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NELS ANDERSON V. PIERCE COUNTY.

FILED MAY 2, 1894. No. 5548.

Rewards: COUNTIES. Section 296 of the Criminal Code, authorizing counties to offer rewards for the detection or apprehension of persons charged with a felony, does not authorize the payment of such reward until conviction. This condition applies as well to an offer made simply for the apprehension of a person as to one made for detection and apprehension.

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

Barnes & Tyler, for plaintiff in error.

Douglas Cones, contra.

IRVINE, C.

The plaintiff in error filed his claim with the commissioners of Pierce county for a reward offered by the county for the apprehension of an escaped prisoner. The claim was rejected and he appealed to the district court, where a demurrer to his petition was sustained and judgment entered for the county, which judgment the plaintiff in error seeks to reverse. The petition alleges the offer to have been made as follows: "It appearing that one Ed Staggs, while under arrest charged with the crime of murder, has escaped from the custody of the sheriff of Pierce county, whereupon it is ordered that a reward of $200 be, and the same is hereby, offered for the apprehension of the said Ed Staggs, and his return to the custody of the sheriff of the said county, as provided by section 296, chapter 27, Criminal Code of Compiled Statutes." The petition does not allege that Staggs was convicted. The want of that averment is the reason urged in support of the demurrer.

Section 296 of the Criminal Code is as follows: "The county commissioners of the several counties in this state are hereby authorized, when they deem the same expedient, to offer such rewards as in their judgment the nature of the case may require, for the detection or apprehension of any person charged with or convicted of a felony, and pay the same on the conviction of such person, together with all necessary expenses not otherwise provided for by law, incurred in making such detection or apprehension, out of the county treasury." The plaintiff in error contends that the clause providing that the reward should be paid on conviction applies only to cases where the detection of a person is a part of the requirement of the offer; that is to say, that where a crime is committed and the perpetrator is unknown, a person to claim the reward must furnish the information necessary to fix the crime upon the person apprehended, and that a conviction is therefore necessary to the performance of the contract; but that where there has already been a conviction had, or where a person has been under arrest charged with a crime and an escape has been effected, simply apprehending the fugitive completes the performance and entitles the captor to the reward. The plaintiff further contends that the offer was general in its terms, and that, irrespective of the statute, it was binding upon the county and entitled him to recover without conviction of the person apprehended. This court has never before been called upon to construe the statute referred to. We are not cited to any decisions of other states having similar statutes, nor have we been able to find any in point. As to the second argument advanced, it is sufficient to say that whether or not authority to offer rewards would be implied in the absence of an express statute, the offer in this case contained an express reference to section 296 of the Criminal Code, and the offer was clearly made in pursuance of that section. If there be any authority independent of that statute, still this reference to the statute

incorporated it into the offer so that in any event the statute must be treated as a part of the contract.

Authority to offer such rewards is not usually implied, and the courts have been inclined to a strict construction of such powers. Thus, an act of congress gave to the city of Washington the power to "sue and be sued, implead and be impleaded, grant, receive, and do all the other acts as natural persons, and to purchase and hold real estate." Another act gave to it "full power and authority to make all necessary laws for the protection of public and private property, the preservation of order and the safety of persons, * * * and for the punishment of all persons violating the same." The legislative authorities of the city authorized a reward of $20,000 for the arrest and conviction of persons concerned in the assassination of President Lincoln; but the court held that this act was not within the scope of the authority conferred upon the city by act of congress. (*Baker v. City of Washington*, 7 D. C., 134.) So, too, where, as in the case of the individual, the authority to contract is clear, the contract itself has been subjected to a strict construction. Thus, in *Jones v. Phœnix Bank*, 8 N. Y., 228, where a reward was offered for the apprehension of a person to whom forged checks had been paid and the recovery of the money or a proportional amount for any part thereof, it was held that both the apprehension of the person named and the recovery of some of the money were essential to sustain a claim for any part of the reward. And in *Cornelson v. Sun Mutual Ins. Co.*, 7 La. Ann., 345, a reward was offered for the conviction of any person who may have been concerned in setting fire to any building. It was held that this offer applied only to persons who had at that time committed the offense and not to those who might thereafter commit it, and also that where a person apprehended was convicted only of having prepared combustible matters and placed them under a building with intent to set fire to it and not of setting fire to the building, the reward was not earned.

Unless a very liberal construction should be given to the statute under consideration, it would seem quite clear that the reward becomes due in no case except upon conviction. The plaintiff argues that unless his construction be given the statute, that part of it applying to persons already convicted would be nugatory. This is not true. Where a person already convicted escapes, the condition of conviction already exists and upon apprehension that condition is complied with; but in the case of a fugitive before trial, the reward may be earned in a certain sense upon apprehension, but by the terms of the statute it is not payable until conviction or unless a conviction be had. The distinction in reason suggested by the plaintiff is obvious, and had the legislature intended to create it, it certainly would have been expressed. We think that in no case arising under this statute is a reward payable except upon conviction of the captive, and therefore the demurrer was properly sustained.

JUDGMENT AFFIRMED.

ROSE KIRKWOOD V. FIRST NATIONAL BANK OF HASTINGS.

FILED MAY 2, 1894. No. 5231.

1. **Actions:** LEGAL AND EQUITABLE JURISDICTION. Where an action is begun in the district court by a petition seeking legal relief, there being an answer praying for equitable relief, and a trial by jury being waived, an objection to a judgment granting equitable relief upon the ground that the action was at law is not well founded. The district courts are courts of general legal and equitable jurisdiction, no forms of action are recognized, and the court has power to administer either legal or equitable relief according as the pleadings warrant and the proof requires.

2. **Lost Instruments:** INDEMNITY. Where an instrument negotiable by delivery is lost before maturity, a bond of indemnity should be required as a condition for recovery thereon; but where it is clearly shown that the instrument was payable to order and not indorsed, or that it was lost after maturity, no indemnity should generally be required.

3. **Negotiable Instruments:** CERTIFICATES OF DEPOSIT: BONA FIDE PURCHASERS. A certificate of deposit in the usual form, issued by a bank and made payable to order or bearer, is negotiable, and a *bona fide* purchaser thereof for value before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper. *First Nat. Bank v. Security Nat. Bank*, 34 Neb., 71, followed.

4. ———: ———: ———. The negotiability of such a certificate is destroyed neither by a stipulation that it is payable on return of the certficate properly indorsed, nor by a provision that it is payable in current funds, nor by a provision that it shall bear interest if left six months, but no interest after six months.

5. ———: ———: ———. A certificate of deposit as follows: "This certifies that A. B. has deposited in this bank $3,000, payable to order of self, in current funds, on return of this certificate properly indorsed. This deposit not subject to check. With interest at six per cent if left six months; no interest after six months," is overdue so as to charge purchasers with notice of equities after the expiration of six months, and not until then.

6. **Trial:** FINDINGS. In actions tried by the court there must be a general finding, and if requested by one of the parties a special finding, and if this finding be vague, uncertain, or indefinite, it will not support a judgment when attacked directly.

7. ———: ———: REVIEW. Accordingly, where there is no general finding, and no special finding upon the issues upon which the form of the judgment depends, the judgment must be reversed.

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

The opinion contains a statement of the case.

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

Courts of law cannot compel indemnity. (Randolph, Commercial Paper, sec. 1697; *Mowery v. Mast*, 14 Neb.,

512; *Pierson v. Hutchinson*, 2 Camp. [Eng.], 211; *Ex parte Greenway*, 6 Ves. Jr. [Eng.], 812; *Lamson v. Pfaff*, 1 Handy [O.], 450.)

If the certificate is a negotiable instrument, a court of law could enter judgment thereon only upon the theory that it was lost after due, unindorsed, and in that event no indemnity bond could be required, and it would stand on the same ground as though non-negotiable. (*Mowery v. Mast*, 14 Neb., 512; *Fells Point Savings Institution v. Weedon*, 81 Am. Dec. [Md.], 603; *Edwards v. McKee*, 13 Am. Dec. [Mo.], 474; *McClusky v. Gerhauser*, 90 Am. Dec. [Nev.], 512; *Moses v. Trice*, 8 Am. Rep. [Va.], 609; *Thayer v. King*, 45 Am. Dec. [O.], 571; *Chaudron v. Hunt*, 20 Am. Dec. [Ala.], 60; *Rowley v. Ball*, 15 Am. Dec. [N. Y.], 266; *Lazell v. Lazell*, 36 Am. Dec. [Vt.], 352; *Pintard v. Tockington*, 10 Johns. [N. Y.], 104; *De Pew v. Wheelan*, 6 Blackf. [Ind.], 485; *Moore v. Fall*, 42 Me., 450; *McNair v. Gilbert*, 3 Wend. [N. Y.], 344; *Aborn v. Bosworth*, 1 R. I., 401.)

If the instrument was non-negotiable, no reason existed for compelling indemnity, either at law or in equity, and the court had no jurisdiction to compel it. (*Averett v. Booker*, 76 Am. Dec. [Va.], 203; *Cook v. Satterlee*, 16 Am. Dec. [N. Y.], 432; *Grimison v. Russell*, 14 Neb., 523; *Hegeler v. Comstock*, 45 N. W. Rep. [S. Dak.], 331, and cases cited; *Platte v. Sauk County Bank*, 17 Wis., 230; *Collins v. Lincoln*, 11 Vt., 268; *Farwell v. Kennett*, 7 Mo., 297; *Klauber v. Biggerstaff*, 47 Wis., 556; *Lindsey v. McClelland*, 18 Wis., 481; *Easton v. Hyde*, 13 Minn., 83; *Huse v. Hamblin*, 29 Ia., 501; *Rindskoff v. Barrett*, 11 Ia., 172; *Patterson v. Poindexter*, 40 Am. Dec. [Pa.], 554; *Irvine v. Lowry*, 14 Pet. [U. S.], 293; *Fry v. Rousseau*, 3 McLean [U. S. C. C.], 106; *Hasbrook v. Palmer*, 2 McLean [U. S. C. C.], 10; *Warren v. Brown*, 64 N. Car., 381; *Mason v. Noonan*, 7 Wis., 609*; *Ford v. Mitchell*, 15 Wis., 334; *Haddock v. Woods*, 46 Ia., 433; *Kirkpatrick v.*

McCullough, 3 Humph. [Tenn.], 171; *Whiteman v. Childress*, 6 Humph. [Tenn.], 303.)

Tibbets, Morey & Lewis, contra:

A certificate of deposit is a written acknowledgment by a bank or banker of the receipt of a sum of money on deposit which he promises to pay to bearer or to the order of the depositor or of some other person. (2 Daniels, Negotiable Instruments, sec. 1698; Tiedeman, Commercial Paper, sec. 486; *Pardee v. Fish*, 60 N. Y., 265.)

Certificates of deposit have all the characteristics of negotiability which pertain to promissory notes in general. (*Miller v. Austen*, 13 How. [U. S.], 218; *Carey v. McDougald*, 7 Ga., 84; *Drake v. Markle*, 21 Ind., 433; *National State Bank of Lafayette v. Ringel*, 51 Ind., 393; *Frank v. Wessels*, 64 N. Y., 155; *Howe v. Hartness*, 11 O. St., 449.)

A general principle applicable to negotiable instruments is that the party to such an instrument when he is called upon to pay it has the right to insist that it shall be produced and delivered up to him. (1 Wait, Actions & Defenses, p. 165, and cases cited.)

The negotiable character of a certificate of deposit is not affected by the fact that a demand is necessary before an action can be maintained thereon, nor is it changed by a provision therein by which it is made payable in current bank notes. (*Pardee v. Fish*, 60 N. Y., 265; *Shamokin Bank v. Street*, 16 O. St., 1; *Bull v. Bank of Kasson*, 123 U. S., 112; 1 Morse, Banks [3d ed.], secs. 299, 300, and cases cited; *Galena Ins. Co. v. Kupfer*, 28 Ill., 332; *Marc v. Kupfer*, 34 Ill., 287; *Lacy v. Holbrook*, 4 Ala., 90.)

IRVINE, C.

A brief statement of the pleadings is necessary to a consideration of this case. The plaintiff in error was the plaintiff in the district court. In her petition she avers

that on December 4, 1890, she deposited with the defendant bank $3,000, for which the defendant issued to her a certificate of deposit; that on or about June 6, 1891, she lost the certificate and at once gave notice of loss to the defendant; that she had not at the time of the loss or at any other time indorsed the certificate or in any way negotiated or hypothecated the same. The prayer was for a judgment for the amount of the certificate with interest.

The defendant, by its answer, admits the deposit and the issuance of a certificate in words and figures as follows:

"FIRST NATIONAL BANK,
"HASTINGS, NEBRASKA, Dec. 4, 1890. 28906.

"This certifies that Miss Rose Kirkwood has deposited in this bank three thousand dollars ($3,000), payable to the order of self, in current funds, on return of this certificate properly indorsed. This deposit not subject to check. With interest at six per cent if left six months; no interest after six months. C. B. HUTTON, *for Cashier*.

"Certificate of deposit."

The defendant further alleged that when the plaintiff demanded payment she failed to produce the certificate, claiming that she had lost it; that the defendant was at all times ready and willing to pay the certificate upon its production, or, if lost, to pay it upon the execution and delivery of a sufficient indemnifying bond. The defendant then denied each and every allegation in the petition not specifically admitted or modified, and prayed that the plaintiff be ordered to execute and deliver an indemnity bond to secure it against any loss by reason of said certificate.

There was a trial upon these pleadings, a jury being expressly waived, and the following finding and judgment were entered:

"This cause comes finally on to be heard upon the petition of the plaintiff, the answer of the defendant, and the

evidence, and the same is submitted to the court; upon consideration, the court finds that there is due to the plaintiff from the defendant upon the cause of action set out in her said petition the sum of $3,090.

"It is therefore considered and adjudged by the court, that the plaintiff have and recover of and from the said defendant the said sum of $3,090, and that each party to this action pay half of the costs herein.

"It is also considered and ordered by the court that the defendant pay the said sum of $3,090 to the clerk of this court, to be paid over to said plaintiff upon the filing by plaintiff, with the clerk of this court, of a good and sufficient bond of indemnity with approved sureties, to be approved by said clerk, indemnifying the said defendant against any and all liability which may hereafter arise and might subject the said defendant to the payment of the said certificate of deposit, as set out in said petition, and heretofore lost by said plaintiff."

The plaintiff brings the cause here, assigning several errors, all, however, going to the authority of the court to make an order requiring a bond of indemnity. There is no bill of exceptions and the case can be reviewed only upon the petition, answer, and judgment.

There is a great deal of argument in the briefs to the effect that the action was begun as one at law; that an action at law can only be maintained upon a lost instrument when it is non-negotiable, or, if negotiable, when lost after maturity or unindorsed, and that in any event in an action at law no indemnity can be required. These distinctions have been recognized in England and generally in those of the United States where the courts of law and equity are distinct. But counsel lose sight of the fact that our district courts are courts of general law and equity jurisdiction; that the Code abolishes formal distinctions between law and equity, and that where a cause of action, either at law or in equity, is stated in a petition the district court may

administer relief according to the nature of the case, without regard to forms of action. Had the old practice prevailed, upon the tender of proper issues, if the court had found that indemnity was proper, the plaintiff could have obtained no relief if she began at law. Had she begun in equity, she would have obtained the appropriate relief according to the pleadings and the proof. Under our practice, she alleging a state of facts entitling her to relief at law and the defendant by answer setting up facts entitling it to equitable relief, the question is not one of jurisdiction but of proof, and the court had jurisdiction to enter either an absolute judgment or one conditioned upon the execution of an indemnity bond according as the proof might justify. The rule as to whether or not indemnity should be required in an action upon a lost instrument has been practically settled in this state. In *Mowery v. Mast*, 14 Neb., 510, it was held that where a negotiable instrument is lost after it becomes due, a recovery may be had in a court of law. This was a case where the suit had been begun originally before a justice of the peace and his jurisdiction depended upon that question. It was there said: "Where a negotiable instrument, in such form that the legal title will pass to the holder by delivery, is lost before it becomes due, there is good reason for requiring a bond of indemnity from the person who has lost the instrument * * * to recover the amount due thereon. In such case the action should be brought in a court of equity, which may impose suitable conditions upon the plaintiff before he will be permitted to recover. But where it is clearly shown that an instrument is lost after it has become due, and an action is brought thereon by the actual owner, no indemnity would seem to be necessary. The instrument will stand on the same ground as though it was non-negotiable, and a recovery thereon by the actual owner will be a complete bar to an action by a party who has received the instrument after it became due." In *Means v. Kendall*, 35 Neb.,

693, it was held that where a negotiable note is lost before it is due, the court will require indemnity; but where lost after due, no bond will ordinarily be required. It does not appear in that case whether or not the note was negotiable by delivery only; but from the language of the first case cited, and upon general principles as settled by the weight of authority (Daniel, Negotiable Instruments, sec. 1481), indemnity will not be required where the instrument is payable to order and clearly shown not to have been indorsed, even if lost before maturity, because in that event the maker would be subjected to no liability. Applying the rules to this case no indemnity should be required unless the instrument was negotiable. So far as the character of the instrument is concerned as being a certificate of deposit, and for the present disregarding its particular phraseology, this court has said that "the established doctrine is that a certificate of deposit in the usual form, issued by a bank and made payable to order or bearer, is negotiable, and a *bona fide* purchaser thereof for value before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper." (*First Nat. Bank v. Security Nat. Bank,* 34 Neb., 71.)

Was there anything upon this certificate to take it out of the general rule and render it non-negotiable? It is argued that the provision that it should be payable "on return of this certificate properly indorsed" destroys its negotiability. That, however, was the language of the certificate in *First Nat. Bank v. Security Nat. Bank, supra,* and such certificates were there treated as negotiable paper. It has, indeed, been frequently said that the stipulation for the return of the certificate adds nothing to the instrument. It is merely the expression of a rule which applies to all negotiable paper, and an action may be maintained without a previous presentment. This question was thoroughly considered in the case last cited. As to the requirement

that it should be properly indorsed, it would seem that an indorsement by the payee would not be necessary. A "proper" indorsement is such an indorsement as the law merchant requires in order to authorize a payment to the holder. If presented by the original payee, no indorsement would be proper or at least necessary; if presented by another, "proper indorsement" to show his title would be requisite. We do not think that this provision operates as a condition destroying the negotiability of the instrument.

