A. When he mentioned bank, wanting the contract made to the bank, I said, Chase, this is a deal of ours, and not of the bank; I don't know anything about the bank; you are the man I had this deal with; he said, "I want to make this contract in the name of the bank." He agreed there that he owned pretty near all the stock in the bank, and that he had put some of the stock in the name of some parties to make them directors. He said that was all right, "I will see that these payments are made myself," and then I followed up by making the remark that "this is a deal between you and me."

Q. You signed this contract?

A. Yes, sir.

The contract referred to by the witness is as follows:

"This agreement, made this 6th day of July, 1886, by and between Marcella Druse and Otis M. Druse, her husband, of Lancaster county, Nebraska, parties of the first part, and The First National Bank of Fairmont, party of the second part, witnesseth: That for and in consideration of the mutual covenants and agreements hereinafter contained, The First National Bank agrees to assign, and by these presents does assign, to the said first parties a contract for the sale of the following described real estate, situate in Fillmore county, Nebraska, to-wit: The N. W. ¼ of sec. 32, Tp. 8, range 2 W. of the 6th P. M.; and also the N. ½ of the S. W. ¼ of said section, township, and range. The said contract of sale being described as follows: A contract from H. G. Bliss and M. E. Bliss, his wife, of Fillmore county, Nebraska, to Charles Warner, dated December 20, 1884, by which the said H. G. Bliss and wife agree to sell and convey the above described lands to Charles Warner, and which said contract was duly assigned

to The First National Bank of Fairmont by the said Charles Warner. And the said First National Bank covenants and agrees that at the time mentioned in said contract for the last payment on the same, to wit, January 1, 1888, that the said bank will make, execute, and deliver to the said first parties a good and sufficient warranty deed to the real estate hereinbefore described. And the said first parties, in consideration of the assignment of said contract of sale, agree to make, execute, and deliver to the said bank a good and sufficient warranty deed to the following real estate, to-wit: Lot number 5, in block 27, in South Lincoln, according to the plat on file in the clerk's office of Lancaster county, Nebraska, together with all the improvements thereon; and the said first parties agree to assign, and by these presents do assign, to the said bank one share, to-wit, No. 9 of the Lincoln Driving Park Company of Lincoln, Nebraska, said park containing 53 acres, more or less, the title to seventeen acres and a fractional part of an acre off the west side of said park being now in litigation. The said first parties agree that said litigation shall be conducted without expense to the said second party. It is further agreed that if the title to said seventeen acres and fractional part of an acre shall fail, then and in that case the said first parties shall pay the said second party the sum of $1,800; and it is further agreed that if the litigation concerning the title to said part of the said park is not determined at the time a deed should be made under this agreement, then the first parties agree to make, execute, and deliver to the said second party a mortgage on the said real estate conveyed by the said party of the second part to the said first parties for the sum of $1,800, said mortgage to be void if the title to said lands now in litigation shall be adjudged on final hearing to be in the said company; or if the said first parties or the said company shall perfect the title in said company without expense to the said bank, it is further agreed that the said second party is

to make the payments provided for in the said contract of sale hereinbefore described. That the said first parties are to have immediate possession of said land therein described, and the said first party is to pay the taxes which shall accrue after the year 1885, and that the said first party shall make, execute, and deliver the deed hereinbefore described to said lot number 5 upon the signing of this agreement.

"In witness whereof, the parties hereto have signed the same, this 13th day of July, 1886."

Signed by Marcella Druse and Otis M. Druse, and J. O. Chase, president, and witnessed by W. C. Sloan.

The witness Druse further stated that he never had any conversation with any other person connected with the bank, in regard to the trade, or as to making back payments on the farm. There occurs then a portion of his testimony which either by the witness is indefinitely stated, or is unintelligently reported, but so far as understood the circumstances mentioned occurred about the date of the first mortgage of Chase to Druse. The witness states that Chase had been to Omaha and returned to Lincoln and informed witness that Irwin had been up to some bad business, had given note against notes against the bank, bonding the bank, and that he knew nothing about it, and had to take that up; that after meeting this unexpected matter, he would like to get some paper discounted, and advised with witness as to where he could probably get that done. Witness suggested to him to apply to the Capital National Bank, and accompanied him there. After some negotiation, Chase succeeded in making a loan. Witness then said to Chase: "J. O., you understand, of course, all I have got to raise money on is my home, and I dread to give that up, and I always trusted you, and have confidence in your integrity, and I want you to make me whole in this matter." He further stated that previously he had heard through one of the banks that the Chases were getting in rather bad shape, and their paper

was being hawked about at less than its value; that witness told Chase what he had heard, deeming it a friendly act, and believing that there was no truth in the report; that he believed Chase was worth a hundred thousand dollars over his liabilities; and thereupon asked Chase to secure him, telling him, "if this thing went on, he didn't know where it would go to, and wanted him to secure witness in some way." Witness went out to Fairmont and to Chase's house, in a few days, and Chase there said to him, "Druse, I will make a mortgage that will make it all right, so you will be in no danger. I don't want you to put it on record," and would have Uncle John Burnett come and take possession of the mortgaged property. The Uncle John Burnett referred to was the hired superintendent of Chase's farm. So far as I understand the witness, he means to say that the chattel mortgage for consideration of $5,500, securing two notes, one for $2,500, due July 1, 1889, and the other for $3,000, due July 15, 1889, both dated June 18, 1888, witnessed by John Burnett, was, at this point of time, executed and delivered to witness, and that the mortgage and the property therein described were placed in Burnett's possession as custodian. Druse stated that he looked over the property, and while he did not find all of it on hand, he saw the principal part, and told Burnett that he would hold him responsible for the property when he should call for it. He also stated that that mortgage was given "to secure the payment due on the contract for a loan due, or to become due, for the deferred payments of the contract." The witness is here supposed to refer to the chattel mortgage mentioned as executed by J. O. Chase to O. M. Druse, June 18, 1888, by which was mortgaged thirty-five head of thoroughbred calves, Hereford and Holstein; two head of thoroughbred Hereford bulls; twelve head of colts from one to four months old; one hundred head of hogs and pigs; one-half interest in the Cleveland bay stallion,

Coachman 2d; one black horse, "Bertie McGregor"; all the farm machinery in use on said farm, with wagons and harness, and hay and grain growing on certain land; one gelding, "Charley;" two top buggies; one two-seated buggy; one set double harness; one Holstein bull, "Neptune;" four brood mares, and other live stock illegibly described. This mortgage purports to have been given to secure the payment of one note for $2,500, due July 1, 1889, and one for $3,000, due July 15, 1889. No notes are attached to the mortgage, and it is accompanied by the receipt of John Burnett, of the possession and control of the property described as inventoried for Druse from June 27, 1888.

Hereupon the witness was shown by his counsel, and told to examine, a mortgage which appears in the bill of exceptions as defendant's Exhibit E; also a note attached to the same, and was asked to state the facts under which the note and mortgage were given, to which he answered, that "during the state fair in September last Chase came to him with that mortgage, and said 'he had changed the security somewhat to make it better for me, and wanted to give me this note and mortgage for security.' I was then very busy taking care of the stuff on the grounds, and said I will look it over and let you know. He said 'he was going back on the train,' and I did not see him again for a few days. After the fair I went up to the farm and saw him, and it having become evident to me that he would not pay the deferred payment on the contract, I said, 'J. O., I cannot raise that money except to borrow it on the farm, or sell my home, and the way matters are I could not sell my home, and if I borrowed money I would have to pay interest for five years, and it would amount to more than $3,000, and that I wanted him to put this thing in shape so there would be no trouble; that it ought to have been straightened up before, but now I wanted it fixed.' He then said that 'he would make another mortgage as additional security.'"

The Exhibit E, is a chattel mortgage by J. O. Chase to O. M. Druse, dated September 11, 1888, describing as property mortgaged, sixty-five head of thoroughbred Hereford cattle, consisting of bulls, cows, and calves; twenty head of colts from four months to three years old; one-half interest in Cleveland bay stallion, "Coachman 2d;" one trotting bred stallion, "Bertie McGregor"; one sorrel gelding, "Charley;" one buggy; seven sets of harness. The cattle and colts subject to a mortgage to the Omaha National Bank. This exhibit was given to secure a note of $3,600, due September 11, 1889, and is accompanied by the same, made by J. O. Chase to O. M. Druse, or order.

The witness was shown Exhibits G and H, and was asked the following:

Q. Are all these notes and mortgages given to secure the same indebtedness?

A. Yes, sir.

Q. Did you finally take possession of the property that was left?

A. I took possession of what was left.

Q. Is this a correct description of what was left?

A. Yes, sir.

Q. And is this the note and mortgage you proceeded to sell under?

A. Yes, sir.

The mortgage referred to, as nearly as can be ascertained, is a chattel mortgage by J. O. Chase to O. M. Druse, of December 6, 1888, and the property described is one economizer, ten horse power boiler engine; seventeen Hereford calves from two weeks to six months old; one Hereford bull, Grove IV a 13733; one light bay mare, "Polly"; one black mare, "Dolly"; all on the farm of W. S. Hogaboom, in Fairmont township, to secure a note of $1,500, dated December 6, 1888, payable September 11, 1889, and is accompanied by the note described.

The witness was asked to state the fair and reasonable

value of the house and lot he deeded to Chase and the bank, which was objected to, and the objection sustained. Yet the witness answered the question, and the same is in the bill of exceptions as follows:

At the time we made the trade I considered the property well worth $3,000. I would not have taken any less in money at that time, and I think, from the property around there, it would be shown that vacant lots brought from $1,600 to $1,800.

Q. Was a sale of the Driving Park stock finally consummated?

A. Yes, sir.

Q. Did he get the money?

A. Yes, sir, he got $5,000.

Q. What was the actual cash value of that Driving Park stock?

A. At that time I considered the stock cheap at $4,500. I could have sold it for that at any time.

It appears from the further examination of this witness that, being secretary of the Driving Park Association, which required that the officers should be stockholders, and several stockholders, as well as Chase, insisting that witness should continue a nominal stockholder in order to act as secretary, he did not transfer the stock, but retained it in his own name, to remain competent as a director, which was the reason the stock remained in his name, but the certificate of stock was assigned by witness and delivered to Chase.

It further appears from the testimony of the witness, and from that of John H. McClay, that his stock was subsequently bought by J. J. Imhoff, and $5,000 paid therefor by checks to J. O. Chase, which were paid, and the stock transferred to Imhoff.

The second and principal point in the case arises on this evidence, together with the evidence that the First National Bank of Fairmont became bankrupt and absolutely with-

out assets or means, leaving the title in the northwest quarter, section 32, township 8, range 2, and the north half southwest quarter of same section, in H. G. Bliss, or the B. & M. Railroad Company, to which does not definitely appear, and leaving the last payment due thereon still unpaid.

The contention of the defendant Druse is that the mortgages and notes were executed to him by J. O. Chase, in consideration of the prospective and ultimate failure of the bank to make the payments and carry out the contract with him, to make a good title to the land. The contention of the plaintiff is that the contract between Druse and the bank, having been reduced to writing by Druse and his wife, the title to the lot being probably in her name, and by J. O. Chase as president on behalf of the bank, that the subject-matter of the contract could not afterwards constitute a lawful consideration for another contract between Druse and Chase, in his personal capacity, and that such would be the law of the case, especially under the statute of frauds, even were the evidence of the making of the contract in fact between Druse and Chase, as evidenced by one or all of the chattel mortgages or notes, ever so clear and satisfactory. It is not necessary to enter upon a discussion of the law of the case, as it would be held to apply, had J. O. Chase, at the time of the making of the contract by the bank, or at a later date, have entered into a single, plain, and definite contract with Druse to indemnify him against any failure which might be made by the bank to carry out its part of the contract with him, expressing the consideration therefor plainly upon the face of the contract of indemnification. I am not prepared to say that in such case the relationship of Chase to the bank as its president and principal owner, together with the inducements which he had held out to Druse to give the credit which he did to the bank, especially if we may fully credit the evidence of Druse as to the conversations between

them, about the time of making the trade between Druse and the bank, would not constitute a valid consideration for a promise on the part of Chase for such indemnity. But I am now considering the case on appeal. The district court has found that the chattel mortgage of Chase to Druse, dated September 11, 1888, and recorded September 12, following, and that dated September 6, 1888, and recorded December 7, following, being two of the chattel mortgages described by Druse in his testimony, were each without consideration, were fraudulent, and void as to the creditors of J. O. Chase.

It may be mentioned here that the mortgage of June 8, 1888, appears not to have been filed for record. Why it should have been preserved in the bill of exceptions is not apparent, but there can be no question, under the statute, of its being absolutely void.

As to the other two mortgages, these findings of the district court must stand, unless this court, from an examination of the evidence, shall find that it is by such evidence "made to appear on the part of such persons claiming under said mortgages that the same were made in good faith and without any intent to defraud any creditor" of Julius O. Chase. (See sec. 11, ch. 32, Comp. Stats.)

There having been no immediate delivery, followed by an actual and continuous change of possession of the chattel property described in the mortgages, the presumption of law is against their validity. This rule has often been applied by this and other courts. It would serve no necessary purpose to comment on the facts as developed by the testimony of Druse or as set forth in the pleadings, but it will be deemed sufficient to say that the transactions surrounding the mortgages are not of that plain, ingenuous character, which would be considered sufficient to remove the presumption of fraud from mortgages of personal property, without change of possession contemplated by the statute.

It appears from the pleadings and evidence that at the sale of the chattels which were the subject of this litigation upon two of the mortgages hereinbefore considered, and which sale was agreed to beforehand, by stipulation by the parties, one horse, "Bertie McGregor," was sold to defendant Druse at $160, and one horse, "Charlie," at $80. There was evidence by Druse, and witness in his own behalf, that he subsequently sold the horse "Bertie McGregor" for $600, taking a note with mortgage security for payment; and also had sold the horse "Charlie," for $275.

By the stipulation it will be seen that it was provided that any property bid off by Druse should be held by him on the same terms and condition as the notes and cash proceeds deposited in the bank. It is probable that the district court construed this provision to mean that in case Druse bid off the whole or any portion of the property, he should bid off the same in trust for the successful party in these proceedings whichsoever it might be. But if this was the construction to be placed on the stipulation, it will be observed that the court does not treat him as a trustee in the judgment, but as a debtor, for it will be remembered that from the evidence Druse had not converted the property into money but had sold it on credit, and taken a chattel mortgage as security. If treated as a trustee, he would have been required to turn over this security that it might have been placed with other notes for chattels sold on credit. But I do not agree to the construction supposed to have been placed upon the stipulation by the district court. I think the agreement recognizing the right of Druse to bid off the property at the sale, made any bid by him a purchase of the property, and that it was the amount of his bid for the property struck off to him that was to be held by him upon the same terms as that of the cash and notes in the bank.

The account of O. M. Druse, growing out of said sale,

upon the facts as stated in the petition will stand as follows:

DEBIT.

To proceeds of sale as per statement in petition:

Articles of property sold for cash, as therein stated	$136 75
Bay mare, to O. M. Druse	100 00
Horse "Charlie," to O. M. Druse	80 00
Twelve colts, to O. M. Druse	312 00
Four Hereford bulls, to O. M. Druse	72 00
Horse "Bertie McGregor," to O. M. Druse	160 00
	$860 75

CREDIT.

By cash paid, taxes and expenses of sale	220 19
	$640 56

The judgment will therefore be modified, by changing the sum of $791.56, representing the judgment of the court below, for the plaintiff against the defendant Druse, reducing it to the sum of $640.56, as above stated, and so much of the said judgment as finds that the remainder of said property, twelve colts, one bay mare, and four Hereford bulls, are the property of Julius O. Chase, and orders the same to be sold by the sheriff of Fillmore county, is reversed, but, with the exceptions stated, the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CARY M. HUNT ET AL., APPELLEE, V. VALENTINE LIPP ET AL., APPELLANTS.

30 469
62 559

[FILED SEPTEMBER 30, 1890.]

1. **The evidence** examined, and *held*, to sustain the findings and judgment of the district court.
2. **Real Estate**: CONTRACT FOR SALE: OCCUPATION: STATUTE OF FRAUDS. The deposit of building material, of from ten to fifty wagon loads of sand, from 2,000 to 10,000 feet of lumber, and from 2,000 to 10,000 bricks, with a tool and lime house, or box ten feet square, upon an otherwise unoccupied and vacant town lot, from which portions of such material were from time to time hauled away and used by the owner in buildings then being built or repaired by him on other lots, the balance remaining on the lot, all with the knowledge and implied consent of the owner of the title to the lot, *held*, not to point unmistakably to a contract between the owner of the lot and the owner of the building material, and tool box, for the sale of the lot, nor to constitute such a possession of the lot by the owner of the building material as amounted to a part performance of a verbal contract for the sale of the lot by the former to the latter, nor such as would take it out of the operation of the statute of frauds.
3. ———: ———: PURCHASER: NOTICE: The same *held*, not to constitute notice to a subsequent purchaser of the lot.

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

B. G. Burbank, John L. Webster, and *Winfield S. Strawn*, for appellants, cited, as to possession and notice: *Giles v. Ortman*, 11 Kan., 63; *Cartwright v. McFadden*, 24 Id., 662; *O'Callaghan v. Booth*, 6 Cal., 63; *Brumagim v. Bradshaw*, 39 Id., 24; *Kerr v. Hitt*, 75 Ill., 60; *McLean v. Farden*, 61 Id., 108–9; *Brooks v. Bruyn*, 18 Id., 542; *Webbs v. Hynes*, 9 B. Mon. [Ky.], 388; *Bartlett v. Draper*, 23 Mo., 407; *Miller v. Northup*, 49 Id., 397; *King v. St. Louis Gas Co.*, 34 Id., 34; *Morrison v. Kelly*, 22 Ill., 610 [74 Am.

Dec., 169]; *Scott v. Delany*, 87 Id., 146; *Copeland v. Murphey*, 2 Coldwell [Tenn.], 64; *Kirder v. Lafferty*, 1 Wharton [Pa.], 502; *Ewing v. Burnet*, 11 Pet. [U. S.], 41; *Gill v. Newell*, 18 Minn., 430; *Machin v. Goertner*, 14 Wend. [N. Y.], 289; *Booth v. Small*, 25 Ia., 181; *Clement v. Perry*, 34 Id., 564; *Spitler v. Scofield*, 43 Id., 572; *Nolan v. Grant*, 51 Id., 519; *Colvin v. McCune*, 39 Id., 502; *Langworth v. Myers*, 4 Id., 18; *Barrett v. Love*, 48 Id., 103; *Ellicott v. Pearl*, 10 Pet. [U. S.], 442; *Moss v. Scott*, 2 Dana [Ky.], 275; *Close v. Samm*, 27 Ia., 510; *Fletcher v. Fuller*, 120 U. S., 553; *Watkins v. Holman*, 16 Pet. [U. S.], 54; *Jackson v. Stoetzel*, 87 Pa. St., 302. As to part performance: *Johnson v. Gresham*, 5 Dana [Ky.], 542; *Caldwell v. Carrington's Heirs*, 9 Pet. [U. S.], 103; *Jones v. Pease*, 21 Wis., 644; *Smith v. Finch*, 8 Id., 99; *Baldwin v. Thompson*, 15 Ia., 504; *Green v. Jones*, 76 Me., 563; *Lester v. Foxcroft*, 1 Coll's Parl. Cas. [Eng.], 108; *Morphett v. Jones*, 1 Swanst. [Eng.], 181; *Bassler v. Niesly*, 1 S. & R. [Pa.], 431*, 472*; *Ayer v. Hawkes*, 11 N. H., 148; *Harris v. Knickerbacker*, 5 Wend. [N. Y.], 638; *Tilton v. Tilton*, 9 N. H., 385; *Brewer v. Brewer*, 19 Ala., 488; *Cumming v. Gill*, 6 Id., 562; *Johnston v. Glancy*, 4 Blackf. [Ind.], 98; *Eaton v. Whitaker*, 18 Conn., 222; *Wilbur v. Paine*, 1 O., 251; *Fitzsimmons v. Allen's Admrs.*, 39 Ill., 440; *Letcher v. Cosby*, 2 A. K. Marsh. [Ky.], 106; *Abbott v. Draper*, 4 Denio [N. Y.], 51; *Underhill v. Williams*, 7 Blackf. [Ind.], 125; *Tibbs v. Barker*, 1 Id., 58; *Wharton v. Stoutenburgh*, 35 N. J. Eq., 266; *Sterling v. Klepsattle*, 24 Ind., 94; *Bechtel v. Cone*, 52 Md., 707; *Dugan v. Gittings*, 3 Gill [Md.], 157; *Beardsley v. Dunley*, 69 N. Y., 577; *Danforth v. Laney*, 28 Ala., 276; *Green v. Finin*, 35 Conn., 181; *Green v. Richards*, 23 N. J. Eq., 32; *Schenck v. Cuttrell*, 1 Zab. [N. J.], 7; *Ashmore v. Evans*, 3 Stock. [N. J.], 151; *Stark v. Wilder*, 36 Vt., 752; *Lipp v. Hunt*, 25 Neb., 91; *Jamison v. Dimock*, 95 Pa. St., 52; *Pugh v. Good*, 3 Watts & Serg. 56; *Bigelow v. Armes*, 108

U. S., 10; Hillard, Vendors [2d Ed.], pp. 140–1; Brown, Statute of Frauds, secs., 465, 467, 469; Bigelow, Fraud, p. 386; Kerr, Fraud and Mistake, p. 135; 4 Kent [12th Ed.], p. 451; 1 Story, Eq. Jur. [12th Ed.], secs. 761, 763; 3 Parsons, Contracts [6th Ed.], p. 395; 2 Chitty, Contracts [11th Am. Ed.], 1451.

Charles Offutt, for appellant Hunt, cited, as to part performance: *Morgan v. Bergen*, 3 Neb., 209; *Poland v. O'Connor*, 1 Id., 50; *Baker v. Wiswell*, 17 Id., 52; 3 Washb., Real Prop. [5th Ed.], 248; *Hill v. Meyers*, 43 Pa. St., 170–3; *Moyer's Appeal*, 105 Pa. St., 432; *Glass v. Hulbert*, 102 Mass., 33–4; *Ash v. Daggy*, 6 Porter [Ind.], 259; *Wack v. Sorber*, 2 Whart. [Pa.], 387.

G. W. Ambrose, for appellees Rocheford and Gould.

COBB, CH. J.

This action was brought by the plaintiffs and appellees to quiet their title to the original lot No. 7, of block No. 77, in the town of South Omaha, against the claim of the defendants and appellants.

The plaintiffs alleged, in the court below, "that on April 2, 1886, Alexander H. Swan and his associates, as trustees of the town of South Omaha, being seized in fee simple of said original lot No. 7, deeded the same to the plaintiff, Cary M. Hunt, by deed of general warranty, duly recorded April 3, 1886.

"II. That on September 24, 1887, the plaintiff Hunt, having become possessed of the fee of the adjoining lot, No. 6 of said block No. 77, subdivided the lots Nos. 6 and 7 as a subdivision of said block, by the name of C. M. Hunt's Subdivision, into lots numbered from one to seven, inclusive, a plat of which was placed of record September 27, 1887, and is referred to as Exhibit A.

"III. That on February 1, 1887, lot No. 6 of the sub-

division was conveyed by plaintiff Hunt to plaintiffs William Rocheford and Frank P. Gould, of record March 8, 1888; and on September 24, 1887, lot No. 7 of the subdivision was conveyed to plaintiff Math. Evetz, of record October 11, 1887.

"IV. That the plaintiffs claim title to, and are in open and notorious possession of, all of said original lot 7 of block 77, in South Omaha, under the conveyances mentioned, specifically as follows: The plaintiff Hunt, of the east 103 feet, being the south 60 feet of lots 1, 2, 3, 4, and 5, of said subdivision; the plaintiffs Rocheford and Gould, of the east half of the west 44 feet of the original lot 7, being the south 60 feet of lot 6 of the subdivision; and the plaintiff Evetz, the west 22 feet of the original lot 7, being the south 60 feet of lot No. 7 of the subdivision; that by reason of the respective and contiguous holdings of the plaintiffs in the original lot No. 7, they have a common interest in this action and are equally affected by the acts of the defendants hereinafter complained of.

"V. That the defendants Charles Corbett and Valentine Lipp claim to be, and pretend that they are, the owners and are entitled to the possession of the original lot 7 by a contract of Lipp with one Pivonka, under an alleged contract for the purchase of said lot by the trustees of South Omaha with Pivonka, and by him alleged to have been assigned to Lipp; and that Corbett claims under a deed from Lipp to him, as trustee, of record January 6, 1888; that defendants Holmes and Smith claim an interest or title to the original lot 7 under a mechanic's lien for material and labor supplied on the premises, of record October 23, 1886.

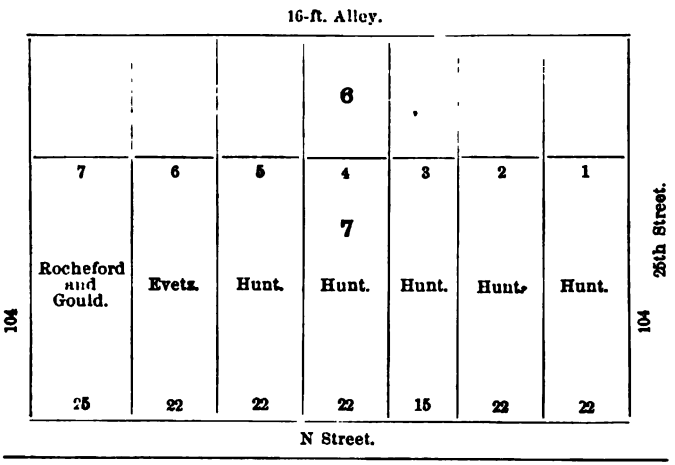
"VI. That the alleged claims of defendants are entirely false; that the contract of the trustees of South Omaha to Pivonka was never assigned to Lipp, and that at the date of Lipp's conveyance to Corbett he had no interest, right, or title in the contract or to the premises, and that any ma-

terial used by him upon the premises was wrongfully used, and without the consent or knowledge of the plaintiffs, or either of them; but that said contract with Pivonka was duly assigned, transferred, and delivered to the plaintiff Hunt, and in compliance with its terms the trustees made to him the deed heretofore described for said lot 7, in block 77, of the town of South Omaha.

"The plaintiffs allege that they are the absolute owners of said lot, but that the defendants' pretended claim casts a cloud upon their title, and ask that the defendants, and each of them, be enjoined from asserting or claiming any interest or title in or to the said premises, or any part thereof, and pray for general relief."

EXHIBIT A.

C. M. Hunt's Subdivision of Lots 6 and 7 of Block 77, of South Omaha.



The defendants Lipp and Corbett answered, admitting "the title to the premises, lot 7, in block 77, in the trustees of South Omaha, and their deed to Hunt, but denied that it conveyed in law the premises to Hunt, or that he had

any interest or title in and to the premises; they admit that he pretended to subdivide lots 6 and 7 into C. M. Hunt's subdivision, but deny that he had any right or authority so to do.

"3. They admit the conveyances of Hunt to Rocheford and Gould, of lot No. 6 of Hunt's subdivision, but deny that it conveyed the absolute fee simple title to any portion of lot No. 7 of block 77, of South Omaha, and admit the conveyance to Evetz, but deny that it conveyed the absolute fee simple title to any portion of lot No. 7 of block 77, of South Omaha.

"4. They deny that the plaintiffs hold any title to or in said premises, or that they are in open and notorious possession of said original lot No. 7 of block 77, except that, claiming to be the owner of said lot on May 26, 1886, the plaintiff Hunt commenced an action of forcible entry and detainer before a justice of the peace of Douglas county, and upon an appeal from the judgment of such justice he obtained a judgment for the possession of the premises, and by a writ of restitution was put in possession, but that the defendant Lipp subsequently appealed said cause to the supreme court of this state, and that the same is now pending and undetermined; that the plaintiffs have no other or different possession than that stated, and that the grantees of Hunt took said conveyances and took possession of the premises with full knowledge of the appeal taken to the supreme court, and are charged with full knowledge of the claims of defendants, and purchased and took possession of the premises at their own risk.

"5. They claim to be the owners and entitled to the possession of the original lot 7, in block 77, and they deny that the plaintiffs, or either of them, are seized of said lot, or any part thereof, or have any title or interest therein, and deny all knowledge of the mechanic's lien of Holmes and Smith.

"6. They allege that on May 6, 1884, Alexander H.

Swan and his associates, as trustees of South Omaha, were the owners of the premises in dispute and on that day sold the same to T. S. Lewis for the sum of $300, by the execution and delivery of a land contract signed by the parties; that by the subsequent assignments the equitable title to the premises vested in Lewis was transferred to and became vested in Frank Pivonka, and that afterwards, about January 15, 1885, Pivonka and defendant Lipp entered into a verbal contract for the sale of the premises to Lipp, who agreed to pay $125 for Pivonka's equitable interest, upon the payment of which Lipp was to have received a formal assignment of the land contract, and such conveyance of the premises.

"7. They allege that Lipp fully paid Pivonka $125 for his equitable interest, and $81.25 additional for the payment due on the contract May 6, 1885, according to its terms, as will be seen by the defendant's Exhibit A; that about February 1, 1885, under this contract and sale, Lipp took peaceable possession of the premises with the knowledge and consent of Pivonka, and has ever since retained possession and control up to the time when Hunt was placed in possession as stated.

"8. That Pivonka, in violation of his contract and in fraud of the rights of Lipp, on October 23, 1885, pretended to sell the premises in controversy to Hunt by an assignment of the land contract purporting to convey the equitable title to Hunt, without having any right, title, or interest to or in said premises.

"9. And that Hunt had notice and full knowledge of Lipp's rights and interest in the premises prior to his alleged purchase.

"10. And the defendants allege that after Hunt had become so possessed of the contract of sale of the trustees of South Omaha to Lewis, he surrendered the same and received a warranty deed for the premises, but it is denied that such deed conveyed any interest, right, or title whatsoever in said premises to Hunt.

"11. The defendants tender into court the sum of $150, with interest and taxes, as in said land contract provided, and set up that the interest of defendant Corbett in the premises is that of a trustee for defendant Lipp, the *cestui que trust*. The defendants ask that the deed from Swan and his associates, as trustees, to Hunt, and the deeds from Hunt to Rocheford and Gould, and the deed from Hunt to Evetz be annulled and set aside, and that the mechanic's lien of Holmes and Smith be set aside, and that the title to the premises be declared to be forever quieted in the defendant Charles Corbett as trustee."

The defendants' Exhibit A is the original land contract, dated May 6, 1884, "between Alexander H. Swan, William A. Paxton, Thomas Swobe, Frank Murphy, Charles W. Hamilton, Peter E. Iler, and James M. Woolworth, trustees, of the first part, and T. S. Lewis, of Omaha, Nebraska, of the second part, for the sale to the party of the second part, of lot 7, in block 77, in South Omaha, Douglas county, Nebraska, for the sum of $300, on which the second party has paid the sum of $75, and agrees to pay to the party of the first part the following sums of principal and interest at the several times named below:

"First payment, 6th May, 1885, $75; interest, $5.25; amount, $80.25; taxes, $1, paid 5–12–'84.

"Second payment, 6th May, 1886, $75; interest, $10.50.

"Third payment, 6th May, 1887, $75; interest, $15.75."

With various provisions and stipulations, by M. A, Upton, assistant secretary; countersigned, Frank Murphy. treasurer; T. S. Lewis, purchaser.

UNDERWRITTEN.

"OMAHA, NEB., November 24, 1884.

"For value received, I hereby assign, transfer, and set over unto Frank Pivonka all my right, title, and interest in and to lot 7, block 77, South Omaha, Neb., as described in within contract.

"Witness: ———. ——— ———.

"OMAHA, NEB., October 23, 1885.

"For value received, I hereby assign, transfer, and set over unto C. M. Hunt all my right, title, and interest in and to lot 7, block 77, South Omaha, Neb., as described in within contract F. PIVONKA.

"Witness: P. J. TIMMONS."

INDORSEMENT.

"South Omaha, contract No. 38, lot 7, block 77, to T. S. Lewis.

"Assigned to R. Allen, 5–23–'84.

" " S. J. Howell, 6–20–'84.

" " R. Allen.

" " F. Pivonka, 12–1–'84.

" " C. M. Hunt, 10–23–'85.

"Deed issued Cary M. Hunt, 4–3–'86.

"Omaha, Oct. 23, 1885. Consent is hereby given for above transfer, and same entered of record.

"M. A. UPTON,
"*Asst. Secty.*"

The reply of the plaintiffs admits the execution and the correctness of the land contract set out as Exhibit A to the defendants' answer, but denies all other allegations of defendants' setting up title or equitable interest in the premises under said contract.

There was a trial to the court, a jury being waived, on the 11th day of May, 1889, in which it was first found that the parties hereto agree that the west twenty-five feet of lot seven, in block seventy-seven, in South Omaha, and the same portion of said lot which was, on September 24, 1887, conveyed to the plaintiff Math. Evetz by the plaintiff Cary M. Hunt, has been duly conveyed by all parties hereto, and that the South Omaha National Bank is now invested with all the right and title of all the parties hereto, to the west twenty-five feet of said lot seven, in block seventy-seven, in the city of South Omaha; and the cause

coming on further to be heard on the motion of the plaintiffs Rocheford and Gould to dismiss the action without prejudice as to them, and the court being sufficiently advised thereon, it is ordered and adjudged that the motion be sustained, and that the action be dismissed without prejudice so far as the same affects their rights and interests, or those of either of them; to which the defendants excepted.

On final hearing, upon the petition, answer, reply, and the evidence, the court found that at the commencement of this suit the plaintiff Hunt was in the possession of the disputed premises, and had a legal estate therein, and was entitled to the possession thereof, to-wit: of lots 1, 2, 3, 4, and 5 of C. M. Hunt's subdivision of lots 6 and 7 of block 77, of South Omaha, Nebraska; and that the defendants Lipp and Corbett, and Holmes and Smith, neither of them have any estate or interest in said premises, or any part thereof, and are not entitled to the possession of the same; to which the defendants excepted.

The arguments of counsel in this case are voluminous and exhaustive, and the points presented are numerous, some of which it will not be deemed necessary to discuss. Our opinion will be confined chiefly to the questions considered in the findings of the court below. Upon the trial the court ruled that the burden of proof was upon the defendants.

The defendant Lipp testified, substantially, that he was a builder and contractor, residing in South Omaha for a period of over four years; that he became acquainted with Frank Pivonka in May, 1884, and "was acquainted with the lot in question all the while he was there;" that about the time of Christmas and New Year's, in 1884 and 1885, he asked Pivonka, in his saloon in South Omaha, "where he could find the party, Lewis, who owned the lot, and was told by Pivonka that the man had gone off, and Pivonka went down to Omaha on the next train and hunted up the

man, and bought the lot;" that Pivonka returned and on the next day said to witness, "Now I have bought that lot, and can sell it to you, if you want it;" that witness replied, "Yes, I want to buy that lot." This the witness thinks took place the second day after Christmas, 1884; that witness asked him what he would take for the lot, and he replied that he would take $125 for his interest in it, and that he had paid $100 for it yesterday.

It should be stated that it was not claimed that the purchase of Pivonka was that of the legal title to the lot, which was in the trustees of the South Omaha Company, which throughout the litigation is called the syndicate. These trustees had, on May 6, 1884, sold the lot to T. S. Lewis, as appears from defendants' Exhibit A, set forth, for $300, of which $75 was paid down, and an equal amount, with interest and taxes, was to be paid in three annual installments, and had delivered a land contract, only assignable by the written authority of the trustees, of which time was made the essence of the contract and prompt payment required.

The witness Lipp further testified that, subsequent to the conversation mentioned, Pivonka wanted a well dug upon the hill, and witness offered to sink the well as consideration for the lot, or as a payment on it, and they finally agreed that witness should have ninety cents per foot for digging and bricking up the well; that the same should be applied to the payment of the $125 on the lot, and that, when the well was completed, if it did not amount to the full sum, witness was to pay the balance, and if to more, Pivonka was to pay him the balance, in cash, and that Pivonka was to assign the land contract to witness as soon as he had finished the well; that the well was not finished till June, 1885, and that its depth was within a few inches of ninety feet; that at about the time the well was finished, the witness contracted with Pivonka to build his brick house according to his plans and specifications, the material to be

furnished by witness, for the sum of $1,200; that witness built the house accordingly, and that at the time of the completion of the well, in June, 1885, Pivonka was indebted to the witness on the building contract six or seven hundred dollars; that afterwards witness entered into another contract with Pivonka to erect a second building, for a barber shop, for the sum of $300, in June, 1885, which was completed according to contract. He further testified that at the time the well was finished and the house under roof, some of his laborers had threatened to file their mechanics' liens against the house, and the witness having asked Pivonka about the promised assignment, he replied, "Wait till you get squared up with these carpenters and it will be all right," and that was all that was then said about it; that later, in August, Pivonka called the witness's attention "to come up and settle with him," and that they had a count of tickets and orders and so on, and Pivonka said then that there had been a lien filed by the carpenters for about $500, or something like it, and if witness would see that paid and get it straightened out he would assign the contract to witness, and not till then; that there was nothing more said between them, and the next thing witness heard about the contract was that Pivonka had sold the lot and assigned the contract to Hunt.

With the remark that this testimony of Lipp is to some extent corroborated by that of other witnesses, I turn to the testimony of Frank Pivonka, a witness for the plaintiffs. The witness testified that in 1884 he learned that the lot in controversy was for sale, it taking him two or three days to find out the owner, and then bought the lot; that three or four days afterwards Lipp said to witness that if he could buy that lot he would go ahead and build a three-story brick house and basement, and commence from Twenty-fifth street and build all over; that witness replied to him, "that is all right; if you will do that, I will sell it to you." That the next day Lipp brought to witness a

plan for a house he proposed to build on the lot, and witness said to him, if he would put up such a building that he would let him have the lot for $25 in addition to the $325 witness had paid for it; that he would not sell it to him for speculative purposes, because he could hold it himself. That subsequently he inquired of Lipp how much he would charge to dig and brick up a well on Twenty-fourth street, and that Lipp replied that in the winter season he had nothing to do, and would charge him ninety cents per foot, and witness replied, "Go ahead and dig the well, and when you get through, if you buy the lot you may pay the balance, or I will pay you the balance, either way, because (said the witness) he was owing me." Lipp then dug the well, and when dug he got that much money out, and went on and built the brick house. Witness gave him money to buy the lumber, and witness bought the brick and paid the men employed, except those two men, and there was nothing said about the lot; neither of us said anything about the lot at that time; witness made the May payment, 1885, on the lot; that he knew that Lipp had no money.

Upon this evidence, and that corroborating defendants' evidence, as stated, the trial court found that it did not establish the sale of the lot by Pivonka to Lipp, at most, with that degree of certainty and clearness necessary to the foundation of an action to compel specific performance, or to enforce a parol agreement for the conveyance of real estate.

In reviewing that finding I am not prepared to say that it is error, for the evidence affirmative of and adverse to the contract is sharply conflicting; and, as has been often decided by all the courts, in cases of conflicting evidence, except where the preponderance is greatly against it, the findings of a trial court on a question of fact will be sustained in a court of review; and, although the trial court admitted the probability of Lipp's version of the

controversy as more nearly the truth than that of Pivonka's, yet it is with the findings of the court we have to do rather than with its reasons therefor. But in justice to that court it is to be said that its findings on the proof of contract were based more upon the lack of evidence of payment than of the contract itself, and its reasoning being satisfactory, its line of argument is adopted.

The well dug and completed for Pivonka was undertaken in the winter season and completed in the following June. According to Lipp's testimony it was ninety feet deep, and at ninety cents per foot amounted to $81, and according to his evidence he was to pay in cash the difference between that sum and $125 due on the lot. If the well came to more than $125 Pivonka was to pay that difference to him in cash. Before the well was completed, and before the cost could be known, Lipp contracted with Pivonka to erect a brick house, and made a second contract to erect a barber shop. At least one of these was in process of construction before the completion of the well. In the meantime, before the completion of the well, the payment of $75 principal and $6 of interest and taxes became due to the trustees of South Omaha on the lot; that was shortly before the completion of the well. Lipp testified that Pivonka called his attention to that fact, and asked him what he was going to do about it; to which he replied, "Well, you owe me money; I am putting up this building for you; you pay that and charge it to me." Lipp further says that Pivonka paid it, and included it in a certain receipt taken by him for two hundred and more dollars. This fact Pivonka denies, and Lipp is not directly supported by any corroborative evidence. I agree with the district court in the opinion that this may or may not have been so. We have Lipp's oath in the affirmative and Pivonka's in the negative, and no corroboration of either. It will be seen, in review of Lipp's evidence, that at one time he asked Pivonka to assign the contract of purchase

of the lot to him, and that Pivonka replied, "That some fellows had filed liens on my property and I won't do anything about it till you get rid of these liens, and when you do I will assign you the contract." This fact is denied by Pivonka in express terms, and lacks corroboration from other sources. Pivonka denies that the well was ninety feet deep, but admits that it was seventy-six feet deep only. But upon the theory of Lipp's statement, the amount of the work on the well was $44 less than that he says he was to pay for the lot, and if the deficiency either way was to be paid in cash by the party owing the other, there is no evidence that he paid the balance due. I agree with the district court that if Lipp's testimony be accepted, it fails to prove the payment of the full consideration for the lot, or for the contract therefor. And this is true, even if it be admitted that there was then and is money still due from Pivonka to Lipp on one or both of the building contracts, as the evidence fails to prove an agreement of the parties that the difference in the sum due Lipp for the well and that due Pivonka for the lot should be taken out of the building contracts or either of them.

I have considered the evidence and the arguments of counsel carefully, with a view of determining whether at the close of these transactions there was money due from Pivonka to Lipp which might be presumed to have been retained by the former as covering this balance, without being able to reach such conclusion.

As to the possession by Lipp of the lot in controversy, he testified that in February, or between February and March, 1885, he established the lot for mortar yards and deposited sixty or seventy-five loads of sand there, "at once during the winter;" that a month or two later he hauled 2,000 feet of lumber there, and in June or July had 2,000 brick deposited there, and on August 1 he moved a lime house from Pivonka's brick building down to and upon the lot; that the house was originally fourteen

feet square, and was rebuilt on the lot ten feet square, and was used to keep tools and lime protected and dry. He testified, in answer to question by his counsel, that at and prior to October 23, 1885, the date of sale to Hunt, there was remaining on the lot the sand, the lime house, 12,000 brick, and 5,000 feet of lumber deposited there; "that he moved this property there under the consideration that it was his lot, and his own place of doing business." The testimony of Lipp as to the sand, brick, lumber, and lime, and the tool house upon the lot, and the times the same were placed there is, to some extent, corroborated by that of other witnesses, and is also in material respects contradicted by witnesses, especially by that of Pivonka on cross-examination by defendants' attorney, in his deposition put in evidence on the trial. Taking it altogether, it appears substantially proven that upon the completion of Pivonka's house, in the latter part of the summer or early fall, there were several thousand brick, and a quantity of sand and lumber, left over from the building, which were hauled to and deposited on the lot in question. It also appears that the tool and lime house, having been used for storage at the site of Pivonka's brick house, remained there until objected to by the occupants of the house as an unsightly incumbrance, and was then removed to the lot in litigation, where it was set up in its original shape, reduced to ten feet proportions. When this was done is left in doubt, from the testimony, but I think it may be admitted to have taken place before October 23, 1885.

Sections 3 and 6 of chapter 32, Compiled Statutes, usually called the statute of frauds, provides that "No estate or interest in land other than leases for a term not exceeding one year * * * shall hereafter be created, granted, assigned, or surrendered, or declared unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same.

* * * * * * *

"Sec. 6. Nothing in this chapter contained shall be construed to abridge the powers of the court of chancery to compel the specific performance of agreements in cases of part performance."

Mr. Pomeroy, in his work on Contracts, at section 107, says: "In a suit to enforce the specific performance of a verbal contract embraced within the statute of frauds, two distinct facts are established by parol evidence—the acts of part performance, and the terms of the agreement itself. According to the theory upon which equity proceeds, in such cases, the part performance must be first proved, in order to fulfill the condition precedent for letting in parol evidence of the agreement; and this is not a mere question of the order of proofs—it involves the very principle of the jurisdiction. As soon as a sufficient part performance is made out, the plaintiff may go on and show the terms of the verbal contract. There are, therefore, two distinct branches of parol evidence, with a distinct fact to be established by each, but proceeding in a fixed order of time, and of antecedent and consequent; not, however, exactly in the order of cause and effect. * * * The true rule is, that the acts of part performance must be such as show that some contract exists between the parties; that they were done in pursuance thereof, and that it is not inconsistent with the one alleged in the pleading. Whenever acts of part performance are made out, which thus point to *a* contract, the door is opened, and the plaintiff may introduce additional parol evidence directed immediately to the terms of *the* contract relied upon."

The defendant Lipp, doubtless, sought to prove his possession of the lot for two distinct purposes: first, as a part performance of the contract for its purchase, as set out in the petition; and, second, such contract of purchase and its part performance, being proved, as notice to the plaintiff of his rights under such contract. Was his proof sufficient for both or either of these purposes? And, first, if the

action were between Lipp and Pivonka would it be sufficient? This possession (or the evidence of it), as we have seen, consisted in the deposit of building material and tools thereon. This material was not intended to be used in the construction of a building on the lot, but to be taken away, and was, in fact, most or all of it taken away to other parts of the town where defendant had use for it, and used in the construction or reparation of buildings on other lots. Doubtless its position on the lot indicated the true purpose for which it was deposited there.

The author above cited, in the next succeeding section, says: "He [the defendant] must first prove acts done by himself, or on his behalf, which point unmistakably to a contract between himself and the defendant [Pivonka] which cannot, in the ordinary course of human conduct, be accounted for in any other manner than as having been done in pursuance of a contract, and which would not have been done without an existing contract."

It cannot be said that the placing, or storing, of these building materials and tools upon this lot by Lipp pointed unmistakably, or at all, to a contract by the owner for the sale of the lot to Lipp. On the contrary, it pointed as well to that permissive use of the lot for temporary and convenient purposes, not amounting to permanent improvement or use, which the owners of unused lots or parcels of land in this country generally allow to their neighbors. But after all, this branch of the discussion leads us to this: Did the placing of these things on the lot amount to the taking of the exclusive possession of the lot by Lipp? and this I think is the true test. It is worthy of note that there is no evidence that Lipp himself was ever actually on the lot, except, possibly, at one time when, as claimed by Lipp, and denied by Pivonka, they two, with three other men, walked out from Pivonka's saloon and looked at the lot. There was nothing to indicate to whom the building material, or tool house, or box belonged;

and as none of the material ever was, or was designed to be, built into permanent improvements, it is presumable that there was nothing in their position, or appearance, as placed and situated upon the lot, to indicate the intention of anybody so to use them; and hence I conclude that the mere ownership of these materials deposited upon the lot did not amount to the exclusive possession of the lot, within the meaning of the law. But if it be granted, for the sake of the argument, that Lipp was in the possession of the lot, what follows? First, according to the rule laid down by Pomeroy, in the section above cited, the proof of possession or other act of part performance of the contract is necessary as a condition precedent to let in evidence of a verbal contract under and in pursuance of which such part performance was made, and to which it must be exclusively referable. And, as between the original parties to the contract, that is, I think, the sole office of the proof of possession. But, as between a party claiming land under a verbal contract of sale and a subsequent purchaser, the possession of the land by such claimant, at the time of such subsequent purchase, is notice to such subsequent purchaser of the verbal contract. In order to perform this latter office such possession must be visible, open, and exclusive.

I know of no case, nor has any been cited, in which the mere deposit of building material or other chattels upon land has been held to be possession, or evidence of possession, or of part performance of a verbal contract for the sale of land, in view of the statute of frauds. In our early case, *Poland v. O'Connor*, 1 Neb., 50, it is said: "To take such a case out of the statute, the possession of the vendee must be by acts clear, certain, and definite in their object, and having reference to the contract. * * * Using a lot otherwise vacant and adjoining the vendee's warehouse for storing lumber, wagons, and like articles for himself, his firm, and others who have placed the same in his hands for sale on commission, is not such possession as

will take the case out of the statute." In the later case of of *Baker v. Wiswell*, 17 Id., 52, it is said: "The acts of part performance that take the case out of the statute are actual possession and the construction of valuable improvements, or perhaps, in some cases, as where the land was wild, cultivation." These cases, so far as they were intended to go, doubtless, correctly express the law.

It is not deemed necessary to discuss the question as to whether the payment of a part or the whole of the purchase price is sufficient to take a verbal contract for the sale of land out of the operation of the statute of frauds. As we have seen, there is no sufficient evidence of payment in the case before us. Lipp claims that he paid the agreed price for the lot, partly by digging and bricking up a well for Pivonka, and partly by the application of money due him from Pivonka for the erection of a brick dwelling house. This payment and application of money is denied by Pivonka. Upon this evidence the trial court found against Lipp, and I am unable to say that such finding was wrong. Upon the whole case, there is a lack of clear, satisfactory evidence of the fact and terms of the verbal contract, as set out in the petition, as well as of its part performance, either by the taking of the possession of the lot by Lipp pursuant to such contract, or of either whole or part payment of the contract price. It is therefore deemed unnecessary to discuss the questions presented as to the effect of proof of possession, or of payment in whole or in part when relied on as part performance of a verbal contract of sale; nor that of the right of the holder of one of two equitable titles to buy in the outstanding legal title and thereby cut off the equity of his opponent.

I have examined the cases of *Lipp v. Hunt*, 25 Neb., 91, and of *Same v. Same*, 29 Neb., 256, and find nothing in either inconsistent with the above.

The judgment of the district court is

AFFIRMED.

THE other judges concur.

JOHN THOMPSON, APPELLANT, V. JAMES THOMPSON, APPELLEE.

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[FILED SEPTEMBER 30, 1890.]

1. **Conditional Deed:** AGREEMENT TO RECONVEY: DISABILITY. One T., a man nearly eighty years of age, was desirous of obtaining a loan of money on a quarter section of land, but the loan agent objected on the ground that the company he represented would not make a loan to a person of great age. The loan agent thereupon suggested that the land be conveyed to J., a son of T., a man about forty years of age, who would procure the loan and give the security. This course was pursued and the loan obtained. *Held*, That a preponderance of the testimony established the fact that the conveyance to J. was not intended to be absolute, but to enable him to effect the loan; and, in an action by the father thereafter brought, J. would be compelled to reconvey, subject to the security for the loan.
2. **Wills:** ADMISSIBILITY IN EVIDENCE. Before the death of the testator, his will is not admissible in evidence to show title in a devisee.
3. **Supreme Court:** DEATH OF PARTY AFTER SUBMISSION. The plaintiff, having died after the cause was submitted to the court, but before judgment, and it being apparent that the defendant had rights in the premises, the cause is remanded to the district court, with leave to the parties to file supplemental pleadings and take further testimony, and for the court to settle the ultimate rights of the parties.

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

Sawyer & Snell, for appellants, cited: 2 Pomeroy, Eq. Juris., secs. 943, note 1; 928, note 1; 955, 956, 957; *Whelan v. Whelan*, 3 Cow. [N. Y.], 537; *Tracy v. Sacket*, 1 O. St., 54; *Wilson v. Stubs*, Hob. [Eng.], 330*a*; *Stebbing v. Spicer*, 8 M., G. & S. [Eng.], 827; *State v. Vittum*, 9 N. H., 519; *Mulock v. Mulock*, 31 N. J. Eq., 594; *Thornton v. Ogden*, 32 Id., 723; *Ford v. Harrington*, 16 N. Y., 285; *Nichols v. McCarthy*, 3 N. E. Rep., 658; *Lavette v.*

Sage, 29 Conn., 589; *Woodbury v. Woodbury*, 2 N. E. Rep., 90; 1 Story, Eq. Juris. [10th Ed.], 194, 195, 197, 307, 310, 311; *Barnes v. Brown*, 32 Mich., 146; *Seeley v. Price*, 14 Id., 541; *Rake's Adm'r v. Pope*, 7 Ala., 161; *Hidden v. Jordan*, 21 Cal., 96; *Bryant v. Hendricks*, 5 Ia., 256; *Judd v. Mosley*, 30 Id., 425; *Laing v. McKee*, 13 Mich., 124; 2 Reed, Stat. Frauds, 542, 555, 582, 596, 643; *Ryan v. Dox*, 34 N. Y., 307; *Clark v. Clark*, 21 Neb., 402; *Hansen v. Berthelsen*, 19 Id., 434; *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y., 354.

Samuel J. Tuttle, contra, cited: Freeman, Judgments, secs. 56, 57, 60, 67; Van Santvoord, Eq. Pl., 100; *Hendrix v. Rieman*, 6 Neb., 523; *Anderson v. Anderson*, 20 Wend. [N. Y.], 585; *Taylor v. Elliott*, 53 Ind., 442; *Stone v. Ringer*, 4 Heisk. [Tenn.], 265; *Gallagher v. Mars*, 50 Cal., 23; *O'Brien v. Gaslin*, 20 Neb., 351; *Callanan v. Judd*, 23 Wis., 343; *Perkins v. Lougee*, 6 Neb., 223; Pomeroy, Eq. Juris., sec. 1035; *Goulde v. Lynde*, 114 Mass., 366; *Osborn v. Osborn*, 29 N. J. Eq., 385; *Russ v. Mebius*, 16 Cal., 350; Perry, Trusts, sec. 164; *Stewart's Exrs. v. Lispenard*, 26 Wend. [N. Y.], 303; *Marmon v. Marmon*, 47 Ia., 121; *Mulloy v. Ingalls*, 4 Neb., 115; *Cole v. Cole*, 21 Id., 112; *Miller v. Finn*, 1 Id., 288; *Clark v. Tennant*, 5 Id., 557; *Mo. Valley Land Co. v. Bushnell*, 11 Id., 197; *Western Ins. Co. v. Putnam*, 20 Id., 331; *Ahlman v. Meyer*, 19 Id., 66; *Courvoisier v. Bouvier*, 3 Id., 61; *Cresswell v. McCaig*, 11 Id., 227; *Roddy v. Roddy*, 3 Id., 96; *Hansen v. Berthelsen*, 19 Id., 433; *Adams v. Adams*, 79 Ill., 517; *Hasshagen v. Hasshagen*, 80 Cal., 514; *Admrs. of Rasdall v. Rasdall*, 9 Wis., 350; *Arnold v. Baker*, 6 Neb., 135.

MAXWELL, J.

This action was brought by John Thompson, Sr., against his son, the defendant James Thompson, to obtain a decree

that the defendant had no estate or interest in a quarter section of land described in the petition, and for such other and different relief as to the court might seem proper.

On the trial of the cause the court below found the issues in favor of the defendant and dismissed the action.

The testimony tends to show that in the year 1881 John Thompson purchased a quarter section of land from the B. & M. Railway Company. The purchase was made by John Thompson, Jr., and for his father, John Thompson, Sr., the agreement being taken in the name of John Thompson. Payments were made upon the land as they accrued, and no difficulty occurred between the father and son until the year 1886. In the year 1885 the defendant cultivated a portion of the land, and some difficulty seems to have occurred between him and his brother John. This culminated in the year 1887, when it was agreed that John should receive $500 for money that he had paid on the contract and that thereupon he was to surrender his claim to said land. In order to obtain the money to pay the balance due to the railway company on the land and to John the $500, it was necessary to effect a loan of $1,250. Thereupon, John, Sr., his sons John and James, applied to Louis Helmer, of Lincoln, for the proposed loan. It was stated to Mr. Helmer that the plaintiff, John, Sr., was nearly eighty years of age, and he (Helmer) said that his company would not make a loan to a person of that age. He testifies that he suggested that the land be conveyed to James, who was to execute a note and mortgage for the sum borrowed. This course was pursued and $1,250 was borrowed from Helmer. The B. & M Company was paid the balance due on the land contract, and $500 to John, Jr. In this testimony Helmer is corroborated by John, Jr.

The defendant contends that the conveyance to him was absolute, but fails to deny the material facts testified to by Mr. Helmer in regard to the necessity of placing the title in his name. Mr. Helmer also testifies that at the time he

made the suggestion of a conveyance to James, he also suggested that James, after the loan was effected, should reconvey to his father. He is a disinterested witness and a business man, and in a case of this kind his testimony is entitled to great weight.

The clear weight of testimony sustains the grounds of the petition, that the conveyance to James was not absolute, but for the purpose of obtaining a loan, and that there was no intention to make an absolute conveyance to the defendant. The judgment of the district court therefore must be reversed.

On the trial of the cause the will of the plaintiff John, Sr., was introduced in evidence, showing that the father intended to leave this land to the defendant. The father was living at this time, and the will was clearly inadmissible.

After the testimony was taken in the case, and after the case was submitted to the court, but before a decision was rendered—the case apparently having been taken under advisement—the father died. The survivors, however, stipulated that judgment might be rendered as of the day of trial. The judgment was so rendered.

It is suggested that the father left a will disposing of his estate. If so, the law has provided a tribunal to determine the validity of such will, and until so determined, it cannot be considered by this court. It is apparent, however, that the defendant has some interest in the land in controversy, but just what that interest is we have no means of determining. It is probable, too, that third parties have an interest in the land, as the defendant seems to have erected a dwelling house thereon.

The judgment of the district court is reversed, and the cause remanded to the district court with leave to the parties to file supplemental pleadings; and the court may take further testimony and make further findings thereon and decide the ultimate rights of the parties.

JUDGMENT ACCORDINGLY.

THE other judges concur.

STATE, EX REL. EDSON PENNELL, v. C. D. ARMSTRONG.

[FILED SEPTEMBER 30, 1890.]

1. **New Counties: FORMATION: CONFLICTING PROPOSITIONS.** A county board cannot lawfully submit, to be voted upon at the same election, two propositions to erect from a county two new counties, when the territory described in one proposition embraces a part of that included in the other. When conflicting petitions for the submission of the question of creating new counties are presented, it is the duty of the county board to grant the petition that is first filed, provided it meets all the requirements of the law, and refuse to submit the others.

2. ———: ———: **AREA.** New counties cannot be formed so as to reduce the county from which they are created to a less area than the constitutional limit.

ORIGINAL application for *mandamus*.

J. C. Crawford, for relator, cited: *State v. Newman*, 24 Neb., 40; *People v. Auditors*, 41 Mich., 223; Dillon Mun. Corp. [3d Ed.], secs. 825, 830, 845–6.

E. F. Gray, contra.

NORVAL, J.

This is an application for a writ of *mandamus* to require the board of supervisors of Knox county to submit to the electors of said county the proposition to erect the county of Union out of the territory now within the boundaries of the county of Knox. On the 9th day of July, 1890, a petition, signed by the relator and 606 other legal voters of Knox county, was filed with the county clerk of that county, and on July 15, 1890, another petition, signed by thirty-one electors of said county, was filed with said clerk, which petition prayed that the respondents, the board of supervisors, submit to the electors of

said county at the next general election a proposition to erect the county of Union out of the two southern tiers of government townships of Knox county. All of said petitioners were residents and legal voters of the territory out of which it is proposed to erect the new county, and it is alleged that they constitute a majority of the electors residing in said territory. It also appears that the proposed Union county comprises the extent of territory required by the constitution and laws, and the remainder of Knox county has more territory than is required by the constitution and laws.

On July 14 thirty of the persons who signed the above petitions filed with the county clerk a remonstrance, and requested that their names be erased from said petitions. On July 15 these petitions were presented to the board of supervisors while in regular session, and were by said board referred to a committee appointed from the membership of the board, to ascertain and report to the full board whether said petitions contained the names of a majority of the electors residing in the proposed Union county. On the next day the committee reported to the board that said petitions contained the names of a majority of the legal voters residing in the territory proposed to be stricken from Knox county, after deducting the names of the thirty petitioners who asked to have their names stricken from the petitions. The respondents refused to grant the prayer of said petitions.

On July 14, 1890, a petition was filed with the county clerk signed by 259 electors of Knox county, and on July 15 there was filed with said clerk another petition signed by thirty-seven legal voters of said county praying for the erection of Alliance county out of three of the eastern tiers of government townships of Knox county. On July 16 the respondents ordered submitted to a vote of the people at the next general election the proposition to create Alliance county, which county includes in its boundaries a

portion of the territory proposed to be included in the county of Union. The relator prays for a *mandamus* to require the respondents to submit to a vote, the proposition to create Union county, and compel them to recall the proposition to erect Alliance county.

Sections 1, 2, and 3 of article 10 of the constitution are as follows:

"Section 1. No new county shall be formed or established by the legislature which will reduce the county, or counties, or either of them, to a less area than four hundred square miles, nor shall any county be formed of a less area.

"Sec. 2. No county shall be divided, or have any part stricken therefrom, without first submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county voting on the question shall vote for the same.

"Sec. 3. There shall be no territory stricken from any organized county unless a majority of the voters living in such territory shall petition for such division, and no territory shall be added to any organized county without the consent of the majority of the voters of the county to which it is proposed to be added." * * *

Section 10 of article 1, chapter 18, of the Compiled Statutes of 1889 provides that, "Whenever it is desired to form a new county out of one or more of the then existing counties, and a petition praying for the erection of such new county, stating and describing the territory proposed to be taken for such new county, together with the name of such proposed new county, signed by a majority of the legal voters residing in the territory to be stricken from each county or counties, shall be presented to the county board of each county to be affected by such division, and it appearing that such new county can be constitutionally formed, it shall be the duty of such county board, or county boards, to make an order providing for the submission of

the question of the erection of such new county to a vote of the people of the counties to be affected, at the next succeeding general election, of which the notice shall be given, the votes canvassed, and the returns made as in case of election of county officers, and the form of the ballot to be used in the determination of such question shall be as follows: 'For new county,' and 'Against new county.'"

It is conceded by the respondents that the petitions presented to the county board for the creation of Union county meet all the requirements of the above quoted sections of the constitution and the statutes excepting one. It is insisted by the respondents that it does not appear that these petitions contain the signatures of a majority of the qualified voters residing in the territory out of which it is proposed to erect the new county. If this be true, it is an insurmountable objection to the granting of the relief demanded by the relator, for, without the requisite number of petitioners, the county board would be without jurisdiction to act.

The relator, in his petition for *mandamus*, alleges that the petitions submitted to the county board, asking for the creation of Union county, contained the signatures of a majority of the legal voters residing in the proposed county, and that there are not more than 1,000 legal voters in said territory.

The respondents in their answer "deny that the two petitions for the creation of Union county contained any greater number than 607 names after deducting the names of those who asked to have their names stricken therefrom in their said remonstrance, and deny that said number was, at the time of their action thereon aforesaid, or now is, a majority of the legal voters residing in the territory comprising the said proposed Union county; deny that the proposed Union county did not, at the time of filing said petitions, or does not now, contain more than 1,000 legal voters." If there were before us nothing but the petition

and answer, the denials in the answer would compel the dismissal of the action. Does the proof show that the petitions for the creation of Union county were signed by a majority of the legal voters residing therein? It is alleged in the petition, and not controverted by the answer, that the proposed Union county comprises the townships of Walnut Grove, Logan, Verdigris, Jefferson, Miller, Creighton, Valley, Central, Cleveland, Lincoln, and the south thirty-six square miles of Dolphin and the south eighteen square miles of Washington and Morton. There are attached to both the petition and the answer certified copies of the abstracts of the total votes cast in said townships at the general election held in November, 1889, for the office of judge of the supreme court, and for and against township organization, from which abstracts it appears that the total vote cast in said townships for judge of the supreme court was 1,019, and 909 votes were cast therein on the question of township organization. These abstracts include the votes cast in Dolphin, Washington, and Morton townships by those residing in said township north of the north line of the proposed Union county. There is also attached to the answer a certified copy of the abstract of the vote cast in said townships at a special election held therein on August 13, 1887, which shows the total vote cast at that election to be 1,334. It appears from this abstract that one-third of Central township and two-thirds of two other townships as then constituted are not included in the territory comprising the proposed Union county. Deducting from the total vote cast at that election fifty votes, being one-third of the votes cast in Central township, and ninety-four, being two-thirds of the votes cast in the two other townships, would leave 1,190 votes cast in 1887 in the territory comprising the proposed new county of Union. All of these abstracts of votes were before the board of supervisors, at the time they declined to submit to the voters the question of creating Union

county. But that is not all. There were likewise presented to the board of supervisors before they took action upon the petitions, the affidavits of five residents of Creighton township in Knox county, wherein each deposed that all the names signed to the petition praying for the erection of Union county are of legal voters residing in said territory, and constitute a majority of all the legal voters residing therein, and that there is not to exceed 1,000 legal voters residing in the proposed county. The abstracts of votes and these affidavits constituted the entire testimony before the county board, and on the hearing in this court. Without any showing to the contrary, this testimony was sufficient to establish that the proposed Union county did not contain more than 1,000 legal voters. In addition to this, we have the report of the committee to whom the board of supervisors referred the Union county petitions. This report finds that the petitions were signed by a majority of the electors residing in the territory comprising the proposed new county. The two Union county petitions contained the names of 607 legal voters after deducting the thirty signers who subsequently requested that their names be stricken from the petitions. This is a majority of all the legal voters residing in the territory comprising the proposed county.

It is urged that it was not for the best interests of the citizens of Knox county that the proposed Union county should be created, and that the petitions for the creation of that county conflict with those granted by the respondents for the erection of Alliance county, in that part of the same territory is included in both sets of petitions. The law is mandatory. When a petition is presented to a county board asking for the creation of a new county which in all respects complies with the law, and contains the requisite number of petitioners, it is the duty of the county board to submit the question to a vote of the people of the county. The law confers no discretion in the matter upon the county board.

Was it the duty of the respondents to submit to a vote the proposition to create Union county after having ordered the submission of the proposition to create Alliance county? The authority of the county board to submit at the same election more than one proposition to create new counties was sustained by this court in the case of *State v. Newman*, 24 Neb., 40. It appears from the statement of facts in that case that the county board of Cheyenne county had submitted to the voters of that county the proposition to create the counties of Kimball, Deuel, Banner, and Scott's Bluff out of the territory embraced in Cheyenne county. Before the general election was held, at which said questions could be voted upon, a proper petition was presented to the county board of Cheyenne county praying that the proposition to establish the county of Potter be submitted to a vote at the same election. The county board refused to permit a vote to be taken thereon. On application to this court a *mandamus* was issued requiring the county board to submit the question of the proposed new county of Potter to a vote of the electors of Cheyenne county. It is stated in the syllabus in that case that "When it is sought to erect from a county more than one new county, and petitions for the submission of the proposition to erect such new counties are severally presented, they may be separately submitted at the same election, without reference to the number of propositions to be voted upon thereat." We adhere to that decision. But the facts in that case are so different from those presented by the record before us, that that decision does not afford us any assistance in determining whether the propositions to create Union and Alliance counties could both be lawfully submitted to a vote at the same election. It will be noticed that each of the proposed new counties contains territory embraced in the other. To be effective, it is clear but one of the propositions can be adopted. The questions are independent, and we are not aware of any

law or statute that would prevent an elector from voting for both propositions. If each should receive the requisite vote, being irreconcilable and conflicting, both would be defeated. The legislature never intended that such conflicting propositions should be submitted to a vote at the same election. It is certain that a fair construction of the language used in section 10 of the statute, above quoted, will not sanction the submission of such conflicting petitions.

There is another very good reason why both propositions could not legally be submitted at the same election. The territory embraced in the proposed new counties of Union and Alliance would reduce the area of the county of Knox below that required by the constitution. The constitution provides that no new county shall be formed which will reduce the county to a less area than four hundred square miles, nor shall a county be formed of a less area. It logically follows that the petitions to create new counties cannot be submitted when the territory included therein will leave the original with an area less than the constitutional limit.

Having reached the conclusion that the county board had no authority to require a vote to be taken on both propositions, the question arises, Which one should have been submitted to a vote? It is conceded that the petitions for the creation of Alliance county were signed by a majority of all the legal voters residing in the territory embraced in the petitions; that such territory has over four hundred square miles, and that the remainder of Knox county was more than the constitutional requirements. The question of creating Alliance county could, therefore, have lawfully been submitted had not the petitions praying for the formation of Union county been presented. The record shows that the Union county petition, containing 607 names, was filed with the county clerk of Knox county on July 9, and after deducting the names

of those who signed a remonstrance contained a majority of the voters residing within the proposed Union county. The first Alliance county petition was not filed until July 14, and it did not contain sufficient signers. On the day following a second Union county petition was filed, also another petition for the creation of Alliance county. Thus it will be seen that those who petitioned for the erection of Union county would have been entitled to have had that question submitted had the board been in session before the petitions for the creation of Alliance county were filed. It makes no difference that the petitions last filed were first circulated and signed, as no duty rested upon the respondents until filed. The fact that the board of supervisors have submitted the Alliance county proposition does not relieve them of the obligation to submit the proposition first presented to the board. The respondents had no authority to submit the question of creating Alliance county.

A peremptory writ of *mandamus* will issue as prayed.

WRIT ALLOWED.

THE other judges concur.

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STATE, EX REL. L. O. HULL, V. GEORGE WALKER.

[FILED SEPTEMBER 30, 1890.]

County Attorney: APPOINTMENT: VALIDITY. Section 25 of chapter 7, Compiled Statutes, 1889, authorizes the county board to fill a vacancy in the office of county attorney by appointment. *Held*, That an appointment made by entering the fact upon the records of the proceedings of the county board is sufficient.

ORIGINAL information in nature of *quo warranto*.

law or statute that would prevent an elector from voting for both propositions. If each should receive the requisite vote, being irreconcilable and conflicting, both would be defeated. The legislature never intended that such conflicting propositions should be submitted to a vote at the same election. It is certain that a fair construction of the language used in section 10 of the statute, above quoted, will not sanction the submission of such conflicting petitions.

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A peremptory writ of *mandamus* will issue as prayed.

WRIT ALLOWED.

THE other judges concur.

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STATE, EX REL. L. O. HULL, v. GEORGE WALKER.

[FILED SEPTEMBER 30, 1890.]

County Attorney: APPOINTMENT: VALIDITY. Section 25 of chapter 7, Compiled Statutes, 1889, authorizes the county board to fill a vacancy in the office of county attorney by appointment. *Held*, That an appointment made by entering the fact upon the records of the proceedings of the county board is sufficient.

ORIGINAL information in nature of *quo warranto*.

Albert W. Crites, for relator, cited: *Ottenstein v. Alpaugh*, 9 Neb., 240; *Bazzo v. Wallace*, 16 Id., 293; *Malick v. McDermots*, 25 Id., 267; *State v. Buffalo Co.*, 6 Id., 460; *Kemerer v. State*, 7 Id., 132; *State v. Harrison*, 113 Ind., 434; *Johnston v. Wilson*, 2 N. H., 202; *State v. Sheldon*, 10 Neb., 452; *Thomas v. Burrus*, 23 Miss., 550; *People v. Woodruff*, 32 N. Y., 355; *People v. Benfield*, 45 N. W. Rep. [Mich.], 135; *McGregor v. Supervisors*, 37 Mich., 388; Mechem, Pub. Officers, sec. 266; *People v. Van Slyck*, 4 Cow. [N. Y.], 324; *People v. Fitzsimmons*, 68 N. Y., 514; *Hoke v. Field*, 10 Bush [Ky.], 144; *Saunders v. Owen*, 12 Mod. [Eng.], 199*.

Alfred Barlow, for respondent, cited: *People v. Weston*, 3 Neb., 322; *White v. Blum*, 4 Id., 561; *State v. Palmer*, 10 Id., 205; *White v. Lincoln*, 5 Id., 514; *Sexson v. Kelley*, 3 Id., 107.

NORVAL, J.

This is an action of *quo warranto*, brought in this court in the exercise of its original jurisdiction, to oust the respondent from the office of county attorney of Sioux county, and to install the relator therein. Both relator and respondent claim under appointment made by the board of county commissioners of the county, to fill a vacancy caused by the resignation of the previous incumbent.

It is established by the agreed statement of facts that E. D. Satterlee, the county attorney of Sioux county, tendered his resignation to the board of county commissioners of said county, which resignation was accepted by the board on the 16th day of December, 1889. On the 7th day of January, 1890, the board of county commissioners, consisting of A. McGinley, James Burke, and Don McWeir, met in regular session and took the following action, which was entered upon the commissioners' record, to-wit:

"Lorenzo O. Hull was appointed county attorney, to fill the vacancy caused by the resignation of E. D. Satterlee. The clerk was instructed to notify Mr. Hull."

Pursuant to the instructions of the board, the county clerk wrote and delivered to the relator the following notice:

"HARRISON, NEBRASKA, January 7, 1890.

"HON. L. O. HULL: You are hereby appointed county attorney for Sioux county, Nebraska, to fill vacancy caused by the resignation of E. D. Satterlee.

"By order of the board of county commissioners.

"CHARLES C. JAMESON,

"*County Clerk.*

"By R. W. WINDSOR,

Deputy."

On the same 7th day of January, 1890, the relator took the oath of office, which was attached to his official bond, and filed the same, with his bond, with the county clerk of said county. The same day the board of county commissioners approved the bond of the relator, and entered a minute of such approval upon the record of their proceedings, and indorsed in writing the following upon the back of said bond:

"Approved by A. McGinly, Don. M. Weir, J. B. Burke, county commissioners."

The relator at once entered upon the actual performance of the duties of the office. On the day that the relator received his appointment, the following communication was sent to him at the request of the county board:

"HARRISON, NEB., January 7, 1890.

"HON. L. O. HULL, *County Attorney:* You are hereby ordered to give your written opinion regarding the bond of Conrad Lindeman for county clerk, touching its legality regarding its reconsideration and approval.

"By order of the county commissioners.

"A reply is requested by noon January 8, 1890.

"CHAS. C. JAMESON,
"*County Clerk.*
"By R. W. WINDSOR,
"*Deputy.*"

On January 8 the relator delivered to the board an opinion, in writing, as requested. On January 9 the term of office of Commissioner McGinly expired, who was succeeded by John A. Green; and January 11 the term of office of Commissioner Burke expired, and he was succeeded by Charles U. Grove.

The respondent claims title to the office of county attorney by virtue of an appointment made by the board of county commissioners at a regular meeting held on January 16, 1890. The record of the said commissioners' proceedings in relation to the appointment of the respondent is as follows:

"HARRISON, SIOUX COUNTY, NEB., January 16, 1890.

"WHEREAS, On examination of records and papers on file it was found that there was no legal appointment of county attorney, and therefore the office was considered vacant: Motion made by Commissioner Green to proceed to appoint a county attorney to fill vacancy. Motion carried. Green and Grove voting affirmative. Weir, no.

"Objection made by Weir to motion on account of having an attorney. Motion made by Commissioner Green to appoint George Walker as county attorney. Motion carried. Green and Grove voting affirmative. Weir, no.

"Motion made by Commissioner Green that the appointment of George Walker be embodied in the minutes of this meeting. Motion carried. Green and Grove voting affirmative. Weir, no.

"GEORGE WALKER'S APPOINTMENT.

"STATE OF NEBRASKA, }
SIOUX COUNTY." }

"WHEREAS, E. D. Satterlee, the duly elected county

attorney of Sioux county, at an election held on the 6th day of November, 1888, has tendered his resignation, and the same being accepted, by reason of which the office of county attorney has become vacant: Now, therefore, we hereby appoint George Walker, Esq., county attorney of said county, to hold said office until a successor is elected and qualified.

"(Signed) J. A. GREEN,
"(Signed) CHAS. U. GROVE,
"*County Board of Sioux County.*

"Dated this 16th day of January, 1890."

The foregoing appointment was made in writing, and filed in the office of the county clerk of Sioux county. The respondent immediately qualified, gave bond, and has ever since been exercising the duties of the office, against the protest of the relator.

The main question presented by the record for our determination is, Was the appointment of the relator to the office of county attorney a valid one?

Sec. 25 of chapter 7, Compiled Statutes, 1889, provides that "In case of vacancy in the office of county attorney by death, resignation, or otherwise, the county board shall appoint a county attorney, who shall give bond, and take the same oath and perform the same duties as the regular county attorney, and shall hold said office until his successor shall be elected and qualified."

The legislature, in 1885, created the office of county attorney, and in the same act adopted the above section, providing for the filling of vacancies in that office. The power to fill such a vacancy is vested in the county board. While the section referred to does not prescribe the manner in which the board shall make the appointment, undoubtedly its action in that regard, like all other proceedings of the board, must be recorded by the county clerk in the book containing its proceedings. (Chapter 18, Compiled Statutes, 1889, secs. 73, 74; *Ottenstein v. Alpaugh*, 9 Neb.,

240.) The action of the board of county commissioners in appointing the relator, and the approval of his bond, was entered upon the official records.

It is claimed by the respondent that the appointment of the relator is invalid, because the members of the county board did not make, sign, and file with the county clerk a written appointment, separate and distinct from the record of their proceedings. This contention of the respondent is based upon the provisions of chapter 26 of Compiled Statutes, entitled "Elections." Sec. 103 of that chapter provides that vacancies in county and precinct offices shall be filled by the county board. This is in harmony with the language used in sec. 25, quoted above. Section 105 of the chapter on elections reads: "Appointments under the provisions of this chapter shall be in writing, and continue until the next election, at which the vacancy can be filled, and until a successor is elected and qualified, and be filed with the secretary of state, or proper township clerk, or proper county clerk, respectively."

The chapter on elections became a law in 1879, and at that time there was no such an office in this state known as county attorney, nor did the legislature provide in that chapter for the election of such an officer. Sec. 105 is limited in its application to the filling of vacancies in the offices mentioned in said chapter 26, and does not in any way control the manner of filling vacancies in the office of county attorney. The legislature having, by a separate act, expressly provided for the filling of vacancies in the office of county attorney, the general law on the subject of vacancies does not apply to that officer. It is, however, believed that the appointment of the relator was made within the spirit of section 105. His appointment was in writing, and the entering of the fact upon the records of the county board was, in effect, a filing of the same with the county clerk.

We are very clear in the opinion that the relator's ap-

pointment was legal and valid, and, having qualified and entered upon the performance of the functions of the office, no vacancy existed on January 16, 1890, and the appointment of the respondent was without authority of law The relator is entitled to the office of county attorney of Sioux county, and a judgment of ouster will be rendered against the defendant.

JUDGMENT OF OUSTER.

THE other judges concur.

GEORGE MARTIN V. STATE OF NEBRASKA.

30 507
49 778
50 156

[FILED OCTOBER 1, 1890.]

1. **Indictment.** Where the foreman of a grand jury indorsed on the indictment the words "True bill," omitting the letter "A," *held*, sufficient.
2. ———: OFFENSES: JOINDER. In case of misdemeanor, several distinct offenses of the same kind may be joined in the same indictment.
3. **Instructions** are to be construed together, and if, taken as a whole, they state the law correctly, they are sufficient.
4. **Liquors:** UNLAWFUL SALE BY AGENT. Where intoxicating liquors have been sold on Sunday, the principal, although not personally present, will be liable, if his agents, or any one authorized by him to sell or give away intoxicating liquor in his place of business, violates the law by selling or giving away such liquors in his place of business on Sunday.

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

Chas. E. Magoon, for plaintiff in error, cited, contending that a principal is not criminally liable for sale of liquor by an agent, unless express or implied consent is

shown: 1 Bishop, Cr. Law, secs. 403-5; 2 Id., sec. 1155; *Lathrope v. State*, 51 Ind., 192; *O'Leary v. State*, 44 Id., 91; *Wreidt v. State*, 48 Id., 579; *Hipp v. State*, 5 Blackf. [Id.], 149; *Com. v. Briant*, 142 Mass., 463; *Com. v. Stevenson*, Id., 466; *Com. v. Nichols*, 10 Met. [Mass.], 259; *Anderson v. State*, 22 O. St., 305; *Mullinix v. People*, 76 Ill., 215; *Keedy v. Howe*, 72 Id., 135; *Pennybaker v. State*, 2 Blackf. [Ind.], 484; *Parker v. State*, 4 O. St., 564; *Seibert v. State*, 40 Ala., 60; *Barnes v. State*, 19 Conn., 398; *Ewing v. Thompson*, 13 Mo., 132; *State v. Borgman*, 2 Nott. & McCord [S. Car.], 34; *State v. Bohles*, 1 Rice [S. Car.], 145; *Martin v. McKnight*, 1 Overt. [Tenn.], 330; *Caldwell v. Sacra*, Litt. Select. Cas. [Ky.], 118; *State v. Mahoney*, 23 Minn., 181; 4 Erskine's Speeches, 137; Coke, Litt., 152*a*, 389*a*; 3 Coke, Inst., 138.

Wm. Leese, Attorney General, contra, cited, contending that ignorance on the part of the accused, of sale by his agent, was a mistake of fact which would not excuse a violation of the statute: *State v. Denoon*, 5 S. E. Rep. [W. Va.], 315; 1 Whart., Cr. Law, sec. 247; *People v. Blake*, 52 Mich., 566; *People v. Roby*, 18 N. W. Rep. [Mich.], 360; *Riley v. State*, 43 Miss, 397; *Com. v. Kelley*, 140 Mass., 441; *Dudley v. Sautbine*, 49 Ia., 650; *Faircloth v. State*, 73 Ga., 426; *Com. v. Emmons*, 98 Mass., 6; *Halstead v. State*, 41 N. J. L., 552; *State v. Hartfiel*, 24 Wis., 60.

MAXWELL, J.

The plaintiff in error was indicted for selling liquor on Sunday, the 9th day of October, 1887. There are five counts in the indictment.

On the trial of the cause Martin was found guilty on the first count and not guilty on the others.

In the court below Martin moved to quash the indict-

ment because the foreman of the grand jury did not indorse thereon the words "A true bill." An examination of the indictment, however, shows the words "True bill" to have been indorsed thereon and duly signed by the foreman of the grand jury. This was sufficient and the omission of the letter "A" before the words "True bill" was not a material defect. The motion was properly overruled, therefore. Martin thereupon filed a motion to require the state to elect upon which count of the indictment it would rely.

In *Burrell v. State*, 25 Neb., 581, it was held that in case of misdemeanor several distinct offenses of the same kind may be joined in the same indictment. That decision was rendered after a careful examination of the authorities on the subject, and we believe the decision is correct.

The offense, as charged in the case at bar, was for selling or giving away intoxicating drinks to five different persons on the 9th day of October, 1887. The offenses, therefore, are of the same kind and were properly joined. The first count in the indictment is as follows:

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

"Of the October term of the district court of the second judicial district of the state of Nebraska within and for Lancaster county, in said state, in the year of our Lord one thousand eight hundred and eighty-seven, the grand jurors, chosen, selected, and sworn, in and for the county of Lancaster, in the name and by the authority of the state of Nebraska, upon their oaths present that Geo. Martin, Mrs. Kate Martin, and Fred Chapman, late of the county aforesaid, on the 9th day of October, in the year of our Lord one thousand eight hundred and eighty-seven, in the county of Lancaster, and state of Nebraska aforesaid, then and there being, did unlawfully and willfully sell and give away malt liquors and intoxicating drinks to one J. A. Wolf, said 9th day of October, 1887, being the first day of the week, commonly called Sunday, without having any

authority therefor, and contrary to the form of the statute in such cases made and provided."

There is testimony in the record tending to show that, at the time stated in the indictment, George Martin was absent from the state and therefore, personally, could not have furnished the liquor in question. There is also testimony tending to show that Mrs. Kate Martin, his wife, and Fred Chapman, the bar tender, were intrusted by him with the sale of intoxicating liquors.

The court instructed the jury as follows:

"The defendants, George Martin, Kate Martin, and Fred Chapman, are charged in the indictment in this cause with unlawfully selling and giving away intoxicating liquor on the 9th day of October, 1887, said 9th day of October being the first day of the week, commonly called Sunday, contrary to the laws of the state of Nebraska.

"2d. The section of the statute upon which this indictment is founded against defendants reads as follows: 'Every person who shall sell or give away any malt, spirituous, and vinous liquors on the day of any general election, or at any time during the first day of the week, commonly called Sunday, shall forfeit and pay for every such offense the sum of one hundred dollars.'

"3d. You are instructed that if you find from the evidence that the defendant, George Martin, or his agent and bar keeper, Fred Chapman, or his wife, Kate Martin, sold or gave away intoxicating liquors to any person or persons on the 9th day of October, 1887, as charged in the indictment, your verdict should be guilty as to the defendant or defendants so giving away or selling such intoxicating liquors on said 9th day of October, 1887.

"4th. You are further instructed that under the law in force in this state it makes no difference whether the defendant, George Martin, was personally present in his place of business when intoxicating liquors were sold contrary to law. If you find from the evidence that his

agents, or any one authorized by him to sell or give away intoxicating liquors in his place of business, did violate the law by selling intoxicating liquors, beer or whisky, in his place of business on the Sabbath day, as charged in the indictment, said George Martin, defendant, would be liable for such violation of the law, and, upon conviction thereof, would be subject to the penalty imposed by the statute.

"5th. In order to find the defendant or defendants guilty, it is only necessary that you believe from the evidence, beyond a reasonable doubt, that the defendant, or any one of the defendants, sold or gave away intoxicating liquors on the 9th day of October, 1887, as charged in the indictment.

"6th. You are instructed that the law presumes the defendants innocent until proven guilty, and it is incumbent upon the state to prove, beyond a reasonable doubt, that the defendant, or his agents or servants, or any one authorized by him, did sell or give away intoxicating liquors as charged in the indictment; and you are instructed that the state must establish by a preponderance of the evidence each particular averment contained in the indictment, beyond a reasonable doubt, and that unless each material averment of fact contained in the indictment is established beyond a reasonable doubt, the defendants are entitled to an acquittal at your hands.

"7th. You are the sole judges of the evidence submitted for your consideration, and if, after carefully considering the same, you find the defendant or defendants guilty, as charged in the indictment, your verdict should be guilty as to such defendant; or if any one of them have not violated the law, as charged in the indictment, it is your duty to acquit."

Objections are made to the fifth paragraph; but the instructions are to be construed together as a whole, and, when so construed, it is apparent that the question of agency was properly submitted to the jury. It was not necessary for Mr. Martin to be personally present in his

place of business when intoxicating liquors were sold contrary to the law. If, from the evidence, the jury should find that his agents, or any one authorized by him to sell or give away intoxicating drinks in his place of business, did violate the law by selling or giving away intoxicating drinks in his place of business on Sunday, the law will hold him responsible, and the penalty will fall upon him as well as those who were acting under him. The question of such authority was fully submitted to the jury, and the judgment is sustained by the evidence, and is

AFFIRMED.

THE other judges concur.

M. S. LINDSAY, APPELLANT, V. CITY OF OMAHA, APPELLEE.

[FILED OCTOBER 7, 1890.]

1. **Municipal Corporations:** VACATED STREETS: TITLE. L. was the owner of and resided in his dwelling house upon two adjoining lots of McCormick's addition to the city of O., bounded north by Harney street, east by Twenty-ninth (Twenty-eighth) street, and south by Half Howard street. The streets and blocks of the addition, as laid out and platted, did not correspond with those of the adjacent portions of the city previously laid out and platted. In order to correct and remedy this irregularity and inconvenience, the city, by ordinance, closed Twenty-eighth street and opened Twenty-ninth avenue through said addition west of the two lots and dwelling of L. in such manner as left a strip eight feet wide between the west one of the two lots and Twenty-ninth avenue; whereupon the city caused the damages to abutting property owners on Twenty-eighth street, including L., to be appraised, and was about to offer the vacated ground of said street at public sale, when L. commenced his suit for injunction as to the whole proceedings. *Held*, That the fee simple title to the vacated street is in the city of O.

2. ———: ———. The city possessed the power to vacate the street.

3. ———: ———. Upon its vacation no title therein passed or reverted to L. as the owner of abutting property.

4. ———: ———: DAMAGES. As the owner of such abutting property, L. was entitled to damages, in addition to any suffered, as one of the community at large.

5. ———: ———: REMEDY: PRESUMPTION. The provision by appraisement of damages, made by the city, presumed to be adequate for that purpose.