It is next said that the amount of payment is uncertain and the instrument for that reason non-negotiable. This argument is predicated chiefly upon the provision that the certificate is payable "in current funds." We are aware that many courts have held that such a clause does not require payment in money, and destroys the negotiability of the instrument. The cases so holding are either cases arising at a time when many forms of bank notes and bills were in use, varying in their values, or cases decided upon the authority of that class without regard to changed conditions. With regard to existing conditions we think the supreme court of the United States has declared the law correctly in *Bull v. Bank of Kasson*, 123 U. S., 105, as follows: "Within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term 'current funds' has been used to designate any of these, all being current and declared by positive enactment to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of those words." This also is the doctrine of the court of appeals

of New York (*Pardee v. Fish*, 60 N. Y., 265); and the supreme court of Illinois has held that a check so drawn entitles the holder to demand coin or its equivalent. (*Galena Ins. Co. v. Kupfer*, 28 Ill., 332.) We are satisfied with the reasoning of these cases as against the contrary authorities, and therefore hold that a provision for payment in current funds is in effect for payment in money, and that such an instrument, if having the other requisites, is negotiable.

It is also contended that the negotiability of the instrument was destroyed by uncertainty of amount arising from the provision that it should draw interest at six per cent if left six months, but no interest after six months. In *Lamb v. Story*, 45 Mich., 488, it was held that the negotiability of a note payable on or before two years from date was destroyed by a memorandum attached, providing that if paid within one year there should be no interest, and that case is cited by Mr. Daniel in support of a similar statement and is the only authority cited. We are not satisfied with that doctrine. In *Hope v. Barker*, 112 Mo., 338, the provision was "without interest thereon if paid at maturity; if not paid at maturity, to bear interest from date." It was held that that provision did not destroy the negotiability of the note, the note on its face showing what should be paid at any particular time and being therefore certain in its terms. The circuit court of appeals for the sixth circuit has recently held that a provision for interest after maturity and attorney's fees did not render a bill non-negotiable, saying: "It is intended to be a circulating medium until maturity. For this purpose every purchaser must know exactly what will be or ought to be paid on it at maturity. It only has currency upon the hypothesis that it is to be paid at that time. If the sum then to be paid is fixed and certain, we do not see why that is not sufficient." We think the same reasoning applies here. Every purchaser has upon the face of the note evidence of the exact amount

to be paid. If he takes it within six months, he knows that the amount to be paid, if presented within that period, is the face of the certificate without interest; that if presented at the end of six months, or at any subsequent time, the amount is the face of the certificate with interest for six months at the rate of six per cent. Nothing could be more certain or more absolute.

When did the certificate become due so as to charge a purchaser with notice of equities? There could be no doubt that if the certificate had provided simply for payment upon presentment properly indorsed, it would be in effect a promissory note payable on demand and would be overdue, so as to charge a purchaser with notice, at the latest after the lapse of a reasonable time for presentment. (Daniel, Negotiable Instruments, 783.) But the terms of this instrument are different. It was to draw interest if left six months, but in no event to draw interest after six months. In *First Nat. Bank v. Security Nat. Bank, supra,* an instrument payable upon the return of the certificate properly indorsed, but bearing across its face the language, "This certificate payable three months after date with six per cent interest per annum for the time specified," was held to be payable three months after date. There the language was absolute and the construction given was undoubtedly correct. We should here follow the rule adopted in that case and so construe the certificate as to give effect to every part. It would seem that the result would be to reach an analogy to instruments payable "on or before" a certain date, which are due at the expiration of the time so fixed and not before. (*Mattison v. Marks,* 31 Mich., 421; Daniel, Negotiable Instruments, sec. 43.) Surely a purchaser reading this certificate within six months from its date, observing that if presented before the expiration of six months it would draw no interest, but if presented at the end of that period would bear interest, would be justified in presuming that it had not

been presented. Equally certain it is that seeing it after the expiration of six months and observing by its terms that it could draw no interest thenceforth forever, he would be put upon inquiry to ascertain why it had not been presented when interest ceased. We think the instrument should be treated, so far as ascertaining the rights of purchasers, as one payable on or before six months after date; or if not that, then, from the peculiar nature of the contract, six months after date should be treated as the reasonable time within which it should be presented, and a purchaser taking it within that period should be considered as a purchaser before maturity. Adopting, then, the conclusions we have outlined, this was a negotiable instrument which a *bona fide* purchaser for value within six months from its date would be entitled to enforce against the defendant.

Recurring now to the judgment it will be seen that the only finding upon the issues was "that there is due to the plaintiff from the defendant upon the cause of action set out in her said petition the sum of $3,090." Does this finding support the judgment rendered? In several cases the general doctrine has been announced that a finding need be no more specific than the verdict of a jury upon the same pleadings. Upon this rule it has been held that where a justice of the peace rendered judgment, saying, "it was found by this court that the plaintiff have and recover" a certain sum was sufficient; but the issue in that case was practically the general issue upon a claim and counter-claim. (*Ransdell v. Putnam*, 15 Neb., 642.) In *Rhodes v. Thomas*, 31 Neb., 848, a justice rendered a judgment as follows: "Court convenes and defense proceeds with examination of witnesses, after which case is argued by parties and submitted to the court, with the following finding: October 17, 1888, after hearing the evidence, it is therefore considered by me that the plaintiff have and recover from the defendant the

sum of $69.15." This was held equivalent to a general finding; but the case rested largely upon the liberality with which records of a justice of the peace should be construed. In several cases similar judgments have been sustained as against collateral attacks, upon the ground that while they might be voidable they were not void. *Black v. Cabon*, 21 Neb., 248, is an example of this class of cases. Upon the other hand it has been several times held that in actions tried by the court there must be a general finding and, when requested by one of the parties, a special finding, and if this finding be vague, uncertain, or indefinite, it will not sustain a judgment when attacked directly. (*Sprick v. Washington County*, 3 Neb., 253; *Smith v. Silvis*, 8 Neb., 164; *Crossley v. Steele*, 13 Neb., 219; *Foster v. Devinney*, 28 Neb., 416.) Had the issue in this case been simply as to the amount of recovery, or had it been such that a finding of an amount due plaintiff from the defendant would logically cover the essential issues, we might treat it as sufficient to determine the case and authorize a judgment; but the most that can be claimed for the finding is that it determined the amount of the certificate and that it determined that the plaintiff remained the owner thereof. The determination of these issues were not sufficient to adjudicate the case. The plaintiff avers that she lost the certificate on or about the 6th of June, which would be after maturity, as we have construed the certificate. She also avers that she had never indorsed it. A determination of either of these facts in her favor would entitle her to an absolute judgment against the defendant without a requirement for indemnity. The defendant by its general denial put both facts in issue. If it were shown that she lost the certificate before it was due and that before its loss she had indorsed it so that it became payable to bearer, then payment could not be required except upon the giving of indemnity. We have not the evidence before us and the court did not find upon either of these issues. Upon their determination

the character of the judgment must depend. There is, therefore, no finding sufficient to sustain that portion of the judgment requiring indemnity. That portion of the judgment is reversed and the cause remanded for a new trial upon the issues relating to the defendant's claim for indemnity.

JUDGMENT ACCORDINGLY.

ROSE KIRKWOOD V. EXCHANGE NATIONAL BANK OF HASTINGS.

FILED MAY 2, 1894. No. 5591.

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

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

Tibbets, Morey & Ferris, contra.

PER CURIAM.

The record in this case presenting precisely the same questions as those in *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb., 484, the judgment is reversed and the cause remanded for a new trial for the reasons stated in the opinion in that case.

JUDGMENT ACCORDINGLY.

MARY P. MOORE, APPELLANT, V. OBED WATERMAN ET AL., APPELLEES.

FILED MAY 2, 1894. No. 5425.

1. **Appeal:** RECORD FOR REVIEW: TRANSCRIPT: AUTHENTICATION. In order to effect an appeal to this court from a judgment of the district court it is necessary to file with the clerk of this court, within six months from the rendition of the judgment, a transcript of the proceedings, authenticated by the certificate of the clerk of the district court. Such requirement is jurisdictional and cannot be waived by the parties, and the filing of the original pleadings in the district court does not take the place of such certified transcript.

2. **Review:** IMPERFECT TRANSCRIPT: AFFIRMANCE. Where a transcript of the judgment is the only paper filed here authenticated by the certificate of the clerk of the district court, and such judgment was one within the jurisdiction of the district court to render, the judgment will be affirmed.

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

Barnes & Tyler, for appellant.

Davis, Gantt & Briggs, contra.

IRVINE, C.

This case is not presented to us in a condition permitting us to examine it upon its merits. The record filed in this court consists of (1) certain documents having the appearance of the original pleadings in the case in the district court; (2) what appears to be a stipulation in the district court submitting the case on certain admissions of fact and certain written evidence; (3) a mass of documents which appear to be original depositions in the district court; (4) a paper duly certified by the clerk under the seal of the court to be a true and correct transcript of the judgment; (5) a

stipulation by counsel, "that the above and foregoing pleadings and record and the evidence upon which this case was tried are all of the pleadings, record, and evidence on which the said trial was had;" that the judge "sign, settle, and allow the same as the record, pleadings, and bill of exceptions herewith, and the same being the original pleadings and record and original evidence used in the district court may be used in the trial hereof on appeal in the supreme court without certificate of the clerk of the district court;" (6) a certificate purporting to be signed by the judge, but without any clerk's certificate, as follows: "I do hereby allow and settle the above and foregoing as the record and bill of exceptions herein, the same being the original record, pleadings, and all of the evidence used and introduced in the trial of this case."

Section 675 of the Code of Civil Procedure provides the manner of taking an appeal to this court from a judgment of the district court. In order to effect such an appeal "the party appealing shall, within six months after the date of the rendition of the judgment or decree, or the making of the final order, procure from the clerk of the district court and file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the cause in the district court, containing the pleadings, the judgment or decree rendered or final order made therein, * * * and on failure thereof the judgment or decree rendered or the final order made in the district court shall stand and be proceeded in as if no appeal had been taken." Jurisdiction of an appeal in this court, therefore, depends upon the filing of such a transcript. The original papers used in the district court are not a transcript. A transcript is a copy, and must be authenticated by the certificate of the clerk, and it is only that which gives authenticity to a transcript filed. It is true that the original bill of exceptions as settled by the district judge may be sent to this court in lieu of a transcript thereof, but that is because an

act of the legislature of 1885 (Code of Civil Procedure, secs. 587*a*, 587*b*) authorizes in that case the original documents to be sent up, and even then by the same statute the certificate of the clerk is necessary to authenticate the original. The law does not contemplate that the records of the district court should be removed in such a manner, and the consent of the parties is insufficient to cure the defect. The filing of a transcript authenticated by the clerk is jurisdictional. Surely it would not be contended that an appeal from a justice of the peace to the district court could be effected by the parties getting possession of the justice's docket and by stipulation filing his docket in the district court instead of a certified transcript of the entries thereon. This case stands in no better light. Neither the parties to it nor their attorneys had any right to take the original papers from the records of the district court, and the fact that they took them and filed them in this court did not supply the place of a certified transcript and conferred no jurisdiction here. These views are supported by the following authorities: *McDonald v. Penniston*, 1 Neb., 324; *Orr v. Orr*, 2 Neb., 170; *Haggerty v. Walker*, 21 Neb., 596; *Hoagland v. Van Etten*, 23 Neb., 462. In addition to these cases in this court which clearly settle the principle, the case of *Cox v. Macy*, 76 Ia., 316, is entirely in point. The proper order would be for a dismissal of the appeal were it not that a single paper, a judgment for the defendant, is on file bearing the clerk's certificate. The judgment being certified without any pleadings, there should here be a judgment of affirmance. (*Galley v. Knapp*, 14 Neb., 262.)

JUDGMENT AFFIRMED.

MARY E. BELL, APPELLANT, V. ELIJAH BELLER ET AL., APPELLEES.

FILED MAY 2, 1894. No. 5426.

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

Barnes & Tyler, for appellant.

Davis, Gantt & Briggs and *William Milchrist, contra.*

PER CURIAM.

The record here being in the same condition as that in the case of *Moore v. Waterman*, 40 Neb., 498, the judgment is for the same reasons affirmed.

JUDGMENT AFFIRMED.

JOSEPH THOMAS, TRUSTEE, V. CITY NATIONAL BANK OF HASTINGS.

FILED MAY 2, 1894. No. 5542.

1. **National Banks:** GUARANTY. While a national bank may not lend its credit for the accommodation of others, still it may guaranty the payment of commercial paper as incidental to the exercise of its power to buy and sell the same.

2. ———: ———: POWERS OF PRESIDENT: RATIFICATION. A, being indebted to a national bank and being the holder of certain negotiable notes, indorsed them generally and delivered them to the president of the bank, who negotiated them for value to C, at the same time executing in the name of the bank a written guaranty of payment. From the proceeds of the sale A's debt to the bank was canceled. *Held* (following *People's Bank*

v. National Bank, 101 U. S., 181), (1) That the guarantying of the notes under such circumstances was within the powers of the bank; (2) that the authority of the president to execute the guaranty would be conclusively presumed in favor of the purchaser acting without notice to the contrary; (3) that the retention and enjoyment by the bank of the proceeds of such transaction constituted a ratification of the president's act.

3. ——: ——: EVIDENCE: INSTRUCTIONS. Where the evidence on behalf of the plaintiff suing upon such a guaranty tended to establish the state of facts set forth in the foregoing paragraph, it was error for the trial court, in the giving and refusal of instructions, to withhold from the jury the law as above stated.

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

Capps & Stevens and *O. H. Dean*, for plaintiff in error.

M. A. Hartigan and *W. W. Morsman, contra.*

IRVINE, C.

The plaintiff in error sued the defendant in error, a national bank, alleging that on January 21, 1889, one Elsmore and one Knowlton made and delivered to Charles H. Paul certain promissory notes secured by real estate mortgage of the same date; that Paul in the ordinary course of business indorsed and delivered the notes to the bank; that the bank executed and delivered to plaintiff a guaranty as follows:

"For value received, we hereby assign and transfer the within note to Joseph Thomas, trustee, and guaranty payment of the principal and interest on the same on the terms and conditions stipulated in the mortgage of even date securing the same.

"[SEAL.] CITY NATIONAL BANK,
HASTINGS, NEBR.,
"By H. BOSTWICK, *Pt.*"

That the foregoing contract was written upon each of said notes, and that plaintiff relying thereon and on the

delivery of said notes and mortgage to him, he paid over to the bank $10,500 as consideration therefor, which money was transmitted by certain bills of exchange, which were duly indorsed, received, accepted, used, and transmitted to the credit of the bank. The petition then avers a default in payment and the insolvency of the makers, and prays judgment upon the contracts of guaranty. The bank admitted the execution and delivery of the notes and mortgage, but denied the default of payment. This defense was, however, waived on the trial. As a second defense it denied the indorsement or transfer of the notes to the bank or that the bank was ever the owner thereof; denied its execution of the guaranty; denied that it authorized the guaranty to be executed, and denied the payment of any money by the plaintiff to the bank. It then alleged that Bostwick, who is shown to have been the president of the bank, without any right or authority and solely for the accommodation of a partnership of which he, Paul, and the makers of the notes were all members, wrote the transfer and guaranty upon the notes and thereby forged the signature of the bank. As a third defense substantially the same allegations are repeated and the defense of *ultra vires* set up. There was a fourth defense pleaded, but it was evidently abandoned in the district court and has not been referred to in the argument here.

The evidence on the part of the plaintiff tended to show that the notes and mortgage were made and delivered to Paul in payment for an interest in a brick yard; that Paul was then indebted to the bank in the sum of about $7,000, $5,000 of which seems to have grown out of the brick yard business, but constituted a debt which Paul testifies he had individually assumed. Bostwick, the president of the bank, took the notes and mortgage, Paul having indorsed the notes, and sold them to the plaintiff, writing the guaranty thereon before their transmission. The payment was made by two drafts of the National Bank of Com-

merce of Kansas City upon the National Bank of the Republic of New York. Each was drawn to the order of the defendant bank. Each draft bears the following indorsement:

"Pay to the American Exchange Bank, New York, or order, for collection account of City National Bank, Hastings, Nebraska. J. M. FERGUSON,
"*Cashier.*"

Ferguson was cashier of the defendant bank. He testifies he did not place the indorsement upon the drafts, and that he never saw them before the trial, but that it was not his duty to make such indorsements; that they were generally made by the remittance clerk. The drafts were paid, and from the proceeds Paul's debt to the bank was canceled and the remainder passed to his credit. The method of bookkeeping pursued in order to accomplish this result is left doubtful by the evidence; but the evidence is uncontradicted that this result was reached. Subsequently one note of the series was paid plaintiff in a draft through the City National Bank. A letter signed by Bostwick, indicating that the bank paid it, was excluded from evidence.

The theory of the plaintiff is that the guaranty was within the scope of the bank's authority and that of the president; but if not so, plaintiff having adopted the benefit of the transaction by receiving the proceeds in satisfaction of Paul's debt, Bostwick's acts were ratified. The theory of the defendant is that the arrangement was a scheme between Bostwick, the makers, and the payee of the notes, constituting the brick company, to obtain money; that the bank never owned the notes, and that the president's act was not within the scope of his authority, but amounted to a forgery committed by him while acting individually, and that the guaranty was in any event a pledge of the bank's credit and *ultra vires.*

From *Rich v. State Nat. Bank of Lincoln,* 7 Neb., 201, we quote the following: "As a [general] rule, the officers of

a bank are held out to the public as having authority to act according to the usage and course of business of such institutions, and their acts, within the scope of their authority, bind the bank in favor of third persons having no knowledge to the contrary." And it may also be laid down as a rule, that "no officer of a bank can bind it by a promise to pay a debt which the corporation does not owe, and was not liable to pay, unless the bank authorized or has ratified the act."