6. **The pleadings and facts in evidence fail to present a case for injunction against the city authorities.**

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

Wm. E. Healey, and *M. S. Lindsay*, for appellant, cited: *State v. Cincinnati Gas Light Co.*, 18 O. St., 292; 2 Washb., Real Prop. [3d Ed.], 2, 3, 20, 445, 458; 1 Id., 66; 2 Chit. Blackstone, 151; 1 Cruise's Digest, 45; 2 Id., 3; Cooley, Con. Lim., 531, 555, 556, 658, 867 and note 3; *State v. Brown*, 3 Dutch. [N. J], 13; *McKelway v. Seymour*, 5 Id., 321; *Hooker v. Utica Co.*, 12 Wend. [N. Y.], 371; *Stuyvesant v. Mayor*, 11 Paige [N. Y.], 425; *Dunham v. Williams*, 36 Barb. [N. Y.], 136, 163; *People v. Kerr*, 27 N. Y., 196; *Heyward v. Mayor*, 3 Seld. [N. Y.], 314; *Kane v. Mayor*, 15 Md., 240; *People v. White*, 11 Barb. [N. Y.], 26; *U. S. v. Harris*, 1 Sumner [U. S.], 21; 1 Redfield, Railways [6th Ed.], secs. 12, and 69, subds. 7, 12, 13; *Hill v. R. Co.*, 32 Vt., 73; *Heynaman v. Blake*, 19 Cal., 579; *Crawford v. Del.*, 7 O. St., 459, 469; *B. & M. R. Co. v. Reinhackle*, 15 Neb., 279; *St. Ry. v. Cumminsville*, 14 O. St., 546, 549; 2 Dillon, Mun. Cor. [3d Ed.], 47 and citations, 570 and citations, 587, 650, 675, 683, 712; Sedgwick, Stat. and Const. Law., 533, 534; *Com. v. Rush*, 14 Pa. St., 186; *Com. v. Alburger*, 1 Whart. [Pa.], 469; *Board v. Edson*, 18 O. St., 221; *Pres. v. Indianapolis*, 12 Ind., 620; *Turner v. Althaus*, 6 Neb., 54; *Barter v. Com.*, 3 Pa., 253;

Com. v. R. Co., 27 Pa. St., 339; *Alleghany v. R. Co.*, 26 Id., 355; *Quincy v. Jones*, 76 Ill., 231, 244; *Milhan v. Sharp*, 27 N. Y., 622; *Matter of N. Y. Cent. R. Co.*, 77 Id., 255; *State v. Mayor*, 5 Port. [Ala.], 279; *C., R. I. & P. R. Co. v. Joliet*, 79 Ill., 34; *Sims v. Chattanooga*, 2 Lea [Tenn.], 694; *Com. v. McDonald*, 16 Serg. & R. [Pa.], 390; *Rung v. Shoneberger*, 2 Watts [Pa.], 23; *Penny Lot Landing Case*, 16 Pa. St., 79, 94; *Phil. v. R. Co.*, 58 Id., 253; *Burbank v. Fay*, 65 N. Y., 57, 71; *Jersey City v. Canal Co.*, 1 Beasl. [N. J.], 547, 561; *Simons v. Cornell*, 1 R. I., 519; *I. P. & C. R. Co. v. Ross*, 47 Ind., 25; *Hoadley v. San Francisco*, 50 Cal., 265; *Harmon v. Omaha*, 17 Neb., 551; *Denver Circle R. Co. v. Nestor*, 15 Pac. Rep., 723; *R. Co. v. Schurmeir*, 7 Wall. [U. S.], 272; *State v. Laverack*, 34 N. J., 201; *Wood v. San Francisco*, 4 Cal., 191; *Minor v. San Francisco*, 9 Id., 45; *Fairfield v. Williams*, 4 Mass., 427; *U. S. v. Harris*, 1 Sumner [U. S.], 21; *Leonard v. Adams*, 119 Mass., 366; *A., T. & S. F. R. Co. v. Patch*, 28 Kan., 470; *Hicks v. Ward*, 69 Me, 436; *Newville Road Case*, 8 Watts [Pa.], 172; *Barclay v. Howell*, 6 Pet. [U. S.], 498; *Davies v. Huebner*, 45 Ia., 574; *State v. Culver*, 65 Mo., 607; *Stout v. R. Co.*, 83 Ind., 46; 2 Kent, Com., 257, 339; *West River Bridge Co. v. Dix*, 6 How. [U. S.], 507; *Beekman v. R. Co.*, 3 Paige [N. Y.], 73; *Varick v. Smith*, 5 Id., 137; *Chas. Riv. Bridge v. Warren Bridge*, 11 Pet. [U. S.], 420; *Bloodgood v. R. Co.*, 18 Wend. [N. Y.], 56; *Wilkinson v. Leland*, 2 Pet. [U. S.], 627; *L. & O. R. Co. v. Applegate*, 8 Dana [Ky.], 301; *Albany St.*, 11 Wend. [N. Y.], 151; *John and Cherry Sts.*, 19 Id., 676; *Taylor v. Porter*, 4 Hill [N. Y.], 140; *Heyward v. Mayor*, 3 Seld. [N. Y.], 314; *Embury v. Conner*, 3 N. Y., 511; *B. & P. R. Co. v. McComb*, 60 Me., 294, 296; *Lance's App.*, 55 Pa. St., 16; Potter's Dwarris Statutes, 371, 375; *Weeping Water v. Reed*, 21 Neb., 271, 272; *Day v. Schroeder*, 46 Ia., 546; *Des Moines v. Hall*, 24 Id., 244, 246, 248; *Dempsey v. Burlington*, 66 Id., 688;

Marshalltown v. Forney, 61 Id., 578; *Williams v. Carey*, 34 N. W. Rep., 814; *Clinton v. R. Co.*, 24 Id., 476; *State v. Brown*, 3 Dutch. [N. J.], 13; *McKelway v. Seymour*, 5 Id., 321; *Hooker v. Utica Co.*, 12 Wend. [N. Y.], 371; *Stuyvesant v. Mayor*, 11 Paige [N. Y.], 425; *Dunham v. Williams*, 36 Barb. [N. Y.], 136, 163; *Atchison & N. R. Co. v. Garside*, 10 Kan., 564; *Augusta v. Perkins*, 3 B. Mon. [Ky.], 437; *Colchester v. Lowten*, 1 Vesey & B. [Eng.], 226; *Alvez v. Henderson*, 10 B. Mon. [Ky.], 131, 168; *Bowlin v. Furman*, 28 Mo., 427; Angell & A., Corp., sec. 187; *Still v. Lansingburgh*, 16 Barb. [N. Y.], 107; *Holladay v. Frisbie*, 15 Cal., 630; *Shannon v. O'Boyle*, 51 Ind., 565; *Mathews v. Alexandria*, 68 Mo., 115; *Kreigh v. Chicago*, 86 Ill., 407; *Buckner v. Augusta*, 1 A. K. Marsh. [Ky.], 9; *Townsend v. Greeley*, 5 Wall. [U. S.], 326; *Rutherford v. Baker*, 38 Mo., 315; *Price v. Thompson*, 48 Id., 363; *Alton v. Trans. Co.*, 12 Ill., 60.

Jno. L. Webster, *contra*, cited: *O. & R. V. R. Co. v. Rogers*, 16 Neb., 119; *Paul v. Carver*, 24 Pa. St., 207; *Gray v. Land Co.*, 26 Ia., 387; *Polack v. Asylum*, 48 Cal., 490; *Fearing v. Irwin*, 55 N. Y., 486; *Des Moines v. Hall*, 24 Ia., 234; *Pettengill v. Devin*, 35 Id., 344; *Day v. Schroeder*, 46 Id., 546; *Williams v. Carey*, 73 Id., 194; *Marshalltown v. Forney*, 61 Id., 578; *Dempsey v. Burlington*, 66 Id., 688; *D. & S. F. R. Co. v. Demke*, 11 Col., 247; *Denver R. Co. v. Nestor*, 10 Id., 416; *Wayne Co. v. Miller*, 31 Mich., 447; *Bay Co. v. Bradley*, 39 Id., 163; *Hunter v. Middleston*, 13 Ill., 50; *Stetson v. R. Co.*, 75 Id., 74; *Zinc Co. v. La Salle*, 117 Id., 411; *Gebhart v. Reeves*, 75 Id., 301; *Chicago v. Bldg. Assn.*, 102 Id., 379; *Kimball v. Kenosha*, 4 Wis., 336; *Weisbrod v. R. Co.*, 18 Id., 40; *Milwaukee v. R. Co.*, 7 Id., 85; *Mariner v. Shulte*, 13 Id., 775; *Price v. Thompson*, 48 Mo., 361; *Rutherford v. Taylor*, 38 Id., 315; *Bd. of Education v. Edson*, 18 O. St., 221; *Knox Co. v. McComb*, 19 Id., 320; *Malone v. Toledo*, 34 Id., 541, 545–6.

COBB, CH. J.

The appellant alleges that on June 25, 1885, he was the owner in fee of lots 1 and 2 of block 11, of McCormick's addition to the city of Omaha; that on February 8, 1887, the appellee, without legal authority, vacated the public street No. 29, in said addition, between blocks 9, 10, 11, and 12, and offered the same for sale; to enjoin which the appellant brought this suit in the district court of Douglas county against the city of Omaha, which, upon final hearing and trial, was dissolved and the petition dismissed.

The answer of the defendant sets up that on February 8, 1887, the mayor and council duly passed an ordinance declaring that part of Twenty-ninth street between Farnam and Howard streets, in McCormick's addition, vacated; that prior thereto three disinterested freeholders of the city were duly appointed to assess the damages to the respective property holders abutting and adjacent to the street so vacated, and such appraisers duly assessed such damages, and the respective amounts were duly tendered to the respective property holders so damaged; that prior to vacating said part of said street defendant extended Twenty-ninth avenue in a straight line from Howard to Farnam street, and through said McCormick's addition, and as so extended lies a short distance west of the property in the plaintiff's petition described, and is one of the main thoroughfares of the city, and that the extension furnished a safe and convenient way of travel for the plaintiff, and for the public, in place of that part of the street vacated and as a substitute therefor; that prior to the vacation thereof defendant duly extended Twenty-eighth street in a straight line from Howard street to Farnam street through said addition, which extension lies a short distance east of the property of the plaintiff described, and is one of the main thoroughfares of the city, and that the extension furnished a safe and convenient way of travel

for the plaintiff, and for the public, in place of that part of Twenty-ninth street vacated and as a substitute therefor; that the vacating of said part of Twenty-ninth street and the extending of Twenty-ninth avenue and said Twenty-eighth street were acts for the use and benefit of the plaintiff, and were for the public good.

The plaintiff's reply denies the allegations of the answer.

The cause was submitted to the court on the pleadings and evidence. The court found for the defendant, dismissing the petition, from which the plaintiff appealed to this court.

Sections 104 and 105 of chapter 14, Compiled Statutes, provide for the laying out of cities, villages, and additions thereto, into lots, streets, alleys, and squares, by the owners or proprietors of land, the platting of the same, and the acknowledging and recording of the plats thereof; and section 106 provides that "The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use, or as is thereon dedicated to charitable, religious, or educational purposes."

Some years ago, in writing the opinion in the case of *O. & R. V. R. Co. v. Rogers*, 16 Neb., 117, I made a thorough examination of the adjudicated cases of the states having statutory provisions similar, or nearly so, to our own above cited, and came to the conclusion that the fee simple title to the streets of cities or villages, which passes by virtue of the acknowledgment and recording of the plats, passes to and vests in the city or village.

Section 56 of chapter 12*a* of the Compiled Statutes provides as follows: "The mayor and council shall have power * * * to provide for the opening, vacating, widening, and narrowing of streets, avenues, and alleys within the city, under such restrictions and regulations as may be provided by law." This provision relates to cities

of the metropolitan class, but there is also a similar provision relating to cities of the first class.

The provision of statute first above quoted is identical with that of a statute of Iowa. That state also has a provision of statute nearly identical with that last above cited. Under these statutes questions nearly similar to the one at bar have been several times before the supreme court of that state. The case of *Dempsey et al. v. City of Burlington et al.*, 61 Ia., 688, I am unable to distinguish in principle from the case at bar. It is true the case appears to have been contested, not so much upon the want of power on the part of the city to vacate the alley in question and convey the land thus vacated, as the form in which it was sought to be done. Yet the court squarely decided the question of power to grant the vacated ground to a private person, as well as to vacate the alley.

The case of *Marshalltown v. Forney*, 51 Id., 578, involves the same principle as the above, and was decided the same way. While I am inclined to follow these cases as far as is necessary to a decision of the case at bar, yet, in so far as it was the purpose and object of the city authorities of Des Moines and Marshalltown, respectively, in vacating the alley involved, to enable themselves to grant away the vacated ground, I would not follow them, as I think that the sale or granting of such ground by the city, could only be done as an incident to the power to open and vacate.

In the case of *Williams et al. v. Carey, Mayor, et al.*, 73 Id., 194, the court in the opinion says, after speaking of the several cases above cited, and others: "While in none of these cases, heretofore determined by this court, are the facts similar to those in the case at bar, yet the power of the city, in a proper case, to vacate a street, has been several times affirmed. Such power is clearly conferred by statute. Under it the power to narrow, widen, or vacate a street is practically unlimited, when it is exercised for the public

good, and yet it cannot be arbitrarily exercised under the pretense that the public good requires it. While this is true, it is subject to equitable control, and, therefore, to a large extent, each case must be determined in accordance with its own particular facts. An abutting lot-owner cannot arbitrarily object to the vacation of a street, or a part of a street, nor can he, upon slight grounds, prevent the accomplishment of that which is a material benefit to the general public; and the conclusion of the city council will, ordinarily at least, be conclusive as to the question whether the vacation of a particular street is for the public good. This being so, the question is whether the plaintiffs will be materially damaged. That they will be damaged to some extent will be conceded; but no tangible property belonging to them will be taken or appropriated for the public benefit. In a city or other community, at least some rights of an individual must be subordinate to the general good."

In the case at bar the action is an equitable one, and the remedy sought is a perpetual injunction to prevent a sale of the vacated ground by the city, or its interference with the plaintiff in his enjoyment of the same as an open street. Plaintiff does not question the method by which the city has sought to vacate the street, or to sell the ground, but attacks its power to do either, and proceeds upon the theory that it not having the power to vacate, the street remains open, notwithstanding the vacating ordinance and the assessment and tender of damages to the abutting property holders. The question as presented by the pleadings, admissions, and evidence is, I think, fully answered by the statute which confers upon the city the power to vacate streets.

Doubtless residence property in a city may be, and often is, so situated in respect to other streets that to vacate a certain street immediately fronting thereon would inflict an irreparable injury, and, as such, might be enjoined. But such case is not presented here. At the same time it must

be conceded that the vacation of Twenty-ninth street, as the parties call it, or Twenty-eighth street, as it is marked on the exhibit, would be an especial damage to the property of the plaintiff, not shared in by the property of the city, or of McCormick's addition generally. The city concedes this by providing for the appraisement and tender of such damages, and the appraisement of the damages sustained by some fair and adequate method, and its payment by the city to the plaintiff is doubtless the relief to which the plaintiff was entitled. This relief he was entitled to upon the vacating of the street, which right is inconsistent with any on his part that the title to half of the street reverted to him upon its vacation, as well as any right to use the vacated ground as a street. So that it all depends upon the right of the city to vacate the street, a right given by the letter of the statute; and I know of no reason through which it should not be made continuous and effective.

The judgment of the district court is

AFFIRMED.

THE other judges concur.

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STATE, EX REL. CHEMICAL NATIONAL BANK, v. SCHOOL DISTRICT NO. 9, SHERMAN COUNTY, ET AL.

[FILED OCTOBER 7, 1890.]

1. **Limitation of Actions:** A PROCEEDING BY MANDAMUS, not being otherwise provided for in the statute of limitations, *held*, to fall under the 16th section of the Code, and is barred at the end of four years.

2. ———. That the statute of limitations, although confined in terms, applies to all claims that may be made the ground of action at law, in whatever form they may be presented.

ORIGINAL application for *mandamus*.

Dawes & Foss, for relator.

G. M. Lambertson, contra.

Cases cited by counsel are in the main referred to in opinion.

COBB, CH. J.

The Chemical National Bank of New York city, as relator, filed its petition August 31, 1888, for a peremptory writ of *mandamus* to compel the school board of district No. 9, of Sherman county, to report the indebtedness of said district, and the rate and amount of taxes required to pay the same, to the county clerk, and the county commissioners, commanding them to levy a tax upon all the taxable property of the citizens of said district to pay such indebtedness, or to pay one-third thereof the first year ensuing, and an equal amount annually until the whole be paid, and commanding the county treasurer to collect and retain the same in special fund, and as often as $100 should be collected, to pay over the same to the clerk of the supreme court, to be by him paid to the relator, on account of two certain school district bonds, lawfully issued by said district and held by the relator, numbered 5 and 8, respectively, for $500 each, dated July 1, 1874, payable in six years from date, with interest at ten per cent per annum, amounting in all to $2,105, for the assessment, collection, and payment of which demand had been duly made, which demand has been neglected and refused by said district board and said county officers, and no part thereof has been paid except such interest coupons as became due prior to January 1, 1879, which were paid.

The defendants appeared and demurred to the petition.

I. That it fails to state a cause of action.

II. That the cause of action is barred by the statute of

limitations, or did not accrue within five years next preceding the filing of the petition.

The relator claims that the defendants admit, by demurrer, the facts set up in the petition; that district No. 9 is a duly organized school district; that it borrowed, by legal methods, the money represented by the bonds Nos. 5 and 8, used it for school purposes within and for the district, and paid the interest due prior to January 1, 1889.

It contends that the demurrer should be overruled, because "there is no doubtful question of the statute of limitations not running against this cause of action, in any former decisions of this court, as claimed by defendants." That the distinction between a school district warrant, for money due, and a school district bond negotiated for the loan of money, is plain and evident, and ought not to be subject to the operation of the statute of limitations, for the reason that the warrant can only be drawn upon funds already provided and remaining in the treasury, and the bonds are issued as the obligation of the district to pay that amount, at a future day, on the public faith of the officers, and upon the presumption that they will do their duty in levying and collecting taxes in order to pay the bonds according to their legal purport. It contends that, under secs. 645–46–47–48 of the Code, *mandamus* should always issue where the right to require performance of the act is clear, and where no other specific remedy is provided; and contends further that it is an established doctrine in the construction of statutes of limitation that cases within the reason and not within the words of the statute, as in this instance, are not barred, but may be considered as omitted cases in the act, the legislature not deeming it proper to limit them.

In support of the application, the relator's counsel cites the decisions of the supreme courts in several states. In *Smith, Admr., etc., v. Lockwood, Exr., etc.*, 7 Wendell, 241, it was held, in the state of New York, in the year 1831,

"That the statute of limitation is not a bar to every action of debt, but only to those brought for arrearages of rent, or founded upon any contract without specialty; and that the settled construction of the statute is, that it applies solely to actions of debt founded upon contracts in fact, as distinguished from those arising from construction of law."

In *Bass v. Bass*, 6 Pickering, 362, it was held, in Massachusetts, in 1828, in an action between merchants, on an account for goods sold and delivered, that, although in a case in New York [5 Johns. Ch. Rep., 522] Chancellor Kent had reviewed the authorities, and had come to the conclusion that merchants' accounts are within the statute, where there is no item within six years, yet in a case reported 5 Cranch, 15, the court maintained the contrary doctrine; and, as the language of the Massachusetts statute is clear, the court will ground its decision upon it. The words of the statute are: "All actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchants, their factors or servants, shall be commenced within the time limited. Such accounts are not within the statute. This is the most natural construction, and the only one the words of the statute will allow."

In *Jordan v. Robinson*, 15 Me., 167, the suit was an action of debt on a judgment of the supreme court of New Brunswick, British Province, rendered in 1818, to which was pleaded the general issue and the statute of limitations. The court held, "That the obligation is not a debt grounded upon any lending or contract within the meaning of the statute, but looking to the consideration of the judgment we find it founded upon an express contract, but one excepted from the operation of the statute, being rendered upon a note in writing for the payment of money, attested by a witness." Judgment was for the plaintiff in the year 1838.

In *Keith v. Estill*, 9 Ala., 669, the action was brought on

a judgment of the county court of Franklin county, Tennessee, rendered in 1820. The statute of limitations was pleaded, the plaintiff demurred, and the court overruled the demurrer. The supreme court, in 1840, Ormond, J., said: "I should be willing to rest the decision on the construction of our statute, that the framers of the act by the word 'contract' did not contemplate judgments, and that it is a *casus omissus*. The contrary opinion has only been supported on the ground that a foreign judgment is merely *prima facie* evidence of a debt; but the judgments of our co-states, rendered on service of process, are conclusive evidence of the debt when sought to be enforced in any other state." From this opinion, Goldthwaite, one of the justices, dissented, and said, in his judgment, the plea interposed was a complete bar to the action.

In *Bedell v. Janney*, 4 Gilman, 193, the supreme court of Illinois, in the year 1847, held that it was then a well established doctrine that cases within the reason but not within the words of the statute of limitation, are not barred, but may be considered as omitted cases which the legislature had not deemed proper to limit."

In the case of *Garland v. Scott*, 15 La., 143, it was held by the supreme court of that state, in 1860, that "statutes of prescription and limitation could not be extended from one action to another, nor to analogous cases, beyond the strict letter of the law."

It will not be disputed that anciently from 1550 to 1800, and subsequently, the views and arguments offered by the relator's counsel in this case, and the precedents cited by him, in their own day, were the accepted rule and authority as to the significance and force of the writ of *mandamus*. But those days are past, and the economy of the law has enlarged the rule. It has been extended in this instance, as in many other remedies, and *mandamus* from a prerogative writ of the crown, or the state, to enforce an official duty, has modernly come to be an action at

law involving all the merits of the inquiry. Hence demurrer is entertained to the relator's information.

The important question raised by the demurrer is that of the statute of limitations applicable to the cause of action described by the relator.

It was given out from this court, as early as 1870, in the case of *Brewer v. Otoe County*, 1 Neb., 382, that "the section of the Code of Civil Procedure providing that 'an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment, can only be brought within five years after the cause of action shall have accrued,' applies as well to actions where counties, or other municipal corporations, are parties as between private persons, the law recognizing no distinction in suitors, but applying the same rule to all." The relator's cause of action would seem to be within this rule under four of the conditions mentioned.

In the case of *May v. The School District No. 22 of Cass County*, 22 Neb., 205, this rule was maintained. The plaintiff sued on a warrant for $75, dated September 9, 1879, payable eighteen months after date. More than five years had elapsed after the maturity of the warrant before suit was commenced. The statute of limitations was applied, and it was held that "the maxim, *lapse of time is no bar to the rights of the sovereign*, applies only to a sovereign state, and not to municipal corporations deriving their powers from the state, although their powers, in a limited sense, are governmental; and thus it appears that the statute runs for and against cities, towns, and school districts in the same manner that it does for and against individuals."

Arguments need not be prolonged in support of this proposition. It has been considered and settled. (*The City of Cincinnati v. Evans*, 5 O. St., 594; *Same v. Church*, 8 Id., 298; *Lane v. Kennedy*, 13 Id., 42; *School Directors v. Georges*, 50 Mo., 194; *Kennebunkport v. Smith*, 22

Me., 445; *Clements v. Anderson*, 46 Miss., 581; *Evans v. Erie County*, 66 Pa. St., 225; *St. Charles County v. Powell*, 22 Id., 522; *Callaway County v. Nolley*, 31 Id., 393; *Abernathy v. Dennis*, 49 Id., 469; *Perrenthal v. San Francisco*, 21 Cal., 351; *Clark v. Iowa City*, 20 Wall. [U. S.], 583; *De Cordova v. Galveston*, 4 Tex., 470; *Underhill v. Trustees, etc.*, 17 Cal, 172; *Baker v. Johnson Co.*, 33 Ia., 151; 2 Dillon on Munic. Corp., sec. 668.)

The question of the statute of limitations to be applied to municipal corporations, was again considered in this court, in July, 1888, in the case of the *Village of Arapahoe v. Albee*, 24 Neb., 242, and it was held that "the statute will run against a warrant issued by the proper authorities of a village, and the warrant will be barred in five years from the time it becomes due," citing the decision in the case of *Brewer v. Otoe County, supra.*

And again in the case of *The School District No. 42 of Pawnee County v. The First National Bank of Xenia, Ohio*, 19 Neb., 89, the district bonds of the plaintiff in error, the cause of action sued upon, were signed by the moderator, director, and treasurer of the school district, dated October 16, 1873, registered the 23d following, and issued by the district after the latter date. To one of the bonds for $200, due October 1, 1875, there was pleaded the statute of limitations, the action having been commenced July 26, 1882, and there being evidence and indorsements on the bond, of the payment by the county treasurer, of interest thereon, March 22, 1878, $25; April 30, 1878, $60.25; June 15, 1878, $54, it was held that such evidence was competent to take the bond out of the operation of the statute of limitations, which otherwise would have barred the action.

If it be insisted that limitation is not to be applied to *mandamus*, as to the duties of municipal officers, it is answered that sec. 2 of title 1 of the form of civil actions of the Code of Civil Procedure declares that "the distinc-

tion between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished, and in their place there shall be hereafter but one form of action, which shall be called a civil action," the complainant to be known as the plaintiff, and the adversary as the defendant in the case.

In consonance with this provision it was held, in the case of *The State, ex rel. of J. G. Miller, v. The County of Lancaster*, 13 Neb., 223, that "a *mandamus*, under our practice, is an action at law, and is reviewable only on error and not by appeal." This decision would appear to settle all the important questions contended for by the counsel for the relator, against his expressed views. Nor is the decision inconsistent with the modern rule of *mandamus* in this country.

In the case of *The Commonwealth of Kentucky v. The Governor of the State of Ohio*, 24 Howard, 66, as early as 1860, the chief justice of the United States, after remarking that "the court is sensible of the importance of this case, and of the great interest and gravity of the questions involved in it which have been raised and fully argued at the bar," held "that a writ of *mandamus* does not issue in virtue of any prerogative power, and in modern practice is nothing more than an ordinary action at law in cases where it is the appropriate remedy." This application was for a writ of *mandamus* to compel the defendant to deliver up to the custody of the plaintiff the body and person of one Willis Sago, indicted of the offense of seducing and enticing *Charlotte*, a slave of C. W. Nuckols, to leave her master and escape into Ohio. The cause of action was fully inquired into, and the writ denied. (*Kendall v. U. S.*, 12 Peters, 615.)

This new view, if it may be called so, has been so well settled, and so apparently proper, that our Brother Maxwell in his work has adopted it, and said that "in modern practice *mandamus* is nothing more than an action at law

between the parties." (Maxwell, Pl. & Pr., 729.) And while this principle cannot be misunderstood in this state, it does not seem to be less common to others. In the case of *Dement v. Rokker*, 126 Ill., 189, it was held "that *mandamus* was an action at law, to be governed by the same rules of pleading as in other actions, and was within the limitation act which provided that 'all actions founded upon any judgment shall be commenced within sixteen years after the cause of action accrued, and not thereafter.'" The supreme court of Illinois held further that the defense of this statute was good, and said that "obviously this proceeding was comprehended within the term 'action' used in the statute." (*Peoria County v. Gordon*, 82 Ill., 437.)

Mr. J. L. High, in his important work on Extraordinary Remedies, sec. 355, lays it down that, in cases where the aid of *mandamus* is sought to compel public officers to draw their warrant for the payment of money "the right to relief, in this class of cases, may be barred by the statute of limitations." That we believe to be this case, and we hold broadly that our statute of limitations, although confined in terms, applies to all claims that may be made the ground of action at law in whatever form they may be presented; the same falling within the meaning and purport of section 16 of the Code, when not falling within any other.

It does not seem doubtful, from the precedents and authorities cited, that the demurrer in this case is well taken, and that the statute of limitations is a bar to the writ, which is denied at the costs of the relator.

WRIT DENIED.

THE other judges concur.

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ISAAC PEFLEY V. LEONORA Z. JOHNSON.

[FILED OCTOBER 7, 1890.]

1. **Pleadings:** LIBERAL CONSTRUCTION. Under the Code, pleadings are to be liberally construed, and if with such construction a petition states a cause of action against a defendant and in favor of the plaintiff, a demurrer thereto should be overruled.
2. **Petition:** EXHIBIT MADE PART OF. The facts on which a plaintiff bases his right to recover should be stated in a systematic and orderly manner, and not by making a mere exhibit a part of the petition. An exhibit, however, if made a part of a petition, is to be considered, and if the facts therein stated, in connection with those in the petition proper, show a liability of the defendant to the plaintiff, a demurrer that the facts stated therein are not sufficient, cannot be sustained.

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

J. W. West, for plaintiff in error, cited: *Rathbun v. R. Co.*, 16 Neb., 442.

Holmes, Wharton, & Baird, contra, cited: *Larimore v. Wells*, 29 O. St., 13; *McCormick Machine Co. v. Glidden*, 94 Ind., 447; *McCampbell v. Vastine*, 10 Ia., 538; *Crawford v. Satterfield*, 27 O. St., 421; Boone, Code Pleading, sec. 27.

MAXWELL, J.

A demurrer to the petition was sustained in the court below and the action dismissed. The question presented to this court is, "Does the petition, when construed liberally as required by the Code, state a cause of action?" The petition, and exhibit which is made a part of it, is as follows:

"Plaintiff for cause of action states that on or about

the 2d day of April, 1888, plaintiff entered into a contract in writing with defendant, Leonora Z. Johnson, a copy of which contract is hereto attached marked 'Exhibit A,' and made a part hereof; that by the terms of said contract there was due from defendant to plaintiff on the 2d day of February, 1889, the one certain payment in the sum of $410, with interest at the rate of eight per cent on the sum of $2,950 from the 2d day of April, 1888, and interest thereon to date, all of which is now due and unpaid.

"EXHIBIT A.

"This agreement, made the 2d day of April, A. D. one thousand eight hundred and eighty-eight, between Isaac Pefley and J. K. Reid, the party of the first part, and Leonora Johnson, party of the second part, witnesseth: That said party of the first part agrees to sell to said party of the second part, and the said party of the second part agrees to purchase of the said party of the first part, on the terms hereinafter mentioned, the following real estate, situate in the county of Sarpy, and state of Nebraska, known and described as lots 1 and 28, in block 3, in Union Pacific subdivision of blocks 6, 7, 8, and 9, in Albright's Choice Addition to South Omaha, as surveyed, platted, and recorded. The said party of the second part agrees to pay to the said Isaac Pefley for said land the sum of $5,000 in payments as follows: $2,950 upon the delivery of this contract and $410 September 2, 1888, $410 February 2, 1889, $410 September 2, 1889, $410 February 2, 1890, and $410 September 2, 1890. All of said payments bearing interest from date until paid at the rate of eight per cent per annum, interest payable semi-annually. So soon as said purchase money and interest shall be fully paid (time being the essence of this contract), the said party of the first part agrees to make to said party of the second part, his heirs and legal representatives, a valid title in fee simple to said land, and for that purpose shall execute and

deliver to him a good and sufficient warranty deed for the same, subject, however, to the taxes for A. D. 1888, and subsequent taxes, which said party of the second part agrees to pay when the same become due and payable.

"In case said party of the second part shall refuse or neglect to pay said purchase money and interest as agreed herein, he shall forfeit any rights he may have to said land, and also shall forfeit any money paid by him to said party of the first part to purchase the same, unless the said party of the first part shall elect otherwise.

"The parties respectively bind their heirs and legal representatives to the faithful performance of the terms of this agreement.

"The said party of the second part shall be entitled to the possession of said land so long as he shall comply with the foregoing terms of sale; but upon a failure to comply with the same his right to the possession shall terminate, and he shall surrender the possession of said land and the improvements thereon, if any, to the said party of the first part.

"In witness whereof, the said parties have hereunto set their hands, the day and year first above written.

"ISAAC PEFLEY.
"J. K. REID.
"LEONORA Z. JOHNSON."

We do not approve of the practice of making a mere exhibit a part of a petition. It is better to make a direct statement of the facts in the order in which they occur. This is the direct and orderly method which a good pleader will observe. Where, however, an exhibit is made a part of a petition, and there are allegations therein tending to show a liability of the defendant to the plaintiff, such allegations cannot be disregarded. For the purposes of the demurrer they must be taken as true. It is therefore admitted that there was due from the defendant to the plaintiff the sum of $410, with interest.

We place no stress upon the provision in contract that time shall be the essence thereof.

By bringing an action to recover the money the plaintiff has waived his right to declare a forfeiture, if, indeed, such right ever existed. The defendant evidently has made a large payment on the land and has a strong equity therein. He is still indebted, however, for the unpaid purchase money and plaintiff has a right to recover the same. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

HORTON S. CALLAND V. MARTIN V. NICHOLS ET AL.

[FILED OCTOBER 7, 1890.]

1. **Agistment: NEGLIGENCE: BURDEN OF PROOF.** Where there is no express contract as to the kind of feed and degree of care to be given by one who takes cattle to keep through the winter, he is bound to provide reasonable and ordinary feed for such stock, and to use reasonable and ordinary care to protect them from injury; but where a number of such cattle die while in charge of the bailee, the bailee upon stating that fact to the owner—in other words, accounts for the cattle—the burden of proof of negligence is upon the owner.

2. ———: EVIDENCE. *Held*, That a clear preponderance of the evidence showed the want of reasonable and ordinary care in feeding and caring for the stock in controversy.

ERROR to the district court for Gage county. Tried below before APPELGET, J.

Pemberton & Bush, for plaintiff in error, cited: *Ransom v. Getty*, 14 Pac. Rep. [Kan.], 487; *Teal v. Bilby*, 123 U.

S., 572; *Mansfield v. Dole*, 61 Ill., 191; *Rey v. Toney*, 24 Mo., 600 [69 Am. Dec., 444]; *Wood v. Remick*, 9 N. E. Rep. [Mass.], 831; *Malaney v. Taft*, 15 Atl. Rep. [Vt.], 327; *Mills v. Gilbreth*, 74 Am. Dec., 487.

A. H. Babcock (*Griggs & Rinaker* with him), *contra*, cited: *Maynard v. Buck*, 100 Mass., 40, 49; *Best v. Yates*, 1 Vent. [Eng.], 268; *Leck v. Maestaer*, 1 Camp. [N. P.], 138; Schouler, Bailment [2d Ed.], secs. 23, 101; Edwards, Bailment, 236; Story, Bailment, sec. 443; 2 Parsons, Contracts, 131.

MAXWELL, J.

This action was brought in the district court of Gage county by the plaintiff against the defendant to recover for feeding and caring for certain cattle of the defendant.

On the trial of the cause the jury returned a verdict for the defendant, upon which judgment was rendered.

The plaintiff alleges in his petition that "in the month of August, 1887, he made and entered into a contract with defendants to furnish feed for and take care of not to exceed 200 head of cattle for said defendants, jointly, which cattle were to be furnished to plaintiff for that purpose by said defendants. * * * By said contract plaintiff was to be paid the sum of $4.50 per head from defendants, for feeding and taking care of said cattle. That pursuant to said contract defendants furnished plaintiff 123 head of cattle, which plaintiff received and took charge of under said contract, and fed and cared for as provided in said contract; that plaintiff has fully and faithfully performed all the conditions of said contract by him to be done and performed; that defendants have paid plaintiff therefor only the sum of $150, and there is now due and owing from defendants to plaintiff on said contract the sum of $403.50, which defendants refuse and neglect to pay."

To this the defendants answered as follows:

"The defendants, for answer to plaintiff's petition, say they admit that on the 10th day of August, 1887, the plaintiff made and entered into a contract with defendants to take 100 head of cattle or more, not to exceed 200 head, and keep them in good shape, give them good care and plenty of food, and to deliver the same to defendants, or order, in the spring of 1888, and at a time when they can live well on grass, and in good condition, for the sum of $4.50 each, to be paid for in full by the defendants, on the delivery of the cattle in good condition, in the spring.

"That on the 7th day of September, 1887, the defendants delivered and the plaintiffs received from the defendants 123 head of cattle, in good and healthy condition, to be cared for in good shape, properly fed, kept, cared for, and to be redelivered to defendants in good condition, in the spring of 1888, according to the terms and provisions of said contract.

* * * * * * *

"The plaintiff then received said 123 head of cattle upon the above conditions, and undertook to use due and proper care in the management of said cattle, to properly feed, water, and shelter the same, and redeliver the said 123 head of cattle in the spring of 1888, in good condition, to the defendants. But the said plaintiff, not regarding his said promise and undertaking, did not, nor would take due and proper care of said cattle, and did not properly feed, water, and shelter the same, and when he was requested to redeliver the said 123 head of cattle at the time mentioned in said agreement, he redelivered only seventy-four head of said cattle, and he has failed and neglected to deliver forty-nine head, the balance thereof, or any part thereof, nor paid the value thereof, amounting to the sum of $980, though often requested so to do, but, on the contrary thereof, the plaintiff so negligently and carelessly conducted himself with respect to the said cattle, and took so little care of them, and failed to properly feed, water, and

shelter them, and that by and through mere carelessness, negligence, and improper conduct of the said plaintiff and his servants in that behalf, the said 123 head of cattle all became poor, thin in flesh, and in a weak condition, and forty-nine head of said number died from the want of proper food, shelter, care, and attention on the part of the plaintiff, and while the same were in his custody, to the defendants' damage in the sum of $980.

"The defendants further allege that in order to prevent the whole number of said cattle from dying of starvation and exposure, they were compelled to and did incur great expense, to-wit, the sum of $199, in furnishing said cattle with proper food, care, and attention while the same were in plaintiff's possession under the contract aforesaid, and he was under obligation to furnish the same, but failed, neglected, and refused to do so, to defendant's damage $199.

The reply need not be noticed.

The clear weight of testimony tends to sustain the allegations of the answer as to the negligence of the plaintiff in feeding and caring for the cattle. The fact that so large a number of them died while under his care is itself a strong circumstance tending to show negligence. There is some testimony in the record tending to show that the cattle were in a poor condition when received by the plaintiff. There is considerable more testimony, however, tending to show that they were in ordinary condition when received. There is no testimony whatever that the plaintiff made any objection to the condition of the cattle when he received them, and he seems to have been satisfied therewith. They were young cattle which had been raised in Iowa and shipped into this state.

Where there is no express contract as to the kind of feed and degree of care to be given by one who takes cattle to keep through the winter, he is bound to provide reasonable and ordinary feed for such stock, and to use reason-

able and ordinary care to protect them from injury; but where a number of such cattle die while in charge of the bailee, the bailee upon stating that fact to the owner—in other words, accounts for the cattle—the burden of proof of negligence is upon the owner.

The burden of proof to show negligence where the stock has been accounted for, is upon the owner of the stock. In our view the defendant has clearly established such negligence.

Objections were made to certain instructions which related more particularly to the counter-claim of the defendant. As the defendant was allowed nothing on this counter-claim, no error can be predicated on the instructions.

There is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

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LOUIS SCHIELDS, APPELLANT, V. JOHN A. HORBACH ET AL., APPELLEES.

[FILED OCTOBER 7, 1890.]

1. **Real Estate:** OPTION: CONDITION PRECEDENT. The defendant gave the plaintiff a written proposition to sell certain real estate in the city of Omaha, for a specified price, conditioned that the plaintiff should pay within six months his note given to the defendant for merchandise, and pay the one-half of the price named during 1873 and the balance in 1874. *Held*, That the payment of the note within the time limited was a condition precedent to the plaintiff's right to accept the offer.

2. ———: ———: ACCEPTANCE. Such proposition, to be binding, must be accepted on the conditions proposed within the specified time, unless the party making the offer continues it to the time of acceptance.

3. ——: ——: SPECIFIC PERFORMANCE DENIED. Under the evidence it was *held*, that the plaintiff is not entitled to a specific performance of the agreement.

ON rehearing.

John W. Lytle, and *Pat. O. Hawes*, for appellant.

George B. Lake, *A. N. Ferguson*, and *Ambrose & Duffie*, *contra*, cited: *Delaney v. Linder*, 22 Neb., 280; *Coon v. Knap*, 8 N. Y., 402; *Eliason v. Henshaw*, 4 Wheat. [U. S.], 225; *Smith v. Gibson*, 25 Neb., 511; Pomeroy, Specific Performances, 334, 335, 387, 388; *Mason v. Payne*, 47 Mo., 517; *Pott v. Whitehead*, 5 C. E. Green [N. J.], 55; *Kerr v. Purdy*, 51 N. Y., 629; *Maughlin v. Perry*, 35 Md., 352–360; *Jones v. Noble*, 3 Bush [Ky.], 694; *Brooks v. Garrod*, 3 K. & J. [Eng.], 608; *Hancock v. Charlton*, 6 Gray [Mass.], 39; *Jones v. Robbins*, 29 Me., 351; *Hall v. Delaplaine*, 5 Wis., 206; *Pritchard v. Todd*, 38 Conn., 413; *Decamp v. Feay*, 5 S. & R. [Pa.], 325; *Shortall v. Mitchell*, 57 Ill., 161; *Young v. Daniels*, 2 Clarke [Ia.], 126; *Taylor v. Longworth*, 14 Pet. [U. S.], 172; *Godbold v. Lambert*, 8 Rich. Eq. [S. Car.], 155–164; *Lott. v DeGraffenried*, 10 Id., 346; *Wright v. Davis*, 28 Neb., 479; Waterman, Spec. Perf., 90, 196, 198, 434, 460, 470, 471, 475, 490, 493; *Little v. Thurston*, 58 Me., 86; *Warren v. Richmond*, 53 Ill., 52; *Ewald v. Lyons*, 29 Cal., 550; *Holland v. Hensley*, 4 Ia., 225; *Minturn v. Seymour*, 4 Johns. Ch. [N. Y.], 498*; *McIntire v. Hughes*, 4 Bibb [Ky.], 186; *Dawson v. Dawson*, 1 Dev. Eq. [N. Car.], 93, 99; *Banks v. May's Heirs*, 3 A. K. Marsh. [Ky.], 436*; *Bibb v. Smith*, 1 Dana [Ky.], 580; *Tucker v. Woods*, 12 Johns. [N. Y.], 190; *Meynell v. Surtees*, 1 Jur. (N. S.) [Eng.], 737; *Williams v. Williams*, 17 Beavan [Eng.], 213; *Tucker v. Clarke*, 2 Sandf. Ch. [N. Y], 96*; *Cutter v. Powell*, 6 T. R. [Eng.], 320; *Evans v. U. S. Life Ins. Co.*, 64 N. Y., 304; *Boston & M. R. Co. v.*

Bartlett, 3 Cush. [Mass.], 224; *Atlee v. Bartholomew*, 69 Wis., 43; *McCulloch v. Eagle Ins. Co.*, 1 Pick. [Mass.], 278; *Lamon v. Jordan*, 56 Ill., 204; *Adams v. Lindell*, 1 B. & Ald. [Eng.], 681; *Warren v. Bean*, 6 Wis., 120; *Marsh v. C., R. I. & P. R. Co.*, 75 Ia., 361; *Low v. Treadwell*, 12 Me., 441; *McClintock v. Lang*, 22 Mich., 212; *Tiernan v. Roland*, 15 Pa. St., 429; *Porter v. Dougherty*, 25 Id., 405; *Davis v. Hone*, 2 Sch. & Lef. [Ir.], 341; *Brashier v. Gratz*, 6 Wheat. [U. S.], 528; *Roby v. Cossitt*, 78 Ill., 638; *Cooper v. Brown*, 2 McLean [U. S.], 495; *Redish v. Miller*, 27 N. J. Eq., 514; *Delevan v. Duncan*, 49 N. Y., 485; *Lauer v. Lee*, 42 Pa. St., 165; *Washington v. McGee*, 7 T. B. Mon. [Ky.], 131; *Huffman v. Hummer*, 18 N. J. Eq., 83; *Rogers v. Saunders*, 16 Me., 92; *Hull v. Noble*, 40 Id., 459; *Higby v. Whittaker*, 8 O., 201; *Remington v. Kelly*, 7 Id., 432; *Galley v. Galley*, 14 Neb., 176; *Doolittle v. Wheeler*, 18 Id., 136; *Hutchinson v. State*, 19 Id., 263; *Dodge v. Ruels*, 20 Id., 35; *Wither v. Hoover*, 24 Id., 605; *Traphagen v. Sheldon*, 19 Id., 76; *Seymour v. Street*, 5 Id., 85; *Callahan v. Callahan*, 7 Id, 41; *Bell v. Sherer*, 12 Id., 412; *Newman v. Muller*, 16 Id., 523; *Sang v. Beers*, 20 Id., 372; *Charles v. Ashby*, 14 Id., 251.

NORVAL, J.

After the filing of the decision (28 Neb., 359), a reargument was allowed upon the application of the defendant. Upon the second hearing the case was ably presented by learned counsel on both sides, by printed briefs and by oral argument. We have fully examined and reconsidered the testimony contained in the bill of exceptions, and have reached a conclusion different from that expressed in the former opinion.

It appears from the testimony that on January 1, 1864, the defendant leased to the plaintiff the real estate in con-

troversy, situated in the city of Omaha, consisting of three and one-fifth acres, at an annual rental of $35, the plaintiff to pay all taxes assessed on the premises during the lease. The following May the defendant contracted to sell the plaintiff the leased premises for $1,600, of which $700 was to be paid by October 1, by doing the brick and stone work, and the plastering on a dwelling house for the defendant. The balance Shields was to settle for with his note, payable October 1, 1865. It is not claimed that this note was ever executed by the plaintiff. Upon the trial he testified that the $700 was paid in work, as agreed. This was, however, denied under oath by the defendant. While it is true that the plaintiff did considerable work upon the defendant's house, the clear preponderance of the evidence shows that the plaintiff was fully paid therefor in cash, and by orders given by Schields, which were accepted and paid by the defendant. Horbach testified upon the trial, that nothing was ever paid by Schields upon the agreement of 1864. In this the defendant is corroborated by the memorandum of settlement, made between the parties on January 14, 1873, as well as by the fact that the plaintiff, on the same day, accepted a new lease of the premises. There can be no doubt that the agreement to convey was mutually canceled by the parties. It is so conceded by the plaintiff.

It also appears from the testimony that the plaintiff, from 1864 to 1873, paid neither rent nor taxes. When the settlement was made on January 14, 1873, the plaintiff was indebted to the defendant for merchandise in the sum of $383.05, for which the plaintiff gave his note, bearing 12 per cent interest. At the same time the defendant, in writing, leased the premises to the plaintiff for one year, for a rental of $50, the plaintiff also agreeing to pay the taxes for 1873. On the same day this lease was entered into, or the day following, the defendant made to the plaintiff the following proposition in writing:

"OMAHA, Jan. 15, 1873.

"Having settled up all claims with Lew Schields to date, I now make him this proposition to purchase said premises of 3⅓ acres. If said Schields will pay up his note of Jan'y 14th, for $383.05, and interest on same, in full within six months from date, I will sell him the premises leased to him Jan. 14, 1873, for $1,946, with 12 per cent interest from this date, and the additional price or sum of what may be found due me for taxes paid by me for 1864, '65, '66, '67, '68, '69, '70, '71, and 1872, and interest at 12 per cent on such amounts from date they were paid by me.

"This proposition is made to enable Schields to acquire title to said premises as a homestead, and his option to purchase shall continue during the lease he now holds, provided one-half of the same shall be paid up during the year 1873, and the balance during 1874, with interest.

"J. A. HORBACH."

This was simply a proposition to sell the premises, and required the acceptance of the plaintiff to make it binding on either party. And it must have been accepted within the time named, and on the conditions proposed, to be of any validity, unless the offer was continued until it was accepted. (*Boston & Maine Ry. Co. v. Barrett*, 3 Cush., 224; *Larmon v. Jordon*, 56 Ill., 204; *Eliason v. Henshaw*, 4 Wheat. [U. S.], 225; *Potts v. Whitehead*, 20 N. J. Eq., 55; Waterman on Specific Performance, sec. 434.)

Was this proposition accepted by Schields? It will be observed that the option to purchase was in the first place conditional that Schields should pay his note of $383.05 within six months from the date of the proposition. There is no claim that any part of the note was paid within the time specified. But a very small portion was paid within a year, and the balance during the year 1875. Considerable importance was attached in the former opinion to the fact that the defendant accepted the money on the note

after the time limited in the option for its payment. As we view the transaction, the receipt of the money after the time named for its payment, was not a recognition of the option. The note was not given as a part of the purchase price of the land, but in settlement for merchandise previously sold by the defendant to the plaintiff. Had the note been given as a payment on the premises, then the accepting of the money would have constituted a waiver of the forfeiture. But the accepting by Horbach of the money due him on another transaction, certainly did not have the effect to revive the option given to the plaintiff to purchase the property. The payment of the note within six months was a condition precedent to the plaintiff's right to purchase the land. It is clear that the plaintiff acquired no interest in the property prior to 1875, for the note was not at that time fully paid.

The option given Schields to purchase, was also conditioned that he should pay one-half of the purchase money during 1873, and the balance in 1874. The total payments made by the plaintiff prior to February, 1875, as testified to by Horbach, were only $222.25, which was less than one-half of the principal and interest due on the note. No part of the purchase money was paid during the years 1873 and 1874.

The defendant testified that after February 1, 1875, the plaintiff made numerous payments aggregating $1,029.68, which were applied in payment of the balance due on the plaintiff's note, and for rents and taxes; that nothing was ever paid on the land, and that plaintiff owed a balance on rent and taxes of $97.54 on January 14, 1878.

The plaintiff testified that he made other payments in addition to those testified to by Horbach, and that all payments were made upon the purchase of the land. The plaintiff put in evidence, Exhibit C, being a receipt signed by Horbach for various items, including certain notes and claims which were to be collected by the defendant. It

appears from the testimony that this receipt was given for the purpose of preventing the creditors of Schields from subjecting the claims to the payment of his debts. Several of the notes included in the receipt were not at the time in Horbach's hands, but some of them were afterwards turned over to the defendant and were collected by him, and are included in the aggregate amount testified to by Horbach. Of the mechanic's lien on the Union brewery of $400, and interest included in the receipt, the amount of $206.10 only was collected, for which Horbach gives credit. The balance of this claim was uncollectible. The receipt recites that "the sum of $123.20 to his credit." The plaintiff claims this shows that the note was at that time fully paid, and that the sum of $123.20 was credited as a payment on the land, and that the amounts subsequently collected by Horbach should be applied for the same purpose. The defendant contends that the item of $123.20 was a claim against James Vandanaker. It appears from the defendant's testimony that this claim was never collected; that one Collins gave his note in settlement of the matter, and at Schields's request it was put into judgment, but was never paid. While the testimony is somewhat conflicting on the matter of payments, we fail to discover anything in the record that would justify us in disturbing the finding made thereon in favor of the defendant, by the district court.

The entire conduct of the parties, as disclosed by the testimony, shows that none of the conditions of the option, either precedent or subsequent, were waived. The lease entered into in 1873 was, by agreement of the parties indorsed thereon, extended to December 31, 1875, Schields agreeing to pay as rent, in addition, to the $50 and taxes stipulated for in the lease, thirty cents for each 1,000 brick made and burned by the plaintiff on the premises during the year 1875. The taking of an extension of the lease, and agreeing to pay an increased rent, is indicative that Schields at that time did not consider that he had acquired

any rights under the option of January 15, 1873. It also appears that the defendant, in 1876, conveyed the lands in question to his father, A. Horbach. On January 14, 1878, a new lease was entered into between the plaintiff and the defendant, as executor of the estate of A. Horbach, deceased, for the period of three years. No objection was made by the plaintiff to the taking of a new lease from a different landlord, nor does it appear that the plaintiff at that time made any claim that he had an interest in the property. The plaintiff subsequently paid rents under this lease, the receipts therefor specifying that the money was received on ground rent. It is also established beyond question that at about the time the 1878 lease expired, the defendant leased two-thirds of the identical same property now claimed by Schields to one H. M. Hurlbut, for a term of four years, who took possession, planted two crops, and farmed the same during the entire term. The plaintiff, having full knowledge thereof, made no claim upon either the defendant or Hurlbut for the land. In the fall of 1879 the plaintiff moved his house near the south line of the tract in controversy. Schields claims that he did this of his own accord, to get his house away from an excavation at the brick yard. The defendant swears that the building was moved by his orders; that he told Schields if he would pay the balance due on rent, and the amount Schields had collected on the Creighton claim, and move his house to the south line, when the defendant came to lay out the tract into lots, that he would deed a lot to his wife. Horbach says that the plaintiff agreed to this and moved the house in accordance with that arrangement. The building not being moved far enough to suit the defendant, on his orders it was moved the second time. The whole circumstances appearing in evidence are inconsistent with the position now contended for by Schields that he had any interest in the premises. It is clear to our mind that Schields never accepted the proposition made by Horbach

in 1873. Until that proposition was accepted, the plaintiff was not bound thereby. Horbach could not have enforced the payment against Schields. The plaintiff not being bound, he was not entitled to a specific performance. (Waterman on Specific Performance, sec. 196.)

The decree of the district court dismissing the plaintiff's bill was right and is

AFFIRMED.

THE other judges concur.

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CASSIE A. STEVENS V. WASHINGTON I. CARSON.

[FILED OCTOBER 7, 1890.]

1. **Husband and Wife:** CONVEYANCES BETWEEN: BURDEN OF PROOF. In a contest between a wife and a creditor of her husband, over property transferred to her by him, after the debt is contracted, she must establish that she is a *bona fide* purchaser, by a preponderance of the evidence.

2. ———: ———: ———. The fact that the wife had possession of the property, claiming ownership, when it was attached by the creditor of the husband, does not relieve her of the burden of proving that the transfer was not made to her for the purpose of hindering, delaying, and defrauding such creditor.

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

F. B. Donisthorpe, for plaintiff in error.

J. D. Carson, W. C. Sloan, and *W. V. Fifield, contra:*

Cases cited by counsel are, in the main, referred to in opinion.

NORVAL, J.

The plaintiff in error sued out a writ of replevin in the court below, against the sheriff of Fillmore county, to recover possession of a general stock of goods and merchandise, taken by defendant in error under several writs of attachment issued against Garrett Stevens, her husband; she claiming title to the goods under an alleged bill of sale from her husband to her. She failed to give the replevin bond to the coroner, required by law, and the suit was prosecuted against the sheriff for the conversion of the property, praying for the restoration of the goods, or judgment for their value.

The defendant answered admitting that he was sheriff of the county, and denying that the plaintiff was the owner of the goods. That orders of attachment were isued against Garrett Stevens and the goods seized by the defendants to satisfy the following claims:

January 22, 1889.	Donald Bros.....	$208	43
" 24, "	S. A. Blasland & Co.....	570	95
" 24, "	J. P. Robinson Notion Co....	141	06
	Total.....	$920	44

The only right and title of the plaintiff to the property, was by a pretended bill of sale made by Garrett Stevens to her on the 15th of January, 1889, at which time said Stevens was wholly insolvent, of which the plaintiff had full knowledge and notice. That no consideration was paid by her on said pretended sale, which was entered into by the plaintiff and her husband with the intent and sole purpose of hindering and delaying the creditors of her husband, and was not a *bona fide* sale. That plaintiff knew at the time the pretended sale was made that it was for the purpose and intent aforesaid; that no change of possession took place, and that at the time defendant levied on said

goods and chattels they were the property of said Garrett Stevens.

The plaintiff replied by a general denial.

There was a trial to a jury, with a verdict, finding that, at the commencement of the action, the right to the possession of the property was in the defendant, with damages assessed at five cents. The plaintiff's motion for a new trial was overruled and the cause brought up to this court on the following assignments of error:

"I. The verdict is against the weight of evidence, is contrary to law, and the court erred in not granting a new trial.

"II. In refusing to give the first, second, third, fourth, fifth, sixth, seventh, and eighth instructions asked for by plaintiff.

"III. In giving the third and fourth instructions asked for by defendant."

On the 15th day of January, 1889, Garrett Stevens, the husband of the plaintiff, was engaged in the dry goods and grocery business at Strang, Nebraska, and on that day he executed and delivered to the plaintiff a bill of sale of his entire stock of goods, worth from $1,800 to $2,000. The consideration specified in the bill of sale was $1,150. At the time of the alleged sale, Garrett Stevens was indebted in about the sum of $1,400, besides an alleged indebtedness of $1,150 to his wife. He was the head of a family, and owned no property other than that covered by the bill of sale. The plaintiff was engaged in the millinery business at Strang at the time of the transfer. Her stock was of the value of about $300. At the time the bill of sale was made, Mr. Stevens was being pressed by his creditors for money, of which fact the plaintiff had knowledge. The plaintiff claims, and she and her husband both so testified on the trial, that she let her husband have money and property from time to time after their marriage, for which he agreed to account; that on the 30th day of

June, 1886, they had a settlement, by which it was found that he was indebted to her in the sum of $1,000; that on that day he gave her, in settlement, his promissory note for $1,000, due in three years, drawing six per cent interest; that when the bill of sale was made there was due upon the note $1,150; that part of the property was transferred to her in payment of this note, and that he, at the same time, gave her goods to the amount of $500, claiming that the same was exempt property. The stock covered by the bill of sale was levied upon by the sheriff to satisfy the several writs of attachment sued out against Garrett Stevens.

It was the theory of the defendant in the court below that the transfer of the property from Garrett Stevens to his wife was fraudulent, and was made for the sole purpose of hindering and delaying his creditors in the collection of their debts. The plaintiff testified, among other things, upon cross-examination, in answer to questions, as follows:

Q. How did it come that he paid this (referring to the note) before it was due?

A. Because his creditors were pressing him, and if I got the goods I could satisfy his creditors, whereas if they got it there would be only one or two that would get anything, and the rest would have to go without.

Q. Were you not afraid that about the time you made this transfer that the creditors would come in and take the goods by attachment?

A. There were two houses that had written threatening letters.

Q. You knew of that?

A. Yes, sir.

Q. And then you and he came to Geneva and had these matters drawn up?

A. Yes, sir.

Q. Mr. Stevens came with you.

A. Yes, sir.

Q. That was after the houses had made threats and were about to push their claims and collect their debts?

A. Yes, sir.

Q. Wasn't this transfer from Mr. Stevens for the purpose of placing the property where these other creditors could not reach it?

A. No, sir; it was not.

Q. Didn't you state a while ago that you knew that they were going to push their claims?

A. I knew that, but I wanted it where Mr. Stevens's creditors could not get it all, but each get his share.

Q. One did get it all.

A. I wanted to loan him the money if he would leave the goods with me, and pay the debts, with interest.

Q. Why didn't you turn the goods over to them?

A. They wouldn't get that much out of them.

Q. It was to pay your debts?

A. It was to get the goods and pay it out to Mr. Stevens' creditors.

Q. That was the only object you had in making that transfer?

A. I knew there were sufficient goods to settle my own indebtedness and all his creditors, if I could keep them.

Q. You say that he owed other creditors about $1,300?

A. Yes, sir.

Q. And you $1,100?

A. Yes, sir.

Q. Could that pay it out?

A. If I had continued in business I could have made it out of the goods, with what goods I have there in the store of my own.

Q. Would you have made the transfer at the time if it had not been for the fact that these creditors were crowding your husband?

A. I should not have molested Mr. Stevens till the note was due if it had not been for that.

Q. You told him that the creditors were coming on and you wanted to fix the matter up so as to put them off?

A. No, sir; I did not tell him so.

Q. It was the mutual understanding between you and Mr. Stevens that this should be done for that purpose?

A. For the purpose that I should pay myself first and afterwards pay off the other creditors.

It appears from the testimony contained in the bill of exceptions that Garrett Stevens on December 29, 1888, for the purpose of obtaining goods on credit, made a written statement to Donald Bros. of his liabilities as follows: "S. A. Blailand, Quincy, Illinois, due March 1, $402.50; due January 1, $242.43; in small amounts, about $400; confidential, and all other debts not included above, not any." It will be observed that the alleged indebtedness of Mr. Stevens to the plaintiff was not included in the above statement. It does not appear from the evidence in the record that the goods transferred to the plaintiff were invoiced. The property was turned over to her in the bulk without any separation from the stock, that part claimed as exempt from that claimed to have been purchased.

The *bona fides* of the transaction were directly in issue upon the trial in the district court. Upon this question the court instructed the jury, at the request of the defendant in error, as follows:

"3. The jury are instructed that in a contest between the wife and the creditors of her husband, in regard to property transferred to her by him, there is a presumption against her which she must overcome by affirmative proof and prove beyond question.

"4. The jury are instructed that in a contest between the wife and the creditors of her husband, in regard to property transferred to her by him, there is a presumption against her which she must overcome by affirmative proof and prove beyond question the *bona fides* of said sale."

The giving of these instructions is made the basis of the third assignment in the petition in error. These instructions appear to have been copied either from the syllabus in *Aultman, Taylor & Co. v. Obermeyer*, 6 Neb., 260, or from the instructions copied in the opinions in the cases of *Lipscomb v. Lyon*, 19 Id., 511, and *Woodruff v. White*, 25 Id., 745. It is claimed that these instructions held the plaintiff to a greater degree of proof than is required in civil cases. They required the plaintiff, in order to recover, to establish the good faith of the transfer of the property beyond question. The word "question" is synonymous with "doubt." The plaintiff, by the charge of the court, was therefore held to as high degree of proof as is required of the state in a criminal prosecution. It has been repeatedly held by this court in civil cases, that the party holding the affirmative of an issue, is only required to establish it by a preponderance of the evidence. (*Patrick v. Leach*, 8 Neb., 538; *Search v. Miller*, 9 Id., 27; *Kopplekom et al. v. Huffman*, 12 Id., 95; *Altschuler v. Algaza*, 16 Id., 631; *Dunbar v. Briggs*, 18 Id., 97.)

Where a debtor transfers property to his wife, and such transfer is contested by the creditors of the husband, the presumption is against the *bona fides* of the transaction, and the law places the burden upon the wife to show that the sale was not made to defraud the creditors of the husband. But she is not required to satisfy the jury in such a case beyond question that the sale was an honest one. A preponderance of the evidence is all that is required. This view is in direct line with the decision of this court in the case of *Thompson v. Loenig*, 13 Neb., 386. We quote from the syllabus: "When property is transferred by husband to his wife after a debt is contracted, as against that debt she must show by a preponderance of the proof that she is a *bona fide* purchaser."

The third and fourth instructions stated the rule too strongly against the wife, and should not have been given

to the jury. It follows that *Aultman, Taylor & Co. v. Obermeyer*, *Lipscomb v. Lyon*, and *Woodruff v. White*, are overruled, in so far as those cases hold that the good faith of transactions between husband and wife in relation to the transfer of property from the one to the other, by which creditors are affected, must be established beyond question.

Eight instructions requested by the plaintiff in error were refused. It is conceded in the brief of the plaintiff that no error was committed in not giving the first, second, third, fifth, and eighth, as they were substantially given by the court in his own instructions.

Complaint is made of the refusal to give the plaintiff's seventh request, which reads:

"If you shall believe from the evidence that the property in controversy was in the possession of the plaintiff, she claiming to be the owner thereof, at the time it was taken under the attachment, this is *prima facie* evidence of ownership in her; and if you further believe, from the evidence, that while the plaintiff was so in possession the defendant took the same from her, then you should find the right of property in the plaintiff, unless you further find, from the evidence, that the plaintiff did not own the property, or that the sale thereof from Garrett Stevens to the plaintiff was without sufficient consideration."

This request does not contain a correct statement of the law applicable to the case. The fact that the plaintiff had possession of the property when taken under the writs of attachment, was not *prima facie* evidence against the attaching creditors that she was the owner. In a contest between her and the creditors of her husband, the burden was upon her to satisfy the jury, by a preponderance of the testimony, that the property was not transferred to her to hinder, delay, and defraud such creditors. The instruction entirely ignored the question of *bona fides* of the transaction, and required the defendant to prove that the plaintiff did not own the property. The fourth and sixth

requests were not based upon the evidence in the case, and were properly refused.

It is insisted that the court erred in sustaining the defendant's objections to certain questions propounded to the plaintiff by her attorney, when on the witness stand. It may be observed that such errors are not assigned in the petition in error, and will not be considered by this court.

As there must be a new trial, we refrain from expressing an opinion upon the sufficiency of the testimony to sustain the verdict. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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A. J. MCCARN, ADMINISTRATOR, ETC., ET AL., APPELLEES, V. EBEN COOLEY ET AL., APPELLANTS.

[FILED OCTOBER 14, 1890.]

1. **Review**: BILL OF EXCEPTIONS ESSENTIAL. Alleged errors and matters of exception which are not properly subjects of record, must be preserved in writing and certified as required by statute, in order to be considered by the supreme court; and affidavits in support of, or in opposition to, any proceeding in the court below, must be embodied in a bill of exceptions.

2. ———: STIPULATION INSUFFICIENT. A stipulation of the attorneys in a cause stating that the record is a correct transcript of the proceedings, or that the files annexed are the original files, and that the transcript may be accepted as the bill of exceptions, may be sufficient to justify the judge in the court below in signing the same as a bill of exceptions, but forms no sufficient basis for the supreme court to consider the same as a bill of exceptions, without having been settled and signed as such. (See *Credit Foncier v. Rogers*, 8 Neb., 34.)

APPEAL from the district court for Knox county. Heard below before POWERS, J.

J. H. McIntosh, and *John L. Webster* (*Ambrose & Strickler*, being also of counsel), for appellants, cited, as to the notice of sale: Freeman, Executions, sec. 285; Murfree, Sheriffs, sec., 676; *Farr v. Sims*, Rich. Eq. Cas. [S. Car.], 122, [24 Am. Dec., 396].

J. H. Berryman, and *Holmes & Hays*, *contra*, cited, on the same point: Code, sec. 497; *Perkins v. Spaulding*, 2 Mich., 157.

COBB, CH. J.

On the 28th day of March, 1887, the appellees and plaintiffs filed their petition in the district court of said county, to foreclose a mortgage given by the appellants and defendants, Eben Cooley and Phœbe, his wife, on a certain tract of land situate in said county, to-wit: The east half of the northeast quarter, and the east half of the southeast quarter of section 32; the west half of the northwest quarter, the west half of the southwest quarter, the east half of the southwest quarter, the southeast quarter of the northeast quarter, and the southeast quarter of section 33; the southwest quarter of the northwest quarter, the west half of the southwest quarter, and the southeast quarter of the southwest quarter of section 34, township 30, range 6 west, aggregating seven hundred and sixty acres, to secure to the plaintiffs the payment of $2,700, according to the terms of certain notes and bonds therein described. The mortgagors were personally served by summons on April 4, 1887.

The Dakota Mortgage Loan Corporation, of Boston, Mass., made defendant by publication, answered on May 19, 1887, that there was then due from the mortgagors

$950 on a subsequent mortgage, and a lien junior to that of the plaintiffs, for which judgment was asked and distribution of the proceeds of the mortgaged premises according to priority of liens.

On the same day a decree was taken by the plaintiffs foreclosing their mortgage and directing the premises to be sold by the sheriff of the county as upon executions at law and the proceeds brought into court to be applied to the satisfaction of the sum of $3,115 as found due with costs and accruing costs. On the same day a decree was entered in favor of the defendant, The Dakota Mortgage Loan Corporation, as a junior lien to that of the plaintiffs on the mortgaged premises, for the sum of $850 to be satisfied accordingly and to have execution therefor. On March 1, 1888, an order of sale was issued to the sheriff, the lands were appraised, aggregating the value of $4,880, and on April 13, 1888, were sold to Eugene A. Crum for $3,325. A motion to set aside the sale, supported by affidavits, upon the following grounds, was overruled, and the sale was confirmed:

"I. That the files of the cause were lost from the clerk's office and could not be found at the time of the order of sale or the day of sale.

"II. That the notice of sale does not state the terms of sale.

"III. On the day of sale there was no copy of the appraisal or of the clerk's and treasurer's certificate on file in the clerk's office, and the appraisment was not its true value.

"IV. The appraisers fixed a lower estimate than they thought the lands were worth, at the instance of the plaintiffs.

"V. That one of the appraisers estimated it at $18 per acre.

"VI. That they did not view the land in making their appraisement. At the commencement of this action the

prior mortgage of the Phœnix Insurance Company was unpaid, and was not made a party to the proceedings of foreclosure, by reason of which the lands did not bring as much as they otherwise would have brought.

"VII. That said prior mortgagee has brought an action in the United States court for foreclosure, in which all parties interested are included, that the court may find the amount due to each lien holder.

"VIII. That the plaintiffs agreed, prior to the bringing of this action, to take $2,500 and release their claim, and at their request the mortgage for $6,350 to the Dakota Mortgage Loan Corporation, to pay the claims of plaintiff and others, was made and placed of record; after which the plaintiffs refused to accept the amount, and the Dakota Mortgage Company refused to release its mortgage, defeating the proposition, and obstructing defendants from procuring it elsewhere, and causing the lands to be sold for less than their true value.

"IX. That the lands should not have been sold in the parcels as returned.

"X. That the lands did not bring two-thirds of the appraised value, but sold for less than their value in cash.

"XI. That the mortgagors are in a position not to redeem on account of the lien of the Dakota Mortgage Loan Company, which is in collusion with the plaintiffs; and after paying the commission to that company there is due from it sufficient to discharge the prior liens against the lands.

It appears from the record, that the sale of the mortgaged premises, in this action, was duly confirmed by regular proceedings in open court on the 24th day of May, 1888.

On the 14th day of June, 1888, the Hon. Isaac Powers, Jr., judge of said court, by an order at chambers, after reciting that it had been made to appear on behalf of said defendants that they had been unable, without fault on their part, to secure the settlement of a bill of exceptions

in said cause, within the time allowed by law, extended such time and allowed them forty days from said date in which to prepare such bill of exceptions, and submit the same to the adverse party, or his attorney, for examination and amendment. This order was made upon the affidavit of Phœbe Cooley, one of the defendants in the case, which affidavit is in the files. Besides these two papers, there is nothing in the case in any manner referring to a bill of exceptions; but there is a stipulation which was probably intended by the parties to supersede and take the place of a bill of exceptions. This it cannot do. In the case of *Ray v. Mason*, 6 Neb., 101, this court held, as appears from the syllabus, "when evidence has been introduced in the court below, which is not properly a matter of record, a party who desires to avail himself of it in the supreme court, must preserve the same by a bill of exceptions."

This case was followed by that of the *Credit Foncier of America v. Rogers*, 8 Id., 34. In that case, like the one at bar, the parties had entered into a stipulation as to the facts and evidence upon which the judgment of the trial court was based. I copy the syllabus entire:

"1. Exceptions which are not properly a matter of record must be preserved in writing, and properly certified by the presiding judge in order to be considered by the supreme court; and affidavits in support of, or in opposition to, any proceeding in the court below, must be embodied in a bill of exceptions.

"2. A stipulation of the attorneys in the cause, stating that the record is a correct transcript of the proceedings, may be sufficient to justify the judge in the court below in signing the bill as presented, but forms no basis for the supreme court to consider the matters embodied in the bill of exceptions." This case was followed in the subsequent ones of *State, ex rel. Stratton, v. Knapp*, 8 Id., 436; *Aultman v. Howe*, 10 Id., 8; *Eaton v. Carruth*, 11 Id., 231; *Walker v. Lutz*, 14 Id., 274; *Kyle v. Chase*, Id., 528;

Dolen v. State, 15 Id., 405; *Tessier v. Crowley*, 16 Id., 369; *McMurtry v. State*, 19 Id., 147.

Of the four points presented by the plaintiffs in error, three are based exclusively upon matters falling within the rule of the above cases, and not being presented by a bill of exceptions, cannot be considered by this court.

Objection is made to the notice of sale. A copy of the notice of sale, with an affidavit of the publication thereof, is attached to the sheriff's return, and will be deemed and taken as a part of such return, and accordingly as a part of the record proper. There are two objections made to the notice. First, that it does not contain the title of the cause; and, second, that it does not state the terms of sale. As to the first objection, the title of the cause as contained in the caption of the petition is: "A. J. McCarn, Administrator for the Heirs of Susan K. Peterson, Deceased, Alex. K. Peterson, and Jerome Dickson, Plaintiffs, vs. Eben Cooley and Phœbe Cooley, Dakota Mortgage Loan Corporation, and J. H. Yates, Defendants." The words "for the heirs" in the above are clearly surplusage, and were so considered by the parties, as they are dropped out of the title in the subsequent papers. With the exception that these surplus words are omitted in the notice, the title of the case is the same, and their omission is proper, if at all material. While there is no provision of statute requiring the notice of sale to contain the title of the cause, it has always been customary, and as a mark of identification the notice should contain substantially the title of the cause. But the retention of useless and meaningless words that may have crept into the title, as used in other papers in the case, will not vitiate the notice.

As to the second objection, the notice contains the words "sell said real estate at public auction to the highest and best bidder for *costs* to satisfy said two orders of sale." The word *costs* is so obviously a typographical error, the word cash being intended, that no one could have failed to

understand it. The statute does not provide that notices of sale contain the terms of sale; nor does it, that I can find, in terms prescribe or fix such terms; but as the object and purpose of foreclosure proceeding is to reduce the claim of the plaintiff to cash, and as there is no provision for making such sales upon credit, or for receiving anything else in payment for mortgaged premises but current money, all persons must and do presume that such sales will be made for cash alone, yet it is a custom to be approved and encouraged, that such notices contain the terms—cash, as a matter of form. But unless the language of the notice is calculated to mislead to the belief that the terms of sale are to be other than for cash, it must not be held sufficient.

The order of the district court is

AFFIRMED.

THE other judges concur.

GEORGE HORST ET AL. V. MCCORMICK HARVESTER MACHINE CO.

[FILED OCTOBER 14, 1890.]

1. **Decedents' Estates:** CLAIMS AGAINST: JURISDICTION. An action against heirs, devisees, or legatees to recover real or personal estate which has been received by them as distributees, of any estate which is liable for any debts under the tenth subdivision, or division of contingent claims, of sec. 267, chapter 23, Comp. Stats., is not an original action, but a special proceeding for the enforcement and collection of a claim allowed or established in the county court. The district court of the proper county has jurisdiction of such proceedings.

2. ———: ———: LIMITATIONS. In a case where a claim against a decedent's estate was allowed in the county court, an appeal upon such allowance taken to the district court, by the administrator, the claim again allowed in the district court and certi-

fied back to the county court, *held*, that the one year's time limited for bringing an action or proceeding thereon under section 266 of chapter 23, Comp. Stats., commenced to run upon the entry of such certification in the county court.

ERROR to the district court for Polk county. Tried below before NORVAL, J.

A. C. Montgomery, for plaintiffs in error, cited: *Ball v. La Clair*, 17 Neb., 39.

R. Wheeler, contra.

COBB, CH. J.

This action was brought in the district court of Polk county for the purpose of establishing the lien of the plaintiff upon certain real estate, the property of W. B. Daydemude, deceased, which had been by the county court of said county distributed to and received by the heirs of said deceased and by them conveyed to other persons who were also made defendants.

The plaintiff's claim against the deceased, which was for agricultural machinery sold to him in his lifetime, was presented to the county court and by it allowed, whereupon the administratrix of the estate appealed the said case to the district court. Here the judgment of the county court was affirmed. The judgment was afterwards, on the 15th day of June, 1888, duly certified by the said district court to the said county court, and the administratrix of said estate was thereupon by the said county court ordered to pay the same out of any personal property or moneys belonging to said estate and in her hands. There was no money or other personal property belonging to said estate, and in the meantime, on the 30th day of March, 1886, upon hearing in the said district court for a partition of said estate amongst the heirs at law of said deceased, it was finally decreed that said defendants, Laura Labbart and Alice

Hanson, have as their share of said estate the south half of the southeast quarter of section 24, in township 15, of range 3 west, in Polk county, and that they, the said Laura Labbart and Alice Hanson, pay all just claims against said estate.

The foregoing is the cause of action as set out in the amended petition. There had been a petition which was demurred to, and the demurrer sustained. There was neither demurrer nor answer to the amended petition, which was taken as confessed by default, and upon evidence, judgment was rendered for the plaintiff for the sum of $144.07 and costs, which was made a lien upon the real estate above described.

The cause was brought to this court upon error. The following are the errors assigned:

"I. The cause of action is against heirs and their assignees, to recover under section 266, chapter 23, Compiled Statutes, and was not brought within one year from the time said action accrued.

"II. The court had no jurisdiction of the cause of action.

"III. The court erred in overruling the demurrer.

"IV. The court erred in entering judgment on the amended petition.

"V. The defendant in error had obtained judgment against Cornelia Daydemude, who is one of the plaintiffs in error, for this same cause of action, which said judgment is a bar to any further cause of action.

"VI. The amended petition of the plaintiff was not filed within thirty days from the 22d day of May, 1888, and the plaintiffs herein had no knowledge of the filing of said petition until after judgment was rendered thereon.

"VII. For errors of law appearing in this case."

There was no motion for a new trial, nor is there any bill of exceptions in the case. All of defendants being in default of an answer, we can only look to the amended

petition for the facts of the case. If they are sufficient to constitute a cause of action, the judgment must be affirmed.

Plaintiff in error, in the brief of counsel, presents five points: First, that the county court, as a court of probate, having exclusive original jurisdiction of all matters of probate, settlements of estates of deceased persons, etc., the district court has no jurisdiction of this case. The premises are true, but the conclusion is false. This action is not an original one, as between the plaintiff and the estate of the deceased or his administrator, but is founded upon the judgment of the county court in the original proceeding therein, which, however, was for a time suspended by the appeal to the district court.

Section 266 of chapter 23 of Compiled Statutes provides that, "When the heirs, devisees, or legatees shall have received real or personal estate, and shall be liable for any debts, as mentioned in this subdivision, they shall be liable in proportion to the estate they may have respectively received; and the creditor may have any proper action or suit in law or equity, and shall have a right to recover his claim against a part or all of such heirs, devisees, or legatees to the amount of the estate they may have respectively received; but no such action shall be maintained unless commenced within one year from the time the claim shall be allowed or established." In the case at bar, while the claim was, in one sense, "allowed or established" by the judgment of the county court, yet, as we have seen, such allowance or establishment was suspended by the appeal to the district court, and it only became operative upon being affirmed in the latter court, and certified back. This appears by the record to have been done on or before the 25th day of June, 1888, but it does not definitely appear when the same was done. From the amended petition it appears that the claim was allowed in the county court on the 24th day of May, 1886. That the case was appealed to the district court, where it was heard on the 11th day

of March, 1885, but it does not appear when the decision or judgment of said court was rendered thereon. But it does appear that the administratrix gave notice of appeal to the supreme court, but that no such appeal was ever perfected. It also appears from the amended petition that the said judgment was certified back to the county court on the 15th day of June, 1888. The summons in the case at bar was issued and bears date on the 14th day of March, 1888, so that if it appeared that judgment was rendered in the case on the same day that the hearing was had in the district court, and it were held that the one year limitation of the statute above cited commenced to run at the date of the judgment, it would have expired the day before the one upon which the suit was commenced. But it does not appear, nor is there any presumption, that the judgment was rendered on the same day of the hearing in the district court; nor do I think that the one year limitation commences to run from the date of the judgment in that court, but from the time when the record of the case in the county court would prove the fact that the claim was allowed or established.

The point that the action was prematurely brought is not made. Had it been, it would have been an embarrassing one.

The only judgment which appears to have been rendered in favor of the plaintiff against Cornelia Daydemude was the order of the county court made upon the certificate of the allowance or establishment of the said claim by the district court. This was no bar to the suit now being considered; on the contrary, it is the foundation and cause of action upon which this suit is based. It does not appear that any demurrer to the amended petition was overruled, or even presented. It does not appear that the plaintiff was limited to thirty days in which to file an amended petition. The same must therefore be presumed to have been filed in time.

There being no bill of exceptions, of course no errors of law occurring at the trial appear in the case. The judgment of the district court is

AFFIRMED.

MAXWELL, J., concurs.

NORVAL, J., having tried the cause in the district court, did not sit.

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SAMUEL GOLDSMITH ET AL. V. W. A. FULLER ET UX.

[FILED OCTOBER 14, 1890.]

1. **Husband and Wife: CREDITOR'S BILL.** In a creditor's bill brought to subject certain real estate conveyed by a husband to his wife, the proof clearly established the fact that the consideration which paid for the real estate was derived from the separate estate of the wife, but that the title was taken in the name of the husband under a parol agreement to convey to her on demand. The court below having found in favor of the wife, *held*, that the judgment was supported by the clear weight of evidence.

2. ———: ———. *Held*, That the proof failed to show that the creditor had relied upon the husband being the owner of the property in extending certain credit.

ERROR to the district court for Valley county. Tried below before TIFFANY, J.

Nightingale Bros., for plaintiffs in error.

Wall & Bradley, contra.

MAXWELL, J.

This is an action in the nature of a creditor's bill brought by the plaintiffs against the defendants, to subject

certain real estate held by Eliza Fuller to the payment of the plaintiffs' judgments. The defendants are husband and wife, and the conveyance was made directly by the husband to his wife. There is a stipulation of facts in the record as follows:

"And now come the plaintiffs by Nightingale Bros., their attorneys, and the defendant Eliza Fuller by her attorneys, Wall & Long, and stipulate and agree that the following facts are true and shall be received in evidence in said cause, to-wit:

"1. That said plaintiffs are partners doing business under the firm name of Goldsmith, Stein & Co.

"2. That at the February term of the county court of said county, on, to-wit, the — day of February, 1887, said plaintiffs recovered a judgment against Josephine R. Fuller, E. S. Fuller, and the defendant W. A. Fuller in the sum of $339.59 and $5.60 costs, and that said judgment is still in full force and wholly unpaid.

"3. That a certified transcript of said judgment was on February 11, 1887, duly filed and docketed in the district court of Valley county, Nebraska, and that on February 12, 1887, plaintiffs caused an execution to be issued on said judgment, which was delivered to the sheriff of said county, to-wit, W. B. Johnson.

"4. That said sheriff, for want of goods and chattels of Josephine R. Fuller, E. S. Fuller, and the defendant W. A. Fuller whereon to levy, levied said execution, by instructions of plaintiffs, upon the real estate described in said petition as the property of said W. A. Fuller, defendant, on February 14, 1887, and on February 17, 1887, duly advertised said property to be sold under said execution upon the 19th day of March, 1887, at one o'clock P. M.; that said real estate was not sold by said sheriff on said day for the reason that the legal title to said premises appeared of record in the defendant Eliza Fuller.

"5. That said defendant Eliza Fuller is the wife of the

defendant W. A. Fuller, and the said E. S. Fuller is the son of the defendant W. A. Fuller, and the said Josephine R. Fuller is the daughter-in-law of the defendant W. A. Fuller and the wife of E. S. Fuller; and each of said co-judgment debtors, to-wit, Josephine R. Fuller, E. S. Fuller, and W. A. Fuller, is insolvent, and said W. A. Fuller is unable to pay said judgment debt unless the real property so levied upon is applied to the payment of the same.

"6. That on December 18, 1886, the defendant W. A. Fuller made and delivered a deed of conveyance of the real estate, in plaintiff's petition described, to the defendant Eliza Fuller by deed of general warranty. * * * That though said deed recites a consideration of $2,000, no consideration actually passed or moved from said Eliza Fuller, to her husband, the said W. A. Fuller at the time of said transfer, nor subsequent thereto.

"7. That on August 4, 1886, defendant W. A. Fuller signed, executed, and delivered to plaintiffs' three notes as follows, to-wit: one for $318.32, due November 1, 1886; one for $318.32, due January 1, 1887; and one for $318.32, due March 1, 1887; each drawing interest at ten per cent per annum from March 24, 1886; that said notes were signed by said Josephine R. Fuller and E. S. Fuller as principal makers, and by said W. A. Fuller as surety, and were given to secure an extension upon indebtedness then due these plaintiffs.

"8. That at the time said notes were signed by defendant W. A. Fuller, and said extension of time so given to the said Josephine R. Fuller and the said E. S. Fuller, the said Josephine R. Fuller was conducting a general retail mercantile business in the town of Arcadia, Valley county, Nebraska, and was the owner and in possession of a store and stock of goods.

"9. That on November 15, 1886, the first of said above mentioned notes was paid in full. That prior to the maturity of the second note, all of the property of the said

Josephine R. Fuller was seized under writs of attachment at the suit of divers creditors of said Josephine R. Fuller, and was ultimately sold to satisfy the judgments obtained by said creditors.

"10. That prior to these transactions, on, to-wit, the 25th day of November, 1884, while the defendants were residing in the state of Iowa, the defendant Eliza Fuller conveyed to her husband, the defendant W. A. Fuller, by deed of general warranty, certain real property situated in the town of Eldora, Hardin county, and state of Iowa, of the value of $2,500. * * *

"11. That the said real property situate in Eldora, Hardin county, state of Iowa, was on January 27, 1886, exchanged for the real property in plaintiffs' petition described, situated in North Loup, Valley county, Nebraska, and a deed of general warranty was made and delivered by J. G. Corey and wife, of North Loup, property in which the defendant W. A. Fuller is named as grantee. * * * That said deed from said Corey to said W. A. Fuller was entered in the numerical index of Valley county, Nebraska, and filed for record on February 26, 1886, and was recorded in book 5, at page 616, of deed record of said county. That the title to the property in plaintiffs' petition described was placed and vested in defendant W. A. Fuller, with the knowledge and consent of the defendant Eliza Fuller.

"12. That defendant Eliza Fuller was, prior to November 25, 1884, possessed of a separate estate, and is possessed of a separate estate at the present time, and is now conducting a business in her own name in Arcadia, Valley county, Nebraska, as a married woman trader.

"13. That there was no instrument of record in Valley county, Nebraska, showing that defendant Eliza Fuller had any interest in the real property described in plaintiff's petition, other than that of wife of said W. A. Fuller, until the recording of the deed from said W. A. Fuller to

said Eliza Fuller of the said premises, on December 24, 1886.

"14. That on May 3, 1887, plaintiffs recovered a judgment, as in plaintiffs' supplemental petition alleged, against defendant W. A. Fuller, and Josephine R. Fuller, and E. S. Fuller in the sum of $353.67, and $5.85 costs, in county court of said county, and that the same was duly filed and docketed in the district court of said county on May 26, 1887.

"15. That said last mentioned judgment was obtained upon the third note described in paragraph 7 of this stipulation, for the sum of $318.32 and interest at 10 per cent per annum from March 24, 1886, and that the same is still in full force and unpaid.

"NIGHTINGALE BROS.,
"Attorneys for Plaintiffs.
"WALL & LONG,
"Attorneys for Defendants."

In addition, the testimony of a number of witnesses is preserved in the record. This testimony will be referred to when discussing the correctness of the judgment.

The court made special findings in the case and rendered judgment as follows:

"Now on this 23d day of May, A. D. 1888, this cause coming on to be heard on the petition and supplemental petition of the plaintiffs, and upon the separate answer of Eliza Fuller and the reply of the plaintiffs thereto, plaintiffs appearing by their attorneys, Nightingale Bros., and the defendant herself and by her attorneys, Wall & Long, and after hearing the testimony of both the plaintiffs and the defendant, and the stipulation of facts filed herein, as a finding of facts in said cause, the court finds specially as follows, to-wit:

"First. That the real property mentioned in plaintiffs' petition was deeded by direct conveyance from her husband W. A. Fuller to the defendant Eliza Fuller.

"Second. That said transfer was so made without any actual consideration moving from the said Eliza Fuller to her husband at that time or subsequent thereto.

"Third. That the notes, which were the foundation of judgments, were signed and delivered prior to the conveyance of said real estate to said Eliza Fuller by W. A. Fuller, but that the judgments thereon were obtained subsequent to said conveyance.

"Fourth. That no instrument or agreement in writing was ever made between Eliza Fuller and W. A. Fuller creating or declaring a trust except the deeds in evidence. * * *

"Fifth. That the signature of W. A. Fuller to said notes was obtained as additional security to the notes of E. S. Fuller and Josephine R. Fuller, the consideration therefor being an extension of time on said notes. At the time of granting such extension of time the plaintiffs had examined the records of Valley county, Nebraska, and knew that the legal title to said property was in the defendant W. A. Fuller, and relied upon such knowledge in accepting W. A. Fuller as security.

"Sixth. That W. A. Fuller did not represent to plaintiffs that he was the owner of said real estate.

"As a conclusion of law the court finds:

"First. That the property in controversy was never the property of defendant W. A. Fuller; that he held it simply in trust for the defendant Eliza Fuller and her heirs. * *

"Second. That having declared the trust prior to the attaching of any specific lien of plaintiffs, her equities were superior to those of plaintiffs. * * * It is therefore ordered, considered, and adjudged that the action of the said plaintiffs be dismissed, and that the defendant Eliza Fuller go hence without day and recover her costs."

One of the attorneys for the plaintiffs testifies that before an extension of time was granted to the defendant's son, for which W. A. Fuller became surety, he inquired of

W. A. Fuller if he was the owner of the real estate in controversy, and that he (Fuller) assured him that he was; and that, relying upon such assurance, he had consented to an extension of the time of payment. W. A. Fuller, in his testimony, denies that the attorney in question ever made any inquiry of him as to the ownership of the property.

All the testimony tends to show that the property in controversy was purchased and paid for out of the wife's separate estate, and there is no doubt that the title was taken in the name of the husband under an agreement with his wife that he would reconvey to her upon demand. Considerable stress is laid by the plaintiffs upon this being an oral agreement and hence could not be enforced. Whether such would be the case between the parties or not we need not now stop to inquire, as a deed has been made in pursuance of the alleged contract. No doubt if a wife places her property in the hands of her husband, and permits him to deal with it as his own and to exercise acts of ownership over the same, as by the sale or exchange of portions thereof, and he is permitted to use the same as a basis for credit, and contract debts upon the faith of his ownership thereof, the equity of the creditors will be superior to that of the wife. This was the rule established in *Roy v. McPherson*, 11 Neb., 197, and *McGovern v. Knox*, 21 O. St., 547: "That he who, having a right or an interest, by his conduct influences another to act on the faith of its non-existence, or that it will not be asserted, shall not be allowed to afterwards maintain it to his prejudice."

The proof upon the point that the plaintiffs relied upon the ownership of the property by the defendant is denied by other testimony, and is not established; but even if it was, it is doubtful if the proof shows that W. A. Fuller was authorized or did deal with the property as his own. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

FRANK M. CROWELL v. ROBERT HARVEY.

[FILED OCTOBER 14, 1890.]

1. **Petition**: DEFINITENESS. In an action for breach of warranty in the sale of certain abstract books, and also for rescission of the contract and return of the money paid for the same, a motion to make the petition definite and certain by pointing out the alleged errors in such books was *held* properly overruled.
2. **New Trial**: GROUNDS INSUFFICIENT. Mere forgetfulness, or the overlooking of material testimony by an attorney or his client, is not sufficient ground on which to base a motion for a new trial.

ERROR to the district court for Howard county. Tried below before HARRISON, J.

Thompson Bros., for plaintiff in error, cited, as to the motion to make more definite: *Louisville, etc., Canal Co. v. Murphy*, 9 Bush [Ky.], 522; Pomeroy, Remedies, secs. 529–31; Maxwell, Pl. & Pr., pp. 73, 85, 203.

Darnall & Babcock, and *Paul & Templin, contra*, cited, as to the affidavit for new trial: *Goracke v. Hintz*, 13 Neb., 397, and citations; Maxwell, Pl. & Pr., 440; Hilliard, New Trials, sec. 38.

MAXWELL, J.

This action was brought in the district court of Howard county by the defendant in error against the plaintiff in error. Issue was joined in 1887, and a jury impaneled and sworn in that year to try the cause. The probability of a protracted and expensive trial seems to have induced the parties to consent to the withdrawal of a juror and continuance of the case. Afterwards the parties, by agreement, referred the matter in controversy to J. A. Haggart

to examine the abstract books and report to the court; the entry being "and this cause was continued to the 9th day of January, 1888, to be then tried to the court, and by consent of all parties J. A. Haggart was appointed referee to examine the abstract books in question in this case, and report thereon as to the correctness or incorrectness of the said books, on the said 9th day of January, 1888." The referee took the oath required by law, and notified the parties of the time and place for the examination of the books, and at the time and place stated examined the same and made a report in favor of the plaintiff below.

No exceptions were filed to this report, nor does there seem to have been any formal confirmation thereof, but the court apparently accepted the finding of facts therein as correct, and based its judgment thereon. The referee reported the errors in the abstract books in detail, and no attempt seems to have been made by the plaintiff in error to dispute the correctness of his findings. If we accept these findings as correct, it is evident that the abstract books contained many errors, and therefore were of but little value.

There is no complaint that the judgment of the court is not sustained by sufficient evidence; but reliance is placed upon two points for the reversal of the judgment, viz. The overruling of a motion to make the petition more definite and certain, and in not granting a new trial based upon the affidavit of the plaintiff in error and his attorney. The petition is as follows:

"That on or about March 7, 1887, the defendant, as an inducement to plaintiff to purchase from him a one-half interest in a set of abstract books of real property in Howard county, Nebraska, consisting of one tract index, one book of abstracts of deeds, one book of abstracts of mortgages, one book of abstracts of judgment record, for the sum of five hundred dollars, warranted the same to be absolutely correct in every respect, and to be a complete

and correct abstract of all transfers, mortgages, judgments, and liens of all kinds affecting the real property in Howard county, Nebraska, to the date March 7, 1887, and plaintiff, relying on said warranty, purchased one-half interest in said abstract books and records from the defendant for the sum of five hundred dollars, then paying the defendant on said purchase the sum of four hundred and fifty-five dollars.

"Plaintiff avers that said set of abstract books, as aforesaid, was not correct in every respect, and was not a complete or correct abstract nor index of transfers, mortgages, judgments, and liens affecting the lands and real property in Howard county, Nebraska, to the date March 7, 1887, but that said set of abstract books are full of errors and mistakes, so much so that they are of no value whatever for the purpose for which they were intended, and for which plaintiff received them.

"The plaintiff further alleges that when by examination and comparing the entries in said abstract records and books with each other and with the county records, and finding them so defective, as aforesaid, that on the 13th day of May, 1887, plaintiff herein returned to him, the defendant, the one-half interest in said books and demanded of him, the said defendant, the sum of four hundred and fifty-five dollars, the same being the amount already paid by him to defendant as part payment for the one-half interest in said books as aforesaid. The defendant refused to pay the same, to the plaintiff's damage in the sum of four hundred and fifty-five dollars and interest thereon from March 7, 1887."

And the following is the motion to make the petition definite and certain: "To require the said plaintiff to make his petition in said cause more specific in this, that he be required to state more fully in what respect the said books were 'not correct in every respect,' and why and in what way they were not a complete or correct abstract or

index of transfers, etc., affecting the lands and real property in Howard county, and in what the errors and mistakes consist of, and in what way they differ with the county records, all of which should be specifically and particularly set forth in the said petition."

In our view the motion was properly overruled.

The plaintiff below alleges, in substance, that the defendant below warranted the books to be absolutely correct in every respect, and also that they were full of errors and mistakes. It would be impossible in an action of this kind to point out the many errors and mistakes relied upon for a breach of the warranty. To sustain the action, however, it must appear that the mistakes are of so serious a nature as to greatly impair the value of the books. Slight or trivial mistakes which could readily be corrected, would not, in all probability, constitute such a breach of the warranty as to entitle the plaintiff to recover more than nominal damages. It will also be observed that the plaintiff below alleges that the defendant below represented the books to be correct, and that, relying upon such statements, he was induced to purchase the same, but that he found them full of errors and mistakes, so much so that they were of no value whatever for the purpose for which they were intended, and that he returned the same to the defendant below and demanded a return of the money paid for said books, which was refused. This, in effect, is a rescission of the contract, and we think the proof is of such a character as to justify the plaintiff below in rescinding.

2d. We have the affidavit of the plaintiff in error and also of his attorney, in support of the motion for a new trial, in which they swear, in substance, that they were misled by the adverse attorney and supposed that all the records had been introduced in evidence when in fact some of such records had not been. It is difficult to perceive what relevancy the affidavits in question have to the case under

consideration. It is no ground for a new trial that an attorney, or his client, forgets a material fact in the case. If new trials could be had for such reason, it would offer a premium for forgetfulness and dereliction of duty. Upon the whole case it is apparent that there is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

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STATE, EX REL. FRONTIER COUNTY, V. GEORGE J. KELLY.

[FILED OCTOBER 14, 1890.]

1. **County Clerk:** FEES: SERVICES AS NOTARY PUBLIC. Where a county clerk, who is also a notary public, takes acknowledgments of deeds and mortgages, and takes affidavits and depositions as a notary public, it is his duty to enter upon his fee book as county clerk and report to the county board every item of fees received by him for such services.
2. ———: ———: SERVICES AS ABSTRACTER. The county clerk of a county containing less than 18,003 inhabitants is required to report to the county board all fees received by him for making and certifying to abstracts of title, although he may be a bonded abstracter, and performed the services as such abstracter.
3. ———: ———: SURPLUS: DISPOSAL. It is only the fees received by a county clerk which are in excess of the salary fixed by law that he is required to pay into the county treasury.

ORIGINAL application for *mandamus*.

George H. Stewart, County Attorney, and *W. S. Morlan*, for relator:

The clerk cannot evade his liability to the county by qualifying as a notary public and abstracter, and perform-

ing as such work which he is authorized by law to do as clerk. (*State v. Sovereign*, 17 Neb., 175.) He must report all fees whether official and fixed by law or not. (*State v. Leidtke*, 12 Neb., 171; *State v. Allen*, 23 Id., 454; *State v. Sovereign, supra.*) The evident intention of the legislature in repealing, in 1887 sec. 13, ch. 28, Comp. Stats., was to take from the clerk the business of abstracting, as the offices of clerk and abstracter are incompatible. (Paine, Elections, p. 131, sec. 157.)

O. P. Mason, and *Chas. E. Magoon, contra:*

The term fees, as used in secs. 42, 44, chap. 28, Comp. Stats., signifies a compensation allowed by law for *official* services. (*Harbor Master v. Southerland*, 47 Ala., 517; *Williams v. State*, 2 Sneed [Tenn.], 162; *Camp v. Bates*, 13 Conn., 9; Bouvier, L. D., "Fee.") As abstracting is not now an official duty, compensation therefor does not constitute a fee; and as the occupation of an abstracter is not an office, there can be no official incompatibility between it and the clerkship. *State v. Sovereign* rests upon the statute as it existed before the repeal of 1887, when abstracting was official. In *State v. Allen* the service rendered was specially enjoined upon the county treasurer. The county board alone is the proper party to make this application. (*State v. Sovereign*, 17 Neb., 176.)

NORVAL, J.

This is an original application for a writ of *mandamus*, to require the respondent to account and report to the commissioners of Frontier county, all fees collected and received by him, during his term of office as county clerk, for taking acknowledgments of deeds, taking affidavits and depositions, for making and certifying to abstracts of title, and to compel the respondent to pay such fees into the treasury of said county.

The answer alleges that the respondent, while holding the office of county clerk, held the position of notary public, and acted as such; that, as notary public, he took acknowledgments of deeds, took affidavits and depositions, and has received compensation therefor aggregating from $50 to $100, which he has not reported to the county board, because he is advised by counsel that he ought not to do so. The respondent, for further answer, says that on the 10th day of June, 1887, he filed his bond and qualified as an abstracter of title in said Frontier county, and that while holding the office of county clerk he made and certified to some abstracts of title, and charged and received fees therefor not exceeding the sum of $50, which he has not reported.

The relator filed a general demurrer to the answer.

Three questions are presented for our determination:

First—Is the respondent required to account for the fees received by him for taking acknowledgments of deeds, and for taking affidavits and depositions?

Second—Is he required to report the fees received for making and certifying abstracts of title?

Third—Is the respondent required to pay such moneys into the treasury of the county?

Sec. 90*a* of chap. 18 of the Compiled Statutes, 1889, provides that: "All county clerks and their deputies within the state of Nebraska shall have authority to administer oaths and affirmations in all cases where oaths and affirmations are required, and to take acknowledgments of deeds, mortgages, and all other instruments in writing, and shall attest the same with the county seal."

It will be seen that the above provision of the statute expressly authorized the respondent to take acknowledgments of deeds, mortgages, and other written instruments, and to administer oaths. The law having made it the duty of the respondent to perform these acts as county clerk, he is not relieved of entering the amount of money collected

for such services on his fee book, and reporting the same to the county board, on the ground that the acts were performed as notary public. (*State v. Sovereign*, 17 Neb., 175.)

It appears that the respondent, while holding the office of county clerk, qualified under the law as an abstracter of title, and as such abstracter made and certified to abstracts of title, and received compensation therefor, which he refuses to enter upon his fee book and report to the county board. Does the law make it his duty to account for these fees? If he was required by law to perform such services as county clerk, then unquestionably it was his duty to report the compensation received therefor, notwithstanding he did the work as an abstracter. It was held in the case of *State v. Sovereign, supra*, that where a county clerk makes abstracts of title, and certifies to the same as notary public, he must report the fees received for making the same to the county board. It is urged that the cited case is not decisive of the point we are now considering. When that decision was rendered section 13, chapter 28, Compiled Statutes, 1885, was in force. That section fixed the fees of county clerks for "making abstracts of title, for the first deed or transfer one dollar, and for each additional deed or transfer ten cents."

The legislature in 1887, having repealed the above quoted provision of section 13, there is now no law on the statute books fixing the compensation of county clerks for the making of abstracts of title. It is urged by the respondent that by the repeal of said proviso clause, county clerks are no longer under obligations to make abstracts of title. We do not agree to this proposition. The duty of a public officer to perform a particular act does not depend upon whether the legislature has prescribed the remuneration he shall charge therefor, but rather whether the law, in express terms or by implication, makes it his official duty to render such service. A similar question was before this court in *State v. Allen*, 23 Neb., 451. That was an

application for *mandamus* against Allen, the county treasurer of Buffalo county, to require him to enter upon his fee book and report to the county board, all fees received by him for abstracts of searchers of delinquent taxes, tax sales, redemptions, and incumbrances, as shown by the records in his office. The statute prescribed no fee for such services. Nevertheless it was held that it was his official duty to furnish such certificate when demanded, and to collect a reasonable fee for the same.

Sec. 85 of chap. 18, Comp. Stats., provides that "It shall be the duty of the register of deeds on receiving any conveyance or instrument affecting realty, including mechanics' liens, to cause such conveyance, instrument or mechanic's lien to be entered upon the numerical index immediately after filing the same."

Sec. 77c provides that in counties having less than 18,003 inhabitants, the county clerk shall be *ex-officio* register of deeds and perform the duties enjoined by law upon such officer.

In *State v. Sovereign*, *supra*, it was held that an abstract of the title is but a copy of what appears on the numerical index, and that a county clerk is required to make a certified copy of the entries appearing on such record, when requested to do so, and to report the fees received therefor, notwithstanding the services were rendered by the clerk as a notary public. Upon the authority of the above case and that of *State v. Allen*, *supra*, it was the duty of respondent to perform the work as county clerk and report the moneys received by him therefor to the county board.

Is he required to pay to the treasurer of his county the compensation received for the taking of acknowledgments, affidavits, and depositions, and for making abstracts of title? Sec. 42 of chap. 28, Comp. Stats., requires county clerks whose fees in the aggregate exceed the sum of $1,500 per annum to pay the excess into the treasury of his county. It does not appear, either from the petition or

answer, that the total amount of fees received by the respondent exceeds the salary fixed by law and he cannot on this application be required to pay any of the fees collected by him over to the county treasurer.

Finally, it is insisted that this application is made by the wrong party, that the board of county commissioners is the proper party to require the defendant to account for these moneys. Without question the application could have been made in the name of the board, but that does not prevent the relator from asking the writ.

The county of Frontier is the real party interested in the accounting. The commissioners are merely representatives of the county and it is to them that the defendant is asked to render an account of the fees received. The demurrer to the answer will be sustained and a peremptory writ of *mandamus* will be issued.

WRIT ALLOWED.

THE other judges concur.

HORACE A. GREENWOOD v. THOMAS D. COBBEY.

[FILED OCTOBER 14, 1890.]

1. **Pleading.** *Held*, That the third count of the petition does not state a cause of action.
2. ———. A good count in a petition will not sustain a verdict rendered upon a count that fails to state sufficient facts to constitute a cause of action.

ON rehearing.

L. W. Colby, and *Mason & Whedon*, for plaintiff in error.

J. E. Bush, and *J. E. Cobbey*, *contra*, cited, as to the sufficiency of the third count: *White v. Nicholls*, 3 How.

[U. S.], 284; *King v. Root*, 4 Wend. [N. Y.], 136; *O'Donaghue v. McGovern*, 23 Id., 26; *People v. Haley*, 12 N. W. Rep. [Mich.], 671; *Eviston v. Cramer*, 47 Wis., 659. As to the construction of words, and slander *per se: Van Akin v. Caler*, 48 Barb. [N. Y.], 58; *Maybee v. Fisk*, 42 Barb. [N. Y.], 330; *Saunderson v. Caldwell*, 45 N. Y., 399; *Buscher v. Scully*, 5 N. E. Rep., 738; *Beneway v. Thorp*, 43 N. W. Rep. [Mich.], 863; *Smith v. Smith*, 41 N. W. Rep. [Mich.], 499; *Wimer v. Allbaugh*, 42 N. W. Rep. [Ia.], 587; *Chaplin v. Lee*, 18 Neb., 441; *Bourresseau v. Detroit*, 3 N. W. Rep., 376, and cases cited. As to privileged communications: *Sunderlin v. Bradstreet*, 46 N. Y., 193; *Hamilton v. Eno*, 81 Id., 117; *Byam v. Collins*, 111 N. Y., 148; *McAllister v. Detroit*, 43 N. W. Rep. [Mich.], 435; *Lowrey v. Vedder*, 42 N. W. Rep. [Minn.], 542; 2 Add., Torts [Wood's Ed.], 316; *Pierce v. Oard*, 23 Neb., 828; *Briggs v. Garrett*, 2 Atl. Rep. [Pa.], 513; *Maehean v. Scripps*, 18 N. W., Rep. 209.

NORVAL, J.

This is an action to recover damages for slander. At the January, 1889, term, a decision was entered reversing the judgment of the district court, on the ground that the third count of the petition did not state a cause of action. (26 Neb., 449.) After the filing of that decision, a rehearing was ordered, upon the application of the defendant in error. On a reargument and examination of the numerous authorities cited, we are all satisfied with the views expressed by Judge Maxwell in the former opinion. We deem it unnecessary to enter upon a discussion of the points covered by the former decision.

It is insisted, however, by the defendant in error, that as the petition contains one good count, the failure of the third count to state a cause of action is no ground for reversing the judgment. We do not yield assent to that proposition. The slanderous words charged in the third

count are entirely different from those alleged in the other causes of action. The jury, in addition to the general verdict, returned special findings, that the plaintiff had proved each count by a preponderance of the evidence. It is obvious that when a petition contains several causes of action, one good count will not sustain a verdict rendered upon a count that fails to state a cause of action.

The judgment of the district court will stand

REVERSED.

THE other judges concur.

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GEORGE OBERNE ET AL. V. WILLIAM BURKE ET AL.

[FILED OCTOBER 21, 1890.]

1. **Agency.** A principal is bound equally by the authority which he actually gives, and by that which, by his own act, he appears to give. (*Webster v. Wray*, 17 Neb., 579.)
2. **The apparent authority** of an agent which will bind a principal is such authority as an agent appears to have by reason of the actual authority which he has or which he exercises with the knowledge and ratification of the principal.
3. **An authority** to an agent to buy and ship specified commodities and to make cash advances on the same to be delivered, *held*, not to be authority, nor to give semblance of authority, to guarantee in the name of the principal an obligation of K., as purchaser, to pay B. & Co., vendors, for cattle sold on thirty days' time.

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

Montgomery & Jeffrey, for plaintiffs in error, cited: Story, Agency, secs. 58, 69, 70, 71; *Webster v. Wray*, 17 Neb., 580; *Bohart v. Oberne*, 13 Pac. Rep. [Kan.], 389;

Hakes v. Myrick, 69 Ia., 189; *Voorhees v. R. Co.*, 71 Id., 735; *Stevenson v. Hoy*, 43 Pa. St., 191–6; *Anderson v. Buchanan*, 20 Neb., 272.

Hall, McCulloch & English, contra, cited: *Bohart v. Oberne*, 13 Pac. Rep. [Kan.], 389; *Rogers v. Hardware Co.*, 24 Neb., 653; *Webster v. Wray*, 17 Id., 579; *White Lake Lum. Co. v. Stone*, 19 Id., 406; *Scales v. Paine*, 13 Id., 522; *Jackson v. Emmens*, 13 Atl. Rep., 210; *Farrar v. Duncan*, 29 La. Ann., 126; *Butler v. Maples*, 9 Wall. [U. S.], 774; *Cruzan v. Smith*, 41 Ind., 288; *Palmer v. Cheney*, 35 Ia., 281.

COBB, CH. J.

This action was brought by the plaintiffs in the court below for the recovery of $791.28, with interest, due from the defendants upon an alleged written guaranty as follows:

"SOUTH OMAHA, NEB., Apr. 26, 1887.

"*M. Burke & Sons, U. S. Yds., Neb.*—DEAR SIRS: We hereby guarantee the payment by R. Kunath in thirty (30) days the sum of seven hundred ninety-one and $\frac{28}{100}$ dollars for 17 head of cattle.

"OBERNE, HOSICK & CO.,
"Pr. HARMAN."

The answer of the defendants was a general denial. There was a trial to a jury, with verdict for the plaintiffs for $863.87 damages.

The defendants' motion for a new trial was overruled, and judgment entered on the verdict.

The plaintiffs in error bring the cause for review on the following errors:

"1. The court erred in admitting in evidence the 'Exhibit A' in bill of exceptions, the guaranty sued upon.

"2. In admitting the testimony of F. W. Gasman, objected to.

"3. In admitting in evidence the 'Exhibit B' in bill of exceptions.

"4. In admitting the testimony of George Burke, objected to.

"5. In admitting the testimony of Robert Kunath, objected to.

"6. In admitting the testimony of Wm. W. Keysor, objected to.

"7. In overruling the defendants' motion for nonsuit.

"8. In sustaining the plaintiffs' objections to questions proposed by defendants and stated in bill of exceptions.

"9. In sustaining the plaintiffs' objections to evidence proffered by defendants and stated in bill of exceptions.

"10. In sustaining objections to defendants' questions, stated on pages 71 and 72 of bill of exceptions.

"11. In giving instruction to the jury No. 4, of the court's own motion.

"12. In refusing to give No. 1 asked by defendants.

"13. In refusing to give No. 2 asked by defendants.

"14. In refusing to give No. 3 asked by defendants.

"15. The verdict is not sustained by sufficient evidence.

"16. In overruling the motion for new trial."

It appears by the bill of exceptions that for a period of ten years prior to the date of the written guaranty sued upon the plaintiffs in error were dealers in hides, wool, tallow, grease, furs, and pelts in Chicago, their place of residence, with various branches in other localities in the charge of agents and clerks for the sole purpose of purchasing and shipping to Chicago those commodities. Their Omaha branch was conducted by F. S. Bush, assisted by J. S. Harman as traveling purchaser. It was testified to, at the trial, that in some instances Bush had loaned sums of money to butchers to aid them in purchasing cattle to be slaughtered, the hides and tallow to be taken by Bush on account of the business he was in charge of. That on other occasions verbal assent by telephone at the office in

Omaha, from Bush, had been given to defendants in error for the security of sums on short credit for the purchase of cattle by third persons, and that in three or four instances Bush had paid the amount when the purchaser had failed to do so. It was also in evidence that on September 29, 1886, he had given a written order, in the name of his principal, for the delivery to one Hickstein of twenty-one head of cattle, which had been weighed, to one McCorney and not taken. The cattle were delivered on the order and paid for by Bush, while the principal was unknown to the transaction. Subsequently, in April, 1887, Bush being absent during the month, Harman gave the written guaranty upon which this suit was brought. There is no evidence tending to show that the plaintiffs in error had knowledge of or acquiesced in any of the transactions mentioned, or that they indirectly authorized either agent, in any manner, to assume the debts or assure the credit, or to give a guaranty for third parties in their name, or on account of their business.

H. M. Hosick, of the firm of Oberne, Hosick & Co., testified that the authority of their agents was confined to the buying and shipping of articles in their line of trade, and that they never had authorized J. S. Harman to guarantee any note or notes to M. Burke & Sons, or to any other persons, at Omaha or elsewhere.

F. S. Bush testified that he was, and had been, the business manager of the firm at Omaha for ten years; that J. S. Harman is employed as traveling agent for the firm, and resides in Omaha when not out on the road; that he and all other agents for the firm traveling out from Omaha were under the supervision and direction of the witness, and took their orders from him; that he was absent from Omaha in April, 1887, and left Harman in charge of the firm's business there. The witness was asked: Q. What directions and instructions were given Harman when you left Omaha to go away at that time; which was objected to,

as incompetent, immaterial, and irrelevant, and the objection was sustained by the court, and exceptions taken to this ruling.

Q. Had you written instructions from the firm at this time limiting your authority?

A. No.

Q. Was it any part of the business of the firm at Omaha to go security for anybody who was doing business with them? Objection was made as incompetent, and as asking for a legal conclusion of the witness, and objection sustained by the court, to which exception was taken.

Q. You did at times assist persons in the purchase of cattle when they bought of Burke & Sons, and others?

A. Yes.

Q. In certain instances, when they telephoned, you agreed they should draw on you for the amount of the purchase of cattle?

A. Yes.

Q. And also in one or two instances you agreed to pay if the purchaser did not pay at a certain time?

A. Yes.

Q. State whether or not the firm had knowledge of your having done these things. (Objected to, as irrelevant, and objection sustained.)

The plaintiffs in error offered to prove by the witness, in his reply to this question, that he had verbally, in the name of the firm, guaranteed the indebtedness of other parties; that he did so upon his own responsibility, and without the knowledge or authority of the firm, and that he was not authorized by them to go security for any one in the course of the business he was conducting for them, and offered to prove these facts by the last question, and by those which are to follow. Objected to, as incompetent, and for the reason that the witness had shown that he was the general managing agent for all the business of the firm in Omaha, and that he carried it on at times by advancing

money and guaranteeing payments. The objection was sustained.

Q. What authority, if any, did you ever receive from the firm to guarantee the payment of third persons' indebtedness?

Q. Did the business of the firm, where you represented it as agent, include the guaranteeing of sales, or the signing of such guarantees as that in this action, or going security for third persons in any way whatever?

Q. Did the firm know that you had at any time, or in any instance, agreed, in their name, to become security for a third person, either by a guaranty such as in this action or otherwise?

Q. What knowledge, if any, did the firm have of your ever having agreed to become security for the purchases of a third person, or of your having agreed to guarantee the payment of the purchases or indebtedness of any third person?

Q. What greater authority, if any, did you have from the firm than that for the purchase of the articles of their trade?

Q. How far did your authority extend, and what were you employed to do for the firm here in Omaha? State fully.

Objections were made and sustained to all the foregoing questions, and exceptions taken to the ruling of the court.

Q. When did you first learn that this alleged guaranty had been made? Objected to by the plaintiff, on the trial, and objection overruled by the court.

A. About ten days after I got home, the 17th of May.

On the trial in the court below, after overruling the testimony offered under the foregoing questions, the court charged the jury, among other instructions, that "it further appears that the man Harman was in the employ of the defendants as traveling purchasing agent, with authority similar to that of Busli; that during a thirty days' absence

of Bush from the branch house at South Omaha, he left Harman in charge of the same, which was known to defendants. It was during the time that Harman was thus in charge that the guaranty sued on was executed and delivered to the plaintiffs; there being no dispute as to the facts recited [the facts recited throughout the instructions], the liability of the defendants is a question of law for the court to decide, and the court instructs you that the defendants are liable, and that your verdict must be for the plaintiffs."

It is not believed from the testimony before the jury, preserved in the bill of exceptions, that the important "facts recited by the court" were not so strongly disputed as to render the court's construction of the law and instruction to the jury inapplicable and partial. The testimony offered, in the form shown by the defendants, and repeatedly overruled on the trial, as to the character of the authority of the agent, does not seem to have been incompetent, immaterial, or irrelevant, but was competent as tending to show the exact and important limitations of the agent's general and implied authority; and we hold that it might have properly gone to the jury and that it was error to overrule it.

The important question involved in this case is, Was the execution of the guaranty sued on an act within the scope of the business in which Harman was employed by the defendants? As to what that business was, the only evidence before the court is that offered by defendants to the effect that it consisted in the purchase of hides and tallow and the commodities stated. It is true there was evidence on the part of the plaintiffs tending to prove that Bush, the general agent of defendants, had at various times in their name guaranteed the obligations of certain butchers to the vendors of cattle, but there is no evidence, even on the part of plaintiffs, that the acts of Bush were authorized or ratified by the defendants, nor that they were

comprehended within the scope of his employment. What the scope of his employment strictly was would be gathered, primarily, from the letter of his employment or appointment as agent, and, secondarily, from the nature of the business in which he was employed, and again from such acts of his within the general scope of his employment as were known to and ratified by his employers, the defendants. But no act of his, extending the scope of his employment, however extensive or often repeated, which did not come to the knowledge of defendants, would enlarge his authority to bind them.

In the cases decided by this court, as well as those cited by the plaintiffs' counsel in the brief, we have gone as far as the farthest in holding that a principal is bound by the acts of his agent within the apparent scope of his authority as agent; and that a party dealing with such agent is not bound by secret instructions or limitations upon the authority of the agent, unknown to such party, so long as the act of the agent to which it is sought to hold the principal is within the general scope of such authority, real or apparent. But we have not gone the length of holding that a principal is bound by the unauthorized acts of his agent, not within the scope of his employment, real or apparent, because of former similar acts of the agent, except where such former acts have been brought to the knowledge of the principal and ratified by him, enlarging the apparent scope of authority covering the acts in controversy.

In the case of *Webster v. Wray*, 17 Neb., 579, Webster purchased a herd of cattle, placing them on his ranch, the whole in charge of Thomas D. Webster, his son, giving him one-fifth interest in the profits of the herd; the agent to have the care and management of the herd, and the principal to pay the expenses of the whole. The agent contracted debts, which the principal, in full knowledge of the facts, paid off. Subsequently the principal, being dis-

satisfied with his agent's conduct of the business, took a bill of sale of the agent's interest in the herd, but allowed him to remain in the apparent charge of it, while the principal, as is claimed, forbade the agent contracting any further debts in his name, but gave no notice to the public, to Wray, or other creditors, so far as appears, of any change in the relationship between himself and the former agent. Under these conditions the agent borrowed money, and contracted other obligations in the name of his principal, apparently, and in fact, so far as shown, for the benefit of the range and herd of cattle under his charge, and upon such facts the court held that the principal was bound thereby, in the following language: "A principal is bound equally by the authority which he actually gives, and by that which, by his own act, he appears to give. In our view, the plaintiff in error is bound both by the authority which he gave his son, and that which, by his own acts, he appeared to give."

In the case of the *White Lake Lumber Co. v. Stone*, 19 Neb., 402, the plaintiff owned and carried on a lumber yard at Crab Orchard, in this state. J. H. Hanna was the agent in the exclusive charge and control of the property and business, with authority to sell lumber for cash, or on credit, to receive and receipt for money, and to maintain suits, to make affidavits to accounts for collection, and secure mechanic's liens, or not, as he saw fit, and upon payments to satisfy and discharge liens so secured, and do all necessary to carry out these general duties. One Janousky had erected a dwelling house on his own land, for which he had purchased lumber from the plaintiff, and on account of which the plaintiff was entitled to a lien on the house. The defendant, being about to purchase the house and land, applied to the agent Hanna to ascertain if the plaintiff claimed a lien on the property, and was informed by the agent that the plaintiff had no lien or claim upon the premises, nor any against Janousky which should

become a lien thereon. The defendant bought the land and house. The action was by the Lumber Company against Janousky and Stone, seeking to establish its lien. The court held that the company was bound by the declaration of Hanna as being within the apparent scope of his authority, although it was in evidence that he had no express authority from the company to waive its right to a lien.

The case of *Butler v. Maples*, 9 Wall., 766, arose from a cotton purchase, during the late rebellion, by one Shepherd as agent for Bridge & Co., of Memphis, Tennessee, of which firm Butler was a partner, the cotton having been bought of the defendant Maples in the state of Arkansas. The facts, so far as necessary to illustrate the issues at bar, were that Bridge & Co. had furnished to Shepherd $4,000, stipulating to furnish the necessary amount from time to time to purchase the required cotton. His instructions, in writing, were to the effect that Shepherd's agency was for the purchase of R. C. Stone's and such other cotton as he might be able to purchase in Desha county, Arkansas, and in that vicinity, under the conditions and restrictions set forth. It was further agreed that the agent should buy the cotton if it could be bought at the price stated, and as much more as he could, on the best terms, not to exceed an average of *thirty cents* per pound for middling cotton, and lower in proportion to the grade, to be delivered at such times and places of shipment as might be agreed upon; that Shepherd should pay as little as possible on the cotton until it should be delivered within the protection of a gunboat, and when thus delivered and paid for, the ownership should be exclusively in Bridge & Co., except as the instructions provided for Shepherd's share of the profits. The cotton, for the price of which suit was brought, was purchased by Shepherd, as it lay, he agreeing to pay for it *forty cents a pound* as soon as it could be weighed, and being weighed he removed fifty-four bales of it, but ninety

bales were burned before they could be shipped up the river to Memphis. The fifty-four bales were shipped and received by Bridge & Co., who denied Shepherd's agency. Maples, the vendor of the cotton, brought suit and obtained service on Butler and Hicox. It was proved on the trial by one Martin, a witness for defendants, that he was sent by them to Arkansas with money and instructions for Shepherd to purchase cotton for the firm, but was not to agree to pay more than thirty to thirty-five cents per pound for it, with authority to make small advances, but not to pay the balance, or to make it payable, until the firm should be able to send a boat up the Arkansas river for the cotton, or until it was in their possession, weighed, and placed on the boat. He was instructed to take no risks, for the firm, of the destruction of the cotton by incendiaries, or otherwise, except to the extent of the money advanced. On a judgment for the plaintiff in the circuit court of the western district of Tenneesee the cause was taken to the supreme court of the United States on error, the principal error assigned being that of certain instructions to the jury, in reviewing which the supreme court says: "That the reasons urged by the plaintiffs in error in support of their denial of liability for the engagements made by Shepherd are, that he agreed to pay forty cents per pound for the plaintiff's cotton; that he bought it where it lay, instead of requiring delivery on board a steamboat, or within the protection of a gunboat; and that he did not obtain a permit from the government to make the purchase. The argument is, that in the first two instances he transcended his powers, and that his authority to buy at all was conditioned upon his obtaining a permit from the government. All this, however, was immaterial, if it was within the scope of his authority that he acted. The mode of buying, the price agreed to be paid, and the antecedent qualifications required of him, were matters between him and his principals. They are not

matters in regard to which one dealing with him was bound to inquire."

In each of these cases, as well as in the others cited by counsel for defendants in error, the principle decided is that while the agent continues to act within the general scope of his authority, although he may violate the private instructions of his employer, and go beyond the restrictions contemplated by his employment, if such private instructions and limitations are unknown to the persons with whom he deals, his principal will be bound; but none of them go to the extent of holding that the principal is bound by the act, contract, or obligation of the agent, though made in the name of the principal, in a transaction independent of and not within the general scope of his authority or apparent authority.

By the words "apparent authority" is meant the authority which the agent appears to have from that which he actually does have, and not from that which he may pretend to have, or from his actions on occasions which were unknown to and unratified by his principals.

To return to the present case, the authority of the agents Bush and Harman to bind the defendants in the purchase of commodities for which they were authorized to deal, did not include within its most general scope the authority to execute the guaranty sued on; and no proper or legitimate exercise of the powers or authority which they really had were such as would give it the appearance of embracing or comprehending the authority to make such contract.

As there must be a new trial, I deem it not out of place to say that the evidence, from the bill of exceptions, so far as it relates to the chattel mortgage executed by R. Kunath to the defendants below on the shop and fixtures, and its settlement, and the several transactions connected therewith, was clearly inadmissible under the pleadings, and would have necessarily misled the jury had they been permitted to consider the evidence in rendering their verdict.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

CARL O. EDLING, APPELLEE, v. LOUIS BRADFORD, APPELLANT.

[FILED OCTOBER 21, 1890.]

1. **Written Instruments:** CONSTRUCTION. A chattel mortgage on certain buildings in course of erection and upon a leasehold interest, an assignment of the lease, and a contract between the parties in relation to the subject-matter were executed on the same day. *Held*, That in determining the rights of parties thereunder they would be construed together.

2. ———: ———: CONTRACT: MORTGAGE. Certain buildings situated upon leased land were mortgaged to one B. and an assignment of the lease executed to him and a contract entered into between the parties which provided "that he (B.) shall have and take immediate possession of the property this day mortgaged to him by Anderson and wife, and Edling and wife, being the building and improvements on lot 8, in block 56, in the city of Omaha, Nebraska, including the lot. But the said Bradford, when he shall have been paid in full the amount due him upon said mortgage, is to surrender possession of said property to Anderson and Edling, and he hereby agrees with them to reassign to them the lease this date by them assigned to him." The mortgage also contains a provision that said Bradford shall have the right to collect all rents, issues, and profits thereof as further security for the notes below described, and said rents are hereby assigned to him for that purpose, the same to be credited upon said notes as fast as the same are collected, save and except so much thereof as may be necessary shall be applied in the payment of the ground rent and insurance and such taxes as these mortgagors are bound to pay on said property." *Held*, That it was the duty of Bradford to apply the rents in payment of insurance, taxes, ground rent, and interest on the notes, and that he

could not declare a forfeiture and sell the property under the mortgage before the first note became due.

3. ———: ———: ———: ———: ACCOUNTING. Plaintiff is entitled to an accounting and to redeem the property.

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

Charles Ogden, and *Congdon & Hunt*, for appellant, cited: *Salisbury v. Andrews*, 19 Pick. [Mass,], 250, 252; *Warde v. Warde*, 16 Beav. [Eng.], 103; *Randel v. Canal Co.*, 1 Harr. [Del.], 154; *Hookes v. Swain*, 1 Lev. [Eng.], 102; *Gifford v. First Pres. Soc.*, 56 Barb. [N. Y.], 114; *Shoenberger v. Hay*, 40 Pa. St., 132; *Watchman v. Crook*, 5 Gill & J. [Md.], 239; *Ludlow v. McCrea*, 1 Wend. [N. Y.], 228; *Marvin v. Stone*, 2 Cow. [N. Y.], 781; *Burk v. Burk*, 64 Ga., 632; *Wadlington v. Hill*, 10 S & M. [Miss.], 560, 562; *Richardson v. Palmer*, 38 N. H., 218; *Jackson v. Myers*, 3 Johns. [N. Y.], 388; *Newlean v. Olson*, 22 Neb., 719; *Winnipisseogee, etc., Co. v. Perley*, 46 N. H., 83; *Youngs v. Wilson*, 27 N. Y., 351; *Stanley v. Green*, 12 Cal., 148; *Connery v. Brooke*, 73 Pa. St., 80; *Hamm v. San Francisco*, 17 Fed. Rep. [Cal.], 119; *Stone v. Clark*, 1 Metc. [Mass.], 378; *Pike v. Munroe*, 36 Me., 309; *Means v. Pres. Ch.*, 3 Watts & S. [Pa.], 303; *Moore v. Griffin*, 22 Me., 350; *Mills v. Catlin*, 22 Vt., 98; *Benedict v. Gaylord*, 11 Conn., 332; *Chouteau v. Suydam*, 21 N. Y., 179; *Wolf v. Scarborough*, 2 O. St., 361; *Houston v. Nord*, 40 N. W. Rep. [Minn.], 568; *Walker v. Cockey*, 38 Md., 75; *In re Bogart*, 28 Hun [N. Y.], 466; *Valentine v. Van Wagner*, 37 Barb. [N. Y.], 60; *Ferris v. Ferris*, 28 Id., 29; *Crane v. Ward*, 1 Clark Ch. [N. Y.], 393; *Hale v. Gouverneur*, 4 Edw. Ch. [N. Y.], 207*; *Noyes v. Clark*, 7 Paige Ch. [N. Y.], 179; *O'Connor v. Shipman*, 48 How. Pr. [N. Y.], 126; *Ottawa R. Co. v. Murray*, 15 Ill., 337; *Stanclift v. Norton*, 11 Kan., 218, 222; *Richards v. Holmes*, 59 U. S. [18 How.], 143; *Johnson v. Payne*, 11 Neb., 269; *Guthrie v. Jones*, 108

Mass., 191; *Kutter v. Smith*, 2 Wall. [U. S.], 491; *Van Ness v. Pacard*, 2 Pet. [U. S.], 137; *Dalzell v. Lynch*, 4 W. & S. [Pa.], 255; *Minshall v. Lloyd*, 2 M. & W. [Eng.], 450; *Brewster v. Hill*, 1 N. H., 350; *Gay's Case*, 5 Mass.; 419; *Duchane v. Goodtitle*, 1 Blackf. [Ind.], 117; *Fleetwood's Case*, 8 Coke [Eng.], 171; *Vredenbergh v. Morris*, 1 Johns. Cas. [N. Y.], 224; *Burden v. Kennedy*, 3 Atk. [Eng.], 739; 3 Am. & Eng. Ency. Law, 164; *Winslow v. Tarbox*, 6 Shep. [Me.], 132; *Barr v. Doe*, 6 Blackf. [Ind.], 335; *Cade v. Brownlee*, 15 Ind., 369; *Schee v. Wiseman*, 79 Id., 389; *McCarty v. Burnet*, 84 Id., 23, 26; *Buhl v. Kenyon*, 11 Mich., 249; *Hutchinson v. Bramhall*, 42 N. J. Eq., 373; *Freeman v. Dawson*, 110 U. S., 264; *Hyatt v. Vincennes Bank*, 113 Id., 408; *Loring v. Melendy*, 11 O., 355; *Northern Bank v. Roosa*, 14 Id., 335; Freeman, Executions, sec. 119 and citations; *People v. Westervelt*, 17 Wend. [N. Y.], 674; *Chapman v. Gray*, 15 Mass., 445; *Nessler v. Neher*, 18 Neb., 649; *Harrison v. McWhirter*, 12 Id., 152; *Green v. Gross*, Id., 123; *Burbank v. Ellis*, 7 Id., 163; *Weaver v. Coumbe*, 15 Id., 170; *Kittle v. St John*, 10 Id., 605; *McHugh v. Smiley*, 17 Id., 623; *Bridges v. Bidwell*, 20 Id., 195; *Galway v. Malchow*, 7 Id., 287; *Kinney v. Watts*, 14 Wend. [N. Y.], 38; *Tone v. Brace*, 8 Paige Ch. [N. Y.], 596; 11 Id., 566; *Mayor v. Mabie*, 3 Kern. [N. Y.], 159; *Vernam v. Smith*, 1 Smith [N. Y.], 333; *Doupe v. Genin*, 1 Sweeny [N. Y.], 25; *Sandford v. Travers*, 40 N. Y., 144; *Mack v. Patchin*, 42 Id., 174; *Wilson v. Brannan*, 27 Cal., 258; *Hurt v. Kelly*, 43 Mo., 238; *Dyer v. Shurtleff*, 112 Mass., 165; *Princeton L. & T. Co. v. Munson*, 60 Ill., 371; *Davey v. Durrant*, 1 De G. & J. [Eng.], 535; *Mowry v. Sanborn*, 68 N. Y., 153, 160; *Martin v. Paxson*, 66 Mo., 260, 266; *Norton v. Olms*, 35 N. W. Rep. [Mich.], 175; *Woodward v. Wilcox*, 27 Ind., 207; *Dikeman v. Puckhafer*, 1 Abb. Pr. [N. Y.], 32; *Howland v. Willett*, 3 Sandf. [N. Y.], 607; *Farrell v. Bean*, 10 Md., 217; *Southwick v. Hapgood*, 10 Cush.

[Mass.], 119; *Goodrich v. Willard*, 2 Gray [Mass.], 203; *Byram v. Gordon*, 11 Mich., 531; *Brock v. Headen*, 13 Ala., 370; *Lanphere v. Lowe*, 3 Neb., 131; *Holt Co. Bk. v. Tootle*, 25 Id., 408; *Lowenburg v. Bernd*, 47 Mo., 297; *Walker v. Sherman*, 20 Wend. [N. Y.], 636; *Teaff v. Hewitt*, 1 O. St., 511; *Fisher v. Saffer*, 1 E. D. Smith [N. Y.], 612; *Ford v. Cobb*, 20 N. Y., 344; *Myrick v. Bill*, 17 N. W. Rep. [Dak.], 268; *Corcoran v. Webster*, 6 Id. [Wis.], 513; *Raymond v. Morrison*, 13 Id., 332; *Wightman v. Spofford*, 8 Id., 680.

Howard B. Smith, and *Shaw & Kuehnle*, *contra*, cited: Greenleaf, Ev. [Redfield Ed.], 297; *Palmer v. Albee*, 50 Ia., 429; *Anderson v. Weiser*, 24 Id., 428; *McClelland v. James*, 33 Id., 571; *Taylor v. Trulock*, 55 Id., 448; *Paddock v. Bartlett*, 68 Id., 19; *Davis v. Butrick*, Id., 98; *Sweney v. Davidson*, Id., 391; *Davis v. Robinson*, 67 Id., 361; *Gibson v. Jones*, 5 Leigh [Va.], 370; *Wilkins v. Gordon*, 11 Id., 547; *Booknan v. Burnett*, 49 Ia., 303; *Stromberg v. Lindberg*, 25 Minn., 513; *Alger v. Farlee*, 19 Ia., 520; Hill, Trustees, 175, 279, 734; Perry, Trusts, 499; *Doe v. Robinson*, 24 Miss., 688; *Powell v. Tuttle*, 3 Comst. [N. Y.], 396; *Waldron v. Chastency*, 2 Blatchf. [U. S.], 62; *Crosby v. Huston*, 1 Tex., 225; *Smith v. Sublett*, 28 Id., 169; *Taylor v. Horde*, 1 Burr. [Eng.], 60; *Gunter v. Fanes*, 9 Cal., 645; *Hawkins v. Kemp*, 3 East [Eng.], 410; *Bitter v. Calhoun*, 8 S. W. Rep., 524; Jones, Chat. Mtgs., 280, 797, 801; *Lee v. Fox*, 14 N. E. Rep., 892; Herman, Chat. Mtg., 514; *Mapps v. Sharpe*, 32 Ill., 13; *Hunt v. Bass*, 2 Dev. Eq. [N. Car.], 292; *Fletcher v. McGill*, 10 N. E. Rep. [Ind.], 651; *Ikerd v. Beavers*, 106 Ind., 483; *Kloepping v. Stellmacher*, 21 N. J. Eq., 328; *Ord v. Noel*, 5 Mad. [Eng.], 440; *Booth v. Kehoe*, 71 N. Y., 341; *Breese v. Bange*, 2 E. D. Smith [N. Y.], 474; *Nessler v. Neher*, 18 Neb., 649; *Rosenfield v. Chada*, 12 Id., 25; *Wheeler v. Sexton*, 34 Fed. Rep., 154; *Doo-*

little v. Lewis, 7 Johns. Ch. [N. Y.], 48; Ewell, Fixtures, 275, 290, 293; *Green v. Armstrong*, 1 Denio [N. Y.], 554; *Fechet v. Drake*, 12 Pac. Rep., 694; *Lyle v. Palmer*, 3 N. W. Rep. [Mich.], 921; *McNally v. Connolly*, 11 Pac. Rep., 320; *Hyatt v. Vincennes Bank*, 113 U. S., 408.

MAXWELL, J.

This is an action for an accounting and to redeem certain real estate, brought in the district court of Douglas county by Edling against Bradford.

It appears from the record that on the 5th day of October, 1882, Edling and one Anderson leased for ten years lot 8 and the east six feet of lot 7, in block 56, in the city of Omaha. The lessees proposed to erect certain store buildings on these lots. Anderson was a carpenter and builder and resided in Omaha. Edling was a resident of Iowa and advanced $5,000 in the enterprise. Anderson seems to have claimed that he advanced a like sum, but whether he did so or not is left in doubt. After the building was partially completed, and Edling and his associate heavily indebted for material furnished in the construction of the building, an arrangement was made with Bradford to furnish $7,500 to complete the building, and Anderson and wife and Edling executed a chattel mortgage to Bradford as follows:

"For the consideration of $7,500 in hand paid, and for the purpose of securing the notes hereinafter described, we, John N. Anderson and Tena Anderson, his wife, C. O. Edling and Charlotte Edling, his wife, do hereby give, grant, sell, and convey and mortgage unto Louis Bradford, of Omaha, the following described goods, chattels, and property, to-wit: All buildings, structures, and improvements on lot 8, in block 56, in the city of Omaha, Nebraska, together with all of our right, title, and interest in or to said lot, being a leasehold. And we do covenant

that all claims or liens against or on account of said improvements shall be paid off out of said amount, and the remainder thereof shall be expended in completing said buildings and improvements; that when said buildings and improvements shall be completed, said Bradford shall have the right to collect all rents, issues, and profits thereof as further security for the notes below described, and said rents are hereby assigned to him for that purpose, the same to be credited upon said notes as fast as the same are collected, save and except so much thereof as may be necessary shall be applied in the payment of the ground rent and insurance, and such taxes as these mortgagors are bound to pay on said property.

"This sale is made to secure the payment of two certain promissory notes for the sum of $7,500 total; one being for $2,500, of this date, payable in one year; one being for $5,000, of this date, payable in two years; both signed by said mortgagors, payable to order of said Bradford, with interest from date at ten per cent per annum, payable annually.

"Now, if the said Anderson and his wife, and the said C. O. Edling and his wife, shall well and truly pay, or cause to be paid, the said sum of money in said notes mentioned, with the interest thereon, according to the tenor and effect of said notes, and shall keep and perform all the other covenants and agreements aforesaid, then these presents shall be null and void. But if said sum of money, or any part thereof, or any interest thereon, is not paid when the same becomes due, then in that case, or in case any of said covenants and agreements are not kept and performed, the whole of said sum and interest shall, and by this indenture does, immediately become due and payable, and the said Bradford shall have the right to take immediate possession of said property, and on default herein, to sell the same at public auction, in the manner provided by law, and out of the proceeds of said sale pay

said notes and interest, and the costs of such proceedings, and the balance, if any there be, pay over to said Anderson and his wife, and Edling and his wife.

"And it is further agreed and understood that the said Bradford shall have the right at any time to take possession of the above described property and hold the same.

"Signed this 21st day of April, A. D. 1883.

"JOHN N. ANDERSON.
"TENA ANDERSON.
"C. O. EDLING.

"In presence of
"CHARLES OGDEN."

This mortgage was duly acknowledged and filed for record.

On the same day on which the mortgage was executed, Bradford, Anderson and wife, and Edling entered into a contract as follows:

"It is understood and agreed hereby that Louis Bradford shall have and take immediate possession of the property this day mortgaged to him by Anderson and wife and Edling and wife, being the building and improvements on lot 8, in block 56, in the city of Omaha, Nebraska, including the lot. But the said Bradford, when he shall have been paid in full the amount due him upon said mortgage, is to surrender possession of said property to said Anderson and Edling, and he hereby agrees with them to reassign to them the lease this date by them assigned to him, being a lease of said lot from H. H. Visscher to them for the term of ten years, which was recorded on the 7th day of October, 1882, in book I, at page 270, Miscellaneous Records of Douglas County, Nebraska. Nothing herein contained shall be taken to prevent said Anderson and Edling from going on to complete said building and improvements on said lot.

"It is further agreed by said Anderson and wife, and Edling and wife, and said Bradford that if, in the event of

the foreclosure of the mortgage by sale of the buildings and improvements, sufficient shall be realized to pay the said mortgage, costs, and expenses, that then said Bradford shall reassign to said mortgagors said lease; in the event that such sale shall not realize sufficient to pay said mortgage, costs, and expenses, then said Bradford shall sell said leasehold interest at public sale upon the same advertisement required by law for the foreclosure of chattel mortgages, and out of the proceeds thereof pay the balance due upon such mortgage, costs, and expenses, and pay the remainder to said Anderson and Edling; and in the event of such sale of said lease, said Bradford shall be and is authorized to transfer said lease to the purchaser, and his transfer shall have the same force and effect as if the same were made and executed by said Anderson and said Edling and wives, and thereupon turn over the possession of the lot to such purchaser.

LOUIS BRADFORD.
"JOHN N. ANDERSON.
"C. O. EDLING.
"TENA ANDERSON.

"In presence of
"CHARLES OGDEN."

On the same day Bradford obtained from Anderson and wife and Edling an assignment of the lease.

As part consideration for the $7,500, the unsecured note of Anderson to Bradford for $700 was taken as part payment. Edling and Anderson were indebted to Bradford in the sum of $3,700. The remainder, viz., $3,077.30, was paid out by the attorney of Bradford upon the orders of Anderson, as Edling nor Bradford seem neither to have had implicit confidence in Anderson. The amount of this loan failed to complete the building, and Bradford, to protect himself, was compelled to pay the further sum of more than $2,000. In 1883 Anderson conveyed all his interest in the premises to Edling. On November 14, 1883, Bradford advertised the property for sale under his chattel mortgage. The notice is as follows:

"Notice is hereby given, that on the 21st day of April, 1883, John N. Anderson and Tena Anderson, his wife, and Charles O. Edling and Charlotte Edling, his wife, made their chattel mortgage to Louis Bradford to secure two promissory notes, both dated Omaha, April 21, 1883, one for $2,500 and payable one year after the date thereof, and the other for $5,000, payable in two years after date to the order of said Louis Bradford, said notes drawing interest at the rate of ten per cent per annum from date; that said mortgage was on the 23d day of April, 1883, duly filed and recorded in the office of the county clerk for Douglas county, Nebraska, that being the county in which the mortgaged chattel was situated; that by the terms of said mortgage the said mortgagors covenanted that all claims or liens against or on account of the improvements on said mortgaged chattel should be paid off out of the amount above named herein, and that the remainder thereof should be expended in completing said mortgaged chattel and the improvements thereon; that default has been made in the above covenant, in that said mortgagors, or any of them, have never performed or kept said covenants, or any part thereof; that the condition of said mortgage was to the effect that if said mortgagors failed to keep and perform all the covenants and agreements by them to be kept and performed, provided for in said chattel mortgage, then and in that case the whole of said sum and interest should immediately become due and payable, and the mortgagee was authorized to sell said chattel and apply the proceeds in paying said notes, interest, and the costs of such proceedings. No suit or proceeding has been instituted at law to recover the debt secured by said mortgage, or any part thereof. The amount due at the date of this notice is $8,231.25. The property covered and conveyed by said mortgage is described therein as follows: 'All buildings, structures, and improvements on lot 8, in block 56, in the city of Omaha, Nebraska, together with all of our right,

title, and interest in or to said lot, being a leasehold.' On the 5th day of December, A. D. 1883, at 10 o'clock in the forenoon, at the Anderson and Edling building, in Omaha, to-wit, at the northwest corner of Sixteenth and Davenport streets, the undersigned will, under the power contained in said mortgage, sell all and singular the above described building and leasehold interest of said mortgagors in lot 8, block 56, city of Omaha, Douglas county, Nebraska, at public auction, to the highest bidder, for cash.

"LOUIS BRADFORD."

Under this notice one Charles W. Edgerton, a constable, sold, first, the building to Bradford for the sum of $3,200, and closed the sale thereof at 10:30 A. M., and next sold the leasehold to Bradford for $1,000, and closed the sale thereof at 11 o'clock. Bradford was not present in person at the sale, but was represented by a friend who purchased the property in his name. On the trial of the cause an account was ordered of the amount received by Bradford for rents of said premises, etc., and the amount necessarily expended by him, and he was allowed $1,390 as compensation for the care of the property, the same being five per cent of the total amount of money which he had received. The court also ordered Bradford to surrender the premises to Edling on the payment of $248.89.

The three instruments, viz., the chattel mortgage, assignment of the lease, and contract heretofore set forth, executed on the same day—apparently at the same time, are to be construed together. Construing them together, Bradford was created a trustee and placed in possession of the property, with authority to collect the rents and apply them to certain purposes. That he did collect rents is clearly shown by the testimony. While the mortgage contains a condition of forfeiture in case Edling and Anderson failed to make certain payments, yet, from other provisions of the several instruments, it is evident that those payments were to be made by Bradford from the rents of the

premises. The note for $2,500 was payable one year from date, while the second note of $5,000 was not payable until two years from date; that is, one note was payable on the 24th day of April, 1884, adding days of grace, and the second on the 24th day of April, 1885. Yet in seven months and a half from the date of the instruments the mortgagee and trustee, who had received the rents and profits of the premises, advertised the property for sale under an alleged clause of forfeiture and purchased the property for an inconsiderable sum, considering its value as shown by the evidence. This cannot be permitted. Bradford took the property as security for his debt. He is entitled to repayment of the sums loaned by him, with interest thereon, but he has no right to more than this.

In a case of this kind, where accounts are to be adjusted between the parties, and a default declared as the result of the forfeiture, the proper tribunal to determine the rights of the parties is a court of equity. Such a court will construe the contract of the parties and, as far as possible, protect the rights of the mortgagor and the mortgagee, and its decree, unless appealed from, will be conclusive. If, however, a party does not invoke the aid of the court, but proceeds to advertise and sell mortgaged property upon an alleged default and forfeiture, he does so at his peril. The mortgagor has rights in the premises which must be considered, as well as those of the mortgagee. It seems to be assumed in many cases that the mortgagee is the only party entitled to consideration in the premises. He is entitled to the repayment of his loan with lawful interest thereon and no more, but he must, as far as possible, protect the rights of the mortgagor; in other words, he must act in good faith with him.

In the case at bar there was no default of Edling and Anderson, and the advertisement and sale were premature, and the plaintiff is entitled to redeem.

Second—It will be observed that in the contract accom-

panying the mortgage it is provided that in case it is necessary to sell the leasehold interest, then Bradford should sell the same at public sale. Substantially the same provision is contained in the chattel mortgage. And in the notice of sale it is stated that "the undersigned [Louis Bradford] will, under the power contained in said mortgage, sell all and singular the above described building," etc.

It is contended on behalf of Edling that this being a trust to be exercised by an individual named, it must be exercised by him and not by another; and that unless the sale is made in conformity to the power, it will be void. There is much force in the argument. A party may have the utmost confidence in the fairness and integrity of the trustee or mortgagee and believe that in case of a forced sale he will conduct the same in such a manner as to obtain the best price possible for the property. This is an important matter. Every person of observation and experience knows that a public sale conducted by a disinterested person, who is anxious to sell the property for the highest price possible, is more likely to effect that object than an indifferent salesman, or one whose interest it is to have the property sold for a low price. It is not the policy of the law to permit the mortgagee to disregard the person agreed upon and named in the mortgage, select an auctioneer to his own liking, and become the chief bidder at the sale. In view of the fact, however, that Edling has a right to redeem, we will not make a formal decision on this point without further argument. The amount allowed Bradford being but five per cent of the entire sum, shows that the property is very valuable, and that it is his duty to account to Edling. The judgment of the district court is

AFFIRMED.

THE other judges concur.

MICHAEL T. KINNEY v. CITY OF TEKAMAH.

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[FILED OCTOBER 21, 1890.]

1. **Instructions** must be based upon, and applicable to, the testimony.
2. **Municipal Corporations:** UNSAFE SIDEWALKS. Where a sidewalk was extended by private parties in front of their store to the edge of a deep creek, so that a stranger, in passing along such sidewalk and continuation thereof, in the dark, and using due care and caution, was precipitated down the bank and injured, *held*, that it was the duty of the city to cause a barrier or obstruction to be erected to apprise travelers of the termination of the walk.

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

E. W. Peterson, for plaintiff in error, cited: 2 Dillon, Mun. Corp., sec. 1018; *Higert v. Greencastle*, 43 Ind., 574; *James v. Portage*, 5 N. W. Rep. [Wis.], 31; *Estelle v. Lake Crystal*, 6 Id. [Minn.], 775; *Plattsmouth v. Mitchell*, 20 Neb., 228, and cases cited; *Gregory v. Lincoln*, 13 Id., 356; *Ray v. St. Paul*, 42 N. W. Rep. [Minn.], 297; *Foxworthy v. Hastings*, 25 Neb., 133; *Lincoln v. Beckman*, 23 Id., 683; *Ireland v. Plank Road Co.*, 13 N. Y., 526; Wood, Nuisances, [2d Ed.], sec. 327, note 1; *Johnson v. Milwaukee*, 1 N. W. Rep. [Wis.], 189; 2 Thompson, Trials, sec. 1766; *Tritz v. Kansas*, 84 Mo., 632, 643.

N. J. Sheckell, contra, cited: 2 Dillon, Mun. Corp., secs. 1003, 1005, 1008, 1010, 1011, 1015, 1016, 1019, and 1024, and citations; *Cartwright v. Belmont*, 17 N. W. Rep., 237; *Fulliam v. Muscatine*, 30 Id., 861; *York v. Spellman*, 19 Neb., 357; *Kennon v. Gilmer*, 4 Mont., 433; *Brown v. Elliott*, 45 How. Pr. [N. Y.], 102.

MAXWELL, J.

This action was brought in the district court of Burt county by the plaintiff against the defendant for injuries sustained by him in being precipitated from the end of a sidewalk in said city into Tekamah creek.

It is alleged in the petition that "upon the said 28th day of October, 1886, and for a long time prior thereto, said Thirteenth street, on the east side thereof, between L and K streets, in front of lot 4, block 118, was out of repair and in a dangerous condition, in this, to-wit: Said Thirteenth street intersects Tekamah creek at this point, and the traveled sidewalk in front of said lot along the east side of said street, at that time, was not extended across the creek, but only built up to the bank or edge of said creek, and that from the end of said walk on the bank of said creek there is an abrupt fall of from eight to ten feet to the bed of said creek, the bank at that point being nearly perpendicular, and there being no railing or guards at the end of said walk, and no light or signal to indicate such dangerous condition; that at about 8 o'clock in the evening of the 28th day of October, 1886, it being quite dark, the plaintiff, lawfully traveling on said street and upon said sidewalk, and unaware of the dangerous condition, and without his negligence, was precipitated into said creek, from the end of said sidewalk, and received great bodily injury, by which he has been kept in bed and detained from business about two weeks, since which time he has suffered great bodily pain, he receiving serious injury in and about the neck, and otherwise, and has spent $177 for medical attendance and nursing, and has been permanently crippled, to his damage in the sum of $5,000."

The answer is a general denial.

On the trial of the cause the jury returned a verdict for the defendant, and the action was dismissed.

The testimony shows that Thirteenth street is the principal street in Tekamah; that this street extends across Tekamah creek; that there is a bridge on the street across the creek, the exact width of which does not appear, but apparently less than twenty feet. There is a sidewalk on the east side of the street which, as it approaches the bridge, angles to the southwest to the bridge. The main sidewalk, however, is continued on past the store of Bardwell & Reed to the bank of the creek. The testimony shows that the plaintiff, at the time in question, in passing along the sidewalk in the night continued on that portion of the walk in front of Bardwell & Reed's store, and stepped off the south end of such walk and was precipitated into the creek and sustained severe injuries. No barriers were erected at the south end of the sidewalk, nor any obstruction to prevent a person unacquainted with the same and passing along that walk in the night season from falling into the creek. The principal defense is that the sidewalk in front of Bardwell & Reed's store was the private property of that firm and not constructed by the city. So far as appears, however, it was a continuation of the sidewalk passing along the east side of that street.

The court instructed the jury as follows: "It is the duty of the city to keep its streets, including sidewalks which are in general use, or over which the city has assumed jurisdiction, in safe condition for the use of the public, but this duty does not require the city to keep all of its streets for the full width of them in good condition for travel. If the city has provided a bridge in a public street where it is intersected by a stream, safe and sufficient for all purposes of public travel, with reasonably safe and sufficient walks leading thereto in continuation of the sidewalks which are constructed along such street, it has performed its duty with reference to providing means for the crossing of such stream, notwithstanding such bridge may not be constructed the full width of such street, and if a person

in traveling along such street voluntarily leaves the usually traveled way, which is safe and in good condition, and by reason thereof receives an injury in a part of the street unfrequented by the public, and where the city has never exercised jurisdiction or done anything towards improving the street or constructing sidewalks, or inviting travel, the city is not liable in damages for such injury."

This instruction was misleading and not based upon the testimony. So far as appears, a traveler, in passing along the sidewalk in the night, and having no knowledge of the locality, might be expected to pass along that portion in front of Bardwell & Reed's store without fault on his part. This element is entirely left out in the instruction. The fact that the sidewalk at that point had been constructed by Bardwell & Reed as a continuation of the city sidewalk would not prevent the city from being liable when a person traveling along the same, and having reason to believe that it was a continuation of the sidewalk, and therefore in a safe condition, was injured by the failure of the city to cause a proper barrier to be erected to prevent persons by mistake from passing along said sidewalk in the night and falling into the creek. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

J. B. WESTON v. C. H. BROWN.

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[FILED OCTOBER 21, 1890.]

1. **Witnesses: REFRESHING MEMORY.** A witness should not be permitted to use memoranda to refresh his memory unless such memoranda were made at or near the time the transactions occurred.
2. **Interest: UNSETTLED ACCOUNTS** do not bear interest until six months after the date of the last item therein.
3. **Instructions.** The fourth and fifth paragraphs of the instructions given by the trial judge to the jury, *held*, erroneous.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Griggs & Rinaker, for plaintiff in error.

E. O. Kretsinger, *contra*, cited: *S. C. & P. R. Co. v. Brown*, 13 Neb., 317; *B. & M. R. Co. v. Schluntz*, 14 Id., 425; *R. Co. v. Finlayson*, 16 Id., 581; *R. V. R. Co. v. Fink*, 18 Id., 93; *Schuyler Nat'l Bk. v. Bollong*, 24 Id., 825.

NORVAL, J.

About the first of October, 1884, the plaintiff in error, who then resided in Lincoln, employed the defendant in error to superintend the construction of a dwelling house in the city of Beatrice, for the agreed price of $3.50 per day. Brown entered upon his duties, having entire charge of the construction of the building, employing the men under him, and the keeping of their time. He claims to have put in 358 days' regular time of ten hours per day, 180 hours' overtime as superintendent, in addition to other labor, and to have paid out moneys at various times for Weston. Brown made no demand for payment of the

alleged balance until more than a year after the house was completed, when he presented to Weston the following bill:

BEATRICE, NEB., May 1, 1887.

J. B. WESTON, in account with C. H. BROWN.

Nov. 1, '84, to making estimates on house and barn	$5 00
Jan. 1, '85, staking out foundation and putting in stone work	10 00
Jan. 1, '85, making out bills and correspondence.	7 00
April 17, '86, to time on house, barn, etc., as superintendent and builder, 358 days, at $3.50 per day	1253 00
April 17, '86, to overtime, 180 hours, or 18 days, at $3.50 per day	63 00
April 17, '86, to money paid out at sundry times for drayage, etc	116 75
April 17, '86, to balance on house and barn, as per detailed bill	44 00
Total	$1498 75

CR.

By cash at various times	$950 00
By balance on benches, trestles, etc	50 00
Total	$1000 00
Balance	498 75

This action was brought to recover the balance claimed to be due the plaintiff on this account.

The defendant, for answer, interposed a denial of all indebtedness, and pleaded a set-off and counter-claim. The set-off is as follows:

C. H. BROWN to J. B. WESTON, Dr.

To cash at sundry times, as per bill	$1093 00
To merchandise, brushes, etc	42 16
To merchandise, benches, etc	75 00
To office rent	32 00
To work by George Stump	6 00
Total	$1248 16

The counter-claim set up in the answer is for damages claimed to have been sustained by the defendant, by reason of the plaintiff unnecessarily impeding and delaying the work in the construction of the defendant's house.

The reply was by a general denial. The cause was tried to a jury, with verdict and judgment for the plaintiff for $204.

Upon the trial the plaintiff Brown testified, in chief, to the correctness of his account. His cross-examination disclosed that the defendant Weston was present during the progress of the work but a small portion of the time; that the plaintiff had entire charge of the work, employed the men under him, who drew their pay each week, the plaintiff keeping their time, and that the plaintiff each Saturday night received usually the sum of $20. The plaintiff further testified that he put in 354 days' regular time between February 28, 1885, and April 17, 1886, or worked every week day and holiday between those dates, and put in 180 hours' overtime. It also appears from the testimony that between those dates the plaintiff worked for one Van Buskirk from twenty to thirty days.

The defendant introduced testimony tending to show that the plaintiff did not expedite the work, but negligently prolonged it, and that he did not put in full time. There also appear in evidence vouchers signed by the plaintiff for moneys received by him, aggregating $1,093. The entire carpenter work on the job amounted to $3,500. The defendant called as witnesses several carpenters and builders, some of whom worked on the house, who testified that the carpenter work, allowing the superintendant $3.50 per day, should not have cost to exceed $2,500.

The rebutting testimony was to the effect that the plaintiff was a competent and faithful superintendent.

It is impossible for any one to read the testimony in this case without reaching the conclusion that the account stated by the plaintiff in his petition is incorrect. In that

account he gives the defendant credit with cash payments aggregating $950. On the trial he is confronted with vouchers signed by himself, amounting to $1,093. He charges in his account for every week day from February 28, 1885, to April 17, 1886, including holidays. He admitted, upon cross-examination, that between these dates he worked on the house of one Van Buskirk thirty-two days. In addition, the plaintiff charges for 180 hours for working overtime. There is no testimony in the bill of exceptions that entitles him to charge for extra time. There is no pretense that the parties ever agreed to such a thing, or that the defendant had any knowledge that the plaintiff was working more than ten hours a day. The first intimation that Weston had that Brown claimed pay for extra time put in was more than a year after the house was completed. Besides there is in the record testimony showing that it is customary for the one who superintends the construction of a building to work more than ten hours a day without charging for overtime.

The charge in plaintiff's account of $116.75 is made up of over eighty small payments of money, which plaintiff claims to have made for the defendant from December 1, 1884, to April 17, 1886. The plaintiff was permitted to testify as to these items over the defendant's objection and exception, by refreshing his memory from a paper held by the witness, which was made out after the building was completed, from a memorandum kept by the plaintiff at the time the transactions occurred. This ruling of the court was clearly erroneous. The paper was not made at or recently after the transactions took place, but months afterwards. (*Schuyler Nat'l Bank v. Bollong*, 24 Neb., 825.)

It is urged that the court erred in giving the fourth and fifth instructions.

"4. As to amounts, if any, which you allow on any of the claims alleged in the petition or answer, you should allow and include interest thereon at seven per cent per annum from the time the same became payable.

"5. Expert testimony is the opinions of witnesses on special subjects in which they are presumed to have special or unusual knowledge. In general, testimony is to facts only, but one exception to the general rule is expert testimony, which is as to the opinions of the experts. Such testimony must receive just so much weight and credit as the jury deem it entitled to when viewed in connection with all the evidence, and no more. Upon the jury rests the responsibility of rendering a correct verdict, and if the testimony of experts is opposed to the jury's conviction of truth, it is their duty to disregard it. Such evidence, as all evidence of opinions, ought to be considered with careful scrutiny and with much caution."

This suit is upon an unsettled account covering transactions between the parties for a period of more than a year. Unsettled accounts do not draw interest until the expiration of six months after the date of the last item. (Comp. Stats., ch. 44, sec. 4.) The fourth instruction was therefore erroneous.

The fifth instruction was given with especial reference to the testimony of the mechanics, introduced by the defendant, to show what the carpenter work on the house and barn should have cost. The object of this testimony was to show, not only that the plaintiff did not work the time claimed by him, but to establish that he did not expedite the work but purposely prolonged it to further his own interests. While the testimony of these witnesses as to how much the house should have cost was, in a certain sense, expert, the jury should not have been told what weight should be given it. The witnesses being experienced mechanics who had seen the house—some of them aiding in its construction—could tell with considerable certainty what it was worth to do the work.

The court, after cautioning the jury that the responsibility of rendering a correct verdict rested upon them, follows it with the statement in substance that it was their

duty to consider the testimony of these witnesses with much caution. Their testimony was so discredited by the charge of the court that the jury might well have understood that it was their duty to entirely disregard it. The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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A. E. ALEXANDER v. D. T. THACKER.

[FILED OCTOBER 21, 1890.]

1. **Tax Liens**: FORECLOSURE In an action to foreclose a tax lien, the owner of the equity of redemption is a necessary party.
2. **Parties**: NON-JOINDER. Where a demurrer is sustained on the ground of non-joinder of parties defendant, the court should not dismiss the action without giving the plaintiff an opportunity to bring in the absent party.
3. **Pleading**: MISJOINDER OF CAUSES When there is a misjoinder of causes of action, the plaintiff should be required either to elect upon which cause of action he will proceed, or file a separate petition for each cause of action. When such petitions are filed, an action should be docketed for each petition.
4. ———: PETITION: GENERAL DEMURRER TO WHOLE. Where a petition contains more than one count, and a general demurrer is directed against the entire pleading, and is not limited to a particular cause of action, if either count is sufficient the demurrer must be overruled.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

S. P. & E. G. Vanatta, for plaintiff in error, cited: Code, secs. 30, 41; Maxwell, Pl. & Pr. [3d Ed.], 20, 35.

Thos. B. Stevenson, contra, cited: Tiedeman, Real Property, secs. 321, 464; *Lynch v. Pfieffer*, 17 N. E. Rep. [N. Y.], 402; *Bell v. Sherer*, 12 Neb., 409; Nash, Pl. [4th Ed.], 160–1.

NORVAL, J.

This is a suit to foreclose a tax lien, and to quiet title. D. T. Thacker and Towle & Farleigh were made defendants. The plaintiff in the amended petition alleges that on the 4th day of September, 1871, one S. N. Merriam purchased from the treasurer of Cass county, Nebraska, the northeast quarter of the southeast quarter of section 5, township 10, range 14, in said county, for taxes before that time levied and assessed thereon for the year 1870, then due and delinquent; that Merriam paid to the said treasurer at said sale $2.76, and received a certificate of purchase of said land; and that he paid the subsequent taxes on the land, amounting to $52.37.

The petition further avers that on September 5, 1873, Merriam presented said certificate of purchase to the treasurer of Cass county, who then executed and delivered to him a treasurer's tax deed for said land, which was duly recorded, and that afterwards said Merriam sold, assigned, and transferred all his interest in said land, and the taxes so paid, to the plaintiff, who is still the owner thereof.

The plaintiff, for a second cause of action, says that on November 3, 1884, one J. P. Mathis purchased from the treasurer of Cass county, the above described real estate for $4.87, for the taxes of 1883, then unpaid, and received a certificate of purchase; that Mathis has paid the subsequent taxes levied on said real estate, amounting to $11.15; that afterwards, on December 27, 1886, Mathis returned said certificate of purchase to the treasurer of the county, who executed and delivered to him a tax deed for the land above described; that on the 10th day of January, 1887,

Mathis conveyed all his interest in the land to one W. D. Merriam, and afterwards, on the 25th day of July, 1888, said Merriam and his wife, Ruth, sold and transferred the lands to the plaintiff, who is now the legal owner of said lands.

The petition also alleges "that the defendant Thacker claims to own an undivided interest in said lands by virtue of a deed executed and delivered to him by C. and E. Towle, and is in possession of said land jointly with the plaintiff. But plaintiff avers that the said deed so executed to defendant is fraudulent and void for the reason that the grantors in said deed had no right or title to said lands and could not convey any right or title to said defendant.

"And plaintiff further avers that the deed so executed by the treasurer of Cass county, Nebraska, to S. N. Merriam failed to convey the title in and to said lands to the said S. N. Merriam, by reason of the treasurer's failure to attach his seal to said deed, and by reason of other deficiencies in the execution of said deed; that said Merriam only obtained a tax lien on said land by virtue of his purchase thereof, and by virtue of the payment of said taxes, which lien he transferred to plaintiff, who now owns the same.

"The plaintiff further alleges that the defendants Towle & Farleigh claim to own some interest in said land, the exact nature and extent of which plaintiff is unable to discover.

"Plaintiff further avers that the deed executed and delivered to plaintiff by said J. P. Mathis conveyed a complete and indefeasible title to said land to plaintiff, and gave plaintiff the right to possession thereof."

The defendant Thacker demurred to the amended petition, alleging that there is a defect of parties plaintiff and a defect of parties defendant; that several causes of action are improperly joined, and that the petition does not state

facts sufficient to constitute a cause of action. The demurrer was sustained and the action dismissed as to Thacker.

The plaintiff's causes of action are based upon two tax deeds issued by the treasurer of Cass county. The one dated September 5, 1873, which is the foundation of the plaintiff's first cause of action, failed to convey any title on account of the omission of the treasurer to attach to the deed his official seal. The plaintiff's title having failed, he acquired a lien upon the land for the moneys paid out for taxes. The evident purpose of the first cause of action was to foreclose such lien. In a suit to foreclose a lien for taxes, all parties having an interest in the real estate are proper parties, and the person holding the equity of redemption is an indispensable party. The petition alleges that the defendants claim to own some interest in the property. It is not alleged that either of the defendants owns the equity of redemption. There was, therefore, a non-joinder of parties defendant. Such defect, however, was not sufficient grounds for dismissing the suit without giving an opportunity to bring in the holder of the legal title. The plaintiff should have been ordered to bring in the absent party within a time to be named by the court, and in default thereof the suit be dismissed.

The cause of action set up in the second count of the petition is one to quiet title. It is founded upon the tax deed issued December 7, 1886, to one J. P. Mathis, upon the same land covered by the tax deed referred to in the first count of the petition. The pleading does not charge, nor does it set up facts which make it appear that the second tax deed failed to convey the title, but on the other hand, it does allege that Mathis, the grantee in the tax deed, "conveyed a complete and indefeasible title to said land to the plaintiff." The facts charged in the second cause of action are sufficient to resist a general demurrer. It is unnecessary to determine whether the first count states a cause of

action or not, for when a petition contains more than one count, and a general demurrer is directed against the entire pleading, and is not limited to a particular count, if any count states a cause of action, such demurrer must be overruled. The plaintiff, however, could not properly join in the same petition a cause of action to foreclose a tax lien with one to quiet title. If it be true that the second tax deed is valid and conveyed the legal title, as alleged, then it is obvious that the lien acquired by the first tax deed became merged in the title and there could be no foreclosure of the lien. He could not foreclose a tax lien on land of which he owns the entire fee.

There being a misjoinder of causes of action, instead of dismissing the suit, the plaintiff should have been required either to elect upon which cause of action he would go to trial or file a separate petition for each cause of action, and, when filed, an action should be docketed for each petition. (Code, sec. 97.) The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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KITCHEN BROS. HOTEL CO. v. JOHN S. HAMMOND.

[FILED OCTOBER 28, 1890.]

Findings: MUST CONFORM TO ISSUES. The findings of facts and the judgments must conform to, and be supported by, the allegations of the pleadings on which they are based. (*Lipp v. Horback*, 12 Neb., 371.)

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

Charles Ogden, for plaintiff in error.

Estabrook, Irvine & Clapp, contra.

COBB, CH. J.

The plaintiff, in the court below, alleged "that the defendant is a corporation duly organized and existing under the laws of this state, and is indebted to him in the sum of $52 for work and labor done and for material furnished at defendant's special instance and request, no part of which has been paid. To which the defendant answered, admitting it is a corporation and denying every other allegation of the plaintiff.

"II. The defendant says that the plaintiff has been paid in full for any amount which may have been due him, and that there was, at the commencement of this suit, no sum whatever due him from defendant."

There was a trial to the court, a jury being waived, with finding and judgment for the plaintiff for $49 and costs.

The defendant's motion for a new trial being overruled, exceptions were taken on the record, and the cause brought to this court for review, on account of the court below admitting certain testimony of the plaintiff excepted to by defendant, and because the finding and judgment of the court should have been for the defendant.

The cause of action, as set forth, was sufficiently proved by the evidence of the plaintiff; that he did the work charged for, and that it was reasonably worth the amount claimed, was admitted by counsel for the defendant in open court. The plaintiff testified that the bill had not been paid, and that he had received nothing on account of it.

From the bill of exceptions it does not appear that there was any evidence offered on the trial proving, or tending to prove, payment. There was testimony offered and received by the court, subject to exception, which tended to

prove that in a former action between the parties, wherein the plaintiff in error was plaintiff, and the defendant in error was defendant, in which the plaintiff had judgment by default, on an *ex parte* hearing, the items of charges constituting the cause of action in this case were credited to the defendant and deducted from the amount of recovery. Whether these facts, as proved, would have constituted a defense to this action had they been properly pleaded, need not be now considered, as they were not pleaded in this action; and while such evidence was before the court, it could not, under well known principles of law, have been, considered in deciding the case. In no event, without an amendment of the answer, or a formal offer to amend, could such defense have been considered. The judgment of the district court is

AFFIRMED.

THE other judges concur.

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W. W. MACE ET AL. V. J. B. HEATH.

[FILED OCTOBER 28, 1890.]

1. **Negotiable Instruments: ALTERATION: ASSENT BY PARTNER.** Two persons jointly purchased the fixtures, furniture stock, and lease of a feed store in the city of O. for the sum of $1,008, and paid thereon the sum of $400 cash, and gave their notes, due in three and six months, for $304 each. The notes were drawn on printed forms, and contained the words, "Payable at the Merchants National Bank of Omaha, Nebraska." These words were erased before the notes were signed, but the word "maturity," indicating the time when the interest would commence, was not erased. A short time afterwards the payee called the attention of one of the makers to the omission to erase the word, and it was thereupon erased, and thereby the notes drew interest from date. *Held*, That, as there was testimony

tending to show that the notes were to draw interest from date, and that the makers were partners, the erasure therefore bound the firm.

2. **Statute of Frauds.** A verbal contract to engage in the business of purchasing five car loads of baled hay, and dividing the same with the defendants, the value being in excess of $50, no part of the hay being delivered, nor any portion of the consideration paid, is within the statute of frauds, and void.

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

Breen & Duffie, for plaintiffs in error, cited, as to the alteration: *Savings Bank v. Shaffer*, 9 Neb., 4; 1 Bates, Partnership, secs. 452–3*a*; Daniel, Neg. Inst., sec. 1401; *Kilkelly v. Martin*, 34 Wis., 525; *Booth v. Powers*, 56 N. Y., 22–31; as to the contract for purchasing the five car loads of hay: Greenleaf, Ev., sec. 481; *York v. Clemens* 41 Ia., 95; *Dodge v. Clyde*, 7 Rob. [N. Y.], 410; *Baldwin v. Burrows*, 47 N. Y., 199.

Gregory, Day & Day, contra, cited, as to the contract for purchasing the hay: *Russell v. R. Co.*, 39 N. W. Rep., 302; *Waterman v. Meigs*, 4 Cush. [Mass.], 497; *Gardner v. Joy*, 9 Met. [Mass.], 177.

MAXWELL, J.

The defendant in error brought an action in the district court of Douglas county on two promissory notes, as follows:

"$304. OMAHA, NEB., May 3, 1887.

"Three months after date we promise to pay John B. Heath, or order, three hundred and four dollars, for value received, with interest at the rate of eight per cent per annum from —— until paid.

"Due August 3, 1887. W. W. MACE.

"C. A. CLEMENT."

$304. OMAHA, NEB., May 3, 1887.

"Six months after date we promise to pay to John B. Heath, or order, three hundred and four dollars, for value received, with interest at the rate of ten per cent per annum from —— until paid.

"Due Nov. 3, 1887. W. W. MACE.

"C. A. CLEMENT."

There is also a count in the petition for goods, wares, merchandise, etc., sold and delivered to the defendants below.

The prayer is for $558, with interest from May 3, 1887.

The defendants below, in their answer, allege that the notes were to draw interest from maturity, but that the plaintiff erased the word "maturity."

"2d. They allege that the second cause of action set forth in the petition is the same as that for which the notes were given.

"3d. They plead a counter-claim in the sum of $250, for a violation by the defendant in error of a contract that he would not open another feed store in the vicinity of the place of business of the plaintiffs in error.

"4th. That the defendant in error entered into a contract with them to deliver five car loads of hay, which was to be purchased by him and shipped in his name, which contract he refused to perform."

The fifth ground is that they purchased a claim of $139.60 against the defendant in error prior to the bringing of this action.

On the trial of the cause, the defendants below filed a motion to require the plaintiff to elect upon which count of the petition he would proceed. This motion was overruled, and no point is made upon it, so that it need not be further noticed.

The court found in favor of the defendant in error and rendered judgment for $500.39.

The testimony shows that prior to May 3, 1887, the

plaintiff below had been engaged in the feed business in the city of Omaha. On that day the defendants below purchased the business, furniture, and fixtures, and lease of the premises of the plaintiff below. The price was $1,008. Of this amount the defendants below paid $400 in cash, and executed the two notes sued on. The notes were made out on printed forms and the words "Payable at the Merchants National Bank, of Omaha, Nebraska," were in the form, but Mr. Clement testifies that he filled the notes out and erased those words before the notes were signed. The word "maturity," which seems to have been in the printed form, was not erased at that time. This is claimed to have been done after the notes were executed and delivered. There is testimony tending to show that the notes should draw interest from date, and a day or two after the making of the notes, the plaintiff below seems to have called the attention of Mr. Clement to the fact that the notes were made not to draw interest until maturity. The word "maturity" was thereupon, by agreement, erased, and this, it is claimed, discharges Mr. Mace. We think differently, however. Mr. Mace and Mr. Clement are shown to have purchased the stock in partnership and continued to be partners for some considerable time afterwards. The change in question was simply making the notes conform to the contract, and was within the scope of the partnership business.

Second—The court below seems to have found that the contract in relation to the five car loads of hay was within the statute of frauds, and void. The amount of the property involved exceeded $50 in value, and no note or memorandum of the contract was made in writing, subscribed by the parties, to be charged thereby, nor were any portion of the goods accepted or received, or any part of the purchase money paid.

There was no error, therefore, in rejecting the claim. The plaintiffs in error have received the defendant in error's

property and are still indebted for the same in the amount found due by the district court. This should be paid. The judgment of the district court is

AFFIRMED.

THE other judges concur.

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WILLIAM GILES, APPELLANT, V. MARY GILES, APPELLEE.

[FILED OCTOBER 28, 1890.]

Divorce: CUSTODY OF MINOR CHILD: CONSIDERATIONS IN AWARDING. A husband and wife living in Aurora, Illinois, having a child which was a minor, were divorced, there being no provision in the decree for the custody of such child. Afterwards the parties agreed that the mother should retain the custody of such infant, the father to pay five dollars per week for its support. This he did for some time, when the mother removed to Omaha, bringing the infant with her. In a proceeding on *habeas corpus* by the father to obtain the custody of the child, *held*, that he had no absolute vested right in the custody of such infant, and that the paramount consideration is, what is really demanded by the child's best interests, and the court, in awarding the custody to the father, mother, or other person, will be guided by what may seem best for the child.

APPEAL from the district court for Douglas county. Heard below before CLARKSON, J.

Fawcett & Sturdevant, and *John P. Davis*, for appellant, cited: *Rex v. Isley*, 5 Ad. & Ell. [Eng.], 441; *Torington v. Norwich*, 21 Conn., 543; *People v. Mercein*, 3 Hill [N. Y.], 408; *Johnson v. Terry*, 34 Conn., 259; *In re Scaritt*, 76 Mo., 565; *Clark v. Bayer*, 32 O. St., 310; *Miner v. Miner*, 11 Ill., 43; *In re Goodenough*, 19 Wis., 296.

C. P. Halligan, contra, cited: *King v. Greenhill*, 4 Ad. & Ell. [Eng.], 624; *Mercein v. People*, 25 Wend. [N. Y.], 98, 101; *Clark v. Bayer*, 32 O. St., 299; *Hewitt v. Long*, 76 Ill., 409; *Miner v. Miner*, 11 Id., 43; *Cowls v. Cowls*, 3 Gilm. [Ill.], 435; *State v. Barrett*, 45 N. H., 15; *State v. Smith*, 6 Me., 462; *Gishwiler v. Dodez*, 4 O. St., 615; *In re Waldron*, 13 Johns. [N. Y.], 417; *U. S. v. Green*, 3 Mason [U. S.], 484, 485; *Marine Ins. Co. v. Hodgson*, 6 Cranch [U. S.], 206; Schouler, Domestic Relations [2d Ed.], 338-9; Hurd, Habeas Corpus, 528; 2 Story, Eq. Jur., 1341; *State v. Bratton*, 15 Am. Law Reg. [N. S.], 359; *Dunmain v. Guynne*, 10 Allen [Mass.], 272; *Lyons v. Blenkin*, Jac. [Eng. Ch.], 245.

MAXWELL, J.

The plaintiff instituted a proceeding by *habeas corpus* in the district court of Douglas county to recover the possession of his infant son, Haeckel Humboldt Giles. A large amount of testimony was taken before the district court, and judgment was rendered by it, that the defendant retain the custody of the child. From that judgment the cause is brought into this court by petition in error.

It appears from the record that in October, 1865, Wm. Giles and Mary A. Giles were married in the state of Illinois, and resided in that state as husband and wife until July, 1889; that four children were born to them, of which the two oldest are of age; that the third child was about twenty years of age; and that the youngest son, the subject of this controversy, is about ten years of age. The testimony also shows that the plaintiff, for many years prior to 1889, had been the traveling agent of a firm in Chicago engaged in the sewing machine business. His territory seems to have covered a considerable part or all of Wisconsin, Minnesota, etc., so that he was absent from home nearly all the time. As testified to by his daughter,

his absences were prolonged from two to five months, and it is claimed, and there is some testimony tending to show, that from 1887 to July, 1889, he did not provide full support for his family. He explains this, however, to some extent in his testimony, by saying that two of his children were absent from home at an educational institution, and he necessarily had to provide the means for their support. The defendant also was engaged in business on her own account, and had been for many years prior to July, 1889. For many years prior to the date last named the family had resided in Aurora, Illinois.

On the 11th of July, 1889, the defendant was granted an absolute decree of divorce from the plaintiff in error, her husband, by one of the courts in the state of Illinois, on the alleged ground of desertion and failure to support.

From the evidence in the record before us, it may be questioned whether a divorce should have been granted. So far as we can judge there was no such desertion and failure to support as are contemplated by the statute. But that question is not before the court.

In the decree there is no provision for the care of the minor children. There is some testimony tending to show that, after the divorce was obtained, the defendant said to the plaintiff that she was willing that he should take their youngest son and care for him, but that he objected on the ground that he had no home to place him in, and said if she would care for him he would pay her five dollars per week. This sum he seems to have paid up to December 6, 1889, when the defendant removed to Omaha, bringing the child with her, and the plaintiff now brings this action to obtain the custody of the child. The testimony shows that he has no home of his own; that he proposes to place the child in the family of a friend in Aurora, Illinois. We have no means of knowing the qualifications of this family to care for and train a child of tender years; nor, indeed, is there any evidence of a valid contract

for the support of the child. For aught that appears, they might at any time—in a day, a week, or a month—abandon the care of the child, without bad faith or a violation of the agreement. But, suppose it did appear that the family named was unobjectionable, and that the father had entered into a valid contract with such family to care for and furnish a home for his child, still it would not follow that the father would be given the custody of such child.

Under the stern rules of the common law, when the wife and mother was but little better than a slave, the father was given the custody of his children, without question. This rule of the common law has not generally prevailed in this country.

In *United States v. Green*, 3 Mason, 482, Judge Story says it is an entire mistake to suppose that the "father has an absolute vested right in the custody of an infant."

In *Corie v. Corie*, 42 Mich., 509, it is said "In contests of this kind the opinion is now nearly universal that neither of the parties has any rights that can be allowed to seriously militate against the welfare of the child. The paramount consideration is what is really demanded by its best interests."

In *Sturdevant v. State*, 15 Neb., 459, this court held that in a controversy for the custody of a child the order of the court should be made with a single reference to the best interests of such child. This rule, we believe, has been adopted generally by the courts of this country. (Schouler on Domestic Relations, sec. 248, and cases cited.)