In *People's Bank v. National Bank*, 101 U. S., 181, one Pickett made his notes for $50,000, payable to his own order, indorsed them and delivered them to the National Bank to be negotiated to the plaintiff. The vice president of the National Bank, with the knowledge and consent of the president and cashier, but without any authority from the board of directors, or from a majority of them as individuals, transmitted the notes to the plaintiff with a written guaranty signed by himself. The plaintiff's account with the defendant was debited with $50,000 on account of the notes. At the same time Pickett's paper held by the defendant was canceled to the same amount. It will be observed that in all its essential features this case was similar to the one under consideration according to plaintiff's theory of the facts. The language of Mr. Justice Swayne in that case is therefore entirely appropriate to this and, so far as it concerns the law of the case, we quote it entire in lieu of an original discussion: "The national banking act (Rev. Stats., 999, sec. 5136) gives to every bank created under it the right 'to exercise by its board of directors, or duly authorized agents, all such incidental powers as shall be necessary to carry on the business of banking, *by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt,* by receiving deposits,' etc. Nothing in the act explains or qualifies the terms italicized. To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securi-

ties named. Undoubtedly a bank might indorse, 'waiving demand and notice,' and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed the vice president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it. Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences. The doctrine of *ultra vires* has no application in cases like this. (*Merchants Bank v. State Bank*, 10 Wall. [U. S.], 604.) All the parties engaged in the transaction and the privies were agents of the defendant. If there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal authorization in advance, or the most formal ratification afterwards. These facts conclude the defendant from resisting the demand of the plaintiff. (Wharton, Agency, sec. 89; Bigelow, Estoppel, 423; *Mississippi & M. R. Co. v. Howard*, 7 Wall. [U. S.], 392; *Kelsey v. National Bank of Crawford County*, 69 Pa. St., 426; *Steamboat Co. v. McCutchen*, 13 Pa. St., 13.) A different result would be a reproach to our jurisprudence." The case involving, to a certain extent, the construction of the national banking act, the decision referred to is probably binding upon this court; but whether it is or not, we accept it as a correct statement of the law.

The errors assigned relate to the admission and exclusion of evidence and to the giving and refusal of instructions. Some are not assigned with sufficient definiteness to permit a review. In ruling upon the evidence the trial court seems to have proceeded upon the theory that the plaintiff had no right to rely upon the apparent authority of Bost-

wick, and that it was not competent to show a ratification by subsequent acts. In instructing the jury he placed before it only the defendant's theory of the case and assumed that there was evidence to show that the guaranty was merely for the accommodation of the parties to the notes and not within the line of the bank's business. The instructions asked by plaintiff and refused were based upon competent testimony tending to establish his theory as we have outlined it, and were in language receiving direct support from the case of *People's Bank v. National Bank*, 101 U. S., 181. In failing to submit the case in this aspect to the jury the court erred.

REVERSED AND REMANDED.

LANCASTER COUNTY V. J. ADDISON MARSHALL.

FILED MAY 2, 1894. No. 5083.

Review: EVIDENCE. No question of law was involved in this case, and the evidence was *held* sufficient to sustain the finding of the district court.

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

N. Z. Snell, for plaintiff in error.

J. L. Caldwell and *J. A. Marshall*, *contra*.

IRVINE, C.

The only point raised in this case is as to the sufficiency of the evidence, and it is conceded that no question of law is involved in the consideration of that point. We have examined the evidence, and while it is on some

points conflicting, we are satisfied that it was ample to sustain the finding.

JUDGMENT AFFIRMED.

THOMAS R. GILL V. HIRAM C. LYDICK ET AL.

FILED MAY 15, 1894. No. 5006.

1. **Assignments in a petition in error** not relied on in the briefs will be deemed waived.

2. **Riparian Rights:** ACCRETION. Where the water of a river recedes slowly and imperceptibly, changing the channel of the stream and leaving the land dry theretofore covered by water, such land belongs to the riparian proprietor. In case the alteration takes place suddenly, the ownership remains according to former bounds. (*Lammers v. Nissen*, 4 Neb., 245; *Wiggenhorn v. Kountz*, 23 Neb., 690.)

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

N. J. Sheckell, for plaintiff in error, cited: *Jones v. Johnston*, 18 How. [U. S.], 150; *Hagan v. Campbell*, 33 Am. Dec. [Ala.], 280; *Boorman v. Sunnuchs*, 42 Wis., 235; *Lynch v. Allen*, 32 Am. Dec. [S. Car.], 671; *Woodbury v. Short*, 17 Vt., 387; *Warren v. Chambers*, 25 Ark., 120; *Murry v. Sermon*, 1 Hawks [N. Car.], 56; *Hopkins Academy v. Dickinson*, 9 Cush. [Mass.], 544.

H. Wade Gillis and *Charles T. Dickinson*, *contra*, cited: *Lammers v. Nissen*, 4 Neb., 250; *New Orleans v. United States*, 10 Pet. [U. S.], 717; *Lovingston v. County of St. Clair*, 16 Am. Rep. [Ill.], 516; *Schurmeier v. St. Paul & P. R. Co.*, 10 Minn., 82; *Jones v. Pettibone*, 2 Wis., 308*; *Barnes v. City of Racine*, 4 Wis., 486; *Kraut v. Crawford*,

19 Ia., 549; *Shelton v. Maupin*, 16 Mo., 128; *Warren v. Chambers*, 25 Ark., 120; *Municipality No. 2 v. Orleans Cotton Press*, 17 La., 122; *Steamboat Magnolia v. Marshall*, 39 Miss., 109.

NORVAL, C. J.

This was a suit in ejectment brought in the district court of Burt county by Hiram C. Lydick and Jonathan Lydick against Thomas R. Gill, to recover certain real estate in fractional sections 13 and 24, in township 21 north, of range 11 east of the 6th principal meridian. The cause was tried to the court, without the intervention of a jury, and from a judgment in favor of plaintiffs below the defendant prosecutes error.

The assignments in the petition in error are as follows:

1. The findings of the court are not sustained by sufficient evidence.

2. The findings of the court are contrary to law.

3. The court erred in finding it had jurisdiction of the subject-matter of the action.

The last assignment is not argued in the brief of counsel, so we are not advised as to the precise matter relied upon to divest the district court of jurisdiction to hear and determine the case. We infer from the allegations contained in the answer that the defendant insisted in the trial court that the lands in controversy in this action lie east of the middle of the main channel of the Missouri river, as the same existed at the time of the survey of the lands in Burt county by the government surveyor, and hence the lands claimed by plaintiffs are not within this state, but within the state of Iowa. It is the rule of this court that assignments of error which are not urged in the brief are deemed waived and will be disregarded. The third assignment therefore will not be considered by us. The other two assignments will be considered together.

It was stipulated on the trial in the court below that the

plaintiffs are the owners in fee-simple, by a complete chain of title from the United States to themselves, of the following described real estate, to-wit: The fractional northeast quarter of the southwest quarter, known as "Lot three;" the fractional southwest quarter of the southwest quarter, known as "Lot five," all in section 13, township 21, range 11 east; also the fractional northwest quarter, known as "Lot one," and the fractional southwest quarter of the northwest quarter, known as "Lot two," all in section 24, town and range aforesaid. The east line of these tracts at the time of the government survey extended to the water's edge of the Missouri river, and since said survey a large body of land has been added to said tracts by the action of said river by changing its channel further eastward. The lands thus made are occupied by the defendant below, and plaintiffs claim that they have been, since the survey, formed by accretion, and hence belong to them as riparian owners.

In *New Orleans v. United States*, 10 Pet. [U. S.], 662, 717, McLean, J., in delivering the opinion of the court, says: "The question is well settled at common law that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied, on just principles. Every proprietor whose land is thus bounded is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss in this way, he cannot be held accountable for his gain." The same court, through Justice Swayne, in *St. Clair Co. v. Lovingston*, 23 Wall., 68, uses this language: "In the light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that prog-

ress has been made, they could not perceive it while the process was going on. Whether it is the effect of the natural or artificial causes makes no difference. The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits; and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim '*qui sentit onus debet sentire commodum*' lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there can be a gradual loss, he must bear it; if a gradual gain, it is his. The principle applies alike to streams that do, and to those that do not, overflow their banks, and where dikes and other defenses are, and where they are not, necessary to keep the water within its proper limits." To the same effect are the following authorities cited by defendants in error: *Jones v. Pettibone*, 2 Wis., 308*; *Walker v. Shepardson*, 4 Wis., 486; *Kraut v. Crawford*, 18 Ia., 549; *Lovingston v. County of St. Clair*, 64 Ill., 56; *Warren v. Chambers*, 25 Ark., 120.

The rights of riparian proprietors of lands were passed upon by this court in *Lammers v. Nissen*, 4 Neb., 245. We quote the first paragraph of the syllabus, which is as follows: "An accretion to land is the imperceptible increase thereto on the bank of a river by alluvion, occasioned by the washing up of sand or earth, or by dereliction, as when the river shrinks below the usual water mark; and land so formed by addition belongs to the owner of the land immediately behind it." The same rule was announced and applied in *Wiggenhorn v. Kountz*, 23 Neb., 690. The doctrine of the authorities, in this and other courts, is that all alluvions belong to the riparian proprietor. Stated differently, the owner of lands bounded by a river, or other stream of water, is entitled to all newly

formed ground gradually and imperceptibly made by the water to which the lands are contiguous; but if the alteration takes place suddenly, the land thus formed does not belong to the proprietor of the adjoining soil. In such case the ownership remains according to former bounds.

Testing the case at bar by the rules above stated, there is no room for doubt that the evidence supports the finding and judgment of the trial court. The testimony in the bill of exceptions discloses that the water in the Missouri river receded gradually; that the land in dispute was several years forming and that the accretions have not been sudden. The channel of the stream was not changed at once. These facts are established by numerous witnesses, and it can serve no useful purpose to give an abstract of their testimony in this opinion. The proof upon the point is of too convincing a character to justify us in holding that the lands belong to the defendant. The judgment is

AFFIRMED.

J. G. CORTELYOU ET AL. v. LUTHER B. MABEN ET AL.

FILED May 15, 1894. No. 5632.

1. **Review:** ASSIGNMENTS OF ERROR. An assignment in a petition in error, that "the court erred in its rulings upon the introduction of evidence offered by the plaintiffs," is not sufficient to present for review the several rulings of the trial court excluding or admitting testimony.

2. **Attachment:** BONDS: APPROVAL: SURETIES. A redelivery bond, executed for the purpose of procuring the release of attached property, is not a binding obligation upon the persons signing as sureties until the same has been accepted and approved by the officer who levied the writ. Such approval need not be indorsed upon the bond, but an approval may be implied from circumstances.

3. ——: ——: ——: ——. Where the officer receiving a forthcoming bond in attachment notifies the defendant that he

rejects the bond on account of insufficiency of the sureties thereon, and it does not appear that the attached property was ever surrendered to the defendant, the sureties are not liable in an action on such bond.

4. ———: ———: ———: ESTOPPEL. Where such a bond is not approved, but is rejected, the sureties are not estopped from asserting that their principal never received the attached property from the officer.

ERROR from the district court of Holt county. Tried below before BARTOW, J.

H. M. Uttley, for plaintiffs in error:

A forthcoming bond, reciting the sheriff's seizure of certain property under a writ of detinue in the case, and conditioned for the delivery of it with other property if the suit fails, estops plaintiff from showing that such property was not so seized, or that it did not go into his possession under the bond. (*Hill v. Nelms*, 5 So. Rep. [Ala.], 797; *Case v. Steele*, 8 Pac. Rep. [Kan.], 242; *Smith v. Fargo*, 57 Cal., 157; *McMillan v. Dana*, 18 Cal., 339; *Bowers v. Beck*, 2 Nev., 150; *Higdon v. Vaughn*, 58 Miss., 572; *Goebel v. Stevenson*, 35 Mich., 172; *Gray v. MacLean*, 17 Ill., 404; *Dorr v. Clark*, 7 Mich., 310; *Easton v. Goodwin*, 22 Minn., 426; *Fowler v. Scott*, 11 Ark., 675; *Oelrichs v. Spain*, 15 Wall. [U. S.], 211; *Towle v. Towle*, 46 N. H., 431; *Heard v. Lodge*, 20 Pick. [Mass.], 53; *Rapelye v. Prince*, 4 Hill [N. Y.], 123; *Dowling v. Polack*, 18 Cal., 626; *Warner v. Matthews*, 18 Ill., 86; *Ferguson v. Glidewell*, 2 S. W. Rep. [Ark.], 711; *Bowden v. Taylor*, 6 S. E. Rep. [Ga.], 277.)

M. F. Harrington, contra.

NORVAL, C. J.

This is an action brought by the plaintiffs in error against defendants in error upon a delivery bond, executed by the defendants for the release of certain personal prop-

erty, which was taken under order of attachment issued out of the county court of Hall county in two actions pending in said court, wherein Luther B. Maben was defendant, and in one of which J. G. Cortelyou, Ralph Ege, and M. N. Van Zant, parties doing business under the name of the Bank of Ewing, were plaintiffs, and in the other, Grace Reed, Ellis O. Jones, Freeman P. Kirkendall, and Charles A. Coe, partners under the name and style of Reed, Jones & Co., were plaintiffs. The petition filed in the court below alleges the issuance of the writs of attachment, and that the same were levied by one Marshall L. Swain, a constable, upon the goods and property of the defendant in the original actions, Luther B. Maben; that for the purpose of procuring a release of the attached property the defendants executed and delivered to the constable the bond, which is the foundation of this suit; that the bond was approved by the officers, and the property held by him under said attachments was surrendered to the defendant Maben, and the same has ever since remained in his possession or under his control. The petition further avers that the bond has been lost and cannot be found; that said orders of attachment are in full force, and the same have been upheld, approved, and sustained, and a judgment in favor of the plaintiffs has been recovered in each of said cases; that an execution has been issued upon each of said judgments for the purpose of selling the attached property in accordance with the orders of the court, and a return of the property for the purpose of sale demanded of the defendants, yet no part thereof has ever been delivered to the plaintiffs or the constable; wherefore plaintiffs ask judgment for $819.36, the value of the property. The defendants, in their answer, admit the recovery of the judgments mentioned in the petition, but deny every other averment therein contained. There was a trial by jury, and at the close of plaintiff's testimony, by direction of the court, a verdict was returned for the defendants.

Numerous objections were made, and exceptions taken, by the plaintiffs to the rulings of the court below excluding evidence offered by them, and several of the rulings are urged in the brief of counsel as grounds for reversal. The decisions of which complaint is now made cannot be considered, for the reason that the same are not sufficiently raised in the petition in error. The only paragraph therein relating to this branch of the case is the fourth, which is in the following language:

"4. The court erred in its rulings upon the introduction of evidence offered by the plaintiffs, which were duly excepted to at the time."

This assignment does not, in the least, indicate what particular piece of testimony was improperly admitted or excluded. The errors relied on for a reversal of a judgment must be specifically pointed out in the petition in error. It is the settled law of this state that such an assignment in a petition in error is too indefinite to present for review the rulings of the trial court on the admission of testimony. (*Lynam v. McMillan*, 8 Neb., 135; *Burlington & M. R. R. Co. v. Harris*, 8 Neb., 140; *Graham v. Hartnett*, 10 Neb., 518; *Lowe v. City of Omaha*, 33 Neb., 587; *Gregory v. Kaar*, 36 Neb., 533; *Farwell v. Cramer*, 38 Neb., 61.) Another reason why the rulings of the district court excluding testimony of plaintiffs' witnesses cannot be considered is that the excluded testimony was not preserved in the bill of exceptions. (*Commissioners of Kearney County v. Kent*, 5 Neb., 227; *Connelly v. Edgerton*, 22 Neb., 83; *Yates v. Kinney*, 25 Neb., 120; *Burns v. City of Fairmont*, 28 Neb., 866.)

We have now to consider whether the court below was right in directing a verdict for the defendants. The answer put in issue the execution and delivery of the bond and the acceptance thereof by the officer, also whether the attached property was ever surrendered by the constable to the defendant Maben. It was established at the trial that

a redelivery bond in attachment, in the usual form, and conditioned as required by statute, was executed by all the defendants about three months after the attachments were levied, which was handed to the constable by Mr. Maben. It also appears that this bond has been either lost or destroyed, and that no formal approval thereof, or the sureties thereon, was ever indorsed upon the instrument by the officer. The contention of the defendants is that the bond was never approved by the constable, and without such approval it was not a binding obligation upon the sureties. It cannot be doubted that until a bond given for the redelivery to the defendants of the property seized under a writ of attachment has been accepted and approved, the sureties are not liable; otherwise the officer levying the writ, upon the delivery of a bond to him, would be compelled to surrender the property to the attaching defendant, even though the person or persons signing the bond as sureties were wholly insolvent. The statute requires that such a bond must be signed by "one or more sufficient sureties resident in the county." (Code, secs. 206, 930.) The officer no doubt may reject the bond on the ground that the surety thereon is irresponsible, because he does not reside in the county, or because the penalty is insufficient. We are unable to find any statute which requires the officer to indorse his approval upon the bond, and when he takes the bond and releases the property from the levy, it will be presumed that he approved the bond. An approval may be implied from circumstances. Thus in *Asch v. Wiley*, 16 Neb., 41, it was held that when an appeal bond in the proper amount, with sureties, is filed by the appellant with a county judge within the statutory time, the acceptance of such bond and the spreading it upon the docket is a sufficient approval, unless the appellant is notified of the fact that the county judge declines to approve the bond and the sureties. The case cited being so closely analogous that it may properly be considered as establishing the doctrine that the approval

of a delivery bond in attachment may be implied from circumstances. A perusal of the testimony in the case not only fails to establish the approval by the constable of the bond in question, but shows the reverse to be true. Mr. Swain, the constable, testifies that Mr. Maben handed him the bond and demanded a return of the goods, which request was not then complied with, the officer stating that he did not know whether the sureties were good or not, as he was not acquainted with them; that subsequently the witness served a written notice upon Mr. Maben, as well as told him, that he would not accept the bond. This testimony is uncontradicted, and entirely negatives an acceptance and approval of the bond. The instrument, therefore, was not operative, nor were the sureties liable thereon. It is urged that the judgment should be affirmed for the further reason the attached goods were never delivered by the constable to Maben. The only evidence in the record as to what was done with the goods is found in the testimony of Mr. Swain, the officer who levied the attachments, and is as follows:

Q. You may now state what was done with those goods after they were attached.

A. They were invoiced and put into a room in the west end of the store building—west end of the main building—and nailed up there.

Q. After the goods were put into that room state what was done with them.

A. All that I know that was done with them was just nailed the room up solid. That was all that I done with them afterwards.

Q. State whether or not, after the goods were put in there and locked up, Mr. Maben done anything, or made any effort, to get possession of these goods again.

Objected to by the defendants John J. McCafferty and Grover B. Maben, as incompetent, irrelevant, immaterial, hearsay, and secondary evidence. Objection sustained, and plaintiffs except.

* * * * * * *

Q. Now you may state what was said by you and Mr. Maben in regard to turning over the goods to him at the time he handed you the bond.

Objected to by defendants John J. McCafferty and Grover Maben, as incompetent, immaterial, and not the best evidence, and not competent or proper testimony to bind these defendants as sureties. Overruled and defendants except.

A. I told him that I did not know whether these men were good or not. I did not know either one of them, excepting maybe—I had met Mr. McCafferty, then, and I had not seen Grover Maben at that time. I did not know them and I went and asked Mr. Cortelyou about it, and he said——

Objected to what Mr. Cortelyou said. Sustained.