The testimony of the father tends to show that the mother is an industrious woman and of good character. He, at least, has been willing to trust the child in her custody, and the principal objection made by him at this time is that she has removed from the state of Illinois. This removal was occasioned by her entering into the employment of a company at a good salary so that she might

be able to support herself and child, and not from any desire to exclude the plaintiff from seeing it when he so desired. He has a right to call upon and see his child at reasonable times, and should this privilege be denied, it might require the interposition of the court.

Where there are minor children, the separation of the parents by divorce almost necessarily will cause more or less pain to one or both of the parties. This is almost unavoidable, and is a matter for the serious consideration of those who, through real or fancied grievances, seek relief in the divorce courts, but neither parent has an absolute right to the custody of the minor children, but the court will consider their best interest and make such orders in the premises as seem to be just and proper. The judgment of the court below is right and is

AFFIRMED.

THE other judges concur.

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O. R. OAKLEY v. G. H. PEGLER.

[FILED OCTOBER 28, 1890.]

1. **Names: INITIALS INSTEAD OF: PLEADING.** At common law a declaration describing a party by the initials of his Christian name is not sufficient on special demurrer. It should appear, however, that the initial used is not the Christian name.

2. ———: ———: **JUDGMENT.** Where a party whose Christian name was Oscar R. was in the habit of signing checks and doing business at banks and at other places by the initials of his Christian name, these initials will be treated as his business name, and a judgment recovered against him by that name is not subject to collateral attack.

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

J. B. Archibald, for plaintiff in error, cited on the question as to the name: *Scott v. Ely*, 4 Wend. [N. Y.], 555; *Miller v. Foley*, 28 Barb. [N. Y.], 630, and cases; *Mead v. Haws*, 7 Cow. [N. Y.], 332; *Griswald v. Sedgwick*, 6 Id., 456; *Gurnsey v. Lovell*, 9 Wend. [N. Y.], 319; *Farnham v. Hildreth*, 32 Barb. [N. Y.], 277; *People v. Ferguson*, 8 Cow. [N. Y.], 102; *People v. Smith*, 45 N. Y., 772, 784; *Waterbury v. Mather*, 16 Wend. [N. Y.], 613; *Crandall v. Beach*, 7 How. Prac. [N. Y.], 271; *Osborn v. McCloskey*, 55 Id., 345; *Hancock v. Bank*, 93 N. Y., 85; *Frank v. Levi*, 5 Rob. [N. Y.], 599; *Bank v. Magee*, 20 N. Y., 363; *Gardner v. Kraft*, 52 How. Pr. [N. Y.], 499.

Harwood, Ames & Kelly, contra, cited on the same question: *Eggleston v. Son*, 5 Rob. [N. Y.], 640; *Cooper v. Burr*, 45 Barb. [N. Y.], 9; *England v. N. Y. Pub. Co.*, 8 Daly [N. Y.], 375; *Linton v. First Nat'l Bk.*, 10 Fed. Rep., 897; *Pancho v. Texas*, 8 S. W. Rep., 476.

MAXWELL, J.

This action was brought in the district court of Lancaster county on a judgment recovered in the state of New York by Pegler against O. R. Oakley.

The answer of the defendant is as follows:

"First answer to the plaintiff's petition says, that his true name is Oscar R. Oakley, and not O. R. Oakley, as set forth in said action, petition, and proceedings.

"Second—That he has no knowledge whether the above named George H. Pegler obtained the pretended judgment mentioned in said petition, or that the same is a true copy of a pretended judgment obtained against one O. R. Oakley in the supreme court of the state of New York, therefore he denies the same.

"Third—That at the time said pretended judgment was claimed to have been obtained, this defendant Oscar R.

Oakley was and still is a resident of the state of Nebraska and not a resident of the state of New York, and this defendant did not appear in said pretended action, either personally or by an attorney or otherwise, and said action was not commenced nor judgment obtained in due form of law in such case made and provided, and that said pretended copy is not a copy of the judgment and judgment roll in said action.

"Fourth—That the said pretended judgment is based upon a fraudulent claim as against this defendant; that this defendant denies that he is or was indebted to said plaintiff in any sum whatsoever, and that said pretended claim is a fraud in each and all respects as against this defendant; that said plaintiff is a non-resident of the state of Nebraska and resides in the county of Chautauqua, state of New York."

On the trial of the cause judgment was rendered in favor of Pegler. It appears from the transcript before us that the action was brought in Chautauqua county, New York; that service of summons was made upon Oakley in that county, the return being as follows:

"STATE OF NEW YORK, } ss.
COUNTY OF CHAUTAUQUA. }

"I certify that I served the summons and complaint hereto annexed upon O. R. Oakley, the defendant therein named, on the 23d day of March, 1887, at the town of Dunkirk, Chautauqua county, New York, by delivering to and leaving with him personally a copy thereof, at that time and place.

"C. H. LAKE, *Sheriff.*
"By S. M. MATTISON, *Deputy.*

"Fees, $4.13."

Oakley made default and judgment was rendered against him.

It is apparent that that court had jurisdiction of the person and also of the subject-matter of the action, and

any errors which may have been committed by it cannot be corrected in this action. The principal error relied upon is that the plaintiff in error was sued by the initial letters of his Christian name and not by his surname.

Mr. Oakley was called as a witness on the trial of the case and testified as follows:

Q. Will you give your full Christian, baptismal name and surname?

A. Oscar Rodman Oakley.

Q. This is the name by which you go and the name by which you are known?

A. It is.

Q. What is your business?

A. Dry goods business.

Q. Where do you reside?

A. Lincoln, Nebraska.

Q. How long have you resided in Lincoln, Nebraska?

A. Since September 1, 1886.

Q. Did you move out here then with your family?

A. I moved my family about that time—August or September—I don't remember.

Q. In September, 1886, were you in any manner or form indebted to this plaintiff?

* * * * * * * *

Cross-examination:

Q. What do you say your name is?

A. Oscar Rodman Oakley is my name.

Q. By what name were you known in the business world?

A. Well, a business man often uses his initials, and I very frequently do that of course.

Q. Is it not a fact you use your initials almost entirely?

A. I use my initials in signing checks, I don't know as I do entirely, but I do sometimes.

Q. Is it not a fact that your business signature to your checks is in the form of O. R. Oakley?

A. They are?

Q. I will ask you if it is not a fact that the signature you leave at bank, prepared for that purpose—the bank at which you do business—at the First National Bank, is not O. R. Oakley?

A. Yes, all business men use their initials.

It will be seen from his own testimony that his habit has been and is when signing checks, doing business at banks and other places, to use the initial letters of his Christian name. At common law a declaration describing a party by the initial of his Christian name is bad on special demurrer. (*Turner v. Fitt*, 3 M., G. & S., 701; Bliss on Code Pleading, sec. 146*a*.) It should be made to appear, however, that the letter used is but an initial and not the true name. (*Tweedy v. Jarvis*, 27 Conn., 42.)

Whether an apparently initial letter will be treated as a name must depend upon the manner in which the question is raised.

In the absence of a motion to the contrary, or a pleading calling attention to the fact that it is not the name of the party, the court will be warranted in treating it as his name. If the defendant objects on the ground of misnomer, he must give his true name. (Bliss on Code Pleading, sec. 146*a*.) A judgment against a party sued by the initials of his Christian name is not void. At the most it is voidable for error of the court in the proceedings. Where, before judgment, the attention of the trial court is called to the fact that the defendant has been sued by the initials of his Christian name, the court may permit an amendment *instanter* by inserting the full Christian name. If no objection is made on that ground, the defendant will be concluded by the judgment.

In the case at bar the plaintiff in error did business as O. R. Oakley, and although his Christian name is Oscar R. Oakley, the name by which he does business in signing checks and at the banks and at other places is O. R.

Oakley. This may be called his business name, and a judgment recovered against him by that name cannot be attacked collaterally.

There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

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CITY OF OMAHA V. HOWELL LUMBER CO.

[FILED OCTOBER 28, 1890.]

Municipal Corporations: EMINENT DOMAIN: DAMAGES: SPECIAL BENEFITS NOT DEDUCTED. Where land is condemned for public use, as for opening a street, the owner is entitled to the fair market value of the land actually taken, and special benefits to the residue of the tract cannot be set off against such value, but may be against incidental damages to the residue of the tract.

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

A. J. Poppleton, for plaintiff in error, after contending that the doctrine of *Wagner v. Gage County* and *Schaller v. Omaha* was intended to establish a rule of practice, and not a principle of the law of property, cited: *Com. v. Middlesex*, 9 Mass., 388; *Livermore v. Jamaica*, 23 Vt., 361; *Harvey v. R. Co.*, 47 Pa. St., 428; *Troy & B. R. Co. v. Lee*, 13 Barb. [N. Y.], 169; *In re Furman St.*, 17 Wend. [N. Y.], 649; *Giesy v. R. Co.*, 4 O. St., 330; *Symonds v. Cincinnati*, 14 O., 147; Cooley, Const. Lim. [5th Ed.], 520, 700, 704; 3 Sutherland, Damages, 432–3; 2 Dillon, Mun. Corp. [3d Ed.], 625; *Brown v. Cincinnati*, 14 O., 541; *Com'rs v. O'Sullivan*, 17 Kan., 58; *A., T. &*

S. F. R. Co. v. Blackshire, 10 Id., 477; *Winona R. Co. v. Waldron*, 11 Minn., 392; *Nicholson v. R. Co.*, 22 Conn., 74; *Nichols v. Bridgeport*, Id., 189; *Wyandotte, etc., R. Co. v. Waldo*, 70 Mo., 629; *Pacific R. Co. v. Chrystal*, 25 Id., 544; *Newby v. Platte Co.*, Id., 258; *Lee v. R. Co.*, 55 Id., 178; *Quincy, M. & P. R. Co. v. Ridge*, 57 Id., 600; *Meacham v. R. Co.*, 4 Cush. [Mass.], 293; *Park v. Hampden*, 120 Mass., 395; *Dwight v. Co. Com'rs*, 11 Cush. [Mass.], 201; *Whitman v. R. Co.*, 3 Allen [Mass.], 133; *Upton v. R. Co.*, 8 Cush. [Mass.], 600; *Green v. Fall River*, 113 Mass., 262; *Allen v. Charlestown*, 109 Id., 243; *Pitts. R. Co. v. Bentley*, 88 Pa. St., 178; *Cummings v. Williamsport*, 84 Id., 472; *East Brandywine & W. R. v. Ranck*, 78 Id., 454; *Shenango, etc., R. Co. v. Braham*, 79 Id., 447; *Schuylkill Nav. Co. v. Thoburn*, 7 S. & R. [Pa.], 411; *Penn. R. Co. v. Heister*, 8 Pa. St., 450; *Searle v. R. Co.*, 9 Casey [Pa.], 57; *Patten v. R. Co.*, Id., 426; *Watson v. R. Co.*, 1 Wright [Pa.], 469; *E. Penn. R. Co. v. Hottensteine*, 11 Id., 28; *Hornstein v. R. Co.*, 1 Smith [Pa.], 87; *S. F. A. & S. R. Co. v. Caldwell*, 31 Cal., 367; *Holton v. Milwaukee*, 31 Wis., 27; *Bigelow v. R. Co.*, 27 Id., 478; *Trinity Col. v. Hartford*, 32 Conn., 452.

Congdon & Hunt, contra, cited: *F., E. & M. V. R. Co. v. Whalen*, 11 Neb., 585; *Schaller v. Omaha*, 23 Id., 325; *Blakeley v. R. Co.* 25 Id., 207; *Com. v. R. Co.*, 58 Pa. St., 26; *Isom v. R. Co.*, 36 Miss., 300; *Woodfolk v. R. Co.*, 2 Swan [Tenn.], 422; *Penn. R. Co. v. B. & O. R. Co.*, 60 Md., 263; *Memphis v. Bolton*, 9 Heisk. [Tenn.], 508; *P. & M. R. Co. v. Stovall*, 12 Id., 1; *Brown v. Beatty*, 34 Miss., 227; *Com'rs v. Harkelroads*, 62 Id., 807; *Jacob v. Louisville*, 9 Dana [Ky.], 81; *H. & N. R. Co. v. Dickerson*, 17 B. Mon. [Ky.], 173; *L. & N. R. Co. v. Thompson*, 18 Id., 735; *L. & N. R. Co. v. Glazebrook*, 1 Bush [Ky.], 325; *Tide Water Canal Co. v. Archer*, 9 G. & J. [Md.], 479; *Shipley v. R. Co.*, 34 Md., 336; *R. Co. v. Tyree*, 7 W. Va.,

693; *R. Co. v. Lagarde*, 10 La. Ann., 150; *R. Co. v. Calderwood*, 15 Id., 481; *R. Co. v. Gay*, 31 Id., 430; *R. Co. v. Dillard*, 35 Id., 1045; *R. Co. v. Ferris*, 26 Tex., 588; *Tate v. Mathews*, 16 Id., 112; *Paris v. Mason*, 37 Id., 447; *T. & St. L. R. Co. v. Mathews*, 60 Id., 215; *Jones v. R. Co.*, 30 Ga., 43; *Savannah v. Hartridge*, 37 Id., 113; *Augusta v. Marks*, 50 Id., 612; *West Shore R. Co. v. Bell*, 24 Hun [N. Y.], 427; *State v. Beackmo*, 8 Blackf. [Ind.], 246; *Butler v. Sewer Com.*, 39 N. J. Eq., 665; *Carpenter v. Jennings*, 77 Ill., 250; *Todd v. R. Co.*, 78 Id., 530; *Hyslop v. Finch*, 99 Id., 171; *Scott v. Toledo*, 36 Fed. Rep., 385; *A. & F. R. Co. v. Burkett*, 42 Ala., 83.

MAXWELL, J.

The city of Omaha extended Leavenworth street from block 187 to the Missouri river, and in doing so condemned a portion of the defendant in error's land. Appraisers were duly appointed, who estimated the damages and made an award. An appeal was taken to the district court, where the jury returned a verdict as follows:

"We, the jury duly impaneled and sworn to try the issues in the above entitled case, do find that the market value of the strip in controversy, at the time of the condemnation proceedings, was $8,625.

"We do further find that the special benefits to the remaining land of the Howell Lumber Company, through the opening of Leavenworth street, amounted to the sum of $5,000."

A motion for a new trial having been overruled, judgment was entered on the verdict excluding the special benefits.

The sole question presented is, Can special benefits be set off against the value of the land actually taken? This question was carefully considered in *Wagner v. Gage County* 3 Neb., 237. In that case about six and three-fourths acres of plaintiff's land were taken for a public

road. The case was tried before Judge GANTT, who, in effect, instructed the jury that they might set off special benefits against the value of the land actually taken. The jury thereupon returned a verdict finding that there were no damages to the land-owner.

This court, after a very careful consideration of the decisions and the rule which should be adopted in such cases, held that the value of the land taken must, in all cases, be paid in money, but that special benefits may be set off against incidental damages to the residue of the tract. That case was followed in the *F., E. & M. V. R. Co. v. Whalen*, 11 Neb., 585. In the latter case, Judge LAKE, who wrote the opinion, and prepared the syllabus, says: ".Where land is condemned for railroad purposes, the owner is entitled to have as one item of damage, in all cases, the fair market value of the part actually taken." This case was followed in *Schaller v. City of Omaha*, 23 Neb., 325. In that case, after referring to *Wagner v. Gage County*, it is said in the published opinion, "that decision has become the rule of practice in this state." The word "practice" was originally written "property," but by mistake was changed to "practice" and the change overlooked.

In *Blakeley v. C., K. & N. Ry.*, 25 Neb., 207, the rule of *Wagner v. Gage County* was adhered to and must be regarded as the settled law of this state.

It is true there are many decisions holding that special benefits may be set off against the value of the property taken. Almost invariably, such benefits are largely speculative and are such as are shared by the public at large. We must remember that it is not the property owner who is desiring the improvement. It is sought to be made on behalf of the public, and it would seem but justice that the party at whose instance, and for whose benefit the improvement was made, should bear the burden. The property owner may well say: "I do not desire the improvement made, as it will interfere materially with the business that

I am carrying on there, or will cause me great expense to adapt the property to the changed condition." The property owner may be indebted thereon, and finds that he cannot apply special benefits in the payment of the debt.

No doubt there are cases where the property owner is benefited very greatly by the public improvement, and this, perhaps, may be one of that kind. No general law can be so applied as to do exact justice in every case, but the rule that property actually taken for public use shall be paid for in money, is based upon justice, and is less liable to abuse, wrong, and oppression than the one that makes speculative or imaginary benefits a legal tender for property which a party has been forced to convey or is taken under the forms of law.

The judgment of the district court is

AFFIRMED.

THE other judges concur.

CITY OF OMAHA V. WARREN COCHRAN.
SAME V. AUGUST DOLL.
SAME V. CHRIS. RASMUSSEN.

[FILED OCTOBER 28, 1890.]

Municipal Corporations: EMINENT DOMAIN: DAMAGES: SPECIAL BENEFITS NOT DEDUCTED. Where land is taken by a municipality for the opening of a street, the owner is entitled to the value of the land taken, without deduction for benefits.

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

A. J. Poppleton, and *John L. Webster*, for plaintiff in error.

Estabrook, Irvine & Clapp, contra.

MAXWELL, J.

The question involved in the cases is precisely the same as in the *City of Omaha v. The Howell Lumber Co.*, just decided (*ante*, p. 633). The reasons for adhering to our former decisions, that the owner of the land in all cases is entitled to the value of the portion taken, are stated in that case. That rule we deem in accordance with justice and as a check upon the abuse of corporate power. It is simply applying the rule that where the property of an individual is taken from him he shall receive an equivalent that is available in satisfaction of his debts, or, if he so desire, in the purchase of other property. The judgments in each of the above cases are

AFFIRMED.

THE other judges concur.

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J. N. ELDRIDGE ET AL. V. A. E. HARGREAVES ET AL.

[FILED OCTOBER 28, 1890.]

1. **Pleading**: REFERENCE TO FACTS PREVIOUSLY STATED. While the facts constituting separate and distinct causes of action or defense are required to be separately stated, so that each count is distinct from every other and complete in itself, yet, where a fact has been stated once in a pleading in a cause, it may be referred to in any subsequent pleading, or subsequent count of the same pleading, and, by proper reference, be made a part thereof.

2. ——: THE ANSWER construed, and *held*, to state all the essential facts necessary to constitute a counter-claim for a breach of warranty.

3. **Warranty**: STATEMENTS OF PARTNER. In an action against a partnership for a breach of warranty, it is competent to prove that one member of the partnership made the representations

and warranty for the firm that induced the sale, although the pleading alleges that the warranty was made by the firm. A partnership is bound by the representations and warranties made in the sale of its goods by a member thereof.

4. ———: ———: EVIDENCE: PLEADING. In such an action, it is not necessary to prove each representation set up in the pleading, but it is sufficient if any one of the material representations averred is established which induced the purchase.

5. ———: ———: ———. The testimony offered by the plaintiffs to establish propositions of compromise made by the defendants, was rightly excluded.

6. ———: ———: ———. In a suit for a breach of warranty brought by A against B, it is not competent to prove the representations made by C to D in the sale of the same kind of goods.

7. **Instructions.** *Held*, That the instructions correctly embodied the law applicable to the case.

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

Chas. O. Whedon, for plaintiffs in error, cited: *Dale v. Hunneman*, 12 Neb., 225; *Peck v. Trumbull*, Id., 136; *Stewart v. Balderston*, 10 Kan., 144–5; *Vassear v. Livingston*, 13 N. Y., 249; Bliss, Code Pl., secs. 367, 431; *Swan v. Swan*, 15 Neb., 453.

Cornish & Tibbets, contra, cited: Maxwell, Pl. & Prac., 393; 1 Sutherland, Damages, 277; *Brizsee v. Maybee*, 21 Wend. [N. Y.], 144; *Masterson v. Mayer*, 7 Hill [N. Y.], 61; *Marsh v. Webber*, 13 Minn., 99; *Young v. Filley*, 19 Neb., 543.

NORVAL, J.

This suit was brought by the plaintiffs in error to recover the sum of $1,203.90, with interest thereon, for 350 cases, and fifty kegs of orange cider, sold and delivered to the defendants. The defendants filed the following answer:

"For answer to plaintiffs' petition herein, defendants admit that on or before the 12th day of July, 1887, he entered into contract with plaintiffs for the purchase of goods mentioned in plaintiffs' petition, and that he agreed to pay for the same the sum of $1,203.90 on the 11th day of October, 1887; that said goods were delivered, and that the same are not paid for, as alleged in plaintiffs' petition.

"2. For a further defense, and by way of counter-claim, defendants allege that the said plaintiffs, as an inducement to the defendants to purchase from them said goods mentioned, falsely and fraudulently represented and warranted to the defendants that the said goods, consisting of orange cider, were of a good merchantable quality, and valuable for the wholesale trade; that the said orange cider was manufactured from orange juice and lime juice, from California fruit; that it was properly named orange cider, and that the defendants, relying upon said representations and warrants, purchased from the plaintiffs the said goods, as above stated; that at the time of said representations and purchase the defendants were engaged in the business of wholesale grocers, and purchased said goods for the purpose of selling in the ordinary course of trade to retail dealers, all of which at the time was well known to the plaintiffs, and plaintiffs sold said goods for said purpose.

"3. Defendants aver that said orange cider was not as represented and warranted, but, on the contrary, it was manufactured entirely from harmful and inexpensive drugs and water, and is of no marketable value and not fit for the purpose of the wholesale trade, all of which plaintiffs, at the time, well knew.

"4. By reason of the false representations and warrants as aforesaid, by which plaintiffs (defendants) were deceived and induced to make said purchase, and of the above premises defendants have sustained damages in the sum of $1,500, for which sum defendants ask judgment, together with costs of suit."

The plaintiffs replied, denying every allegation of the answer. The case was tried to a jury, who found that there was due the plaintiffs upon the cause of action set forth in their petition $1,321; that there was due the defendants upon their counter-claim the sum of $1,075, and assessed the plaintiffs' recovery at $246. The defendants filed a remittitur of $9 from the amount found due on their counter claim, and a judgment was rendered in favor of the plaintiffs for $255.

Upon the trial, the plaintiffs objected to the defendants introducing any testimony for the reason that the facts stated in the answer are insufficient to constitute a defense to the plaintiffs' cause of action, or to establish a counter-claim in favor of the defendants. The objection was overruled, and the ruling is assigned as error.

While the answer is divided into four distinct paragraphs, it is clear that the pleader only attempted to state a single cause of action against the plaintiffs, and in determining the sufficiency of the pleading it must be construed as an entirety. The first paragraph of the answer makes reference to the contract declared upon in the petition, admits that the defendants entered into the same, received the goods in the petition mentioned, and agreed to pay therefor the amount herein stated. The remainder of the answer consists of a plain statement of the facts constituting the defendants' counter-claim. It is urged by counsel for plaintiffs that in construing that part of the answer setting up a counter-claim, we must not consider the first paragraph of the answer nor any allegation of the petition which is referred to in the answer. While it is true, as a general rule, that each count in a petition or answer should be separate and distinct from every other count and be complete in itself, it does not follow, when a fact has been once stated in a pleading, that it is necessary to state it again in the same case. An allegation in one count may be referred to in any subsequent count and

made a part thereof by reference, and the allegation referred to will be considered in construing such subsequent count. So an answer may refer to an allegation of the petition and by such reference make it a part of the answer. Any other rule would require unnecessary repetitions. The facts set up in the petition, which are admitted by the answer, must be considered in construing the answer. The defendants having alleged that they were damaged by reason of the breach of warranty in the sum of $1,500, it was not necessary that they should have plead in the answer what would have been the value of the goods if they had been as warranted, or their value as they actually were when received. The answer states all the essential facts necessary to constitute a counter-claim for a breach of warranty. It is substantially the same as the form given in Maxwell's Pleading and Practice, for a counter-claim for a breach of warranty.

The testimony shows that A. E. Hargreaves, one of the defendants, met in the city of Omaha, in July, 1886, C. C. Higgins, one of the plaintiffs, who, at that time, sold to the defendants a large quantity of an article called orange cider, which was to be thereafter delivered to the defendants in the city of Lincoln, for which they agreed to pay $1,357.50, and that Higgins exhibited to Hargreaves several bottles of the drink, which were labeled as follows:

CALIFORNIA
ORANGE CIDER.
The Pure Juice of the Ripe Fruit Clarified.
Nature's Most Healthful Beverage. Superior to Lime Juice or Lemonade as a Refreshing Drink. Especially recommended as a Fruit Alterative, to be taken at lunch or meal time.

The testimony introduced by the defendants tends to prove that Higgins, to induce the sale, represented to Har-

greaves that the article was orange cider, manufactured in California from orange juices, and that it was a good salable article.

Charles C. Higgins, one of the plaintiffs, testified that he made no false representations to Hargreaves, but that at the time of the sale he truthfully informed Hargreaves of all the facts regarding the cider. Higgins, in his testimony, admitted that he knew when he made the sale to the defendants that the beverage was not made of orange juice, and that it was put up in Columbus.

But three of the persons who were present at the time of the sale and heard the conversation, were witnesses upon the trial. They were A. E. Hargreaves, C. C. Higgins, and Herbert C. Bowman. The testimony of the interested witnesses—Hargreaves and Higgins—is conflicting. What one avers as true, the other denies. Hargreaves was corroborated by the testimony of Bowman, a disinterested witness, who was present when the order for the goods was given, and heard the entire conversation. We quote from his testimony:

Q. State what was said at the conversation.

A. Well, Mr. Higgins took us upstairs and he said he had this orange cider there, and sent down for some samples—sent for ice water, and he poured it out, and we all tasted the orange. He said a couple of young fellows had gone to California and had seen these oranges going to waste off the trees, and not used, and they conceived the idea of making this cider of it. They had furnished money to these young fellows to make cider of these oranges, and Mr. Hargreaves asked him if it was put up in Columbus. He said yes, it was put up in bottles there—made in California and bottled in Columbus. He asked him why he had it put up in Columbus. He said it would cost more in bottles—they would have to ship them back, and pay double first-class freight—the bottles would cost him double than putting it up in Columbus. We talked the thing

over—talked about the labels, one thing and another—why they did not put their name on the labels, it being a California product, and having it put up in Columbus, the trade would not understand why it was not put up in California, and they could not do that. We talked it over a while, and Mr. Hargreaves bought some of the goods.

Q. Do you remember of anything being said about the firm of W. T. Coleman?

A. Yes; he said W. T. Coleman wanted the agency for the west; further than that I don't remember about W. T. Coleman, only his saying he wanted the agency of it.

Q. Did Mr. Higgins say anything about this being good for the trade, selling in temperance states?

A. Yes; Mr. Hargreaves asked him why he did not put it up as orange wine. He said a good many people made objections to it in temperance states, and temperance people would not buy it unless it was put up under the brand of cider.

Q. Did he state how it sold?

A. Yes; he claimed it was selling best where they had sold it, and it was a good salable article, if I remember.

The defendants had never had any experience in orange cider, and in making the purchase, the testimony tends to show, that they relied upon the representations made by Higgins. It is conclusively shown that the cider was not made from the juice of the orange, but that it was manufactured by two firms at Columbus, Ohio, from the following formula: Granulated sugar, 15 parts; citric acid, $\frac{75}{100}$ of a part; tartaric acid, $\frac{75}{100}$ of a part; alcohol, $\frac{4}{10}$ of a part; oil of orange, $\frac{1}{10}$ of a part; water, to make the remainder of the 100 hundred parts, and colored with burnt sugar.

The testimony introduced by the defendants further shows that the cider soon fermented and leaked out of the kegs and bottles in which it was shipped, was unsalable, and of but little, if any, value. If the testimony introduced by

the defendants is true, then Higgins knowingly misrepresented and warranted the goods and perpetrated a fraud upon the defendants. It is manifest that the verdict should not be set aside as being against the evidence.

Several of the rulings of the trial judge, made on the admission of testimony, are complained of by the plaintiffs in error. We will notice such of these as seem to us to require attention. The defendant A. E. Hargreaves was, against the plaintiffs' objection, permitted to testify that he had never had any experience in orange cider, and that he relied upon the representations made by Higgins. The objection urged against this testimony is, that there is no allegation in the answer that the defendants relied upon the representations made by one of the plaintiffs. The answer alleges that the plaintiffs made the representations and that the defendants relied thereon. Under this averment it was competent to prove that one member of the plaintiffs' firm made the statements that induced the defendants to make the purchase. The plaintiffs were bound by the acts of Higgins and by the statement made by him. They could not accept part of his acts without adopting all.

There was no reversible error committed in allowing Hargreaves to testify that orange cider was a new article to the trade, and that the cider bought by the defendants soon fermented and escaped from the kegs and bottles. If it be conceded that the witness had not shown himself competent to testify whether orange cider was a new or old article, yet the error, if any was made in allowing the witness to testify upon that subject, was cured when the plaintiffs proved by the depositions of Wm. I. Newlove, one of the manufacturers, that they commenced its manufacture in the latter part of December, 1886, and ceased making it in July, 1887. The plaintiffs' own testimony shows that it could not have been known very long to the trade. Although the answer contains no allegation in regard to orange cider keeping, the testimony offered by the

defendants, to the effect that it would not keep, was admissible under the allegation of the answer that "it is of no marketable value and not fit for the purpose of the wholesale trade." If the cider soon fermented and leaked out of the casks, it was not a valuable article for wholesalers to handle.

It appears in testimony that a day or two after the order was given for the goods, the defendants concluded to countermand the same. Hargreaves having known for some years W. G. Higgins, a brother of one of the plaintiffs, and not remembering the correct address of plaintiffs' firm, sent the following telegram to W. G. Higgins:

"JULY 9, 1887.

"*To W. G. Higgins, care Shuman, Mann & Higgins, Chicago, Illinois:* Have your brother cancel our order, if not already shipped. Will write giving reasons.

"HARGREAVES BROS."

The objection as made to the admission of this telegram was because it was not addressed to or received by any party to the suit, and as being incompetent and immaterial. The testimony shows that this message was received by C. C. Higgins, one of the plaintiffs, and was answered by him, the answer being preserved in the record. It is quite immaterial that the telegram was addressed to one not a party to the suit, so long as it is shown that it came into the possession of the plaintiffs and that they recognized it by sending a reply. We fail to see the relevancy of this message to the issues that were being tried. It was not claimed that the order given for the goods was rescinded. The answer admits the receipt of the goods, and it was incompetent for the defendants to prove that an attempt was made by them to cancel the order. But as numerous other letters and telegrams, in substance the same as this one, were introduced without objection, the plaintiffs were not prejudiced by the admission of the message complained of.

The answer alleges that the plaintiffs represented "that the said orange cider was manufactured from orange juice and lime juice from California fruit." The testimony introduced by the defendants tends to show that the cider was represented to be made from pure orange juice, and that nothing was said at the time about lime juice entering into its manufacture. It was not necessary that the defendants should prove that each representation set up in their answer was made, but it was sufficient if they established any one of the material representations therein contained, that the same was untrue, and that the defendants were induced thereby to make the purchase.

The plaintiffs on the trial in the district court offered to prove by the witness C. C. Higgins that one of the defendants in October, 1887, offered to pay $900 in settlement of plaintiffs' claim, and that at the same time the plaintiffs offered to deduct from their claim $100. The proposed testimony was rightly rejected, for the obvious reason that a proposition of compromise made by a party which is not accepted by the other is not competent evidence. The defendants had a perfect right to buy their peace, and that they made the plaintiffs an offer for the purpose of settlement, is no evidence that the defendants did not have a valid counter-claim against the plaintiffs' cause of action. Counsel for the plaintiffs in error say: "If the answer had denied the defendants' liability, the offered testimony would not have been admissible, but when they admitted their liability and sought to recover a sum greater than their admitted indebtedness to plaintiffs, any testimony which tended to show want of good faith in their claim was admissible as a defense to that claim." It certainly is quite immaterial that the defendants in their answer admit entering into the contract declared upon in the petition. If the defendants had brought a separate suit against the plaintiffs for a breach of warranty in the sale of goods sued for in this action, the offer of compromise would not have been

competent evidence on the trial of that suit. That the same matters are set up by way of counter-claim does not change the rule as to the admission of such testimony.

The defendants called as a witness O. J. King, who testified that he purchased from Sprague, Warner & Co., of Chicago, a quantity of the same kind of beverage as that purchased by the defendants. The court permitted the witness, over the plaintiffs' objection, to answer this question:

Q. What inducements were held out to you by Sprague, Warner & Co. to purchase their goods?

A. They represented them to me as being the pure juice of the orange, and a new thing in the market.

In this ruling of the court we think there was error prejudicial to the plaintiffs. It was not competent to prove the representations that were made that induced King to make the purchase. The testimony objected to did not in the least tend to show that these plaintiffs made any representations to the defendants to induce the sale. The only effect of this testimony was to mislead the jury, and to cause them to believe that if the goods were warranted to King, they were likewise warranted to the defendants.

The remaining errors assigned upon the rulings of the trial court, upon the introduction of testimony, will not be noticed, as they are not likely to occur upon a retrial of the cause.

We will next consider some of the objections urged against the charge of the court. The jury were told by the second instruction to ascertain the amount due the plaintiffs on their cause of action, then find how much, if anything, was due the defendants upon their counter-claim, and to return a verdict in favor of the party entitled to the larger amount for the difference between the two sums. It is urged that the answer fails to state a cause of action against the plaintiffs, and for that reason this instruction was wrong in directing the jury to ascertain the amount

due the defendants upon their counter-claim. We held in the first part of this opinion that the answer was sufficient, and what we there said disposes of the criticism made upon this instruction.

The fourth instruction is as follows:

"You are instructed that, upon the counter-claim of the defendants, the burden of proof is upon the defendants to establish by a preponderance of evidence every material allegation of the counter-claim as set forth in defendants' answer.

"The material allegations of the answer are:

"'First—That the plaintiffs at the time of the sale falsely and fraudulently represented that the goods in question, consisting of orange cider, were of a good and merchantable quality and valuable for the wholesale trade, and that the said orange cider was manufactured from orange juice and lime juice from California fruit.

"'Second—That in making said purchase of goods the defendants relied upon the said representations of the plaintiffs.

"'Third—That the goods were not as represented and warranted, but were a manufactured article.

"'Fourth—That the goods were of no marketable value, and not fit for the purpose of the wholesale trade.

"'Fifth—That the defendants have sustained damages, by reason of the failure of the plaintiffs to comply with their representations concerning the goods in question.'"

It is urged that this instruction is erroneous, because it told the jury that the answer alleged that the representations were made at the time of the sale, and that it also omitted to state one of the material averments of the answer, to-wit, that the plaintiffs warranted the goods sold.

The answer alleges that "the plaintiffs, as an inducement to the defendants to purchase from them said goods mentioned, falsely and fraudulently represented and warranted to the defendants that said goods, consisting of orange cider,

were of a good and merchantable quality, and valuable for the wholesale trade; that the said cider was manufactured from California fruit, and that it was properly named orange cider; and that the defendants, relying upon said representations and warrants, purchased from the plaintiffs the said goods." The only reasonable construction which can be placed upon this language is, that the representations were made at or prior to the time the goods were purchased by the defendants. It is true the fourth instruction omitted to inform the jury that one of the material averments of the answer was that the plaintiffs warranted the goods. This omission was, however, fully covered by the fifth, sixth, and seventh of the instructions given. It is a rule of universal application that instructions must be considered as a whole.

The point is also made that this instruction is erroneous, because it states that the allegation in the answer, that the orange cider was of a good, merchantable quality, and valuable for the wholesale trade, was a material averment. There was no error in this.

The article was entirely new to the defendants. They knew nothing of its selling qualities. It was purchased for their wholesale trade, which the plaintiffs, at the time, well knew. The representation, if made, was a part of the description of the quality of the cider, and was a material issue in the case.

It is urged that, under the third paragraph of the fourth instruction, the defendants could have recovered if the cider had been made of pure orange juice, because it would then have been a manufactured article. The jury could not have understood the words "manufactured article," as used by the court in the instruction, to mean cider made of orange juice, but the article put up according to the formula, proved on the trial. By the eighth instruction, the jury was told, in effect, that if the plaintiffs represented that the cider was a manufactured article, and

not the real juice of the orange, the defendants could not recover. In view of this instruction the jury could not have been misled by the language of the third paragraph of the fourth instruction.

By the ninth instruction, it was stated that the measure of the defendant's damages was the difference between the value of the cider at the time of the sale, and what it would have been worth had it been as warranted. It is claimed that there was no evidence upon which to base this instruction. The testimony introduced by the defendants was to the effect that the cider, as received, was of but little value, and that it was sold to the defendants for $1,203.90. This was sufficient proof of its value as warranted, when no other testimony was introduced by either party on that branch of the case. For the error pointed out the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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STATE, EX REL. J. H. DUNTERMAN, V. WILLIAM GASLIN.

[FILED OCTOBER 28, 1890.]

Referee: SHOULD SIGN BILL OF EXCEPTIONS. In a case tried before a referee, it is his duty to sign any true exceptions taken to any order or decision made by him in the case. Such bill of exceptions is not to be signed by the judge. (*Light v. Kennard*, 10 Neb., 330; *Turner v. Turner*, 12 Id., 161.)

ORIGINAL application for *mandamus*.

Bowen & Hoeppner, for relator.

Capps, McCreary & Stevens, contra.

NORVAL, J.

This is an application for a writ of *mandamus* to compel the respondent, as judge of the eighth judicial district, to sign a bill of exceptions in a cause tried in the district court of Adams county before a referee.

It appears from the record before us that on the 20th day of May, 1889, there was pending in the district court of Adams county the case of *Joseph Story v. John H. Dunterman*, and on said date, by the agreement of the parties, the court appointed W. L. Marshall, Esq., sole referee to take the testimony in said cause and report his findings of facts and conclusions of law thereon. The cause was tried before said referee, who, on the 25th day of November, 1889, reported to said court his findings of law and fact. Exceptions to the report of the referee were filed, and on November 30, 1889, the same were by the court overruled and judgment was rendered in favor of said Joseph Story, and against the relator for $621.36.

The relator's motion for a new trial was, on the last named date, overruled, an exception was taken to the ruling of the court thereon, and forty days were given to settle a bill of exceptions. The November, 1889, term of the district court adjourned *sine die* on the 28th day of December, 1889. On the 16th day of January, 1890, the relator presented to the attorneys of said Joseph Story his proposed bill of exceptions, containing all of the testimony taken on the trial before the referee, and said attorneys refused to accept for examination said draft of the bill of exceptions, and declined to state the reason or grounds for such refusal. On the 17th day of January, 1890, the relator served notice upon Joseph Story that he would present said proposed bill of exceptions on January 23, 1890, to said referee for allowance. The proposed bill was on

that day presented to the referee for settlement, who refused to sign the same on the ground that it was not presented within proper time.

The relator on the 29th day of January, 1890, applied to the respondent for a peremptory writ of *mandamus* to compel the referee to sign, settle, and allow said bill, which application was denied. On the 1st day of March, 1890, the relator presented the proposed bill of exceptions to the respondent for settlement and allowance, who refused to sign the same.

The sole question presented for our consideration is, Has a judge of the district court any power or authority to settle and allow a bill of exceptions in a cause tried before a referee? Section 303 of the Code provides that "it shall be the duty of the referee to sign any true exceptions taken to any order or decision by them made in the case, and return the same with their report to the court making the reference." This section confers ample authority upon a referee to sign a bill of exceptions. It makes it his duty to sign any true bill. There is no law or statute in this state making it the duty of the judge making the reference to settle a bill of exceptions in a cause tried before a referee. The judge cannot know what exceptions were taken to the rulings made by the referee, or what testimony was introduced on the trial.

Section 311 of the Code does not govern the settlement of the bill of exceptions in cases tried before a referee, either as to the person who shall sign the same or the time in which it shall be allowed.

A similar question to that involved in this action arose in the case of *Light v. Kennard*, 10 Neb., 330. In that case the referee signed a bill of exceptions and returned the same with his report to the district court making the reference. The report was confirmed and the cause was brought to this court on error. The defendant in error moved to quash the bill of exceptions on the ground that

the same was not signed by the district judge. This court held that the bill should be signed by the referee and not by the judge. The question was again before the court in *Turner v. Turner*, 12 Neb., 161, in which it was held that in a case tried before a referee, the bill of exceptions is not to be signed by the judge of the district court but by the referee. The writ therefore must be

DENIED.

THE other judges concur.

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ISAAC OPPENHEIMER ET AL. V. SAMUEL MCCLAY, ADMINISTRATOR, ETC.

[FILED OCTOBER 28, 1890.]

1. **Appeal:** COUNTY JUDGE: FAILURE TO FILE TRANSCRIPT. A judgment was rendered against the plaintiffs in error in the county court of Lancaster county. Within ten days thereafter an appeal bond was filed and a transcript of the proceeding was ordered. The judge thereupon promised to make out a transcript and file the same in the district court within the statutory time, but failed to do so. The transcript was filed more than thirty days after the rendition of the judgment. *Held*, That the neglect of the judge to file the transcript in time is the neglect of the appellants.

2. ———: ———: ———: DISMISSAL. *Held*, That it was not error to sustain the appellee's motion to dismiss the appeal.

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

Pound & Burr, for plaintiffs in error, cited: *Dobson v. Dobson*, 7 Neb., 296; *R. V. R. Co. v. McPherson*, 12 Id., 480.

Chas. E. Magoon, contra, cited: *Nuckolls v. Irwin*, 2 Neb., 65; *Verges v. Roush*, 1 Id., 113; *Gore v. Hare*, 4

Id., 131; *Horn v. Miller*, 20 Id., 104; *U. P. R. Co. v. Marston*, 22 Id., 722; *Gifford v. R. Co.*, 20 Id., 538.

NORVAL, J.

The defendant in error recovered a judgment against the plaintiffs in error, in the county court of Lancaster county on the 10th day of December, 1887. The defendants below gave an appeal bond and filed a transcript of the judgment in the office of the clerk of the district court of the county on the 7th day of February, 1888. Malone filed in that court a motion to dismiss the appeal, on the ground that the transcript was not filed within thirty days from the rendition of the judgment. The motion was sustained and the appeal dismissed.

The transcript was not filed within the time limited by the statute for the taking of appeals. It is claimed that the failure to perfect the appeal sooner is not attributable to the fault or neglect of the plaintiffs in error, but to that of the county judge.

It appears that Isaac Oppenheimer, one of the defendants below, within ten days after the entry of the judgment in the county court, and at the time of filing the appeal undertaking, applied to the judge of that court for a transcript of the proceedings, and was informed by the judge that he could not prepare the transcript just then, but he would make out and file the same with the clerk of the district court within the time required by law. Relying upon this promise, Oppenheimer the next day left the state on business and did not return for more than a month afterwards. The judge neglected to make out and file the transcript as he agreed. When Oppenheimer returned he procured and filed one.

The proofs offered in resistance of the motion to dismiss the appeal fail to show that the appellants were diligent in perfecting their appeal. The neglect of the county judge to deliver the transcript to the clerk of the district court

was not an omission of any official duty he owed the appellants. It was their duty, under the law, to have their appeal docketed in the district court, and a failure of the county judge to do so is attributable to them. It can make no difference that the judge of his own accord volunteered to perform the services for the appellants. They could not, by relying upon his promises to perform for them an unofficial act, escape the consequences of his neglect. It is quite immaterial that the offices of the county judge and clerk of the district court were at the time in the same building. The facts in this case bring it within the decisions of *Gifford v. R. V. & K. R. R. Co.*, 20 Neb., 538, and *U. P. R. R. Co. v. Marston*, 22 Id., 722. In the former case the appellant, by letter, ordered the transcript and requested the county judge to deliver or send it to the clerk of the district court. The court in the opinion says: "This was not a service which in any event or upon any demand and tender of fees would become due to the plaintiff or to any party from the county judge. It was not demanded as a matter of law or of right, but requested doubtless as a matter of favor or courtesy. Had this service been performed by the county judge as requested, so far as delivering or sending the transcript to the clerk of the district court was concerned, he would have done it only as the friend or agent of the plaintiff or of his attorney, and not in his official capacity as county judge; and so his failure or neglect in that regard is the failure or negligence of the plaintiff."

In the second case, the appellant's attorney made an arrangement with the justice of the peace before whom the cause was tried, to file the transcript in time. The justice failed to do so. It was held that the neglect of the justice did not relieve the appellants of the consequences of such neglect.

The plaintiffs in error not having shown sufficient excuse for the failure to file the transcript within thirty days

after the rendition of the judgment, the district court did not err in dismissing the appeal. The judgment is

AFFIRMED.

THE other judges concur.

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C. G. DORSEY ET AL. v. J. L. McGEE.

[FILED NOVEMBER 5, 1890.]

1. **Building Contract: MODIFICATIONS: ACTION ON BOND: EVIDENCE.** Specifications accompanying plans for a dwelling house provided for two coats of plastering; S. and W. contracted with M. to furnish all material and labor, and to build and construct a house according to such plans and specifications, with certain exceptions. In an action by M against the contractors, and D. and W., their sureties, on a bond by the contractors to M. for the due and faithful performance of the contract, the specifications were introduced in evidence by M., and it appearing that a change had been made in the specifications by which the requirement of *two* coats of plastering was made to read *three* coats of plastering, and two witnesses testifying that such change was made at the time of the signing of the contract, and two also that the change was made by M ten days subsequent to the execution of the contract, and without the knowledge or consent of the sureties of the contractors and the jury having found for the plaintiff, against the sureties as well as the contractors, upon error, *held*, that the specifications, as introduced in evidence, must be taken and considered as the original specifications under which the contract was executed.

2. ———: ———: ———. The plans and specifications referred to were drawn in view of a building fronting north and east. The locality of the building having been changed by M. to that of a southwest corner lot, the contractors had full knowledge and consented to the new location; the sureties afterwards signed the bond without knowledge either of the original design or of any change as to the location or frontage of the building. By direction of M. the contractors built the house fronting south and west. *Held*, Not to be such a change of plans, specifications, or contract as would release the sureties.

3. ———: ———: ———: The specifications contained a clause, that "It is understood that the owner of this building and the architect shall have the right and power to make any alterations, additions, or omissions of work or materials herein specified, or shown on the drawings, that they may find necessary, during the progress of the building, and the same shall be and hereby is made obligatory upon and must be acceded to by the contractor and carried into effect without in any way violating or vitiating the contract; and the value of all such alterations, additions, or omissions shall be in proportion to the cost of other similar work to be done under the contract." The evidence shows the construction of a stairway from the kitchen to a bedroom to be one not specified, as well as the use of bronze hardware in the place of No. 1 hardware specified, and a change in the location of the cistern. *Held*, that this addition and these changes were provided for in the clause set forth.

4. **The findings of fact** and the judgment must conform to and be supported by the allegations of the pleadings on which they are based. (*Lipp v. Horbach*, 12 Neb., 371; *Kitchen Bros. v. Hammond*, *ante*, 618.)

5. **Instructions** to a jury must be based upon and applicable to the pleadings and evidence. (*Herron v. Cole Bros.*, 25 Neb., 692; *Runge v. Brown*, 23 Neb., 817.)

6. **Evidence**: RECORDS. A person not a stranger to a judicial proceeding is bound thereby, and the record of such proceeding is admissible in evidence against him. (1 Greenleaf [14th Ed.], sec. 522.)

7. **A motion for a new trial** is indivisible, and when made jointly by two or more parties, if it cannot be allowed as to all, must be overruled as to all. (*Dutcher v. State*, 16 Neb., 30; *Long & Smith v. Clapp*, 15 Id., 417; *Real v. Hollister*, 17 Id., 661; *Boldt v. Budwig*, 19 Id., 739; *Dunn v. Gibson*, 9 Id., 513.)

ERROR to the district court for Gage county. Tried below before BROADY, J.

Hazlett & Bates, for plaintiffs in error, cited, contending that the sureties were released by variations in the plans: *Miller v. Stewart*, 9 Wheat. [U. S.], 680; *Polak v. Everett*, L. R. 1 Q. B. D. [Eng.], 669; *U. S. v. Hillegas*, 3 Wash. C. C. [U. S.], 75; *Taylor v. Johnson*, 17 Ga. 521; *Grant v.*

Smith, 46 N. Y., 93; *Brigham v. Wentworth*, 11 Cush. [Mass.], 123; *St. Albans Bank v. Dillon*, 30 Vt., 122; *Zimmerman v. Judah*, 13 Ind., 286; *Judah v. Zimmerman*, 22 Id., 388; *Bacon v. Chesney*, 1 Stark. [Eng.], 192; *Dobbin v. Bradley*, 17 Wend. [N. Y.], 425; *Walrath v. Thompson*, 6 Hill [N. Y.], 540; *Fowler v. Brooks*, 13 N. H., 240; Brandt, Suretyship, secs. 338, 387; *Bethune v. Dozier*, 10 Ga., 235; *Rowan v. Mfg. Co.*, 33 Conn., 1; Chitty, Contracts [11th Ed.], 776, 777; *Ind. Dist. of Mason City v. Reichard*, 50 Ia., 99; *Cunningham v. Wrenn*, 23 Ill., 64; *Simonson v. Grant*, 36 Minn., 439; DeColyar, Guaranties, P. & S., 389; Id., 394–95, 96, and cases cited: *Leeds v. Dunn*, 10 N. Y., 469; *Gardiner v. Harback*, 21 Ill., 129; *Barker v. Scudder*, 56 Mo., 272; *Whitcher v. Hall*, 5 B. & C. [Eng.], 269; Theobold, Prin. & Sur., 119; *Weir Plow Co. v. Walmsley*, 11 N. E. Rep., 232, and cases cited in note; *Lucas Co. v. Roberts*, 49 Ia., 159; *Taylor v. Jeter*, 23 Mo., 244. Also by changes in regard to terms of payment: *Gen'l Steam Nav. Co. v. Rolt*, 6 C. B. [Eng.], 550; *Calvert v. London Dock Co.*, 2 Keene [Eng.], 638; *Bragg v. Shain*, 49 Cal., 131; *Bacon v. Chesney*, 1 Stark. [Eng.], 152; *Benjamin v. Hillard*, 23 How. [U. S.], 149; Brandt Suretyship, sec. 345, and cases cited: *Farmers Bank v. Evans*, 4 Barb. [N. Y.], 490; *Birkhead v. Brown*, 5 Hill [N. Y.], 634. As to the sufficiency of the answer: *Burr v. Boyer*, 2 Neb., 267; *Rathburn v. R. Co.*, 16 Id., 443; *Herdman v. Marshall*, 17 Id., 257; *Olcott v. Carroll*, 39 N. Y., 436; *Humphries v. Spafford*, 14 Neb., 488; *Mills v. Miller*, 3 Id., 95; *Wilson v. Macklin*, 7 Id., 50; *Catron v. Shepherd*, 8 Id., 318; *Singer Mfg. Co. v. Doggett*, 16 Id., 611; *Evarts v. Smucker*, 19 Id., 43; *Brown v. Rogers*, 20 Id., 548; *Klosterman v. Olcott*, 25 Id., 382; *Homan v. Steele*, 18 Id., 659; *Hale v. Wigton*, 20 Id., 83; *Curtis v. Cutler*, 7 Id., 317. As to the instructions: *Simonson v. Thori*, 31 N. W. Rep., 861; *Bacon v. Chesney*, *supra*.

Pemberton & Bush, contra, cited, as to variation of plans and terms of payment: *Irwin v. Opp,* 3 N. E. Rep. [Ind.], 650; Lloyd, Buildings, sec. 54; *Strawbridge v. R. Co.,* 74 Am. Dec., 545, and note; *Hanauer v. Gray,* 99 Id., 226, and note; *McKecknie v. Ward,* 17 Am. Rep., 281; *Benjamin v. Hillard,* 23 How. [U. S.], 165, 166; Brandt, Suretyship and Guaranty, 467. As to the pleadings: *Curtis v. Cutler,* 7 Neb., 317. As to the instructions: *Russell v. Rosenbaum,* 24 Neb., 769, 772; *Weir v. R. Co.,* 19 Id., 212; *Smith v. Brady,* 72 Am. Dec., 442.

COBB, CH. J.

This action was brought in the district court of Gage county by the defendant in error against Sweet & Wilson, as principals, and the plaintiffs in error, as sureties, on a bond given for the faithful performance of a certain contract for the erection of a dwelling house and barn in the city of Beatrice, entered into between J. L. McGee and Sweet & Wilson, who were contractors and builders, at Beatrice, as follows:

"Know all men by these presents, that Messrs. Sweet & Wilson, of Beatrice, Nebraska, principals, and C. G. Dorsey and J. B. Weston, as sureties, are held and firmly bound unto J. L. McGee, of same residence, in the penal sum of two thousand dollars, lawful money of the United States, for the payment of which sum well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents.

"Signed by us and dated this 6th day of April, 1887.

"The condition of the above obligation is such, that whereas the above named Sweet & Wilson have been awarded the contract of building a frame residence and stable and furnishing all materials, situated in lot No. 7 and south half of lot No. 8, in block No. 20, in Fairview addition to the city of Beatrice, Nebraska, according to

the contract entered into this 29th day of March, 1887, between them and said J. L. McGee, and according to the plans and specifications accompanying said contract and referred to therein :

"Now if the said Sweet & Wilson shall perform their part of said contract with the true intent and meaning and conditions of the same, then the foregoing obligations shall be null and void, otherwise the same shall remain in full force and effect.

"Witness our hands this 6th day of April, 1887.

"(Signed) SWEET & WILSON.
"C. G. DORSEY.
"J. B. WESTON."

The amended petition alleged a number of breaches of the condition of said bond, by reason of which plaintiff was damaged in the sum of $2,350, and asked judgment against Sweet & Wilson and C. G. Dorsey and J. B. Weston in the sum of $2,000.

To the amended petition, the plaintiffs in error, Dorsey and Weston, filed an answer admitting the execution of the bond as sureties, but allege as a defense thereto that after the execution and delivery of said bond the defendants Sweet & Wilson and the plaintiffs, without the knowledge or consent of these defendants, changed the contract plans and specifications referred to in said bond, in material parts thereof, and erected said buildings mentioned in said contract in a different manner than that mentioned and agreed to be built in said original contract, and changed the plans and specifications for the erection of said buildings from the original contract plans and specifications as referred to in said bond, all of which was done by plaintiff and defendants Sweet & Wilson after the execution and delivery of said bond, without the knowledge or consent of the defendants Dorsey and Weston.

To this answer a reply consisting of a general denial was filed by plaintiff. A trial was had by a jury, who

found in favor of plaintiff and against all of the defendants in the sum of $1,551.16.

Separate motions for a new trial were filed by the defendants Sweet & Wilson and the defendants Dorsey and Weston, which were overruled by the court and judgment rendered against the defendants Sweet & Wilson as principals and the defendants Dorsey and Weston as sureties, to reverse which ruling and judgment, and for a new trial, the defendants Dorsey and Weston prosecute a writ of error to this court.

Counsel for plaintiffs in error, in the brief, do not present the errors upon which they rely, in the order in which they are stated in the petition in error, nor is it easy, in all cases, in following the argument, to apply it to the specific error intended. But I will take up the points as they are presented in the brief, and as no point is argued which is not stated in the petition in error, with more or less accuracy, I will spend but little time in endeavoring to point out their special application.

The first point of the argument is directed to the insufficiency of the evidence to sustain the verdict and judgment. In support of this proposition evidence is cited from the bill of exceptions tending to prove that after the execution and delivery of the bond upon which the plaintiffs in error were sued, the plaintiff, and Sweet & Wilson, his contractors, changed the contract plans and specifications referred to, and mentioned in the bond, in material points, without the knowledge or consent of the sureties, plaintiffs in error, and thereby released them from the obligation of the said bond. The first alteration to which attention is called is in the specifications for the plastering, where the figure "3" was substituted for the figure "2," as fixing the number of coats of plastering for the building. The two defendants, C. A. Sweet and C. S. Wilson, testified that this alteration, which is plain and palpable upon the face of the specifications, was made by the plaintiff

some week or ten days after the execution and delivery of the bond by plaintiffs in error, while the plaintiff and his daughter, Miss Minnie McGee, testified that the alteration was made at the time of the execution of the contract between the plaintiff and the defendants Sweet & Wilson; and as the verdict was for the plaintiff, we must, for the purposes of this review, consider the specifications as introduced in evidence, as the original specifications.

The next change in the plans and specifications to which attention is called is that the plans were drawn for a building facing north and east, and that by direction of the plaintiff the house was actually built facing south and west. That this change was made is clearly shown by the evidence, but it does not appear that any change was made on the face of the plans or specifications, nor does it appear that any change in the drawings or written specifications was necessary for that purpose. The logic of the position of the plaintiffs in error on this point is, that whereas Sweet & Wilson entered into a contract with the plaintiff to build a certain house according to plans and specifications, drawn by Mendelssohn and Fisher, of Omaha, and the plaintiffs in error entered into a penal bond conditioned that they would build that identical house, and, by direction of the plaintiff, they did not build that identical house, plaintiffs in error were thereby released from the obligation of their bond, and cannot be held for the failure of said Sweet & Wilson to build another and different house. The turning point is, Did the contemplated building, by reason of the premises, lose its identity? This question must be answered in the negative.

The other changes complained of, are, "An extra flight of stairs from kitchen to bedroom; inside finish of house was changed from white pine to yellow pine finish; change from No. 1 hardware to solid bronze hardware, and change of location of cistern." The first was not a change merely, but an "addition," and as such is amply provided for in

the first clause of the specifications. It was, moreover, the purpose and object of this clause of the specifications to provide for alterations and omissions in the work of the construction and finishing of the building. Doubtless this clause of the specifications was designed to meet and obviate the hardship of the decisions releasing sureties on account of small changes and alterations in the plans and specifications of buildings and other works. To give the language of the provision that effect when used in instruments such as that we are now considering, will work no injustice, but, on the contrary, conduce to a fair and equitable administration of justice. A careful examination of the specifications fails to show that they call for an inside finish of *white* pine, so that it reqires no change to make the finish of *yellow southern* pine, but simply an addition; and so also of bronze hardware.

We now come to the consideration of the matter of payments. The contract between the plaintiff and Sweet & Wilson provides for the payment by the former to the said contractors for the materials and work contracted for, of $300 for the barn when the same should be completed and finished; for the house, when the foundation is in and the frame erected, $1,000; when ready for plastering, $1,000; when finished woodwork is on, $1,000, and $500 when contract is completed and accepted by owner. The contract provided that the said house should be completed and finished by July 1, 1887, and the barn to be finished by April 15, 1887.

At the trial, upon his cross-examination as a witness, sworn and examined on his own behalf, the plaintiff testified that the first payment he made to Sweet & Wilson was $300, April 16, 1887; that he also paid them $15, April 25; $700, May 7; $300, May 16; $1,000, May 29; $35, May 29; $22, June 18; $295, June 18; $3, at the same date, and on the same date, $500; June 25, $300; $7.40 about the same date. He also testified that the barn

was completed and finished about the 1st of July; that it was not completed on the 16th day of April; that he paid the $300 at that date because Mr. Sweet claimed he needed the money and asked it as a favor, and that he did not consult the plaintiffs in error in regard to changing the times of payment to the contractors. Thereupon counsel for the defendants (plaintiffs in error) asked the witness the following question: Q. Don't you know when the foundation of the house was put in and the frame erected? To which question the plaintiff objected, as irrelevant and and not proper cross-examination, which objection was sustained.

C. S. Wilson, one of the contractors, sworn as a witness on the part of the defendants, testified that the foundation was put in and the frame-work erected for the house about May the 1st, according to his recollection. He was asked the following question, by counsel for defendants: Q. When was the second money you received from McGee on this contract? Which question was objected to by plaintiff, and the objection sustained; no ground of objection was stated.

This witness had previously testified as follows:

Q. When was this barn completed?

A. Along about—the barn was completed as well as I can recollect shortly after ——. We had received the three hundred dollars a little before the barn was completed.

Q. When did you receive the three hundred dollars?

A. April 16.

Q. The barn was not completed entirely till about the 21st, was it? (Objected to, as leading; sustained.)

Q. When was the barn finished? (Objected to, as irrelevant and immaterial, and as repetition; sustained.)

* * * * * * * * * *

Q. When was the foundation completed and the frame-work erected for this house? (Objected to, as irrelevant,

immaterial, and inadmissible under the pleadings, as far as the bondsmen are concerned; sustained.)

Q. When was the second money you received from Mr. McGee under this contract? (Objected to (no ground stated); sustained.)

BY THE COURT: This comes in as rebuttal testimony for Mr. McGee.

Q. BY MR. BATES: When was the foundation completed and the frame-work erected for this house? (Objected to, as irrelevant, immaterial, and inadmissible under the pleadings; overruled.)

A. About May the 1st, is my recollection.

It is to be regretted that the defendant Wilson was not allowed to testify fully as to the times when the barn was finished and when the foundation of the house was completed and the frame-work erected for the house; also, when the payment for the barn and the first payment of $1,000 on the house were made. As the evidence stands, it is proven that the first payment under the contract, to-wit, the $300 for the barn, was made before the barn was finished, and hence before the money was due under the terms of the contract. No advantage could be taken of this fact by the contractors themselves, but I think that it is otherwise in so far as the plaintiffs in error are concerned. All of the cases cited, or all that I have been able to find, follow the principle of law as stated by Brandt in his work on Suretyship and Guaranty, sec. 345: "Any dealings with the principal by the creditor, which amount to a departure from the contract by which the surety is bound, and which by possibility might materially vary or enlarge the latter's liability without his consent, generally operate to discharge the surety." To apply this principle to the case at bar, the plaintiffs in error were bound to the performance by Sweet & Wilson of the entire contract, as well for the completion of the barn as for the completion of the house, and any act of McGee that would release them from

a part of their contract or binding obligation of the bond, would release them from the whole. While the payment of the $300 for the barn remained in prospect, it was an inducement and stimulant to Sweet & Wilson to keep their contract inviolate and complete the barn according to its terms. It was the right of the plaintiffs in error that this stimulant and inducement should not be removed by the act of McGee, and their removal by him without their consent or approval before the completion of the barn released them from the obligation of the bond so far as it bound them for its completion. And although the barn and the house were separate buildings, the bond and its penalty is an entirety, and I understand it to be of the very nature of security that when, by the independent act of the creditor, a surety is released in part he is released in whole. But the fact stares us in the face that there are no allegations of pleading in the answer under which evidence of the payment above referred to was admissible or a verdict or a judgment following which could find, or adjudge, that the sureties were released thereby; and it has often been held in this as well as other courts that no finding or judgment will stand unless supported by a pleading.

At the close of the trial counsel for the defendants (plaintiffs in error), as appears by the record, applied to the court for "leave to amend their answer, alleging that plaintiff did not pay Sweet & Wilson at the time named in the contract," which was refused. This refusal of the court to permit plaintiffs in error to amend their answer in accordance with the evidence is assigned for error. Had application been made at the proper time to amend the answer so as to set up the payment by the plaintiff of the $300 for the stable before the stable was completed, and so before said money was due under the terms of the contract, the application should have been granted, as such amendment would make the answer applicable to and in accordance with evidence, which had been in part given by the

plaintiff himself while on the stand as a witness in his own behalf, and in part given by the defendant Wilson, without objection. But there was no evidence which would be applicable to an amendment such as was indicated by the application.

As to the question of the inadmissibility of evidence to prove the dates of the payments actually made on the work by the plaintiff under the pleadings as they stand, there can be no doubt, either upon the theory that such payments, or some of them, were made before they were due under the terms of the contract, or that they were delayed and withheld for an unreasonable time after they became due respectively.

The instructions 2 and 5 asked for by defendants (plaintiffs in error) and refused by the court, state the law correctly, abstractly considered, but were properly refused for the reason that there was no evidence before the court and jury, under the pleadings in the case, to which the same were applicable.

In addition to that which has already been said upon the point of the admitting and refusing to admit testimony there remains the consideration of the admitting in evidence of the records of the district court in the case of *Henry & Coatsworth v. Sweet & Wilson et al.;* also the answers and cross-petitions of the defendants in the case, together with the decree, and also the testimony of the clerk of said court as to who paid the judgment of Henry & Coatsworth.

It appears from the record, which was offered and received in evidence upon the trial, and is preserved in the bill of exceptions, that some time in the month of September, 1887, the Henry & Coatsworth Company, a corporation, filed its petition and commenced an action in the said district court of Gage county against C. G. Dorsey, Crump & Nicholson, Armacost & Co., Charles A. Sweet and Charles S. Wilson, partners as Sweet & Wilson, J. L.

McGee, E. G. Drake & Co., Frank Hall, and the Dempster Mill Manufacturing Company, defendants; the purpose and object of which action was to establish and foreclose a lien upon the said house and barn and the lots upon which they were situated, for certain building materials, set out in a schedule attached to said petition, furnished by the said Henry & Coatsworth Company to the said Sweet & Wilson, contractors, for the erection of said house and barn for the said J. L. McGee, under the contract therein referred to; that the defendants to said last mentioned action and petition, other than the said Sweet & Wilson and J. L. McGee, were made such for the reason that they and each of them had or claimed to have liens upon the said buildings and lots for material by them severally furnished to the said Sweet & Wilson, contractors as aforesaid, and by them used in the construction of said buildings; also, that on the 17th day of November, 1887, the said C. G. Dorsey appeared in said court by his attorneys and presented and filed his answer and cross-bill in said action, in which he alleged by way of admission the entering into the said contract by the said Sweet & Wilson with the said J. L. McGee for the erection of said house and barn, being the same buildings described in the petition of said Henry & Coatsworth Company, and for the furnishing of all the materials therefor; that in pursuance of said contract, and for the purpose of carrying it into effect, said defendants Sweet & Wilson purchased of the defendant Dorsey certain building materials, set out in the schedule attached to said answer and cross-bill; that said materials were furnished and were of the value therein named; with other allegations apt and pertinent to the claim of said Dorsey for the establishment and foreclosure of his lien upon the said buildings and lots for the amount and value of said materials.

It further appears from the said record, that on the 9th day of December, 1887, the said cause came on for a hear-

ing in the said court upon the petition of the said Henry & Coatsworth Company, plaintiff herein, the answer of defendant therein, J. L. McGee, the cross-petitions of defendants, the Dempster Mill Manufacturing Company, E. G. Drake & Co., C. G. Dorsey, Crump & Nicholson, and Armacost & Co., and the answers of the defendant J. L. McGee to said cross-petitions, and the evidence; the defendants Sweet & Wilson and Frank Hall, having failed to answer or demur to said petition and cross-petitions, the same were taken as confessed as to them; that there was a trial to the court upon the merits and final judgment rendered, etc.

The introduction of this record in evidence was objected to by the defendants (plaintiffs in error) as immaterial, incompetent, and irrelevant, which objection was overruled and the evidence admitted.

There were three motions for a new trial, one by all the defendants together, one by the defendants Sweet & Wilson, and one by the defendants Dorsey and Weston, plaintiffs in error, separately. Neither one of them contains as ground for a new trial the admission in evidence of the said record specifically. The one made by Dorsey and Weston contains, among other grounds, "errors of law occurring at the trial." Possibly under this head the question whether the court erred in overruling the objections to the admission of the said record in evidence might be inquired into. I find no reason for the exclusion of the record from the evidence, in so far as the defendant C. G. Dorsey is concerned. He is a party to the record; was in court when it was made up; he is therefore not a stranger to the proceedings of which said record is evidence and he is bound thereby. (See Greenleaf on Evidence, vol. 1, sec. 522.) But Weston was a stranger to the said record, and by the same authority it was inadmissible as evidence against him. But to render the error of the admission of this record in evidence against him available, he

must have moved for a new trial separate from and disconnected with Dorsey or any party to the said record. This he did not do. The reason for this is, that, to make a ruling, judgment, and decision of a trial court overruling and denying a motion a ground of reversal on error, the motion must be presented to the court in the very terms in which it ought to be sustained and allowed. This is not the case where a motion is made jointly by two parties, one of whom is not entitled to a favorable ruling thereon, although the other one is entitled to such ruling.

It does not follow from the above rule that a trial court may not, where a motion is divisible, in its discretion, allow it in part and overrule it in part. But a failure or refusal to do so is not reversible error.

Counsel for plaintiffs in error filed a supplemental brief, in which they take the ground that it was the duty of the plaintiff to retain the money, which, by the terms of his contract with Sweet & Wilson, he was to pay them in the several installments therein expressed, as the work progressed, until the expiration of sixty days after the same became due, by reason of the completion of so much of the work of the buildings, and that by making these payments sooner the plaintiffs deprived the plaintiffs in error of an indemnity for their obligation upon their bond, and thereby released them, citing the case of *Taylor v. Jeter*, 23 Mo., 244. Counsel, by this supplemental brief, but restate the position already disposed of with but a slight variation in its application. There was evidence before the court, of the date of the payments by the plaintiff to Sweet & Wilson, of the sum of $300 for the barn, and that the same was not then due, for the reason that the barn was not then completed; and, as we have already seen, this evidence was unavailable to the plaintiffs in error for the want of allegations of pleading, to which it was applicable. We have already seen that the several amounts paid by the plaintiff to Sweet & Wilson, together with the dates of such payments, re-

spectively, were testified to by the plaintiff, and that, upon the theory that such payments, or some of them, were delayed and not made at the time named in the contract, plaintiffs in error applied to the court for leave to amend their answer by inserting the allegation that plaintiff did not pay Sweet & Wilson at the time named in the contract; but no application was made to so amend the answer as to let in evidence of premature payments, either for the purpose of sustaining the theory contended for by counsel in the brief, or the supplemental brief. I am, upon the whole case, unable to find reversible error in the record. The judgment of the district court is therefore

AFFIRMED.

THE other judges concur.

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LEVI KAUFMAN ET AL. V. WILLIAM COBURN ET AL.

[FILED NOVEMBER 5, 1890.]

1. **Insolvency: SURETIES: TRANSFER OF PROPERTY TO.** A firm engaged in the mercantile business, being indebted in about the sum of $18,000, for which A, B, and C were separately liable as sureties for about equal portions of said debt, sold their stock of goods, including real estate and other property, to said sureties, who jointly assumed all the debts for which they were severally liable. *Held*, That this was a sale and not an assignment, and if made in good faith would be sustained.

2. ——: ——: **LIABILITY.** The sureties, so far as appears, did not take the property for the benefit of one or more creditors of the debtor other than themselves, but they became absolutely liable for the debts which they had assumed, whether the property received was of sufficient value to pay said debts or not. *Bonns v. Carter*, 20 Neb., 566, distinguished.

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

R. S. Ervin, and *Ballet, Ervin & Points*, for plaintiffs in error, cited: *Davis v. Scott*, 27 Neb., 642; *Schars v. Barnd*, Id., 94; *Harkrader v. Leiby*, 4 O. St., 602; *Carson v. Byers*, 67 Ia., 606–11; *Lininger v. Raymond*, 12 Neb., 19–25; *Kieth v. Heffelfinger*, Id., 497; *Switz v. Bruce*, 16 Id., 466; *Whitfield v. Stiles*, 24 N. W. Rep. [Mich.], 119; *Grimes v. Farrington*, 19 Neb., 44; *Deitrich v. Hutchinson*, 20 Id., 52; *Merrill v. Wedgwood*, 41 N. W. Rep., 149; *Sloan v. Coburn*, 26 Neb., 607; *York Bank v. Carter*, 38 Pa. St., 446; *Chase v. Walters*, 28 Ia., 460; *Dart v. Farmers Bank*, 27 Barb. [N. Y.], 337; *Funk v. Staats*, 24 Ill., 632.

John L. Webster, A. C. Troup, Chas. Ogden, Cavanaugh, Crane & Atwell, and *W. O. Bartholomew, contra*, cited: *Bonns v. Carter*, 20 Neb., 566; *Wallace v. Wainwright*, 87 Pa. St., 263; *Harkrader v. Leiby*, 4 O. St., 602; *Kerbs v. Ewing*, 22 Fed. Rep., 693; *Freund v. Yuegerman*, 26 Id., 812; *Kellog v. Richardson*, 19 Id., 70; *White v. Cotzhausen*, 129 U. S., 329; *Winner v. Hoyt*, 66 Wis., 227; *Chase v. Walters*, 28 Ia., 460; *McKinnon v. Lumber Co.*, 63 Tex., 31; *Bridge v. Eggleston*, 14 Mass., 250; *Groves v. Steel*, 2 La. Ann., 480; *Chase v. Chase*, 105 Mass., 388; *Landecker v. Houghtaling*, 7 Cal., 392; *McLane v. Johnson*, 43 Vt., 48; *Wyckoff v. Carr*, 8 Mich., 44; *Taylor v. Robinson*, 2 Allen [Mass.], 562; *Dickson v. Rawson*, 5 O. St., 218; *Loudenback v. Foster*, 39 Id., 203; *Grimes v. Grimes*, 6 S. W. Rep. [Ky.], 333; *Willis v. Yates*, 12 Id. [Tex.], 232; *Winner v. Hoyt*, 66 Wis., 227; *Burrows v. Lehndorff*, 8 Ia., 96; *Bank v. Crittenden*, 23 N. W. Rep. [Ia.], 646; *Straw v. Jenks*, 43 Id. [Dak.], 911; *Holt v. Bancroft*, 30 Ala., 193; *Palmour v. Johnson*, 10 S. E. Rep. [Ga.], 500; *Preston v. Spaulding*, 120 Ill., 208; *Martin v. Hausman*, 14 Fed. Rep., 60; *Perry v. Corby*, 21 Id., 737; *Pyle v. Warren*, 2 Neb, 241; *Ransom v. Schmela*, 13 Id., 73; *Jamison v. McNally*, 21 O. St., 295; *Aultman v. Heiney*,

59 Ia., 654; *James v. Hetherington*, 45 Id., 681; Wait, Fraudulent Conv. [2d Ed.], sec. 379.

MAXWELL, J.

This is an action of replevin brought in the district court of Douglas county, and as the petition and answer purport to set out the facts as claimed by each party, they are hereby given. The amended petition is as follows:

"The plaintiffs complain of the defendant and allege for cause of action that they are the absolute and unqualified owners of the goods, wares, and merchandise described as follows, to-wit: All the goods, chattels, wares, and merchandise, consisting of the stock of tobacco, pipes, cigar-holders, cigars, fancy articles, cigarettes, including all the stock of goods, chattels, wares, and merchandise contained in the building and place of business No. 207 South Fifteenth street, Omaha, Nebraska, including all the fixtures, show cases, counters, and shelving, and including all the articles, goods, and chattels contained in the basement and storeroom of said building, No. 207 South Fifteenth street. All of the goods, chattels, wares, and merchandise, consisting of tobacco, pipes, canes, cigars, cigar-holders, fancy articles, cigarettes; also all fixtures, including counters, shelving, show cases, and including all articles, goods, and chattels contained in the storeroom and basement in the building, No. 216 South Thirteenth street, Omaha, Nebraska. All of the stock of goods, wares, and merchandise, consisting of tobacco, pipes, fancy articles, cigars, cigar-holders, cigarettes, and cigarette-holders; also the fixtures, including counters, shelving, show cases, including all the goods, chattels, wares, and merchandise contained in the storeroom of No. 1009 Farnam street, Omaha, Nebraska; all the said goods above described being in the city of Omaha, Douglas county, Nebraska.

"Second—Plaintiffs allege that said goods, wares, and merchandise, above described, are of the value of $10,000.

"Third—That the defendant wrongfully and unlawfully detains said goods, wares, and merchandise from the possession of plaintiffs, and has wrongfully detained the same for ——— days, to the plaintiffs' damage in the sum of $10,000."

Afterwards the Bank of Commerce was admitted as a defendant with Coburn, and they filed a joint answer as follows:

"Now come said defendants and for answer to plaintiff's petition filed herein deny each and every allegation therein contained.

"Second—That on or about the 20th day of February, 1888, David Kaufman and Isaac Kaufman, copartners in trade and doing business in the city of Omaha, Nebraska, under the firm name and style of Kaufman Brothers, were indebted to the said Bank of Commerce in the sum of $6,600 in two causes of action arising upon two certain promissory notes, one for the sum of $3,000 and interest thereon, and the other for $4,000 and interest, on which there was a credit of $400, and on said day the said Bank of Commerce commenced two actions by attachment against the said Kaufman Brothers in the district court in and for Douglas county, and caused an order of attachment to be issued in each of said cases, one for the sum of $3,000 and interest, and the other for $3,600 and interest, and delivered the same to the defendant Wm. Coburn, who was at that time, and all the time hereinafter mentioned has been and now is the sheriff of said Douglas county, Nebraska; that under and by virtue of said orders and in pursuance of the command thereof the said defendant, Wm. Coburn, sheriff, levied upon the goods, wares, and merchandise, and took the same into his custody; that said goods and chattels were at the time of said levy the goods and chattels of said Kaufman Brothers and were liable to be lev-

ied upon for the satisfaction of said debts and taken under said orders of attachment for the satisfaction of the same.

"Third—That on the 11th day of February, 1888, one Darwin H. Hull commenced an action by attachment against said Kaufman Brothers in the county court of said Douglas county, and caused an order of attachment for the sum of $367.50 to be issued in said cause and delivered to the defendant William Coburn, sheriff; that under and by virtue of said order, and in pursuance of the command thereof, said defendant Wm. Coburn, sheriff, levied upon the goods above described, subject to the levy of the attachment first above described, and took the same into his custody; that said goods were at the time of said levy the goods and chattels of the said Kaufman Brothers, David Kaufman and Isaac Kaufman, and were liable to be levied upon for the satisfaction of said last named debt, and taken under said order of attachment for the satisfaction of the same; that afterwards and on the 19th day of March, 1888, a judgment was rendered in said county court in said case in favor of the plaintiff and against said Kaufman Brothers for the sum of $367.50 and costs in the sum of $6.10. Since the issuing of said attachments aforesaid, and, to-wit, on or about the 8th day of January, 1889, there has been paid on the note for $4,000 to the Bank of Commerce, above referred to, the sum of $1,000."

The above amended answer was filed at the close of the trial The cause having been tried on a general denial, the court instructed the jury as follows:

"This is an action brought by the plaintiffs to recover from the defendant Coburn, as sheriff of this county, the possession of certain goods, wares, and merchandise, to which the plaintiffs claim they were entitled, and which had been taken by the sheriff under orders of attachment sued out of this court in actions commenced by creditors of Kaufman Bros. against them. The plaintiffs base their right of recovery herein upon the instruments which have

been introduced in evidence, purporting to be a bill of sale of the property in controversy, to them. You are instructed:

"I. That the written instruments referred to, which were introduced in evidence by the plaintiffs as evidence of their title to the property in controversy, was, in effect, as shown by the testimony, an assignment for the benefit of creditors, and as such is void under our statute, and conveyed no title to the plaintiffs in this action as against other creditors. It is your duty, therefore, to return a verdict for the defendants, and I hand you a verdict, which you will sign by your foreman and return the same into court."

The jury returned a verdict as follows:

"We, the jury duly impaneled and sworn to try the issue joined between the said parties, do find for the said defendants, and do find that defendants had a special interest in and were entitled to the possession of the property at the time of the commencement of this suit, and we find the interest of the Bank of Commerce to be $5,055, and of Wm. Coburn, sheriff, $909.83; total, $5,964.83."

A motion for a new trial was thereupon filed, one of the grounds of which was that the damages were excessive; the bank thereupon remitted from the verdict the sum of $205, whereupon the motion for a new trial was overruled and judgment entered on the verdict.

The testimony tends to show that prior to the 8th day of February, 1888, David Kaufman and Isaac Kaufman were engaged in business in the city of Omaha under the name of "Kaufman Bros." It also appears that they were largely indebted, and that Edgar P. Davis, Samuel Rees, and Levi Kaufman had each become security for Kaufman Bros. in a very large amount. These parties, to save themselves from loss, claimed to have purchased the stock of goods and other property of Kaufman Bros., who thereupon executed the following instruments:

"This agreement, made and entered into this 8th day of

February, A. D. 1888, by and between Kaufman Bros., consisting of David Kaufman and Isaac Kaufman, of the first part, and Levi Kaufman, Edgar P. Davis, and Samuel Rees, parties of the second part, witnesseth:

"That the said Kaufman Bros., David and Isaac Kaufman as aforesaid, are to transfer, sell, and set over unto Levi Kaufman, Edgar P. Davis, and Samuel Rees all of our personal property, consisting of all of the stock of goods, wares and merchandise, chattels of every kind and nature contained in the three storerooms and basements of the store buildings No. 207 South Fifteenth street, No. 216 South Thirteenth street, and 1009 Farnam street, Omaha, Nebraska, also all of our real estate situated in Douglas county and Sarpy county, Nebraska, and Monona county, Iowa, except the homestead of David Kaufman, said real estate being in the name of David Kaufman.

"In consideration and in full payment of the indebtedness due from us, the said Kaufman Bros., to the said Levi Kaufman, Edgar P. Davis, and Samuel Rees, of $3,000 cash in hand, the receipt whereof is hereby acknowledged, and we, the said Levi Kaufman, Edgar P. Davis, and Samuel Rees, do hereby bind ourselves, our heirs, executors, and administrators, to hold the said Kaufman Bros. harmless from all liability on notes which we have either indorsed for them, or signed with them, or put up collateral security for, and of which we, before the execution of this agreement, guaranteed the payment.

"Witness our hands this 8th day of February, A. D. 1888.

KAUFMAN BROS.,
"By DAVID KAUFMAN.
"DAVID KAUFMAN.
"ISAAC KAUFMAN.
"EDGAR P. DAVIS.
"SAMUEL REES,
"By E. P. DAVIS.
"LEVI KAUFMAN,
"By R. S. ERVIN.

"We, Levi Kaufman and Samuel Rees, hereby accept, affirm, and ratify the above and foregoing agreement.

"SAMUEL REES.

"LEVI KAUFMAN.

"This indenture made this 8th day of February, A. D. 1888, between Kaufman Bros., consisting of David Kaufman and Isaac Kaufman, doing business under the firm name of Kaufman Bros., of Douglas county, Nebraska, parties of the first part, and Levi Kaufman, Edgar P. Davis, and Samuel Rees, of the second part, witnesseth:

"That the said parties of the first part, in consideration of the sum of $20,000, in hand paid by the parties of the second part, have bargained and sold, and by these presents do grant and convey unto the parties of the second part, their executors, administrators, and assigns, the following described goods and chattels, to-wit, the said personal property hereby sold as aforesaid being now owned, kept, and used by the parties of the first part at the buildings and places of business known as Kaufman Bros.' cigar store, and located at Nos. 207 South Fifteenth street, 216 South Thirteenth street, and 1009 Farnam street, in the city of Omaha, Nebraska, and consisting of all and singular the personal property of the party of the first part now in and belonging to said places of business respectively, and consisting principally of

"First—All the goods, chattels, wares, and merchandise, consisting of the stock of tobacco, pipes, cigar-holders, fancy articles, cigars, cigarettes, and all of the stock of goods, chattels, wares, and merchandise owned by us and kept by us in the building and place of business No. 207 South Fifteenth street, Omaha, Nebraska; also all the fixtures, show cases, counters, shelving, including all articles, goods, and chattels owned by us and used in running the business and contained in the store and basement No. 207 South Thirteenth street.

"Second—All the stock of goods, chattels, wares, and merchandise, consisting of tobacco, pipes, cigar-holders,

fancy articles, cigars, cigarettes; also all fixtures, including counters, shelving, show cases, including all articles, goods, and chattels owned by us and contained in the storerooms and basement No. 216 South Thirteenth street, Omaha, Nebraska.

"Third—All of the stock of goods, wares, merchandise, consisting of tobacco, pipes, fancy articles, cigars, cigarettes, cigar-holders; also the fixtures, including counters, shelving, show cases, including all the goods and chattels owned by us and kept in the storerooms No. 1009 Farnam street, Omaha, Nebraska.

"The intention being to sell and convey to the said Levi Kaufman, Edgar P. Davis, and Samuel Rees all of our personal property of every kind and nature in the premises hereinbefore described.

"Fourth—All the interest of the said parties of the first part as seised in the premises above described, to-wit: No. 207 South Fifteenth street, No. 216 South Thirteenth street, Omaha, Nebraska, and No. 1009 Farnam street, Omaha, Nebraska, and all of the estate, title, and interest of the said parties of the first part in and to said premises.

"The condition of the above sale is such, that whereas, the said Levi Kaufman stands and is security for $6,000 on the notes of the said Kaufman Bros., due the Bank of Commerce, also one note of $1,500 and a note of $500 to U. S. National Bank, all drawing interest at the rate of ten per cent—the date when said notes were given and the date upon which they fall due cannot now be given by the parties of the first part, and also cash loaned the said Kaufman Bros. in the sum of $300 by the said Levi Kaufman; and

"Whereas, the said Edgar P. Davis indorsed and stands security for the said Kaufman Bros. for two notes for the sum of $750 each, one note for $1,074.62, also three notes, $2,100, $1,000, $1,000 respectively, and cash loaned in the sum of $250, for which the said Davis stands security and indorsed for the said Kaufman Bros.; and

"Whereas, the said Samuel Rees stands security and indorsed notes for the said Kaufman Bros. as follows, to-wit: one note for $2,100; two notes, one for $1,247 and one for $1,000; also the said Rees has loaned Kaufman Bros. cash in the sum of $666:

"Now, whereas, the said Kaufman Bros. have failed to pay said notes and cannot meet the payment of said notes, now, therefore, the said Kaufman Bros. do hereby sell and transfer the above described property to the second parties herein for the payment of said notes and indebtedness of the said Kaufman Bros. to the said Levi Kaufman, Edgar P. Davis, and Samuel Rees:

"It is expressly agreed that the said second parties may take possession of said goods, chattels, and wares and merchandise, and their possession is their authority.

"In witness whereof, we have hereunto set our hands and seals this 8th day of February, A. D. 1888.

"KAUFMAN BROS.
"By DAVID KAUFMAN.
"DAVID KAUFMAN.
"ISAAC KAUFMAN.

"Witness: R. S. ERVIN."

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

"Be it remembered that on this 9th day of February, A. D. 1888, before me, G. H. Payne, a notary public in and for said county, personally came David Kaufman and Isaac Kaufman, and to me known to be the identical persons described in and who executed the above and foregoing instrument as grantors, and acknowledged said instrument to be the voluntary act and deed of Kaufman Bros., and to be their voluntary act and deed.

"Witness my hand and seal this 9th day of February, A. D. 1888.

[SEAL.] G. H. PAYNE,
"*A Notary Public in and for Douglas County, Neb.*"

The debts owing by Kaufman Bros., for which these parties were security, so far as appears, were *bona fide*, and the plaintiffs in error agreed to assume the same upon the consideration that they were to receive the property described in the foregoing agreement. It is not a case of a trust where the parties agreed to sell the property and pay the debts; but they assumed the debts for which they were security. They did not receive the property for the benefit of one or more of the creditors of Kaufman Bros. other than themselves but personally assumed the burden. In all probability they saw that Kaufman Bros. would be unable to pay the debts for which they were security unless an arrangement of that kind was made, and hence that they would be called upon each for himself to pay the debts for which he was security. There is testimony in the record tending to show that Kaufman Bros. were popular salesmen, and that after the transfer of the places of business to the plaintiffs in error the business fell off considerably, and in order to retain the business the plaintiffs again employed the Kaufman Bros. as salesmen. Whether or not this testimony is true is a question for the jury, but if true it would afford a satisfactory reason for the retention of the Kaufman Bros. to assist in conducting the business.

The stock is shown to have been worth about $12,000, and the real estate and other property conveyed less than $8,000—probably not to exceed $6,000, so that if that testimony is true the property conveyed was not in excess of the amount of the consideration. The obligations assumed evidently were not before the parties when the bill of sale and contract were drawn and the debts assumed probably are only estimated as to amounts and dates. A mistake in this regard, however, whereby the consideration would be less than stated, is a matter of defense.

The case differs materially from that of *Bonns v. Carter*, 20 Neb., 566, where a transfer was made to a creditor for

the payment of creditors other than himself, and the transfer was held to be in trust and fraudulent as to creditors. The court erred in the instruction given to the jury, as the questions of fact should have been submitted to them.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

STEPHEN ROBERTS v. M. V. MOUDY.

[FILED NOVEMBER 5, 1890.]

1. **Exemptions:** HEAD OF FAMILY: DIVORCED HUSBAND IS. The wife of one M. removed to Wyoming, taking her children, a boy and a girl, with her, and there obtained a divorce from M., her husband, and was awarded the custody of the children. The testimony tended to show that M., notwithstanding the divorce, continued to furnish support for his children. *Held*, That he was the head of a family and entitled to the benefit of the exemption law.

2. ———. The library and implements of a professional man, a resident of the state, are exempt under sec. 539 of the Code, whether he is the head of a family or not.

ERROR to the district court for Nance county. Tried below before POST, J.

E. V. Clark, and *Sullivan & Reeder*, for plaintiff in error:

The district court of Wyoming, where the wife and children were domiciled, awarded the custody of the latter to the wife, and that decree is still in force. (Cooley, Const. Lim., 404; *Kline v. Kline*, 10 N. W. Rep., 825.) De-

fendant in error is not the head of the family because he has formed no part thereof since the divorce. (*Rock v. Haas*, 110 Ill., 528; *Tyson v. Reynolds*, 3 N. W. Rep., 469.)