* * * * * * *

Q. Recurring to these orders that you have made here —the returns you have made—in the case of Reed, Jones & Co., and Cortelyou, Ege, and Van Zandt, state where that store building was that is described in your return.

A. It was in Deloit precinct, right in the southeast corner of the county.

Q. Who did you find in possession of these goods when you went down there?

A. Mr. Maben, you, and Butler.

Q. The goods you attached you put in the back of Maben's store and nailed them up?

A. Yes.

Q. And Mr. Maben still had a lot of goods in the front of the room?

A. Yes.

Q. That was the last you ever saw of the goods?

A. Yes.

* * * * * * *

Q. The goods were nailed up?

A. I don't know.

Q. You told him you would not accept the bond?

A. Yes.

Q. But that you would give him the goods?

A. No, sir; I did not tell him that.

Q. You never told him that?

A. I just served the notice upon him.

Q. That Uttley sent you?

A. Yes.

Q. That you would not give him the goods on that bond?

A. No, sir; that was not it.

Q. What was it, now?

A. I can't tell you the words now.

Witness excused.

The foregoing is wholly insufficient upon which to base a suspicion, much less an inference, that the property levied upon was delivered, under the forthcoming bond, by the officer to the principal therein named. A bond given for the release of attached property is not operative, nor are the sureties liable thereon, unless the property has been delivered into the hands of the defendant. It is not necessary that the officer physically deliver the property. If he point out the same, and offer to surrender it to the defendant, it is sufficient. But nothing of that kind was done in this case, so far as this record discloses. For aught that appears the goods are still in the room where they were left at the time they were seized under the writs. Doubtless, as counsel for plaintiffs suggests, where such a bond has been accepted and approved, it is the duty of the officer to turn over the property to the defendant, and *mandamus* will lie to enforce the performance of such duty; but in this case, since the bond was rejected, Maben was not entitled to the possession of the goods, and we cannot indulge in the presumption that he has received them.

It is argued in the brief of plaintiffs that the sureties are estopped from asserting that their principal did not receive

the goods from the constable, by reason of the giving of the bond in controversy. The authorities cited in the brief do not sustain the contention of counsel. Some of the cases assert the familiar doctrine that a party will not be heard to dispute the recitals in his bond. Others are to the effect that where a forthcoming bond, given to release goods seized upon an attachment, has been approved by the officer and the attached property released, a surety cannot urge that the attachment proceedings were defective, or that the property did not belong to the defendant, or was incumbered, for the purpose of discharging himself from the obligation he assumed when he signed the bond. We do not controvert the propositions which the cited cases lay down, but these decisions are not applicable to the facts made by this record. Here the bond was never approved and accepted as such, and it would be a monstrous proposition to hold that the sureties will not be permitted to assert that their principal did not receive the goods from the officer, although it was executed by them to secure such release, simply because the bond was not returned to them. The undertaking of these sureties, had the bond been accepted, was, if the officer would deliver the goods to Maben, then, in case judgment should be rendered against him in the attachment suits, they would deliver the goods to the officer or pay him the amount of their value in money; but inasmuch as their principal never received the goods under the bond, the sureties are not liable in this action. The judgment is

AFFIRMED.

PHILIP BENDER ET AL. V. GEORGE BAME.

FILED MAY 15, 1894. No. 4991.

Exemption: EXECUTIONS: FAILURE OF SHERIFF TO CALL APPRAISERS. Where personal property is seized under an execution against a debtor, who has neither lands, town lots, nor houses subject to exemption, and an inventory, under oath, is made and filed by such debtor as provided by section 522 of the Code, it is the duty of the officer holding the writ to call appraisers to determine the value of the property, and the neglect or refusal of the officer to do so will not deprive the debtor of his exemptions, but he may sue for the value of the property.

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

R. P. Drake and *Albert & Reeder*, for plaintiffs in error.

McAllister & Cornelius, contra.

NORVAL, C. J.

This is an action by George Bame against plaintiffs in error for the conversion of a quantity of corn owned by plaintiff and claimed to be exempt. A trial to the court resulted in a judgment for Bame, and the defendants prosecute error. There is not much controversy as to the facts. The overwhelming preponderance of the testimony establishes the following: One of the plaintiffs in error, Philip Bender, recovered a judgment before a justice of the peace of Platte county against George Bame, who is the head of a family, and a resident of said county. An execution was issued upon said judgment and placed in the hands of Joseph Linaberry, a constable and one of the plaintiffs in error, who, by direction of Bender, levied the same upon about 700 bushels of corn belonging to Bame. Plaintiff below owns neither town lots, lands, nor houses, and the total value

of his personal property, at the time of the levy, did not exceed $500. He filed an inventory, under oath, of his property with the justice before whom the judgment was obtained, under the provisions of section 522 of the Code of Civil Procedure, and demanded an appraisement of the property, but no appraisement was ever made. The corn thus levied upon was replevied from the constable by one F. T. Fleming, who claimed it by virtue of a chattel mortgage executed by Bame. The testimony also shows that this mortgage was paid before the levy of the execution. That the corn was exempt is clear. The sole contention of plaintiffs in error is that this action cannot be maintained, because there has been no appraisement of property as provided by statute. That the officer did not cause an appraisement to be made is no fault of the defendant in error. All the law required of him was to make and file with the justice an inventory under oath of his personal property, and, after the appraisement has been made, to select therefrom property to the amount of the statutory exemption. It is the well settled law of the state that exemption laws are to be construed liberally, to the end that the purpose for which they were adopted may be accomplished. After the debtor has complied with the law on his part, he ought not to be deprived of his exemption by the failure of the officer to perform his duty. To hold, when exempt property has been seized under execution and the proper inventory has been filed, that an action for conversion will not lie where the officer fails or refuses to make an appraisement would, in many cases, destroy the value of the exemption by preventing the debtor from deriving any benefit from it.

But it is said the remedy was by *mandamus* to compel the officer to call the appraisers. Doubtless defendant in error could have resorted to *mandamus*, but it does not follow that he has no other remedy. In *Cunningham v. Conway*, 25 Neb., 615, it was held that where an execution is levied upon personal property of the head of a family,

who has neither lands, town lots, nor houses subject to exemption, it is the duty of the officer holding the writ, when the debtor files the inventory of all his property, to have the property appraised, and if its value does not exceed $500, return it to the judgment debtor; and in case the officer fails or refuses to call appraisers, he may, by *mandamus*, be compelled to act, or the debtor may bring a suit against him for non-performance of his duty, or may enjoin the sale under the execution. Another case quite in point is *Hamilton v. Flemming*, 26 Neb., 240. That was an action against a sheriff for the conversion of exempt property, which the officer had seized by virtue of an order of attachment. Flemming, the judgment debtor, filed an inventory of the whole of her property, but it was not acted upon by the officer. This court held that a suit for the conversion of the property would lie. REESE, C. J., in delivering the opinion of the court, says: "It is quite probable that the justice of the peace might have ordered the property released, and quite true that the sheriff should have called appraisers as provided by law; but neither was done. Defendant in error might then have instituted an action in replevin for the possession of the property shown to be exempt (*Mann v. Welton*, 21 Neb., 541), the proper foundation having been laid therefor. This right is also conferred by section 182 of the Civil Code. The quality of exemption having been fixed upon the property by the filing of the affidavit and inventory, at least so far as it was within the power of defendant in error to fix such quality, she might, perhaps, have maintained an action in replevin for the specific property; and failing to do so, she could maintain her action for its conversion." The facts in the two cases cited above are substantially the same as in the one under consideration, and are precedents for maintaining this action.

The case of *Mann v. Welton*, 21 Neb., 543, is clearly distinguishable. There the debtor brought replevin to

recover property seized under an execution, which was claimed to be exempt. No inventory was ever filed, and the court held that replevin would not lie. A debtor may waive the $500 exemption, and he will be held to have done so if he fails to file the required inventory before the sale of the property by the officer under the writ. The doctrine announced in the authority last cited does not militate against the conclusion we have reached in this case. The judgment below is

AFFIRMED.

POST, J., having decided the case in the district court, took no part in the above opinion.

FRANK E. SHUPE V. STATE OF NEBRASKA.

FILED MAY 15, 1894. No. 4972.

1. **A recognizance for an appeal in a criminal case** is not required to be signed by the defendant and his sureties; but if so signed, it is not for that reason alone invalid. If otherwise properly taken and certified, the signatures of the recognizors may be disregarded as surplusage.

2. **Criminal Law:** SUFFICIENCY OF RECOGNIZANCE FOR APPEAL. A recognizance executed under section 324 of the Criminal Code, for the purpose of prosecuting an appeal by one who has been convicted of a misdemeanor, conditioned that he "shall be and personally appear at the next term of the district court in and for Saunders county, on the first day of the term thereof, and abide the judgment of the court, and not depart the court without leave, then this recognizance to be void, otherwise to remain in full force and effect," sufficiently complies with the requirements of the statute and is a binding obligation.

3. ———: ———. Under section 388 of the Criminal Code a recognizance is not invalidated by reason of defects in the form thereof, if it appear from the tenor of the recognizance at what court the

party was bound to appear and that the court or officer before whom it was taken had the power to require and take such recognizance.

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

The opinion contains a statement of the case.

Pound & Burr, for plaintiff in error:

The recognizance was entered into, filed, and approved by the justice within the time required by the statute. The fact that the recognizance was signed did not invalidate it, and it was not necessary to enter it on the docket of the justice. (*Irwin v. State*, 10 Neb., 325; *State v. Moran*, 24 Neb., 103; *Millikin v. State*, 21 O. St., 635.)

The court erred in dismissing the appeal. (*Vierling v. State*, 33 Ind., 218; *People v. Gillman*, 125 N. Y., 372; *State v. Clarkson*, 59 Mo., 149; *Casey v. Peebles*, 13 Neb., 7; *Bazzo v. Wallace*, 16 Neb., 293.)

If the recognizance taken was defective, the court should have ordered a new one to be given. (*Hosie v. Gray*, 73 Pa. St., 502; *State v. Rhodius*, 37 Tex., 165.)

A party cannot be deprived of his right of appeal through the fault or neglect of the proper officer if he has used due diligence. (*Dobson v. Dobson*, 7 Neb., 296; *Republican V. R. Co. v. McPherson*, 12 Neb., 480; *Cheney v. Buckmaster*, 29 Neb., 420.)

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

NORVAL, C. J.

On the 13th day of December, 1891, plaintiff in error, having been tried and convicted of an assault and battery before a justice of a peace of Saunders county, was sentenced to pay a fine of $5 and the costs of prosecution, taxed at $60.90. On the same day the prisoner entered into before the magistrate a recognizance with surety, which

was duly approved by the justice. The following is a copy of the same:

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

"Be it remembered, that on the 13th day of December, 1890, F. E. Shupe and C. H. Pirtle, of the county of Saunders, personally appeared before me, F. P. McCutchan, a justice of the peace in and for said county, and acknowledged themselves jointly and severally indebted to the state of Nebraska in the sum of $200, to be levied on their goods and chattels, lands and tenements, if default is made in the conditions following:

"The condition of this recognizance is such that the said F. E. Shupe shall personally be and appear at the next term of the district court in and for said Saunders county on the first day of the term thereof and abide the judgment of the court and not depart the court without leave, then this recognizance to be void, otherwise to remain in full force and effect.

F. E. SHUPE.
"C. H. PIRTLE.

"Executed in my presence, and surety approved by me, this 13th day of December, 1890.

"F. P. MCCUTCHAN,
"*Justice of the Peace.*"

A transcript of the proceedings, including the recognizance, was duly lodged in the office of the clerk of the district court of the county. Subsequently the county attorney filed a motion to dismiss the appeal, for the following reasons:

1. The appeal was not taken within twenty-four hours after the conviction.

2. That no recognizance was taken or given in the justice court.

3. The pretended recognizance is nothing more than an ordinary appeal bond, and not such a recognizance, as required by law, to entitle the defendant to an appeal.

4. The pretended appeal bond or recognizance is void, in this: that it does not show any crime of which the defendant has been convicted, or of which he is required to appear and answer.

5. That the pretended recognizance was not taken and acknowledged in open court and made a part of the record, as required by law.

The district court sustained the motion, dismissed the appeal, and taxed the costs against the plaintiff in error.

Section 324 of the Criminal Code (section 5951, Cobbey's Consolidated Statutes) provides that "the defendant shall have the right of appeal from any judgment of a magistrate imposing fine or imprisonment, or both, under this chapter, to the district court of the county, which appeal shall be taken immediately upon the rendition of such judgment, and shall stay all further proceedings upon such judgment. No appeal shall be granted or proceedings stayed, unless the appellant shall, within twenty-four hours after the rendition of such judgment, enter into a recognizance to the people of the state of Nebraska, in a sum not less than one hundred dollars, and with sureties to be fixed and approved by the magistrate before whom said proceedings were had, conditioned for his appearance at the district court of the county at the next term thereof, to answer the complaint against him," etc. The record before us shows that the foregoing instrument was entered into before the justice by both plaintiff in error and his surety on the same day the conviction was had, which, so far as time is concerned, met the requirements of the statute. A recognizance for an appeal in a criminal case is not required to be signed by either the defendant or his sureties; but if so signed, it is not for that reason alone invalid. If properly taken and certified, the signatures of the recognizors may be treated as surplusage. (*Irwin v. State*, 10 Neb., 325; *King v. State*, 18 Neb., 375.)

The only ground stated in the motion for the dismissal

of the appeal which possesses a semblance of merit is the fourth, and that is the recognizance is defective and therefore invalid, because it fails to recite the offense with which plaintiff in error is charged and with which he has been convicted, and was to answer in the district court. It was upon the ground just stated that the district court dismissed the appeal. The statute above quoted has prescribed how a recognizance for an appeal in a case like the one before us shall be conditioned; namely, "for his [defendant's] appearance at the district court of the county at the next term thereof, to answer the complaint against him." It is not indispensable, however, to the validity of a recognizance for an appeal in a criminal case that it should be conditioned in the precise language laid down in the section quoted, as a reference to section 388 of the Criminal Code will disclose. This section expressly provides that "no action brought on any recognizance shall be barred or defeated, nor shall judgment thereon be reversed by reason of any neglect or omission to note or record the default, nor by reason of any defect in the form of the recognizance if it sufficiently appear from the tenor thereof at what court the party or witness was bound to appear and that the court or officer before whom it was taken was authorized by law to require and take such recognizance." It is obvious that great particularity is not required, and the legislature, in enacting the foregoing section, has taken pains to provide against technical objections of the character of those which have been urged against the recognizance in this case. An undertaking of bail is binding, although the offense is not described in the recognizance, and although it is not recited that the accused shall "answer the complaint against him," if the particular case to which the undertaking is applicable is manifest, that the officer in taking it acted within the scope of the authority conferred by statute and that the defendant is thereby required to appear before the proper court. The condition

of the recognizance under consideration fully meets all these requirements, and more was not essential to the validity of the undertaking. (*Zidek v. State*, 22 S. W. Rep. [Tex.], 143; *McLaughlin v. State*, 10 Kan., 581; *Jennings v. State*, 13 Kan., 80.)

The motion to dismiss the appeal was not well taken and should have been overruled. The judgment is reversed and the cause remanded with direction to reinstate the appeal.

REVERSED AND REMANDED.

GAYTON BALLARD, APPELLANT, V. ROY THOMPSON ET AL., APPELLEES.

FILED MAY 15, 1894. No. 5143.

1. **Mechanics' Liens**: LIMITATION OF LIEN. A mechanic's lien will not be continued in force beyond the statutory period of two years except as to such persons, including mortgagees, as are made parties to an action to foreclose within such period.

2. ———: SUMMONS. In all cases the summons must be issued before the bar of the statute is complete, although sufficient if served thereafter.

APPEAL from the district court of Lincoln county. Heard below before CHURCH, J.

D. H. Ettien, for appellant.

Grimes & Wilcox, contra.

POST, J.

On the 27th day of December, 1887, the defendants Thompson and wife executed to James L. Lombard two mortgages upon the northwest quarter of section 22, town-

ship 14, range 33 west, in Lincoln county. One of said mortgages was for $1,000, to secure a note of that amount maturing January 1, 1893, with interest from date at seven per cent, payable semi-annually. The other was for $150, to secure a note of that amount maturing January 1, 1890, with interest at ten per cent after maturity, and both conditioned that in case of failure to pay the interest or any instalment thereof at maturity, the principal debt should immediately become due and payable. On the 10th day of January, 1888, the mortgage first described was sold and assigned to the plaintiff, and on the same day the second mortgage, to-wit, for $150, was assigned to the Anglo-American Land Mortgage & Agency Company (Limited), but such assignments were never filed for record in Lincoln county. On the 20th day of December, 1890, the plaintiff herein commenced this proceeding to foreclose the mortgage assigned to him, alleging default of payment of interest due. He made Thompson and wife and the Anglo-American Land Mortgage & Agency Company, defendants. He also joined as a party defendant W. W. Birge, who claims a mechanic's lien upon the premises paramount to both mortgages, and which presents the only controversy in the case. The additional facts essential to an understanding of the contentions of the several parties are fully disclosed by the following stipulation:

"It is hereby stipulated and agreed by and between the plaintiff and the defendant W. W. Birge that the case shall be submitted to the court, as to the plaintiff and said Birge, upon the following facts, to-wit:

"On the 1st day of July, 1887, the defendant W. W. Birge made and entered into an oral contract with the defendant Roy Thompson to furnish him material for the erection of a dwelling house and barn on the northwest quarter of section 22, township 14, range 33 west of the sixth principal meridian.

"In pursuance to said contract said W. W. Birge

furnished said material for the erection of said dwelling house and barn on and between the 1st day of July, 1887, and the 22d day of September, 1887; that the defendant Roy Thompson, at the time plaintiff furnished said material, was the owner in fee of said land; that on the 21st day of January, 1888, the defendant W. W. Birge made an account in writing of the items of such materials furnished the defendant Roy Thompson under said contract, and after making oath thereto, as required by law, filed the same in the clerk's office of Lincoln county and claiming a mechanic's lien therefor upon said lands and buildings thereon; that on the 20th day of January, 1890, the defendant W. W. Birge filed his petition in the district court of Lincoln county, Nebraska, to foreclose said mechanic's lien against the defendant Roy Thompson and one James L. Lombard, and summons was issued by the clerk of said court for said Roy Thompson and James L. Lombard, bearing date of January 20, 1890; that the defendant Roy Thompson was served personally with said summons on the 21st day of January, 1890, and that said summons was returned not served as to the said James L. Lombard and no alias summons was issued; that on March 31, 1890, and more than two years after the filing of said mechanic's lien, James L. Lombard, by his attorney, appeared in said case and answered disclaiming any interest in the said premises, and stating that the mortgage on said premises above described made to him and the notes secured thereby had been duly assigned, one for $1,000 to Gayton Ballard, the plaintiff in this case, on the 10th day of January, 1888, and one for $150.40 to the Anglo-American Land Mortgage & Agency Company (Limited), one of the defendants in this case, on the 10th day of January, 1888, and that said notes and mortgages are the same described in plaintiff's petition and in the answer and cross-petition of the defendant the Anglo-American Land Mortgage & Agency Company (Limited) in this case; that said assign-

ments of these mortgages to Gayton Ballard and the Anglo-American Land Mortgage & Agency Company (Limited) from James L. Lombard were not recorded in Lincoln county, Nebraska; that said Gayton Ballard and the Anglo-American Land Mortgage & Agency Company (Limited) were not made parties to the suit to foreclose the said mechanic's lien, nor were they, or either of them, in any manner served with summons, nor did they, or either of them, appear in said case.

"It is agreed further that the plaintiff's petition and the answer and cross-petition of the defendant the Anglo-American Land Mortgage & Agency Company (Limited) state the facts as to dates, amounts, and conditions of the bonds and mortgages sought to be foreclosed in this action, and their assignment to the plaintiff and the defendant and cross-petitioner, the Anglo-American Land Mortgage & Agency Company (Limited), and of the dates, books, and pages of the record of said mortgages and the land covered by them.

GRIMES & WILCOX,
"*Attorneys for Defendant Birge.*
"D. H. ETTIEN,
"*Attorney for Plaintiff and the Defendant Anglo-American Land Mortgage & Agency Company (Limited).*"

On the 11th day of August, 1891, a final decree was entered by the district court sustaining the contention of Birge and adjudging his claim, to wit, for $654.95, to be a first lien upon the mortgaged premises, and from which the plaintiff and the Anglo-American Land Mortgage & Agency Company have appealed to this court.

The contention of appellants is that the commencement of the action by Birge against Thompson and wife in January, 1890, and the decree subsequently rendered therein did not continue in force the mechanic's lien as against the mortgages. The preserving and enforcement of mechanics, liens in this state is regulated by sections 3 and 4 of chapter 54, Compiled Statutes, 1885, as follows:

"Sec. 3. Any person entitled to a lien under this chapter shall make an account in writing of the items of labor, * * * and after making oath thereto shall, within four months of the time of performing such labor and skill, * * * file the same in the county clerk's office of the county of which such labor * * * shall have been furnished, which account so made and filed shall be recorded in a separate book to be provided by the clerk for that purpose, and shall, from the commencement of such labor or the furnishing such materials for two (2) years after the filing of such lien, operate as a lien on the several descriptions of such structures and buildings and the lots on which they stand. * * *

"Sec. 4. Every person holding any lien under this chapter may proceed to obtain a judgment for the amount of his account thereon by civil action. And when any suit or suits shall be commenced on such accounts within the time of such lien, the lien shall continue until such suit be finally determined and satisfied."

These provisions were before the court in *Green v. Sanford*, 34 Neb., 363, and the construction there given them fully sustains the position of appellants, overruling *Manly v. Downing*, 15 Neb., 637. It is therein declared to be the plain meaning of the statute that the lien is preserved as against those persons only who are made parties to the suit prior to the expiration of the statutory period for enforcing it by action. In that case Dishong, to whom building material was furnished, had but an equitable title, the legal title being in Sanford, the party subsequently brought in; but we are unable to perceive any ground for a distinction on principle between that case and this. The rights of a mortgagee are regarded with no less favor than those of the purchaser of the fee. He is even held to be a purchaser within the meaning of the registration laws of most of the states. (Jones, Mortgages, 458.) There are no considerations of equity in favor of the continuance of the lien as

against mortgagees that do not apply with equal force to purchasers; but whatever reasons may be urged for a different conclusion, the question must be regarded as settled by *Green v. Sanford.*

2. Did the subsequent voluntary appearance of James L. Lombard relate back to the commencement of the action so that it will be said to have been commenced as to him at the time of the filing of the petition in January, 1890? Clearly not. It is provided by section 19 of the Civil Code that "an action shall be deemed commenced, * * * as to the defendant, at the date of the summons which is served on him;" and in all cases the summons served must be issued before the bar of the statute is complete. (*Rogers v. Redick,* 10 Neb., 332; *Baker v. Sloss,* 13 Neb., 230.) This conclusion renders unnecessary an examination of the question to what extent, if at all, the rights of the appellee were affected by the neglect to file for record the assignments of the mortgages. For reasons stated the decree of the district court is reversed and the cause remanded with directions that the decree be so amended as to allow the appellee's lien subject to the mortgages of appellants.

REVERSED AND REMANDED.

W. J. CLAIR V. STATE OF NEBRASKA.

FILED MAY 15, 1894. No. 5292.

1. **Grand Jury:** CHARGE BY COURT: DISCRETION. A wide discretion is allowed to the presiding judge in directing the attention of the grand jury to particular subjects of inquiry, or to particular offenses or classes of offenses, and that discretion appellate courts will not assume to control.

2. **Exceptions to Charge to Grand Jury:** CONTEMPT. But

where a party indicted, in the honest belief that he has been prejudiced by an abuse of discretion by the judge in his charge to the grand jury, in respectful language alleges the action of the judge as error, in order to secure a ruling thereon, he is not guilty of contempt of court.

3. ———: ———. So *held*, although he mistakes his remedy by assailing the charge of the judge by motion instead of by plea.

4. **Grand Jury:** EXISTENCE OF FACTS. The existence of facts which will warrant its finding of an indictment is a question for the grand jury, and should not, as a rule, be assumed by the judge.

5. **Inflammatory Charge by Court to Grand Jury.** A charge to the grand jury which, after assuming that the crime of bribery had been committed and that it was the duty of the jurors to indict therefor, concluded as follows: "There comes up from the people a command for a 'forward march' all along the line of your duty. You should give heed to that cry, for it comes from a patient and long suffering endurance which has at last reached its limit." *Held*, That the term "inflammatory," as applied to said charge, is a merited criticism.

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

The facts are stated in the opinion.

Charles Offutt, *W. D. McHugh*, and *Lee S. Estelle*, for plaintiff in error:

Filing the motion to quash the indictment did not constitute a contempt of court. (Rapalje, Contempts, sec. 28; *Mullin v. People*, 24 Pac. Rep. [Col.], 880; *In re Dalton*, 26 Pac. Rep. [Kan.], 673; *Ex parte Curtis*, 3 Minn., 274; *Neel v. State*, 9 Ark., 259; *Dunham v. State*, 6 Ia., 245; *State v. Anderson*, 40 Ia., 207; *McFadden v. Reynolds*, 11 Atl. Rep. [Pa.], 638; *Thomas v. People*, 23 Pac. Rep. [Col.], 327.)

The charge to the grand jury was inflammatory and prejudicial. (Criminal Code, sec. 397; *Charge to Grand Jury*, 2 Sawyer [U. S. C. C.], 669; 2 Hale, Pleas of the

Crown, p. 161; Chitty, Criminal Law, p. 312; Thompson & Merriam, Juries [ed. 1882], sec. 597; *State v. Turlington*, 102 Mo., 642.)

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

POST, J.

This is a petition in error and brings before us for review the judgment of the district court for Douglas county, whereby the plaintiff in error was adjudged guilty of contempt of court and sentenced to pay a fine of $25, and in default thereof to be committed to the county jail. The alleged contempt consists in the filing, as attorney for the defendant, in the case of State of Nebraska v. Edward F. Moriarty, then pending in said court, of a motion in the following language:

Comes now the defendant in the above entitled cause and moves the court to quash the indictment herein for the following reasons, to-wit:

First—That the charge heretofore given to the grand jury, who found the indictment herein, by the Honorable C. R. Scott, judge, was inflammatory and prejudicial, in that said charge aroused the prejudice of said grand jury so that they were not fair and impartial grand jurors. Said charge is filed in the office of the clerk of this court, and is herein referred to and made a part of this motion.

Second—That the said indictment does not charge any offense under the laws of the state of Nebraska.

Third—That said indictment is insufficient in law and is not specific enough, in that it fails to point out what said claim and bill of said C. E. Squires it was that was before the city council at the time of the alleged commission of said crime.

W. J. CLAIR,
SILAS COBB.
Attorneys for Defendant.

For a perfect understanding of the essential facts in the case it is proper to state that there are for the fourth judicial district seven judges, six of whom are assigned to Douglas county and usually engaged in the disposition of causes on separate dockets. Judge Scott, who presided over the criminal division of the court at the opening of

the February, 1892, term, gave to the grand jury the charge mentioned in the motion above set out, and to which an extended reference will hereafter be made; but to Judge Davis was assigned the trial of criminal causes for the term. On the 19th day of March following, while Judge Davis was engaged in the trial of Moriarty on the charge of bribery, upon an indictment found by the grand jury previously charged by Judge Scott, the following proceedings were had, quoting from the bill of exceptions:

Be it remembered, that on March 19, 1892, in the criminal court room No. 1 of the court aforesaid, Judge Davis presiding, on the trial of the State of Nebraska v. Edward F. Moriarty, at about 11:45 A. M., the said jury in said cause were dismissed until the afternoon hour of adjournment, to-wit, 2 o'clock P. M., by his honor Judge Davis, and just about that time, and shortly before the said jury were dismissed, his honor Judge Scott took the bench in connection with Judge Davis, and after the retirement of said jury his honor Judge Scott called attorneys W. J. Clair and Silas Cobb, the same who are defendants herein, and calling their attention to a motion which has been filed by the said attorneys to quash the indictment against said Edward F. Moriarty, and which said motion is in words as follows [referring to the motion copied above]; and thereupon the said Judge Scott asked said attorneys if this was their motion [holding the same in his hand], to which question they both answered that it was, and that their names were signed to it; whereupon said Judge Scott asked them if they were willing to strike out the first count of said motion as above, and they were asked if they knew of any statute authorizing the filing of such a motion; whereupon Mr. Clair said:

"I will state for myself that the motion was not filed under any provision of the statute that I know of. I never looked to see whether there was a provision of that kind, but I proposed to fix myself in such a position by the filing of that motion that if it were necessary in taking this case to the supreme court, I could raise the question as to whether or not the charge of the grand jury, given at the beginning of this term by your honor, was one which is contemplated by the law of this state. I simply did it as an attorney. I did not do it for the purpose of casting any reflection one way or the other."

Mr. Cobb said: "I was a party to the filing of the motion. I filed it myself. Mr. Clair and myself prepared it in my office. I did it in good faith. I did it with no disregard for the court who gave the instructions to the grand jury heretofore. I did it after consultation, and, in fact, upon the suggestion of one of the oldest criminal practi-

tioners at this bar. In fact, to show that I had no ill-faith in the matter, I did it thinking it was simply doing my duty to my client, and at the suggestion of this attorney who has practiced at the bar. I do not desire to give his name."

Judge Scott: "Do you refuse to disclose his name?"

Mr. Cobb: "Yes, because I do not think it is necessary. An attorney who has practiced at this bar for years, one of the best lawyers, civil or criminal, at this bar. But I am not giving that to clear my skirts, but to show my good faith; and, as I tried to say, I did it, furthermore so that we, as attorneys for the defendant, would have the advantage of everything that it was our duty to take advantage of; and I considered it, and I consider it at the present time, my duty to take advantage of everything that has gone before the grand jury as well as the jury. I think that is what an attorney is employed for. I consider that he would not be doing his duty if he considered that this might be held by the supreme court as one of the grounds of reversal. I say I consider that an attorney would not be doing his duty unless he did all these things. And with no disrespect to the court I did what I thought was my duty to my client."

Judge Scott: "Do you know of any provison of the statute that makes that a ground to quash?"

Mr. Cobb: "I do not know of any provision in the statute. I do not know whether there is or not."

Judge Scott: "Gentlemen, you are both young men and I do not wish to injure you. I know that sometimes attorneys, and especially young attorneys,—sometimes old ones,—in the flash of the moment and amid excitement, say things and do things which are a reflection and which should not have been said or put in the record. You say here that 'the charge of the court heretofore given to the grand jury, who found the indictment herein, by the Hon. C. R. Scott, judge, was inflammatory and prejudicial,' and that 'said charge aroused the prejudice of said grand jurors.' You both admit that there is no ground laid down in the statute for quashing the indictment as contemplated by the matters I have just read."

Mr. Cobb: "I do not know that we do."

Judge Scott: "I will give you an opportunity to strike it out if you are so advised. It is a direct charge at the court of prejudicing the grand jury by an inflammatory charge. You look at the word 'inflammatory' and you will see that it has a bad meaning when applied to a court. I will give you an opportunity to strike it out."

Mr. Clair: "I would like to take time to consider it."

Judge Scott: "You will do it now or not at all. It is my turn now."

Mr. Cobb: "At the present time I am not prepared to strike out anything from the motion that we have filed heretofore. In consid-

eration of the fact that we are called upon peremptorily to do so 'now or never,' my answer will be 'never.' If I were permitted to deliberate for an hour or two, I might be led to strike it out; but in due consideration for my client, still believing that that would be one of the things that would possibly promote his interests in the trial of this case if taken to another court, I refuse to strike anything, so far as I am concerned, from the motion."

At this point both defendants were adjudged to be guilty of contempt, although the colloquy was continued at considerable length and ending with a statement by the judge that further action would be deferred until the termination of the trial with which the accused were engaged; but, according to the transcript, sentence appears to have been pronounced immediately. The charge in question is a lengthy and able discourse on the duties of grand jurors, in which especial prominence is given to the crime of bribery, as shown by the following quotations therefrom:

Bribers and bribed alike are, as other criminals often appear to be, moving in straight lines, when their ways are most devious and serpentine. Nor should you expect always to find a money consideration, paid direct, as the price of the bribery, as criminals generally act upon the principles of "indirect radiation." It takes two or more to commit bribery,—the briber and the bribed;—purchaser and seller. Both are guilty, and both should receive merited mention in your proceedings. Such criminals as these are defiantly walking our streets, sneeringly, brazenly, and insultingly bidding defiance to the law that punishes bribery, by asking, "What are you going to do about it?" If you do your duty as a grand jury, such criminals will have no occasion or excuse for asking that question hereafter.

* * * * * * * * *

If any public officer converts or diverts the public funds under his care, or subject to his direction or control, or directly or indirectly uses them in whole or in part for his own or his friends' personal advantage, benefit, or emolument, he also is a criminal; and you should not abate your energy, or forget your obligation, or be discharged, until all such public officers, whether now in or out of office, are made to know, by proper bills of indictment (if the evidence can be had before you by the exercise of diligence on your part), that the people will not longer be robbed by their public officials, without a pronounced protest, so long as there remains room for convicts in the state penitentiary, and a grand jury can be found to do its duty.

* * * * * * *

A dishonest public official, whether ministerial, legislative, or judicial, is a public menace, and should be hunted down as a blighter of public confidence and a peculator and speculator upon the property and rights of the public; a perjurer who makes merchandise, for his own selfish and corrupt purposes, of the confidence and faith reposed in him by the people; worse than a highway robber, because his victims, the people, have not a fighting chance to protect themselves ere he robs them. To call such an officer a thief would be flattery. That such persons have held office, within the boundaries of this county and within the statute of limitations, is quite manifest, unless all indications point the wrong way. Nor will you have to exercise a very high degree of diligence to find them if you are looking for public criminals.

* * * * * * * * *

A little well directed effort on your part, as grand jurors, in the direction here indicated would doubtless open up a field into which a stone could not be thrown without hitting a criminal. You should see to it that the stone is thrown, and thrown hard. You owe it to yourselves, the people whom you represent in your present service, and to your sworn obligations to make that effort, and to make it with such an uncompromising zeal that hereafter a mark more indelible than that put upon Cain shall be stamped upon their foreheads, marking them as "ticket-of-leave-men" and moral blisters upon the body politic.

There comes up from the people a command for a "forward march" all along the line of your duty. You should give heed to that cry, for it comes from a patient and long suffering endurance which has at last reached its limit.

1. The first question suggested by the record is whether the term "inflammatory," as applied to the charge of the judge, is an unmerited criticism. The adjective "inflammatory," as here used, is derived from the verb "inflame," which is thus defined: 1. "To set on fire; to kindle; to inflame." 2. "To excite or increase; as, passion or appetite; to enkindle into violent action." 3. "To exaggerate, aggravate, in description." 4. "To heat; to excite excessive action in the blood vessels." 5. "To provoke; to irritate to anger." 6. "To increase; to exasperate." 7. "To increase; to augment." (*Vide* Webster's Dictionary.) Fairly construed, the charge under consideration is an impassioned appeal, if not indeed an express direction, to the grand jury to present by

indictment certain persons not named, but who are assumed to be guilty of the crime of bribery. In that sense, if not inflammatory, it is at least what in the science of medicine is denominated "heroic treatment." In directing the attention of the grand jury to particular subjects of inquiry, or to particular offenses or classes of offenses, a large discretion is conferred upon the presiding judge, and which discretion appellate courts will not assume to control. In this instance we assume that sufficient ground existed within his knowledge for the giving of especial emphasis to the crime of bribery; but when resort is had to a remedy so drastic as that here adopted, it must be with the understanding that parties whose rights are affected thereby may by a proper proceeding call for judgment upon the action of the court or judge in order to determine whether there has been an abuse of discretion to their prejudice. This we understand to have been the object of the motion to quash the indictment against Moriarty, and is, we think, a sufficient justification in this prosecution, unless a different rule is to be applied on account of the mistake of remedy in presenting the question by motion instead of by plea, a subject which will be hereafter considered.

2. We are constrained, after a careful consideration of the subject, to regard the objection made to the charge, so far as it assumes the commission of the crime of bribery, as a merited criticism. While doubtless intended as an admonition to the jurors with respect to their duty, it cannot be construed otherwise than as an invasion of their province, which amounts to an abuse of discretion. The finding or presentment of the grand jury of necessity includes two elements, viz., first, the *corpus delicti*, and second, a finding that the offense named was committed by the persons charged. Both facts must be found by the jurors and cannot be dictated by the judge. The history of the English constitution presents no more interesting or instructive field for study than the long and stubborn contest between the

people and commons on one side, and the ministers and judges on the other side, concerning the independence of grand and petit juries, and the right of the judiciary to dictate verdicts and bills of indictment. We are told that during the existence of the star chamber it was the practice to punish jurors by fine and imprisonment for refusing to find verdicts and indictments when commanded by the judges; and according to 2 Hallam [standard ed.], 227, such punishments were not infrequent at the time of the Restoration, in 1660, and until declared to be illegal by Sir Matthew Hale, who subsequently said:

> The privilege of an Englishman is that his life shall not be drawn in danger without due presentment or indictment; and this would be but a slender screen or safeguard if every justice of the peace, or commissioner of oyer or terminer, or gaol delivery, may make the grand jury present what he pleases, or otherwise fine them. (2 Hale, Pleas of the Crown [Eng.], 161.)