W. F. Critchfield, and *M. V. Moudy, contra:*

The property should have been appraised and the exempt portion selected. (*Metz v. Cunningham*, 6 Neb., 90; *Chesney v. Francisco*, 12 Id., 627; *Cunningham v. Conway*, 25 Id., 617.) Infants are legally incapable of choosing a domicile. (5 Am. & Eng. Encyc., 861 [N. 3], 862–6.) Even had the district court of Wyoming authority to grant the divorce, the children are not bound by its decree. (*In re Bort*, 25 Kan., 308; *People v. Allen*, 40 Hun [N. Y.], 611; 5 Am. & Eng. Encyc., 836–7.) Abandonment of the husband by wife and children does not take away his exemption right. (*Dorrington v. Meyers*, 11 Neb., 391.) This right belongs to him because of his own residence, and not that of his family. (*Dobson v. McClay*, 2 Neb., 8; *Chesney v. Francisco, supra.*)

MAXWELL, J.

On September 14, 1886, the plaintiff in error was the sheriff of Nance county, and had for collection an execution issued out of the district court of Buffalo county against M. V. Moudy, the defendant in error. Moudy was a practicing lawyer of Nance county, and the execution was levied upon his law library and other property used by him in the practice of his profession. Moudy gave a redelivery bond to the sheriff and retained possession of the property levied upon.

In April, 1887, the plaintiff in error sought to sell the property upon which the levy had previously been made when Moudy alleged that he was the head of a family, and filed an inventory of his assets with the sheriff, who

refused to recognize his right to the benefit of the exemption law. Moudy thereupon commenced an action to enjoin the sale, and also one to cause the sheriff to appraise and set aside the property as exempt. Both actions were commenced March 30, 1888, and were, on the motion of defendant in error, subsequently consolidated. A temporary injunction was granted, which, on final hearing, was made perpetual, and at the same time a peremptory writ of *mandamus* was awarded against Roberts and the property appraised and awarded to Moudy.

The testimony tends to show that in the year 1875 Moudy was married in Wyoming territory; that two children were the fruit of this marriage. In the year 1878 or 1879 his wife returned to her father's home in Wyoming, taking the children with her, and in 1880 she procured a divorce from her husband, and in the decree was awarded the custody of the children. Moudy testifies, however, that he has continued to furnish means for the support of his children. There is no denial of this testimony in the record, except such as may be inferred from the decree of divorce. There is testimony, therefore, tending to show that he is the head of a family and entitled to exemption under the statute.

Under section 530 of the Code "the library and implements of any professional man" are exempt whether he is the head of a family or not.

Nearly all the property levied upon in this case was such as pertained to Moudy's law office, and was exempt under the statute.

The judgment of the court below is right and is

AFFIRMED.

THE other judges concur.

CHICAGO, B. & Q. R. CO. v. MARY HOGAN.

[FILED NOVEMBER 5, 1890.]

Railroads: FENCING IN CITY LIMITS. A railroad company is not required to fence its right of way within the limits of a city, town, or village. And where the larger portion of its depot and station grounds are within such limits, the company is not required to fence that part of such grounds extending outside of the city limits, and upon which abuts a platted addition to such city, when it appears that such grounds are constantly used, and are necessary for the proper transaction of its business as a common carrier.

REHEARING of case reported 27 Neb., 801. For contentions of counsel, see former report.

Marquett & Deweese, for plaintiff in error.

Sawyer & Snell, contra.

NORVAL, J.

This case was reversed on a former hearing and a rehearing granted. We have again considered the questions involved and found no reason to change the views expressed in the former opinion prepared by Judge MAXWELL, that, under the agreed statement of facts, the railroad company was not required to fence its right of way at the point where the plaintiff's horse was killed, and, as the animal was killed without the fault or negligence of the company's employes, the defendant was not liable for the loss. The greater portion of the defendant's depot and station grounds at the city of Lincoln are within the corporate limits; the remainder of such grounds, while not within the corporate limits, extends along a laid out and platted addition to Lincoln, known as "West Side

Addition." This addition had several houses thereon, which were occupied by owners and tenants. Numerous tracks had been constructed through said depot grounds, which had been used by the company for many years, and which tracks and depot grounds were necessary for the proper transaction of its business as a common carrier. The horse entered upon the defendant's right of way and was killed at a point within that part of its depot or station grounds which extend outside of the city limits. No fence had been erected on either side of the defendant's tracks at that point.

Sec. 1, art. 1, ch. 72, Comp. Stats., expressly exempts a railroad company from fencing its right of way within the limits of a city, town, or village. To have fenced that part of the depot grounds not within the city limits, would have required the construction of cattle guards and wing fences across these grounds. It is stipulated by the parties that it would be inconvenient and unsafe to employes of the road if cattle guards and fences were erected there. Such guards within station grounds could not be otherwise than exceedingly dangerous to those whose duty it is to attend to the switching of cars. This work of necessity is done at stations, and freight cars must be coupled and uncoupled by a person standing on the ground. To perform such labor with cattle guards constructed across the tracks, within station grounds, would not only be perilous to the life and limb of the employes, but would greatly interfere with the proper discharge of its duties as a carrier. It is not believed that the legislature contemplated or intended that a railroad company should fence that part of its station grounds extending outside of the limits of a city, town, or village, when such grounds are necessary for the proper transaction of its business as a common carrier. The conclusion we have reached is sustained by the following authorities: *Davis v. B. & M. R. Co.*, 26 Ia., 553; *Durand v. C. & N. W. R. R.*, Id.,

559; *L. & I. R. Co. v. Shriner*, 6 Ind., 141; *I. & C. C. R. Co. v. Oestel*, 20 Id., 231; *Railroad Co. v. Rowland*, 50 Id., 349; *C. R. & Ft. Wayne R. Co. v. Wood*, 82 Id., 598; *I. R. Co. v. Christy*, 43 Id., 143; *G. & C. R. Co. v. Griffin*, 31 Ill., 303; *Flint & P. M. R. Co. v. Lull*, 28 Mich., 510; *McGrath v. D. M. & M. R. Co.*, 24 N. W. Rep. [Mich.], 854; *Lloyd v. Pac. R. Co.*, 49 Mo., 199; *I. B. & W. R. Co. v. Quick*, 9 N. E. Rep., 789; *C. & G. T. R. Co. v. Campbell*, 11 N. W. Rep., 152. As there can be no recovery in this case, the judgment of the district court is reversed and the action

DISMISSED.

THE other judges concur.

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C. C. BURR ET AL. v. M. F. LAMASTER.

[FILED NOVEMBER 5, 1890.]

1. **Party Walls: INCUMBRANCES.** Where a person purchases a vacant lot which supports the half of the wall of the building erected on the adjoining lot, and such purchaser is, by the terms of a previous wall agreement entered into by his grantor, obliged to pay a part of the costs of the wall in order to use it, such agreement and wall constitute an incumbrance.
2. **A covenant against incumbrances** covers incumbrances unknown to the purchaser, as well as those known.

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

Pound & Burr, for plaintiffs in error, cited: *Chapman v. Kimball*, 7 Neb., 399; *Post v. Campau*, 42 Mich., 90; *Fritz v. Pusey*, 31 Minn., 368; *Prescott v. Trueman*, 4 Mass., 630; *Mitchell v. Warner*, 5 Conn., 527; *Carter v. Denman*, 3 Zab. [N. J.] 273; *Bronson v. Coffin*, 108 Mass.,

175; *Cary v. Daniels*, 8 Met. [Mass.], 482; *Huyck v. Andrews*, 113 N. Y., 85; *Roche v. Ullmann*, 104 Ill., 1; *Sharp v. Cheatham*, 88 Mo., 498; *Richardson v. Tobey*, 121 Mass., 457; *Dowling v. Henning*, 20 Md., 179; *Eno v. Vecchio*, 4 Duer [N. Y.], 53; *Bloch v. Isham*, 28 Ind., 37; *Ingalls v. Plamondon*, 75 Ill., 123; *Platt v. Fggleston*, 20 O. St., 414; *Keteltas v. Penfield*, 4 E. D. Smith [N. Y.], 134; *Savage v. Mason*, 3 Cush. [Mass.], 500; *Andrea v. Haselline*, 58 Wis., 395; *Haslett v. Sinclair*, 76 Ind., 488; *Maine v. Cumston*, 98 Mass., 317; *Brown v. McKee*, 57 N. Y., 684; *Spurr v. Andrew*, 6 Allen [Mass.], 420; *Lamb v. Danforth*, 59 Me., 322; *Russ v. Steele*, 40 Vt., 310; *Wilson v. Cochran*, 46 Pa. St., 233; *Bank v. Hill*, 48 Ind., 52; *Beach v. Miller*, 51 Ill., 206; *Kellogg v. Malin*, 50 Mo., 496; *Haynes v. Young*, 36 Me., 557; *Kellogg v. Ingersoll*, 2 Mass., 101; *Butler v. Gale*, 27 Vt., 739; *Hubbard v. Norton*, 10 Conn., 422; Rawle, Cov. for Title [5th Ed.], 79, 81–2; *Clark v. Conroe*, 38 Vt., 469; *Gerald v. Elley*, 45 Ia., 322; *Butt v. Riffe*, 78 Ky., 352; *McGowen v. Myers*, 60 Ia., 256; *Blake v. Everett*, 1 Allen [Mass.], 248; *Cathcart v. Bowman*, 5 Pa. St., 319; *Morgan v. Smith*, 11 Ill., 199; *Ginn v. Hancock*, 31 Me., 42; *Rosenberger v. Kellar*, 33 Gratt. [Va.], 489; *Mackey v. Harmon*, 34 Minn., 168; *Giles v. Dugro*, 1 Duer [N. Y.], 331; *Mohr v. Parmelee*, 43 N. Y., 320; 2 Washb., R. P. [4th Ed.], 300, 363; 3 Id., 468, 470, 474; *Mitchell v. Stanley*, 44 Conn., 312; *Roberts v. Levy*, 3 Abb. Pr., (N. S.) [N. Y.], 311; *Bertram v. Curtis*, 31 Ia., 46; *Cole v. Hughes*, 54 N. Y., 444; *Hendricks v. Starks*, 37 N. Y., 106.

O. P. Mason, contra, cited: Rawle, Covenants for Title, 79, 80; *Whitbeck v. Cook*, 15 Johns. [N .Y.], 483; *Vaughn v. Stuzaker*, 16 Ind., 340; *Goodtitle v. Aiker*, 1 Burr. [Eng.], 133; *Coretyou v. Van Brundt*, 2 Johns. [N. Y.], 357; *Lewis v. Jones*, 1 Pa., 336; *Peck v. Smith*, 1 Conn.,

103, 147; *Hendricks v. Stark*, 37 N. Y., 106; *Waterman v. Van Every*, 3 Alb. L. J., 304; *Ogden v. Jones*, 2 Bosw. [N. Y.], 685; *Ingalls v. Plamondon*, 75 Ill., 118; 2 Washb., R. P. [3d Ed.], 275; Bouvier's Dic., "Party Wall," and authorities cited; *Walters v. Pfeil*, 1 Mood. & M. [Eng.], 362; 3 Kent's Com., 437; *Partridge v. Gilbert*, 15 N. Y., 601; *Andrae v. Haseltine*, 58 Wis., 395; *Sanders v. Martin*, 2 Lea [Tenn.], 213; *Brooks v. Curtis*, 50 N. Y., 639; *McGittigan v. Evans*, 8 Phila., 264.

NORVAL, J.

On the 8th day of May, 1886, the defendant, Milton F. Lamaster, was the owner of lots 7 and 8, in block 40, in the city of Lincoln, and E. W. Baldwin and G. S. Baldwin were the owners of lot 9, in said block. On said day the said Lamaster and the Baldwins entered into the following contract for a party wall between said lots 8 and 9:

"Articles of agreement made and concluded this eighth day of May, 1886, by and between E. W. Baldwin and G. S. Baldwin, party of the first part, and Milton F. Lamaster, party of the second part, witnesseth:

"That whereas, said parties of the first part are the owners of lot 9, block 40, in the city of Lincoln, in the county of Lancaster, and state of Nebraska; and whereas, said party of the second part, is the owner of lot 8, block 40, in the said city of Lincoln, which lot joins said lot 9, belonging to said first parties, on the west side; and

"Whereas, said first parties contemplate building upon their said lot nine a three-story brick store building, and one wall of which would lie along the west of said lot, adjacent to said lot eight, belonging to the party of the second part:

"Now, therefore, it is hereby mutually covenanted and agreed by and between the parties hereunto, that said first

parties shall build said wall so that the center of the same shall be upon the dividing line between said lots eight and nine, in said block forty, in the city of Lincoln, Lancaster county, Nebraska, and that the same shall be and remain a party wall for the common use of the parties hereunto.

"And it is further agreed that said parties shall construct said wall in a good, durable, and sufficient manner, the wall of basement being one foot ten inches in thickness, with a footing of concrete one foot thick by three feet wide, and a footing of large stone upon this; that the wall of the first story shall be four bricks, or sixteen inches in thickness, and that the remainder of wall shall be three bricks, or thirteen inches in thickness; that said wall shall contain flues properly built and arranged for the accommodation and use of the party of the second part; that there shall be at the height of each story proper joist holes left in said wall and in the west side thereof, for the accommodation of the party of the second part, and that said holes shall be filled with brick set on end so they can be taken out when required, and that said holes shall be made directly opposite to the ends of the joists of said building to be erected by the parties of the first part. It is also further agreed that in case said first parties do not build on the whole of said lot 9, and that their wall does not extend to the full depth of lot 9, and that their wall does not extend to the full depth of said lot, and if at any time either of the parties hereunto desires to extend said party wall, they shall be at liberty to do the same subject to all the terms and conditions of this contract as to thickness and character of wall, and as to the rights and privileges of both parties hereunto.

"It is also mutually agreed that when the party of the second part shall join to or make use of said party wall he shall pay to said first parties for the same a sum not exceeding the first cost thereof, or the portion thereof so used, to be determined at that time by two disinterested

persons or arbitrators, one to be chosen by the party of the first part and one by the party of the second part, and in case of disagreement these two arbitrators shall choose a third person as referee, and the decision of these three persons as to the value of said wall shall be final.

"And in case of the extension of said party wall by either of the parties hereunto, then the other party shall, upon his joining to or using said wall, pay to the party building the same one-half the value thereof, the same to be determined as hereinbefore provided.

"It is further agreed by and between the parties hereunto that the several covenants and agreements herein contained shall extend to and be binding upon their several heirs, executors, and administrators and assigns.

"In witness whereof, we have set our hands this seventh day of May, 1886.

"In presence of

"Party of the first part:

"G. S. BALDWIN.

"E. W. BALDWIN.

"Party of the second part:

"M. F. LAMASTER."

The above contract was duly acknowledged and on the 19th day of May, 1886, was recorded in the county clerk's office of Lancaster county. During the year 1886 the Baldwins erected a brick building on lot 9, and in pursuance of the above agreement constructed a party wall on the line between lots 8 and 9, one-half of the wall resting on each of said lots.

On February 19, 1887, Lamaster sold and conveyed to Carlos C. Burr and Lionel C. Burr said lots 7 and 8. The deed contains the following covenants:

"The said Milton F. Lamaster does hereby covenant with said Carlos C. Burr and Lionel C. Burr, and their heirs and assigns, that he is lawfully seized of said premises; that they are free from incumbrance; that he has good

right and lawful authority to sell the same; and said M. F. Lamaster does hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever."

Afterwards the Burrs erected a six-story stone building on the lots purchased by them, but did not use said party wall. The plaintiffs brought this suit for damages, claiming that the party wall agreement and the party wall constructed by the Baldwins constituted a breach of the covenants in the deed. The judgment of the district court was for the defendant.

The main question presented by the record is, whether the party wall agreement and the party wall erected in pursuance thereof constituted a breach of the covenants of the deed against incumbrances.

An incumbrance is defined to be any right to or interest in land which may subsist in third persons to the diminution of the value of the land and not inconsistent with the passing of the fee in it by the deed of conveyance. (1 Bouv. Law Dic., 784; 2 Greenleaf, Ev., sec. 242; *Fritz v. Pusey*, 31 Minn., 368; *Prescott v. Trueman*, 4 Mass., 630.)

By the contract entered into between Lamaster and the Baldwins the latter were authorized to construct one-half of the party wall on the vacant lot owned by Lamaster, and he covenanted for himself, his heirs and assigns, to pay the Baldwins the one-half of the cost of the wall whenever he should make use of the same. This agreement gave the Baldwins an interest in the nature of an easement in the Lamaster lot, and constituted an incumbrance. The obligation to pay a portion of the cost of the wall was not merely a personal covenant binding upon Lamaster, but was a burden which ran with the land and bound his grantees to pay for one-half of the wall if they used the same. It was a charge upon the lot conveyed to the Burrs, and until it was used by them the Baldwins had a right of property in the wall.

In *Savage v. Mason*, 3 Cush., 500, the action was brought for a breach of covenants against incumbrances. In an agreement of partition of real estate between the owners, it was stipulated that the center of the party walls of each brick or stone building might be placed upon the lines dividing the lots from a contiguous lot, and that the owner of such contiguous lot should pay for one-half of the wall so used by him, whenever he should make use of the same. A lot set off to Benjamin Joy, one of the parties to the agreement, was conveyed by his heirs to John F. Loring and Henry Arews, and subsequently it was by them conveyed to Ezekiel W. Pike, who erected his brick dwelling house on the lot, placing the center of one of the walls upon the line dividing his lot from the contiguous lot. Subsequently Pike conveyed his lot to Luther S. Cushing and wife, who in turn conveyed to the plaintiffs. The contiguous lot by Jonathan Mason was, upon his death, set off to the defendant, who erected thereon a brick dwelling, in which the party wall was used. The plaintiff sued upon the covenant for one-half of the value of the party wall. The court, in the opinion, says: "A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. The liability to perform, and the right to take advantage of, this covenant both pass to the heir or assignee of the land, to which the covenant is attached. This covenant can, by no means, be considered as merely personal or collateral, and detached from the land. There was a privity of estate between the covenanting parties in the land to which the covenant was annexed. The covenant is in terms between the parties and their respective heirs and assigns; it has direct and immediate reference to the land; it relates to the mode of occupying and enjoying the land; it is beneficial to the owner as owner, and to no other person; it is in truth inherent and attached to the land, and necessarily goes with the land

into the hands of the heir or assignee." Among the many decisions sustaining the same proposition, we cite *Roche v. Ullman*, 104 Ill., 1; *Sharp v. Cheatham*, 88 Mo., 498; *Richardson v. Tobey*, 121 Mass., 457; *Bronson v. Coffin et al.*, 108 Id., 175; *Platt v. Eggleston*, 20 O. St., 414.

In the case of *Sharp v. Cheatham*, *supra*, Roach & Stitt and Austin Elliott being the owners respectively of adjoining lots in the town of Warrensburg, Mo., on July 7, 1868, entered into a written agreement by which Roach & Stitt agreed to erect a party wall on the line between the two lots, and Elliott agreed that when he should use said wall he would pay to the other parties one-half of so much of the wall as he should join to. Subsequently Roach & Stitt erected a wall along the line between the lots and six inches on Elliott's lot for ninety feet in length. Afterwards Elliott erected a building on his lot, using the party wall. Subsequently Roach & Stitt conveyed their lot to one Sharp, and shortly thereafter Elliott conveyed his lot to Cheatham, who erected thereon a brick extension of the building previously erected by Elliott, and joined the same with the party wall, using thirty feet in length and sixteen feet in height. Suit was brought to recover from Cheatham the costs of one-half of the wall used by him. It was held that the effect of such an agreement was to create cross-easements as to each owner, and that the one who purchased the lot with notice would be bound by his grantor's agreement to pay one-half the cost of the party wall upon using it.

The question was again before the same court in March, 1886, in the case of *Keating v. Korfhage et al.*, reported in 4 Western Rep., 569. It was a suit to enforce the provisions of a party wall agreement, similar to the one in the case at bar. We quote from the syllabus of that case: "An agreement made between adjoining owners in relation to a party wall erected on the division line of their lots is bind-

ing on the parties and creates an equitable charge, easement, and servitude upon the lots built upon."

There are cases holding that a party wall agreement like the one before us is merely personal, binding alone upon the parties to it, and does not attach to the land, but the weight of the decisions in this country is to the effect that it attaches to and is a charge upon the land.

A case similar in its facts to the one at bar is *Mackey et al. v. Harmon et al.*, 34 Minn., 168. One Hurlburt and the defendant Harmon, owning adjoining lots in Minneapolis, entered into a written agreement that Hurlburt might erect a party wall on the dividing line between the lots, so that one-half of the wall should stand on each lot, and that Harmon should have the right to join to and use the wall by paying one-half of the value of so much thereof as he should use. The agreement was acknowledged and recorded. Hurlburt erected the party wall according to the agreement, and afterwards Harmon conveyed his lot to the plaintiff Mackey, by a deed containing covenants against incumbrances, and Mackey conveyed one-half the lot to his co-plaintiff Legg, which deed contained like covenants. The plaintiffs in order to use the wall, paid to Hurlburt $850, being one-half of the value of the wall used by them. Suit was brought against Harmon on his covenants against incumbrances. The trial court held that the party wall agreement did not constitute a legal incumbrance. The case was reversed by the supreme court. Berry, J., in delivering the opinion of the court, says: "The easement in the plaintiff's lands in favor of and appurtenant to Hurlburt's is a right or interest in a third person in the former to the diminution of its value, and therefore an incumbrance within the authoritative definition before given. The existence of the incumbrance does not depend upon the extent or amount of the diminution in value. If the right or interest of the third person is such that the owner of the servient estate has not

so complete and absolute an ownership and property in his land as he would have if the right or interest spoken of did not exist, his land is in law diminished in value and incumbered. It follows that in the case at bar the existence of the right in plaintiff's land conferred upon and as appurtenant to Hurlburt's land was an incumbrance, and that therefore the covenant against incumbrances in Harmon's deed to plaintiff Mackey is broken."

The supreme court of Iowa, in *Bertram v. Curtis*, 31 Ia., 46, held that where the owner of a vacant lot, on which rests one-half of a neighbor's wall, conveys the same with a covenant of warranty against incumbrances, the existence of such wall is not a breach of the covenant. This case is not an authority in point. An examination of the reported case shows that it is based upon a statute of that state which confers the right to one who is about to erect a building contiguous to the lot of another, to construct one-half of the wall on his neighbor's lot, and gives the latter the right to make use of the wall as a party wall by paying one-half of the expense of constructing the same. Under such a statute the existence of a party wall would not be an incumbrance. The covenant is presumed to have been made with reference to the provisions of the statute. As we have no law in this state regulating party walls, it is obvious that the decision in *Bertram v. Curtis*, is not applicable.

In *Mohr v. Parmelee*, 43 N. Y. Super. Ct., 320, it was held that a party wall resting upon the land of adjoining owners is not an incumbrance. In that case it appears that the party wall was constructed wholly on one of the two adjoining lots, with the right granted to the owner of the other contiguous lot to use the same as a party wall. It was held, both in the opinion and syllabus, that such right constituted an incumbrance upon the lot on which the wall stood. It is obvious that what is said by the court about a party wall constructed upon the lots of adjacent

owners not being an incumbrance, is mere *obiter dicta*, and was not pertinent to any question necessary to be decided in the proper determination of the case.

In *Hendricks v. Starks*, 37 N. Y., 106, it was held that "a party wall creating a community of interest between adjoining proprietors is in no just sense to be deemed a legal incumbrance." That was an action to enforce the specific performance of a contract for the sale of real estate. Stark refused to complete his purchase on the ground that two of the walls of the building on the premises were party walls, which supported the buildings on adjoining lots. These walls stood part on the premises purchased and part on the adjoining lots. It is doubtless true that a party wall between two buildings owned by different persons would not constitute a breach of a covenant against incumbrances, for the owners have a community of interest in the wall, each having the right to support his building by that part of the wall owned by the other. It is difficult to see how a purchaser of one of the buildings and the lot on which it stands could be damaged by the existence of the party wall, as the easement of support is mutual and reciprocal. But where one purchases a vacant lot which supports the half of the wall of the building erected on the adjoining lot, and such purchaser is, by the terms of a previous party wall agreement, obliged to pay part of the costs of the wall in order to use it, such agreement and wall is an incumbrance.

The plaintiffs offered to prove at the trial that they did not know that the wall rested upon any part of lot 8. This testimony was excluded, and we think properly so. Whether or not the plaintiffs had such knowledge is immaterial to their right of action. A covenant against incumbrances covers those unknown as well as those known at the time of the purchase. (*Barlow v. McKinley*, 24 Ia., 69; *McGowen v. Myers*, 60 Id., 256; *Bank v. Hill*, 48 Ind., 52; *Huyck v. Andrews*, 113 N. Y., 81; *Herrick v.*

Moore, 19 Me., 313; *Prichard v. Atkinson*, 3 N. H., 335; *Clark v. Estate of Conroe*, 38 Vt., 469; *Kellogg v. Maetin*, 50 Mo., 496; *Hubbard v. Norton*, 10 Conn., 422; *Parish v. Whitney*, 3 Gray, 516; *Long v. Moler*, 5 O. St., 271.) The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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CITY OF OMAHA V. D. F. RANDOLPH.

[FILED NOVEMBER 5, 1890.]

Municipal Corporations: UNSAFE STREETS. The plaintiff, in driving into the city of Omaha after dark, followed from Twenty-eighth to Twenty-seventh street a public way that had been used by the public for years, although it had never been laid out as a road. The city was at the time grading Twenty-seventh street and had excavated the same perpendicularly to a depth of three feet at the intersection of this road, but placed no barriers or lights at or near the same. It being dark the plaintiff was unable to see the condition of the street and his team was precipitated into the excavation, causing the plaintiff to receive permanent injuries. *Held*, That the city was guilty of negligence.

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

A. J. Poppleton, for plaintiff in error, cited: *Goodwin v Des Moines*, 7 N. W. Rep., 411; *Beardsley v. Hartford*, 50 Conn., 529; *Sparhawk v. Salem*, 1 Allen [Mass.], 30; *Tisdale v. Norton*, 8 Met. [Mass.], 388; *Zettler v. Atlanta*, 66 Ga., 195; *Stark v. Lancaster*, 57 N. H., 88; *Cobb v. Standish*, 14 Me., 198; *O. & R. V. R. Co. v. Martin*, 14 Neb., 296.

John W. Lytle, contra, cited: *Palmer v. Lincoln*, 5 Neb., 136; 2 Thompson, Negligence, 745, 746, 762, 787; *Cantwell v. Appleton*, 37 N. W. Rep., 813; *Burnham v. Boston*, 10 Allen [Mass.], 290; *Goodwin v. Des Moines*, 7 N. W. Rep., 411; *Glidden v. Moore*, 14 Neb., 90; *Willard v. Newberry*, 22 Vt., 458; *Batty v. Duxbury*, 24 Vt., 155; *Ray v. St. Paul*, 42 N. W. Rep. [Minn.], 297; *Foxworthy v. Hastings*, 23 Neb., 772; *Warner v. Holyoke*, 112 Mass., 362.

NORVAL, J.

This suit was brought by the defendant in error against the city of Omaha, in the district court of Douglas county, to recover for personal injuries. The plaintiff below obtained a verdict for $1,000.

The defendant in error resides on a farm west of Omaha. On the evening of October 27, 1886, he drove into the city with a load of hay, passing down Leavenworth street to Twenty-eighth street, thence north on Twenty-eighth street a short distance, where he followed a public road which angles across a block of ground belonging to the Catholic society, to Twenty-seventh street. In attempting to reach the latter street from this road, the load of hay overturned, the wagon was broken, and Randolph received serious permanent injuries. At the point where the accident occurred the city was grading Twenty-seventh street, having excavated the same to the depth of three feet below the natural surface of the ground. No barricade or signal lights were placed by the city at or near the junction of this road with Twenty-seventh street.

The testimony shows that for many years the public had used this road across the private property, although it had never been laid out as a street or highway. There is in the bill of exceptions testimony tending to show that this roadway at its intersection with Twenty-seventh street

was not graded down to the street level, but that the street at that point was excavated perpendicularly to the depth of at least three feet; that on account of the darkness of the night Randolph was unable to see the condition of Twenty-seventh street, and that when his horses reached it they were precipitated down into the excavation. It also appears that the plaintiff passed safely over the same road on Friday prior to the accident with a load of hay. The plaintiff called several witnesses, who testified that this road was usually traveled by the public; that Twenty-seventh street was at the time being excavated by the city, and at the place the accident occurred it was graded to the depth of three feet, and that Leavenworth street between Twenty-seventh and Twenty-eighth streets, on account of its being graded, was not in a safe condition for travel.

The testimony of a number of defendant's witnesses is to the effect that this roadway, at the point of intersection with Twenty-seventh street, had been graded or sloped back from the street, making a fall of three or four feet in a distance of twenty-five feet; that this was done by L. J. Leming, who was then excavating for a cellar for a school house on this block of ground, in order that his loaded wagons could pass from this road to the street, and that it was then in such condition that a team could haul a thousand brick or a yard of sand or gravel up the embankment. The record discloses that at the time of the trial the road at the point where the accident occurred was in the same condition as on the night of October 27, and that the jury viewed the premises. The verdict of the jury settled the controverted facts in favor of the plaintiff below, and must be accepted by us as final.

The defendant city requested the court to give the following instructions:

"First—The jury are instructed that the plaintiff cannot recover unless the testimony satisfies you that the plaintiff was free from contributory negligence, and the

burden of proof is upon the plaintiff to show that he was free from contributory negligence.

"Third—The city is not bound to maintain approaches to the streets to or from private property, and when persons seek to enter upon the streets from private property they take upon themselves the responsibility of knowing that the entrance way is safe and not dangerous.

"Fourth—If the jury find that Mr. Randolph was attempting to enter Twenty-seventh street from a roadway which was upon and across private property, and which roadway was not one of the public streets of the city of Omaha, and that Mr. Randolph met with the accident while so passing over said private roadway, and not while traveling in and upon a public street of the city, then the city is not liable in damages and your verdict should be for the defendant.

"Fifth—The obligation upon the city to keep the streets in a good condition for travelers passing along the streets, applies only to the public streets of the city, and does not apply to approaches to the public street from private roadways which are across private property, even though such private roadways may be used more or less by the public, and if the jury find that the roadway over which the plaintiff was passing was such private roadway as distinguished from a public street of the city, and that the plaintiff was injured in driving over an embankment into the street at the side of the street and not from any imperfection in the street itself, then the city is not liable and your verdict should be for the defendant."

Each of these requests were refused, and the court, among other things, charged the jury as follows:

"Third—If you believe from the evidence that a roadway had existed for many years over and across the block of private ground, which had been much used by the public in general as a highway to reach Twenty-seventh street from Leavenworth street so that it became known and was

used as a common way for travel by those who had occasion to pass between Leavenworth street and Twenty-seventh street in going to and returning from the business part of the city, and so as to render it necessary for the city, in the exercise of due and reasonable care, to provide barriers or signals at the terminus of such roadway at Twenty-seventh street, where the accident to plaintiff occurred, as a warning to persons coming or going over said roadway and to prevent such persons in the exercise of due reasonable care from falling or driving over the bank made by excavating Twenty-seventh street in the process of grading the same, and if you find the city unreasonably and negligently failed to erect such barrier or to place such signals, the jury would be justified in finding the city guilty of negligence, and unless the plaintiff was guilty of some act of negligence contributing to his injury he would be entitled to your verdict.

"Fourth—If you find from the evidence that the city was guilty of negligence under the last instruction, you will then inquire whether the plaintiff was guilty of any negligence on his part which contributed substantially to produce the injury complained of. If you find he was guilty of such contributory negligence, your verdict should be for the defendant."

It is urged by the plaintiff in error that the third paragraph of the charge given by the court does not correctly state the law of the case and that the requests asked by the city should have been given. The question raised by the instructions given and refused is, whether the city was guilty of negligence in not placing barriers or danger signals to prevent persons entering Twenty-seventh street from this roadway traveled by Randolph. Had the road in question been a private way, not traveled by the public generally, then the law expressed in the defendant's requests would have been applicable. The testimony clearly shows that the road traveled by Randolph was not a pri-

vate way, but a highway that had been generally used by the public for more than ten years. The question is therefore fairly presented, whether the city was under any legal obligation to erect railings, or to place lights where its streets are excavated perpendicular, at the intersections of public traveled roadways, several feet below such roadway. While a municipal corporation is not required to erect barriers or place danger signals to prevent persons from receiving injuries in entering its streets by private ways, yet it is bound to provide such guards or signal lights in the street at dangerous places to prevent travelers from receiving injuries in entering such street by a usually traveled public road, although such road was never laid out as a highway or street. The plaintiff, and others traveling the road in question, had a right to expect that Twenty-seventh street was in a safe condition for travel. We are of the opinion that the city authorities were guilty of negligence in not placing barriers or lights at or near where the accident occurred.

The authorities cited in the brief of the plaintiff in error do not sustain a contrary doctrine. The principal case is *Goodwin v. Des Moines*, 7 N. W., Rep., 411. There the plaintiff, in following a private way across a vacant lot, fell down an embankment into the street and was injured. It was held that the city was not liable.

The case of *Omaha & Republican Valley R. Co. v. Martin*, 14 Neb., 296, is not in point. Martin, in following an old abandoned road, fell into an excavation made by the railway company within its right of way and received personal injuries. The company had neither erected barriers to prevent persons from falling into the excavation, nor constructed a crossing where the railroad crossed the abandoned track. It was held that the company was not guilty of negligence.

Both of these cases are clearly distinguishable from the one at bar. The facts are entirely different. In the Iowa

case the plaintiff entered the street by a private way, and in the Nebraska case the injury was received while following an old road that had been abandoned for months.

This case was submitted to the jury upon proper instructions and the judgment of the district court is

AFFIRMED.

THE other judges concur.

GEORGE OBERLIES v. J. H. WILLIS.

[FILED NOVEMBER 11, 1890.]

Lease: CROP RENT: SALE OF LESSEE'S SHARE. One M. leased ninety-two acres of land of O. to farm the same on shares, each to have one-half of the crop. M. sowed twenty-two acres in oats, and agreed that O. should have eleven acres of corn in lieu of one-half of the oats. Seventy acres of the land were planted to corn. In May, M. mortgaged the oats and left the state. Soon afterwards O. requested W. to purchase the interest of Mrs. M. in the corn, and cultivate and care for the same, and a bill of sale was thereupon executed by Mrs. M. to W., which was witnessed by O., whereby W. purchased the interest of M. in the corn free from the claim of the oats contract. *Held*, That O. had no claim upon W. for eleven acres of corn in lieu of one-half of the oats.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

Abbott & Abbott, for plaintiff in error.

Hastings & McGintie, contra.

MAXWELL, J.

In the spring of 1887 the plaintiff leased to one T. D. Matthews about 125 acres of land to farm on shares for

that season. Matthews subsequently relinquished a part of the land, some thirty acres or more. Matthews wished to put a part of the land in oats, while Oberlies wanted it all planted in corn. It was thereupon agreed that plaintiff should have one-half as many acres of corn as there were acres of oats in lieu of his share of the oats. Matthews sowed twenty-two acres of oats, and executed a mortgage thereon, and planted the remainder of the land to corn, then abandoned the whole and left the state. The testimony shows that the defendant purchased the corn in question from Mrs. Matthews, and received from her the following bill of sale:

"Know all men by these presents, that I, Mary J. Matthews, of Dorchester, Saline county, Nebraska, party of the first part, do, for and in consideration of one dollar an acre bargain, sell, and convey unto John H. Willis, of the same place, party of the second part, thirty-five acres of farm land now planted in corn on the following described land, on S. E. ¼ section 21, town 8, range 3 east, in Saline county, Nebraska.

"The said Mary J. Matthews, of the first part, hereby releases all her right, title, and interest in and to the above described land, subject, nevertheless, to all the conditions of the contract between George A. Oberlies, the owner of said land, and T. D. Matthews, the lessee of said land, (except twenty acres of oats) mentioned in said contract.

"MARY J. MATTHEWS.

"Signed in our presence this 23d day of May, 1887.

"LAYTON BUTIN.

"GEORGE A. OBERLIES."

The testimony clearly shows that after Mr. Matthews left the state the plaintiff went to the defendant and urged him to purchase the corn in question from Mrs. Matthews, and that the twenty acres of oats were excepted. This contract the plaintiff not only induced the defendant to enter into, but appeared before the scrivener, and at the

time the bill of sale was drawn and signed, was one of the witnesses to the same. He no doubt had a motive in this. It was necessary that the corn should be cultivated and kept free from weeds in order that the crop might be raised. The defendant seems to have possessed plenty of horses and was able to care for and cultivate the corn. This, no doubt, was the motive which induced the plaintiff to desire him to purchase the interest of Mr. Matthews from Mrs. Matthews. He did not purchase the same, however, subject to the contract for the oats; that contract was specially excepted.

The judgment of the district court is right and is

AFFIRMED.

THE other judges concur.

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G. H. HILTON ET AL., APPELLANTS, V. J. C. CROOKER ET AL., APPELLEES.

[FILED NOVEMBER 11, 1890.]

1. **Deeds**: REFORMATION. On the testimony before the court, *held*, that a deed set forth in the record would be reformed so as to exclude forty acres of land described in the opinion.
2. **Assignment**: A CONTRACT FOR PROFESSIONAL SERVICES—as that of an attorney—is personal and confidential and cannot be assigned to another without the assent of the client and in case of such assignment without assent, the client may; declare the contract at an end and recover certain lands conveyed as a conditional fee, for the prosecution of the action—money expended in the prosecution of the action, however, to be refunded.

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

William Leese, and *George H. Hilton*, for appellants, cited on the point that the contract was personal and could not be assigned: Rapalje & Lawrence, L. D., p. 282; Chitty, Contracts, 671.

John S. Gregory, contra.

MAXWELL, J.

This action is brought to obtain the following relief:

"And upon final hearing of this case, the plaintiffs may be granted the following relief, to-wit: That the agreement aforesaid between plaintiffs and defendants Crooker and Gregory may be declared a personal and binding agreement, as before stated, between all the parties thereto, and the obligations and deeds made under it not assignable or transferable, but a breach of the same, and that the breach as stated herein may be so declared, as also the neglect and abandonment of the prosecution of the suits by them, and failure of consideration for both deeds and agreement, and that the agreeement and deeds made by plaintiffs under it may be declared conditional, inoperative, null, and void, also the deed made to McMurtry may be so declared and decreed, and a decree entered accordingly, or if the above relief is not granted, that the deeds made to Crooker and also the deed made by him to McMurtry may be so reformed as to correct the mistake or error in including therein the whole of the south half of section 11, town 9 north, range 6 east, and that the northeast quarter of the southeast quarter of said section 11, town 9 north, range 6 east, and undivided one-third of south half northwest quarter of section 14, and southeast quarter of northeast quarter of section 15, both in town 10, range 6, may be excluded from said deeds as included by mistake, and the title declared to be in each of the plaintiffs as to the first tract, each holding an undivided one-third of said land, and a decree made accord-

ingly, and such other and different relief as equity may require, and judgment rendered against defendants in favor of plaintiffs for costs of suit."

On the trial of the cause the court found the issues in favor of the defendants and dismissed the action.

The following agreement and conveyances are set forth in the record. "Exhibit A" is as follows:

"Agreement made this 10th day of January, A. D. 1885 between Jabez C. Crooker, of the first part, John S. Gregory, attorney, of the second part, and George H. Hilton, James F. Hilton, and Joseph B. Hilton, of the third part, as follows: That for and in consideration of certain deeds of conveyance to be executed by James F. Hilton, Joseph B. Hilton, Alice Duchanne, Nora M. Lincoln, Augusta Hilton, and George H. Hilton, and delivered unto Jabez C. Crooker, within twenty days from the date hereof, the said Jabez C. Crooker agrees to advance the necessary money required in the prosecution of the suits hereinafter mentioned, and furnish good and satisfactory bond and security for costs, and said Jabez C. Crooker will pay the required attorney fees to the party of the second part, in addition to the purchase price paid and stipulated in said deeds.

"In consideration whereof the party of the second part agree to accept said party of the first part in payment of all his fees and perquisites; and further agrees to and with the party of the third part that he will carry on to a final determination, both in the circuit court of the United States for the district of Nebraska and in the supreme court of the United States, if the same shall become necessary in the actions of the said parties of the third part, or each, or any of them for the purpose of recovering title and possession to the lands in the said deed described, and quieting the title thereto unto the said party of the third part in all respects, except for tax liens (it being understood that all parties hereto shall be severally liable for

the tax or tax liens therefor in proportion to their several interests in said lands), and said party of the second part shall have and take full and entire control and management of said causes, and shall give his full and careful attention personally thereunto, until the final determination of said causes, and without any other or further consideration than that hereinbefore stated.

"In case of the death, sickness, or inability of the party of the second part at any time during the progress of the proceedings brought and carried on as herein mentioned, so that he shall be unable to personally attend at the courts in said cause or causes when at all times the same shall be necessary, then and in that case said party of the first part agrees to employ a competent and sufficient satisfactory attorney as his substitute, and in his stead, and shall be at the expense of payment of such services. It is further mutually agreed that the consideration for which this contract is made is the deeds herein mentioned conveying said land to said Jabez C. Crooker in the proportion stated in said deeds, which are hereby taken and receipted as the full payment for the fulfillment of this contract upon their part. It is mutually agreed that no compromise of the controversies in question shall be made, except upon the agreement of all the parties in interest herein.

"If the costs paid and advanced by the party of the first part shall be recovered from the defendants in said actions, said party of the first part shall be entitled to recover the amount he may have advanced. And if a compromise is made on all or any of the property herein conveyed before the decree of the courts therein upon the merits of the case, then and in that case the party of the first part agrees to accept one-sixth of the land or of the sum obtained in such compromise which shall be taken and accepted as his share of the proceeds thereof upon deed executed to the proper one. Also that the said attorneys are to prosecute the suits with all necessary dispatch and no unnecessary delay.

"In witness whereof, the parties to this agreement set their hands this day above written.

"JOHN S. GREGORY.
"J. C. CROOKER."

Exhibit D is as follows:

"To J. S. Gregory and J. C. Crooker, attorneys for J. F. and J. B. Hilton in their case against J. E. Jones *et al.*, in circuit court United States, district Nebraska: I am authorized by the above complainants to give you notice that they hereby require you to proceed to have the record made in the above case, and have the appeal granted in their said cause, now nearly two months ago, to be duly filed in the supreme court United States, without any further or unnecessary delay, as you are bound to do by written agreement, so that said case may be docketed in said supreme court by the rules, in order that the case may be ready for hearing at the next term of said court, if agreed to, or as soon thereafter as possible.

"Lincoln, Neb., 9 August, 1887.

"J. F. AND J. B. HILTON,
"By G. H. HILTON."

"Exhibit C" is as follows:

"Know all men by these presents, that James F. Hilton and Joseph B. Hilton, of Cook county, Illinois, for and in consideration of one dollar in hand paid by Jabez C. Crooker, and the further consideration of an agreement made and executed by Jabez C. Crooker and John S. Gregory, bearing date the 10th day of January, 1885, they do hereby sell and convey and quitclaim unto Jabez C. Crooker, of Lincoln, Nebraska, and to his heirs and assigns, forever, the following described real estate, to-wit:

"The undivided $\frac{1}{6}$ part, title, and interest in and to the S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of sec. 14 and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of sec. 15, all in town 10, range 6 and S. $\frac{1}{2}$ sec. 2, and S. $\frac{1}{2}$ of sec. 11, and W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ sec. 11, and S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ sec. 14, and N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$

sec. 15, all in town 9, range 6; and N. E. ¼ of sec. 6, and E. ½ of N. W. ¼ and N. E. ¼ of S. W. ¼ sec. 6, and N. W. ¼ sec. 18, and S. E. ¼ of N. W. ¼ of E. ½ S. W. ¼ and S. W. ¼ of S. E. ¼ sec. 19, and W. ½ of N. E. ¼ and S. E. ¼ of N. E. ¼ sec. 29, and W. ½ of S. E. ¼ and S. W. ¼ of N. E. ¼ sec. 30, and S. E. ¼ of S. E. ¼ sec. 33, and S. W. ¼ of S. W. ¼ sec. 34, all in town 8, range 7; and N. W. ¼ of N. W. ¼ sec. 3, and N. E. ¼ sec. 4, all in town 7, range 7; all in Lancaster county, Nebraska. Subject to said agreement above referred to.

"Signed this 21st day of January, A. D. 1885.

"JOSEPH B. HILTON.
"CLARA J. HILTON.
"JAMES F. HILTON.

"In presence of
"S. W. KING."

"Exhibit B" is as follows:

"QUITCLAIM DEED.

"*George H. Hilton to Jabez C. Crooker.*

"Recorded Jan'y 23, 1888, at 9 A. M.

"JNO. D. KNIGHT,
"*Register of Deeds.*

"Fees, $1. T. M. COOK, *Dep.*

"Know all men by these presents, that George H. Hilton of Hamilton Co., and state of Ohio, for and in consideration of five dollars to him in hand paid by Jabez C. Crooker and the further consideration of an agreement made and executed by Jabez C. Crooker and John S. Gregory, bearing date the 10th day of January, 1885, does hereby sell, convey, and quitclaim unto Jabez C. Crooker and to his heirs and assigns, forever, the following described real estate situate, in Lancaster county, Nebraska, and described as follows, to-wit:

"One undivided ⅛ part, title, and interest in and to the S. ½ of N. W. ¼ sec. 14, and S. E. ¼ of N. E. ¼ sec. 15,

all in town 10, range 6; and S. ½ of sec. 2, and S. ½ of and W. ½ of N. E. ¼ of sec. 11, and S. W. ¼ of N. W. ¼ and N. W. ¼ of S. W. ¼ of sec. 14, and N. E. ¼ of S. E. ¼ of sec. 15, all in town 9, range 6; and N. E. ¼ sec. 6, and E. ½ of N. W. ¼ and N. E. ¼ of S. W. ¼ sec. 6, and N. W. ¼ of S. E. ¼ of sec. 19, and W. ½ of N. E. ¼ and S. E. ¼ of N. E. ¼ of sec. 29, and W. ½ of S. E. ¼ and S. W. ¼ of N. E. ¼ sec. 30, and S. E. ¼ of S. E. ¼ of sec. 33, and S. W. ¼ of S. W. ¼ sec. 34, all in town 8, range 7; and N. W. ¼ of N. W. ¼ sec. 3, and N. E. ¼ of N. E. ¼ of sec 4, all in town 7, range 7, in said Lancaster county, Nebraska. Subject to above contract.

"Signed this 13th day of January, 1885.

"GEORGE H. HILTON.

"In presence of witness:

"W. W. DUNHAM.

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

"On this 13th day of January, 1885, before me, W. W. Dunham, a justice of the peace duly appointed and qualified for and residing in said county, personally came George H. Hilton, to me known to be the identical person described in and who executed the foregoing conveyance as grantor, and he acknowledged the said instrument to be his voluntary act and deed.

"Witness my hand and notarial seal the day and year above written. W. W. DUNHAM,

"*Justice of the Peace.*"

Also the following:

"Know all men by these presents, that Jabez C. Crooker and Sarah B., his wife, of Lancaster county, Nebraska, for and in consideration of one dollar, and other good and valid consideration, in hand paid by James H. McMurtry, of Lancaster county, Nebraska, the receipt whereof is hereby acknowledged and confessed, they do hereby sell, convey, and transfer unto said James H. McMurtry, and

to his heirs and assigns, forever, the following described real estate, to-wit:

"All their right, title, and interest in and to the undivided $\frac{2}{3}$ part of the S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of sec. 14, town 10, range 6; and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ sec. 15, town 10, range 6; also S. $\frac{1}{2}$ of sec. 2, and S. $\frac{1}{2}$ of sec. 11, and W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of sec. 11, and S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of sec. 14, and N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of sec. 15, all in town 9, range 6; and N. E. $\frac{1}{4}$ sec. 6, and E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, and N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ sec. 6, and N. W. $\frac{1}{4}$ sec. 18, and S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, and E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ sec. 19, and west half of N. E. $\frac{1}{4}$, and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of sec. 29, and W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ sec. 30, and S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ sec. 33, and S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ sec. 34, all in town 8, range 7; and N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of sec. 3, and N. E. $\frac{1}{4}$ of sec. 4, all in town 7, range 7; all in Lancaster county, and state of Nebraska; meaning and intending by this indenture to convey to said James H. McMurtry all our right and title to the above described premises under and by virtue of all deeds and conveyances to Jabez C. Crooker, by Joseph H. Hilton, Clara J. Hilton, James F. Hilton, George H. Hilton, Augusta Hilton, John Hilton, and Alice B. Duchanne or others.

"And the said Crooker covenants to warrant and defend the aforesaid covenants by him made against any and all acts heretofore made by him. And the said Sarah B. Crooker hereby relinquishes her right of dower in and to the foregoing described lands.

"Signed this 27th day of September, 1887.

"JABEZ C. CROOKER.

"SARAH B. CROOKER.

"In presence of

"JOHN S. GREGORY.

"J. H. BROWN."

"The condition of the following obligation is such, that

whereas, J. C. Crooker, of the city of Lincoln, in the county of Lancaster, and state of Nebraska, has this day sold, transferred, and conveyed by deed to the full satisfaction of James H. McMurtry, of the city of Lincoln, in the county of Lancaster, and state of Nebraska, all his right, title, and interest in and to certain lands claimed by George H. Hilton and others, for the recovery of which suits have been brought or are now pending in the United States circuit court, and in the state courts of Nebraska, wherein the said Jabez C. Crooker became surety for costs; and whereas, a certain contract was made and entered into by the said Jabez C. Crooker, and all and each of the Hiltons in said contract mentioned, to prosecute said suits to final determination in the courts for a contingent fee, as in the said mentioned contract of the value of all property recovered in said suits and prosecutions as is fully stated in said contract referred to with said Hiltons as aforesaid; and whereas, the said Jabez C. Crooker, in consideration of the sum of $100 to him in hand paid by the said James H. McMurtry to his full satisfaction, has conveyed by quitclaim deed to the aforesaid lands by an assignment of the contract aforesaid, with the said Hiltons, unto the said James H. McMurtry:

"Now, therefore, in consideration of the assignment of said contract, and the quitclaim deed of his interest in the Hilton lands by the said Jabez C. Crooker to the said James H. McMurtry, hereby binds and obligates his heirs, executors, and administrators, each and all of them, in the penal sum of $3,000, well and truly to be paid unto the said Jabez C. Crooker, his heirs, executors, and assigns, that he, the said James H. McMurtry, will save the said Jabez C. Crooker harmless, as aforesaid, from all costs that have heretofore accrued in the suits and proceedings hereinbefore referred to, and all damages and expenses that he, the said Jabez C. Crooker, may be liable for by reason of his having given his personal security in the suits and pro-

ceedings as required by the orders of the courts wherein the same are pending and brought, in the name of the said Hiltons, or that may hereafter arise in the prosecution of said suits and causes of action. The meaning and intent of this obligation is such, that if the said James H. McMurtry, his executors, administrators, or heirs, shall save and indemnify the said Jabez C. Crooker, his heirs, executors, or administrators, from any and all costs in any way that have arisen or may arise from the litigation above referred to, then this obligation to be and become null and void, otherwise to be and remain in full force and virtue.

"Witness my hand this 27th day of September, A. D. 1887. "J. H. MCMURTRY.

"Witness:

"J. S. GREGORY."

It is admitted that the northeast quarter of the southeast quarter of section 11, town 9 north, range 6 east, was included by mistake in the deeds from the Hiltons. This being the case the deed conveying said land will be reformed so as to exclude it.

The second objection is, that the contract between Hilton *et al.* and Gregory and Crooker was personal in its nature, requiring the service of those parties, and therefore was not assignable. We are of the opinion that the contracts set forth in the record were of a confidential nature, the services to be performed by the parties who had undertaken to perform them, and said contract was not assignable. A party selects a lawyer, doctor, or member of one of the other professions, because he has confidence in his skill and ability to perform the duties which he undertakes. These duties imply trust and confidence, and the employe cannot shift the duties onto another person without the consent of the employer. The proof in this case wholly fails to show such assent. The rule in such case is stated in Pomeroy's Equity Jurisprudence as follows: "Where a person has entered into a contract involving a

personal trust or confidence in himself, and stipulating to use his own personal skill, knowledge, etc., he cannot, while the agreement is still executory, by assignment substitute another in his place in order to perform the service without the consent of the other contracting party." After the contract has been executed by himself he can assign the right to recover compensation. (*Flanders v. Lamphear*, 9 N. H., 201; *Bethlehem v. Annis*, 40 Id., 34, 40; *Burger v. Rice*, 3 Ind., 125; *Landsen v. McCarthy*, 45 Mo., 106; *Stevens v. Benning*, 6 De G., M. & G., 223.)

The contract is joint on the part of the defendants, and there has been a practical abandonment thereof. The plaintiffs, therefore, are entitled to a reconveyance of the property upon refunding the amount which these parties and McMurtry have paid as costs in the federal courts. This amount they are equitably entitled to receive, and as we cannot determine from the record the amount due, a reference will be ordered to take testimony and find and state the amount of legitimate costs paid by any of the parties in the case.

There is some claim that the plaintiff was exceedingly officious in the case, and there is some testimony tending to show that such was the fact. It must not be forgotten, however, that he deemed his interests of vital importance, and in his anxiety to protect them perhaps rendered more service than the necessity of the case required. We are not called upon to determine this matter, but it seems to be stated as a palliation or justification of the defendants.

The judgment of the district court is reversed, the deed including the forty acres of land, described in the opinion, will be reformed so as to exclude said land. The case will be referred to Samuel J. Tuttle, Esq., to take testimony and find the facts as above required, and report the same to this court within thirty days from this date, and upon the payment of the sum so found due, with interest thereon,

within a reasonable time, to be fixed by the court, said land will be reconveyed to plaintiffs by a deed of the same nature as that by which the land was conveyed to them.

DECREE ACCORDINGLY.

THE other judges concur.

E. J. DICKERSON v. MARIA MECHLING.

[FILED NOVEMBER 11, 1890.]

Appeal: DISTRICT COURT: DISMISSAL. Judgment was rendered by a justice of the peace on the 7th day of August, 1889, from which the plaintiff, on the same day, appealed to the district court and filed a transcript therein. On the 19th of that month the plaintiff filed a petition. No pleadings were filed by the defendant, and on the 17th of October, 1889, the cause was continued. Afterwards, on the same day, the continuance was set aside and the appeal dismissed on the motion of the defendant—the defendant at the time being in default of an answer. *Held*. That the appeal was properly taken, and the court erred in dismissing it.

ERROR to the district court for Gage county. Tried below before APPELGET, J.

Winter & Kauffman, for plaintiff in error.

T. D. Cobbey, contra.

MAXWELL, J.

This action was originally brought before a justice of the peace, and judgment rendered on the 7th day of August, 1889. The plaintiff appealed from the judgment, and on the 7th day of August, 1889, filed his transcript in the district court.

On the 19th day of August, 1889, the plaintiff filed a petition in the case. No answer was filed by the defendant, and on the 17th of October, 1889, the cause was continued. Afterwards, and on the same day, the court set aside the continuance and dismissed the appeal on the motion of the defendant. A motion was afterwards filed to reinstate the appeal, which motion was overruled.

The question presented to this court is, Did the court err in dismissing the appeal? The undertaking seems to have been filed within the statutory period, and the transcript and petition properly filed in the district court, and the case, so far as this record discloses, was properly in that court. No written motion was filed in the case; at least none is preserved in the record assigning any reason why the appeal should be dismissed. So far as appears it was an arbitrary exercise of power by the court, which we cannot approve.

The judgment of the district court is reversed, the appeal reinstated, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

BOHN MANUFACTURING CO. ET AL., APPELLANTS, V. HERMAN KOUNTZE ET AL., APPELLEES.

[FILED NOVEMBER 11, 1890.]

Mechanic's Lien: SUPERIOR TO THAT OF VENDOR. In a contract for the sale of land, it was stipulated that the purchaser should erect a dwelling upon the premises within a stated time. The building was erected, but the labor performed and material furnished were not fully paid for. *Held*, In an action to fore-

30 719
30 732
30 719
37 288
30 719
38 607
38 655
38 693
39 411
39 497
30 719
40 581
30 719
49 489
49 685
53 474

close a mechanic's lien, that the liens of the mechanic and material-man have priority over the lien of the vendor for unpaid purchase money.

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

B. G. Burbank, and *A. C. Troup*, for appellants, cited: *Henderson v. Connelly*, 123 Ill., 98; *Hill v. Gill*, 42 N. W. Rep. [Minn.], 294; *Hilton v. Merrill*, 106 Mass., 528, and cases cited, *Paulsen v. Manske*, 18 N. E. Rep., 275; *Savoy v. Jones*, 2 Rawle [Pa.], 343; *Bickel v. James*, 7 Watts [Pa.], 9; *Woodward v. Leiby*, 36 Pa. St., 437; *Rollin v. Cross*, 45 N. Y., 768; *Hackett v. Badeau*, 63 Id., 476; *Justice v. Parker*, 12 N. W. Rep., 553; *Keller v. Denmead*, 68 Pa. St., 449; *Botsford v. R. Co.*, 41 Conn., 464; *Seitz v. R. Co.*, 16 Kan., 133; *Atkins v. Little*, 17 Minn., 320; *Hunt v. Johnson*, 19 N. Y., 279; *Parkist v. Alexander*, 1 Johns. Ch. [N. Y.], 394; *N. S. Ins. Co. v. Shriver*, 3 Md. Ch. Dec., 381; 2 White & Tudor, Lead. Cas. Eq. [4th Am. Ed.], part 1, 204; *Bank of Greensboro v. Clapp*, 76 N. Car., 482; *Monroe v. West*, 12 Ia., 121; Jones, Mort., secs. 364, 375, 469, 576; *Platt v. Griffith*, 27 N. J. Eq., 207; *Moroney's App.*, 24 Pa. St., 372; *Taylor v. La Bar*, 25 N. J. Eq., 222; *Macintosh v. Thurston*, Id., 242.

Congdon, Clarkson & Hunt, *contra*, cited: *Neil v. McKinney*, 11 O. St., 58; *Logan v. Taylor*, 20 Ia., 297; *Cochran v. Wimberly*, 44 Miss., 503; *Zeigler's Ap.*, 69 Pa. St., 471; *Hickox v. Greenwood*, 94 Ill., 266; *Mills v. Milburn*, 7 Md., 315; *Kline v. Lewis*, 1 Ashm. [Pa.], 31; *Brooks v. Lester*, 36 Md., 65; *Walker v. Burt*, 57 Ga., 20; *Holmes v. Ferguson*, 1 Or., 220; *Gillespie v. Bradford*, 7 Yerger [Tenn.], 168; *Scales v. Griffin*, 2 Doug. [Mich.], 54; *Burbridge v. Marcy*, 54 How. Pr. [N. Y.], 446; *Knapp v. Brown*, 45 N. Y., 207; Phillips, Mechanics' Liens, secs. 71, 73, 88, 89, 243, 244, 245, 246, pp. 130, 131; *Oliver*

v. Davy, 34 Minn., 292; *Orr v. Batterson*, 14 B. Mon. [Ky.], 100; *Millard v. West*, 50 Ia., 616; *Thaxter v. Williams*, 14 Pick. [Mass.], 53; *Rees v. Ludington*, 13 Wis., 308; *Jessup v. Stone*, Id., 521; *Perkins v. Davis*, 120 Mass., 408; *Guy v. Carriere*, 5 Cal., 511; *Campbell's App.*, 36 Pa. St., 247; *Stoner v. Neff*, 50 Id., 258; *Ansley v. Pasahro*, 22 Neb., 962; *McGinniss v. Purrington*, 43 Conn., 143; *Callaway v. Freeman*, 29 Ga., 408; *Seitz v. R. Co.*, 16 Kan., 133; *Trustees v. Young*, 2 Duv. [Ky.], 582; *Francis v. Sayles*, 101 Mass., 435; *Conant v. Brackett*, 112 Id., 18; *McCarty v. Carter*, 49 Ill., 53; *Leissmann v. Lovely*, 45 Wis., 420; *Lauer v. Bandow*, 43 Id., 556; *Dutro v. Wilson*, 4 O. St., 101; *Johnson v. Dewey*, 56 Cal., 623; *McClintock v. Criswell*, 67 Pa., 183; *Hervey v. Gay*, 42 N. J., 168; *Craig v. Swinnerton*, 8 Hun [N. Y.], 144; *Nat'l Bk. Metropolis v. Sprague*, 20 N. J. Eq., 13; *Wilkerson v. Rust*, 57 Ind., 172; *Muldoon v. Pitt*, 54 N. Y., 269.

NORVAL, J.

The Bohn Manufacturing Company brought suit in the district court of Douglas county to foreclose a mechanic's lien upon certain premises in the city of Omaha. Herman Kountze, the owner of the fee, Z. B. Berlin, the equitable owner in possession under a contract of purchase with Kountze, and various mechanic lien holders were made defendants. Afterwards Robert G. King was made a party defendant.

On the 7th day of September, 1887, the defendant Herman Kountze, being the owner of lot 4, block 15, Kountze Place, city of Omaha, contracted in writing to convey by warranty deed said lot to the defendant Z. B. Berlin, in case Berlin should perform his part of the contract. The contract price was $2,500. The purchaser paid $100 cash down, and agreed to pay $100 January 7, 1888; $50 Sep-

tember 7, 1888, and $50 on the first day of each month thereafter, until the whole sum was paid. All deferred payments were to bear eight per cent interest from date of sale. The contract contained among others this provision: "And it is hereby expressly understood and agreed, and is a part of the consideration for the sale of said lot to said Z. B. Berlin, that the said Z. B. Berlin agrees and binds himself, his heirs, executors, or assigns, to build, or cause to be built, on said lot a good substantial new dwelling house, costing not less than twenty-five hundred dollars, and if more than one dwelling is erected on said lot, then each such dwelling shall cost not less than twenty-five hundred dollars, exclusive of all the other improvements that may be put on said lot, such house or houses to be built on good substantial brick or stone foundations. The said dwelling shall be commenced within eight months from the date hereof, and be fully completed within twelve months from the date hereof, time being of the essence of this contract, and the improvements provided for being a part of the consideration to be paid for said lot. Therefore, should said Z. B. Berlin for any reason fail or neglect to build such building as herein provided for, and within the time specified, then, at the option of said first party, and for the reason that said improvements have not been made as stipulated, this contract may be declared forfeited by said first party, with all the penalties herein provided for."

The contract also contained this stipulation: "And said party of the first part shall have the right, immediately upon the failure on the part of the second party to comply with the stipulations of the contract, or any part thereof, to enter upon the land aforesaid, and take immediate possession thereof without process of law, together with the improvements and appurtenances thereunto belonging."

Upon the back of the contract was indorsed this memorandum, which was duly signed and witnessed:

"It is hereby understood and agreed that, if so requested by the within named Z. B. Berlin, the within named H. Kountze shall advance to the within named Z. B. Berlin any sum of money desired, not exceeding twenty-two hundred dollars, said money so advanced to be used in paying for workmanship and material for building the house within required to be built. Said money so to be advanced shall be placed in the First National Bank of Omaha, subject to check at the date when said Kountze is notified that work will commence on said building. But nothing herein shall be construed to mean that any money shall be advanced unless work is commenced on said building within the time fixed by the within agreement for the commencement of work on said building.

"And the money so deposited shall be paid on checks of the said Z. B. Berlin, accompanied by the estimates of the architect actually in charge of said building, and not to exceed 80 per cent of the amount due for work done and material actually furnished shall be paid on any estimate, and the remaining 20 per cent shall not be paid until the building is fully completed, and not then until ninety days have first elapsed and proper proof is furnished that the building is clear of mechanic and other liens.

"All checks for the payment of money must bear the countersign of Herman Kountze before the same shall be paid by said bank, and duplicates of all contracts, bonds, and vouchers shall be filed with the said Herman Kountze.

"No contract for work shall be let to irresponsible parties, and all contractors shall furnish good and sufficient security, in adequate amounts, for the faithful performance of their contracts, and that no mechanic or other liens will be allowed to go on said property, and that said property shall be clear of all liens or claims by reason of improvements put upon the same.

"At the option of said Kountze, party of the first part, this contract shall be surrendered to him when the money

for the building is advanced, and a new contract entered into, and the consideration therein named to be the amount of money advanced by him and the balance then unpaid on the lot herein referred to; and if no new contract is executed, then all money advanced by said Kountze on this contract, to be used in building, shall be considered as part of the purchase money for said property."

On April 24, 1888, Kountze placed with the First National Bank of Omaha, to the credit of Berlin, $2,200 to be used in building the house provided for in the contract, and on June 7, 1888, for a like purpose, the further sum of $225 was deposited by him in said bank. Peterson & Co. contracted with Berlin to put up the building for $2,944. The house was erected, the extras on the job amounting to $249. The other lien holders were subcontractors. The moneys placed in the bank were paid out for labor and materials on the architect's estimates by the checks of Berlin, countersigned by Kountze.

The decree of the district court gave Kountze a first lien for $5,009.72, the same being the unpaid purchase price, and the $2,200 first advanced for the construction of the house, with interest on the amounts. The mechanic lien holders were given liens for the amounts due them respectively, but junior to the above lien of Kountze for $5,009.72. Kountze was also given a lien for the amount of his second advancement, which was made junior to all other liens.

The case is here on appeal from that part of the decree giving Kountze the prior lien.

Section 1 of the mechanic's lien law provides that "Any persons who shall perform any labor or furnish any material or machinery or fixtures for the erection, reparation, or removal of any house, mill, manufactory, or building or appurtenance by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon

such house, mill, manufactory, building, or appurtenance, and the lot of land upon which the same shall stand." The word "owner," as used in this section, is not limited in its meaning to the one who holds the legal title, but embraces the equitable owner as well. Ordinarily the lien of the mechanic attaches only to the interest of the one who causes the improvement to be made. The correct rule, doubtless, is where one holding land under a contract of purchase causes a building to be erected thereon, and the contract of sale contains no provision for the erection of a building, that the mechanic's lien is confined to the interest of the purchaser in the premises, and is subordinate to that of the vendor of the land for unpaid purchase money. It is insisted by the appellants that when the contract of sale of real estate stipulates that the purchaser shall erect on the land a building within a specified time, the mechanic who performs the labor or furnishes the material for the making of the improvement is entitled to a lien against the interest of the vendor in the premises as well as that of the vendee.

The contract of sale in the case at bar not only authorized but made it obligatory upon the purchaser to erect a dwelling on the premises, of a certain value, within a fixed time. Further than that, Kountze stipulated to furnish not to exceed $2,200 towards the erection of the building. The proof shows that Kountze advanced that amount, and more, and that he approved the expenditure of the money. This is additional proof of the authority of the vendee to contract for the erection of the house. Kountze having in the contract of sale authorized his vendee to make the improvements, and in pursuance of that authority Berlin procured the labor to be performed and the materials to be furnished, the vendor thereby subjected his lien for the unpaid purchase money to the liens that might be acquired by the laborer and material-man for making the improvement. Where a vendee, owning the equitable title, con-

tracts for the erection of a building upon the express authority of the owner of the legal title, it is but just that the lien of the mechanic should attach to the interest of both vendor and vendee in the premises, and be paramount to the lien of the vendor. And this rule does not in any manner contravene any statutory provision.

If any authority is necessary to support this construction it is not wanting. The case of *Henderson v. Connelly*, 123 Ill., 98, is similar in its facts to the one at bar. C. M. & W. S. Henderson sold certain real estate to one Sharp for $2,150. Part of the consideration was paid down and the balance was to be paid in monthly payments. The contract of sale contained this clause: "And said Henderson agrees that when said Sharp shall have expended $325 in the erection of a suitable dwelling house upon said premises, they will advance him, as the progress of the building justifies, in their opinion, the further sum of $875, to aid in the completion thereof." J. G. Sharp, the vendee, subsequently employed Connelly to do the excavating, stone, and brick work and plastering for a house he proposed to erect on the premises. Connelly performed the labor and furnished the materials according to his contract, amounting to $465.58, and filed his lien for the same. The Hendersons, during the progress of the work, advanced Sharp $700. Sharp having failed to make his payments to the Hendersons, the latter took possession of the property and completed the house. Connelly brought suit to enforce a lien for labor and materials furnished under the contract with Sharp. Mr. Justice Craig, in delivering the opinion of the court, says: "The only reasonable and fair construction to be placed on this clause of the contract is, that the purchaser was authorized and empowered by the vendors to enter into contracts with builders to furnish material and erect a building on the premises to which they held the legal title. If, therefore, the Hendersons authorized and empowered Sharp, the purchaser, to

cause a building to be erected on the property while the legal title was in them, upon what ground can they now, after the labor has been expended and materials furnished, claim that the mechanic who furnished the labor and materials which they, by contract, authorized, shall look alone to the title held by the purchaser? Certainly no principle of equity or fair dealing would sanction a precedent of that character. * * * The vendors, by their contract, have subjected their title to the property to the lien of the petitioner, and the decree properly, in our opinion, authorized a sale of the legal title, and a priority of payment to the petitioner." This case was afterwards approved by the same court in *Paulsen v. Manske et al.*, 18 N. E. Rep., 275.

In May, 1889, the supreme court of Minnesota in *Hill et al. v. Gill et al.*, 42 N. W. Rep., 294, upon similar facts, held that the lien of the mechanic attached to the interest of the vendor. The statutory provisions in Illinois and Minnesota, relating to mechanic's liens, are substantially the same as those in this state, and the decisions from those states are entitled to much weight.

There are cases holding a contrary doctrine, some of which are cited in the brief of appellee; but as they are contrary to the liberal rule of construction that has always prevailed in this state in construing the mechanic's lien law, we do not follow them. The rule we adopt is the most just and equitable.

The decree of the district court, in so far as it awarded the appellee Kountze the paramount lien on the premises, is reversed, and the decree will be modified in this court, making his lien junior to that of the mechanic lien holders. In all other respects the decree is affirmed.

DECREE ACCORDINGLY.

THE other judges concur.

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A. MILLSAP ET AL., APPELLEES, v. JOHN BALL ET AL., APPELLEES, IMPLEADED WITH H. K. GALBRAITH ET AL., APPELLANTS.

[FILED NOVEMBER 11, 1890.]

1. **Mechanic's Lien: PARAMOUNT TO THAT OF VENDOR.** Where a vendee of real estate, under a contract of sale, containing a stipulation that the purchaser shall construct a building upon the premises, erects a building thereon, the laborer or materialman is entitled to a lien against the property paramount to the lien of the vendor.
2. ———: **FILING CLAIM.** Under section 2 of the mechanic's lien law a subcontractor, to obtain a lien, must make out and file with the recorder of deeds of the county where the building is erected a sworn statement of the amount due from the contractor for labor and materials, within sixty days from the performing of the labor and furnishing of the materials.
3. ———: **LIMITATIONS.** The contractor cannot maintain a suit against the owner until after the expiration of that time.
4. ———: **SET-OFF.** If a building is not constructed according to contract, the owner is entitled to offset any damages he may have sustained thereby, and the lien attaches for the amount actually due after deducting such damages.

APPEAL from the district court for Douglas county. Tried below before GROFF, J.

Scott & Scott, for appellant Omaha Lumber Co., cited: Bigelow, Estoppel, 547, 565–6, and citations; *Dodge v. Pope*, 93 Ind., 480, 487; *Gregg v. Wells*, 10 Ad. & E. [Eng.], 90; *Slocumb v. R. Co.*, 57 Ia., 675; *Patterson v. Baumer*, 43 Ia., 477, and citations; *Chapman v. Chapman*, 59 Pa. St., 214; *Campbell v. Nesbitt*, 7 Neb., 303, and citations; *Gillespie v. Sawyer*, 15 Id., 541; *Buckstaff v. Dunbar*, Id., 116, and citations; *Lessee v. Coats*, 1 O., 246; *Morningstar v. Selby*, 15 Id., 345; *Lamb v. Lane*, 4 O. St., 178; *Scovern v. State*, 6 Id., 291; *Rogers v. Hotel Co.*, 4 Neb., 58–9; *Edminster v. Higgins*, 6 Id., 270; *Rhea v.*

Reynolds, 12 Id., 133; *Ansley v. Pasahro*, 22 Id., 662; *Aultman & Miller v. Mallory*, 5 Id., 180; 9 Id., 144; *McCormick v. Stevenson*, 13 Id., 70; *McCormick v. Lawton*, 3 Id., 452; *Rollin v. Cross*, 45 N. Y., 768; *Hackett v. Badeau*, 63 N.Y., 476; 2 Jones, Liens, sec. 1254, and citations; *Smith v. Norris*, 120 Mass., 58; *Davis v. Humphrey*, 112 Id., 309; *Peabody v. East'n Soc.*, 5 Allen [Mass.], 540; *Hayes v. Fessenden*, 106 Mass., 228; *Hilton v. Merrill*, Id., 528; *Parker v. Bell*, 7 Gray [Mass.], 429; *Weeks v. Walcott*, 15 Id., 54; *Mulrey v. Barrow*, 11 Allen [Mass.], 152; *Clark v. Kingsley*, 8 Id., 543; *Tanner v. Bell*, 61 Ga., 584; *Weber v. Weatherby*, 34 Md., 656; *Walker v. Burt*, 57 Ga., 20; *Henderson v. Connelly*, 123 Ill., 98; *Hickox v. Greenwood*, 94 Id., 266; *Paulsen v. Manske*, 18 N. E. Rep. [Ill.], 275; Story, Ag., sec. 476; *Whitelock v. Hicks*, 75 Ill., 460; *Lewis v. Rose*, 82 Id., 574; *O'Neil v. School*, 26 Minn., 331; *Meyer v. Berlandi*, 40 N. W. Rep., 513; *Laird v. Moonan*, 32 Minn., 358.

McCoy & Olmstead, for appellants Deiss *et al.*, cited: *Edminster v. Higgins*, 6 Neb., 265, 270, 299; *Rhea v. Reynolds*, 12 Id., 128, 133; *Ansley v. Pasahro*, 22 Id., 663; *Westheimer v. Reed*, 15 Id., 663; *H. & G. I. R. Co. v. Ingalls*, Id., 128; *Fremont F. & B. Co. v. Dodge County*, 6 Id., 25; *Bradford v. Peterson*, *ante*, p. 96; *Henderson v. Connelly*, 123 Ill., 98; *Hill v. Gill*, 42 N. W. Rep. [Minn.], 294; *Paulsen v. Manske*, 18 N. E. Rep. [Ill.], 275; *Bright v. Boyd*, 1 Story [U. S. C. C.], 478, 491–2–3–4; *Herring v. Pollard*, 4 Humph. [Tenn.], 362; *Mathews v. Davis*, 6 Id., 327; *Rhea v. Allison*, 3 Head [Tenn.], 180; *Humphreys v. Holtsinger*, 3 Sneed [Tenn.], 229; *Rainer v. Huddleston*, 4 Heisk. [Tenn.], 226.

H. B. Holsman, for appellant Groves.

W. J. Connell, and *W. C. Ives*, for appellees Boggs & Hill, cited: *Lenderking v. Rosenthal*, 63 Md., 28; Phillips,

Mech. Liens, secs. 128, 131, 244, 245, and cases; *Denison v. Shuler*, 47 Mich., 598; *Gillispie v. Bradford*, 7 Yerg. [Tenn.], 168; *Neil v. Kinney*, 11 O. St., 58; 1 Add., Contr. [Am. Ed.], sec. 30; *Rollin v. Cross*, 45 N. Y., 768; 1 Parsons, Contr. [7th Ed.], p. 8*; *Doolittle v. Goodrich*, 13 Neb., 279; *Rhea v. Reynolds*, 12 Id., 128; *Robinson v. Appleton*, 15 N. E. Rep., 763; *Kline v. Lewis*, 1 Ashm. [Pa.], 31.

NORVAL, J.

The record shows that on the 26th day of September, 1887, lots 6 and 7, block 5, Omaha View, were owned by Boggs & Hill, and on that day they sold the lots to the defendant A. F. Groves, for the sum of $2,600. The sum of $115 was paid in cash and time was given for the balance. Boggs & Hill delivered to Groves the following receipt and memorandum of the terms of sale:

"SEPTEMBER 26, 1887.

"Received of A. F. Groves one hundred and fifteen ($115) dollars to apply on lots six and seven, block five, Omaha View, price of lots to be $2,600. Contract to be given for same when the foundations for buildings on said lots are commenced. Payable as follows: In five equal payments, on or before, at 8 per cent. Houses to cost at least $600 to $700 each. BOGGS & HILL."

At the time of the sale the lots were vacant and unimproved. Groves went into possession and contracted with the defendant Ball to erect four cottages on the lots. The buildings were constructed and the plaintiff Millsap and several of the subcontractors, who are defendants, filed their liens for materials furnished and labor performed for the construction of the buildings. This action was brought by A. Millsap against John Ball, the contractor, Boggs & Hill, the vendors, A. F. Groves, the vendee, and the several lien-holders, to foreclose his lien. Each lien-holder

filed a cross-petition setting up his lien upon the premises and buildings.

The defendants Boggs & Hill deny in their answer the claims of the mechanics and material-men, and admit that they made the agreement in writing with the defendant Groves (copied above) by which they agreed to sell to him the lots in controversy, and that the defendant Groves agreed to pay them therefor the sum of $2,600 in the manner following, to-wit: Cash, $115, and the balance in five equal payments.

The answer further states that it was agreed that, upon the payment in full of said sums of money, and certain taxes and interest, Boggs & Hill were to make to Groves a warranty deed for said premises; that Groves went into possession under said contract, and paid the cash payment of $115, and that said contract is in full force. Boggs & Hill claim a vendor's lien on the lots and the buildings thereon superior to the liens of the mechanics and material-men.

The defendant Groves, for answer, denies that either of the parties to the action has any valid lien or interest in said property. He further sets up that he contracted with Ball to furnish all labor and materials, and erect four houses on the lots for the sum of $700; that about January 4, 1888, after partly completing the buildings, Ball abandoned, refused, and neglected to carry out the terms of the contract, and that neither Ball nor any one of the subcontractors have carried out the agreement; that the defendant Groves, on the 15th day of May, 1888, completed said buildings so far as practicable, considering the unworkmanlike manner in which the work was performed, and the inferiority of the materials furnished by Ball, and that all the mechanics' liens were prematurely filed before the completion of the buildings. There are other allegations in the answer of Groves to which it is not necessary to refer.

The court found that there was due from Groves to Boggs & Hill $2,485 as balance of purchase money, together with 8 per cent interest thereon from September 26, 1887. The court also found the amount due the various lien holders. A decree of foreclosure was rendered, which gave Boggs & Hill a paramount lien for the purchase money, and the premises were ordered sold and the proceeds applied, after the payment of costs, first, to the payment of the claim of Boggs & Hill, and the balance *pro rata* among the mechanic lien holders. The defendant Groves and the mechanic lien-holders appeal.

The main question raised in this case is identically the same as we have just considered at the present term, in the case of *Bohn Mfg. Co. et al. v. Kountze*, *ante*, p. 719. We held in that case that where a vendee of real estate under a contract of sale which contained a stipulation that the purchaser shall construct a building upon the premises, erects a building thereon, the laborer and material-man are entitled to a lien against the premises paramount to the lien of the vendor. The memorandum of agreement in the case we are now considering contemplated that the purchaser, Groves, would erect houses on the lots to cost at least $600 to $700 each. The buildings were constructed, but the labor performed and materials furnished have not not been paid for. Boggs & Hill, having authorized the purchaser to make the improvements on the property, to which they held the legal title, we hold, for the reasons given in the Kountze case, that they postponed their lien for the unpaid purchase money to that of the mechanic and material-man.

We will now pass to the consideration of the points raised by the appellant Groves. It appears that after Ball abandoned the contract for the construction of the buildings, H. A. Schreckingast, in pursuance of a contract with Groves, furnished the balance of the hardware and the labor necessary to complete the buildings, amounting to

$75.75. The last item was furnished on the 9th day of May, 1888. Within sixty days thereafter Schreckingast filed his answer and cross-petition herein, and upon the trial the defendant Groves objected to the Schreckingast lien being introduced in evidence, because his suit was prematurely brought. The court thereupon permitted this answer and cross-petition to be withdrawn from the files and to be refiled. This ruling is assigned for error.

Under section 2 of the mechanic's lien law, a subcontractor, to obtain a lien, must make out and file with the register of deeds of the county where the building is erected, a sworn statement of the amount due him from the contractor, within sixty days from the performing of the labor or the furnishing of the materials. The section also provides that "No owner shall be liable to any action by the contractor until the expiration of the said sixty days." It is obvious that a contractor cannot lawfully bring an action against the owner of the building within sixty days after performing the last labor or furnishing the last item of material. To bring the case within the provisions of the statute, Schreckingast withdrew his answer and cross-petition and refiled the same. At that time the sixty days' limit had elapsed, and he was entitled to maintain his action. Of course, on the refiling of the pleading, Groves would have been entitled to a continuance of the hearing upon the cross-bill had he demanded it. Failing to request a postponement, there was no error committed in proceeding with the trial.

After the lienors had introduced their testimony in support of their respective claims, the defendant Groves offered to prove that the contract entered into between Ball and himself had never been complied with by Ball, and that the buildings were not erected according to the terms of the contract. Groves's counsel stated to the court that his purpose in offering this testimony was to show that the liens were prematurely filed and that they could not file

and enforce their liens until the buildings were completed and the contract complied with. The court ruled out the testimony.

It will be noticed that the excluded evidence was not tendered in support of any claim for damages which Groves may have sustained by the failure of Ball to fulfill his contract. In fact no such issue was tendered in Groves's answer. Had such been the purpose of the excluded testimony, under proper pleadings it would have been error to have refused to receive it.

If we understand the position of Groves' counsel it is this: that neither a contractor or subcontractor can enforce a mechanic's lien when the building is not completed according to contract. We cannot accept this as a correct statement of the law. There is certainly no legislative enactment so limiting the right of the mechanic or materialman to a lien. He must establish his account, and the lien attaches for the amount found to be due thereon. If the contract for the erection of the building is not fulfilled by the contractor, it does not necessarily defeat his lien. The owner of the building is entitled to set up as a counter-claim any damages he has sustained by reason of the breach of the agreement, and the lien attaches for the amount actually due, after deducting such damages.

One D. M. Bowman was examined as a witness to establish his claim for a lien for labor performed. He was cross-examined by Mr. Holsman, counsel for Mr. Groves. The bill of exceptions shows that before the last question propounded to the witness was answered, the court ordered the witness to stand aside, and another witness was called. No objection or exception having been taken to the order dismissing the witness from the stand, it cannot be considered here.

That part of the decree of the lower court awarding Boggs & Hill the prior lien on the property is reversed, and the decree will be modified in this court giving the para-

mount lien to the mechanic lien-holders. In all other respects the decree is affirmed.

DECREE ACCORDINGLY.

THE other judges concur.

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U. P. R. Co. v. PATRICK BRODERICK.

[FILED NOVEMBER 11, 1890.]

1. **Master and Servant: INJURIES: NEGLIGENCE.** Where an employer negligently provides his workmen with improper and unsafe apparatus with which to perform the work, and the workman, without any fault on his part, is injured owing to the employer's neglect to provide suitable, safe, and proper appliances, the employer is liable for the injury.
2. **Review.** *Held*, That the evidence sustains the verdict and judgment.
3. **The instructions** examined, and *held*, to have been properly given.

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

J. M. Thurston, W. R. Kelly, and *J. S. Shropshire,* for plaintiff in error, cited: *Walsh v. R. Co.*, 2 Am. & Eng. R. R. Cases, 144.

Mahoney, Minahan & Smyth, contra, cited: *Plank v. R. Co.*, 60 N. Y., 607; *Gibson v. R. Co.*, 46 Mo., 163; *McGatrick v. Wason*, 4 O. St., 566; *Huttleton v. Machine Co.*, 106 Mass., 282; 3 Wood, Ry. Law, sec. 371; *Snow v. R. Co.*, 8 Allen [Mass.], 441; 2 Thompson, Negligence, 1015; *Fairbanks v. Haentzsche*, 73 Ill., 236; *Dorsey v. Phillips*, 42 Wis., 583.

NORVAL, J.

The plaintiff below, Patrick Broderick, brought suit against the defendant to recover $1,995 damages sustained from an injury received while in the employ of the defendant, alleging that on October 15, 1886, he was so employed as a laborer, attending the masons of defendant in building the stone piers of its bridge over South Thirteenth street, in the city of Omaha; that he was acting under the direction and control of the defendant's foreman, and without fault or negligence on his own part, while so acting with other workmen, he moved a large stone, by means of rollers, onto two planks, placed over a hole, six feet square, intended to receive the stone; that the planks were provided by the defendant's foreman, and while obeying his orders, and performing his labor as directed, he was in the act of lifting up one side of the stone by means of a crow-bar in order to slide the stone down into the hole on the opposite side, and while so lifting, one of the planks on which the stone rested, being of insufficient strength, broke in two and gave away, thereby throwing the crow-bar out of his hands, and throwing him backwards into a hole of like dimensions behind him and thereby breaking his arm, by reason of which he has suffered great bodily pain, has been unable to labor for a long time, and that his disability therefrom is permanent; that such injury was caused by the negligence of the defendant in selecting and directing to be used as a means of labor and construction insufficient, unsafe, and defective planks for the purpose of lowering and placing the stone in the abutment of the bridge, without contributory negligence on the plaintiff's part.

The defendant answered admitting its corporate capacity, and that the plaintiff was in its employ at the time and place alleged, and denying that such injury was caused by any want of care on its part, or that of its foreman, but was caused by the negligence of the plaintiff and of his fellow-workmen.

The plaintiff replied denying every allegation of the defendant's answer.

There was a trial to a jury and verdict for the plaintiff for the sum of $1,995. The defendant's motion for a new trial was overruled and judgment entered upon the verdict. The defendant below brings the case to this court on error.

In the last half of the year 1886, the plaintiff in error was constructing a railroad bridge over Thirteenth street in the city of Omaha. The abutments and piers of the bridge were of heavy masonry. Broderick, the defendant in error, with five or six others, was employed to attend the masons and assist them in laying the stone. Broderick commenced work about the 20th of August, and until the 15th of October was employed upon derrick work. Two holes had been dug about five feet apart on the west side of the street, to the depth of five feet, and about five or six feet square. About two feet of concrete had been laid by the masons in the bottom of these holes, upon which foundations of the piers were to be constructed. On the morning of October 15th Broderick and three other workmen were directed by Charles Brogstadt, the foreman of the gang, to bring a large stone from a pile on the east side of Thirteenth street to one of these holes, to be laid by the masons. The stone was rolled across the street by placing it upon rollers, which rested upon two planks laid upon the ground. When the stone reached the west side of the street it was rolled onto two planks which were stretched east and west across the south hole, and by means of a crow-bar the stone was pried up and thrown into the hole. While it was being placed in proper position by the masons, the plaintiff with the three others was ordered by the foreman to procure from the same pile another stone and take it to the north hole. This was accomplished in the same manner as the other. This stone was about five feet square, ten inches thick, and weighed from 2,500 to 3,000 pounds. It was rolled onto two planks placed across the

north hole. The plaintiff and one Hans Christianson, under the instructions of the foreman, took a crow-bar and attempted to pry the stone up and throw it into the hole. In doing so one of the planks broke, the crow-bar was jerked out of their hands and Broderick was thrown into the south hole, breaking one of his arms. He was removed to the hospital, where he remained under the care of the company's surgeon for a long time. The arm has not fully recovered. It is for this injury that the plaintiff brings this action.

It appears from the testimony that the planks placed across the hole were pine, twelve or fourteen feet long, two or three inches thick, and twelve inches wide. While the testimony does not disclose which one of the men placed them in position, there is testimony tending to show that it was done under the direction of Brogstadt, who had entire control over all the men working on the job, and who directed the manner in which the work should be performed. Brogstadt denies under oath, that these planks were obtained and used by his orders, but says that they were in position, and the stone on them when he first saw them.

There is likewise in the bill of exceptions, testimony tending to prove that the ends of these planks rested upon high banks of dirt that had been thrown out near the hole, so that there was nothing to support the planks for a space of eight or ten feet; that the planks were entirely too weak for handling such heavy stones, and were not proper and safe appliances for that kind of work; but that a derrick should have been used for lowering the stone. It also appears that there was a derrick near the work, which could have been used, and that the foreman had a right to have taken it had he so desired.

The testimony of the defendant's witnesses tends to establish that the planks did not rest upon banks of dirt, but upon level ground, and that the method employed, to

use the language of the witness Brogstadt, "was safe enough if the workmen look out."

There was ample testimony to justify the jury in finding that improper and unsafe appliances were used under the instructions of the company's foreman, or at least, if the planks were not procured by Brogstadt's directions, he ordered the plaintiff and his fellow-workmen to roll the stone upon them after they had been laid across the hole. It was the duty of the defendant to have provided and used suitable, safe, and proper apparatus for the performance of this work, and it is liable for any injury which happened by reason of the use, by direction of its foreman, of improper and unsafe appliances, if the injured party is free from fault and negligence. Whether or not Broderick was negligent, was for the jury to determine from all the evidence in the case. That question was submitted to the jury upon proper instructions, and we are not prepared to say that the verdict is clearly against the weight of the testimony.

Prior to the examination of any witness in the court below, the defendant objected to the introduction of any testimony, for the reason that there are no allegations in the petition showing negligence on the part of the defendant. It does not appear that the trial court ruled upon this objection, but permission was granted the plaintiff to amend his petition by interlineations, to which the defendant excepted. The petition was thereupon amended by inserting the following:

"But the defendant and the defendant's foreman negligently selected and directed to be used for that purpose old, weather-beaten, defective pine planks, well knowing that the same were unfit and unsafe for the use to which the defendant then and there applied them, and well knowing that the said planks were not strong enough to stand the weight of said stone."