The development of this branch of the law during the next century is shown by the observation of Mr. Chitty in his treatise on Criminal Law (vol. 1, 312), where, referring to the duty of the court in charging the grand jury, he says:

> In the performance of this duty, the judicious magistrate will take care, not only that his remarks are, in general, suited to the offices which a grand jury have to discharge, but have a plain reference to local objects, events, discussions, and concerns, as far as they properly fall within the limits of his jurisdiction, and seem entitled to his notice. He will strive to allay animosities, to destroy the spirit of party, to discountenance every receptacle of idleness and vice, as well as every vestige of popular barbarity and grossness.

The trend of judicial sentiment in this country is illustrated by the language of Justice Field of the supreme court of the United States, who, in charging a grand jury in the year 1872, said it was—

> designed as a means of not only bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizens against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. (See 2 Sawyer [U. S. C. C.], 669.)

In the recent case of *Turlington v. State,* 102 Mo., 642, it was shown on the trial of a plea in abatement that in charging the grand jury which returned the indictment for murder the presiding judge had said:

> Your sheriff has been assassinated—not assassinated, but murdered—in the jail of your county by one whom he had in charge at the time. It is your duty, gentlemen, to investigate this matter. The crime is no greater because it was committed in the jail, for murder is murder, and the aggressor is equally responsible for the crime as is he had met his victim on the street and shot him down. What the circumstances of the killing were is not for me to say. It is my duty to give the charge to the jury, and it is then your duty to hear this matter when it comes before you, and treat each party fairly, and after your determination of the case, the court sits here for the protection of the accused as well as for the public. Whether the crime was committed in the jail I don't know, and it is not for me to say; but if you find that such a murder has been committed in your jail, whether it was the object of this party to secure his liberty or not, makes no difference whatever. It is my duty, gentlemen, to charge you in regard to this matter; it is your duty to investigate the matter, and, if you find the facts sufficient to justify you in believing that there has been a murder committed in your jail, you should find an indictment against the party committing it.

The charge was held not prejudicial, on account of the caution contained in the concluding paragraph; but referring to the language quoted above the supreme court say:

> It is manifestly improper for a circuit judge, in his charge to a grand jury, to express an opinion as to the guilt or innocence of a party accused of a crime to be investigated. The action of the grand jury is a part of the judicial proceedings which may terminate in a conviction and sentence of the accused. The court sits in judgment between the state and her citizens, and should "hold the scales with a firm hand, without bias or prejudice." The language of the judge in this case was improper, and cannot be justified.

It is true that case differs from the one before us, inasmuch as reference was therein made to a particular person as guilty of murder. The difference is, however, in degree only and not in principle. Here, although the charge does not point to any particular person, it is emphatically declared that the crime of bribery and receiving bribes by public officers has been recently committed in Douglas

county, accompanied by direction to the jurors to indict some person or persons therefor, and a reminder that a demand has come up from the people for a "forward march," and that a patient and long suffering endurance has at last reached its limit. We must not be understood as intimating that the presiding judge is in every case prohibited from assuming that indictable offenses have been committed, concerning which it is the duty of the grand jury to inquire. We can conceive of cases which may be committed *in facie curiæ*, and possibly others of which it is the duty of courts to take notice without proof, but such cases are exceptions. Here, according to the record and as conceded by the state, the crime of bribery was a pure assumption, perhaps correctly assumed, but of which the judge possessed such information only as was derived from current rumor. The reference to the conditions of the public sentiment above mentioned is especially unfortunate and for which the charge is justly subject to criticism. Public sentiment, in a representative government, controls in the solution of political questions; but we recognize in it a dangerous force when it seeks to dictate judicial decisions. So potent is this proposition that further discussion of the question is deemed superfluous.

3. It is conceded that the remedy was by plea, and not by motion to quash; but, as we have seen, it was Moriarty's right to put in issue the question of the propriety of the charge, and the fact that he mistook his remedy, to his prejudice, we regard as unimportant. The accused appears to have acted in perfect good faith in advising and signing the motion, and should not be held to a stricter liability than he would have incurred had he alleged the same facts in a plea in abatement. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with the views herein stated.

REVERSED AND REMANDED.

SILAS COBB V. STATE OF NEBRASKA.

FILED MAY 15, 1894. No. 5291.

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

Charles Offutt, Lee S. Estelle, and *W. D. McHugh,* for plaintiff in error.

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

POST, J.

The questions presented by this case being in all respects identical with the case of *Clair v. State,* 40 Neb., 534, it is for reasons therein stated

REVERSED AND REMANDED.

SAMUEL BARNES V. STATE OF NEBRASKA.

FILED MAY 15, 1894. No. 6553.

1. **Larceny:** INDICTMENT: DESCRIPTION OF PROPERTY. In an indictment or information for larceny the property alleged to have been stolen should be described with sufficient particularity to enable the court to determine that such property is the subject of larceny; to advise the accused with reasonable certainty of the property meant, and enable him to make the needful preparations to meet such charge at the trial.

2. ———: ———. An indictment charging the accused with "stealing three hogs about eleven months old, weighing about 175 pounds each, each of the value of $12," is sufficiently definite.

3. ———: ———: STEALING: INSTRUCTIONS. The term "steal," as used in the Criminal Code, includes all of the elements of lar-

ceny at common law, and it is not error to instruct that the jury may convict on finding the accused guilty of stealing the property described.

4. ———: INSTRUCTIONS. But where the court undertakes to define larceny as at common law, such definition is faulty if it omits any essential element of said crime.

5. ———: ———. An instruction which authorizes a conviction provided the jury shall find, beyond a reasonable doubt, first, that the accused took and carried away the property described, intending to deprive the owner thereof and to convert the same to his own use; second, that he intended to deprive the owner permanently of his property, is erroneous, for the reason that it omits the element of felonious intent.

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

Jesse T. Davis and *S. H. Cochran*, for plaintiff in error, cited: *State v. Patrick*, 28 Am. Rep. [N. Car.], 340; *State v. Morey*, 2 Wis., 362; *Thompson v. State*, 4 Neb., 524; *Turner v. O'Brien*, 5 Neb., 548; *Baldwin v. State*, 12 Neb., 66; *Mead v. State*, 25 Neb., 447; *Polin v. State*, 14 Neb., 540; *Langford v. State*, 32 Neb., 782; *People v. Brown*, 48 Cal., 256; *State v. Tucker*, 76 Ia., 233; *State v. Manley*, 74 Ia., 561; *State v. Brown*, 25 Ia., 561.

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

The description of the animals given in the information filed in this case is sufficient. (*State v. Mansfield*, 33 Tex., 129; *People v. Stanford*, 64 Cal., 27; *People v. Littlefield*, 5 Cal., 355; *Perry v. State*, 37 Ark., 54; *Matthews v. State*, 24 Ark., 484; *Brown v. State*, 44 Ga., 300; *Grant v. State*, 2 Tex. App., 163.)

POST, J.

This is a petition in error from the district court of Burt county, and brings up for review the judgment whereby the plaintiff in error was convicted of the crime of grand larceny and sentenced to imprisonment in the penitentiary.

1. The first error assigned relates to the sufficiency of the description of a portion of the property alleged to have been stolen, viz., "three hogs about eleven months old, weighing about 175 pounds each, each of the value of $12." The ground of the objection to the foregoing description is that it does not apprise the accused of the specific offense charged, or to enable him to successfully plead this judgment in a second prosecution on the same charge. It is true that in an indictment for larceny the property alleged to have been stolen should be described with reasonable certainty; and where the description is so vague or uncertain as not to advise the accused of the particular kind or character of property stolen, the indictment will be held insufficient. For instance, in *State v. Morey*, 2 Wis., 362, a charge of stealing "one hundred pounds of meat," without any designation of the kind or quality of meat, was held bad for uncertainty; and in *State v. Patrick*, 79 N. Car., 655, the designation of the stolen animal as "a yearling" was held insufficient. The sound rule is believed to be that the court must be able to determine from the indictment that the thing alleged to have been stolen is the subject of larceny, that the accused be advised with reasonable certainty of the property meant, and put in a position to make the needful preparation to meet such charge at the trial. (2 Bishop, Criminal Procedure, 702.) Following this rule the following descriptions have been held sufficient: "One sheep," "a horse," "a certain mare," "one certain hog," "one cow," etc. (2 Bishop, Criminal Procedure, 700.) The court did not err, therefore, in holding the information sufficient.

2. Exception was taken to the following, among other instructions: "To this information the defendant has entered a plea of not guilty, and this plea is a denial on his part of every material allegation charged against him in the information. In order, therefore, to warrant you in convicting him on the charge made against him the state must

have convinced you, by the evidence adduced upon the trial, of each of the following material allegations of information: First, that the defendant took and carried away the hogs described in the information, or some one or more of them; second, that in taking said hogs, or one or more of them (if he took any), he intended to deprive the owner thereof permanently of his property and to convert them to his own use and benefit; third, that said hogs were the property of one Seth Kelley, and were of some value; and, fourth, that this occurred in this county and state on or about the 18th day of May, 1893, or at any time within the three years prior to the 10th day of October, 1893, the date of the filing of the information against him in this case." The vice imputed to this instruction is that it excludes the felonious taking, which is a necessary element of the crime of larceny. It has been held that the term "steal," as used in the statute defining larceny, is sufficiently comprehensive to include every element of larceny at common law. (*State v. Chambers*, 2 Greene [Ia.], 308; *State v. Mann*, 25 O. St., 668.) In states where that construction prevails it is not error to instruct that the jury may convict on finding the accused guilty of stealing the property as charged, without further definition of the crime; but an instruction which assumes to define larceny as at common law is faulty, which omits an essential element thereof. In *Thompson v. People*, 4 Neb., 524, an instruction substantially like the one under consideration was condemned on the ground that it authorized a conviction without proof of the *animus fraudendi*, and that case is approved in *Turner v. O'Brien*, 5 Neb., 542; *Baldwin v. State*, 12 Neb., 61. The authorities bearing upon this question are cited and fully considered by the supreme court of Missouri in a recent case (*State v. Moore*, 101 Mo., 316), where an instruction, in all material respects identical with the one now before us, was condemned on similar grounds. There are other questions discussed by counsel, but since the judgment

must be reversed for reasons above stated, it is deemed unnecessary to notice them.

REVERSED.

JAMES WHITCOMB ET AL. V. JOHN D. ATKINS.

FILED MAY 15, 1894. NO. 5344.

1. **Garnishment.** Proceedings in garnishment are authorized by section 244 of the Code only after judgment upon which an execution has been issued and returned unsatisfied.

2. ———: PAYMENT BY GARNISHEE. Where the garnishee summons is issued and returned, under the provisions of said section, before judgment against the principal defendant, such proceeding is void, and the payment of money by the garnishee in obedience to an order therein by a justice of the peace is no defense in a subsequent action by the defendant or his assignee.

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

Barnes & Tyler and *Abbott & Curry*, for plaintiffs in error.

Guy T. Graves and *Jay & Beck*, *contra*.

POST, J.

This was an action in the district court of Thurston county by the plaintiffs in error against the defendant in error on an agreement in writing, of which the following is a copy:

"BANCROFT, NEBRASKA, Jan. 7, 1890.

"Bought of Eugene Waldvogle 1,889 bushels of corn at 15 cents per bushel, ($283.35) two hundred and eighty-three and $\frac{35}{100}$ dollars. Paid on same ($68.25) sixty-eight

and $\frac{25}{100}$ dollars. Balance due, $215.10, less $100 to be held for J. B. Moncravie until his rent is settled.

"J. D. ATKINS."

And which was indorsed as follows:

"PENDER, NEB., Feb. 8, 1890.

"For value received, I hereby sell, assign, and set over all my right, title, and interest in the within due bill to Abbott & Curry. EUGENE WALDVOGLE."

"Pay to Bank of Pender. ABBOTT & CURRY."

The answer of the defendant admitted the execution of the agreement set out and alleged as a defense, the payment of the amount due thereon into court in obedience to the orders of the county judge in certain proceedings in which he had been summoned as garnishee of said Waldvogle. The reply was a general denial.

The first and only assignment of error necessary to discuss is that relating to the validity of the proceedings in garnishment. It is shown by the bill of exceptions that on the 6th day of February, 1890, one McHaffie filed with the county judge a bill of particulars against Eugene Waldvogle and Hiram Forbes claiming $35.75 and interest for goods sold and delivered, and procured a summons to be issued, returnable February 13. He also at the same time filed a paper entitled an "affidavit for garnishment," as follows:

"In the County Court of Thurston County, Nebraska.

"W. MCHAFFIE, PLAINTIFF,
v.
HIRAM FORBES AND EUGENE WALDVOGLE, DEFENDANTS.

"STATE OF NEBRASKA, THURSTON COUNTY. } ss.

"W. McHaffie, being first duly sworn, says he is the plaintiff in the above entitled action; that the plaintiff recovered a judgment therein against the said defendants on the 5th day of February, A. D. 1890; that there is now

due on said judgment the sum of $35.75; that an execution issued on said judgment has been returned unsatisfied for want of sufficient property belonging to the said defendant whereof to levy and collect the same. And affiant further says that he has good reason to, and does, believe that J. D. Atkins, in said county, has property of and is indebted to the said judgment debtor. W. MCHAFFIE.

"Subscribed in my presence and sworn to before me this 6th day of February, A. D. 1890. J. G. DOWNS,
"County Judge."

Upon the filing of the foregoing affidavit a summons was issued for the defendant in error as garnishee, by which he was notified to appear on the 13th day of February and answer touching his indebtedness to the defendant therein. On the return day of the summons judgment was entered against the defendants by default. On the same day the defendant in error, having answered that he was indebted to Waldvogle in the sum of $100, was ordered to pay into court the amount of said judgment, to-wit, $47.22.

In this connection it should be stated that similar proceedings were had in a suit by one Bringe against Waldvogle and Forbes, in which the defendant in error was summoned as garnishee, but for the reason that the records are in all material respects identical, we have seen fit to confine our examination to the case first mentioned.

The question presented is whether the order relied upon by the defendant is irregular merely and a sufficient justification of the payment when assailed in a collateral proceeding, or whether it is void for want of jurisdiction. It is not contended that the proceeding is in any sense a compliance with the provisions for garnishment before judgment in aid of attachment; but it is said in the brief of counsel for the defendant in error that "the affidavit for garnishment was in proper form and contains all of the averments required by section 244 of the Code." By the section

named it is provided as follows: "In all cases where an execution issued upon any judgment of a court of record, or of a justice of the peace, shall be returned by the officer in whose hands the same was placed for service, unsatisfied for want of sufficient property whereof to levy and collect the same, and the judgment creditor in such execution, his agent, or attorney, shall file an affidavit in the office of the clerk of the court, or justice of the peace, from which said execution issued, that he has good reason to and does believe that any person or corporation (naming them) have property of and are indebted to the judgment debtor, the said clerk or justice of the peace shall issue a summons as in other cases, requiring such person or corporation to appear in court and answer such interrogatories as shall be propounded to him, it, or them, touching the goods, chattels, rights, and credits of the said judgment debtor in his, its, or their possession or control." In *Clough v. Buck*, 6 Neb., 343, it was held that garnishment was authorized by this section only after judgment and an execution thereon returned unsatisfied for want of property. If the question was to be determined from the affidavit alone, we should feel constrained to hold that the necessary steps had been taken to authorize the garnishment proceeding, but, unfortunately for that contention, every averment of the affidavit is contradicted by the record in the case. McHaffie could not have recovered a judgment against Waldvogle on the 5th day of February, as his bill of particulars was not filed until the next day. It is not true that an execution had been returned unsatisfied, since, according to the transcript, the only execution ever issued was on the 13th day of February, the return day of the summons. In determining the existence of facts essential to confer jurisdiction the court will take notice of what is disclosed by its own record; and the fact that an affidavit had in this case been filed so palpably at variance with the admitted facts as to cast suspicion upon the motions of the

maker, cannot make this an exception to that rule. Our conclusion is that the garnishment proceeding was without jurisdiction and void, and not merely irregular, as it appears to have been regarded by the district court. It follows that payment in obedience to the order of the county judge cannot be alleged as a defense to the action on the contract. The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

VICTOR C. GOODWIN V. CHARLES W. POTTER ET AL.

FILED MAY 15, 1894. No. 5274.

1. **Replevin:** JUDGMENT. In an action of replevin, where the property has been taken under the writ and delivered to plaintiff in the case, and the jury find for the defendant, the judgment must be in the alternative, for the return of the property, or its value if a return cannot be had. The statutory provision requiring that the judgment shall be as before stated is imperative and mandatory.

2. ———: VERDICT: REVIEW. Where the verdict of a jury in an action of replevin (the property in controversy having been taken under the writ and delivered to plaintiff) was for defendant, but did not contain an assessment of the value of the property or of the defendants' interest therein, *held*, that the verdict was insufficient and fatally defective, and a judgment in the alternative, for the return "of the property, and in case a return cannot be had, for the value thereof, of $90.50," was not supported by the verdict, and was erroneous and prejudicial to plaintiff.

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

L. K. Alder and *Alex. Altschuler*, for plaintiff in error.

R. M. Logan, contra.

HARRISON, J.

The plaintiff in error, who was plaintiff in the lower court, on or about April 10, 1890, commenced an action of replevin before a justice of the peace in Brown county to recover the possession of certain personal property which he alleged belonged to him, and of which he was entitled to the immediate possession. The property was taken under the writ of replevin and delivered to plaintiff. The trial before a justice of the peace and a jury, held April 21, 1890, resulting in a verdict for Kingery, one of the defendants, which was as follows:

"We, the jury in this case, being duly impaneled and sworn in the above case, do find and say that at the time of the commencement of this action the right of property and right of possession to the same was in the defendant J. M. Kingery, and assess his damages in the sum of $1."

And the justice rendered judgment thereon in words and figures following, to-wit:

"It is therefore considered, ordered, and adjudged by me that the defendant J. M. Kingery have and recover of the plaintiff a judgment for the return of the property in question, and in case a return cannot be had, for the value thereof, of $90.50, and that he recover the amount of damages of $1, and costs of this suit, taxed at $39.55."

The transcript of the record of the proceedings before the justice shows that the docket contained these further entries, viz.:

"April 21, 1890, issued order for the return of the property, which was on the 23d day of April returned as follows:

"'Received the above described property.

"'J. M. KINGERY.'

"Said order is hereto attached and marked Exhibit 'A' and made a part hereof. O. C. BARTLETT,

"*Justice of the Peace.*

"'EXHIBIT "A."

"'In the Justice Court held before me, O. C. Bartlett, in and for Ainsworth Precinct, Brown County, Nebraska, April 21, 1890.

"'V. C. GOODWIN, PLAINTIFF,
v.
C. W. POTTER, J. M. KINGERY, AND F. HOLUBAR, DEFENDANTS.

"'Whereas, in an action pending in this court, J. M. Kingery recovered the following described property: One spotted bull, one red cow and calf, one red and roan cow and calf, one spotted cow, three yearling heifers: You are therefore ordered to deliver to J. M. Kingery, or his agent, the above described property upon demand.

"'O. C. BARTLETT,
"'*Justice of the Peace.*'

"'April 21, 1890. Deliver the above property to W. H. Magill. J. M. KINGERY.

"'Received the above described property.

"'J. M. KINGERY.'"

The plaintiff removed the case to the district court of Brown county by petition in error and in the district court filed a motion, the object and purpose of which was to have stricken from the transcript of the justice's record all that appeared therein after the entry of the judgment and the name of the justice signed thereto.

The errors upon which the case, according to the record, was argued and determined in the district court were that the verdict was defective and irregular, in that it did not find the value of the property, or the value of Kingery's right of possession, and that the justice erred in rendering any judgment upon such a verdict, it being insufficient to support the judgment entered by the justice. The following entry contains the findings and decision of the district court:

"O'NEILL, NEBRASKA, 4-13-1891.

C. F. Boyd, Esq., Clerk, Ainsworth—DEAR SIR: Herein files in Goodwin v. Potter and Kingery. For the benefit of counsel who may wish to know my reasons for my decision I will say that I decide the case upon the following propositions:

"1. It was positive error for the justice to make a finding of the value of the property (the jury having failed to do so) and render a judgment on such finding, together with a verdict of the jury.

"2. It appears by the justice's transcript, and not simply by Mr. Kingery's receipt on the original papers (as I had it in my mind when at Ainsworth), that the property had been returned.

"3. The question then decisive of the case is whether the error committed is prejudicial to the plaintiff, and I am of the opinion it is not—not for the reason merely that plaintiff may have waived it by a voluntary surrender of the property (which I claim he did not), but for the reason that the property has in fact been received by the defendant and it is therefore impossible now for the defendant to enforce that portion of the judgment based on the finding of value,—the other alternative having been satisfied, that is also satisfied,—and I cannot possibly conceive how the plaintiff has been prejudiced.

"4. This mere formal grievance could have been redressed by appeal, not by error. Judgment affirmed.

"Truly, M. P. KINKAID, *Judge.*"

The case is brought here by plaintiff on petition in error to obtain a review of the action of the district court.

The main question presented for decision is, was the verdict in the case, in that it failed to find any value to the property, so defective that no judgment could be rendered thereon? Section 1041 of our Code, in reference to the action of replevin before justices of the peace, is as follows: "If the property has been delivered to the

plaintiff, and judgment be rendered against him, or if he otherwise fail to prosecute his action to final judgment, the justice shall, on application of the defendant, or his attorney, impanel a jury to inquire into the right of property and right of possession of defendant to the property taken. If the jury shall be satisfied that the said property was the property of the defendant at the commencement of the action, or if they shall find that the defendant was entitled only to the possession of the same, at such time, then in either case they shall assess such damages for the defendant as are right and proper, for which, with costs of suit, the court shall render judgment for the defendant. And in all cases where the property has been delivered to the plaintiff, unless the jury shall find for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant, for which, with costs of suit, the court shall render judgment for the defendant." And section 191*a* further provides: "The judgment in the cases mentioned in sections one hundred and ninety and one hundred and ninety-one, and in section one thousand and forty-one of said Code, shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property, and costs of suit."

The language of the last section leads to the conclusion that the judgment must conform to its requirements in all respects, or in all essential particulars. In *Manker v. Sine*, 35 Neb., 746, it was held: "In an action of replevin, where the property has been delivered to the plaintiff, in case a verdict is returned in favor of the defendant, the judgment must be in the alternative, for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for

the unlawful detention. The statute requiring the judgment to be in the alternative form is imperative;" and in the text of the opinion it is said in referring to the above section 191*a*: "The statute is imperative that where the property has been delivered to the plaintiff in replevin, in case a verdict is returned for the defendant, the judgment must be for the return of the property, or its value in case it cannot be returned, or the value of the defendant's possession. This statutory provision is mandatory. (*Hooker v. Hammill*, 7 Neb., 231; *Lee v. Hastings*, 13 Neb., 508.) * * * We think the plaintiff has a right to insist that the judgment shall be in the alternative." It being established that the judgment must be in the alternative, it follows that the verdict must be one upon which such a judgment could be based,—a verdict in form and substance sufficient to support the judgment prescribed by law. The justice of the peace had no power to supply the finding of value and enter the judgment that he did, since the jury had not assessed the value by their verdict. The statute imperatively directs that the judgment must be rendered in the alternative, and the justice had no discretion. He must, if he rendered judgment, enter an alternative one; and as the verdict of the jury was not only irregular and insufficient in substance, in that it contained no finding of value, no such judgment as was strictly required by statute could be predicated upon it. The judgment could not be extended in substance beyond the verdict upon which it depended, or from which it derived its force and validity. The verdict did not assess or name any value, omitted an imperative requirement of the law, and it was error to enter any judgment upon it, and prejudicial to plaintiff. (See *Meeker v. Johnson*, 28 Pac. Rep. [Wash.], 542; Wells, Replevin, sec. 760; Cobbey, Replevin, secs. 1061, 1062; *Archer v. Long*, 11 S. E. Rep. [S. Car.], 86; *Singer Mfg. Co. v. Dunham*, 33 Neb., 686.) The value of the property was put in issue by the pleadings, and was one of the

essential facts in controversy, to be determined by the jury, and the verdict, wherein it failed to find upon this issue, was defective and incomplete. (*Meeker v. Johnson, supra.*) It follows, if the judgment was unwarranted by the verdict and invalid, that what was done under it could and did not cure the error; and the fact that an order was issued and the property taken from the plaintiff by virtue of it did not operate to deprive the plaintiff of the right to have the case reviewed and, if any prejudicial error discovered, reversed. The decision of the lower court is reversed and the case remanded for further proceedings according to law.

REVERSED AND REMANDED.

FAYETTE I. FOSS v. LORENZO MARR ET AL.

FILED MAY 15, 1894. No. 5601.

1. **Replevin:** FINDINGS: REVIEW. An action of replevin was commenced in the district court and the property taken under the writ and delivered to the plaintiff. The parties to the action waived a jury and submitted the case to the court for decision upon a stipulated statement of the facts. The court made a general finding for defendants, containing no valuation of the property, and rendered a judgment for money only, based upon such finding. *Held*, That both finding and judgment were erroneous, to such an extent as to call for a reversal of the case.
2. **Mortgages:** FORECLOSURE: GROWING CROPS. A matured crop of corn standing ungathered upon land sold at judicial sale, which was not considered or taken into account by the appraisers in arriving at the value of the premises sold, did not pass to the purchaser at the judicial sale, but remained the property of the mortgagor who had planted and cultivated it.

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

W. H. Morris, for plaintiff in error.

House & Blackledge, contra.

HARRISON, J.

November 4, 1891, F. I. Foss commenced an action of replevin in the district court of Hitchcock county, Nebraska, to recover, as is stated in the petition, "all corn now standing and growing, and all corn now in crib or lying in piles, upon the following described real estate, to-wit: The southeast quarter of section 4, and the northwest quarter and southeast quarter and the north half of the southwest quarter of section 3, all in township 3 north, of range 31 west of the 6th P. M., in Hitchcock county, Nebraska, of the value of $800." Writ was issued, the property taken and bond given, and the property was delivered to plaintiff. Issue being duly joined in the case, a jury was waived and a stipulated statement of the facts filed and the case submitted to the judge of the court for decision and judgment. The stipulation of submission is as follows: "It is hereby stipulated by and between the parties that should the court desire to take this cause under advisement, the bill of exceptions herein shall be signed, and the motion for new trial, by the parties filed herein, shall be taken and deemed as filed of this term; and the decision of the court, when rendered, shall be decreed as rendered of this term, and that the exceptions of the parties hereto shall be entered, and that all the time that would be to each party, if said judgment was rendered at this term, shall be saved to the several parties herein, and all things done within the time required by law shall be deemed and filed as if done at this term." The plaintiff's motion for a new trial was afterwards overruled, as appears by the record, and judgment rendered as follows: "March 23, 1892. Trial to the court upon the petition, answer, and the stipulation of the parties to the action. The court finds for the defendants. It is

therefore considered by the court that the defendants recover from the plaintiff the sum of $325." The plaintiff brings the case to this court by petition in error for the purpose of reviewing the decision and judgment of the lower court.

It will be better here to give a statement of some facts regarding prior actions and transactions by and between some of the parties to this suit which led up to and finally culminated in this action. Lorenzo and Rebecca Marr, of defendants, were husband and wife, and in 1888 Lorenzo was the owner of the lands hereinbefore described, and he and his wife borrowed some $3,300 of the Massachusetts Mutual Life Insurance Company and gave a mortgage on the land to secure the note evidencing the loan, and executed and delivered to Dawes & Foss, a firm of which plaintiff was a member, a second mortgage on the same lands for the sum of $700. Default was made in the payment of this second mortgage, and proceedings were commenced to foreclose it. A decree was rendered November 11, 1889. The decree was stayed by defendants' request for the statutory period, then order of sale issued, and was delivered to the sheriff, of date October 2, 1890. February 2, 1891, the real estate was sold subject to the mortgage of the life insurance company and tax liens, the plaintiff herein being the purchaser. September 21, 1891, the sale was duly confirmed, and on October 20, 1891, the sheriff made and delivered to F. I. Foss, the purchaser, a deed for the premises, and, in obedience to an order of the court, put him in possession of the lands. During the year 1891, and after the sale, which was of date February 2, 1891, Lorenzo Marr cultivated the farming lands and planted thereon wheat, oats, flax and corn, and gathered of these crops all the wheat, oats, and flax, and a portion of the corn. When the sale was confirmed there was standing in the field, matured, but ungathered and unsevered from the soil, some corn, being the same corn in controversy in this action,

which was gathered by defendants after the confirmation of the sale and possession of the lands by plaintiff, defendants then entering and going upon the premises for such purpose.

The first assignment of error which is argued by counsel for plaintiff in error is that the finding of the court and its judgment entered thereon is contrary to law. This is an action of replevin, and the record shows that the property in controversy was taken under the writ of replevin and delivered to plaintiff. Where such a state of facts exists in an action, and the jury or court finds for defendant, as did the court in this case, and renders judgment, it must, in its finding, assess the value of the property, or, if the defendant's interest is special, the value of such interest, and the judgment based upon such verdict or finding must, be in the alternative, for the return of the property, or its value in case a return cannot be had. Sections 190, 191, and 191*a* of our Code of Civil Procedure applicable to finding or verdict and judgment for defendant in a suit of replevin are as follows:

"Sec. 190. If the property has been delivered to the plaintiff, and judgment be rendered against him on demurrer, or if he otherwise fail to prosecute his action to final judgment, the court shall, on application of the defendant or his attorney, impanel a jury to inquire into the right of property and right of possession of the defendant to the property taken. If the jury shall be satisfied that said property was the property of the defendant at the commencement of the action, or if they shall find that the defendant was entitled to the possession only of the same at such time, then, and in either case, they shall assess such damages for the defendant as are right and proper; for which, with costs of suit, the court shall render judgment for the defendant.

"Sec. 191. In all cases, when the property has been delivered to the plaintiff, where the jury shall find upon is-

sue joined, for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant.

"Sec. 191*a*. The judgment in the cases mentioned in sections one hundred and ninety and one hundred and ninety-one, and in section one thousand and forty-one of said Code, shall be for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property, and costs of suit."

It has been held, referring to section 191*a*, in *Manker v. Sine*, 35 Neb., 746: "In an action of replevin, where the property has been delivered to the plaintiff, in case a verdict is returned in favor of the defendant, the judgment must be in the alternative, for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for the unlawful detention. The statute requiring the judgment to be in the alternative form is imperative;" and in the body of the opinion the writer thereof states: "The judgment is erroneous, because it was rendered for money absolutely, and was not in the alternative, for a return of the property, or the value thereof in case a return could not be had, as required by section 191*a* of the Code. The statute is imperative, that where the property has been delivered to the plaintiff in replevin, in case a verdict is returned for the defendant, the judgment must be for the return of the property, or its value in case it cannot be returned, or the value of the defendant's possession. This statutory provision is mandatory. (*Hooker v. Hammill*, 7 Neb., 231; *Lee v. Hastings*, 13 Neb., 508.) In the last case cited there was a stipulation that the property could

not be returned, and yet the court held that it did not preclude the necessity of an alternative judgment." The finding of the court in this case (above quoted), it will be remembered, was merely a general one in favor of defendants, without specifying what issues the court determined in their behalf, or assessing any damages, or the value of the corn, which should have been incorporated in the finding or verdict in the case, and the judgment is a money judgment in the sum of $325, with no finding to found it upon, when, by an imperative and mandatory requirement of our Code, it should have been an alternative one, for the return of the corn to defendants, or payment of its value. This was clearly such error as to call for a reversal of the case.

The only other question in the case is: The land having been sold under decree of foreclosure, and the sheriff having executed and delivered to the purchaser at such sale a deed and put him in possession of the premises, who was then entitled to the corn standing in the field unharvested or not "husked," the purchaser or the mortgagor? It being further agreed as a fact in the case, "if considered material," that the corn was not taken into consideration by the appraisers when the appraisement of the premises was made prior to the sale. The courts of last resort in the greater number of the states in the Union have established by decisions that the purchaser of lands at a mortgage foreclosure sale is entitled, as against the mortgagor of the premises, to all crops growing upon the lands at the time of sale, or, in some cases, at the time of the execution of the deed by the sheriff. The courts of some of the states have announced a different and opposite rule; *i. e.*, that growing crops do not pass to the purchaser at a judicial sale, Ohio and Pennsylvania having adhered to this latter doctrine. The case of *Crews v. Pendleton*, 1 Leigh [Va.], 297, s. c., 19 Am. Dec., 750, is a typical case of the former kind or class, and therein it is stated: "The

contract between the mortgagor and mortgagees is, in effect, this: 'I convey you my land, slaves, etc., as a security for the debts I owe you. I bind myself to pay you those debts by a given time, and if I fail, you may proceed to get a decree for the sale of the subject; meantime I remain in possession, use the slaves, and take the profits of the land; but when you get a decree, you may immediately sell everything.' Under this agreement, if the mortgagor goes on and makes preparation for a crop, he does it with a full knowledge that the land with the crop is subject to be sold if the decree be obtained before he severs it. Nor does he lose anything by this; for the crop on the land enhances the price. If by this increase the debt be overpaid, he gets the surplus; if not, still the full value of his labor goes (as he had agreed it should go) to the payment of the debt secured by the mortgage." "This," says a writer of an article on this subject in 19 American Law Review, 25, referring to the above excerpt from the Virginia case, "is the view taken by all the cases; and it may be added that in awarding the crop to the mortgagee, the law simply dispenses with a resort on his part to a judgment at law to reach the crop for the satisfaction of the debt, and that in a case where, by yielding up his lands to satisfy the debt, the mortgagor admits it to be due." I have copied this much of the article to show that the reasoning upon which the prevalent rule is founded is not applicable to the facts as stipulated in the case at bar, for, it will be remembered, it was agreed as one of the facts to be considered by the court, if material, that the corn was not valued with and as a part of the land by the appraisers, hence it did not enhance the value of the land, or enlarge the purchase price, and the mortgagor did not derive any benefit from it. In the Ohio case (*Cassilly v. Rhodes*, 12 O., 88) it is said: "This reasoning does not apply to judicial sales when conducted under our system of appraisements. The principle which now extends to personalty as well as to lands is that the

subject of sale should be appraised and not sold, except at a price bearing some proportion to its value; but where lands are valued for judicial sales, the value of the annual crops is not included in the estimate. Yet, if the crops passed, the purchaser would acquire property which had not been subjected to appraisal, and thus defeat the system of policy intended for the debtor's protection. The debtor's rights, therefore, can be saved only by regarding the annual crops as personalty, requiring a separate levy. The case of *Beggs v. Thompson*, 2 O., 105, although decided on other grounds, adopts these premises, and barely abstains from expressing this result."