After the pleading was thus amended the defendant did

not ask for further time to prepare for trial, nor does it appear that it was not then ready with its witnesses to meet the new issue presented, but, on the other hand, the record before us shows that the defendant introduced witnesses to disprove the new allegations made by the plaintiff. As it is not shown that the defendant was prejudiced by the amendment made to the petition on the eve of the trial, the case should not be reversed on the objection made.

Complaint is made of the giving of the last paragraph of the instructions prepared by the court on its own motion, and to instructions 1, 2, 3, 4, and 7, given on request of the plaintiff. It is conceded by counsel for the railroad company that these instructions state correct principles of law, but it is urged that they were not warranted by the testimony. We are satisfied that the law, as laid down by the court, was based upon the facts of the case, and that the instructions were not in the least misleading. Every disputed question of fact was submitted to the jury upon instructions that were quite favorable to the defendant. The judgment is

AFFIRMED.

THE other judges concur.

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THOMAS R. LINCH ET AL. V. STATE, EX REL. GEORGE W. ECKLES.

[FILED NOVEMBER 18, 1890.]

1. **Mandamus: MAY BE GRANTED AT CHAMBERS.** Under the provisions of the statute, sec. 57, ch. 19, of C. S., a judge of the district court sitting at chambers at any time and place within his judicial district has the power and jurisdiction to hear and determine an application for a writ of *mandamus*, and such

power and jurisdiction include the allowance of a peremptory writ of *mandamus*.

2. **Pleading.** All material allegations, well pleaded in a petition and not denied or answered unto in the answer, will be deemed and taken as true.

ERROR to the district court for Grant county. Tried below before HARRISON, J.

O. A. Abbott, for plaintiffs in error.

Kirkpatrick & Holcomb, contra.

COBB, CH. J.

This action was *mandamus* brought in the district court of Grant county and tried before the Hon. T. O. C. Harrison, judge of the ninth judicial district, at his chambers, in the city of Grand Island, in Hall county. The petition contains the following allegations of fact:

"1. That the relator is a duly qualified elector, citizen, and taxpayer of the county of Grant and state of Nebraska.

"2. That on about the 15th day of April, 1888, the governor of the state, on the petition of citizens of Grant county, appointed Thomas R. Linch, James Forbes, and Romane Westover special commissioners, and John S. Dellinger special county clerk of said county; that each of said officers took the oath prescribed by law and entered upon the discharge of their duties as said officers, according to law, and that on the 28th day of May, 1888, said special county commissioners and county clerk called a special election to elect county officers for said county and to vote upon a site for permanent county seat for said county of Grant.

"3. That said special commissioners and clerk divided said county of Grant into four voting precincts as follows, to-wit: Whitman, Hyannis, Ashby, and Collins, and that

at the special election held in said county on the 31st day of July, 1888, pursuant to the call of said special commissioners, the following legal votes were cast in the several precincts, to-wit:

"4. That there were cast in the precinct of Whitman, thirty legal votes for the town of Whitman for permanent county seat, and twenty-eight legal votes for Milton Dodds for county treasurer of said county, and two votes for James Forbes for county treasurer, 'as returned by the board of canvassers of said precinct.'

"5. That at said special election there were cast in the precinct of Ashby nine legal votes for the town of Whitman for permanent county seat and six votes for the town of Hyannis for permanent county seat of said county, and fifteen legal votes for Milton Dodds for county treasurer of said county, 'as returned by the board of canvassers of said precinct.'

"6. That at said special election there were cast in the precinct of Collins twenty-one legal votes for the town of Whitman for permanent county seat and twenty eight votes for the town of Hyannis for permanent county seat, and twenty-one legal votes for Milton Dodds for county treasurer and twenty-eight votes for James Forbes for county treasurer, 'as returned by the board of canvassers of said precinct.'

"7. That at said special election there were cast in the precinct of Hyannis twenty-four votes for Hyannis for the permanent county seat of said county, and twenty-four votes for James Forbes for county treasurer of said county, as returned by the board of canvassers of said precinct of Hyannis; 'a copy of said canvass is hereto attached, marked "Exhibit A," and made a part hereof.'

"8. That there were cast in said county at said special election in the several precincts sixty legal votes for the town of Whitman for permanent county seat and fifty-eight votes for the town of Hyannis for permanent county

seat, and no more, and sixty-four votes for Milton Dodds for county treasurer, as returned by the precinct canvassing board.

"9. That there were cast at said special election in the precinct of Collins for the town of Hyannis for county seat, two illegal and unlawful votes, that were duly canvassed and counted for the town of Hyannis for county seat, in this that they were cast by one Walter Broking and one William H. Rothwell, who had not resided in the state of Nebraska but five months.

"10. That there were cast at said election in the precinct of Ashby for the town of Hyannis for county seat six illegal votes that were cast by persons that did not reside in Grant county and had only been in said county twenty-one days, and their names are unknown to this affiant. That said votes were duly counted for the town of Hyannis by the precinct canvassing board.

"11. That there were cast at said election in the precinct of Hyannis for the county seat at the town of Hyannis four illegal votes duly counted and canvassed by the board for the town of Hyannis, to wit: G. G. Pickering, H. R. Dellinger, and Michael Yokum who were not citizens and residents of Grant county, and one vote cast by ———, who was not a citizen of the United States and had never declared his intention to become one, and said illegal votes were all counted for the town of Hyannis and given in the number of votes given above except those cast in the precinct of Ashby.

"12. That on the 7th day of August, 1888, said special county commissioners and county clerk met at the town of Hyannis, temporary county seat, to canvass the votes cast at said special election, and then and there duly canvassed and declared the returns of the votes cast at said election in the precincts of Whitman, Collins, and Hyannis, in said county, and unlawfully, wrongfully, and fraudulently threw out, disregarded, and refused to canvass the votes cast in the

precinct of Ashby in said county, as returned by the precinct canvassing board, though often requested so to do, and still neglect and refuse to canvass said votes and to declare the result, and this without any color of right or authority of law so to do, and fraudulently and unlawfully declared the town of Hyannis the permanent county seat and the said James Forbes to be the duly elected county treasurer of said county. A copy of the record of said commissioners is hereto attached, etc.

"13. That the town of Whitman received a majority of all the votes cast at said election for permanent county seat, and Milton Dodds received a majority of all the votes cast at said election for county treasurer, and that the town of Whitman should be declared the permanent county seat, and that Milton Dodds should be declared the duly elected county treasurer of said county.

"With prayer that the said board of county commissioners and county clerk be compelled to reassemble and canvass the votes cast in the county at said election, and especially the votes cast in Ashby precinct, as they are by law required, and that they may be required to declare the town of Whitman the permanent county seat, and to declare Milton Dodds the duly elected county treasurer of said county of Grant, and for costs."

The defendant John S. Dellinger, answering for himself, as well as for his co-defendants, "admits that there was a special election at the time mentioned in Grant county, and denies each and every the several matters and things alleged in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the petition.

"Answering paragraph, or cause of action No. 12, the defendant denies that any legal election, or any election, was held in Ashby precinct at said special election. But alleges that the said special commissioners in specifying the place of voting in said Ashby precinct selected the house of H. J. Kinley, two and one half miles west of

Ashby station; that notices were posted of such fact, and one of said notices was posted on said Kinley's house; that no election was held at said house, nor was there any pretense of holding an election there, nor in or about it, or at any place on the farm or land of said Kinley; nor did any judge or clerk of election act or receive any votes or ballots at the place so designated, nor were any polls opened at said place on said 31st day of July, 1888; but that several evil-minded and wrongly disposed persons and illegal voters, in order to disturb the law abiding citizens of said county, congregated together at a place some two and a half miles distant east of the said Kinley house, a place that had not been designated as the place of election, and wholly unknown to the legal voters of said Ashby precinct, fraudulently and unlawfully pretended to receive votes and ballots for several officers to be voted for, and for the places designated for county seat of Grant county, and received, or pretended to receive, some fifteen votes without any kind of ballot-box other than a cigar-box, which said box was unlocked and without any means of fastening, and was not fastened at any time, but was opened and shut at pleasure during the day, and votes taken therefrom and changed at the will of the pretended board; that at the said pretended election in said precinct there was but one book for the names of the voters, and the said book, when returned to the county clerk to be opened by the board of canvassers, was found to be in such an irregular, changed, and scratched condition as to be unintelligible; that the persons shown to have acted as judges and clerks were not sworn before any justice of the peace, or any officer known to the law, and the papers returned were not, and could not be, recognized as the returns of an election held at the place designated to hold said election, in Ashby precinct, in said county—this return being the one complained of by the plaintiff; that out of the fifteen votes alleged to have been cast in said Ashby precinct, ten of them were illegal,

for the reason that said votes were cast by persons who were not residents of Grant county.

"3. That, in the event that said board of canvassers was recalled together as prayed for, the result of the said election would not be changed, for the reason that in Whitman precinct all votes cast in said precinct were for Whitman; that seven of said votes so as aforesaid cast were cast by illegal voters who were not residents of Grant county; five of said persons are named as follows: Milton Dodds, Dean Durham, M. A. Fairchild, S. A. Weaver, and Frank Ellswick; that in Collins precinct three illegal votes were cast for Whitman, by C. H. Manning, Bert Procter, and B. Swingel; with prayer for judgment."

The defendants also filed a supplemental answer to the said petition, in which they allege: "That, since the institution of said suit, and since the answer hereto filed therein, a new election has been called and had in the said county for the purpose of locating a county seat of said county by common consent as well of the parties to this suit as of all the citizens of said county, parties in said election, and agreed to abide by the result thereof; that said agreement was made and said election held in pursuance thereof for the purpose of amicably adjusting and settling all matters in controversy in this case, and that as a result of said election the county seat of said county has been located at the town of Hyannis, that being the place designated as having been chosen by the board of canvassers of said county."

To which supplemental answer the plaintiff filed a demurrer, which was by the court sustained. Thereupon the cause came on to be heard, upon the objection of the respondents, to the jurisdiction of the judge to try and determine said cause at his chambers, whereupon the said objection was overruled. And thereupon the cause, being submitted, was taken under advisement, and afterwards a peremptory writ of *mandamus* was awarded as prayed.

The defendants assign the following errors:

"1. The court (judge) had no jurisdiction to hear, try, or determine said matter at chambers.

"2. The court (judge) had no jurisdiction to hear, try, or determine said matter in the county of Hall.

"3. The court (judge) had no jurisdiction to hear, try, or determine said matter at any place except at the county seat of Grant county, and at the regular term of court holden in and for said county.

"4. The court erred in finding the issues joined in favor of the defendant in error and against the plaintiff in error.

"5. Under the facts and circumstances of the case the defendant in error was not entitled to a writ of *mandamus*.

"6. The judgment of the court should have been for the plaintiffs in error and not for the defendant in error, according to the law of the land."

The first, second, and third assignments will be considered together.

To the proposition, that a district judge is without jurisdiction, or power, to hear and determine an application for a *mandamus* at his chambers, within a county other than that of the respondent, etc., counsel cite secs. 39 and 57 of ch. 19, Comp. Stats. They also cite sec. 5 of ch. 71, Comp. Stats., 653, of the Civil Code, and sec. 9 of art. 6 of the constitution of the state.

Secs. 39 and 40, chapter 19, Comp. Stats., were passed as a part of an act entitled "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts,' approved February 27, 1877." That act, so far as it purported to confer upon district judges the power and jurisdiction to "sit at chambers anywhere within his district for the purpose of * * * 8. Hearing an application for *mandamus*" was considered by this court in the case of *State, ex rel., v. Pierce County*, 10 Neb., 476. In that case it was held that under our present constitution, section 11, article 3, the legislature could not by an amendatory act confer

such power and jurisdiction upon the judges of the district courts. In the opinion by Judge LAKE we find the following language: "The act of 1866, to which this amendment was made, has a very restrictive title, it being simply 'Courts,' and was passed when no such limitation upon the discretion of the legislature in the enactment of laws as the foregoing existed. In view of that limitation [the provision of the constitution above cited], it would hardly be contended * * * that under this title the legislature could, by an original enactment, confer upon judges of courts during vacation any jurisdiction whatever. And if the legislature could not do this directly by means of an original act, surely it could not be done by an amendment of this one wherein, with the single exception of the district court judges being, by sec. 13, made conservators of the peace, there is not a solitary provision investing them with judicial power."

At the next session of the legislature, after the above opinion was filed and published, that body, doubtless with the above opinion in full view, passed the act of March 2, 1881, which now constitutes section 57 of chapter 19 of the current compilation. The language of this act is such as to clearly invest district judges, sitting at chambers anywhere within their respective districts, with the power and jurisdiction in question, without regard to the county of such district into which such jurisdiction is to extend or operate. And it was so held in the case of *Clark v. State*, 24 Neb., 263.

The remaining assignments may be considered together, as they are all directed to the merits of the finding and judgment upon the evidence.

There was quite a volume of testimony taken in the form of depositions. Nearly all of this testimony was stricken out upon the motion of either party. But nevertheless the depositions thus stricken out were attached to the bill of exceptions, and counsel in the brief treats it

as having been before the district judge, and considered by him in deciding the case; and as being before this court for the purposes of this review. I might possibly take this view of the matter were it not that the certificate of Judge Harrison, of his allowance of the bill of exceptions, is before me, in which he specifies the evidence which was before him upon the trial, to-wit, on the part of the plaintiff, the depositions of Sidney Manning, A. R. Elswick, and George W. Eckles, and a certified copy of the proceedings of the county board of said county, and upon the part of the respondents the deposition of H. R. Dellinger, and a map of the county of Grant, showing the locations of the various precincts therein, and that the same was all the evidence produced at the trial.

Sidney Manning is the county clerk of said county elected at said special election. He introduced and delivered to the county judge taking his deposition, a certified copy of the record, made by the special commissioners, of the canvass of the votes cast at the said special election, which was received in evidence. He also testified that he had in his possession the ballots and poll books showing the votes cast at the said special election; but that said ballots and poll books were under seal as the same were delivered to him by John S. Dellinger, late special county clerk of said county, and he declined to open them or to introduce them in evidence.

A. R. Elswick testified that he resides at Whitman, is engaged in keeping a hotel, and in the practice of the law; that he is acquainted with Thomas R. Linch, who was one of the special commissioners for Grant county, and who canvassed the election returns of the special election held July 31, 1888; that witness had a conversations with him with regard to canvassing the returns of Ashby precinct. I quote his testimony: "I have had conversations with him in regard to the canvass of the Ashby precinct vote, and he has told me at about three different times that that vote

was canvassed and had given two majority for Whitman, and was declared so by the special commissioners. And he said then that Mr. Dellinger found that Whitman had a majority, and he claimed that he had business in Lincoln and that he had to go to Lincoln, and they adjourned to the ninth day from the closing of the polls. He said he did not know what the business was or what he went for." He also stated that after Mr. Dellinger returned the commissioners met according to adjournment and that they sealed up the poll books and the ballots and said they wouldn't count Ashby precinct at all; that these conversations—the last and most particular one—took place about four weeks before the time of the taking of witnesses' depositions, and occurred at witnesse's house. Witness also testifies that he knows Romane Westover, who also was one of said special commissioners; that he had a conversation with him with reference to the canvass of Ashby precinct; that they had counted the vote of Ashby precinct, and that it was declared in favor of Whitman; that it gave Whitman a majority of two and was declared so by the commissioners. Then Mr. Dellinger went to Lincoln. When he came back they sealed up the ballots and the poll books from Ashby precinct, and would not count it, which he said gave a majority to Hyannis. He said, as to the condition of the returns from Ashby precinct, that they were somewhat erased and scratched up, but they were plain enough to know what they were and what they meant."

Geo. W. Eckles testified that he was one of the plaintiffs; that he resided two miles east of Whitman; that he was acquainted with Romane Westover, who was a special commissioner of said county. He said he was one of the special commissioners who made a canvass of the special election on the 31st day of July; heard him make a statement concerning the returns of the canvass of the vote of Ashby precinct. He said that they counted them fifteen

votes in Ashby precinct, nine votes were cast for Whitman for permanent county seat and six for Hyannis; that Whitman had the county seat by a majority of two at that time. Then he said they threw it out on account of its being erased, erasing being done in the writing of the names in the poll book.

I here copy so much of the proceedings of the special commissioners, as a board of convassers of said special election, as is deemed relevant.

"Aug. 3, 1888.—Board met pursuant to adjournment; all members present. On motion board adjourned to 1 o'clock.

"1 P. M.—Board met pursuant to adjournment; all members present. On motion board proceeded to canvass votes. On motion by Forbes, seconded by Westover, it was decided to not canvass the votes of Ashby precinct, for the reason that the said voting place in Ashby precinct was moved from the place designated by the county commissioners, two miles, without authority of the board, or without cause and against the law. Said moving constituting such an irregularity that the vote could not be legally canvassed. Motion carried. On motion board then adjourned to 1 P. M. (*sic*).

"1 P. M.—Board met pursuant to adjournment, and finished canvassing votes. Clerk was instructed to write out notices, and have same put up declaring Hyannis the permanent county seat, it having a majority of votes."

The respondents offered in evidence the deposition of John S. Dellinger, in which he testified that he resided in Hyannis, and was acquainted with the county of Grant. Whereupon he presented a map of said county, which he declared to be a correct representation of said county, and the several precincts therein, as established by the board of special county commissioners; that he was acquainted with some of the legal voters of Ashby precinct, in said county; that they were all, with the exception of two, in the em-

ployment of the B. & M. Railroad Company; that one of these, Mr. J. H. Kinley, resided about two and a half miles west of Ashby—that is, his first residence was at that point; that the other, Mr. Markland, lived in the southwest part of the county, probably about fourteen miles from the place where the election was held; that witness did not know whether Markland voted or not; that witness had seen him several times, and believed it was in April he saw him first; that was at the house of Mr. Yates; that he was out of the county at that time, being before he went onto his claim in Grant county. He also testified that he did not know who made the map which he presented; that it was not absolutely correct, but is a good representation of the way the precincts lie; that this man Markland's family had resided a number of years in the southern part of the state, according to Mrs. Yates's story, who is a part of the family, witness did not know the fact himself; that Mr. Yates then lived north of Alkali lake, near the county line of Cheyenne county. "Some think he is on this side of the line, and some think on the other side."

The purpose of the introduction of the map in evidence is not stated, nor is it apparent. So far as the evidence before the district judge is concerned, I do not think that it was sufficient to sustain the issuance of a writ of *mandamus;* but I do not deem it necessary to discuss the evidence, because an examination of the pleadings impels me to the conclusion that under them no evidence whatever was necessary, but that upon the pleadings alone the judge was justified in issuing the writ. The petition and information of the plaintiff or relator consists of thirteen paragraphs or causes of action. The defendants or respondents, by their answer, deny all of the facts, matters, and things alleged in the said paragraphs or causes of action, numbered from one to eleven inclusive, except the allegation that there was a special election at the time

mentioned, in Grant county, which they admit. The allegations contained in the twelfth paragraph or cause of action are not specifically denied by the answer, but are rather confessed and sought to be avoided by the allegations of other facts, but with what degree of success it is unnecessary to decide, as there was no evidence tending to prove such facts before the judge. The thirteenth paragraph of the petition was not denied by the answer, nor was any notice, whatever, taken of it or its allegations by the defendants. By reference to the statements of the pleadings in the forepart of this opinion, it will be seen that the said thirteenth paragraph contains the allegation "that the town of Whitman received a majority of all the votes cast at said election for permanent county seat." This allegation contains the very gist and essence of the petition and of the plaintiff's case. It was not denied, nor, as I have already intimated, was it proved upon the trial. This allegation, had it been denied by the answer, must have been proved to enable the plaintiff to recover, but being fairly well pleaded and not denied, the facts alleged stand as true without proof. That there was an election for the location of a permanent county seat for said county is alleged and admitted. The record of the canvass of the votes cast at said election shows that the returns of the votes cast in one precinct were rejected and thrown out, and that thereupon Hyannis was, by the record, declared to have a majority of the votes cast. The object and purpose of this proceeding was, in substance, to correct that record. As we have seen, the pleadings settle the point against the record made by the county commissioners. The judgment of the district court is therefore

AFFIRMED.

THE other judges concur.

DESERET NATIONAL BANK, APPELLANT, V. HEATH NUCKOLLS, APPELLEE.

[FILED NOVEMBER 18, 1890.]

Judgment: VOLUNTARY PAYMENT. Money recovered and paid on legal process upon a judgment of a court of competent jurisdiction rendered in a suit or proceeding in which the court had jurisdiction of the subject and the parties thereto, or voluntarily paid in satisfaction of the judgment or process, cannot be recovered back in a subsequent action, while such judgment remains in force unreversed and unmodified.

APPEAL from the district court for Richardson county. Heard below before APPELGET, J.

Charles Offutt, for appellant.

Isham Reavis, and *E. F. Warren*, for appellees.

S. H. Calhoun, pro se.

See opinion for citations of counsel.

COBB, CH. J.

This action is in the nature of a creditor's bill, brought in the name of the Deseret National Bank, of Salt Lake City, against Heath Nuckolls and others, in the district court of Richardson county, in which a decree was rendered for defendant Nuckolls on March 18, 1889, for $993.66, and from which decree the plaintiff appeals to this court.

In the summer of 1879 one S. F. Nuckolls was indebted to the Deseret National Bank in the sum of $1,000, and as security assigned a note made payable to himself by Heath Nuckolls for the sum of $987.87 and accrued inter-

est. S. F. Nuckolls died before the bank's debt became due, and at the request of his representative the bank proceeded to collect the collateral against Heath Nuckolls, who lived in Otoe county in this state. On June 10, 1879, the note was sent to an Omaha bank with instructions to place it in the hands of an attorney for collection. The Omaha bank sent it to the Nebraska City National Bank, which delivered it to S. H. Calhoun, an attorney at law, for suit. On July 29, 1879, Mr. Calhoun wrote the Deseret National Bank that he had received the note, and had "brought suit against Heath Nuckolls alone." Preparations were made for trial in December following in the district court of Otoe county, the bank having forwarded to the attorney the United States comptroller's certificate of its organization as a national bank and of its corporate capacity. On October 8, 1879, the Deseret bank sold the note it held against the estate of S. F. Nuckolls to W. S. McCormick, and wrote to the attorney:

"SALT LAKE CITY, UTAH, Oct. 8, 1879.

"S. H. CALHOUN, Esq.: I have to-day sold the note of S. F. Nuckolls to W. S. McCormick, of this city, and given him an order on you for the Heath Nuckolls note; he will pay all costs incurred, and, we presume, have his own name substituted in the place of the Deseret National Bank. Please return us the comptroller's certificate relative to our organization, and oblige, L. S. HILL,

"Cashier."

The attorney received and answered this letter as follows:

"NEBRASKA CITY, OTOE CO., NEB., Oct. 14, 1879.

"DESERET NATIONAL BANK: Yours of October 8 announcing sale of the note in suit against Heath Nuckolls duly received. I think suit had better go on in your name, and it can be treated as a trust for Mr. McCormick. Depositions will have to be taken before the first Monday

in December. I also herewith enclose you the comptroller's certificate of your organization heretofore sent me.

"S. H. CALHOUN."

No further correspondence appears to have passed between these parties until September 5, 1887, but the attorney continued the suit against the defendant Nuckolls without substituting the name of the assignee and owner of the note as the *cestui que trust*, and on December 8, 1880, obtained judgment in favor of the bank for the sum of $1,420.23, with interest at ten per cent per annum until paid.

On September 8, 1880, execution issued on the judgment, and on June 6, 1881, and December 28, 1882, *alias* writs of execution were issued, and not satisfied. On January 20, 1880, a transcript of the judgment was filed and indexed in the clerk's office of the district court of Richardson county. On October 14, 1885, a transcript of the issuance of executions was filed in the same office in Richardson county.

On December 13, 1884, one Albert Harmon, holding a tax lien on certain real estate owned by Heath Nuckolls in Otoe county, entered foreclosure proceedings in the district court of that county, making the Nebraska City National Bank, Lewis Dunn, and the Deseret National Bank defendants, as holding liens against the property. Mesne process was not served on the last named defendant. On April 6, 1885, the attorney, Mr. Calhoun, filed the answer of the Deseret bank, setting up that the judgment of December 19, 1879, was unpaid, and was a valid subsisting lien on the land described "to the exclusion and precedence of all others."

On April 7, 1885, a decree of foreclosure was taken in Harmon's case, directing the sale of the land to pay the liens of the parties, that of the Deseret bank being adjudged third in order of priority, amounting to $2,234.49, bearing interest at ten per cent per annum.

On August 1, 1885, the land was sold for $1,250. The sale was confirmed, and after discharging the two prior liens and the costs, $798.06 were paid to the attorney, Mr. Calhoun, by the clerk of the district court on October 1, 1885, "as the attorney for the Deseret National Bank."

On May 20, 1886, Mr. Calhoun brought the present action in the name of the Deseret National Bank against Heath Nuckolls, Robert Hawke, Isham Reavis, William E. Nuckolls, Rupert Nuckolls, Bruce Nuckolls, Paul Nuckolls, and Allen Fowler, executor of S. F. Nuckolls, deceased, as debtors of Heath Nuckolls, or as being in possession of equitable assets of which he was entitled to the possession and the proceeds. The plaintiff's petition sets up the rendition of the judgment of December 8, 1880, and the subsequent proceedings thereunder, and was in fact a creditor's bill against the appellee in the case to enforce the satisfaction of the judgment debt in favor of the Deseret National Bank.

On January 4, 1888, the defendant Heath Nuckolls answered by his cross-petition and counter-claim, setting up that the plaintiff, on December 8, 1879, recovered a judgment in the district court of Otoe county for the sum of $1,423.23 and $12 costs, which remains but partially satisfied; that a transcript thereof has been filed in the clerk's office of the district court of Richardson county, and that this suit is based thereon. He also admits the allegations of the petition in the suit of Greever and others; and further answering, by way of cross-petition, the defendant alleges that, after the rendition of said judgment, he entered into an agreement with one Allen Fowler, as the executor of S. F. Nuckolls, deceased, whereby certain litigation then pending in the district court of Otoe county, between this defendant and Fowler, as executor, and certain other matters in difference between defendant and said executor should be settled and amicably arranged, by virtue of which said executor agreed to assume and pay off the

said judgment against this defendant in favor of the Deseret bank; that such agreement was made long prior to the issuing of any execution on said judgment as mentioned in the petition, and this defendant further alleges that the said Allen Fowler, as executor, fairly and fully carried out the provisions of the agreement entered into; that on November 21, 1881, said Fowler paid to the holder and owner of the judgment at Salt Lake City the sum of $1,698.02, the full amount of the judgment with interest, but not including any amount collected on execution prior thereto, as alleged in the petition herein, but the whole amount of the judgment and interest was considered as due, owing, and payable; that on December 15, 1884, one A. M. Harmon commenced his action in the district court of Otoe county against defendant, the Nebraska City National Bank, the Deseret National Bank, and others, the object and purpose of which was to foreclose certain tax liens held by Harmon on certain lands owned by defendant in said county of Otoe; that the plaintiff herein was made defendant in the action, as the alleged holder of the lien on said described real estate, which was subject to the lien of the plaintiff Harmon therein; that thereafter, on April 6, 1885, the plaintiff herein, the Deseret bank, filed its answer, setting up that the judgment against this defendant in favor of this plaintiff had been duly recovered; that the same was a lien upon the premises from the date of its rendition; that it was at the date of the filing of said answer still unreversed and unpaid, and was a valid and subsisting lien upon the premises, and that by said answer judgment and decree were prayed that the land be sold, and from the proceeds the judgment, interest, and costs be paid and discharged.

Also on April 7, 1885, at the regular term of the district court of Otoe county, judgment and decree were rendered therein in favor of the plaintiff's first lien upon the real estate, described in the petition, for the aggregate

amount of the taxes paid thereon by him, with interest thereon to the last date, being the sum of $86.70; and as to the defendants Greenwood and the Deseret National Bank, it was found that there was unpaid and due on the judgment set up in the answer of Greenwood, including interest, the sum of $262.36, which was a second lien on said real estate; and that there was due and unpaid on the judgment set up in the answer of said bank, including interest, the sum of $2,234.49, which was a third lien on said real estate; and further, that said liens should be enforced against the same. The defendant Heath Nuckolls was required, within twenty days from the rendition of the judgment and decree, to pay the costs of the action, and for the benefit of the plaintiff, the defendants Greenwood and the Deseret bank were to pay the aggregate amount of the three liens described, with interest from that date, and in default of such payment, that said real estate be sold by the sheriff of Otoe county, as upon execution at law, and that the proceeds be applied, first, to the payment of costs; second, to the plaintiff's lien; third, to the lien of Greenwood, fourth, to that of the Deseret National Bank, and fifth, as should be thereafter directed by the court. That by such sale the defendants Heath Nuckolls and Lewis Dunn, and all persons claiming under them, were forever barred and foreclosed of all right, title, and interest in, to, or upon said real estate, the possession of which, after confirmation and sale, was by the sheriff to be delivered to the purchaser, to-wit, the west half of the southeast quarter of section 7, township 7 north, of range 12 east, in Otoe county, Nebraska.

On October 1, 1885, the plaintiff in the present suit, by the receipt of its attorney to the clerk of the district court, received and had in said action the sum of $798.06, the surplus aforesaid, and has retained the same and has failed to pay the amount, or any part thereof, to defendant.

It is further alleged that at the date on which the

plaintiff received said sum of $798.06, there was nothing due it on the judgment or otherwise; that the same had been long prior thereto, on December 21, 1881, paid to plaintiff as it well knew, and has not been repaid though often requested and is still due and owing, with interest thereon. Further, it is alleged that the defendant was not informed of, and did not know the facts as to the judgment until long after the commencement of this action, on November 1, 1887, and that he was unable to secure the proof thereof; that all of said transactions occurred in Utah territory, where the plaintiff and Allen Fowler reside; that defendant was not advised by any person of these facts, but that the plaintiff had full knowledge of them, and that the judgment was no longer a lien upon the property of defendant.

Subsequently, on August 1, 1888, the plaintiff moved to strike the amended answer of defendant from the files, for reasons presented to the court, which were overruled. At the same time the plaintiff moved for an order on the defendant to make his answer more definite and certain, which motion was overruled. The plaintiff's demurrer to the defendant's cross-petition and answer, on the grounds that the same do not contain facts sufficient to maintain a cause of action, was heard and overruled.

On August 30, 1888, the plaintiff answered the cross-petition and reply to the amended answer of defendants, setting up:

1. That the action was instituted, conducted, and prosecuted, from its inception down to June 16, 1888, without the authority of the plaintiff in the suit.

2. That it was never served with process in the action of A. N. Harmon, commenced December 15, 1884, or at any other time, in the district court of Otoe county against Heath Nuckolls and others; that it never made its appearance in that action, and never authorized any one to enter or make appearance in the action; that the answer filed

April 6, 1885, purporting to be that of the Deseret National Bank, was not the answer of plaintiff, and was filed without its knowledge, authority, or consent, and that each allegation therein made, and the relief asked, were made and sought without the knowledge, authority, or consent of the plaintiff; that it has never been within the state of Nebraska, but is a national banking association, organized under the laws of the United States in the territory of Utah, and has never had any officer or managing agent in Nebraska, and that neither the plaintiff nor any of its attorneys knew of the prosecution of Harmon's action or of the pretended answer filed therein until the 16th day of June, 1888.

3. That S. H. Calhoun was not the attorney of said Deseret bank, and had no authority to file its answer or to receive said sum of $798.06 as the attorney of the plaintiff or otherwise, and plaintiff denies that said sum, or any part thereof, was ever paid to it, or to its attorney.

4. The plaintiff further denies any allegation in the cross-petition set up not in this answer admitted.

For a second defense to the cross-petition of Heath Nuckolls, the Deseret bank, not waiving its defense hereinbefore set forth, further alleges:

1. That the action named in the amended answer and cross-petition, which lately, before the commencement of this suit, depended in the Otoe county district court, wherein A. M. Harmon was plaintiff and Heath Nuckolls, the Nebraska City National bank, the Deseret National Bank (this plaintiff), and Lewis Dunn were defendants, it was by the plaintiff alleged that the defendant Nuckolls was the owner in fee simple of the land described as the west half of the southeast quarter of section 7, township 7 north, of range 12 east, in the county of Otoe, and that the plaintiff had a lien thereon for taxes, and that the other defendants had each a lien on said land by reason of judgments which each owned and held, of record

in the Otoe county district court, in full force and effect; that the plaintiff petitioned for a sale of said land under a decree of the court for the purpose of satisfying the liens thereon in the order of their priority.

2. That the judgment which the plaintiff then had of record in Otoe county, as a lien on said land, was the same judgment which the defendant Nuckolls, in this action, by his amended answer and cross-petition alleges was finally and fully paid off and discharged to this plaintiff on the 21st day of November, 1881.

3. That on April 4, 1885, the defendant Nuckolls filed his answer in the cause mentioned, admitting that he had the title to said land, and put in issue the lien claimed by the plaintiff and those of the other defendants therein.

4. That on April 7, 1885, after the separate answers of the defendants had been filed, asserting their judgment liens, the cause was finally heard and judgment entered for the plaintiff as having the first lien upon said land, for the aggregate amount of taxes paid thereon, and interest to the last date, amounting to $86.70; and as to the defendants Greenwood and the Deseret National Bank there was unpaid and due on the judgment set up in the answer of Greenwood, including interest, $262.36, which is a second lien on said real estate; and that there is due and unpaid on account of the judgment set up in the answer of the Deseret National Bank, including interest, $2,234.49, which is the third lien on said real estate, and it was adjudged that the said lien should be enforced against said real estate and in default of the payment of the costs of this suit, within twenty days, by the defendant Heath Nuckolls, who should pay for the benefit of the plaintiff, the defendants Greenwood, and the Deseret National Bank, the aggregate amount of the three liens described, with interest from the date of the decree, and in default thereof that said real estate be sold by the sheriff of Otoe county as upon execution at law, and the proceeds applied to satisfy the

costs of suit, and the amounts of said liens according to their priorities, with interest, and, further, as the court shall thereafter direct; that by such sale the defendants Nuckolls and Dunn, and all others claiming under them, or either of them, should be forever barred and foreclosed of all right, title, and interest in and to said real estate, the possession of which upon confirmation of such sale shall be by the sheriff delivered to the purchaser.

5. The Deseret National Bank further sets up that the judgment remains in full force and effect, unreversed, and has not been modified or vacated, and that the sum of $798.06 paid to the attorney, S. H. Calhoun, October 1, 1885, was paid under, by virtue, and in pursuance of the judgment aforesaid, in said Otoe county district court, and that the defendant Nuckolls ought not to be permitted to have his answer and cross-petition to sue for the recovery of said sum, forasmuch as the same was paid under and in pursuance of the orders, decree, and final judgment of a court of competent jurisdiction, and the matters, allegations, and issues in his answer and cross-petition set up and made are *res adjudicata*, and have been finally settled in the parties to this action.

6. That the Deseret National Bank presents herewith the complete record of the action of *Harmon v. Heath Nuckolls and others*, and pleads the same, and the judgment therein, in bar of the claim asserted in the answer and cross-petition of the said Heath Nuckolls, with prayer for the dismissal of the same, with costs.

This record is more extended than was required, for the purpose of presenting the questions upon which, as I conceive, the case must be decided.

It is not deemed necessary to discuss the matters presented in the first or second points of the brief of counsel for the appellant. Although it were true, and so conceded, that the action, to reverse which this appeal was taken, was commenced in the district court without author-

ity, and that the cross-petition and counter-claim of the appellee ought to have been dismissed at the request of the appellant, even then it is no less true that after such request was refused by the trial court the appellant, as defendant to the cross-petition, made answer to the same upon the merits and submitted to the trial thereof. At the hearing we were all of the opinion that by this course all questions of the jurisdiction of the court and its right to hear and determine the cause were waived. In expressing this view neither the court, nor the writer as a member of it, wishes to be understood as expressing an opinion whether or not the appellant pursued the wiser or more prudent course in answering to the merits rather than seeking other remedy, as the case stood, upon the overruling of its motions and demurrer.

The cross-petition of the defendant Nuckolls was in the nature of an action in assumpsit for money had and received by the plaintiff to the use of said defendant. The plaintiff, The Deseret National Bank, set up, by way of admission in answer to the defendant's cross-petition and counter-claim, the identical facts relied upon by the defendant therein as hereinbefore stated, in so far as the same depended upon the proceedings in the district court of Otoe county, and pleaded and relied upon the same as being judicial proceedings in and the judgment of a court of competent jurisdiction, and in a proceeding wherein it had jurisdiction as well of the subject-matter as of all the parties thereto.

It is not deemed necessary to refer to the evidence in the case other than that of the record in the action of *Harmon v. Nuckolls, The Deseret National Bank, and others*, stated in the cross-petition of the defendant Nuckolls, and in the answer of the bank. This record is relied upon by both parties, and appears to be complete, in due form, and sufficiently proved. The appellee, in the brief of counsel, attacks the pleading and brief of appellant as inconsistent

in embracing propositions contradictory and paradoxical. As a criticism, the reflections of counsel are not without force, and are fairly well taken. Counsel cited the case of *School District v. Holmes*, 16 Neb., 487; that of *Hopper v. Hopper*, 11 Paige, Ch. [N. Y.], 46; Bliss on Code Pleadings, sec. 243, and Maxwell's Pleading and Practice [3d Ed.], 93. The doctrine of all of these authorities is doubtless correctly laid down by Judge MAXWELL, that "while the Code permits a defendant to set forth in his answer as many grounds of defense, counter-claim, or set-off as he may have, and places no limitation upon the right, except that the party shall state in the verification that he believes the facts stated in the answer to be true, yet this clearly requires consistent defenses, because it is impossible for two alleged grounds of defense, which plainly contradict each other, to be true." (*Citizens Bank v. Closson*, 29 Ohio St., 78.) The authors in these cases are laying down a rule for the construction of pleadings when the same are brought before a court by the established methods. None of them go to the length of holding that, where an answer contains two or more inconsistent defenses, and the opposite party, without motion, or in any manner, invokes a ruling or decision of the court, but proceeds to trial on such defenses, either in the trial court, or on error, can he insist that all of such defenses be rejected on account of their inconsistency with each other. In the case cited from the 29th Ohio St. Report doubtless the correct practice was pursued where the court, on motion of the plaintiff, ordered the defendant to elect which of the two supposed inconsistent defenses he would rely upon; and that case was reversed, not because a correct rule was not followed, but because in the judgment of the appellate court the two defenses were not inconsistent, and the order for the defendant to elect in that case was error. In the case at bar it may be conceded that the defenses set up to the cross-petition by the answer of the plaintiff in the first

and second defenses of the answer were inconsistent, and that upon proper application the plaintiff would have been required to elect upon which of the two defenses pleaded he would rely. At the same time the inconsistency was more serious in law than in fact; it was more technical than objectionable. The plaintiff made no motion requiring the plaintiff to elect, nor did he take any exception to the form of the plaintiff's pleading, and I think, therefore, if either count of the answer is found to present a sufficient defense to the cross-petition, the plaintiff is entitled to the benefit of it.

While, as before stated, there is an apparent inconsistency in the defenses set up in the first and second counts of the plaintiff's answer to the cross-petition, such inconsistency is more superficial than substantial. The tenor and effect of the first count are that the defendant was not represented by an attorney of its employment in the commencement and prosecution of the action, nor is it chargeable with the money set up as the foundation of the defendant's counter-claim, because the attorney who drew and receipted for the money from the clerk's office of Otoe county was not authorized to receive money by the plaintiff. These are the substantial facts alleged in the first count. It is true there are other facts set up, that the attorney was not that of the plaintiff authorized to prosecute in its name, or to accept service of process for it in the suit of Harmon. But it is not alleged that the proceedings in the Otoe county district court, from the commencement of Harmon's action up to and including the final judgment therein, were not, in fact, had and made in a court of competent jurisdiction, nor that such proceedings were not juridical in form. And the sole object and purposes of the second count were and are to allege and bring before the court the fact that the money sued for by the defendant in his counter-claim was derived from the property of the defendant, and received by the plaintiff, if at all, under due process of law,

as the judgment of a court of competent jurisdiction acting within the requirements of law.

The fact is not to be denied that there is an apparent inconsistency in the two propositions: the plaintiff's denial that it ever received the money, and that it received the money under the process of law. But it is equally apparent and clear to the whole case, that, while the plaintiff received the money in the eye of the law, it never did receive it in point of fact.

There is another view to be taken of the question. So far as the case presented is concerned the defendant stands in the attitude of a plaintiff. Although designated as the defendant, by his cross-petition and counter-claim he in reality sues the Deseret National Bank for money had and received to his use. Hence it was incumbent upon him, by his pleadings, to allege, and, by evidence, to prove, the material facts and circumstances of the receipt of the money by the plaintiff, and necessary to establish his right to the money and to demand its return to him. Accordingly by his cross-petition he set up and alleged all the material facts, lacking the arguments and conclusions contained in the first and second counts of the plaintiff's answer, and the principal if not the sole proof in support of his cross-bill and counter-claim was the record of the judicial proceedings of the judgment in Otoe county. To state it differently and briefly, the defendant, being sued by the plaintiff in Richardson county, sets up, by cross-petition and counter-claim against the plaintiff, the commencement of the suit against him by Harmon in the district court of Otoe county; the impleading of the Deseret bank in the action; the appearance of the plaintiff therein, and its lien on the property of the defendant; the decree and sale of the property to satisfy the liens of the action; the payment into court of the proceeds, and the receipt by the plaintiff of $778.06 in satisfaction of that amount of its lien and judgment which the defendant claims to recover

back upon his cross-bill and counter-claim. Upon the supposition that the plaintiff had made neither plea nor answer to this claim, but had only appeared after judgment, and had brought his cause to this court on appeal, in my view the identical question would have been presented by the record which is now before us; and such judgment could only be affirmed upon its appearing to the court that it was rendered upon sufficient allegations of pleading, and upon competent and satisfactory evidence.

A case involving the same question here presented was brought before the supreme court of the territory of Nebraska in the case of *Paynter v. Mills*, reported in 1 Neb., 440. So far as appears, in that report but one precedent was cited as authority, either by counsel in argument or by the court in its opinion, and that to a collateral issue. It is probable at that early day but few authorities were accessible. But the experienced and cultivated mind of the judge who delivered the opinion directed him to the same logical conclusions which had already been promulgated by the jurists of English and American law. The facts were that certain land had been entered under an act of congress, for the relief of citizens of towns on land of the United States under certain circumstances, approved May 23, 1844. The land being within the corporate limits of the city of Omaha, it was by the purview of the act made the duty of the mayor to convey the lots into which the land had been subdivided to such purchasers as were entitled thereto under the provisions of the act; and in cases of conflicting claimants to any of such town lots the mayor was "to hear and determine all questions of title according to law and evidence, and give to the person, adjudged to have the best title a deed in fee simple." A certain lot was claimed by both John I. Paynter and George M. Mills, of Omaha. Upon a hearing before the mayor he decided in favor of the title of Mills, and conveyed the lot to him. Paynter brought ejectment for pos-

session, which resulted in a verdict and judgment for th defendant, from which the plaintiff appealed, and the supreme court held that "the decision of a tribunal acting within its jurisdiction, whether it be a court or merely a board, or an officer having special enumerated powers, can be reviewed or set aside only by a direct proceeding for that purpose."

In the case of *Marriott v. Hampton*, 7 Term R. [Eng.], 269, the defendant formerly brought an action against the plaintiff for goods sold for which the plaintiff had before paid and taken a receipt; but not being able to produce the receipt at the trial, and having no other proof of the payment, he could not defend the action, but was obliged to submit to judgment and pay the money again, and gave a *cognovit* for the costs. Subsequently, he found the receipt, and brought this action for money had and received to recover back the sum wrongfully enforced in payment. But Lord Kenyon was of the opinion, at the trial, that since the money had been paid under legal process it could not be recovered back again, however unconscientiously retained by the defendant, and the plaintiff was nonsuited. The chief justice said: "If this action could be maintained, I know not what cause of action could ever be at rest. After recovery by process of law there must be an end of litigation, otherwise there would be no security for any person. I cannot, therefore, consent even to grant a rule to show cause lest it should seem to imply a doubt. It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial, and they are as often refused, but this proposition goes much further."

Lord Ashhurst was of the same opinion, and the other justice, upon the king's bench, said: "It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again because they were not properly prepared the first time with their evidence."

The case of *Huffer v. Allen and another*, reported in the *Jurist* [Eng.], vol. 12, pt. 1, p. 930, is to the same effect, and it was there held that "A demand for which action was brought, having been reduced below £20 by payment, and the plaintiff afterwards signing judgment in default of appearance for the original claim, and arresting the defendant by *capias* on the judgment, the defendant was estopped by the judgment from alleging that the arrest was maliciously made for a sum which did not authorize it."

The court said: "The judgment must be for the defendants, which I regret, for if the acts of the defendants as plaintiffs in the former action were willfully done, they are unjustifiable. But we must stand on the principles and process of the law. There is here a judgment which is equivalent to an act of the law, and constitutes an estoppel, and I take it that this judgment imparts an absolute incontrollable verity of all the words convey, against which neither of the parties to the suit can aver anything so long as it remains. So long as there stands a judgment saying that £28 is due, that cannot be controverted or called in question. The counsel says, if the plaintiff cannot maintain this action, he has no other remedy. But that is not the case. His client might have caused the judgment to be corrected, and the execution prevented or set aside; otherwise we are concluded by first principles. It may be that if the judgment had been first set right, this action would have afterwards lain, but there is no opinion upon this point."

There are abundant American cases, cited by counsel for the plaintiff, to the same effect: *Corbet v. Evans*, 25 Pa. St., 310; *Tilton v. Gordon*, 1 N. H., 33; *Le Grand v. Francisco*, 3 Munford [Va.], 83; *James v. Cavit*, 2 Brevard [S. Car.], 174; *Stephens v. Howe*, 127 Mass., 164; *Greenabaum v. Elliott*, 2 Cent. L. J., 439; *Kirklan v. Brown's Admr.*, 4 Humph. [Tenn.], 174; *Binck v. Wood*, 43 Barber [N. Y.], 315.

The only authorities cited to this branch of the case by counsel for appellee is the latter clause of sec. 524 of 1 Greenleaf on Evidence, as follows: "Another qualification of the rule is that a party is not to be concluded by a prior suit or prosecution, where from the nature or course of the proceedings he could not avail himself of the same means of defense or of redress which are open to him in the second suit." There is nothing in the nature or cause of the proceedings pointed out in the Harmon suit which the defendant could avail himself of in the second suit, and not in that one except that at that time he did not know, as he alleges, that he had paid off the note upon which the original suit had been brought against him in Otoe county.

This allegation falls far short of the facts in the case of *Marriott v. Hampden*, *supra*, where the defendant knew that he had paid for the goods, but had temporarily lost the receipt; and under the rules of evidence of that day could not prove the fact of payment. No cases are cited to the text of Greenleaf, but there is a citation to Starkie on Evidence, 214, 215, which is not pertinent to the question, and is doubtless a miscitation.

I am of the opinion, upon the authorities, and from a consideration of the nature and conclusive character of judicial proceedings, that the claim set up by the appellee's cross-petition and counter-claim, and proved by the record produced by him, is insufficient to sustain an action in the present collateral proceeding. The judgment of the district court is therefore reversed, and the counter-claim and cross-petition of the appellee are dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

A. D. ROOT ET AL. V. STATE BANK.

[FILED NOVEMBER 18, 1890.]

1. **Final Order: OVERRULING MOTION TO DISCHARGE ATTACHMENT IS NOT.** An order overruling a motion to discharge an attachment is not a final order and cannot be reviewed prior to the rendition of final judgment.
2. **Proceedings in error,** *held*, to be prematurely brought and are dismissed.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

Dawes & Foss, for plaintiffs in error.

M. H. Fleming, and *Hastings & McGintie, contra*, cited, to the contention that the order was not reviewable: *Wilson v. Shepherd*, 15 Neb., 15; *Seidentopf v. Annabil*, 6 Id., 524; Drake, Attachment, sec. 419; *Talbot v. Pierce*, 14 B. Mon. [Ky.], 195.

MAXWELL, J.

The allegations in the case are substantially as follows: A. D. Root & Co. were indebted to the State Bank of Crete, in the sum of $3,000 upon a promissory note due September 29, 1889, which note was signed by A. D. Root & Co., Benjamin Root, and A. D. Root. Benjamin Root was indebted to the State Bank in the sum of $2,900, which note was due August 24, 1889. This note was signed by A. D. Root as surety. On the 14th day of November the State Bank caused an order of attachment to be issued against the said parties, attaching their drug store at Crete, and also attaching some property which had been the individual property of Benjamin Root, and which he had conveyed by deed, in the month of June, 1889, to his

wife, Susie Root; also attaching one piece of property which he had bought and given to his wife, having had the deed made directly to her more than two and a half years previous to the issuing of said attachment.

The affidavit for attachment is in the usual form: "That the defendants have assigned and disposed of a part of their property with intent to defraud their creditors, and that the defendants are about to convert a part of their property into money for the purpose of placing it beyond the reach of their creditors, and that they have property which they conceal."

The defendants deny every allegation that is made in the affidavit for attachment; admit that Benjamin Root owned block 46, in Crete; that he conveyed it to his wife; admit that A. D. Root & Co. did own five acres of land which is near Crete, and they conveyed this five acres to the wife of Benjamin Root, or, in other words, Benjamin Root gave this land to his wife; admit that lots 5 and 6, in block —, were given to Susie Root by her husband, Benjamin Root, in April, 1887, as a birthday present, the deed being made direct from the party of whom Benjamin Root bought the property at that time to his wife, and never has been changed since, and at which time the firm of A. D. Root & Co., Benjamin Root, or A. D. Root owed the State Bank nothing whatever. They set forth that these transfers were made in good faith, with no intent to defraud their creditors, and they allege the further fact that at the time the said attachment was issued the said Benjamin Root had property of the value of $13,355, and that he owed $7,709, and had a balance, after paying his creditors, of $5,646; that the firm of A. D. Root & Co. were possessed of property to the value of $12,023.67, that they owed $4,774.12, and had a balance of assets of $7,249.55; that they were worth on the day the attachment was made $12,895.55 over and above liabilities, which property could have been reached, and was liable to

satisfaction of any judgment under execution which might be issued against them; that at the time the attachment was issued A. D. Root & Co. owed the State Bank the sum of $3,000, and, being engaged in a general drug business, they also owed various firms with whom they did business an amount of $1,774.12, which amount has all been paid by the said A. D. Root & Co. since that time, and had been paid at the time that the motion to dissolve was made.

A motion to dissolve the attachment was made in the court below and overruled, and from that order the cause was brought into this court by a petition in error. No final judgment, so far as appears, has been rendered in the case. The action, so far as the record discloses, is still pending and undetermined. This being the case, the overruling of the motion to discharge the attachment cannot be reviewed. It is not a final order, as it simply continues the lien of attachment in force and is subject to further review up to the time of rendering judgment.

The question here presented was before this court in *Wilson v. Shepherd*, 15 Neb., 15, and it was held that overruling a motion to discharge an attachment was not subject to review up to the time judgment was rendered. The question was carefully considered in that case and the decision we believe is right. The proceeding in error in this court, therefore, is premature and will be

DISMISSED.

THE other judges concur.

CITY OF SEWARD V. CATHERINE KLENCK.

[FILED NOVEMBER 18, 1890.]

1. **Review: FAILURE TO SERVE BILL OF EXCEPTIONS IN TIME.** Where a bill of exceptions which contained all the testimony was not presented to the attorneys of the adverse party for correction and amendment for a considerable time after that fixed by law, and was then signed by the judge against the protest of the attorneys of the defendant in error, *held*, that while errors which occurred during the trial could not be reviewed, yet the evidence will be considered for the sole purpose of determining whether or not there was sufficient to sustain the verdict.

2. **Evidence** examined, and *held*, to support the verdict.

ERROR to the district court for Seward county. Tried below before NORVAL, J.

Ed. P. Smith, and *D. C. McKillip*, for plaintiff in error.

R. S. Norval, and *R. P. Anderson*, *contra*.

MAXWELL, J.

This is an action brought by the defendant in error against the plaintiff in error to recover damages sustained by her from an alleged defect in a sidewalk in the city of Seward by reason of which she fell and fractured her left leg.

On the trial of the cause the jury returned a verdict in her favor for the sum of $1,200, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The special question was submitted to the jury whether Mrs. Klenck at the time of the injury was on the sidewalk, and the jury answered in substance that she was. In view of the condition of the case this finding is important.

After the case was docketed in this court a motion was made to quash the bill of exceptions, because it was not reduced to writing and presented to the attorney of the adverse party within the time required by law.

It appears from the record that the trial took place on the 7th day of March, 1888, and court adjourned *sine die* on the 30th day of April, 1888. No time was taken by the plaintiff in error to reduce the exceptions to writing, so that the time to prepare the bill and submit it to the attorneys of the defendant in error would expire on the 15th day of May of that year. The bill was not presented to the attorneys of the adverse party or trial judge for his approval and signature until the 11th day of October, 1888, and was signed by him against the protest of the attorneys of the defendant in error.

It is the duty of the court to give a liberal construction to all provisions of the statute relating to the preparation and signing of bills of exceptions, and, if possible, to protect the rights of the parties by sustaining such bills. In the case at bar, however, for some reason which does not clearly appear, the bill was not prepared and presented to the attorneys of the defendant in error until October next after the trial. No valid excuse is offered for this delay. The judge evidently considered the evidence proper to submit to this court, and signed the bill which contains all the testimony.

It is apparent that the bill, so far as it embodies the exceptions taken during the trial, cannot be considered, but may be retained for the sole purpose of determining whether the evidence is sufficient to sustain the verdict. (*Scott v. Waldeck*, 11 Neb., 525; *Donovan v. Sherwin*, 16 Id., 130.) The record shows that the jury viewed the place where the accident occurred and made special findings that the defendant in error was on the sidewalk when injured.

The attorneys for the city called certain witnesses who

testified that the defendant in error was angling from the sidewalk to the street crossing, and that the accident in fact occurred in the street outside of the sidewalk. The testimony upon this point was in direct conflict and proper for the jury to decide.

The jury had a much better opportunity of determining the facts than is possessed by this court, and the verdict appears to be based upon the testimony. The judgment is therefore

AFFIRMED.

COBB, CH. J., concurs.

NORVAL, J., having tried the case in the court below, did not sit.

MARTIN CANNON v. M. C. WILBUR.

[FILED NOVEMBER 18, 1890.]

1. **Lease**: FORFEITURE: NOTICE REQUIRED. In order that a landlord may avail himself of an option contained in his lease to terminate the same for a failure to pay the rent, he must give the tenant notice of his intention to declare a forfeiture.
2. ———: WRONGFUL EVICTION: MEASURE OF DAMAGES. Ordinarily, where a tenant is wrongfully evicted by his landlord, the measure of the tenant's damages is the rental value of the property for the unexpired term, less the amount of rent reserved by his lease.
3. **Evidence** considered, and *held*, to sustain the verdict.

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

Jno. L. Webster, and *Seymour G. Wilcox*, for plaintiff in error, cited, contending that notice of forfeiture was not

required: *Sexton v. Chicago Storage Co.*, 21 N. E. Rep., 920, and cases cited; *Colton v. Gorham*, 33 N. W. Rep., 76.

Charles Offutt, and *R. W. Patrick*, cited, in reply to the contention: *Wilson v. Gerhardt*, 13 Pac. Rep., 705; *Hendrickson v. Beeson*, 21 Neb., 61; Code, secs. 1020–22. As to the measure of damages for wrongful eviction: Sutherland, Damages, sec. 149, and cases; *Mack v. Patchin*, 42 N. Y., 167, and cases.

NORVAL, J.

This is an action for damages which the plaintiff claims to have sustained by reason of the defendant unlawfully terminating a certain lease entered into between the plaintiff and defendant, whereby the plaintiff lost the benefit of the possession of the leased premises. A trial was had to a jury, with verdict and judgment for the plaintiff for $510. The defendant's motion for a new trial was overruled, and he brings the case here for review by proceedings in error.

On the 29th day of November, 1886, the defendant, Martin Cannon, executed and delivered to Mathew C. Wilbur, the plaintiff below, a written lease of a barn and other improvements, situated on lot 1, in block 205½, in the city of Omaha, for a term of four years from December 1, 1886, in consideration of an annual rental of $720, payable semi-annually in advance. The plaintiff paid the defendant about December 1, 1886, $360 rent in advance, and went into possession of the premises under the lease, and continued to occupy the same until July 30, 1887. Wilbur on this date, with the consent of Cannon, subleased the premises for the remainder of the term to one J. E. Blackman for $1,200 per annum, to be paid, $600 August 1, 1887, and $600 every six months thereafter, until the termination of the lease. It was at the time agreed between Blackman, Cannon, and Wilbur, that Blackman should pay to Cannon the $60 per month rent stipulated

for in the lease entered into between the plaintiff and defendant, and Blackman promised to pay the plaintiff Wilbur the remaining $40 per month of said rent. In pursuance of this arrangement Wilbur vacated the premises and Blackman immediately took possession thereof, and paid to Cannon $360 and to Wilbur $240, being the rent to February 1, 1888. On January 3, 1888, Blackman assigned his lease to one J. H. McShane, and gave possession to him. No further rents were paid to Cannon by either Wilbur, Blackman, or McShane, and about February 8 Cannon demanded possession of the barn from McShane. Possession was surrendered and on the same day McShane again went into possession as Cannon's tenant, and remained until about March 1, when Cannon leased the premises to one Proctor for the period of one year, at a rental of $75 per month. Each lease contained a stipulation to the effect that if the rent should not be paid at the time the same became payable, the landlord should have the right, at his option, to declare the lease at an end and retake immediate possession of the premises.

The plaintiff introduced evidence tending to show that defendant Cannon fraudulently procured Blackman to assign his lease to McShane, in order that McShane might take possession of the property, and then surrendered the same to the defendant; that McShane, in pursuance of that arrangement, took possession and surrendered the same to Cannon, and immediately re-entered as the direct tenant of the defendant.

The defendant strenuously maintains that he entered into no fraudulent arrangement to obtain possession of the leased premises. The circumstances disclosed by the testimony were ample to warrant the jury in finding that the defendant obtained the possession of the premises through undue means. Cannon took McShane to Blackman to purchase his lease. The lease is assigned to McShane, who enters into possession and remains in the occupancy thereof

a short time, when, at the request of Cannon, he voluntarily surrenders to him, and on the same day McShane goes into possession as Cannon's tenant and remains, without paying rent, until Cannon leases to Proctor for $75 per month, an advance of $180 per year over the rent Wilbur agreed to pay. The day the rent was due from Wilbur, or the day following, he saw the defendant and gave him an order on Blackman for six months' rent in advance, and without notifying the plaintiff that this order was not paid, or that he intended to terminate the lease, the defendant secretly takes possession of the premises and declares the lease forfeited. The plaintiff was two months in arrears in the payment of his rent at the time the premises were leased by Blackman, yet the defendant made no objection thereto. Why such haste to forfeit the lease without notice when there was a default of but a few days? Doubtless the increase of $40 per month in the rental value of the property was the motive that prompted the defendant's conduct.

As to the right of the defendant to terminate the lease without giving notice to plaintiff, the court instructed the jury that, "the right reserved by the terms of the lease to the lessor, Cannon, was, in case of a failure to pay rent, or performance of other conditions of the lease by Wilbur, at his (Cannon's) option to declare the term at an end, and to retake immediate possession of the premises. But in order to avail himself of this option it was the duty of Cannon to give Wilbur reasonable notice that he would terminate the lease unless the rent was paid or other conditions complied with, and if he retook possession without such notice—without Wilbur's consent, he would be liable for such damages as might be sustained by Wilbur by reason of such wrongful act."

It is urged that as the plaintiff had subleased the entire premises for the balance of his term, he was not entitled to any notice of forfeiture. Did the subleasing of the prop-

erty have the effect to make Blackman the tenant of the defendant, and to release the plaintiff from all liability on his covenants to Cannon? This must be determined from the intention of the parties. In the lease between plaintiff and Blackman, the latter agreed to pay his rent to the plaintiff. The amount reserved as rent, and the date of payment, were different from that stipulated for in the lease between the plaintiff and defendant. Blackman covenanted to yield possession, at the termination of his lease, to the plaintiff. The lease between the plaintiff and defendant gave the plaintiff an option to purchase the demised premises within a fixed period, at a stipulated price, while the other lease contained no such provision. Again, the defendant received an order from plaintiff on Blackman for the rent, thus recognizing the plaintiff as his tenant, and the one he looked to for his rent. The defendant was aware that the plaintiff had leased the premises to Blackman at an increased rate. Wilbur was holden to the defendant for the payment of the rent. If he was not released from his covenants to pay rent to Cannon, on what principle of law was Cannon released from his obligation to notify the plaintiff of his intention to terminate the lease? The greater is the necessity for this notice when the occupant of the premises is in collusion with the defendant to deprive the plaintiff of his rights. In view of all the facts appearing in evidence we have reached the conclusion that the plaintiff was entitled to notice of the intention of the defendant to declare the lease at an end. The instruction, therefore, stated the law correctly as applied to the facts in the case.

Exceptions were taken to the third and fourth instructions given. They are as follows:

"3. If you believe from the evidence that the defendant Cannon connived with Blackman and McShane or Brown, or with either of them, to obtain possession of the premises described, without the knowledge of Wilbur, and

without having given him any notice of his intention to terminate the lease, or that he had done so, and that thereby Wilbur lost the benefit of the possession of the premises to which he was entitled under the lease, and if you further find that the value of such possession was greater than the rent which he had obligated himself to pay by the terms of the lease, then and in that case the plaintiff would be entitled to your verdict.

"4. If you find for the plaintiff, the rate of damages would be the difference between the rental value of the premises and the amount which, under the terms, he was obligated to pay as rent for the balance of the term, after he was so deprived of the possession."

It is claimed that these instructions were erroneous for two reasons: First, that, under the pleadings and evidence, the plaintiff had no right of action; second, that no evidence was introduced tending to show the rental value of the property.

The defendant unlawfully obtained possession of the premises and canceled the plaintiff's lease, thereby damaging the plaintiff to the extent that the rental value exceeded the amount of rent that the plaintiff promised to pay. It is now firmly settled by the decisions that, where a landlord unlawfully takes possession of the leased premises and withholds the same from his tenant, a cause of action arises in favor of the tenant, and the measure of his damages, ordinarily, is the rental value of the unexpired term less the amount of rent reserved by the lease. (*Mack v. Patchen*, 42 N., Y., 167.) And it makes no difference that such possession was obtained by collusion and fraud.

The undisputed testimony shows that Blackman leased the property at a monthly rental of $100, and that subsequently Proctor rented for a year at $75 per month. No other proof was offered as to the rental value of the property. It is urged that this was not competent evidence. It was certainly competent to prove the price the property

rented for at or near the time the eviction took place. The difference between the rent reserved in the lease between the plaintiff and the defendant and the rent paid by Proctor was $15 per month, which for two years and ten months, the unexpired term of the lease, makes $510, the amount of damages assessed by the jury. The verdict is sustained by the evidence. The judgment is

AFFIRMED.

THE other judges concur.

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A. J. FRIEDLANDER, APPELLEE, V. J. J. RYDER, ET AL., APPELLANTS.

[FILED NOVEMBER 18, 1890.]

1. **Lease: FIXTURES: LESSEE CANNOT RE-ENTER TO REMOVE.** A tenant in possession under a lease which does not provide that he may remove his fixtures and improvements, cannot, after he has surrendered possession to his landlord, re-enter and remove his fixtures.

2. ———: ———: **RIGHTS OF LESSEE'S CREDITOR.** A creditor, by the levy of an execution upon a tenant's fixtures, acquires no greater rights therein, or to remove the same, than the tenant had.

3. ———: **SALE OF PREMISES: NOTICE OF LESSEE'S RIGHTS.** When a tenant is in the actual possession of real estate at the time it is sold by the landlord, the purchaser is chargeable with notice of the rights of the tenant.

4. ———: **FIXTURES: MUST BE REMOVED WITHOUT INJURING PREMISES.** Unless there is a stipulation in the lease to the contrary, a tenant can only remove such improvements erected by him, the removal of which will not materially injure the premises or put them in a worse condition than they were in when he took possession. (*Lanphere et al. v. Lowe*, 3 Neb., 131.)

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

John P. Breen, for appellant, cited: *Van Ness v. Packard*, 2 Pet. [U. S.], 137; *Linahan v. Barr*, 41 Conn., 471; *Rogers v. Brokaw*, 25 N. J. Eq., 496; *Wall v. Hinds*, 4 Gray [Mass.], 271; *Ombony v. Jones*, 19 N. Y., 234; *Lanphere v. Lowe*, 3 Neb., 135; *Smith v. Whitney*, 18 N. E. Rep. [Mass.], 229; *Townsend v. Underhill*, Pa. Com. Pl., 6 Pa. Co. Ct., 545; *Wing v. Gray*, 36 Vt., 261–8; *Dubois v. Kelly*, 10 Barb. [N. Y.], 508; Devlin, Deeds, sec. 770; *Dietrichs v. R. Co.*, 13 Neb., 43; *Wilgus v. Gettings*, 21 Ia., 177; Wood, Land. & Ten., sec. 516; *Mason v. Fenn*, 13 Ill., 525; *Waterman v. Clark*, 58 Vt., 601; *Mills v. Redick*, 1 Neb., 437; *Sec. Nat'l Bk. v. Merrill*, 34 N. W. Rep. [Wis.], 514; *Kerr v. Kingsbury*, 39 Mich., 150.

A. C. Troup, contra, cited: *Godfrey v. Walker*, 42 Ga., 562; *Farnam v. Hohman*, 90 Ill., 312; *Cook v. Creswell*, 44 Md., 581; Taylor, Land. & Ten., secs. 551 (and note), 553; Wood, Land. & Ten., sec. 532, and authorities cited in note, page 892; *Erickson v. Jones*, 35 N. W. Rep. [Minn.], 267; *Darrah v. Baird*, 101 Pa. St., 265.

NORVAL, J.

On July 8, 1885, one Malina Sanchezerey entered into an article of agreement for the purchase from the South Omaha Land Company of lot 4, in block 81, South Omaha. Subsequently she erected on the north half of the lot a two-story frame building, and on the 1st day of October, 1886, she leased the said north half to one George Boyle for the term of one year with the privilege of three years more, at his option, the stipulated rent being $50 per month. Boyle went into possession under the lease, and while in

possession he erected a frame addition to the building which had been constructed by Mrs. Sanchezerey. The defendants claim that the lease contained a provision giving the tenant the right to remove all buildings he should construct upon the premises. The plaintiff denies that the lease contained such stipulation. Mrs. Sanchezerey assigned her contract of purchase to one Moses Horrowich, on December 7, 1886, who completed the payments to the South Omaha Land Company and received a deed for the lot. On the 30th day of April, 1887, Moses Horrowich and wife sold and conveyed by warranty deed the lot to Abraham J. Friedlander, the plaintiff, who is still the owner thereof. This deed was filed for record in the county clerk's office of Douglas county on April 23, 1887. Boyle on the 4th day of February, 1887, assigned the lease to one Thomas Higgins, and on the same day executed a bill of sale to Higgins for the frame addition erected by Boyle. Higgins went into possession of the premises under the lease, and remained in the occupancy thereof until the latter part of December, 1887. On the 12th day of January, 1888, Higgins, it is claimed, assigned the lease to Mary E. Hewitt, one of the defendants, and at the same time sold her his interest in the frame addition. The Hewitts took possession, and paid the rents for a time. Having quit paying rent, and being in default thereof, the lease was declared forfeited for that reason, and on March 19, 1888, the plaintiff A. J. Friedlander brought an action of forcible detainer against Harry Hewitt, the husband, before J. S. Morrison; a justice of the peace in and for Douglas county, to recover the possession of the premises. The justice found the complaint of the plaintiff to be true and rendered a judgment of restitution on the 4th day of April, 1888. On the same day a writ of restitution was issued, and two days later the Hewitts were dispossessed by an officer under the writ.

It also appears that some time in April, 1888, and after

the judgment of restitution was entered, the defendants Ryder & Glick recovered a small judgment before a justice of the peace of Douglas county against Harry W. Hewitt and Mary E. Hewitt, and that an execution was issued thereon, which was levied upon the frame addition above referred to, as the property of the Hewitts. The officer holding the execution having advertised the addition for sale, and the Hewitts having threatened to remove the improvement, the plaintiff filed his bill in the district court to enjoin the sale and removal.

A trial was had to the court, with findings and judgment for the plaintiff. The defendants appeal.

It is claimed by the appellants that the lease from Mrs. Sanchezerey to Boyle contained a stipulation that the tenant could remove all buildings he should erect thereon during the continuation of the lease. The original lease was not produced on the trial, and without showing that it was not in existence, the defendants introduced a purported copy thereof, which contained such a clause. Whether such a provision was in the original lease when executed is not so clear. The lease, soon after its execution, was recorded in the county clerk's office of Douglas county. The record thereof was produced at the trial, and it contained no stipulation authorizing the tenant to erect and remove buildings, nor did it prohibit the erection and removal of improvements. The parties to the lease were not called to prove its terms. Theodore Elliott and M. H. Ish, being called as witnesses by the defendants, testified to having made the copy of the original lease introduced in evidence, after it had been assigned to Mrs. Hewitt. While it may be true that they made a correct copy of the paper then before them, they could not know that it contained the disputed clause at the time of its execution, as they never saw the instrument until many months after it was made. This testimony was not sufficient to overcome the record of the original made by the

county clerk. The finding of the trial court, that the original lease contained no such a provision, was certainly justified by the evidence.

Under the lease, as established by the evidence, the tenant had a right, before the surrender of possession, to remove any improvements owned by him which are embraced under the head of tenant's fixtures, but the tenant had no authority to remove such improvements after the termination of the tenancy; in other words, the tenant could not re-enter to remove his fixtures after the surrender of possession to the landlord. In the case at bar the addition constructed by the tenant was not removed before the tenant was ousted under the writ of restitution. It is true, before the writ of restitution was served, the execution in favor of Ryder & Glick was levied upon the addition. But we fail to see how that could affect the rights of the plaintiff. These creditors, by the levy of their execution, obtained no greater rights in the premises than had their debtors, the Hewitts. If the Hewitts had no right to re-enter and remove the property after they had been dispossessed under the writ of restitution, then it would seem clear that their creditors had no such right.

It is claimed that the lease was transferred to Mrs. Hewitt and not to her husband, and as she was not a party to the forcible detainer suit, she is not bound by the proceedings therein. It does appear from the copy of the lease introduced in evidence by the appellants that it was assigned to her; yet it is equally certain that Friedlander, the plaintiff, was not aware that Mrs. Hewitt claimed any interest in the premises until long after this suit was instituted. The testimony shows that her husband stated to the plaintiff's agent, Andrew Rosewater, just after the Hewitts took possession, that the lease had been transferred to Mr. Hewitt. It was he who paid the rent. The transcript of the detainer suit shows that Mrs. Hewitt was a witness for her husband on the trial of that case. There

is ample testimony in the record to warrant the conclusion that the husband was the plaintiff's tenant. But if it be conceded that Mrs. Hewitt owned the improvements claimed as fixtures, she has forfeited all right thereto. She failed to pay the rent and the lease was forfeited for that reason. She made no effort to remove the improvements prior to the taking of possession by the plaintiff of the leased premises.

The plaintiff contends that he is an innocent purchaser and had no notice when he purchased from Horrowich that the tenant in possession claimed to own the addition in question. The testimony shows that one Hammond represented the plaintiff in making the purchase. The testimony introduced for the purpose of showing that Hammond had actual notice that the addition belonged to the tenant, is conflicting and unsatisfactory. Horrowich and his wife each testified at the trial that they informed Hammond at the time the deed was executed that the addition did not belong to them but was the property of the tenant. This is contradicted by the testimony of Hammond. As a reviewing court, we only examine the evidence to see whether it sustains the finding of the trial court. The testimony of Hammond, if true, was sufficient to base a finding that the plaintiff was not chargeable with actual notice of the rights of the tenant. In our view, it is quite immaterial whether Friedlander had actual notice of the claims of the tenant or not. The latter was in the open, notorious possession at the time the plaintiff became the owner of the lot. This was sufficient notice of the rights of the tenant. (*Wing v. Gray*, 36 Vt., 261; *Dubois v. Kelly*, 10 Barb., 508; Devlin on Deeds, sec. 770.)

This brings us to the consideration of the question, Was the addition erected by the tenant of such a character that the law would permit him to remove it? The evidence shows that at the time the premises were leased by Boyle,

there stood upon the lot and attached to it a frame two-story building. To the front of this building Boyle, while in possession, erected a frame addition 24x20 feet in dimensions, two stories in height. It was placed upon wooden posts set in the ground. This addition, as well as the old portion of the building, was sided with shiplap. In the construction of the addition all the windows in the front of the old building were taken out, the openings made thereby were sealed up with boards. An opening was cut in the front of the upper story of the old part and as a means of communication between the old and new parts a door was hung therein. The eaves of the main building, where the addition joined, were cut off, and the roof of the two parts were so connected as to use one drainage. The addition next to the old part was not sided, but a row of studding was placed there which, as well as the sill of that side of the addition, were nailed to the main building. There is also evidence tending to show that the siding was removed from the front of the old house where the new was joined. This is denied by some of appellant's witnesses. It further appears in testimony that the tenant at one time presented to the landlord a bill for repairs made by the tenant on the new part, the amount of which was allowed by the landlord and deducted from the rents. It is obvious that the new part could not be removed without material injury to the old portion, and if separated and removed neither part would be a complete structure. We do not deny the right to remove this addition on the ground that it was attached to the freehold, but because the improvement was of such a character and was so annexed to the main building that its removal would greatly injure the demised premises. The modern decisions are to the effect that a tenant can only remove such improvements erected by him, the removal of which will not materially injure the premises or put them in a worse condition than they were in when he took posses-

sion. (*Lanphere et al. v. Lowe*, 3 Neb., 131; 1 Washburn on Real Property, sec. 27; Taylor's Landlord and Tenant, sec. 550; *Whiting v. Brastow*, 4 Pickering [Mass.], 311.)

We are convinced, from a careful reading of the testimony, that the improvement placed upon the leased premises was practically an enlargement of the old building, and that it cannot be removed without considerable injury to the premises. The judgment of the district court is

AFFIRMED.

THE other judges concur.

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K. C. & O. R. CO. ET AL. v. LOUIS FREY.

[FILED NOVEMBER 19, 1890.]

1. **Statutes**: CONSTITUTIONALITY. A bill which has but one general object that is fairly expressed in the title thereof, is not objectionable on the ground that it contains two or more subjects.
2. ——: ——. The act approved March 3, 1881, giving a laborer and material-man a lien upon a railway for material furnished and labor performed on such railway does not contain more than one subject and is not in conflict with the constitution.

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

Hazlett & Bates, for plaintiffs in error, cited: Cooley, Const. Lim. [4th Ed.], 180–1; *Antonio v. Gould*, 34 Tex., 49; *State v. McCracken*, 42 Id., 383; *Smails v. White*, 4 Neb., 353; *B. & M. R. Co. v. Saunders Co.*, 9 Id., 510; *State v. Lancaster Co.*, 17 Id., 85; *State v. Hurds*, 19 Id., 323; Const., sec. 2, art. 3; *Newcherter v. Price*, 11 Ind., 199; *State v. Young*, 47 Id., 150; *Jones v. Thompson*, 12 Bush

[Ky.], 394; *Rushing v. Sebree*, Id., 198; *State v. Kinsella*, 14 Minn., 395; *Boggs v. Washington Co.*, 10 Neb., 298; *White v. Lincoln*, 5 Id., 514; *Ex parte Thomason*, 16 Id., 238; *Ives v. Norris*, 13 Id., 252; *Tecumseh v. Phillips*, 5 Id., 305; *Jones v. Lancaster Co.*, 6 Id., 486.

Maule & Sloan, contra, cited: *B. & M. R. Co. v. Saunders Co.*, 16 Neb., 123; *White v. Lincoln*, 5 Id., 515; *People v. Mahaney*, 13 Mich., 494; *Santo v. State*, 2 Ia., 208; *Herold v. State*, 21 Neb., 50.

MAXWELL, J.

This action was brought in the district court of Fillmore county against the plaintiffs in error to foreclose three liens claimed against the road-bed, rolling stock, etc., of the railway for a balance due on a contract for the construction of said road through Fillmore county. The first cause of action was for a balance due the defendant in error on a subcontract for grading one mile of said road. The second cause was for work performed on said road by one William Felker, and the third for work performed thereon by one A. Parviance. These claims were assigned to the defendant in error before bringing the action.

On the trial of the cause judgment was rendered in favor of the defendant in error, and the railway company brings the cause into this court. The principal error relied upon is that the act approved March 3, 1881, making the railway companies liable for work performed and material furnished in the construction or repair of the road, is unconstitutional and void, because the bill contains more than one subject not embraced in the title.

In *White v. City of Lincoln*, 5 Neb., 515, this court held that where a bill has but one general object it will be sufficient if the subject is fairly expressed in the title.

The question is very fully considered in *People v. Mahaney*, 13 Mich., 494, and it was held, in effect, that where

the title expressed the general purpose of the bill it would be sufficient.

The object of the framers of the constitution was not to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus greatly multiply their number, but it was intended that a proposed measure should stand upon its own merits, and that the several members of the legislature should be apprised of the purpose of the act when called upon to support or oppose it; in other words, members were prohibited from joining two or more bills together in order that the friends of the several bills may combine and pass them. It was never designed to place the legislature in a straight jacket and prevent it from passing laws having but one object under an appropriate title. The act in this case was designed to secure persons aiding in the construction of a railway, by furnishing either labor or material, from being defrauded out of their just dues on a contract.

It is a well known fact that, prior to the taking effect of the act in question, subcontractors not unfrequently failed to pay their employes or persons who had furnished material, and the act in question was designed to remedy that evil. The railway companies to a great extent can protect themselves by withholding from the subcontractors the money due until the legitimate claims against such subcontractors for labor and materials have been paid.

The judgment of the court below is right and is

AFFIRMED.

THE other judges concur.

A. E. ALEXANDER, APPELLEE, V. CLARK WILCOX ET AL., APPELLANTS.

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[FILED NOVEMBER 19, 1890.]

1. **Adverse Possession.** Where a person has been in the open, exclusive, notorious, adverse possession of real estate as owner for ten years, he thereby acquires an absolute title to the lands free from the lien created by a tax deed on the property, issued prior to the commencement of such adverse possession. *D'Gette v. Sheldon*, 27 Neb., 829.

2. **A tax deed** issued more than five years after the expiration of the time to redeem from the tax sale is invalid, and creates no lien upon the real estate therein described.

APPEAL from the district court for Cass county. Heard below before FIELD, J.

Beeson & Root, for appellants, cited: *Preston v. Van Gorder*, 31 Ia., 250; *Jarvis v. Peck*, 19 Wis., 84; *Sayles v. Davis*, 22 Wis., 225; *Dougherty v. Henarie*, 47 Cal., 14; Blackwell, Tax Titles, 544, and citations; *Wygant v. Dahl*, 26 Neb., 562; *D'Gette v. Sheldon*, 27 Id., 829.

NORVAL, J.

This suit was brought by A. E. Alexander on the 7th day of August, 1888, in the district court of Cass county, to foreclose two tax liens. The petition contains two counts. The first cause of action is based upon a tax deed bearing date July 11, 1870, and the second is upon a tax deed issued on October 13, 1885, upon a certificate of purchase dated September 13, 1875. The answer sets up the statute of limitations, and to the first cause of action the further defense that the tax purchaser failed to pay the taxes levied and assessed on the land after the purchase; that the land was sold for such subsequent taxes to

one Perry Walker, and that a tax deed was afterwards issued to said Walker.

Upon a trial to the court a decree was entered in favor of the plaintiff, foreclosing the tax liens. The defendants appeal.

The facts in the case are undisputed. On the 25th day of September, 1866, one J. J. Monroe purchased at tax sale the east half of the southeast quarter of section 8, town 10, range 14, in Cass county, for the taxes levied thereon for the year 1865, amounting to $11.52, and that he received a certificate of purchase from the county treasurer. Monroe afterwards paid the taxes on the land for the years 1869, 1872, 1874, 1875, 1878, and 1880, amounting, in the aggregate, to $30.30. On the 11th day of July, 1870, he surrendered said certificate to the treasurer and received a tax deed for said land, to which the treasurer failed to attach his official seal. On the 11th day of January, 1885, Monroe sold and conveyed the land to the plaintiff.

On the 15th day of September, 1875, one S. N. Merriam purchased from the treasurer of Cass county the northwest quarter of the southeast quarter of section 8, same town and range, for the taxes of 1874, for the sum of $7.43. Afterwards he paid the taxes assessed thereon for the years 1863, 1875, 1877, 1878, 1880, 1881, and 1882, amounting in the aggregate to $34.82. On the 13th day of October, 1885, the plaintiff A. E. Alexander, being the owner of the tax certificate, presented it to the treasurer and received a tax deed for the lands.

On the 8th day of September, 1868, the taxes levied on the land first above described for the year 1867, being unpaid and delinquent, the land was sold by the treasurer to one Perry Walker, and a certificate of purchase was delivered to him. On the 1st day of September, 1874, the treasurer executed and delivered to said Walker a deed to the land, which deed conveyed no title for the reason that it does not bear the seal of the county treasurer. Sub-

sequently Walker conveyed by quitclaim deed to Robert Maxwell, who afterwards conveyed the lands to the defendant Clark Wilcox on the 26th day of January, 1875. Wilcox immediately took possession of the land, and has been in the continuous, open, notorious, exclusive, adverse possession thereof ever since. The defendant Gilmore holds a mortgage on the premises given by his co-defendant Wilcox.

Are the plaintiff's actions barred by the statute of limitation? It will be observed that the tax deed, which is made the foundation of the first count of the petition, was issued July 11, 1870, or more than eighteen years prior to the commencement of this suit. The same land included in that deed was again sold for taxes to Perry Walker, and a tax deed was issued to him September 1, 1874. The defendant Wilcox purchased this tax title on January 25, 1875, and immediately took possession of the land. He had been in the open, exclusive, adverse possession thereof as owner for more than ten years prior to the bringing of this suit. He thereby acquired an absolute title to the land free from the tax lien acquired by the plaintiff prior to Wilcox's possession.

The precise question here involved was before this court in *D'Gette v. Sheldon*, 27 Neb., 829. That was an action to foreclose a tax lien. The defense was ten years' adverse possession. Judge MAXWELL, in the opinion of the court, says: "It was the evident intention of the legislature to limit the time in which to bring an action for the foreclosure of tax liens to five years from the time the cause of action accrued. This is in conformity to the general purpose of the statute of limitations, that stale claims shall be barred. The whole tenor of the legislation of this state has been in favor of the repose of titles to real estate after a fair opportunity has been given any party claiming an adverse interest therein to assert his claim thereto. Hence an action for the possession of real estate

must be brought in ten years; otherwise it is barred. This gives security to titles, and is designed to be and is a statute of quiet enjoyment. The statute in effect says to every one: Here is a party in possession of real estate as owner. If you dispute his claim, you must assert your rights in the courts within the period fixed by law, or the doors of the courts will be closed against you. This applies to every one. The law does not distinguish between claims and claimants, but gives to the adverse occupant for ten years an absolute title in fee." We see no reason to doubt the correctness of that decision. It follows that the rights of the plaintiff are cut off by the adverse possession of the defendant.

Again, the first cause of action is barred by the special limitation fixed by the statute for the foreclosure of tax liens. The plaintiff never acquired any title under the tax deed, but the same was void on account of the omission of the treasurer's seal therefrom. He acquired a lien on the land for the amount of the taxes paid, but the cause of action to foreclose such lien accrued at the date of the deed. He could have brought his suit for that purpose immediately on the delivery of the deed. He cannot now, after the lapse of eighteen years, assert his claim.

The tax deed referred to in the second count of the petition, was based upon a tax certificate issued and dated September 15, 1875. Section 179, chapter 77, Compiled Statutes 1889, authorizes the owner of any certificate of tax sale to foreclose the same by bringing an action for that purpose, "at any time before the expiration of five years from the date of such certificate."

Sec. 180 of the same chapter provides that, "If the owner of any such certificate shall fail or neglect either to demand a deed thereon, or to commence an action for the foreclosure of the same, as provided in the preceding section, within five years from the date thereof, the same shall cease to be valid or of any force whatever, either as

against the person holding or owning the title adverse thereto, and all other persons, and as against the state, county, and all other municipal subdivisions thereof."

It has been held by this court in a number of cases that an action to foreclose a tax certificate cannot be brought until the time given to redeem has expired, and that such suit is barred after the expiration of five years from the time the cause of action accrued. (*Helphrey v. Redick*, 21 Neb., 80; *Parker v. Matheson*, Id., 546; *D'Gette v. Sheldon*, 27 Id., 829.)

It follows from the reason of those cases, that where a tax deed is demanded after the expiration of five years from the time limited by law for the redemption from a tax sale, no lien is acquired by such deed. The tax deed to Alexander not having been issued until October 13, 1885, or more than ten years after the date of the certificate, and more than seven years after the expiration of the time to redeem, it is plain that the plaintiff acquired no rights in the land thereby. The lien acquired by the issuing of the tax certificate of September 15, 1875, was barred when the tax deed was issued thereon. The plaintiff could not revive the lien by afterwards taking out a tax deed.

What effect the subsequent sale of land, on which a tax deed is outstanding, has on the holder of such prior deed, it is unnecessary to decide. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

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LUCIEN W. COY ET AL. V. RICHARD D. JONES ET AL., AND MARATHON COUNTY BANK V. RICHARD D. JONES ET AL.

[FILED NOVEMBER 25, 1890.]

1. **Limitations: QUASI-PENAL ACTIONS: STOCKHOLDER'S LIABILITY.** Section 136, chap. 16, Compiled Statutes, which makes stockholders in a corporation liable for debts contracted by the corporation while its officers are in default in publishing an annual notice stating "the amount of all of its existing debts," is *quasi*-penal, only, but is not a penalty, the evident purpose being to secure the rights of creditors, and an action to recover such debts is not barred by the statute of limitations in one year. (*Howell v. Roberts*, 29 Neb., 483.)

ERROR to the district court for Webster county. Tried below before GASLIN, J.

Kaley Bros., for plaintiffs in error.

Case & McNeny, contra.

PER CURIAM:

The plaintiffs in error brought their action in the court below alleging that on February 4, 1884, the Nebraska Lumber Company, of Red Cloud, in said county, became a duly authorized corporation under the laws of this state, of which corporation the defendants were stockholders and members, and were responsible as such under section 136, chap. 16, Compiled Statutes. That on April 10, 1888, the plaintiffs recovered judgment in the court below, against the said corporation, upon certain promissory notes given for goods sold and delivered to it for $1,975.84, and costs, for the collection of which final process was issued and served, and returned *nulla bona*, and that said corporation was thenceforward, and hitherto insolvent.

The plaintiffs further alleged that for more than one year next prior to the time of contracting said indebtedness, the corporation had not given notice of the amount of its existing debts in a newspaper printed in said county, or elsewhere, as required by the statute, of its incorporation, by reason of which default the defendants, as stockholders, became personally liable for the debts and for said judgment recovered against the Nebraska Lumber Company.

To this complaint the defendants demurred as insufficient to constitute a cause of action, which defense the court below held to be sufficient, and gave judgment thereon.

From the record it appears that this action was brought in the court below on September 28, 1888, to secure the rights of the plaintiffs, as creditors, against the defendants as stockholders of a defaulting and insolvent corporation.

The defendants' counsel, in their brief, maintain that this is a penal action merely, and under section 13 of the Civil Code, that an action for a penalty, or forfeiture, can only be commenced within one year after the cause of action shall have accrued, citing twenty precedents in support of their view, and endeavoring to bring the case within their premises.

It is only necessary to state that this question has heretofore been considered by the court; that it was fully considered on a reargument to the court in the case of *Howell v. Roberts*, at the last term, 29 Neb., 483, in which it was held that sec. 136 of chap. 16, Comp. Stats., under which this action was brought, and "which makes stockholders in a corporation liable for debts contracted by the corporation while its officers are in default in publishing an annual notice stating *the amount of all the existing debts of the corporation*, is *quasi*-penal, but is not a penalty; the evident purpose being to secure the rights of creditors, and an action to secure the rights of creditors, and to recover such debts, is not bared by the statute of limitations in one year." (*White v. Blum*, 4 Neb., 563; *Smith v. Steele*, 8 Id.,

115; *Garrison v. Howe*, 17 N. Y., 458; *Doolittle v. Marsh*, 11 Neb., 243.)

The judgment of the district court is reversed, and the cause remanded for further proceedings.

The Marathon County Bank, as plaintiff in error, alleges that on April 13, 1888, it recovered a judgment against the same corporation, in the district court of Webster county, on a promissory note of Kriegsman & Co. for $1,542.66, with interest at ten per cent per annum, payable to said corporation on January 8, 1886, dated November 9, 1885, and indorsed by the defendant R. D. Jones, as president of said corporation, whereby the corporation was liable for the same, for the sum of $1,920.50 and costs, for the collection of which final process was issued and served, and returned *nulla bona*, and that said corporation was thenceforward and hitherto insolvent.

Under the same conditions and terms the court below gave judgment for the defendants and against the plaintiff in error, and upon the same conditions and terms of the preceding case, the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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H. E. BROWN V. GEORGE Z. WORK ET AL.

[FILED NOVEMBER 25, 1890.]

Fraudulent Conveyances: UNAUTHORIZED PREFERENCE OF CREDITORS. B. was the owner of a stock of goods valued at $4,200, and real estate valued at $1,500, and was indebted to ten creditors and firms to the amount of $5,000. The largest creditor was R., amounting to $1,800, not yet due. As security to R., B. delivered to him a mortgage on his real estate and a chattel mortgage of his entire personal property. In an attachment

proceeding brought by one of the other creditors, *held*, that the mortgages to R. constituted a fraudulent disposition of the property of B. (See *W. V. Morse & Co. v. J. F. Steinrod & Co.*, 29 Neb., 108.)

ERROR to the district court for Johnson county. Tried below before APPELGET, J.

C. K. Chamberlain, and *D. F. Osgood*, for plaintiff in error, cited: Waples, Att. & Garn. [Ed. 1885], 56–7, and note 1; *Grimes v. Farrington*, 19 Neb., 45; *Deitrich v. Hutchinson*, 20 Id., 52; *Hunter v. Soward*, 15 Id., 215; *Thurber v. Sexauer*, Id., 541; *Steele v. Dodd*, 14 Id., 496; *Hilton v. Ross*, 9 Id., 409; Kerr, Fraud & Mistake, 384; *Clemens v. Brillhart*, 17 Neb., 335.

S. P. Davidson, *contra*, cited: *Holland v. Bank*, 22 Neb, 572, 583; *Rothell v. Grimes*, Id., 526, 531; *Mayer v. Zingre*, 18 Id., 458.

COBB, CH. J.

This cause comes up on error from the district court of Johnson county.

On the 18th of August, 1888, plaintiffs (who are defendants in error here) commenced an action in the district court for Johnson county against H. E. Brown, (the plaintiff in error here) to recover from him the sum of $420.60 and interest thereon. The same being due for goods and merchandise purchased from them by said Brown. At the time of commencing said action said plaintiffs filed an affidavit for an attachment against Brown and for garnishee process against one James D. Russell as garnishee. The two grounds alleged in the affidavit for attachment were:

First—Fraud practiced by said Brown in misrepresenting his financial standing in order to obtain the goods on credit; and,

Second—Averring that said Brown had sold and disposed of his property, or a large part of it, for the purpose of placing it beyond the reach of, and of cheating and defrauding, his creditors.

An order of attachment was issued and notice in garnishment was served upon Russell, and certain other property was attached. A motion was made by Brown to discharge the attachment, supported by affidavits, in which it was sought to controvert the allegations in the affidavit for attachment; and afterwards the plaintiffs filed additional affidavits sustaining the original affidavit and supporting the attachment. Upon these affidavits a hearing was had by the court after Russell, as garnishee, had answered as such, and his answer was also relied upon in support of the attachment by plaintiffs; and upon this hearing the court found that the preponderance of the proof sustained the attachment, and, therefore, the motion to discharge the same was overruled, to which said Brown excepted, and brings the cause to this court by petition in error.

Although stated differentially, there is, substantially, but one error assigned, that of the overruling the motion of the plaintiff in error to discharge the attachment, in the court below. The grounds of the motion were:

1. Because the facts stated in the affidavit were not sufficient to justify the order.

2. That the statements of fact were not true.

The substantial part of the affidavit was that "the defendant has obtained credit to said amount, and has been able to and did contract said debt by reason of fraudulently misrepresenting his financial standing, and by fraud said defendant has since, as affiant is informed, and avers the fact to be, sold and disposed of his property, or of a large part thereof, for the purpose of placing it beyond the reach of, and of cheating and defrauding, his creditors."

Upon the trial the plaintiff offered this affidavit, and

those of W. H. Longmoor, and R. G. Work, in evidence. The defendant offered his own, and those of H E. Brown, D. F. Osgood, C. R. Chamberlain, and J. D. Russell. The salient facts proved by this evidence, and as to which there is little, if any, conflict are, that on August 8, 1888, the plaintiff in error was the owner of a stock of goods of about the value of $4,200, and of real property in the village of Elk Creek of from twelve to fifteen hundred dollars, and was indebted to the amount of about $4,000, $1,800 of which was owing to James D. Russell, or to the bank, of which he was manager, not then due; Brown having previously executed a chattel mortgage to Ella Longmoor upon a part of his stock of goods, or to all the groceries of his stock, to secure an indebtedness to her of $1,875, neither of which, the groceries or the debt, is included in the assets or liabilities of Brown, who executed and delivered to Russell, to secure his claim of $1,800, a mortgage of all his real estate, and also a chattel mortgage upon his entire stock of merchandise, both of which conveyed to Russell the entire property of Brown. The chattel mortgage provided that whenever the mortgagee should deem himself insecure of his debt he might take immediate possession of the property. These mortgages of Brown to Russell constitute one of the grounds set up, or so intended to be, for the attachment. And the evidence in the trial court fairly raised the question whether, or not, a debtor may execute a mortgage, or mortgages, to a creditor, or creditors, whose claims amount to less than one-third of the value of his property, and less than one-half of the entire debts owing by him, upon both his entire real and personal property, without being chargeable with fraud against other creditors who may be thereby left without other security, or any fund in the hands of the debtor for their payment other than the equities of his estate, if any.

This question was before the court and considered in the several cases of *Morse & Co. v. Steinrod & Co., Smith & Co.*

v. The Same, and *Farwell & Co. v. The Same*, 29 Neb., 108. These cases were consolidated, and, in the opinion, the court, by Judge MAXWELL, held that "A creditor may secure his own debt by taking adequate security, but he cannot cover up all of a debtor's property, so that other creditors cannot reach it, where such property greatly exceeds in value the amount of his claim. The law was never intended to permit a debtor to place a blanket mortgage on all his personal property to secure a debt of but a small portion of the value of such property, and thus prevent other creditors from appropriating the same to the payment of their claims. * * * Other creditors have rights in the premises which he must respect by limiting his security to a sufficient amount to satisfy his claim."

The case at bar comes quite within the principle of this opinion. Practically a small excess of security sufficient for accruing costs and expenses, accruing interest, and possibly for a depreciation in values would be justifiable, but where the excess of security is so great as to show either an utter disregard of the rights of other creditors, or a disposition to cut them off from an opportunity to secure their claims, subject of course to the preference which the law gives to superior vigilance and activity, the giving of security on the part of the debtor, and the taking of it by the creditor, with the knowledge of the existence of the claims of other creditors, actual or implied, must be held to be fraudulent as to them.

The first cause set up in the affidavit for attachment will not be further considered, as one sufficient ground will sustain the action, though there may be others relied upon by the plaintiff and not sustained. The judgment of the district court is

AFFIRMED.

THE other judges concur.

JAMES D. RUSSELL v. HANS P. LAU.

[FILED NOVEMBER 25, 1890.]

1. **Chattel Mortgage**: SALE BY FIRST MORTGAGEE: SURPLUS. B., a merchant in failing condition, gave a mortgage to R. on his stock of goods valued at $4,000, and also on his real estate, to secure debts of $1,800, and delivered possession of the goods. On the following day B. executed a second mortgage on the goods to secure L. of a debt of $286.86, and, following this, other mortgages to other creditors, of all of which R. had full knowledge, and was given formal notice by L. of his secondary lien on the goods. R. sold the goods at private sale, satisfying his own claim, with a surplus retained in his hands of $237.50, and turned back to B. the remainder of the goods which was immediately appropriated by other creditors than L., who was without opportunity of notice. L. brought his action against R. for the amount of the surplus, which, in the meantime, had been garnished by W. B. & Co. foreign creditors, in an attachment against B. R. appeared and answered as garnishee, failing to disclose the claim and secondary lien of L., but, under an order to pay the $237.50 into court, on the judgment of W. B. & Co., paid the same to their attorney of record, without a satisfaction of the order. On the trial of L.'s action for the surplus against R. judgment was for the plaintiff, and, upon review, it is *held*, that the blanket mortgage of R. was void, that he paid out the surplus in his hands, as garnishee, improvidently, and is liable for that amount to L.

2. **Garnishment**: LIABILITY OF GARNISHEE. A garnishee answering to proceedings in attachment stands in the impartial attitude of a stake-holder between the parties, and is liable for the property in his hands and the amount of his indebtedness, which can only be discharged by the delivery of the property, or money, into the court, in compliance with its orders.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

S. P. Davidson, for plaintiff in error, cited: *Tallon v. Ellison*, 3 Neb., 75; Herman, Chattel Mtgs., 235–6; *Faulkner v. Meyers*, 6 Neb., 418; *Burnham v. Doolittle*, 14

Id., 214; *Smith v. Ainscow*, 11 Id., 478; *Reed v. Fletcher*, 24 Id., 436, 452; *Turner v. Killian*, 12 Id., 585, 586; *Densmore v. Tomer*, 14 Id., 395; *Lee v. Gregory*, 12 Id., 284; *Davenport Plow Co. v. Merwis*, 10 Id., 321; *Simmons Hdw. Co. v. Brokaw*, 7 Id., 409; *Grimes v. Cannell*, 23 Id., 187.

J. M. Stewart, and *H. F. Rose, contra*, cited: *Turner v. Killain*, 12 Neb., 586; Jones, Chattel Mtgs., sec. 691, and cases cited; *Lininger v. Herron*, 18 Neb., 450; 23 Id., 197; Code, secs. 224–5, 244–49; *Fitzgerald v. Hollingsworth*, 14 Neb., 188; *Hollingsworth v. Fitzgerald*, 16 Id., 492; *Clark v. Foxworthy*, 14 Id., 241; *Edney v. Willis*, 23 Id., 63; *Smith v. Ainscow*, 11 Id., 478; *Reed v. Fletcher*, 24 Id., 452.

COBB, CH. J.

On March 26, 1889, defendant in error, as plaintiff, filed his petition in the district court for Johnson county against the plaintiff in error and Noyes, Norman & Co., A. B. Symms & Co., W. V. Morse & Co., R. L. McDonald & Co., D. F. Osgood, and C. K. Chamberlain as joint defendants, alleging that on August 9, 1888, plaintiff and all the defendants except Osgood and Chamberlain were creditors of one H. E. Brown, a merchant at Elk Creek, Nebraska; that on the 9th day of August, 1888, said Brown gave a chattel mortgage on his stock of goods to said Russell to secure the amount due him—$1,800—which was the first lien on said goods; that afterwards, but on the same day, said Brown gave plaintiff Lau a second mortgage to secure $286.86; that on August 10, 1888, said Brown gave a third mortgage to said Noyes, Norman & Co., to secure $449.15; that afterwards, but on the same day, said Brown gave a fourth mortgage to A. B. Symms & Co., to secure $218; that afterwards said Brown gave a fifth

mortgage to W. V. Morse & Co., to secure $267.80; and afterwards said Brown gave a sixth mortgage to R. L. McDonald & Co., to secure $336. Said Russell's mortgage was the first lien, said plaintiff Lau's mortgage was the second lien, and by its terms was made subject to said Russell's mortgage; and each of the other mortgages was, by its terms, made subject to the said mortgages of said Russell and said plaintiff Lau.

The petition further alleges that on the 9th day of August defendant Russell took possession of the said stock of goods for the purpose of foreclosing his lien thereon; that notwithstanding the rights of said plaintiff Lau, said defendants Russell and Osgood, as agent and attorneys for Noyes, Norman & Co. and A. B. Symms & Co., and said Chamberlain acting as agent and attorney for W. V. Morse & Co. and R. L. McDonald & Co., conspiring together for the purpose of cheating and defrauding said Lau, without any legal foreclosure of their mortgages, and without notice, proceeded to sell said stock of goods, and received as the proceeds of such sale three thousand and fifty dollars; that out of said proceeds said Russell, although his claim thereon was only $1,800, appropriated and converted to his own use $2,500, and said Osgood and Chamberlain, for their said clients, wrongfully converted to their own use the balance remaining and being in their hands as the proceeds of such sale, to-wit, the sum of $1,450; that nothing has been paid on said Lau's claim, which remains due, with ten per cent interest thereon from August 9, 1888. Wherefore plaintiff prays for an accounting of the moneys received by said defendants from said sale, and for judgment against defendants for $286.86 and said interest.

The petition contains the averments, in addition to those mentioned, that of the money received from sales of mortgaged property, "the defendant Russell, although his claim upon said fund was but $1,800 and no more, appropriated and converted to his own use and benefit the sum

of $2,500." Paragraph five alleges non-payment of plaintiff's note and mortgage, "and that plaintiff is entitled to have the same paid by defendants from the proceeds of the sale of said mortgaged property, so as aforesaid made by defendants."

The defendant creditors who participated with Russell in the profits of the sales of the mortgaged goods, were non-residents and could not be found.

Plaintiff in error filed his separate answer, admitting the receipt by him, from the sale of the mortgaged property, of $237.50 in excess of the sum secured by his mortgage, but alleging payment to Work Brothers under an order of court, in an attachment suit against him as garnishee, for a defense as to this $237.50.

The reply "denies that any valid binding or final order was made therein against said defendant as garnishee, requiring him to pay to said Work Brothers all or any portion of the moneys received by said Russell from the sale of said mortgaged goods and chattels, and alleges that said defendant was not compelled by any judgment, order, or process of said court so to pay over said money as garnishee or otherwise. 2. If any payment was so made by said defendant by virtue of said pretended order against him as garnishee, the same was wholly voluntary on his part, and made with notice, actual and constructive, of the lien of plaintiff on said mortgaged goods, and with full knowledge of the plaintiff's rights in the premises."

The cause was tried to the court, who found the facts as follows: "The court being fully advised in the premises, finds in favor of defendant Russell and against plaintiff as to all the mortgaged property not sold by defendant Russell under his mortgage, and as to the allegation of fraud and conspiracy against him. The court further finds in favor of plaintiff and against said Russell as to the balance of the proceeds of the property sold by said Russell over and above his mortgage debt, and the court finds that

the amount of the proceeds of said sale over and above said mortgage debt is $237, the court finds there is due plaintiff from said defendant thereon the sum of $237."

Upon this finding judgment was entered for said sum of $237 and costs taxed at $20.48 against defendant Russell, whose motion for a new trial was first overruled.

By a more careful inspection of the record than is set forth by counsel, it appears that the mortgagor made the transfer on August 8, 1889, and the plaintiff in error took possession of the stock of goods on the 9th following; that later, on that day, the chattel mortgage to the defendant in error was executed. On the 11th following the defendant's attorney wrote to the plaintiff urging him to have the goods invoiced and his mortgage legally foreclosed by a public sale, upon twenty days' notice, rather than at a private sale, as it had been understood he contemplated doing. On the 15th following, this letter of the attorney was acknowledged and reply made by the plaintiff that he was having an invoice of the goods taken that day, and, when completed, he would sell $1,800 worth to some one at private sale, or would give twenty days' notice and sell at auction. On September 1 the attorney again wrote to the plaintiff in error expressing surprise that on going to Elk Creek the week before he found that the plaintiff had disposed of the goods without notice to defendant and advising the plaintiff of his client's intention to make a common defense in the anticipated replevin suit of another creditor of the mortgagor, and explaining that it was the plaintiff's duty after satisfying his own claim, even in the manner he had, to deliver the remnant to his client as the next junior mortgagee, and prior creditor to all others. After disposing at private sale of $2,037 of the goods the mortgagee returned the remainder to the mortgagor, and, in fact, to the other creditors junior to the defendant in error.

On March 26, 1889, this action was commenced in the court below, and a summons issued of which the defendant

had service. On May 7, following, in the attachment proceedings of *Work Brothers & Co. v. Brown*, the mortgagor, the plaintiff in error, answered as garnishee, setting up his mortgage on the stock of goods for $1,800, admitting the sale of $2,040 worth at private sale, without notice, and the delivery back to the mortgagor of the remainder before service of notice of garnishment. His answer stated that "some time after he had taken possession of the goods he was told by Mr. Rose that he had taken a chattel mortgage from defendant in favor of H. P. Lau & Co., of Lincoln, to secure a claim due them. The mortgages, which were delivered to Chamberlain and Osgood for other creditors, and that in favor of H. P. Lau & Co, were all executed and delivered after he had taken possession of the property and during the time he remained in possession of it."

It will be observed that no mention is made in this answer of the demand of the defendant in error that he should sell the goods, if at all, at public sale, after notice, nor of the commencement of this action in the court below, for the surplus of sales in his hands, the subject in garnishment. But had he done so the order of garnishment would have properly been made as it was, that he pay the surplus into court, and had he complied with the order the amount of the surplus would doubtless have been ordered to be paid over to the defendant in error. But the plaintiff in error, as garnishee in the attachment proceedings, having, in violation of the order of the court in that case, paid the money into the hands of the attorney for the plaintiffs in attachment, it followed that the trial court rendered judgment for a like amount for the plaintiff there.

In the first part of the plaintiff in error's argument, under subdivision IV of his brief, he directs attention to the fact that before the execution of the chattel mortgage under which the defendant in error claims rights in this action, the plaintiff in error had taken possession of the goods by virtue of his prior mortgage, and thence argues

that the mortgagor, not being in possession of the goods at the date and delivery of the subsequent mortgages, could not convey any title or lien to defendant in error, and further, the plaintiff in error, having taken possession of the goods, continued to sell the same at retail with the knowledge and consent of the mortgagor, it was the same disposition of the property in fact, so far as the other creditors were concerned, as if the mortgagor had continued to sell the same at private sale after the execution of the subsequent mortgages to other creditors.

It is presumed that the main part of this argument is intended to be predicated upon the theory and supposition that the mortgage to the plaintiff in error was a legal and sufficient instrument, in which condition it has been held, and is the settled law of this state, that the execution, delivery, and filing in the proper office, of a valid chattel mortgage, conveys to the mortgagee the legal title to such chattels; and it would, therefore, be altogether doubtful if the subsequent mortgage to the defendant in error would have conveyed any title to the goods then in the possession of the plaintiff in error, and being sold to satisfy his prior mortgage.

But in the recent case of *H. E. Brown, plaintiff in error, v. George L. Work et al., defendants in error*, in an opinion at the present term, *ante*, p. 800, it was held that this identical mortgage having been taken upon the entire personal estate of the mortgagor, of a value largely in excess of the debt to be secured, and of the creditors' claims, was fraudulent and void as to the other creditors of the mortgagor who would be, in case this mortgage were held valid, thereby cut off from any security of their respective claims. This mortgage, then, being void, did not stand in the way of that of the defendant in error, the validity of which is not otherwise questioned. This I think disposes of the more important part of the argument of the plaintiff in error. His further argument that, if the defendant's

mortgage was worth anything at all, he had the first lien on the remnants turned back to the mortgagor, and was obliged to exhaust that remedy before charging the surplus of $237.50 garnished by Work Brothers & Co., whose *only* lien was upon that surplus, is sufficiently answered in the reply of the plaintiff below, and not traversed on the trial, that the sales of the goods were private sales, without notice to creditors, and that before the plaintiff was informed of the transaction, and on the same day the mortgagor was again in possession, the remainder of the goods was given up, taken away, and appropriated by other creditors without any probability of plaintiff's recovery from that source. This allegation was sustained on the trial, and was not contradicted by any evidence in the case. Under these circumstances, the plaintiff below pursued his only remedy.

The defense in the court below was the fact of the payment of the surplus under an order of court into the hands of the attorney of record for the attachment proceedings of Work Brothers & Co., against the mortgagor, to which the plaintiff in error had answered as garnishee.

The judgment in attachment was entered May 23, 1889, for $434.63, with a finding as to the amount in the hands of the garnishee, and an order that he pay that amount into the court, to be applied on the judgment of the plaintiffs within twenty days from that date.

It was in evidence on the trial that the defendant paid the amount, $237.50, to the attorney of the firm of Work Brothers & Co., who were residents in Chicago, and not into the court, subject to its order and distribution. The payment was not made in the court house, nor was any part of it then entered there of satisfaction. It was also in evidence that the defendant had full knowledge of the priority of the second mortgage over that of other creditors as well as a direct notice from the plaintiff's attorney that he would be held responsible, in this action, for the surplus in his hands from the sale of the goods, and for its

proper application to the prior lien, thus establishing the superior claim of the defendant in error, over that of the plaintiff in attachment, to the surplus in the hands of the garnishee. The court, in view of this evidence, held that this payment by the garnishee was not a satisfaction of the order.

Sec. 224, Civil Code, provides that in proceedings under attachment, if the garnishee is possessed of any property of the defendant, or is indebted to him, the court may order the delivery of such property, and the payment of the amount owing by the garnishee into court, and (in sec. 225) if he fail to comply with the order of the court, the plaintiff may proceed against him in an action in his own name, and such proceedings may be had as in other actions, and judgment may be rendered for the plaintiff for what shall appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee. Under these provisions, the court assumed jurisdiction and authority to determine the question of superiority and that of the liability of the garnishee to a strict compliance with the order of the court.

In the case of *Wilson v. Burney*, 8 Neb., 39, where the garnishee appeared and answered inconclusively, and an order was made requiring him to pay a certain sum, owing by him to the defendant, into court, from which no appeal was taken, and default having been made by the garnishee, the judgment was paid after execution, by the defendant's surety, who recovered the amount in an action against the garnishee, which was affirmed on error, holding the garnishee to the strict order of the court, and that the surety was subrogated to the rights of the plaintiff.

And subsequently, in *Hollingsworth v. Fitzgerald*, 16 Neb., 492, it was also held that "in an action by an attachment plaintiff against a garnishee founded upon an order of court, made upon the answer of the garnishee to pay money into court, the order is not conclusive as to the indebted-

ness of the garnishee, nor as to his rights, and the question of indebtedness at the time of the service of notice of garnishment, may be inquired into in an action by the attachment plaintiff against the garnishee." If such an action may be brought, it will not be questioned that, under the circumstances and conditions of this case, the present actior will lie.

It has been laid down by an accepted authority on proceedings in attachment that "As an attaching creditor can acquire, through the attachment, no greater rights against the garnishee than the defendant has, except in cases of fraud, it follows that the extent of the garnishee's liability is to be determined by the value of the defendant's property in his hands, or the amount of the debt due from him to the defendant.

"The garnishee is a mere stake-holder between the parties, and it would be manifestly unjust, in that position, to subject him to a judgment for a greater amount than that in his hands.

"It is his recognized right to discharge himself from personal liability by delivering into court the property of the defendant which is in his hands. In such case the property is wholly within the control of the court, and the garnishee is thus relieved from all responsibility therefor, and is not considered as having any further concern in the proceedings." (Drake on Attachment, p. 661.) This authority seems fully to justify the ruling of the trial court in this case.

The plaintiff in error assigns as the seventh error, in the trial below, the admitting in evidence of the letter of the attorney of H. P. Lau & Co. to the mortgagee, previous to the sale of the stock of goods, relating to the claims of the next creditor.

It has almost uniformly been held that a judgment would not be reversed for the admission of doubtful evidence on the trial of a cause to the court, without a jury,

and the reason for this is too plain to be mistaken. But in this case I think the evidence was admissible generally, and no fact is stated in the brief taking the case out of the general rule. The reply of the party was admitted with it, and he was not denied an opportunity to explain the circumstances, or to modify the force of the facts, if he had so pleased, in his answer as garnishee in attachment.

From all the facts disclosed by the record in this case, the overreaching mortgage taken by the plaintiff in error, the knowledge he had of the claims of other creditors, the notice given him by the defendant in error before the disposition of the goods, his inconclusive answer as garnishee, and his improvident payment of the surplus in his hands, not in accordance with the court, we can only come to the conclusion that the judgment of the district court was carefully and properly rendered, and is therefore to be

AFFIRMED.

THE other judges concur.

GEORGE C. WHITLOCK V. STATE, EX REL. SCHOOL DISTRICT OF OMAHA.

[FILED NOVEMBER 25, 1890.]

1. **Trusts**: LAND GRANT FOR SCHOOLS: CONSTRUCTION. Under the act of 1869, donating "Capitol Square" to the city of Omaha, the grant provided "that the said property shall be used by said city for the purpose of a high school, college, or other institution of learning, and for no other purpose whatever;" *held*, that this does not include the mere primary department of the common schools.

2. ———: CHANGE OF ADMINISTRATORS. The substitution of the board of education for the board of regents of the high school,

made by the act of 1871, did not change the character of the trust but merely of the body which administered the same.

3. The words "high school," as used in the act, may be defined as a school where the higher branches of a common school education are taught.

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

A. J. Poppleton, and *Howard B. Smith*, for plaintiff in error, cited: *Van Wyck v. Knevals*, 106 U. S., 360; *Kan. Pac. R. Co. v. Dunmeyer*, 113 U. S., 629; 9 Opinions of Attys. Genl., 41; *Silver v. Ladd*, 6 Wall. [U. S.], 440; Perry, Trusts, sec. 38–41, 687–700; Dillon, Mun. Corp., 566–7–8 and note; *State v. Benton*, 29 Neb., 460.

Lee S. Estelle, and *Wm. E. Healey*, *contra*, cited: *State v. Benton*, 29 Neb., 460.

MAXWELL, J.

This action was brought in the district court of Douglas county to compel the plaintiff in error to issue a permit for a one-story brick building to cost about $5,000, to be erected on "Capitol Square," in the city of Omaha. The court below rendered judgment in favor of the relator, and the cause was brought into this court by a petition in error.

The petition of the board of education, which is very long, sets out the ordinances of the city of Omaha relating to the erection of new buildings, to show that it was the duty of the plaintiff in error to grant such permit.

In his answer the plaintiff in error alleges "that he is advised and believes that the effect of the said acts passed by the said legislatures of the state of Nebraska, and of the conveyance made in pursuance thereof, is, and has been from the date of the passage of the first of said acts hereinbefore referred to, approved February 4, 1869, and the occupancy of said premises, and control thereof by the

board of regents, created by said act, on behalf of the city of Omaha, to vest the legal title of said premises and the control and use of said premises in the city of Omaha, and to vest in said city the sole and exclusive jurisdiction and control thereof, and that the said board of education, representing the school district of Omaha, have heretofore, and do at the present time occupy said premises only by the permission of said city, and that they have no legal right whatever to occupy, use, or control said premises, save by the consent and permission of said city of Omaha, and that the said school district of Omaha, the relator, has no legal or equitable title to said premises, and that the relator is not in any sense the owner thereof, and is not entitled under and by virtue of the provisions of the ordinances of said city relating to the inspection of buildings, hereinbefore referred to, to the building permit applied for. That prior to the application of the relator to this respondent for said permit, the city council of the city of Omaha adopted a concurrent resolution, which resolution was approved on the 6th day of September, 1890, by the mayor of said city directing the superintendent of buildings (this respondent) and all other persons, not to issue or cause to be issued to any person or corporation a permit to erect any building upon the grounds hereinbefore described, without the express permission of the mayor and council of said city in writing; which said resolution is in words and figures following, to-wit:

"'*Resolved*, By the city council of the city of Omaha, the mayor concurring, that the superintendent of buildings and all other persons be and they hereby are instructed and directed not to issue or cause to be issued to any person, persons, company, association, or corporation, a permit to erect any building upon the grounds commonly known as the "High School Grounds," in the city of Omaha, without the express permission of the mayor and council of said city in writing, and said superintendent of buildings and all

officers of said city are directed and instructed to see that all violations of chapter XVII of the Revised Ordinances or amendments thereto, for said city, compiled by W. J. Connell, are prevented, if possible, and all violators thereof prosecuted and punished.'

* * * * * * * * * *

"And respondent says that in obedience to the said resolution and in pursuance of the direction and authority of the council in that regard, he has declined and refused to issue any permit for the erection of any building whatever upon said premises, and shall continue so to decline and refuse and to obey said resolution, according to its tenor and effect, unless otherwise ordered by said city council or by the court; that in the year 1869, and before the passage of the act establishing the school district of Omaha, and while the premises in question were in the charge and control of the board of regents provided for in the act granting said premises to the city of Omaha, the books, papers, archives, records, and other public property belonging to the state of Nebraska, were removed from said premises, and the 'old capitol building' situated thereon, to the place designated by law as the capital of the state, to-wit, Lincoln, Lancaster county, Nebraska, whereby a full and complete and perfect title in fee became vested in the city of Omaha, to be held and enjoyed only subject to the conditions and limitations in said act set forth; and respondent further says that at the date of the passage and approval of the act creating the city of Omaha a school district and providing for the government of said district by a board of education, to-wit, February 6, 1873, and of an act relative to public schools in metropolitan cities which took effect March 31, 1887, the premises hereinbefore described as 'High School Square' and the buildings and erections thereon were not owned by any school district within the corporate limits of the city of Omaha. The act of 1869, transferring the title of capitol square to the city of Omaha, is as follows:

"'AN ACT to transfer to the city of Omaha for school purposes the capitol grounds and buildings in said city, and to provide a board of regents for the management of the same.

"'WHEREAS, The capitol grounds heretofore occupied by the state of Nebraska were originally conveyed to the territory of Nebraska by said city of Omaha; and,

"'WHEREAS, After the erection of a capitol building thereon had been commenced by the government of the United States, the appropriation therefor was found to be insufficient; and,

"'WHEREAS, After the suspension of the construction of said building for the reason aforesaid, the people of said city of Omaha contributed the sum of sixty thousand dollars to complete the same; and,

"'WHEREAS, The state of Nebraska has ceased to use said capitol grounds and buildings for the object originally contemplated; and,

"'WHEREAS, The said capitol building is now in a condition to require the expenditure of a large sum before the said building can be safely used by the state of Nebraska for any purpose:

"'SECTION 1. *Therefore, Be it enacted by the Legislature of the State of Nebraska:* That whenever the books, papers, archives, records, and other public property belonging to the state shall be removed from the old capitol building in the city of Omaha, to the place designated by law as the capital of this state, the said capitol building and grounds surrounding the same and whereon the same stands, known and designated on the lithographed plat of said city as Capitol square, shall revert to and vest in said city of Omaha for school purposes; and the governor of this state is hereby authorized and required, for and on behalf of this state, to make and execute, under his official seal, the full and complete conveyance of said property to said city for the purpose herein mentioned, on or before the first

day of April, A. D. 1869; *Provided*, That the said property shall be used by said city for the purpose of a high school, college, or other institution of learning, and for no other purpose whatever; *And provided further*, That said city shall never alien, convey, lease, or in any manner incumber the same.

"'SEC. 2. That Alvin Saunders, G. W. Frost, Thomas Davis, J. H. Kellom, Augustus Kountz, and J. M. Woolworth, and their successors, be and they are hereby appointed a board of regents to serve as follows: The two first named for three years, the two next named for two years, and the two last named for one year; the term of service of each to commence at the date of the passage of this act and run for the full term herein named after the general election for city officers in said city of Omaha, in 1869, so that two of said regents shall be chosen by the qualified electors of said city at the general election of municipal officers in the year 1870, and two of said board at each annual election thereafter. The said board of regents, or a majority of them, shall receive in behalf of said city of Omaha, from the state, the aforesaid property, and shall take possession of the same, and manage and control said high school, college, or other institution of learning so to be established, and provide such rules and regulations for the government of the same as to them shall seem expedient. Said regents shall continue in office until their successors are duly elected and qualified as hereinbefore provided.

"'SEC. 3. That in case of death, resignation, refusal to serve, removal from said city, or other disability of one or more of said regents, the remaining members shall fill said vacancy or vacancies until the next general election for city officers of said city. The said regents shall appoint a treasurer, who shall give such bonds as they shall prescribe, and hold his office during the pleasure of the board, which said officer shall receive for his services such

reasonable compensation as shall be prescribed by said board. The acts of a majority of said board shall, in all respects, be as binding and valid as if concurred in by the whole number of regents hereby appointed.

"'SEC. 4. That no college, school, seminary, or other institution of learning shall ever be kept in said building or upon said grounds, or upon any portion thereof, the control or management whereof shall be placed under the direction of any religious sect or denomination whatever.

"'SEC. 5. This act shall take effect and be in force from and after its passage.

"'Approved February 4, 1869.'"

The city accepted the trust as specified in the act. In 1871 an act was passed in relation to the schools of Omaha, sections 1 and 2 of which are as follows:

"*Be it enacted by the Legislature of the State of Nebraska:* That the city of Omaha, excepting a certain part of said city to be hereinafter designated in this act, shall constitute one school district, and all schools organized therein under the general school law are under special acts, creating and authorizing the board of high school regents in Capitol Square, in the city of Omaha, and all schools hereafter to be erected or organized within the limits of said city, shall, under the direction and regulations of the board of education authorized by this act, be public and free to all children residing within the limits of said city, between the ages of five and twenty-one years.

"Sec. 2. The board of education of the city of Omaha shall consist of two members elected by the electors in each ward, who shall be elected in the manner following: At the annual city election in the year 1872, the electors of each ward shall elect two members of said board of education, one of whom shall hold his office for the term of one year and one for the term of two years. At the annual election in the year 1873, and annually thereafter"

there shall be elected one member from each ward, who shall hold his office for two years and until his successor shall have been elected and qualified; *Provided*, That the present school board and the board of high school regents shall remain in full authority over their respective schools until the election and organization of the board of education to be elected under the provisions of this act, and no longer."

Other acts have been passed in relation to the high school of Omaha which need not be referred to here. The present board of education is the successor of the board created by the act of 1871.

The change from the board of regents to the board of education did not change the character of the trust, but merely provided what body should administer it. In order to determine the powers of the board of education we must consider the character of the trust in the act donating "Capitol Square." It was expressly provided "that the said property shall be used by said city for the purpose of a high school, college, or other institution of learning, and for no other purpose whatever."

The city seems to have performed its part of the trust in good faith and it now protests against the erection of an inferior building upon the grounds in question for the sole purpose of a primary department, and contends that such use of the property would be a violation of the purposes for which the land was conveyed. The objection is well taken. The evident purpose of the act in question was to create an educational institution of a higher grade than the primary department of the common schools. The words "high school, college, or other institution of learning" indicate this. The words "high school" may be defined as a school where the higher branches of a common school education are taught. This does not include a mere primary school. This school, no doubt, under the terms of the grant, may be converted into a college or

other like institution, free alike to all, but cannot be perverted from the purpose of the original grant.

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

REVERSED AND REMANDED.

THE other judges concur.

LEVI G. TODD ET AL., APPELLEES, V. CASS COUNTY ET AL., APPELLANTS.

[FILED NOVEMBER 25, 1890.]

1. **Elections**: ILLEGAL VOTING: EVIDENCE REQUIRED. In order to establish the fact that illegal votes were cast at an election in a specified voting precinct, proof must be offered by one or more witnesses having actual knowledge of such fact that persons who were not legal voters did actually vote at such election, and such witness or witnesses must designate such illegal voters. When the proof merely tends to show that the witnesses do not know all the legal voters in the precinct, and therefore fails to designate certain voters as illegal, it is insufficient to authorize the rejection of such votes as illegal.
2. ———: ———: PLEADING. In contesting an election in court the allegations of the petition and proof must correspond; in other words, the plaintiff must set forth in his petition the names of the persons whose votes are claimed to be illegal, in order that issue may be taken thereon. If such names are unknown at the time of bringing the action, the contestant afterward should obtain leave of court to amend his petition, giving a list of the names of voters claimed to be illegal, and it is the duty of the court to designate from the evidence the particular persons who have voted unlawfully.
3. ———: BALLOTS: PRESUMPTION OF LEGALITY. Where ballots have been cast in the mode provided by law, the presumption is that they are legal, and this presumption cannot be overturned by vague, indefinite, and uncertain testimony.

APPEAL from the district court for Cass county. Heard below before BRODY, J.

T. M. Marquett, Byron Clark, J. B. Strode, A. N. Sullivan, and *Mathew Gering,* for appellants, cited: *People v. Cicott,* 16 Mich., 283; *Sudbury v. Stearns,* 21 Pick. [Mass.], 148; *Ex parte Murphy,* 7 Cow. [N. Y.], 153; *People v. Tuthill,* 31 N. Y., 550; *Judkins v. Hill,* 50 N. H., 140.

E. H. Wooley, and *J. R. Webster, contra,* cited: McCrary, Elections [3d Ed.], secs. 547, 548; *Knox v. Blair,* 1 Bart 521; Brightley, Election Cases, 493; *Russell v. State,* 11 Kan., 308; *Tarbox v. Sughrue,* 12 Pac., Rep., 939; *Patten v. Coates,* 41 Ark., 111; *Burr v. Boyer,* 2 Neb., 267.

MAXWELL, J.

This is an action to contest an election held in Cass county on the 8th day of June, 1889, for the purpose of voting bonds to erect a court house in said county. It is alleged in the petition:

"Said election was held in the county of Cass on the 8th day of June, 1889, pursuant to notice given therefor, and the whole number of votes cast for the proposition submitted was 5,953, of which the proposition incumbent received 3,078 in favor thereof, and there were cast against said proposition incumbent 2,875 votes, and upon the canvass of said votes said proposition incumbent had an apparent majority of 203 votes; and said proposition, by the board of canvassers, organized and held by the county clerk, at the city of Plattsmouth, on the 12th day of June, 1889, was declared to have received an apparent majority of 203 votes, and the result of said canvass was by the board of canvassers signed and filed with the board of county commissioners of the said county of Cass, and said board of canvassers declared said proposition carried." The petition contains the names of fifty persons who, it is alleged,

voted in the First ward of said city and were not legal voters; also the names of fifty-four such persons whom, it is alleged, voted in the Second ward, and fifty-seven persons, whose names are set out, that it is alleged were not legal voters, but voted in the Fourth ward. No names of alleged illegal voters are set forth as having voted in the Third ward, and there is no contest over the Fifth ward. The reason given for not setting out the names of other alleged illegal voters is, that the plaintiffs did not have access to the poll-books of the Third ward.

The county of Cass in its answer:

"First—Denies all the facts stated in the contestant's petition.

"Second—Alleges that at a point (naming it), which had formerly competed for the county seat, there were 205 illegal votes cast, giving a large number of names, all of which were cast against said bonds.

"Third—That at other points named illegal votes to the number of more than 150 were cast against said bonds."

It is unnecessary to consider the answer in the case farther than the general denial, as on the trial, upon the conclusion of the testimony offered by the contestants, the defendant moved for a nonsuit on the ground "that the evidence adduced by the plaintiff in this case does not sustain the allegations of the petition, and is not sufficient to sustain a finding in favor of said plaintiff and against these defendants, or any of them."

The court thereupon took the matter under advisement, and afterwards filed a lengthy written opinion which, so far as relates to the cause for declaring the election annulled, is as follows: "At the polls in the contested wards, on the part of many on the outside, there was a very active desire to increase the vote for the bonds without regard to whether the same were legal or illegal votes. There was not present, either in or out the election board, any opposing force to prevent illegal voting. The judges of elec-

tion hid behind the erroneous supposition of the law, that it was not their duty to challenge, but, on the contrary, that it was their duty to receive all votes offered by men that were not challenged by outsiders. There was a moral or an immoral influence around the polls sufficient to guard against illegal votes against the bonds, and so the gates were left wide open for all men to vote who would offer ballots. This was weakening to that presumption of legality. Then, to further weaken that presumption, the plaintiffs offer in evidence the records showing the men on the tax list of personal property, and polls for spring of 1889 in the several wards of the city, and the record of votes at the city election in April, 1889, in the several wards, with evidence tending to show there was a spirited contest on members of school board at that election: the records showing the number of votes and the names of the voters of the several wards of the bond election in dispute; the registry of voters in the several wards in dispute for the general fall election of 1889, and the records showing the number of votes in the several wards at the November, 1889, election. The following is a recapitulation of those records, with some deductions and stated results:

"ABSTRACT OF DOCUMENTARY PROOFS.

	City vote, spring election, 1889.	Tax list taxable and polls, 1889.	Vote bond election contested June, 1889.	Registered vote October, 1889.	Vote general election, 1889.	Excess over highest other figure, 1889.
First ward	212	141	522	239	230	283
Second ward	256	147	516	291	291	225
Third ward	272	231	627	296	248	325
Fourth ward	227	206	503	276	269	227
Fifth ward	86	82	128	98	99	29
	1053	807	2296	1200	1183	1089
Excess	1243	1489		1096	1113	

"These defendants' statements certainly have a tendency to maintain plaintiff's assault against that presumption of regularity at the bond election in June. It shows that there was then voted more than double the men who paid poll or personal tax and nearly double as many as they voted before or after. The circumstances surrounding the fall election of 1889, as shown by the evidence, would tend to bring out a full vote.

"There is another record that should be noticed—that concerning census. The law provides for the taking of the census of the children with school age, giving sex, name, age, residence, etc., as means of verification of correctness thereof. This was done according to law, and the number of children with school age in the district in which Plattsmouth is situated was 1,928. The plaintiffs brought this out for the purpose of showing the opportunity of the witnesses for general acquaintance with the electors, and for the same purpose showed that the witness, at the request of the city officials, took the census of the town by taking the names of the head of the family as to the number of the family, without giving name, age, sex, or residence of individuals or other means of verification of correctness. The plaintiffs asked for the number of children but not for the population. This was asked for by defendants while cross-examining, although not strictly cross-examination. The census of the children is authorized by law and is a legal and sworn record and must be admitted. The census of the population was unauthorized by law and was hearsay, and during its taking it is safe to say that while one eye was on the census the other was on the county seat. It cannot be taken as a census nor as a sworn count.

"Still further, the plaintiffs offer, to support their attack against that presumption, oral testimony of a negative character. Their witnesses, being interested against them, are necessarily chosen with reference to high character as a guarantee that they will be truthful, and with good

opportunities of general and extended acquaintance with the voters, same having been judges of election in dispute when they saw the men and heard their names announced, and some assessors, and school census takers, the different vocations of life among the men of the place being well represented. They ask these witnesses if they knew or know of these challenged voters. They fail to know or know of more than twice the number of 203, the majority canvassed by the bonds.

"These witnesses, in estimating the proportion of the voters within their knowledge, fixed at a very small fraction, safe for defendants, but give no sufficient reason for the estimate; the examination throughout of each of them showing a very extensive acquaintance with the names not challenged. This was satisfactorily illustrated in the examination of ex-Mayor Johnson and Barber Boone, who were asked for knowledge on both the challenged and unchallenged lists, and from the utter unreliability of their estimates of the proportion of the votes known of by them. The many striking circumstances of the want of knowledge of these witnesses and to the records of the same challenged votes, make the witnesses and the records go together much stronger than either could go alone. The vote in June was out of all proportion to the other votes, the records, and out of the knowledge of those of general knowledge who ought to know. If the bond vote was legal the conclusion is irresistible, that there was a remarkable temporary sojourn of voters at that time, never discovered to tax, to work, or to vote except on that occasion. This event could not have escaped attention such as to track up in evidence and find where to place them. Nothing of this sort is done, except the repeated suggestion of shop hands and railroad employes. But these men are substantially all found, and these undiscovered votes are not to be any great extent among them, but on the contrary they are known residents, voters, and taxpayers and unchallenged

voters. This increases the mystery of so many undiscovered voters. That some of the undiscovered voters cast illegal votes is beyond doubt. Whether they were by men not entitled to vote, or by legal voters repeating under assumed names, as the evidence sufficiently shows that the Italians, otherwise called Dagos, did, and under circumstances authorizing the belief that they were not legal voters at all, cannot be determined. How many illegal votes were cast? The number cannot be named to a certainty. Were there 203? The number of strangers to the witnesses, and all the records except of that election are about three times that number. All the legal votes must be counted. They will be counted for the bonds. The evidence is sufficient to find the maximum number of legal votes in Plattsmouth at the time of the election in dispute, and the excess in the election in dispute are that may be fairly said to have been illegal.

"In view of all the evidence, I fix, by that maximum of votes, 1,928, the number of children of school age in the whole district (too high an estimate for other places in Nebraska). The evidence is sufficient to show that the Fifth ward, which is not contested, cast at the election in dispute substantially a full vote, so that it cast at that election not enough legal votes to change their estimates or results.

"This leads to the conclusion that more than 203 illegal votes were cast in the other four wards. I am constrained to feel that the proofs are sufficient to prevail against that presumption of regularity, so as to call for evidence from the other side, which they do not offer.

"I therefore find that in this court of equity the bond election of June 8, 1889, cannot stand. It is therefore annulled at the cost of Cass county. Defendants except to all. J. H. BROADY, *Judge.*"

Charles S. Twiss, the witness who took the school census in March, 1889, and also in March, 1888, was called

as a witness by the plaintiffs, and testified that he had lived in the Third ward of Plattsmouth for ten years; that he had been assessor in that ward a number of times, and that in March, 1889, when taking the census of children of school age in the city, he had also, under the direction of the city council, taken an enumeration of the persons residing in the city. This testimony was elicited evidently to show his knowledge of the people residing within the limits of the city. On cross-examination he testified as follows:

Q. Mr. Twiss, you may state as a matter of fact if a larger number of persons have their homes here while their employment is outside of the city.

A. Yes, a great many of them.

Q. You are not personally acquainted with these folks, are you.

A. No. I believe a good many of them are working on farms and their families are living here.

Q. State whether or not a large number of men whose homes are in Plattsmouth are employed in the service of the Burlington & Missouri railroad as machinists, carpenters, repairers, stone masons, brick masons, etc., whose homes are here and their employment elsewhere.

A. Yes.

Q. How did you take that list, or how did you keep count of the population here in the city of Plattsmouth last spring; did you keep a list of all their names, or just the numbers?

A. Of the numbers; I didn't keep the names. I took the numbers, except of the school children. Of course I was compelled to take the names of the school children and the parents, father and mother, and then took down the names of the different ones between the ages of five and twenty-one, and when I got the family I would take the number and not the name.

Q. Do you remember the number of school children you returned between the ages of five and twenty-one?

A. It was 1,928, I think, if I am not mistaken.

Q. Can you state to the court the population of the city as found by that census?

A. I cannot exactly, it is a good while; but it was something over eleven thousand returned to the city council.

Q. You may state whether or not your recollection of these names or a great number of persons resident in that ward, and that your knowledge of them comes solely from meeting them in your official capacity as census-taker for the schools.

A. Yes.

Q. State to the court whether or not you would be able to say you know one-third of the people in that ward by name.

A. I do not.

Q. You may state whether or not you have attended the meetings in the Third ward, such as primaries and elections.

A. I have, that is pretty near all of them.

Q. State whether or not, at these meetings, you knew one-third of the people.

A. I could not call them by name.

Q. State whether or not we have not in the Third ward, and a good share of the city, a large number of foreigners, with peculiar and unusual names.

A. Yes, very.

Q. Can you say that you would be able to recall these names?

A. No, I would not. There is another thing about all the foreigners, it is a difficult matter to get the foreigners to give a correct list of the children and grown persons, because the idea is as soon as they give their names they have to pay more taxes. We have had to work very near

to get the names of the school children, and I am confident I never did get them all. As soon as you commence to ask questions they think they are going to have more taxes to pay. I have explained it, I was going to say, a thousand and one times; but I have explained it a great many times, yet it is difficult to get a correct list of the grown people and children. I always explain it every time I take the enumeration.

This testimony was not objected to and was proper cross-examination, and so recognized by the attorneys for the plaintiffs, who failed to interpose a single objection.

In this state cities are graded according to the number of inhabitants contained therein. Thus, all cities containing eighty thousand inhabitants, or upwards, are denominated metropolitan cities, and governed by a statute passed expressly for said cities. Cities containing more than twenty-five thousand and less than eighty thousand inhabitants are denominated cities of the first class, and governed by a statute peculiar to said cities. Cities of the second class are of two grades, viz., cities containing more than one thousand inhabitants and less than twenty-five thousand, and cities containing more than five thousand and less than twenty-five thousand inhabitants. Each grade of cities of this class is governed by a statute applicable to it.

In several cases which have come before this court relating to the organization of cities, the enumeration has been taken substantially as testified to by the witness in this case, the purpose being merely to ascertain the charter under which the city shall act, and this, doubtless, was the object of the enumeration ordered by the council in this case. This witness had peculiar advantages for ascertaining who were residents of the ward in which he resides, and of the city, yet he testifies that he did not know by name one-third of the people in his own ward.

S. W. Dutton, a witness called by the plaintiffs, testified on his direct examination as follows:

Q. Where do you reside?

A. I reside in the city of Plattsmouth.

Q. In which ward do you reside?

A. In the Third ward.

Q. In what business are you engaged?

A. General time keeper of the B. & M. railway for the locomotive department.

Q. Do you keep the time of the workmen in the shops?

A. I supervise the keeping of the time.

Q. I will ask you about how much the force of workmen in the shop was reduced in the spring of this present year?

A. About one hundred men.

Q. About one hundred men discharged and the force cut down that much?

A. Yes.

Q. At what time was that cut made?

A. Well, I cannot say exactly what month it was; I cannot tell without referring to the books.

Q. I will ask you if it was not as early as April?

A. No, I think not.

Q. Was it in May?

A. If I recollect right it was in June. I would not be positive.

Q. I will ask you after you go from the witness stand to look that up definitely.

A. I will.

Q. The force was reduced about a hundred?

A. I judge about a hundred.

Q. How many men prior to this reduction did you have employed in the shops?

A. Do you mean on the shop roll?

Q. Yes, on the shop roll?

A. Well, there was, to the best of my recollection, something over six hundred. That is only one roll though.

Q. What other roll did you keep?

A. The engineers, firemen, and wipers' roll.

Q. That included all on what division?

A. On the whole system.

Q. From what point to what point.

A. From Denver, Colorado, to Plattsmouth, Nebraska, and from Atchison to Newcastle, the whole system west of the Missouri river.

Q. A great many of that list would be parties that did not reside here?

A. Oh yes.

Q. Do you know about how many you had upon that list of switchmen, wipers, engineers, and firemen that reside here in Plattsmouth?

A. I judge there was likely one hundred or more that resided in Plattsmouth.

Q. So you had upon your pay rolls altogether something like seven hundred men that were residents of Plattsmouth?

A. Something over seven hundred in our department.

Q. That was prior to this reduction?

A. Yes.

Q. What other department was there?

A. The store department employed about a hundred men.

Q. Did the store department employ a hundred men additional?

A. Yes, they have a separate roll.

Q. Who kept that roll?

A. That was under Weed.

Q. Don't you make it up in your general roll?

A. No, it was entirely separate.

Q. What other roll do you have?

A. The store department—the station roll.

Q. What does that include?

A. That includes all the men employed about the stations.

Q. Is the telegraph operator a station man?

A. Yes, and the employes under him.

Q. About how many did he have on this?

A. There is not so many; I judge about ten, likely.

Q. What do they do?

A. There is the agent and two clerks, and there is the baggage-master, and there are two or three men up in the store that handle freight—helpers, and two operators.

Q. About ten or a dozen of these?

A. I judge about that.

Q. What was the other roll?

A. Then there is a train service roll, and also a roll for the trackmen.

Q. How many trackmen reside here?

A. That is impossible for me it say.

Q. Are there any trackmen residing here that you know of except those that work this section from Plattsmouth to Oreapolis?

A. I have very little knowledge of the trackmen.

Q. Who keeps the list of trackmen?

A. I am not aware of the name of the party who keeps it; the foreman returns it, I suppose.

Q. Are you any way certain about the number you had upon the pay roll?

A. Yes, I am pretty sure—that is, I am reasonably sure.

Q. Will you bring into court the pay rolls for April and May of the present year?

A. I cannot do it.

Q. Where are they?

A. They are in the B. & M. office.

Q. Do you keep duplicates?

A. No, sir.

Q. In what office are they?

A. In the office of the superintendent of motor power.

Q. Do you keep a record in your office of them?

A. No other record except them.

Q. You simply make up the list and sign it.

A. I make up the pay roll.

Q. Do you keep any record in your office of the names?

A. We have a copy of the pay roll.

Q. Will you bring that into court?

A. I cannot do it.

Q. Where is it?

A. In the office.

Q. Why cannot you bring it?

A. It don't belong to me individually.

Q. You have charge of it?

A. It belongs to the B. & M. railway.

Q. You have charge of it?

A. In one sense I have; I have no right to take the records out of the office.

Q. Will you look at that record and return into court so as to swear positively to the number of men that you had upon the shop roll?

A. Yes, I can look that up.

Q. For the months of March, April, May, and June, 1889? Also, will you look over your other rolls of the motive department, or motor power; the engineers, firemen, and brakemen, and see how many you know of that were residents of Plattsmouth?

A. It is impossible for me to tell on that roll who are residents here, or who are not. It is not specified where they reside; they are kept alphabetically on the roll.

Q. Is it specified on the roll where they are to receive their pay?

A. No, sir.

Q. These train men receive their pay wherever they catch the pay car?

A. Yes.

Q. I will ask you if there are not a great many men that work in the shops, that work there a short time and go elsewhere, or whether they are stable men?

A. A great many of them—the great body are stable men—but a few are coming and going continually, but not a great many except when there is a reduction made.

Q. I will ask you if a great many of these shop men are not men that own their little homes here in Plattsmouth, and reside here some length of time?

Q. State whether or not there are men that you know have been residing here some length of time—a good many of them.

A. I cannot say as to anything like the number; I know some of them have their homes, quite a goodly number, but I have no idea what proportion to the whole number; I don't interest myself particularly about that.

Q. You have quite a number of these Bohemians that live out in the west part of the city, have you?

A. Yes.

Q. You have a large number of men that you have been acquainted with for several years?

A. There is only a small proportion that I would be personally acquainted with.

Q. I will ask you whether or not a large number, and if you have any knowledge of it, about what proportion of these men are married men living here in town?

A. I have no idea.

Q. Do you know that a large number of them are married men living in town here?

A. Certainly, I know there is a large number of married men residing here.

Q. I will ask you, Mr. Dutton, if, outside of the merchants of Plattsmouth, the larger part of the population of Plattsmouth is not made up of railroad men—shop men? * * *

Q. How long have you resided here in Plattsmouth?

A. About fifteen years.

Q. You have been about the city considerably, have you?

A. Yes.

Q. And you know about all these men that work in the shops, don't you?

A. No, sir.

Q. You know of the men and their names?

A. I know the names. I know we have such men on the roll, that is all I know.

Q. Now I will ask you if, outside of the merchants and business men here on Main street, and some carpenters and stone masons, and lawyers and clerks, and such men as that—if outside of that the population of Plattsmouth is not principally made up of railroad men and shop men?

A. Why, I can only give my opinion, that likely they form about one-fifth of the population, they and their families.

Farther along in his testimony he states that the shop men and their families in his opinion compose from a fifth to a third of the population of Plattsmouth. If we take either estimate, it would give a considerably larger number of men than the votes polled at the election in question. This witness testified in substance that while he was unacquainted with certain men whose names were mentioned to him, yet for aught he knew they were residents of Plattsmouth. From the testimony of this witness and that of others, the whole number of men directly and indirectly employed by the B. & M. Railway Company who resided in Plattsmouth must have been nearly or quite 1,000.

Joseph W. Johnson, who was called as a witness for the plaintiffs, testified in substance that he had a general acquaintance in the city and had held a number of positions therein, that he had had charge of grading the

streets, etc., and a number of men were employed in that business. The exact number does not any where appear. He testified in substance that while he was unacquainted with certain persons named, yet such persons might reside in Plattsmouth without his being acquainted with them.

Some thirteen other witnesses were called who testified in substance that they were residents of Plattsmouth, and had been for some time; that they were unacquainted with certain persons whose names are mentioned, but that such persons might reside in Plattsmouth and they not be acquainted with them.

The testimony tends to show that in the years 1888 and 1889 the city of Plattsmouth engaged in the construction of a system of sewerage and paved its principal streets, and did a large amount of grading, and made other improvements. These necessarily required the employment of a large number of persons. During this time also the engineers' strike on the C., B. & Q. railway seems to have been general along the line, and the engineers and firemen in Plattsmouth, as well as other points on the line, went out and their places were supplied by others. The exact number thus affected does not appear, but evidently is quite large. And there is testimony tending to show that many of the old employes, as well as the new, had their homes in Plattsmouth.

It addition to this, it is evident from the testimony that many of the men connected with the railway company were young and unmarried. The judge evidently was aware of the fact in basing his estimate of legal voters upon the number of school children. This estimate, however, as shown by the testimony of the enumerator, is probably greatly below the actual number.

The city election held in the spring of 1889 does not appear to have involved any important matter, such as would arouse the zeal of the mass of voters, and the same is true of the election in November, 1889. A new regis-

try law had just taken effect. Registration could only take place on certain days, and many, no doubt, who were connected with train service found it inconvenient or impossible to register. Experience has shown that only where important matters of public interest are at issue can anything like a full registry of voters or of full votes be obtained. From some cause which is not fully shown a very full vote was polled throughout the entire county upon the question of issuing bonds.

A better criterion would have been the vote for president of the United States, members of the legislature, and county officers held in November, 1888, about eight months before the bond election. Such election no doubt called out the full vote of the city, and as no contests seem to have resulted therefrom it will be presumed to be satisfactory to all parties. In order to establish the fact that illegal votes were cast at an election in a specified voting precinct, proof must be offered by one or more witnesses having actual knowledge of such fact, that persons who were not legal voters did actually vote at such election, and such witness or witnesses must designate such illegal voters. When the proof merely tends to show that the witnesses do not know all the legal voters in the precinct, and therefore fails to designate certain votes as illegal, it is insufficient to authorize the rejection of such votes as illegal.

The testimony in this case tends to show that there were a greater number of adult males in the city of Plattsmouth on the day of election than there were ballots cast. In regard to the charge of repeating, it is sufficient to say that there is no proof of it whatever.

So far as appears, the Italians were legal voters and it is an uncalled for imputation to charge them with the commission of a crime without any evidence to sustain it. The only pretext for such statement is the testimony of a witness from the interior of the county who was attending the election in Plattsmouth, who testifies that in the First

ward he saw six or eight Dagos go towards the polls, but did not see them vote; he also claims that they went towards the polls two or three times, but he did not see them vote even once. He states that there was a water closet back of the building in which the election was held, and that he himself, although not a voter in that city, had just visited the water closet. He also, in effect, testifies that he would be unable to distinguish Italians from Austrians. In addition to this, this action is based upon the proposition that certain illegal votes were cast in favor of the bonds sufficient to change the result. This requires a designation of the persons who it is alleged were not legal voters. The *allegata et probata* must agree. (*Williams v. Lowe*, 4 Neb., 393; *Young v. Filley*, 19 Id., 543.) The plaintiff recognizes this rule by giving the names of 161 persons who, it is claimed, were not legal voters. There was no attempt, however, to prove that the persons named were not legal voters; that is, commencing with the first name and continuing to the last, no individual is selected and proved to have voted unlawfully.

The issue is made upon the pleadings. A party may not be able to obtain the names of all the illegal voters when the petition is filed, and hence may be unable at first to set them forth in the petition. When, however, he does obtain such names he must amend his petition to conform to what he expects to prove, so that issue may be taken thereon. The court should afford every reasonable facility to enable a party contesting to ascertain the facts as to the casting of unlawful votes. The parties, however, must act in good faith, and set forth the names of the persons alleged not to be voters. Such cases are not tried upon vague statements or charges, but by sifting the list of voters and determining who are not authorized to vote. It was the duty of the plaintiffs, therefore, to set forth the names of at least 203 persons whom they allege were not authorized to vote, and introduce proof tending

to show that each of the individuals named was not a legal voter. This they have wholly failed to do.

In *State v. Penniston*, 11 Neb., 100, it was held that, a notice of contest of election which states that the contestant was an elector of the district, the points of contest, the office contested, and the date at which its duties commenced, the person selected to take depositions, and the time and place of taking the same, is sufficient. That was a contest for a member of the legislature, and after the selection of the officers before whom the testimony was to be taken, they refused to proceed upon the ground that the notice of contest was insufficient. Thereupon the contestant applied to this court for a *mandamus* to compel the officer who had entered upon the duties of his office in taking the testimony to proceed and complete the taking of such testimony. The defendant demurred to the petition and the demurrer was overruled and the officer required to proceed and complete the taking of such testimony.

It will be seen a very different question was presented from that under consideration. The rule is, that where a vote has been received at an election by officers who have conformed to the forms of law in its reception, the law will presume that the vote is legal. (*Cirencester Case*, 2 Frans. [El. Cases], 448; Orme on Election, 405; *Porterfield v. McCoy*, 1 Cong. El. Cases, 261; *Loyall v. Newton*, Id., 520; *New Jersey Case*, 2 Cong. El. Cases, 19; *Whitaker v. Cummings*, L. & R. [Mass. El. Cases], 360; 6 Am. & Eng. Ency. of Law, 428.) And this presumption must prevail in this case.

Some comment is made upon the remarks and conduct of two or three persons on election day, but no fair-minded person will charge a whole community with the trivial sayings or conduct of two or three persons. If the proof in this case was held sufficient to annul the election, it would be possible, on vague, indefinite charges, or mere

suspicion, to annul any election held in the state. This cannot be permitted. Elections can only be annulled for sufficient causes which are open and apparent to all and susceptible to specific proof.

The judge in the case at bar confesses that he does not know from the evidence what illegal votes were cast. It was his duty, however, to have found what particular persons, if any, voted illegally, specifying the names, based upon the testimony.

Upon the whole case it is apparent that the proof is not sufficient to warrant the judgment annulling the election. The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

MAGNEAU ET AL V. CITY OF FREMONT.

[FILED NOVEMBER 25, 1890.]

1. **De Facto Officers.** The acts of a *de facto* officer are valid and binding, so far as the interests of the public or third persons are involved.

2. **Cities:** COUNCIL. A MEETING of the city council, held at a time other than that fixed by ordinance for a regular meeting, is valid, if the mayor and all the councilmen are present and act as a body, notwithstanding the meeting was not called by the mayor or two councilmen.

3. ——: ——: ADJOURNED SESSIONS. Where such a meeting is adjourned to a specified date, and at such date a quorum of the council meet, they may transact any business within the powers conferred by statute.

4. ——: ——: QUORUM. In cities of the second class having more than five thousand inhabitants, the council, when in lawful

30 843
32 544
38 843
39 698
30 843
48 877
30 843
51 874
52 217
55 313
55 489
55 523
30 843
56 550
56 581
30 843
61 493

session, may pass any ordidance, by the concurring vote of a majority of all the members elected to the council, or by the affirmative vote of one-half of the whole number of councilmen, with the concurrence of the mayor.

5. ———: ———: ———. The city council of the city of F. is composed of eight members. The mayor and four councilmen voted in favor of the passage of a certain ordinance, three members voted nay, and one was absent. *Held*, That the ordinance was legally passed.

6. ———: OCCUPATION TAX: CONSTITUTIONALITY. The provision of subdivision 8 of section 52, article 2, chapter 14, Compiled Statutes, authorizing cities to levy and collect occupation taxes, is not repugnant to sections 1 and 6 of article 9 of the constitution.

7. ———: ———: ———. Where a city ordinance imposes a fixed sum upon each of the various avocations therein named, and makes no exceptions in favor of or against any person who may desire to pursue the business taxed, *held*, not to violate the rule respecting uniformity prescribed by the constitution and statute.

8. ———: ———: PENALTY: ORDINANCE VOID IN PART. While the penal provision for the enforcement of an ordinance imposing an occupation tax is void, it does not invalidate the remainder of the ordinance.

APPEAL from the district court for Dodge county. Heard below before MARSHALL, J.

N. H. Bell, and *C. Hollenbeck*, for appellants, cited: Cooley, Const. Lim. [2d Ed.], 116; *Mays v. Cincinnati*, 1 O. St., 268; *R. Co. v. Columbus Co.*, Id., 77; *State v. Wilcox*, 45 Mo., 458; Locke, Civ. Gov., sec. 142; *State v. Mayor*, 38 N. J. L., 110; *State v. Green*, 27 Neb., 64; 1 Waterman, Corp., 347; *Hildsley v. McEnters*, 19 Am. Dec., 61, note 68; *Green v. Burke*, 23 Wend. [N. Y.], 490; *People v. Hopson*, 1 Denio [N. Y.], 574; 1 Dillon, Mun. Corp. [3d Ed.], 301, and citations; *Ex parte Wolf*, 14 Neb., 24.

Frank Dolezal, and *W. H. Munger*, *contra*, cited cases referred to in opinion.

NORVAL, J.

This suit was brought in the district court of Dodge county, to enjoin the collection of certain occupation taxes imposed upon various occupations within the city by ordinance No. 231, and to have said ordinance declared void. The district court found the issue in favor of the defendants, and dismissed the action. The plaintiffs appeal.

The city of Fremont is a city of the second class having over 5,000 inhabitants. It is divided into four wards, and under the act or charter which governs cities of that class, is entitled to eight councilmen, two from each ward. At the general election held in said city on the first day of April, 1890, E. N. Morse was elected councilman from the Second ward as the successor to J. J. Lowry, and D. Hein was elected from the Third ward as the successor to C. A. Peterson. At a session of the city council held on April 3, 1890, the votes cast at the last city election were canvassed and Morse and Hein were declared elected. This meeting was adjourned to April 4, when the ordinance in question was introduced and read for the first time. An adjourned session was held on April 5, when the ordinance was read the second time, and the meeting was adjourned to April 9. On that date the council met pursuant to adjournment when the ordinance was read a third time and passed. There were present and participated at this session, besides the mayor, councilmen Biles, Esmay, Plambeck, Harms, Wilcox, Peterson, and Lowry. On April 7, prior to the passage of this ordinance, the councilmen elect, Morse and Hein, qualified.

It is contended by the appellants that the ordinance was never legally passed for the following reasons:

"First—That there were not present at its passage a quorum of the legal members of the city council.

"Second—That a sufficient number of the legal members of that body did not vote in favor of the passage of the ordinance.

"Third—Because the mayor had no legal right to vote upon its passage.

"Fourth. Because the ordinance was passed at a meeting at which the council had no authority to pass an ordinance."

The first two objections will be considered together. It is conceded that all who participated at the meeting when the ordinance was adopted were legal members of the council, except Peterson and Lowry, whose right to act is questioned, on the ground that their successors had previously qualified on April 7. The statute requires that two-thirds of all the members of the council shall be necessary to constitute a quorum for the transaction of business. It is obvious that if Peterson and Lowry could not lawfully act with the council at that meeting, no quorum was present and the ordinance is invalid.

Section 12 of article 2, chapter 14, Compiled Statutes, provides that in cities of the second class having more than 5,000 inhabitants there shall be elected annually in each ward one councilman, who shall hold his office for a term of two years, and until his successor shall be elected and qualified. There being no statutory provision fixing a particular date when the term of office of a councilman shall begin, it is believed that the provisions of said section 12 control, and that the term of such officer commences immediately after the person elected has qualified.

While Morse and Hein had qualified, they had not, as yet, taken their seats in the council, or participated in the proceedings of that body. The names of Lowry and Peterson appeared upon the roll of members, and they were recognized as such by other members of the council, as well as by the mayor and city clerk. They took part in the proceedings of the council on April 9th without objection from any one, although Morse and Hein were at the time in the council chamber. We conclude, therefore, that Messrs Morse and Hein were *de jure* officers and that Lowry and Peterson were *de facto* members of the city council.

The cases are numerous which hold that the acts of a *de facto* officer, so far as they involve the interests of the public or third persons are as valid and binding as though he was an officer *de jure*.

In *Ex parte Johnson*, 15 Neb., 512, the petitioner had been tried upon a criminal complaint before a justice of the peace, convicted and fined, and ordered committed to jail until the fine and costs were paid. He applied to this court for a writ of *habeas corpus*, alleging that the justice of the peace before whom he was convicted, usurped said office without authority of law. It was held that as the justice was a *de facto* officer his acts were valid, and the writ was denied.

In *State, ex rel., v. Gray et al.*, 23 Neb., 365, it was held that "the acts of councilmen *de facto*, within the power of the statutes, will be recognized and upheld."

In *Braidy v. Theritt*, 17 Kan., 468, the defendant exercised the duties of councilman of the city of Wathena after his successor had been elected and qualified. It was held that Theritt was a *de facto* officer.

The case of *Morton et al. v. Lee*, 28 Kan., 286, was a suit brought by Lee to enjoin the collection of a judgment rendered by one A. J. Buckland, as justice of the peace after his term of office had expired, and after the election and qualification of his successor. It was held that Buckland was a justice of the peace *de facto*, and his acts as such were valid. The following cases support the same doctrine: *Norton v. Shelby Co.*, 118 U. S., 445; *Carli v. Rhener*, 27 Minn., 292; *Leach v. People*, 122 Ill., 420; *People v. Bangs*, 24 Ill., 184; *Trumbo v. People*, 75 Ill., 561.

It follows from the reason of these cases that the acts of Lowry and Peterson are valid, and that there was a quorum of the city council present at the time the ordinance was adopted. The authorities cited in the brief of plaintiffs do not, in any manner, conflict with the rule for which we contend in this case, but sustain the proposition that the

acts of officers *de facto* are invalid as to the person performing the duties of the office, and are no protection to him.

It appears from the record, that four members of the council and the mayor voted in favor of the passage of this ordinance—three voted against it, and one was absent. Whether a sufficient number voted in the affirmative, depends upon whether the provisions of section 18, or those of section 30 of article 2 of chapter 14, Compiled Statutes, control and govern cities of the class of Fremont, in the passage of ordinances.

Section 18 provides that "The mayor shall preside at all meetings of the city council, and shall have a casting vote when the council is equally divided, except as otherwise herein provided, and none other, and shall have the superintending control of all the officers and affairs of the city, and shall take care that the ordinances of the city and of this act are complied with."

Section 30 provides that "On the passage or adoption of every resolution or order to enter into a contract by the mayor and council, the yeas and nays shall be called and recorded; and to pass or adopt any by-law, ordinance, or any such resolution or order, a concurrence of a majority of the whole number of members elected to the council shall be required; *Provided*, That the concurrence of the mayor and one half of the whole number of members elected to the council shall be sufficient to pass any such ordinance, by-law, resolution, or order."

Section 18, standing alone, sustains the construction contended for by the plaintiffs and appellants, that the mayor can only vote when the council is equally divided. The language used in section 30 is plain and explicit, "that the concurrence of the mayor and one-half of the whole number of members elected to the council shall be sufficient to pass any such ordinance."

In construing statutes, effect, if possible, must be given

to every part of the law. Effect can be given to all the provisions of both sections by holding that the section first above quoted does not apply to the passage of ordinances, by-laws, or resolutions, but relates to the other proceedings of the council. Holding, as we do, that section 30 authorizes, when a quorum of the council is present, the passage of ordinances by the affirmative vote of one-half of all the members of the council, with the concurrence of the mayor, the ordinance under consideration received a sufficient affirmative vote to adopt the same.

The appellants claim that the case of *State v. Gray*, 23 Neb., 365, conclusively settles the present case in their favor. We do not think so. The court, in that case, had under consideration secs. 10, 76, and 79 of the act which governs and controls cities of the second class containing a population of less than 5,000, being article 1, chapter 14 of Compiled Statutes. The only difference between section 10, construed in that case, and section 18, involved in this, is that the former section does not contain the words "except as otherwise herein provided." Sections 76 and 79 each provides that to pass an ordinance it requires the concurrence of a majority of all the members elected to the council. Neither of said sections provides "that the concurrence of the mayor and one-half of the whole number of members shall be sufficient to pass any such ordinance." In that respect the provisions of said sections are different from those contained in section 30, which we have been considering. The court in *State v. Gray, supra*, held, and we think correctly, that section 10 therein construed did not apply to the passage of ordinances, and that it required the concurrent vote of the majority of whole number of members of the council to adopt an ordinance. It is obvious that the provisions of section 30 and those of sections 76 and 79 are so different that the decision reported in 23d Nebraska does not in any manner conflict with the views expressed in this opinion, but on the other

hand sustains us in holding that section 18, copied above, does not refer to the passage of ordinances.

It is also claimed that the city council had no authority to pass ordinance 231 at the meeting at which it was adopted. Ordinance No. 3 of the city of Fremont provides that the regular meetings of the council shall be held on the last Tuesday of each month. It is conceded that the ordinance under consideration was not acted upon at such a meeting, nor at any adjourned session thereof.

It is provided by ordinance No. 79 that the mayor and council shall meet on the Thursday following each city election and canvass the returns of the votes cast at such election. A meeting was held April 3, when the votes cast at the city election held on April 1 were canvassed. Prior to this meeting a call was issued by the mayor for a meeting of the council on April 3 to canvass the votes of the city election and to transact any business that might lawfully come before the council. At the meeting held on April 3, the mayor and all the members of the council were present except Archer. This meeting was adjourned to the following day, at which time, the mayor and all the councilmen being present, the ordinance was introduced, read the first time, and the meeting adjourned to April 5. On that date there were present the mayor and all the councilmen except Plambeck. The ordinance was then read a second time, and an adjournment taken to April 9. On the last named date, all the members of the council being present except Archer, the ordinance was read a third time and passed.

The meeting held on April 3 was for the special purpose of canvassing the returns of the city election. Had it been a regular meeting then any corporate business could have been lawfully transacted at any adjourned session thereof. The statute authorizes the mayor or any two councilmen to call special meetings. Whether the call must specify the object of such a meeting, the statute is silent, and the

decisions of the courts are conflicting upon that question. At any rate the purpose and object of the call is to apprise the members of the proposed meetings so that they may attend. So it seems clear to us that when all the members of the council and the mayor meet and act as a body, they may at such meeting, or at any adjourned session thereof, transact any business within the powers conferred by law, notwithstanding no written call for the meeting was made by the mayor or two councilmen, or in case one was made which failed to specify the purpose of the meeting.

At the session held on April 4, at which the ordinance was introduced and read, the mayor and all the members of the council were present and acted. All the members were notified of the meeting at which the ordinance was read the second time, by the adjournment of the previous meeting when all were present, and all had notice of the meeting at which the ordinance was passed, by the adjournment of the meeting held on April 5, except Plambeck, and he was present and participated at the meeting when the ordinance was finally passed. In view of these facts, we must hold that the council was in lawful session when each step was taken in passing this ordinance.

It is urged that subdivision 8 of sec. 52 of the act governing cities of the second class having over five thousand inhabitants, which authorizes a city to levy and collect a license tax on any occupation or business carried on within the corporate limits, violates sections 1 and 6 of article 9 of the constitution.

Section 1 of said article provides that "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct; and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor

dealers, toll bridges, ferries, insurance, telegraph, and express interests or business, vendors of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

Section 6 provides that "The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of property benefited. For all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

It has been the uniform holding of this court that the constitution is not a grant but a restriction of legislative power, and that the legislature may legislate upon any subject not inhibited by the constitution. (*State v. Lancaster County*, 4 Neb., 537; *State v. Dodge Co.*, 8 Id., 124; *Hanscom v. City of Omaha*, 11 Id., 37; *State v. Ream*, 16 Id., 685; *Shaw v. State*, 17 Id., 334.)

In *State v. Bennett*, 19 Neb., 191, this court had under consideration sec. 1, article 9, of the constitution, and subdivision VIII of section 69 of "An act to provide for the organization, government, and powers of cities and villages," passed in 1879, which empowers cities containing less than five thousand inhabitants to impose an occupation tax. It was held that the constitution and statute both conferred the power to levy and collect such a tax.

While the legislature has authority to enforce a tax upon occupations, it is evident that section 1 of the constitution above referred to does not prohibit the legislature from conferring, by general law, power upon cities and villages to impose occupation taxes for municipal purposes. The only restriction imposed is that the taxes shall be uniform as to class.

The above quoted section 6 of the constitution was not

referred to or considered by the court in *State v. Bennett, supra.* It therefore only remains to be determined whether the provision of that section prohibits the legislature from conferring upon municipal corporations the power to levy occupation taxes.

It is claimed by appellants that this section of the constitution has reference to taxation by valuation. We do not think so. The language used is: "Such taxes shall be uniform in respect to *persons* and *property.*" If it was the intention of the framers of the constitution to limit a municipal corporation to the imposing of taxes on property, why was the word "persons" specified in the section? It was evidently inserted for the purpose of authorizing the levy and collection of occupation taxes.

Sections 1 and 6 of article 9 of our constitution are identically the same as sections 1 and 9 of the ninth article of the constitution of Illinois, which were construed by the supreme court of that state in 1873, before the adoption of the constitution of this state, in *Wiggins v. City of Chicago,* 78 Ill., 378. Mr. Justice Walker, in delivering the opinion of the court, observes: "The ninth section, article 9, of the constitution declares that the general assembly may vest the municipal authorities of cities, towns, and villages with authority to assess and collect taxes for corporate purposes; 'but such taxes shall be uniform, in respect to persons and property within the jurisdiction of the body imposing the same.' To give full effect to this provision, we must hold that it embraces more than the mere assessment and imposition of a uniform tax on property. It evidently was designed to include the various modes of collecting taxes of persons pursuing various avocations. And in the first section of the same article, the legislature is authorized to tax peddlers, auctioneers, etc. The tax here provided for is manifestly the sum of money which shall be paid to enable them to pursue their calling. Their property was required to be assessed by the first

clause of the section, as it falls within the language employed, hence it follows that the tax last referred to, as applied to the classes of persons enumerated, is a personal tax, imposed upon the person exercising the calling, and has no reference whatever to his property."

We are clearly of the opinion that the provision of subdivision VIII of section 52, article 2, chapter 14, Compiled Statutes, is not repugnant to the constitution.

It is, however, urged that the ordinance is void because the taxes imposed by it are not uniform in respect to the classes upon which they are levied. The ordinance imposes a fixed sum upon each of the various avocations therein named. The fact that it does not classify each business and graduate the amount that shall be paid by the person pursuing an avocation, according to the amount of business he shall do, is not a violation of the rule of uniformity prescribed by both the constitution and statute. It is not an income tax, but a license fee or tax for the privilege of carrying on business in the city. The ordinance makes no exceptions in favor of or against any one carrying on the business taxed, but operates uniformly on the class to which it applies.

Section 7 of the ordinance provides that any person violating any of its provisions shall, on conviction thereof, be fined not less than five nor more than fifty dollars, and be committed until the fine and costs be paid. Under the decision of this court in *State v. Green*, 27 Neb., 64, the penal provision for the enforcement of the ordinance is void. But that does not invalidate its other provisions, as the valid part is a complete act and is not dependent upon the void portion. (*State v. Lancaster Co.*, 6 Neb., 474, *State v. Hardy*, 7 Id., 377; *State v. Lancaster Co.*, 17 Id., 85; *State v. Hurds*, 19 Id., 323; *Muldoon v. Levi*, 25 Id., 457; *Messenger v. State*, Id., 674.) The judgment of the district court is

AFFIRMED.

THE other judges concur.

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C. B. BAILEY v. STATE OF NEBRASKA.

[FILED NOVEMBER 25, 1890.]

1. **Appeal:** WAIVER OF INFORMALITIES. The taking of an appeal from a conviction had before a magistrate for the violation of a village ordinance, is a waiver of the errors committed on the trial before such magistrate.
2. **Villages:** ORDINANCES: PROOF OF PASSAGE. The certificate of a village clerk attached to an ordinance of the municipality, attested by his official seal, stating that such ordinance was passed and approved, and when and in what paper it was published, is sufficient proof of its passage, approval, and publication.
3. ———: LIQUORS: SALE: PENALTY. The board of trustees of a village has authority to enact an ordinance to prohibit the sale of intoxicating liquors within the corporate limits, and to provide as a penalty for its violation the imposing of a fine not to exceed one hundred dollars and for imprisonment in default of the payment of the fine and costs.
4. ———: ORDINANCE VOID IN PART. Where such an ordinance provides for its enforcement, the imposing of a "fine of not less than twenty-five dollars, nor more than one hundred dollars, or by imprisonment not exceeding thirty days, or by both fine and imprisonment," *held*, that part providing for punishment by imprisonment is void, but that it does not invalidate the remainder of the ordinance.

ERROR to the district court for Saline county. Tried below before MORRIS, J.

Hastings & McGintie, for plaintiff in error:

A police judge may exercise only such powers as the statute gives him. (*S. C. & P. R. Co. v. Washington Co.*, 3 Neb., 41; *Morrill v. Taylor*, 6 Id., 242; *Doody v. Vaughn*, 7 Id., 32; *Brondberg v. Babbott*, 4 Id., 519.) Secs. 11, 12, and 25, ch. 50, Comp. Stats., fix a method of procedure which is exclusive. (*S. C. & P. R. Co. v. Washing-*

ton Co., supra.) Since the two provisions for enforcing the ordinance form parts of a penalty, one cannot be void and the other valid. (*Oatman v. Bond*, 15 Wis., 22; *State v. Dousman*, 28 Id., 541; *State v. Perry Co.*, 5 O. St., 497; *Campau v. Detroit*, 14 Mich., 276; Cooley, Const. Lim., 213.)

Abbott & Abbott, contra:

A municipality may inflict penalities. (Horr & Bemis, Municipal Police Ordinances, secs. 89–119; *Brownville v. Cook*, 4 Neb., 101.) Imprisonment is no part of the penalty, but a method of collecting the fine. (*Sheffield v. O'Day*, 7 Ill. App., 339; *State v. Herdt*, 40 N. J., 264.) Void and valid parts of an ordinance should, if possible, be construed as separable. (Horr & Bemis, Municipal Police Ordinances, sec. 139.) When a double penalty is imposed the fact that one is unauthorized does not invalidate the other. (*Wilcox v. Hemming*, 58 Wis., 144.) As to the effect of the appeal: 1 Dillon, Mun. Corp., sec. 367.

NORVAL, J.

On November 19, 1888, J. B. Dann made a written complaint under oath before E. J. Hancock, justice of the peace of the village of De Witt, Saline county, charging Charles B. Bailey, the plaintiff in error, with unlawfully selling malt and spirituous liquors to one James Liggard, in violation of ordinance No. 24 of said village. Bailey was arrested and taken before the justice, where he entered a plea of not guilty. He applied for a change of venue, which was refused. He thereupon demanded a trial by jury, which was denied. Over the defendant's objection he was tried before the justice, who found him guilty, and was sentenced to pay a fine of $100 and costs, and that he stand committed until such fine and costs be paid. An appeal was taken to the district court, where the defendant

was tried, convicted, and sentenced to pay a fine of $100 and costs.

As this case was tried in the district court on appeal, the proceedings and judgment of that court alone are before us for review. The errors, if any, committed by the justice were waived by the appeal.

The prosecution is brought under sec. 1 of ordinance No. 24 of the village of De Witt, which provides: "That any person who shall within the corporate limits of De Witt, by himself, herself, or themselves, or by his, her, or their agent, servant, clerk, or employe, barter, sell, exchange, give away, or deliver intoxicating, malt, spirituous, vinous, mixed, or fermented liquors, shall for each offense be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, or be imprisoned in the county jail not to exceed thirty days, or both such fine and imprisonment."

The first objection urged by the plaintiff in error is that there is no proof that the ordinance was ever passed. There is attached to the ordinance introduced in evidence a certificate of the village clerk, attested with the seal of the village, showing that it was adopted by a unanimous vote of the board of trustees on April 23, 1888, was signed by its chairman, and that it was published in the De Witt *Times*, a newspaper published in the village, for two consecutive weeks, beginning April 26, 1888. This certificate, under the provisions of sec. 49, chap. 14, Compiled Statutes, was sufficient proof of the passage, approval, and publication of the ordinance.

It is claimed that, as the legislature has by general law made it a criminal offense for any person to sell or give away intoxicating liquors without having obtained a license so to do, and prescribed the penalty therefor, the village board had no authority to pass the ordinance in question.

Section 11 of the liquor law fixes the penalty for selling liquors without a license by a fine not less than one hundred dollars nor more than five hundred dollars, or by imprisonment not to exceed one month in the county jail. Section 12 provides for a preliminary examination where a complaint is made of a violation of section 11. The ordinance having fixed a different punishment from that provided for the violation of the general law on the same subject, the objection is fairly presented, had the board of trustees of the village authority to enact such an ordinance? The legislature, by subdivision IX of section 69, chapter 14, Compiled Statutes, conferred the power upon villages to pass ordinances to prohibit the selling or giving away of intoxicating liquors within the corporate limits, and subdivision XII of the same section authorizes the imposing of fines for the violation of such ordinances "not exceeding one hundred dollars for any one offense, recoverable with costs, and in default of payment to provide for confinement in prison or jail, and at hard labor upon the streets or elsewhere, for the benefit of the city or village." The law makers not only granted the power to village authorities to make the selling of intoxicating liquors a criminal offense, notwithstanding it is also made such by general law, but authorized the imposing of a different punishment from that attached to the statutory offense.

It will be observed that the ordinance under which the defendant was convicted and sentenced provides for its enforcement by the inflicting of a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment not exceeding thirty days, or both fine and imprisonment. The fine provided for by the ordinance is clearly within the power conferred upon the village by statute. But there is no law which empowers a village to enforce its ordinances by both fine and imprisonment, nor by imprisonment alone, except as a means of enforcing the payment of the fine imposed by the court for

a violation of the ordinance. It follows that that part of the ordinance providing for imprisonment is void, as being contrary to the power conferred upon the village authorities by statute.

The point is made that the portion of the ordinance providing for the punishment by imprisonment being bad, invalidates the entire ordinance. It does not necessarily follow that a whole act or law is invalid because some of its provisions are void and cannot be sustained. The rule, as established by the decisions of this and other courts, is that when the valid and invalid portions of a law are dependent upon each other, the whole law is void; but if the valid part is not dependent upon that which is void, and is a complete law in itself, it will be upheld. (*State v. Lancaster Co.*, 6 Neb., 474; *State v. Hardy*, 7 Id., 377; *State v. Lancaster Co.*, 17 Id., 85; *State v. Hurds*, 19 Id., 323; *Muldoon v. Levi*, 25 Id., 457; *Messenger v. State*, Id., 674; *Oatman v. Bond*, 15 Wis., 22; *Campau v. Detroit*, 14 Mich., 276; *Wilcox v. Hemming*, 58 Wis., 144.)

The ordinance in question, tested by the above rule, must be sustained as to all of its provisions, excepting the part providing for punishment by imprisonment. Strike out the invalid part, and a complete law remains, capable of being executed and carried into effect, independent of the void portion. The judgment of the district court is

AFFIRMED.

THE other judges concur.

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NORTON ET AL. V. A. P. PILGER ET AL.

[FILED DECEMBER 22, 1890.]

1. **Chattel Mortgages: RETENTION BY MORTGAGOR: FRAUD PRESUMED.** A chattel mortgage, or bill of sale of personal property, not accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold, mortgaged, or assigned, is presumed to be fraudulent and void as against subsequent purchasers in good faith; and when offered in evidence in an action between the person claiming under it and a subsequent purchaser in good faith, and for value, to be effective, must be accompanied by evidence on the part of the person claiming under such chattel mortgage, or bill of sale, that the same was made in good faith and without intent to defraud creditors or purchasers. A prior recording of the instrument will not supersede the necessity of such proof.

2. ———: **FAILURE TO RECORD.** Under the act of February 19, 1877, sec. 26, ch. 32, Comp. Stats., an unrecorded bill of sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, is void only as against any purchaser or judgment creditor of the vendee or lessee in actual possession, obtained in pursuance of such sale, contract, or lease without notice. As to all other persons or parties, the law remains unaffected by the act, except in so far as it places conditional leases of personal property upon an equal footing with conditional sales.

ERROR to the district court for Madison county. Tried below before CRAWFORD, J.

D. A. Holmes, for plaintiffs in error, cited: *Aultman v. Mallory*, 5 Neb., 180; *Blunk v. Kelley*, 9 Id., 441; *McCormick v. Stevenson*, 13 Id., 72; *Gorham v. Holden*, 9 At. Rep., 894; *Germain v. Wind*, 13 Pac. Rep., 753; *Miles v. Edsall*, 14 Pac. Rep., 701; *McGinnis v. Savage*, 1 S. E. Rep., 746; *Campbell P. P. & M. Co. v. Walker*, 1 So. Rep., 59; *Faeth v. Leary*, 23 Neb., 270; *Loeb v. Milner*, 32 N. W. Rep., 209; *McConnell v. People*, 84 Ill., 585; *Sirrine v. Briggs*, 31 Mich., 444.

H. C. Brome, contra, cited: *Heryford v. Davis* 102 U. S., 235; *Everett v. Buchanan,* 2 Dak., 249; *Cartelyou v. Lansing,* 2 Caines Cases, [N. Y.], 202; *Dykers v. Allen,* 7 Hill [N. Y.], 497; *Wilson v. Little,* 2 N. Y., 443; *Lewis v. Graham,* 4 Abb. Pr. [N. Y.], 106; *Warner v. Martin,* 11 How. [U. S.], 225; *Newbold v. Wright,* 4 Rawle [Pa.], 195; *Buckley v. Packard,* 20 Johns. [N. Y.], 421; *Rodriguez v. Heffernan,* 5 Johns. Ch. [N. Y.], 429.

COBB, CH. J.

The plaintiffs below brought their action in replevin on April 30, 1887, in the district court of Madison county, alleging that they are the owners and entitled to the immediate possession of all the machinery, presses, type, and printing material of the Norfolk Printing Company, not incorporated; that the defendants wrongfully detain the same, and have so detained the said goods and chattels for two days, to the plaintiff's damage $1,200.

The defendants Norton, Sprecher, and Bell answered by a general denial.

There was a trial to a jury, with verdict for the plaintiffs, that the right of possession of the property at the commencement of this action was in the plaintiffs, and assessing their damages for the wrongful detention thereof at one cent.

The defendants' motion for a new trial was overruled, and judgment entered on the verdict, to which the defendants excepted; and in their petition in error to this court assigned:

"I. That the court erred in overruling the objections of defendants to the introduction of testimony offered by plaintiffs.

"II. In instructing the jury to return a verdict for the plaintiffs.

"III. In overruling the motion of defendants to in-

struct the jury to return a verdict at the close of the testimony in chief."

It appears from the record that in April, 1886, one Frank A. Sharpe, of Fremont, Dodge county, was in possession of certain printing presses and printing material, and on April 13 executed to the firm of Marder, Luse & Co., of Chicago, a chattel mortgage on the property to secure an indebtedness of $500 with interest; that in the fall of that year Sharpe removed the mortgaged property to Norfolk, Madison county, and had the chattel mortgage also recorded there. At this time Sharpe and George B. Van Voart, of Norfolk, entered into partnership under the name of the Norfolk Printing Company, contemplating an incorporation of their company, which was not effected; also, at this time, Sharpe went to Chicago and obtained from Marder, Luse & Co. two additional printing presses, a three horse-power engine and boiler, and other material for a more complete printing, binding, and stereotyping establishment, of the value of $3,422.52, which was shipped to the Norfolk Printing Company, at Norfolk, Nebraska, with directions to deliver the consignment to Sharpe. At the time of the delivery to Sharpe he executed to Marder, Luse & Co. the following instrument:

"NORFOLK, NEB., October 2, 1886.

"Mr. Frank A. Sharpe borrowed and received of Marder, Luse & Co., 139 and 141 Monroe Street, Chicago, Ill., the following articles in good order: If the prices set against them are paid as per memorandum below, the property is then to belong to said borrower, otherwise it remains the property of Marder, Luse & Co. Notes and drafts, if given, are not to be considered payments until they are paid.

"In the meantime the borrower is to keep the property in good order, and agrees to pay the price as per memorandum below, keeping the property sufficiently insured for the benefit of the said Marder, Luse & Co., depositing

the policy of insurance with them, and may use the property free from any other charge. Said property is not to be removed from Madison county, Nebraska, without the written consent of Marder, Luse & Co. Should said borrower fail to meet any of the payments at the time specified, or to keep the property satisfactorily insured, or in good order, then Marder, Luse & Co. may take the said articles and dispose of them to the best advantage, rendering to said borrower all surplus, if any, after paying the price agreed upon, and the expense of removal and sale.

"MEMORANDUM OF PAYMENTS TO BE MADE.

Thirty days after date.....	$200 and 8 per cent
Sixty days after date.....	200 and 8 per cent
Four months after date.....	100 and 8 per cent
Five months after date.....	100 and 8 per cent
Six months after date.....	100 and 8 per cent
Seven months after date.....	100 and 8 per cent
Eight months after date.....	100 and 8 per cent
Nine months after date.....	100 and 8 per cent
Ten months after date.....	100 and 8 per cent
Eleven months after date.....	100 and 8 per cent
Twelve months after date.....	100 and 8 per cent
Thirteen months after date.....	100 and 8 per cent
Fourteen months after date.....	100 and 8 per cent
Fifteen months after date.....	100 and 8 per cent
Sixteen months after date.....	100 and 8 per cent
Seventeen months after date.....	100 and 8 per cent
Eighteen months after date.....	100 and 8 per cent
Nineteen months after date.....	100 and 8 per cent
Twenty months after date.....	100 and 8 per cent
Twenty-one months after date.....	100 and 8 per cent
Twenty-two months after date.....	100 and 8 per cent
Twenty-three months after date.....	100 and 8 per cent
Twenty-four months after date.....	100 and 8 per cent
Total.....	$2,525."

Then follows "a memorandum of articles borrowed" and the signature of Frank Sharpe, witnessed by Amos Dresser, the agent of Marder, Luse & Co., and James Hawkins. It

appears from the evidence that promissory notes were given by Sharpe to Marder, Luse & Co. for each of the payments recited in this instrument. It was filed in the county clerk's office of Madison county February 11, 1887.

This property, as well as that brought to Norfolk from Fremont the spring before, was in the possession and use of Sharpe & Van Voart, otherwise known as the Norfolk Printing Company. On December 23, 1886, an instrument had been executed by Sharpe & Van Voart for the printing company, signed by T. H. Egbert and A. P. Pilger, as follows:

"That the Norfolk Printing Company, in consideration of $1,000, paid by A. P. Pilger and P. Schwenk & Co., have sold, and by these presents do sell and convey, to said A. P. Pilger and P. Schwenk & Co. all the right, title, and interest of said printing company in and to all machinery, presses, type, and printing material now in possession of and owned by said printing company, at Norfolk, Nebraska, a partial list of the property conveyed being hereto attached.

"It being understood and agreed by and between the parties that this conveyance is made subject to first lien upon said property of $2,000 in favor of Marder, Luse & Co.

"It being further agreed that if said Norfolk Printing Company shall at any time pay to said A. P. Pilger and P. Schwenk & Co. said sum of $1,000, together with any additional sum or sums that may at the time of such payment be due from said Norfolk Printing Company to said A. P. Pilger and P. Schwenk & Co., then, and in that event said Pilger and Schwenk & Co. agree to sell and convey said property to Norfolk Printing Company.

Witness our hands at Norfolk, Nebraska, December 23, 1886.

NORFOLK PRINTING CO.,
"By FRANK SHARPE.
"GEO. B. VAN VOART.
"T. H. EGBERT.
"A. P. PILGER."

This instrument is duly certified to have been placed on file in the clerk's office of Madison county January 21, 1887.

It appears that Sharpe & Van Voart, otherwise the Norfolk Printing Company, were in possession of the property at the time of the execution of the last instrument, and remained in possession during some part of 1887, but up to what date does not appear. But at some time in that year Sharpe transferred his interest to Van Voart, and shortly afterwards left Norfolk, and at the time of the trial had disappeared. It further appears that about April 28, 1887, after Sharpe had left, Van Voart, being the only representative of the printing company and in possession of the property, delivered it to Marder, Luse & Co., who sold and delivered it to the plaintiffs in error (the defendants below), from whom the goods and chattels were replevied, and delivered a bill of sale to them which was in evidence; that Norton, Sprecher, and Bell, the plaintiffs in error, took possession of the property and were in possession under Marder, Luse & Co. on April 30, 1887, when this action was commenced and the order of replevin executed.

There are several important questions presented and argued by counsel on either side, but it is not deemed strictly necessary to follow them, as it is believed that the first argument presented by the plaintiffs in error is conclusive of other questions in the case.

The instrument introduced by the plaintiffs below on the trial, although designated and indorsed as a bill of sale is, in law, a chattel mortgage executed by the Norfolk Printing Company, but without witnesses, to secure the payment of $1,000 to the defendants in error. It is apparent from its terms that it was not intended there should be an immediate delivery, or any change of possession, of the property from mortgagors to mortgagees. And there is an entire absence of evidence by the plaintiffs in the court below of any delivery of the property by the Norfolk Printing

Company to the plaintiffs, or of any change of possession until taken by Marder, Luse & Co. and turned over to the defendants in the court below; nor is there any evidence, except the instrument itself, of its primal character, that it was made in good faith or for an actual consideration. The case therefore falls within the meaning of sec. 11, chap. 32, of our statutes, cited by counsel for plaintiffs in error, which provides that "every sale, * * * unless accompanied by immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale, that the same was made in good faith and without any intent to defraud such creditors or purchasers."

It is the contention of the defendants in error that the instrument executed by Sharpe on October 2, 1886, and herein set out, is in legal effect a chattel mortgage, and counsel cite very high authority in support of the argument. But I do not agree that the case cited, that of *Heryford v. Davis*, 102 U. S. S. C. R., 235, can be followed under our statutes and decisions. In the case of *Aultman, Miller & Co. v. Mallory*, 5 Neb., 180, it was held that "A sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee until the condition is performed." This opinion was delivered at the July term, 1876. It was there contended, by the defendants in error, that while the selling and delivering of the property in controversy upon the condition that the title does not pass from the vendor until the purchase price was paid, might be good, and the condition sustained as between the original parties, yet, as between creditors of the vendee or innocent purchasers, it was fraudulent, and was contrary to public policy; but as the law of the state then was, al-

though there was nothing on record to show the conditional character of the sale, and it appeared by stipulation that the defendant in error had no actual notice thereof, the court was of a different opinion and expressed it decisively in the decision.

The legislature, then about to convene, passed an act to prevent the fraudulent transfer of personal property, which was approved February 19, 1877, providing in sec. 1: "That no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee, in actual possession, obtained in pursuance of such sale, contract, or lease, without notice, unless the same be in writing, signed by the vendee or lessee, and a copy thereof filed in the office of the clerk of the county within which such vendee or lessee resides; said copy shall have attached thereto an affidavit of such vendor or lessor, or his agent or attorney, which shall set forth the names of the vendor and vendee or lessor and lessee, a description of the property transferred, and the full and true interest of the vendor or lessor therein. All such sales and transfers shall not remain valid against purchasers in good faith, or judgment or attaching creditors, without notice, for a longer period than one year, unless such vendor or lessor shall, within thirty days prior to the expiration of one year from the date of such sale or transfer, file a copy thereof, verified as aforesaid, in the office of said clerk, and the said vendor or lessor may preserve the validity of his said sale or transfer of personal property by an annual refiling, in the manner as aforesaid, of such copy."

It was the evident intention of the legislature to place conditional leases of personal property upon the same footing with those of conditional sales, as held in *Aultman, Miller & Co.'s Case, supra;* but applying the statute to the present case, if the defendants in error were purchasers, or

judgment creditors, of the lessees without notice, then the lease was void as to them. It is not contended that they were judgment creditors; and were they purchasers? They cannot be held to be purchasers because, as we have seen, no possession of the property passed to them, nor was it made to appear, on their part, that the sale to them was in good faith, and without intent to defraud other creditors or purchasers. But if the plaintiffs were purchasers, they certainly were not purchasers without notice, as by reference to the bill of sale, a copy of which is herein set out, it will be seen that the same was taken expressly "subject to the first lien upon said property of $2,000 in favor of Marder, Luse & Co."

There being, then, neither judgment creditor nor purchaser without notice whose rights were to be affected by the failure of Marder, Luse & Co. to file their lease, or a copy thereof, in the office of the county clerk, as provided by law, the only effect which the statute of 1877 had upon their lease was to recognize it, and place it on a footing with conditional sales, as we have shown. And although the trial was in a manner at arms length on either side, it nevertheless appears from the whole proceedings that the firm of Marder, Luse & Co. acted in entire good faith towards other parties; that it furnished an amount of valuable machinery to Sharpe & Van Voart, for the Norfolk Printing Company, allowed them the possession and use of it until Sharpe had abandoned his printing enterprise, had left the town and county, and probably the state. Then Van Voart, who remained the only representative of the printing company, recognizing the property rights of Marder, Luse & Co., delivered the property to them, who sold it again to the plaintiffs in error.

It has been stated that this sale was by the consent of Van Voart, the sole representative of the Norfolk Printing Company at the time. It is probably more exact, in the light of the closing testimony of Sprecher, one of the

plaintiffs in error, to say that the sale was made jointly by the Chicago firm and the Norfolk Printing Company, represented by Van Voart, and while I am of the opinion that the whole evidence, of record, shows good faith on the part of the plaintiffs in error, yet it is noticeable that neither Norton nor Sprecher, who testified for themselves, stated how much they gave for the property. Sprecher does say, in his closing testimony, that they assumed the notes and mortgage of the Norfolk Printing Company, and assumed to pay off the wages of Van Voart's printer, so he could go away.

Amos Dresser, a witness for defendants, testified that at the time of the transfer of the property by Marder, Luse & Co. to defendants there were the amounts of $275 and $28.65 due upon the notes and mortgage given by Sharpe at Fremont. This witness also testified that he was a clerk in the employ of Marder, Luse & Co., and was in charge of the credit business of the firm, and that $200, and no more, had been paid upon the material embraced in the lease.

On the other hand, it is significant that while Dr. Schwenk, one of the plaintiffs below, and defendants in error, was twice examined as a witness on behalf of the plaintiffs, and testified as to various matters, he did not testify, nor was he interrogated by counsel, as to the consideration for the bill of sale or chattel mortgage under which he claimed the goods, nor did he disclose any consideration whatever for the same.

Upon the whole aspect of the trial, I think the court erred in its instruction to the jury to find for the plaintiffs, and therefore there should be a new trial. Judgment is

REVERSED AND REMANDED.

THE other judges concur.

JOHN W. GETCHELL v. THOMAS H. BENTON.

[FILED DECEMBER 22, 1890.]

Internal Improvement: WHAT IS NOT: A BEET SUGAR MANUFACTORY which does not manufacture sugar from beets for toll, although propelled by water power, is not within legislative control by virtue of any law of this state, and is, therefore, *held*, not a work of internal improvement within the meaning of the constitution or statute.

ORIGINAL application for injunction.

B. B. Willey, and *Talbot & Bryan*, for plaintiff, cited, on the point discussed in the opinion, cases there referred to.

William Leese, Attorney General, H. C. Brome, and *N. D. Jackson, contra*, cited on the same point: *U. P. R. Co. v. Colfax County*, 4 Neb., 450; *State v. Adams County*, 15 Id., 568; Angell, Water-Courses, sec. 466; *Olmstead v. Camp*, 33 Conn., 532; Lewis, Eminent Domain, sec. 180; *Head v. Amoskeag Mfg. Co.*, 113 U. S., 9; *Hankins v. Lawrence*, 8 Blackf. [Ind.], 266; *Boston, etc., Corp. v. Newman*, 12 Pick. [Mass] 467.

COBB, CH. J.

This cause was submitted upon an agreed statement of facts, of which the following is the substance:

First—The plaintiff is, and, for more than one year last past, has been a citizen, a resident, freeholder and taxpayer of the city of Neligh, in the county of Antelope.

Second—The city of Neligh at all the dates hereinafter mentioned has been, and now is, a city of the second class, with more than one thousand and less than five thousand inhabitants, duly incorporated, organized, and existing under and by virtue of the laws of this state.

Third—That on the 20th day of May, 1890, said city of Neligh submitted the question of the issuing of the bonds of said city to the amount of fourteen thousand eight hundred dollars to a vote of the legal voters of said city in the manner provided by law.

Fourth—More than two-thirds of the votes cast at said election being in favor of said proposition, said city council did, subsequent to said election, cause said proposition and the vote at said election to be entered upon the records of said city, and a notice of the adoption of said proposition to be published in a newspaper of said city, and thereafter and on the first day of June, 1890, the authorities of said city, in the manner provided by law, issued said bonds.

Fifth—Said bonds have been delivered by the corporate authorities of said city to the defendants, the auditor of public accounts of this state, for the purpose of registration and said defendant will, unless enjoined therefrom by the order of the court, register said bonds.

Sixth—Plaintiff claims:

1. That the purpose for which said bonds were issued, as shown by the proposition and notice of election, is not to aid a work of internal improvement within the meaning of the laws of this state.

2. That the corporate authorities of the city of Neligh have no authority, under the law, to issue bonds in aid of a work of internal improvement to be located outside of the corporate limits of the said city.

Seventh—The above claims of plaintiff, as set out in the sixth paragraph of the stipulation, are denied by defendant, and the questions, thus presented, are the only matters in controversy between the parties, it being agreed that all the requirements of law with respect to the voting of bonds to aid works of internal improvement in the cities of this state have been complied with.

Upon the submission of the case, the respective parties, by their counsel, filed exhaustive briefs on each side, which

were carefully examined and considered, at our consultation, and we were all of the opinion that the bonds could not be sustained.

The authority of statute, relied upon to justify the issuance of the bonds, is found in an act passed by the legislature in 1869, and which now constitutes section 1 of chapter 45 of the current compilation of the statutes. This section provides that "Any county or city of the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county commissioners of such county, or the city council of such city, not exceeding ten per centum of the assessed valuation of all taxable property in said county or city; *Provided*, The county commissioners or city council shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city in the manner provided by chapter 9 of the Revised Statutes of the state of Nebraska, for submitting to the people of a county the question of borrowing money."

Chapter 57 of the Compiled Statutes has also an important bearing upon the question involved. Section 1 of this chapter provides that "If any person desiring to erect a dam across any water-course for the purpose of building a water grist, saw, carding, or fulling mill, or of erecting any machinery to be propelled by water, be the owner of the lands on which he desires to build such mill or erect such machinery on one side of such water-course and not of the lands on the opposite side against or upon which he would abut his dam; or if any person be the owner of the lands on which he desires to erect any such mill, or machinery, on both sides of such water-course; or if any person shall have erected such mill and mill-dam on his own lands, he may file a petition for leave to build or continue such mill-dam, and a writ of *ad quod damnum*, in the district court of the county, where such lands lie,

against the owners or proprietors of the lands above and below such dam, which are, or probably will be, overflowed or injured thereby, or against or upon which he may desire to abut his dam." The succeeding twenty-five sections are devoted to matters of procedure and detail. Section 27 provides that "All mills within this state, now in operation, or which hereafter may be put in operation, for grinding wheat, rye, or corn, or other grain, and which shall grind for toll, shall be deemed public mills." The remaining six sections of the chapter are devoted to prescribing the duties of the miller at such mill, providing for the fixing of the rates of toll and other matters of regulation, but all confined to public mills for grinding grain.

In the case of *Traver v. Merrick County*, 14 Neb., 327, this court, construing the two chapters of the statute, above cited, and in part copied, held that "A water grist mill erected for public use, the rates of toll to be determined by the county commissioners, and being subject to regulation by the legislature, is a work of internal improvement within the meaning of the act of 1869, and bonds voted to aid its construction are valid."

The case of the *State v. Adams County*, 15 Id., 569, was an original application in this court for a *mandamus* to issue to the county commissioners of Adams county to compel them to levy a tax to pay the interest on a certain bond, one of a series of bonds issued by the county commissioners of said county upon an affirmative vote of the electors of Juniata precinct, in said county, for the issuance of $6,000 in bonds to aid in the erection of a steam grist mill. The writ was denied, the court, in the syllabus, holding that "there is no statute in this state authorizing the voting of aid to steam grist mills and bonds voted for that purpose are invalid." The opinion reviewed to some extent the case of *Traver v. Merrick County, supra*, and said: "The decision in that case is based almost entirely upon the

statute authorizing the condemnation of private property for the purpose of erecting dams and overflowing lands in order to obtain power to propel mills." Now, although beet sugar mills are not specifically mentioned in section 1 of chapter 57, the statute referred to in the opinion quoted, yet the machinery for their propulsion by water is as clearly within the language of the section, "any machinery to be propelled by water," as though specially mentioned by name, so that, as the case of *Traver v. Merrick County*, *supra*, rests almost entirely "upon the statute authorizing the condemnation of private property for the purpose of erecting dams," etc., other reasons must be found for excluding beet sugar mills from the benefit of county or municipal aid, for, as we have seen, machinery for their propulsion by water is equally within the language of the act, and, if sugar is as much a necessary of life as flour, which, I think, no one will doubt, it is equally within its spirit. But this reason is found in the provisions of section 27 and the following sections of the same chapter. By these provisions, as we have seen, all mills for the grinding of wheat, rye, corn, or other grain, and which shall grind for toll, shall be deemed public mills. The succeeding sections make it the duty of the owner or occupant of every such public mill to grind the grain brought to such mill in due time and "as the same shall be brought"—in other words to give every mill-boy his turn; to cause a statement of the rates of toll by him charged for grinding and bolting the different species of grain to be posted up in the mill, "and the county commissioners of each county shall establish and regulate the amount of toll allowed to be charged." They also fix the liability of the miller for the safe keeping of all grain, grain bags, and casks brought to the mill, and for taking a greater toll than that fixed by the county commissioners, or as contained in printed or written statements required to be posted up in the mill. And, finally, section 33 prescribes the manner and method by which any such

public mill may be divested of such public character and become a private mill, but with the proviso "that no party shall change his mill to a private mill until fully reimbursing all parties who have assisted in its erection."

None of these provisions apply to a beet sugar mill, nor a beet sugar factory, and it is for the reason that such beet sugar factory, when erected, would not, by virtue of any statute or law of this state, be subject to the regulation of any board, or officer of the state, county, or city, but would be private property, pure and simple, that it is held not to be a work of internal improvement within the meaning of section 1, chapter 45, Compiled Statutes. Counsel for defendant, in the brief, quote a portion of section 1, chapter 57, and from its provisions placing water power for the propulsion of saw, carding, and fulling mills, or "any machinery propelled by water," upon the same footing with grist mills. So far as the right to the writ of *ad quod damnum* is concerned they argue that the act quoted from, *ex vi termini*, subjects all machinery propelled by water to legislative control. The argument is ingenious and it would not be strange if, in this age of enterprise and adventure, it did not find some support in the authorities. But where a theory tends directly to the subversion of private rights, courts will, and should, be slow to follow them.

It will be observed that the mere fact of mills for grinding grain being propelled by water does not make them public mills, or bring them within the operation of any legislative regulation; but in order to make them public mills or bring them within the operation of the legislative regulations, or to authorize the county commissioners to establish and regulate the rates of toll to be charged, such mills must grind for toll. Indeed, were it a question of first instance, and not indirectly affected by former decisions, I would be of the opinion, from a consideration of the lan-

guage of sections 27 and 33 of the chapter above cited, that the grinding for toll, and not their being propelled by water, is the test of such mills being public mills. The language of the statute applies as well to mills run by any other power as those run by water; and the distinction depends solely upon the fact that the section declaring "all mills * * * shall be deemed public mills" occurs in the same chapter with the sections providing for the writ of *ad quod damnum*; and I should add the argument used in the cases of *Traver v. Merrick County* and *State v. Adams County, supra*, based upon the more permanent and continuing character of water over steam power, as well as its acknowledged cheapness.

There is certain language used in the opinion last above cited which may be understood to mean that the provisions of the statute authorizing the use of the power of eminent domain in behalf of the water mills thereby places their regulation under legislative control. The language used was not intended, I am sure, to bear such construction; for, as we have seen, the framers of the statute deemed it necessary to use express language for the purpose of placing certain of the beneficiaries of the power of eminent domain under legislative control, and that with such discrimination as to repel the idea that they were only supplementing that which had already been done indirectly or by implication.

The writer has but little knowledge of beet sugar manufactories, or of their manner of doing business; but he is sure that their operators do not, as a rule, manufacture beets into sugar for toll, and hence that such manufactories would not be under legislative control, and so, under the constitution and statutes of this state, and the previous decisions of this court, are not works of internal improvement.

Having come to the above conclusion upon the second point argued by counsel for plaintiff in the brief, it is not

deemed necessary to discuss the other questions argued. An injunction will be granted as prayed.

INJUNCTION GRANTED.

THE other judges concur.

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NICHOLAS WULLENWABER ET AL., APPELLEES, V. MICHAEL DUNIGAN ET AL., APPELLANTS.

[FILED DECEMBER 22, 1890.]

1. **Railroads**: BOND PROPOSITION. A proposition to issue bonds to a railway company is in the nature of a contract, upon the acceptance of which both parties are bound by the agreement.
2. ———: ———: AGENT: REPRESENTATIONS. Where certain petitioners were induced to sign a petition calling an election in K. township, Seward county, upon the representations of an agent of the railway company that the depot would be located on section 16 of said township, when in fact the depot was afterwards located on section 17, *held*, that the company was bound by the representations of its agents, and that persons who had been deceived thereby and induced to sign the petition might set up such facts to enjoin the issuing of the bonds.
3. ———: ———: ELECTION: PETITIONERS. At least fifty freeholders, resident of the township, etc., must sign a petition to the county commissioners requesting them to call an election in said township for the purpose of voting aid for a railway. Without a petition so signed by the full number required, the commissioners have no jurisdiction.

APPEAL from the district court for Seward county. Heard below before NORVAL, J.

George W. Post, and *D. C. McKillip*, for appellants, cited: Mechem, Agency, secs. 714, 716, 743 and notes, 747 and note, 750; *Montgomery S. R. Co. v. Mathews*, 77 Ala., 357; Hilliard, Inj., 295–6; *Helms v. McFadden*, 18 Wis., 201; 2 Whart., Ev., secs. 797, 932; *Perkins v. Lougee*, 6

Neb., 223; *Ex parte Fisher*, 18 Wend. [N. Y.], 609; *Long v. Woodman*, 58 Me., 49; *Graves v. Hedges*, 58 Pa. St., 540; *Ranney v. People*, 22 N. Y., 417; *Com. v. Mishey Brenneman*, 1 Rawle [Pa.], 311; 1 Woods, R. Law, sec. 33, and p. 81, secs. 112–13–14, 120; *Martin v. Pensacola R. Co.*, 8 Fla., 370; *Carlisle v. Evansville R. Co.*, 13 Ind., 477; *Miss. R. Co. v. Cross*, 20 Ark., 443; *Holbrook v. O'Berne*, 9 N. W. Rep., 291; *B. C. R. & M. R. Co. v. Palmer*, 42 Ia., 228; *First Nat'l Bk. of Cedar Rapids v. Hurford*, 29 Id., 585; 1 Wood, R. R., 110, 111, note 6, 112 to 120; 1 Parsons, Cont., 71; *C. R. & M. R. Co. v. Boone Co.*, 34 Ia., 51; *State v. Lake City*, 25 Minn., 404; *Platteville v. Galena*, 43 Wis., 493; *People v. Klokke*, 92 Ill., 134; *Burns v. Campbell*, 71 Ala., 271; Ewall's Evans, Agency, 64, 70, 71; 4 Coke, Institutes, 317; Story, Agency, secs. 239, 240; *Townsend v. Lamb*, 14 Neb., 324; *Platteville v. R. Co.*, 43 Wis., 493; *E. L. & R. R. Co. v. Garrett*, 52 Tex., 133; *B., & M. L. R. Co. v. Brooks*, 60 Me., 568; 6 Am. & Eng. Ency. L., 738, 895; 1 Washb., Real Prop. [5th Ed.], 57; *Gage v. Scales*, 100 Ills., 218, 221, 895; 6 International Ency., 885; *M. & S. R. Co. v. Matthews*, 24 Am. & Eng. R. Cas., 9; 1 Redfield, Railways [5th Ed.], 172–3; *Franklin Glass Co. v. Alexander*, 9 Am. Dec., 92; *Hanover Junc. R. Co. v. Haldeman*, 82 Pa. St., 36; *Caley v. P. & C. R. Co.*, 80 Id., 363; *Kotsenbader v. Peters*, Id., 438; *Lippincott v. Whitman*, 83 Id., 244; *Brownlee v. R. Co.*, 18 Ind., 68; *Hardy v. Merriweather*, 14 Id., 203; *Anderson v. O. R. Co.*, 14 Id., 169; *Prees v. Davis*, 29 Mo., 184; *Hodges v. Torrey*, 28 Id., 103; Cooley, Torts, 475, 483, 487, 502; 1 Story, Eq., secs. 199, 200, 203, 203*a*, 203*b*; *Wall v. Stubble*, 10 Vesey, Jr. [Eng.], 509; *Dyer v. Hargrave*, Id., 505; *Anderson v. Burnett*, 35 Am. Dec., 426; *Bell v. Henderson*, 6 How. [Miss.], 313; *Juzan v. Toulmin*, 44 Am. Dec. 452; Kerr, Fraud & Mistake, 382, 383; *Custar v. Titusville*, 63 Pa. St., 381; *Vicksburg R. Co. v. McKean*, 12 La. Ann., 638; *Crossman v. Penrose Co.*, 26 Pa. St., 69; *Hughes*

v. Antietam Co., 34 Md., 317; *Kelsey v. N. L. Co.*, 54 Barb. [N. Y.], 111; *Walker v. Mobile R. Co.*, 34 Miss., 245; *Anderson v. R. Co.*, 14 Ind., 169; *Johnson v. Crawfordsville*, 11 Ind., 280; *Mabey v. Adams*, 3 Bosw. [N. Y.], 346; *Upton v. Tribilcock*, 1 Otto [U. S.], 45; *Goodrich v. Reynolds*, 31 Ill., 490; *Saffold v. Barnes*, 39 Miss., 399; *Uppfalt v. Nelson*, 18 Neb., 533; *Gammage v. Alexander*, 41 Tex., 418; *Teal v. Terrell*, 48 Id., 491; Whart., Ev., sec. 1174; *Williams v. Lowe*, 4 Neb., 393; *Pratt v. Philbrook*, 41 Me., 132; *Tuck v. Downing*, 76 Ill., 71; *Whiting v. Hill*, 23 Mich., 399; *Bowman v. Carithers*, 40 Ind., 90; *Stitt v. Little*, 63 N. Y., 427; *Phipps v. Buckman*, 30 Pa. St., 401; 1 Greenleaf, Ev., 113, 114; *Chapman v. R. Co.*, 55 N. Y., 584; *Gilman v. R. Co.*, 13 Allen [Mass.], 441; *Livingston v. R. Co.*, 35 Ia., 556; *Verry v. R. Co.*, 47 Id., 549; *Martin v. Farnsworth*, 49 N. Y., 558; *Trudo v. Anderson*, 10 Mich., 357; *Rice v. Club of G. R.*, 52 Id., 87.

Norval Bros. & Lowley, for appellees, cited: *State v. Babcock*, 21 Neb., 187; *Williams v. Holmes*, 2 Wis., 9; *Damp v. Dane*, 29 Id., 427; *Canfield v. Smith*, 34 Id., 381; *Eldred v. Leahy*, 31 Id., 546; *Galbraith v. Plasters*, 101 Ill., 444; *Gage v. Busse*, 94 Id., 590; *Sinnett v. Moles*, 38 Ia., 25; *Curry v. Board*, 15 N. W. Rep., 602; *Henderson v. R. Co.*, 67 Am. Dec., 675; *Crump v. Mining Co.*, 56 Id., 116; *Wickham v. Grant*, 28 Kan., 517; *Melendy v. Keen* 89 Ill., 395; *Sanford v. Handy*, 23 Wend. [N. Y.], 260; *Burhop v. Milwaukee*, 18 Wis., 453; *McClellan v. Scott*, 24 Id., 81; *Davis v. Dumont*, 37 Ia., 47; *Vreeland v. Stove Co.*, 29 N. J. [Eq.], 188; *People v. Supervisors*, 67 Ill., 57; *People v. Ry. Co.*, 63 Id., 374; *People, ex rel., v. Jackson Co.*, 92 Id., 441; *Platteville v. R. Co.*, 43 Wis., 493.

MAXWELL J.

This is an action to enjoin the issuing of certain bonds of K. township, in the county of Seward, and to have said

bonds canceled and delivered up and declared null and void. The pleadings, which are very lengthy, need not be set out in this opinion.

On the trial of the cause the court made findings and rendered judgment as follows:

"Now on this 29th day of December, 1888, this cause, heretofore tried on a former day of the present term of court and taken under advisement, came on for decision and judgment; and the court, being now fully advised in the premises does find the issues joined in favor of the plaintiffs, and that the injunction heretofore allowed and granted and issued herein ought to be made perpetual, and that the bonds now under custody of the court, in the hands and keeping of S. C. Langworthy, ought to be canceled and held for naught, and that the said colorable and the apparent record of the proceedings of the board of supervisors of Seward county, recorded in Commissioners' Record No. 4, pages 94 to 98 inclusive, and on pages 127 to 131, so far as the same relates to the calling of an election and the voting of bonds in said K. township, is incorrect, unauthorized, and ought to be canceled, set aside, and held for naught. It is therefore by the court considered, ordered, and adjudged that the said bonds and the proposition for their issue and the election held and proceedings had and done in pursuance thereto in reference to the issue of said bonds of K. township, in Seward county, Nebraska, were unauthorized by law and void, and that the same and all proceedings of the said board of supervisors in reference thereto be held for naught; that the said defendants, their successors in office or assigns, are perpetually enjoined and restrained from delivering or authorizing the delivery in any capacity whatever of the said bonds or any of them to the said defendant railroad company, and from negotiating or transferring them or any of them at any time; and the said defendant railroad company, its officers, assigns, agents and successors, are each of them restrained from receiving,

claiming, assigning, or negotiating said bonds or any of them, and from in any way holding the same to be valid; that the said board of supervisors and county clerk and their successors in office are severally enjoined and restrained from signing, authenticating, or in any way validating said election, canvass on the question submitted at said special election, or the record of said proposition submitted, or the record of the board of supervisors thereon, and from in any way giving color of validity of said proceedings or any of them, and from recognizing in any way the same to be valid."

To authorize a precinct, township, or village to issue bonds the statute requires: "A petition signed by not less than fifty free-holders of the precinct, township, or village to be presented to the county commissioners, or board authorized by law to attend to the business of the county within which such precinct, township, or village is situated. Said petition shall set forth the nature of the work contemplated, the amount of the bonds sought to be voted, the rate of interest, which shall in no event exceed eight per cent per annum, and the date when the principal and interest shall become due, and the said petitioners shall give bond, to be approved by the county commissioners, for the payment of the expenses of the election, in the event that the proposition shall fail to receive a two-thirds majority of the votes cast at the election."

It appears from the record that fifty persons did sign the petition, and that thereupon the election was duly called and held, and the bonds declared carried. This election appears to have been held before the depot in the township of K., Seward county, was located. There is a large amount of testimony in the record tending to show that a considerable number of the signers of the petition were induced to sign the same by representations of the agents of the railroad company that a freight and passenger depot on

the line of said railroad would be located upon section 16 of said township.

The depot finally was located on section 17 of said township. A proposition to issue bonds to aid in the construction of a railway is in the nature of a contract, which, when accepted, is binding upon the respective parties. Hence, if the electors, through false or fraudulent representations, have been induced to vote bonds to aid in the construction of such railway, a court of equity in a proper case will grant relief. (*Curry v. Board of Supervisors*, 15, N. W. Rep., 602; *Sinnett v. Moles*, 38 Ia., 25; *Henderson v. San Antonio, etc., R. Co.*, 67 Am. Dec., 675; *Crump v. U. S. Mining Co.*, 56 Id., 116; *Wickham v. Grant*, 28 Kan., 517.)

Where parties have been induced by false representations to sign a petition calling an election to vote aid to a railway, they may set up such false representations as grounds for enjoining the issuing of the bonds. (*Sinnett v. Moles et al.*, 38 Ia., 25; *Curry v. Board of Supervisors, etc.*, 15 N. W. Rep. 602; *Wickham v. Grant*, 28 Kan., 517; *Melendy et al., v. Keen*, 89 Ill., 395; *Sandford v. Handy*, 23 Wend., 260; *Burhop v. City of Milwaukee et al.*, 18 Wis., 431; *McClellan v. Scott et al.*, 24 Wis., 81; *Davis & Co. v. Dumont*, 37 Ia., 47; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Equity, 188.)

If, therefore, the plaintiffs were induced to sign the petition by false representations, they have a right to set up such representations to prevent the issuing of the bonds. It is claimed, however, that the persons who procured the signatures to the petition were not the agents of the railway company, and therefore such company cannot be affected by their statements. This question was before the supreme court of New York, in *Sandford v. Handy*, 23 Wend., 265, and the opinion delivered by Chief Justice Nelson, who says: "The distinction between a *general* and *special* agent has often been the subject of discussion in ad-

judged cases, and by elementary writers, but it is not particularly important here, as this is conceded to be a case of *special agency*. Our inquiry is more especially directed to ascertain the extent of the principal's responsibility in cases of this character; or rather, confining it more particularly to the point before us, to what extent and to what circumstances will the principal be held responsible for the representations and declarations of the agent.

"Mr. Justice Story, in his recent valuabl ecommentaries on the subject, p. 126, lays down the general rule, and which is as applicable to special as to general agents, that, 'where the acts of the agent will bind the principal, then his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the *res gestæ*.' He further observes that 'for most practical purposes, a party dealing with an agent, who is acting within the scope of his authority and employment, is to be considered as dealing with the principal himself. If it is the case of a contract, it is the contract of the principal. If the agent, at the time of the contract, makes any representation, declaration, or admission touching the subject-matter of the contract, it is the representation, declaration, or admission of the principal.' These principles are fully borne out by the several authorities referred to—are founded in good sense and with a just conception of the commercial and other business transactions of life from which they have been derived." This, we think, is a correct statement of the law.

If a person employed by a railway company in a special matter, as to procure signatures to a petition for the calling of an election to vote bonds in aid of such railway, the company will be bound by the representations of such agent made in any matter pertaining to his duties; in other words, a principal, by availing himself of the acts of an agent, must adopt the same *in toto* and cannot adopt that which is beneficial and reject that which is detrimental.

This rule was recently applied by this court in *Donisthorpe v. F., E. & M. V. Ry. Co., ante,* p. 142, and the company held responsible for the representations of the agent.

In the case at bar it is clearly shown that a number of the petitioners were induced to sign the petition by representations made on behalf of the railway company, that the depot would be located on section 16. There is no pretense that the depot has been located on that section. The appellant contends that it was located on section 17, and therefore is more advantageous to some of the plaintiffs than if located on section 16. It is sufficient to say that the original proposition under which a number of the plaintiffs were induced to sign the petition was that the depot would be located on section 16. If the company may remove it to section 17 it may remove it to the extreme limits of the township.

We cannot make a new contract for the parties. The plaintiffs are entitled to a performance of the condition under which they are induced to sign the petition for the election to vote the aid. And as it is apparent that the company has not performed its part of the agreement, hence it is not entitled to the bonds. It is contended on behalf of the plaintiff in error that fraud cannot be predicated on a promise not performed. *Perkins v. Lougee,* 6 Neb., 220, is cited to sustain that position. That action was brought for the purchase money of the sale of a lot which the defendant had personally examined before purchasing, and he alleged as a defense that the plaintiff, to induce him to purchase the same, had falsely represented to him that he was about to erect a large brick hotel on a lot near that sold to the defendant. It was held that such promise was not actionable, and as the party had personally viewed the lot before purchasing that he must pay for the same. In the case at bar, however, the inducement or consideration for signing the petition calling the election was the location of the depot on section 16. The case therefore differs from that of *Perkins v. Lougee.*

Some objection is made to a number of the signers of the petition on the ground that they are not freeholders. It is unnecessary to examine this question. It is sufficient to say that it is indispensable that a petition requesting the calling of an election must be signed by at least fifty freeholders, and without such petition such commissioners have no jurisdiction. The judgment of the district court is right and is

AFFIRMED.

COBB, CH. J. concurs.

NORVAL, J., having tried the case in the court below, took no part in the decision.

DIXON COUNTY v. W. E. GANTT.

[FILED DECEMBER 22, 1890.]

Laches: JUDGMENT BY DEFAULT AFFIRMED. A firm of attorneys rendered service for Dixon county and filed a claim for the same before the board of county commissioners, which claim was rejected. The case was then appealed to the district court, the transcript being filed in March, 1886, and a petition filed in April following. The county filed no answer, nor other pleading in the case, and in April, 1887, judgment was entered against the county, and afterwards a motion made by the county to set the default aside was overruled. *Held*, That as error must appear to authorize the reversal of the judgment of the district court, and as the county had been guilty of gross negligence in not pleading, and it did not appear that it had any valid defense to the action, the judgment would be affirmed.

ERROR to the district court for Dixon county. Tried below before POWERS, J.

A. E. Barnes, County Attorney, for plaintiff in error.

Davis, Gantt & Keatley, contra.

MAXWELL, J.

This is an action founded on an oral contract between the plaintiff in error and the firm of Gantt & Norris, wherein said plaintiff in error employed said firm of Gantt & Norris to bring suit on the official bond of R. H. Knapp, a defaulting county treasurer of Dixon county, Nebraska. In consideration of said contract said firm of Gantt & Norris commenced suit on said bond. After said case had been commenced, the same was compromised between the county and said R. H. Knapp, and his bondsmen and the county took certain lands of said R. H. Knapp, and his bondsmen paid the sum of $2,000, and said cause on said bond was dismissed, when W. E. Gantt, the defendant in error, presented a claim in his own right to the board of county commissioners of the plaintiff in error, which claim was rejected by said board, when the defendant in error appealed the case to the district court of Dixon county, where the defendant in error filed a petition, set up the facts that the plaintiff, in error was indebted to said defendant in error on a contract made with the county of Dixon by Gantt & Norris; that this cause was continued from time to time, when on the 21st day of April, 1887, said defendant in error took judgment by default against the plaintiff in error for the sum of $590.50, in the absence of the attorney for plaintiff in error; that plaintiff in error at once moved to set aside the judgment, and supported said motion by several affidavits; that the hearing of said motion to set aside and vacate said judgment was continued from time to time, and on the 17th day of October, 1888, the same was overruled by the court, whereupon said cause is brought to this court by petition in error.

The transcript shows that it was filed in the district court of Dixon county in March, 1886, and the petition was filed in the following April. One year thereafter

judgment was taken against the county by default, and no reason is given to explain the delay. It does not appear now that the county has any defense to the action.

Whatever the facts may be, it seems to be admitted that the defendant in error and his partner rendered valuable services for the plaintiff in error. If it was not liable for such services, or the amount claimed is too large, an answer to that effect should have been pleaded. This is a reviewing court, and to authorize the reversal of the judgment it must appear that the court below erred. This is not apparent in this case. The judgment of the district court is

AFFIRMED.

THE other judges concur.

GEORGE W. SHRECK ET AL. V. LYDIA SPAIN.

[FILED DECEMBER 22, 1890.]

Chattel Mortgages: DESCRIPTION: NOTICE: PRIORITY. In an action by a senior mortgagee against a junior mortgagee for the conversion of two mares which it is alleged were described in the senior mortgage as one dark brown mare, age five years, weight about 1,200 pounds, of the value of $175, and one dark brown mare, right hind foot white, age five years, weight about 1,200 pounds, of the value of $175, and in the junior mortgage as one dark brown mare five years old called "Dolly," and one light brown mare four years old called "Pet," *held*, that the testimony showed that the mares were properly described in the senior mortgage and that such mortgage was duly filed for record; it was notice therefore to the junior mortgagee, of the existence of the lien of the senior mortgagee, and that the senior mortgagee had the superior right.

ERROR to the district court for York county. Tried below before NORVAL, J.

France & Harlan, for plaintiffs in error, cited, contending that the description was insufficient: *Rowley v. Bartholemew*, 37 Ia., 374; *Smith v. McLean*, 24 Id., 322; *Adams v. Com. Nat'l Bk.*, 53 Id., 491; *Montgomery v. Wright*, 8 Mich., 147; *Ivins v. Hines*, 45 Id., 73; *Savings Bank v. Sargent*, 20 Kan., 576; Jones, Chattel Mtges., sec. 63; *Rhutasel v. Stephens*, 27 N. W. Rep., 786; *Ormsby v. Nolan*, 28 Id., 569; *Hayes v. Wilcox*, 61 Ia., 732, cases cited.

Sedgwick & Power, in reply to the contention, cited: *Peters v. Parsons*, 18 Neb., 193; *Price v. McComas*, 21 Id., 197; Jones, Chattel Mtges. secs. 54, 61, 65; *Pettis v. Kellogg*, 7 Cush. [Mass.], 456; *King v. Aultman & Co.*, 24 Kan., 246; *Eddy v. Caldwell*, 7 Minn., 225.

MAXWELL, J.

This action was brought in the district court of York county by the defendant in error against the plaintiff in error to recover the value of a span of mares, and on the trial the jury found in favor of the defendant in error and assessed the amount of her recovery at the sum of $310, and a motion for a new trial having been overruled judgment was entered on the verdict. The testimony tends to show that on the 9th day of May, 1887, one John Price executed a chattel mortgage to one John Milton Oliver on the following described property: "One dark brown mare named 'Browny,' age five years, weight about 1,200 pounds, sound, and worth $175; one dark brown mare (right hind foot white), named 'Flora,' age five years, weight about 1,200 pounds, sound, and worth $175; also one white mare named 'Maggie,' age seven years, weight about 1,050 pounds, sound, and worth $125; one black horse named 'Bill,' age eight years, weight about 1,150 pounds, sound, and worth $125; one red cow, four years

old, with spotted heifer calf at side; one white cow, three years old, with spotted steer calf at side."

This mortgage was duly filed for record on May 9 of that year. On the 3d day of June, 1887, John Price executed a chattel mortgage to the Utica bank of Seward county for a large amount of personal property, which included the following: "One team of mares; one light brown mare four years old, called 'Pet,' one dark brown mare, six years old, called 'Dolly,' steers and heifers on section 27, town 11, range 1 west; all of said property owned by me; mares on section 8, town 11, range 1 west, in Waco precinct, and York county, Neb., and free from incumbrance."

The mares were taken by the bank under the second mortgage and converted to its own use. The contest is thus between two mortgagees, and the question presented is, first, whether the description of the mares in the first mortgage was sufficient to identify them so that the filing of the mortgage would be constructive notice to subsequent mortgagees or purchasers in good faith; and, second, whether the mares described in the second mortgage, viz., one dark brown mare, five years old, called "Dolly," and one light brown mare, four years old, called "Pet," are the same animals which Price had previously mortgaged to Oliver. On both of these points there seems to be no doubt, and we fail to perceive any ground upon which the plaintiff in error would be entitled to recover.

A large number of errors are assigned in the record which it is unnecessary to review at length. There is no error in the record and the judgment is

AFFIRMED.

COBB, CH. J., concurs.

NORVAL, J., having tried the case in the court below, did not sit.

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When made by the agent of a railroad company, as to the intended location of a depot, in order to procure signers to a petition for a bond election, may be set up by such signers as grounds for enjoining the issue of the bonds. *Wullenwaber v. Dunigan* 877

Family. See HEAD OF FAMILY.

Fees.

1. When received by county clerk as notary public or as abstracter, must be reported to county board, though only those in excess of the lawful salary need be paid into the treasury. *State v. Kelly*.....576–9
2. Either county or county board is a proper party to institute proceedings to compel fees to be reported. *Id*..... 579

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1. General duties of railroads as to fencing at crossings discussed. *O. & R. V. R Co. v. Severin*..... 318
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1. Overruling motion to discharge attachment is not. *Root v. Bank*..... 774
2. Ruling on motion to quash service by publication, without a judgment of record, is not. *Brown v. Rice*..... 236

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1. Must conform to pleadings. *Dorsey v. McGee*..... 667
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2. Special findings must be requested before error can be predicated upon refusal to submit. *Davis v. Giddings*..... 215

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By railways; damages. *O. & N. P. R. Co. v. Janecek*..... 278

Fixtures.

1. Tenant cannot re-enter to remove, after surrendering possession to landlord, nor can former's creditors do so. *Friedlander v. Ryder*..... 787
2. Only those whose removal will not injure the freehold may be taken. *Id*.....788–90

Foreclosure. See MECHANICS' LIENS, 4. TAX LIENS, 2.

Of mortgage on buildings. *Edling v. Bradford*.....603–4

Forfeiture. See CHATTEL MORTGAGES, 6. CONTRACTS, 4, 5.

Fraud. See FALSE REPRESENTATIONS.

Fraudulent Conveyances. See CHATTEL MORTGAGES, 3. HUSBAND AND WIFE, 2–6. INSOLVENCY. PREFERENCE OF CREDITORS.

1. Chattel mortgage or bill of sale, not followed by actual

and continued change of possession, void under sec. 11, ch. 32, Comp. Stats., and prior recording will not supersede necessity of proving good faith. *Norton v. Pilger*..... 860

2. Sole effect of sec. 26, ch. 32, upon unrecorded conditional lease of personalty, where lessee is neither judgment creditor nor purchaser without notice, is to place it on an equal footing with conditional sale. *Id.*.....867–8

3. Blanket mortgages on entire real and personal property, to one creditor, to the exclusion of others, and disproportionate to former's claim, are void. *Brown v. Work*.....803–4

4. Preference, less than thirty days before an assignment, of a creditor who has ground for knowing of his debtor's insolvency, is void. *Banks v. Barb Wire Co.*.....131–4

5. A trust, resulting from the purchase of city lots, the deed to which is made to another, for the purpose of defrauding creditors, cannot be enforced by the *cestui que trust* by action, but the legal title which he afterwards acquires, is free from claims of heirs of the trustee. *Detwiler v. Detwiler* 338

Freight. See CARRIERS.

Garnishment.

1. Status and liability of garnishee discussed. *Russell v. Lau*, 814

2. First mortgagee of a stock of goods, having satisfied his claim by sale, and having in his hands a surplus, garnished by other creditors; action by second mortgagee against first to recover surplus; improvident payment thereof by first mortgagee to attorney of other creditors; *held*, that former was liable to second mortgagee for such surplus. *Id.*..... 805

3. In proceedings against a bank, whose president and cashier are absent, service on the book-keeper is sufficient. *First Natl. Bank v. Turner*.....84–5

4. A garnishee, duly served, who delivers property then in his possession to defendant, is not thereby released from liability to plaintiff. *Id.*..... 85

Guaranty. See PRINCIPAL AND AGENT, 2.

Head of Family.

Divorced husband is, where, as the testimony tends to show, he has furnished support for the children, since their custody was awarded to the wife. *Roberts v. Moudy*..... 685

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Homestead.

Value exceeding $2,000; decree applying surplus to payment

of liens existing before commencement of action, *held*, to be sustained by weight of testimony. *Tingley v. Gregory* 196–7

Horses. See WARRANTY, 1–4.

Husband and Wife. See MECHANICS' LIENS, 1.

1. Replevin by wife, of property owned by her but incumbered by her husband. *Ashby v. Greenslate*..... 253
2. Burden is upon wife to establish by preponderance of evidence *bona fides* of a transfer to her by an indebted husband, when such transfer is contested by the creditors. *Stevens v. Carson*..... 550
3. The fact that the wife had possession of the property when attached, and claimed ownership, is not *prima facie* evidence thereof. *Id*..... 551
4. Conveyance from husband to wife to secure a pre-existing *bona fide* debt owing to her, not fraudulent as to other creditors if taken in good faith. *Ward v. Parlin*..... 384
5. Failure of wife to record her conveyances, does not estop her from claiming under them, if creditors are not misled thereby. *Id.*
6. Creditor's bill to subject real estate conveyed by husband to wife; property shown to have been paid for out of wife's separate estate; but title taken in name of husband under parol agreement to convey; failure to show that creditor relied upon ownership of husband; judgment for wife sustained. *Goldsmith v. Fuller*..... 569

Impeachment.

Alleged previous contradictory statement of a party's own witness cannot be proved without first calling his attention to the time, place, and circumstances. *Farmers Loan & Trust Co. v. Montgomery*..... 34

Incumbrances.

1. Covenants against, cover those unknown to purchaser, as well as those known. *Burr v. Lamaster*..... 698
2. Agreement by owner of vacant lot which supports half the wall of a building on an adjoining lot, obligating himself and his grantees to pay part costs of wall in order to use it, constitutes an incumbrance. *Id*.....693–8

Indictment.

1. Omitting "A" and indorsing simply the words "True bill" not fatal. *Martin v. State*..... 509
2. May join several distinct misdemeanors. *Id.*

Infancy.

1. Custody of child of divorced parents awarded to mother. *Giles v. Giles* 624
2. Father has no absolute vested right in such custody. *Id.* 627–8
3. Child's best interests the paramount consideration in awarding custody. *Id.* 624, 628

Information.

When charging unlawful sale of liquors, should state names of vendees or the fact that they are unknown. *Martin v. State* 421

Injunction. See BONDS, 4.

Application for by owner of abutting property, to prevent the sale of vacated streets by a city, denied. *Lindsay v. Omaha* 512

Insolvency.

Transfer of stock of goods by an indebted firm to parties who had been severally liable for the debts, but who then assumed them jointly and absolutely, is a sale, and not an assignment. *Kaufman v. Coburn* 672, 682

Instructions.

1. Are sufficient if as a whole, they state the law correctly. *Martin v. State* 511
2. Must be based upon and applicable to the testimony. *Farmers Loan and Trust Co. v. Montgomery* 41–2
   Walker v. Haggerty 126
   Davis v. Giddings 214
   Natl. Lumber Co. v. Wymore 360
   Kinney v. Tekamah 608
3. And to the pleadings. *Dorsey v. McGee* 658
4. Objections to, must be assigned in motion for new trial in order to be considered in supreme court. *Walker v. Haggerty* 125
5. Mere repetition in, of the same legal principle, not reversible error where it is not intended to, and does not mislead the jury. *Seebrock v. Fedawa* 438–9
6. Error to refuse, when legally correct, warranted by the testimony, and not already covered. *First Natl. Bank v. Carson* 104
7. Errors in, not excepted to before verdict, waived. *Watson v. Roode* 273
8. In action for breach of warranty discussed. *Id.* 273–6
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9. In action on a promissory note, set out and discussed. *First Natl. Bank v. Carson*.....107–12

10. In action to recover for farm machinery, approved. *Champion Machine Co. v. Gorder*..... 89

11. In action for injury to freight while in hands of common carrier, discussed. *U. P. R. Co. v. Marston*.....248–52

12. In action to recover for boarding horses, discussed. *Houck v. Gue*.....116–17

Insurance. See CARRIERS, 3.

1. Objections to proof of loss must be specific, as proof may be waived. *Hartford Fire Ins. Co. v. Meyer*..... 135

2. Clause in policy forbidding additional insurance, even by agreement with the local agent, except upon the express written consent of the company, upheld. *German Ins. Co. v. Heiduk*.....296–7

3. Where a policy provides that in case of additional insurance the holder shall recover no more on the one policy than its amount bears to the whole insurance, and other insurance has been taken, and there is evidence that the entire loss is less than the whole insurance, it is error to instruct jury that measure of damages is market value of goods destroyed. *Id*..... 301

Interest. See NATIONAL BANKS.

Unsettled accounts do not draw, until six months after date of last item. *Weston v. Brown*..... 613

Internal Improvements.

Beet sugar factories are not, within the meaning of constitution or statute, so as to justify the issuance of municipal bonds therefor. *Getchell v. Benton*..... 870

Interpretation. See CONSTRUCTION.

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Judgment. See FINAL ORDER. NAMES, 2. PLEADING, 15.

1. Must conform to pleadings. *Dorsey v. McGee*..... 667

2. *Held*, Not subject to collateral attack. *Deseret Natl. Bank v. Nuckolls*..... 754

3. Money voluntarily paid in satisfaction of, cannot be recovered back while judgment remains in force. *Id.*

Judicial Sales.

1. Notice of, not vitiated by omitting the words "for the

heirs," following the word "administrator." *McCarn v. Cooley*..... 557

2. Nor by containing the phrase "bidder for costs" where the latter word palpably should be "cash," and would mislead no one. *Id.*.....557–8

3. It is proper, though not essential, that the notices publish the terms as cash. *Id.*..... 558

Jurisdiction. See BONDS, 5. DECEDENTS' ESTATES, 1. VENUE.

Jury. See FINDINGS. TRIAL.

Justice of the Peace. See APPEAL, 6.

Laches. See COUNTIES. DEFAULT.

Neglect of county judge to prepare and file in district court, for appellant, a transcript, within the statutory time, as he had promised to do, is neglect of appellant and will forfeit the right of appeal. *Oppenheimer v. McClay*.....655–7

Landlord and Tenant. See COUNTER-CLAIM, 1, 2.

1. In order to avail himself of an option in a lease to terminate it for default of rent, landlord must give notice to tenant of such intention. *Cannon v. Wilbur*..... 781

2. Measure of damages for wrongful eviction by landlord, is rental value of property for unexpired term, less amount reserved by lease. *Id.*..... 782

3. Where lease does not provide that tenant may remove fixtures and improvements, he cannot re-enter for that purpose after surrendering possession to landlord, nor can tenant's creditors do so. *Friedlander v. Ryder*..... 787

4. Without a stipulation to the contrary, only those improvements whose removal will not injure the premises may be taken. *Id.*.....788–90

5. Actual possession by tenant is notice to purchaser of former's rights. *Id.*..... 788

Leases.

1. Must be construed according to intent of parties. *Cannon v. Wilbur*..... 781

2. *Held*, To require notice from landlord to tenant of former's intention to declare a forfeiture. *Id.*

3. Measure of damages for wrongful eviction is rental value of property for unexpired term, less amount reserved by lease. *Cannon v. Wilbur*..... 782

4. Where there is no provision that lessee may remove fixtures and improvements, he cannot re-enter for that pur-

pose after surrendering possession to lessor, nor can his creditors do so. *Friedlander v. Ryder*..... 787

5. Without a stipulation to the contrary, lessee can take away only those improvements whose removal will not materially injure the premises. *Id*.....788–90

6. Purchaser of property in possession of lessee, chargeable with notice of latter's rights. *Id*..... 788

7. Agreement by lessee to farm land for one-half the crop; eleven acres of corn in lessee's share substituted for like acreage of oats; sale by lessee of his share, the lessor consenting and waiving rights as to the eleven acres, *held*, that he had no claim as to the latter, on the purchaser.

Liens. See HOMESTEAD. STATUTES, 2.

Mechanic's lien *held* to be paramount to lien, for purchase money, of vendor of land on which building was erected. *Bohn Mfg. Co. v. Kountze*.....725–7
Millsap v. Ball..... 732

Limitation of Actions.

1. An action to recover for damages for the opening of a street fifteen years before, is barred. *Alexander v. Plattsmouth*... 120

2. Statute begins to run upon the original allowance in county court of a claim afterwards appealed to the district court and thence certified back to county court. *Horst v. McCormick Co*..... 562

3. Statute begins to run against an action to correct a deed upon discovery (or facts leading thereto) of the mistake, where correction involves no change of possession or disturbance of investments by defendant. *Ainsfield v. More*.....405–6

4. Action under sec. 136, ch. 16, Comp. Stats., against stockholders of a corporation, for failing to publish corporate indebtedness, is *quasi*-penal only, and not barred in one year, the limitation being the same as in other contracts. *Coy v. Jones*..... 799

5. The statute, though confined in terms, applies to all claims that may be made the ground of action at law, in whatever form they may be presented. *State v. School Dist*..... 520

6. A proceeding by *mandamus* is barred at the end of four years. *Id.*

Liquors.

1. Information charging unlawful sale of, should state names of purchasers or the fact that they are unknown. *Martin v. State*..... 421

2. Sale on Sunday by agent, or one authorized by principal to sell at his place of business, renders latter liable, though he is absent. *Martin v. State*.....511–12

3. Village trustees are authorized to prohibit, by ordinance, sale of, within corporate limits, with the penalty of a fine not exceeding $100, and imprisonment in default thereof. *Bailey v. State* 857–8

Malicious Prosecution.

1. Probable cause defined. *C., B. & Q. R. Co. v. Kriski*..... 235

2. Evidence found to show probable cause. *Held*, That verdict for plaintiff should be set aside. *Id.*

Mandamus.

1. Right of action by, barred at the end of four years. *State v. School Dist*..... 528

2. *Semble*, Is now only an ordinary action at law in cases where it is the appropriate remedy. *Id*..... 527

3. May be granted by district judge at chambers anywhere within his district; need not be sitting in respondent's county. *Linch v. Eckles*.....747–8

4. Issuance of writ *held* to have been justified by the pleadings, though the evidence was not sufficient. *Id*..... 752

Manufactory. See INTERNAL IMPROVEMENTS.

Marriage.

A condition in a will which discourages or interferes with marriage is void, and a devise which, but for such condition, would vest, is not thereby prevented from doing so. *Hawke v. Euyart* 149

Master and Servant.

Employer who negligently provides his workmen with unsafe appliances is liable for injuries received by them therefrom. *U. P. R. Co. v. Broderick*..... 739

Maxims.

Falsus in uno, falsus in omnibus, held, applicable to certain testimony under discussion. *Walker v. Haggerty*..... 126

Measure of Damages. See DAMAGES, 6–9.

Mechanics' Liens.

1. A building erected by a husband on his wife's land, with her consent, is subject to, the husband's agency being presumed. *Bradford v. Petersen* 98

2. Evidence found not to show the furnishing of material, or the filing of an account within the sixty days; *held*, that plaintiffs were not entitled to a lien. *McPhee v. Kay* 62

3. In case under discussion, *held*, to have priority over lien for purchase money of vendor of land on which building was erected. *Bohn Mfg. Co. v. Kountze*.....725–7
Millsap v. Ball..... 732

4. Suit to foreclose cannot be maintained until after expiration of the sixty days. *Millsap v. Ball*..... 733

5. If building is not completed according to contract, owner may set off damages therefor, and lien attaches only for amount due after deducting the same. *Id*..... 734

Merger.

While all the prior agreements of parties relative to a transaction are merged in a deed, yet representations upon which the deed was given may be shown. *Donisthorpe v. R. Co*..... 146

Mistake.

1. Deed wrongly including certain land, reformed. *Hilton v. Crooker*..... 716

2. The statute of limitations begins to run against an action to correct a deed upon the discovery of the mistake, or of facts leading to such discovery, where correction involves no change of possession or disturbance of investments by defendant. *Ainsfield v. More*.....405–6

Moderator. See SCHOOLS, 2, 3.

Mortgages. See CHATTEL MORTGAGES. FRAUDULENT CONVEYANCES, 3.

Municipal Bonds. See BONDS, 2–5.

Municipal Corporations. See CITIES. VILLAGES.

1. Where land is taken by, for opening a street, owner is entitled to value thereof without deduction for special benefit. *Omaha v. Howell Lumber Co*.....635–7
Same v. Cochran..... 638

2. Have power to vacate streets, and title to latter does not revert to abutting owner, but vests in municipal corporation. *Lindsay v. Omaha*.....517–20

3. Injunction to prevent sale of vacated streets, denied; remedy in damages deemed sufficient. *Id.*

4. Are liable for injuries received by a party in passing along the continuation of a sidewalk to a deep creek, and falling down the bank; though such continuation of the sidewalk is constructed by private individuals. *Kinney v. Tekamah*.....607–8

5. Liable for injuries received by one who, in driving after

dark along a way used by the public for years, though not laid out, falls into an excavation made in grading streets no lights or barriers being there. *Omaha v. Randolph*...703–4

6. School districts are *quasi* rather than real municipal corporations, but by statute may sue and be sued. *Frans v. Young* 363

Names. See INFORMATION.

1. At common law a declaration describing a party by his initials is bad on special demurrer; though it should appear that the initials are not his Christian name. *Oakley v. Pegler* 632
2. Where a party signs checks, etc., by his initials, they will be treated as his business name, and a judgment recovered against him thereunder is not subject to collateral attack. *Id.*.....628, 632

National Banks.

1. Are not liable to the penalty for usury, when the same has not been knowingly charged. *Hall v. Bank*..... 102
2. Nor where usurious interest has been charged but not collected. *Id*..... 103
3. Partial payments on a usurious note will be applied on the principal. *Id*..... 102

Negligence.

1. In care of cattle. *Calland v. Nichols*..... 532
2. Verdict of jury that common carrier of live stock was not guilty of, sustained. *Black v. R. Co*..... 197
3. Of municipal corporations in permitting existence of unsafe streets and sidewalks. *Kinney v. Tekamah*.....607–8
Omaha v. Randolph..... 703–4
4. Of employer in providing improper and unsafe appliances for his workmen. *U. P. R. Co. v. Broderick*..... 739

Negotiable Instruments. See BONA FIDE PURCHASER. CHATTEL MORTGAGES, 6. EVIDENCE, 20. NAMES, 2. ONUS PROBANDI, 4. USURY.

1. Abandonment of a partnership, the formation of which was the consideration for a note, is a sufficient defense to an action thereon. *Norman v. Waite*.....317–18
2. An indorsee who sues on a note, to which the payee sets up a good defense, alleging notice to plaintiff, must prove that he not only bought, but paid for, the note. *Id*.....314–15
3. Erasure by payee of word "maturity," indicating when interest should commence on note given by a firm; erasure assented to by a partner; *held*, that firm was bound,

especially as there was evidence that the notes were to draw interest from date. *Mace v. Heath*..... 623

New Trial. See ERROR PROCEEDINGS, 2. INSTRUCTIONS, 4.

1. Should be granted where verdict is clearly against the instructions. *C., B. & Q. R. Co. v. Kriski*..... 235
2. Mere forgetfulness of or overlooking of material testimony by counsel, not ground for. *Crowell v. Harvey* 573–4
3. Motion for, indivisible, and when made by several parties must be allowed or overruled as to all. *Dorsey v. McGee*... 670
4. Admission of irrelevant testimony on a jury trial, to the prejudice of the adverse party, is good ground for. *First Natl. Bank v. Carson*..... 104

Notary Public.

Fees received as by county clerk must be reported to county board. *State v. Kelly*.....576–7

Notice. See CHATTEL MORTGAGES, 4. JUDICIAL SALES. REAL ESTATE, 1.

1. Required of, intention to forfeit lease. *Cannon v. Wilbur*... 781
2. Possession by lessee is, to purchaser, of former's rights. *Friedlander v. Ryder*..... 788

Oaths. See SCHOOLS, 2.

Occupation Tax.

1. Not an income tax, but a license fee for privilege of doing business. *Magneau v. Fremont*..... 854
2. Does not violate constitutional requirement of uniformity, because each occupation is not classified and amount to be paid by those pursuing it graduated according to business done. *Id.*

Offer. See CONTRACT, 4.

Officers. See COUNCILMEN. COUNTY ATTORNEY. COUNTY CLERK. SCHOOLS, 2, 3.

Acts of *de facto* officers valid so far as interests of third parties are involved. *Magneau v. Fremont* 847

Onus Probandi.

1. Upon owner to prove negligence of agister, where latter informs owner of cattle which have died. *Calland v. Nichols*, 536
2. Upon party alleging undue influence in execution of will. *Seebrock v. Fedawa*..... 442
3. Upon proponent, both in county and district court, to prove testamentary capacity. *Id* 431–2
4. Upon plaintiff, in an action on a promissory note, where the answer is a general denial, to show that defendant ex-

ecuted the note, and does not shift to defendant after note is introduced in evidence. *First Natl. Bank v. Carson*..... 112

5. Upon wife to establish by a preponderance of evidence *bona fides* of a transfer to her by an indebted husband when such transfer is contested by the creditors. *Stevens v. Carson* ... 550

6. She is not relieved from such burden by having possession of the property under claim of ownership, when the same is attached. *Id*..... 551

Opening and Closing.

1. Proponent of will entitled to. *Seebrock v. Fedawa*..... 436

2. Plaintiff entitled to, whenever he is required to introduce *any* evidence in support of his case. *Mizer v. Bristol*..... 138

Option. See CONTRACT, 4.

Order. See FINAL ORDER.

Ordinances.

1. In cities of second class over 5,000 may be passed by vote of one-half the council with concurrence of the mayor. *Magneau v. Fremont*.....848-50

2. When imposing a fixed sum on each of several occupations, do not violate the constitutional requirements of uniformity in taxation. *Id*..... 854

3. Clause in, providing penalty of imprisonment for violation void; but other provisions thereof are not invalidated. *Id. Bailey v. State*..... 859

4. Passage of, proved by certificate of village clerk, attested by his official seal. *Bailey v. State*..... 857

Parties.

1. Either the county or county board is a proper party plaintiff in a proceeding to compel the county clerk to account for fees received by him and which it is his duty to report. *State v. Kelly*..... 579

2. Owner of equity of redemption a necessary party to foreclosure of tax lien. *Alexander v. Thacker*..... 617

3. Action should not be dismissed on sustaining demurrer for non-joinder of parties defendant, without giving plaintiff an opportunity to bring in absent parties. *Id.*

Partnership. See NEGOTIABLE INSTRUMENTS.

1. Testimony found to show that incoming partner assumed liabilities of retiring one. *Richards v. Hone*..... 262

2. Firm bound by representations and warranties of a member, and the warranty of one partner may be proven under

an allegation that it was made by the firm. *Eldridge v. Hargreaves* 638–9

Party Walls.

An agreement by the owner of a vacant lot, which supports half the wall of a structure on an adjoining lot, obligating himself and his grantees to pay part of the costs of the wall in order to use it, constitutes an incumbrance. *Burr v. Lamaster* 693–8

Penalty. See ACTIONS.

Personal Contract. See CONTRACTS, 6.

Personal Injuries.

1. From unsafe highways; municipal corporations held liable for. *Kinney v. Tekamah* 607–8
   Omaha v. Randolph 703–4
2. When received by workmen from unsafe appliances negligently furnished by employer, latter is liable. *U. P. R. Co. v. Broderick* 739

Petition. See PLEADING.

Pleading. See AMENDMENT. APPEAL, 2. COUNTER-CLAIM. INFORMATION.

1. Liberal construction of. *German Ins. Co. v. Heiduk* 300
   Pefley v. Johnson 529
2. While it is not good practice to make a mere exhibit a part of a petition, yet if facts in the former, together with those set forth in the petition, state a cause of action, a demurrer should be overruled. *Pefley v. Johnson* 529
3. Material allegations well pleaded and not denied taken as true. *Linch v. Eckles* 741, 752–3
4. Facts pleaded as matters of information and belief, and not positively, may be objected to only by motion; not by demurrer or effort to exclude testimony. *Myers v. Bealer*, 283
5. One good count in a petition will not sustain a verdict rendered upon a count that fails to state a cause of action. *Greenwood v. Cobbey* 581
6. A general demurrer to a petition containing more than one count must be overruled if any count is sufficient. *Alexander v. Thacker* 618
7. Where there is a misjoinder of causes plaintiff should be required either to elect upon which he will proceed, or file a separate petition and docket an action for each cause. *Id.*
8. An allegation in one count may be referred to in any subsequent pleading or count of the same pleading, and, by

proper reference, be made a part thereof. *Eldridge v. Hargreaves* 641-2

9. Under an allegation that a certain warranty was made by a firm, competent to prove that it was made by a member thereof. *Id* 645

10. Sufficient in such case to establish any one of the material representations averred. *Id* 639

11. Answer in action for breach of warranty, *held*, sufficient to constitute a counter-claim. *Id* 641-2

12. Testamentary capacity need not be specifically pleaded; mere allegation that instrument is the will of the testator, sufficient. *Seebrock v. Fedawa* 436

13. Contestant of election must designate in his petition parties alleged not to be legal voters. *Todd v. Cass County* ... 841-2

14. Action for breach of warranty in sale of abstract books, etc.; motion to make petition definite and certain by pointing out alleged errors in the books, *held*, properly overruled. *Crowell v. Harvey* 572-3

15. Facts constituting an alleged defense to a judgment, in an action to enjoin the same, must be pleaded so that it may appear that a retrial would probably result differently. *Hartford Fire Ins. Co. v. Meyer* 135, 136-7

16. *Semble*, That if an answer sets up inconsistent defenses, and plaintiff goes to trial thereon, either in district or supreme court, without objection, he cannot insist that defenses be rejected because of inconsistency. *Deseret Natl. Bank v. Nuckolls* 765-6

17. Matter pleaded as a counter-claim, *held*, properly stricken from answer. *Brugman v. Burr* 417

18. Objection to counter-claim as a defense may be taken at any stage of proceedings in review. *Id* 420

Practice. See AMENDMENT. DISMISSAL. EVIDENCE. PLEADING. SUPREME COURT. TRIAL.

1. Court may take case from jury where there is no evidence presenting questions of fact. *Hall v. Bank* 103

2. Plaintiff is entitled to open and close whenever he is required to introduce any evidence in support of his case. *Mizer v. Bristol* 138
Seebrock v. Fedawa 436

Preference of Creditors.

1. Blanket mortgages on entire real and personal property, to one creditor excluding others, and disproportionate to former's claim are fraudulent. *Brown v. Work* 803-4

2. Of creditor who has reasonable ground to know of his debtor's insolvency, void, if made less than thirty days before assignment. *Banks v. Barb Wire Co*.....131–4

3. A husband may prefer a *bona fide* pre-existing debt owing to his wife, though she knew he was being pressed by his creditors. *Ward v. Parlin* 384

Presumption. See BALLOTS. CHATTEL MORTGAGES, 3. ONUS PROBANDI.

Principal and Agent. See MECHANICS' LIENS, 1.

1. Apparent authority defined. *Oberne v. Burke* 592

2. Authority to agent to buy, ship, and advance cash for certain commodities does not authorize him to guarantee, in the name of the principal, the obligation of a third party for the purchase of cattle. *Id*.....587–92

3. Clause in insurance policy limiting powers of local agent, upheld. *German Ins. Co. v. Heiduk*.....296–7

4. Principal cannot ratify part of agent's acts and reject the balance. *Walker v. Haggerty*.....125–6

5. Railway company bound by false representations of its agent as to the intended location of a depot. *Wullenwaber v. Dunigan* 877

6. Representations by such agent as to intended use of land purchased for right of way, may be proven to show purchase of deed given therefor. *Donisthorpe v. R. Co*.....146

7. Sale of liquors on Sunday by agent, or one authorized by principal to sell at his place of business, renders latter liable, though he is absent. *Martin v. State*.....511–12

Principal and Surety.

Action against sureties on contractor's bond; defense, changes in plans and specifications; sureties, *held*, not to be released by change of frontage of building, nor by premature payment of contractor, the latter defense not being pleaded in the answer; testimony as to what original specifications were, conflicting, and verdict against sureties sustained. *Dorsey v. McGee* 662–4, 667

Probable Cause.

C., B. & Q. R. Co. v. Kriski..... 235

Probate. See WILLS.

Quorum.

Of council of cities of second class over 5,000; what constitutes. *Magneau v. Fremont*.....848–50

Railroads. See BONDS, 3–5. DAMAGES, 2, 8, 9. CARRIERS. RIGHT OF WAY.

1. General duties as to fencing at crossings discussed. *O. & R. V. R. Co. v. Severin* 318
2. Are not required to construct cattle-guards at private or farm crossings. *Id.* 334–5
3. Are not required to fence that portion of their depot grounds outside city limits, the remainder being within, upon which abuts a platted addition; the grounds being constantly used and necessary for railroad business. *C., B. & Q. R. Co. v. Hogan* 667
4. Special damages caused by, to abutting property, and not sustained by the public generally, may be recovered for. *O. & N. P. R. Co. v. Janecek* 278
5. Injuries resulting from smoke, soot, and cinders from passing engines are proper elements of damage. *Id.* ...278–80

Real Estate. See CONVEYANCES. INCUMBRANCES.

1. Deposit of building material on a lot, *held*, not to establish a contract for sale of the lot between its owner and owner of material, nor to constitute possession amounting to part performance, so as to take the contract out of the statute of frauds, nor to constitute notice to a subsequent purchaser. *Hunt v. Lipp* 486–8
2. Offer to sell, conditioned, among other things, on payment of a note within six months; *held*, that this was a condition precedent; that it had not been waived; that the offer, unless continued, must be accepted within six months; and that upon failure to do so the party to whom it had been made was not entitled to specific performance. *Schields v. Horbach* 540–4

Recording. See CHATTEL MORTGAGES, 4.

1. Sole effect of sec. 26, ch. 32, Comp. Stats., upon unrecorded, conditional leases of personalty, where lessees are neither judgment creditors nor purchasers without notice, is to place them on an equal footing with conditional sales. *Norton v. Pilger* 867–8
2. Prior recording will not supersede necessity of proof of good faith, required by sec. 11, ch. 26, where sale is unaccompanied by delivery. *Id.* 860
3. Failure by a wife to record conveyances from her husband does not estop her from claiming under them, if creditors are not prejudiced. *Ward v. Parlin* 384

Records.

Of a judicial proceeding, admissible against any one not a stranger thereto. *Dorsey v. McGee* 670

Redemption.

Of mortgaged property sold before the debt became due. *Edling v. Bradford*.....603-4

Referee.

Should sign and settle bill of exceptions in case tried before him; not duty of district judge to do so. *State v. Gaslin*.....653-4

Reformation. See DEEDS. MISTAKE.

Remittitur.

Made a condition of affirmance. *Fitzgerald v. Richardson*... 373

Removal of Causes.

From state to federal court, cannot be effected on ground of local prejudice, unless amount in controversy exceeds $2,000. *Bierbower v. Miller*..... 161

Replevin.

By wife, of personalty owned by her but incumbered by her husband. *Ashby v. Greenslate*..... 253

Res Adjudicata.

Subject-matter of suit for specific performance, *held*, not to be, on account of former action of ejectment. *Uppfalt v. Woermann*.....194-5

Rescission.

1. May be effected by either party to a contract without the consent of the other. *Hale v. Hess*.....55-6
2. Measure of damages for such rescission, *held*, to be the profits to be realized under the contract. *Id*..... 61

Resulting Trusts. See TRUSTS, 4, 5.

Review. See APPEAL. ERROR PROCEEDINGS. SUPREME COURT.

1. Questions not raised below, not considered in supreme court. *South Omaha Natl. Bank v. Chase*.....455-6
2. A judgment against which the sole error assigned is that it is contrary to the weight of evidence, will be affirmed where testimony is conflicting. *Curry v. Metcalfe*..... 256
3. Finding of jury, as to damages, not reviewed where a view by it of the subject of the litigation introduced a new element into the evidence which could not be presented by bill of exceptions. *U. P. R. Co. v. Marston*..... 253
4. Where bill of exceptions was not signed by judge until long after statutory time, alleged errors at trial will not be reviewed; only sufficiency of evidence considered. *Seward v. Klenck*..... 776

5. Errors not assigned in petition in error will not be considered in supreme court. *Stevens v. Carson* 552

6. Alleged errors, matters of exception, and affidavits used below must be preserved by bill of exceptions. *McCarn v. Cooley*..... 556

7. A stipulation stating that a transcript may be accepted as a bill of exceptions will not be accepted by the supreme court. *Id.*

Right of Way.

1. Where land is deeded to a railway company for, upon the representations of its agent that main line only should be built thereon, and side tracks are laid, the purpose for which the deed was executed may be shown. *Donisthorpe v. R. Co*..... 146

2. Special damages due to the construction of side tracks, and in excess of those arising from the operation of the main line, may be recovered for. *Id*..... 147

Sale. See CONDITIONAL SALE. WARRANTY.

Schools.

1. School districts may sue and be sued, but are *quasi*, rather than real municipal corporations. *Frans v. Young*..... 363

2. The district moderator is not required to take an oath of office. *Id.*

3. Nor does his failure to file a written acceptance of office forfeit title thereto, if he perform its duties. *Id*..... 364

4. Land conveyed by legislative act, in trust to a city, "for the purpose of a high school, college, or other institution of learning" only, cannot be used for a mere primary school. *Whitlock v. Omaha School Dist*..... 822

5. Words "high school" as used in the act, mean a school where higher branches of common school education are taught. *Id.*

6. Substitution by later act, of board of education for board of regents for such high school, does not change character of trust; merely body which administers it. *Id.*

Service. See APPEARANCE. GARNISHMENT, 3.

Set-Off.

1. Special benefits to residue cannot be set off in an action for damages for land taken in opening a street. *Omaha v. Howell Lumber Co*..... 633
Omaha v. Cochran..... 637

2. Damages for failure to complete a building according to

contract may be set off in action to foreclose mechanic's lien, and latter attaches only for amount due after deducting such damages. *Millsap v. Ball*..... 734

Sheriff's Sale. See JUDICIAL SALES.

Sidewalks.

If owned by private individuals, being a continuation of those owned by the city, latter is liable for unsafe condition. *Kinney v. Tekamah*.....607–8

Special Benefits. See STREETS, 2.

Special Findings.

Must be requested before error can be predicated upon refusal to submit. *Davis v. Giddings*..... 215

Specific Performance.

1. Party not entitled to, who failed to accept an offer within the required time, and was not bound by its terms. *Schields v. Horbach*..... 544
2. Cause of action for, need not be pleaded as counter-claim to ejectment; suit may be brought thereon separately, plaintiff being liable for costs. *Uppfalt v. Woermann* ...194–5

Statute of Frauds. See FRAUDULENT CONVEYANCES.

1. Verbal contract to buy and divide between the parties baled hay worth more than $50 is within the statute and void. *Mace v. Heath*..... 621, 623
2. Deposit of building material on a lot, *held*, not to constitute possession amounting to part performance of a verbal contract for sale of the lot, so as to take the contract out of the statute of frauds. *Hunt v. Lipp*.....487–8

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See Table, *ante*, p. xliii–xlv.

1. Purpose of sec. 11, art. 3, of Const., relative to subjects and titles of acts, discussed. *K. C. & O. R. Co. v. Frey*...791–2
2. Ch. 60, Laws 1881, p. 267, providing for liens of laborers and material-men, not in conflict with such constitutional provision. *Id.*
3. Subdiv. 8, sec. 52, art. 2, ch. 14, Comp. Stats., authorizing cities to levy and collect occupation taxes, not repugnant to secs. 1 and 6, art. 9, Const. *Magneau v. Fremont*.....851–4

Stipulations.

1. When verbal and made out of court are unenforceable. *Hale v. Hess*..... 47
2. Cannot be accepted by supreme court in lieu of bills of exceptions. *McCarn v. Cooley*..... 556

Stockholders. See LIMITATION OF ACTIONS.

Streets. See LIMITATION OF ACTIONS, 1.

1. City held liable for unsafe condition of. *Omaha v. Randolph* 703–4
2. Where land is taken for, by municipal corporation, owner is entitled to value thereof without deduction for special benefits. *Omaha v. Howell Lumber Co*.....635–7
   Omaha v. Cochran 638
3. City has power to vacate. *Lindsay v. Omaha* 517–20
4. Title to, when vacated, is in municipal corporation; not in owner of abutting property. *Id*..... 517
5. Such owner is entitled to damages for injuries not suffered by the community at large; but such remedy is presumed to be adequate, and in the case under discussion, application for an injunction as to the sale of vacated ground denied. *Id.*

Sunday.

Sale of liquors on, by agent; principal held liable though absent. *Martin v. State* 511–12

Supreme Court. See APPEAL. ERROR. PROCEEDINGS. REVIEW.

Death of plaintiff after submission of cause in; certain rights of defendant left undetermined; cause remanded to district court for final settlement. *Thompson v. Thompson* 492

Sureties. See INSOLVENCY. PRINCIPAL AND SURETY.

Tax Liens.

1. Absolute title free from, acquired by adverse possession for ten years. *Alexander v. Wilcox*..... 795
2. Owner of equity of redemption a necessary party to foreclosure proceedings. *Alexander v. Thacker*..... 617
3. Where lots are held under, damages cannot be recovered for lessening plaintiff's security, by opening a street through the lots, if the value of the parts not taken exceeds the amount of the tax lien. *Alexander v. Plattsmouth*.....119–20

Taxes. See OCCUPATION TAX.

Tax Titles.

Tax deed issued more than five years after time to redeem, invalid and creates no lien. *Alexander v. Wilcox*.....793, 797

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1. Where plaintiff is required to introduce any evidence in support of his case, he is entitled to open and close. *Mizer v. Bristol*..... 138
2. Proponent of will entitled to open and close. *Seebrock v. Fedawa*..... 436
3. Statutory order of introducing evidence may be varied. *Gandy v. Early*..... 186
4. Where plaintiff is allowed to offer proof on rebuttal, defendant may introduce evidence in reply. *Id.*
5. Permitting amendments and reopening of case for further testimony, *held*, not reversible error. *F., E. & M. V. R. Co. v. Crum*..... 78
6. Language of a judge, not becoming but evidently without effect on the jury, not reversible error. *Black v. R. Co*... 208
7. Where there is no evidence presenting questions of fact the court may take the case from the jury. *Hall v. Bank*, 103
8. Error for court to direct verdict where testimony is conflicting upon a material fact. *Houck v. Gue*..... 116
9. On a jury trial, either side has the absolute right of argument where a material fact is in dispute. *Id*..... 117

Trusts. See CHATTEL MORTGAGES, 5.

1. Land conveyed to a city, in trust, by legislative act, "for the purpose of a high school, college, or other institution of learning," cannot be used for a mere primary school. *Whitlock v. Omaha School Dist*..... 822
2. The words "high school," as used in the act, mean a school where the higher branches of a common school education are taught. *Id.*
3. Substitution by later act of board of education for board of regents of such high school, does not change the character of the trust; merely the body which administers it. *Id.*
4. A trust results in favor of a party who purchases lots with his own means, but directs the deed to be made to his mother. *Detwiler v. Detwiler*..... 338
5. But if the transaction is so directed in order to defraud creditors, the *cestui que trust* cannot enforce such trust, but the legal title which he afterwards acquires is free from claims of other heirs of his mother. *Id.*

Usury. See NATIONAL BANKS.

Partial payments on a note drawing more than legal interest will be applied on the principal. *Hall v. Bank*..... 102

Variance.

Held, Not to exist in an action as brought in justice's court, and afterwards tried in district court. *Rickards v. Hene*... 262

Vendor and Vendee. See NOTICE, 2.

Lien, for purchase money, of vendor of land on which building is erected, *held*, to be inferior to lien of laborer, mechanic, or material-man. *Bohn Mfg. Co. v. Kountze*..... 725–7

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Venue.

Peremptory writ of *mandamus* may be issued at chambers by district judge to another county than one where he is sitting. *Linch v. Eckles*.....747–8

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Villages. See ORDINANCES, 3, 4.

Trustees may, by ordinance, prohibit sale of liquors within corporate limits, and impose, as a penalty, a fine of not more than $100, with imprisonment in default thereof. *Bailey v. State*.....857–8

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Voluntary Payment.

Satisfaction of the judgment of a court of competent jurisdiction is, and money so paid cannot be recovered back while the judgment remains in force. *Deseret Natl. Bank v. Nuckolls*.....754, 768–71

Waiver. See CONTRACTS, 5. LEASES, 7.

1. Proof of loss required in an insurance policy may be waived. *Hartford Fire Ins. Co. v. Meyer*..... 135
2. Appeal is, of errors by magistrate in trial for violating village ordinances. *Bailey v. State*..... 857
3. Consent by appellee to trial is, of error in raising new issues on appeal from county to district court. *First Natl. Bank v. Carson*..... 107

Warranty. See PLEADING, 9–11, 14.

1. Not presumed to be parol, where, in an action on, peti-

tion is silent as to the form; if written, it is admissible under such pleading. *Watson v. Roode*..... 268

2. Purchaser must have relied upon, in order to maintain an action for breach. *Id*..... 276

3. Vendor is liable for patent defects if he so stipulate. *Id*... 271

4. Where a written warranty states that a horse is registered in the Stud Book of England, vendor cannot introduce testimony that he informed purchaser, prior to the sale, that the horse was not so registered. *Id*.....271–3

5. In action for breach of, alleged to have been made by a firm, competent to prove that one member of the firm made the warranty. *Eldridge v. Hargreaves*..... 645

6. Sufficient in such case to establish any one of the material representations averred. *Id*..... 639

7. Testimony to establish an offer to compromise claim for breach of warranty, inadmissible. *Id*..... 647

8. In action for breach of, not competent to prove representations as to the same kind of goods by one person to another, neither of them being parties to the action. *Id*..... 648

9. Instructions in action for breach of, examined and approved. *Id*.....648–51

10. In sale of abstract books. *Crowell v. Harvey*..... 570

Wills.

1. Are not admissible in evidence before death of testators, to show title in devisees. *Thompson v. Thompson*..... 492

2. Undue influence defined and discussed. *Seebrock v. Fedawa*.....437–9

3. Burden is upon party alleging undue influence to establish it. *Id*..... 442

4. Burden is upon proponent, both in county and district court, to prove testamentary capacity. *Id*.....431–2

5. Testamentary capacity need not be specifically pleaded. *Id*..... 436

6. Proponent is entitled to open and close argument to jury. *Id.*

7. Liberal provision by testator for some of his children to the exclusion of others, not to be regarded as an indication that will is result of undue influence. *Id*..... 440

8. Failure to revoke, where testator lingers several months after execution of will, an indication of its validity. *Id*... 443

9. A codicil confirming a will wholly or in part, amounts to a republication of the will and brings it down to the date of the codicil. *Hawke v. Euyart*.....158–60

10. A devise to a son conditioned on his abandoning certain bad habits is valid. *Id* 150

11. But a further condition in a will that the devise should not vest until devisee should abandon a woman, to whom he was already married, is void, and, without observing it, devisee is entitled to his share. *Id*..... 160

Witnesses.

1. Should not be allowed to refresh memory by memoranda unless made at or near the time the transactions occurred. *Weston v. Brown* 612

2. Party bound by answer of his own witness and cannot call another to contradict it. *Farmers Loan & Trust Co. v. Montgomery*..... 39

3. In order to impeach, by proving alleged contradictory statement, attention must be called to latter, its time, place, and circumstances. *Id* 34

4. Falsity of any material part of a witness's testimony, warrants jury in disregarding the whole unless corroborated. *Walker v. Haggerty*.....126–7
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Words and Phrases. See JUDICIAL SALES.

1. "Apparent authority" of agent defined. *Oberne v. Burke*, 592

2. "Causeway or other adequate means of crossing" as used in sec. 106, ch. 16, Comp. Stats., construed. *O. & E. V. R. Co. v. Severin* 322–3

3. "District" as used in sec. 1, art. 14, Comp. Stats., means a judicial, not a school district. *Frans v. Young* 363

4. "High school," as used in act donating Capitol Square to city of Omaha, means a school where higher branches of common school education are taught. *Whitlock v. Omaha School Dist* 822

5. "Probable cause" defined. *C. B. & Q. R. Co. v. Kriski*..... 235

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7. Words "True bill," omitting "A," indorsed on an indictment, sufficient. *Martin v. State* 509

8. The words "ordinary" and "reasonable," as used to define the degree of care required of a common carrier of live stock, when overtaken by the "Act of God," are used interchangeably, and either word expresses the degree sufficiently. *Black v. R. Co*..... 206

Writs. See VENUE.

Written Instrument. See CONSTRUCTION.

1. *Held*, Not to convey title to land described therein. *Norman v. Waite*.....302, 313–14
2. Existence of, as evidence of a contract, does not forbid proof of a distinct oral agreement as a condition to the written. *Id*..... 316