From this last quotation it will be readily perceived that the reasoning in the Ohio case is very apt and pertinent to the facts in the case at bar. It must further be borne in mind that the crop in this case, corn, was not a growing crop, but had fully matured and was only awaiting the hand of the husbandman to gather it, and there was surely no hardship imposed upon the purchaser in allowing the mortgagor ingress and egress of the land to remove it. *Hecht v. Dettman*, 41 Am. Rep., 131, 56 Ia., 679, was an action of replevin to recover some barley, cut and in shocks, and oats partly threshed and partly in bundles or sheaves, all upon the premises where it was grown. The defendant was a tenant of the owner of the land, who had mortgaged it to certain parties, and among them, the plaintiff in the replevin case. After defendant had rented the land, the plaintiff foreclosed his mortgage and at the sale of the land became purchaser of the premises, and on the 7th of the month of July received a sheriff's deed of the property. At the time the deed was delivered to the plaintiff the grain in controversy in the replevin case was not cut, but it was matured and fit for harvesting prior to that time. The jury were instructed that the title of the grain passed to plaintiff by the sheriff's deed, and the court instructed them to return a verdict for the plaintiff; and on

an appeal of this and another case presented together, being between the same parties, on the same facts and rules of law, the supreme court, by Beck, J., said: "The sheriff's deed executed upon the foreclosure sale vested plaintiff with the title of the land, and the right to all growing crops followed the title thus acquired. (*Downard v. Groff*, 40 Ia., 597.)" This rule, we think, is not applicable to grain which has matured and is ready for the harvest. It then possesses the character of personal chattels and is not to be regarded as a part of the realty. (See 1 Schouler, Personal Property, 125, 126; Bingham, Sales of Real Property, 180, 181.) The conclusion is well supported upon the following reasons: "The grain being mature, the course of vegetation has ceased and the soil is no longer necessary for its existence. The connection between the grain and ground has changed. The grain no longer demands nurture from the soil. The ground now performs no other office than affording a resting place for the grain. It has the same relations to the grain that the warehouse has to the threshed grain, or the field has to the stacks of grain thereon. It will not be denied that when the grain is cut it ceases to be a part of the realty. The act of cutting, it is true, appears to sever the straw from the land, but it is demanded by the condition of the grain. It is no longer growing. It is no longer living blades which require the nourishment of the soil for its existence and development. It is changed in its nature, from growing blades of barley or oats to grain mature and ready for the reaper. Now, the mature grain is not regarded by the law, like the growing blades, as a part of the realty, but as grain in a condition of separation from the soil. Suppose the defendant had cut a part of the seventy-two acres of grain in controversy. The grain so cut, it will not be denied, would not have passed to plaintiff. There is no valid reason why the act of cutting should change the property in the grain. The work required time, and therefore

plaintiff loses a part of his property. All of the grain is in the same condition,—all ready for the reaper. The part cut is his property, while the part uncut belongs to the landowner. We think the ownership of the grain should be determined by its condition, not by the act of cutting, which cannot be done as soon as it is demanded by its condition. We conclude that for the reason the grain was mature and was uncut because defendant had been unable to do the work, it cannot be regarded as part of the realty which passed with the deed to plaintiff;" and on rehearing this opinion was adhered to.

In the state of Iowa the law provides for a definite period of time between the sale of the land in foreclosure proceedings and the time of the issuance of the deed, which is called a time of redemption. In this state we have no such statute and no such time of redemption. In Iowa the party occupying the land has positive and definite information of the date when his occupancy will terminate and must cease, and hence has less warrant or excuse for sowing or planting a crop, which to mature and harvest may require until beyond such date, than does a person occupying a farm in this state, upon which foreclosure proceedings have been commenced, where the termination of the occupancy cannot be ascertained or calculated, or even approximated, with any reasonable degree of certainty. We are satisfied that in this case, the facts agreed to by the parties disclosing that the corn was fully ripened and matured and partly husked, and further, that it was not considered by the appraisers in valuing the farm for the purposes of the sale, the defendants did not receive the benefits of it in such sale. It was not taken or was not sold as a part of the realty; was not used to, or did not have the effect of enhancing the value of the farm, or increasing the price received for it; and the defendants not having, in such sale, received the benefit of their outlay of money, bone and

sinew, or labor, it was but just and fair to allow them the corn, and that on this branch of the case the decision of the lower court was right.

A consideration of the question, generally, of who is entitled to a crop growing upon the lands sold at judicial sale, the purchaser or the owner, or parties holding under him, and a determination of the same and an announcement of the rule of law to govern in cases presenting the above question, is not deemed necessary to a discussion and decision of the case at bar upon its state of facts; hence it is not herein raised or decided. For the reason of the error in rendering judgment the same must be reversed and the cause remanded.

REVERSED AND REMANDED.

FREDERICK J. BURNETT, APPELLEE, V. FRED HOFFMAN ET AL., APPELLANTS.

FILED MAY 15, 1894. No. 5239.

Mortgage Foreclosure: ASSIGNMENT: GUARANTOR: PARTIES. A mortgagee of real property, who has sold, and to the purchaser has guarantied payment of the bond secured by mortgage, and who afterwards, on account of his guaranty, has taken up some of the overdue coupons attached to and evidencing the interest to be paid on such bond, may avail himself as to such coupons (subject only to the rights of the holder of the note guarantied) of the same remedies as, before the sale, had been available to the original mortgagee.

APPEAL from the district court of Chase county. Heard below before COCHRAN, J.

Charles W. Meeker and *John C. Hayes*, for appellants, cited: Bliss, Code Pleading, 100; Maxwell, Pleading & Practice, 25; *Swenson v. Moline Plow Co.*, 14 Kan., 387;

Shellenbarger v. Biser, 5 Neb., 195; *Burroughs v. Ellis*, 38 N. W. Rep. [Ia.], 141; *McDowell v. Lloyd*, 22 Ia., 448; *Cleveland v. Booth*, 44 N. W. Rep. [Minn.], 670; *Lowenstein v. Phelan*, 17 Neb., 429; *Pope v. Hooper*, 6 Neb., 178; *Fletcher v. Daugherty*, 13 Neb., 224; *Jackson v. Blodgett*, 5 Cow. [N. Y.], 202; *Richards v. Kountze*, 4 Neb., 207; *Holmes v. Andrews*, 16 Neb., 296; *Young v. Brand*, 15 Neb., 601; *Peet v. O'Brien*, 5 Neb., 360; *Johnson v. Hahn*, 4 Neb., 139.

Montgomery, Charlton & Hall and *Stephen S. Bishop, contra*, cited: *Colby v. Lyman*, 4 Neb., 430; *Forrer v. Kloke*, 10 Neb., 373; *White v. Bartlett*, 14 Neb., 320; *Stratton v. Reisdorph*, 35 Neb., 314; *Studebaker Mfg. Co. v. McCargur*, 20 Neb., 500; *Crouse v. Holman*, 19 Ind., 30; *Moffitt v. Roche*, 76 Ind., 75; *Rankin v. Major*, 9 Ia., 297; *Bressler v. Martin*, 34 Ill. App., 122; *Benton v. Barnet*, 59 N. H., 249; *Hardy v. Miller*, 11 Neb., 395; *Young v. Brand*, 15 Neb., 601; *Schoenheit v. Nelson*, 16 Neb., 235.

RYAN, C.

This action was brought by the appellee in the district court of Chase county for a foreclosure on past due detached coupons. The bond and mortgage securing the same were made to the American Loan & Trust Company of Ashland, Nebraska. The coupons which evidenced the obligation to pay interest on the bond above referred to were, of course, made payable to the same payee as was the bond, and each was secured by the same mortgage. The loan and trust company sold the bond, with its coupons, to a third party, and guarantied that payment of each should be made as it fell due. The defendant Fred Hoffman having failed to pay several of these coupons, they were taken up by the loan and trust company. Subsequently these coupons were assigned to Frederick J.

Burnett, who began this action for the purposes above stated. The mortgage provided that in case of failure to pay the several sums secured thereby as they fell due, the mortgagee, or its assigns, might sell the property mortgaged, for the satisfaction of the amount due. As Burnett has no higher rights than could have been asserted by the loan company, no further reference need be made to him. There was a demurrer to the petition, on the grounds of a defect of parties plaintiff and defendant, because several causes of action were improperly joined, and for the reason that the petition did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and defendants having elected to stand thereon, judgment was, on sufficient proofs, rendered against them as prayed.

It is argued that the holder of the bond to which the coupons were originally attached was a necessary party in this proceeding. No satisfactory reason is given for this contention, for, as between such party and the loan and trust company, there was the relation of creditor and debtor in a certain limited sense; that is to say, the loan and trust company was a guarantor to the purchaser that the bond and its interest-evidencing coupons should be paid as stipulated. When the loan and trust company took up these coupons, it, as between itself and the party who had purchased the coupons, had but discharged an obligation to pay, provided payment was not made by the party primarily liable. Upon the coupons so taken up the loan and trust company was entitled to foreclose the mortgage, subject to the rights of the party in whose favor the discharged guaranty had existed. There was no necessity of making the paramount incumbrancer a party. (*Forrer v. Kloke*, 10 Neb., 373; *White v. Bartlett*, 14 Neb., 320; *Stratton v. Reisdorph*, 35 Neb., 314.) In *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb., 500, it was held by this court that the assignment of one of a series of notes

secured by mortgage, without an accompanying transfer of the mortgage, was an assignment *pro tanto* of the mortgage, and the right of a holder of one of the notes to commence a foreclosure suit on his own behalf, without prejudice to the rights of the holder of any other of such notes, was expressly recognized. These propositions dispose of the questions presented by the demurrer, and the judgment of the district court is

AFFIRMED.

WADSWORTH HOLLISTER, APPELLANT, V. WILLIAM H. MANN ET AL., APPELLEES.

FILED MAY 15, 1894. No. 5378.

Mortgages: ORDER CONFIRMING SALE: REVOCATION: PURCHASER.

An order of confirmation is in its nature so far final that a purchaser from the party to whom a deed has regularly issued pursuant to such order is not bound by a subsequent revocation thereof upon proceedings commenced after he has acquired title.

APPEAL from the district court of Webster county. Heard below before GASLIN, J.

Tibbets, Morey & Ferris, for appellant.

B. F. Smith, contra.

RYAN, C.

This action, though in effect but to try title, was begun and prosecuted as of equitable cognizance. In the brief on behalf of appellant the reasons for applying for an injunction and seeking other equitable relief are thus stated: "The claim of the appellant, as set forth in his pleadings, is want of any title or equity in appellees, and repeated acts

of trespass and threats to continue the same, to the irreparable injury of appellant, and the engendering of a multiplicity of suits." No objection was made by appellees to the presentation and consideration of the matters involved as though properly determinable in equity; indeed, to facilitate the proceedings as though of equitable cognizance, the appellees stipulated with appellant that the affidavits used on the hearing had of a motion to dissolve the temporary injunction should be considered on the final trial of all the issues involved. The title of the appellees was derived through the sale made by a special master under a decree of foreclosure had in the circuit court of the United States for the district of Nebraska. No fuller description of the decree need be made, since both parties claim under it. The sale under which appellees claim was confirmed May 21, 1890, and thereunder the special master executed to Henry G. Koehler a conveyance of the property, of date May 27, 1890, which was duly filed for record two days afterward. On June 2, 1890, Henry Koehler, by his warranty deed, conveyed the property to the German Land & Mortgage Company. This deed was duly filed for record on the day immediately following its date. The German Land & Mortgage Company, by its warranty deed of date June 16, 1890, conveyed the property in dispute to William H. Mann. This deed was duly filed for record on June 19, 1890. The appellees, other than William H. Mann, were made defendants with him; but as their rights are to be measured and limited by his, no further mention will be made of their relations to the matters in controversy. On the 21st day of June, 1890, two days after the deed of William H. Mann was filed for record in Webster county, an order was made by the circuit court of the United States for the district of Nebraska, that if plaintiff should, within ten days, file his written guaranty with the clerk of said circuit court that at a resale the premises would sell for $700 more than at the former sale,

and that complainant would pay the costs of the former sale, the deed already issued would be canceled, the confirmation set aside, the sale vacated, and a resale ordered. On June 30, 1890, the conditions prescribed having been complied with, a resale of the premises was ordered and the former sale was canceled. These orders were made during the same term of court. A notice *lis pendens* was duly filed in the office of the county clerk of Webster county. On December 23, 1890, there was executed to the appellant herein a deed made by the special master in chancery, which said deed was duly filed for record on the 29th day of December following. The evidence leaves no room for doubt that immediately upon his purchase Henry G. Koehler took possession of the lands in dispute, and that his possession and that of his grantees was undisputed until about March 1, 1891, when various demonstrations were made by parties acting in the interest of appellant, apparently rather as maneuvers for advantage of position for the purposes of this action than with a view to obtaining possession.

Appellant's first contention is that the appellee William H. Mann is entitled to no consideration as a *bona fide* purchaser, for, says appellant, the only evidence on this point is that contained in the affidavit of Mr. Mann, in the following language: "And affiant further says that he purchased said land in good faith and for a valuable consideration, relying upon the title being complete as shown by said abstract, and without any knowledge or notice of any kind that any one else claimed any interest in said land." These statements in the affidavit of Mr. Mann are supplemented, as appellant admits, by the following statement in the affidavit of H. G. Koehler, that "on the 16th of June, 1890, said German Land & Mortgage Company sold said premises to William H. Mann for a valuable consideration." This case was heard, as stipulated, on "the affidavits and other evidence heretofore filed herein, and that

said affidavits shall be read as evidence and shall constitute all the evidence in the case," subject to certain enumerated exceptions which are of no importance. The language quoted above was found in affidavits, which, it was stipulated, should be used in evidence. These affidavits had been used on the hearing of a motion to dissolve an injunction, and the stipulation as to their use must have been advisedly entered into by appellant. If there existed a valid objection to the above statements now criticised, the right to insist upon such objection should have been reserved, and it could then consistently have been insisted upon. It is too late now, in the face of this stipulation, to insist that the language quoted embodied a conclusion rather than a fact, even if this criticism under any circumstances was meritorious. The finding of the trial court on this point was, that the defendants (the appellees) "acquired their rights and interest in said land in good faith without notice of any imperfection in title to said premises at the time of the acquisition thereof." This finding in favor of parties who by warranty deeds acquired title and at once went into possession was sufficiently sustained by the evidence to preclude a re-examination in this court of this question.

For the purposes of this case it must be assumed that the appellee Mann derived title through successive conveyances made by two *bona fide* purchasers in possession of the property conveyed, and that he himself was a *bona fide* purchaser for a valuable consideration, for so the trial court found. The appellant's argument is that the federal court had the power to modify its orders at any time during the term at which such orders were made; that appellees were bound to take notice of this power and of the possible action of the court thereunder, and that the confirmation of the sale having been set aside and the sale annulled, the appellees were thereby bound and their title extinguished. The case of *Deputron v. Young*, 134 U. S.,

241, is specially relied on and at length quoted from by appellant to sustain this contention. In this very case it was very significantly observed that "no rights of a third party had accrued during the time that the sale was apparently confirmed." The case of *Scudder v. Sargent*, 15 Neb., 102, is quite instructive, if not an authority in point, on this question. In that case plaintiff had a judgment in the district court of Cass county on the 21st day of November, 1879, declaring the title to the north half of the northwest quarter of section 30, in township 11 north, range 9 east, to be in her, and that defendant Sargent had no interest therein. On January 7, 1880, Sargent, by his attorney, served a notice on plaintiff of a motion to open the said judgment had solely on notice by publication. This motion to open was filed the same day notice of it was given. Afterwards, on January 31, 1880, plaintiff conveyed the real property to John G. Ellinwood. At the April term, 1880, the motion of Sargent to open the judgment was sustained and he was let in to defend. Ellinwood was admitted as a defendant, and, upon a trial had, judgment was rendered in favor of Ellinwood. It was claimed that inasmuch as Ellinwood bought the land after the notice to open the judgment had been filed and notice thereof had been given to plaintiff, Ellinwood was outside the protection given by the statute and bound by the result. LAKE, C. J., delivering the opinion of this court, said: "According to all of the authorities the action in question ceased to be pending upon the rendition of the judgment, in November, 1879, whereby the title to the property was found to be in Mrs. Scudder, the grantor. When was it again pending? Surely not until by the opening of that judgment the controversy which it had settled was renewed. This did not occur until the following April, and in the meantime Ellinwood had invested his money in the land on the faith of the judgment. The judgment rendered in November was a final judgment, nor does the fact that it

was liable to be opened or reversed by proceedings in error deprive it of that character. It fixed the rights of the parties to it and their privies, and while it stood, until it was opened and the controversy renewed, the action cannot properly be said to have been pending within the meaning of the statute."

This court applied the above doctrine in the case of *Keene v. Sallenbach*, 15 Neb., 200. This case owes its weight, not so much to any independent line of reasoning, as to the facts to which the principle announced was held applicable. In 1874, Josiah Keene, a non-resident of this state, was the owner of eighty acres of land in Lancaster county. Hiram B. and Nathaniel S. Keene were sons of Josiah, engaged in business in this state. They became insolvent, and suits were begun against them in Lancaster county and personal service had upon each of them. While the suits were only against the sons, the real property of their non-resident father was attached as the property of the sons. Judgments were rendered against the sons, whereon executions were issued and returned wholly unsatisfied. These judgments were assigned to Clinton B. Jacobs, who filed a creditor's bill against Josiah, Hiram B., and Nathaniel S., seeking to subject the land in controversy to the payment of the judgments against Hiram and Nathaniel. Service of notice of the pendency of this action was had on Josiah Keene by publication only. The creditor's bill asserted that the attachments were never discharged; that at the date of the levy thereof the real property levied on belonged to Nathaniel S. Keene and Hiram B. Keene, although the legal title to the same was in the name of Josiah Keene, but that Josiah was not the owner and never possessed any interest in the land attached and that the title was placed in Josiah's name by Nathaniel S. and Hiram B. for the purpose of hindering, delaying, and defrauding their creditors. The prayer of the bill was for the exclusion of Josiah Keene from all right, title,

or interest in said land, and that it should be subjected to the payment of the aforesaid judgments. A decree was rendered as prayed and the land ordered to be sold as the property of Hiram B. and Nathaniel S., and after confirmation of, and under, such sale the defendant received a sheriff's deed to the property. A successful application was made to open the decree rendered on the creditor's bill on service by publication alone, and upon a trial thereafter duly had it was judicially determined that the land in dispute was the property of Josiah Keene and not of Nathaniel S. and Hiram B. This fact was held not to affect the title of Sallenbach, who, under the statute, was entitled to protection as a *bona fide* purchaser. It is not attempted in this case to extend the special provisions in favor of *bona fide* purchasers found in the statute, giving the right to have opened a judgment rendered on service by publication alone. The analogy which obtains is rather as to the effect of a determination by the court, whether in the form of a final judgment or a final order. As we have seen in *Scudder v. Sargent, supra*, a final judgment leaves pending no action from which notice *pendente lite* is inferable. It seems that the order confirming a sale is, in its nature, just as final, and that thereafter there is pending nothing which would impart notice of what might result, provided proceedings should be commenced to set aside such order of confirmation. If there had been pending a motion to set aside the sale and confirmation before the purchaser thereunder had parted with his title, a question very different from that under consideration would have been presented. In such a case there would have been pending a motion upon consideration of which it might reasonably be anticipated that the sale and confirmation would be set aside. When William H. Mann and his grantor, the German Land & Mortgage Company, received conveyance of the property, there was no action or proceeding pending, consequently there was nothing from which notice could pos-

sibly be inferred by them. After title had vested by virtue of the deed of the special master, duly authorized and executed, it was held and might be conveyed as might any other title, and a subsequent holder could only be divested thereof by proceedings to which he was a party. The judgment of the district court is

AFFIRMED.

RAGAN, C., took no part in the consideration or determination of this case.

JAMES CHAPPELL, APPELLEE, V. WILLIAM H. SMITH ET AL., APPELLEES, IMPLEADED WITH MICHIGAN SAVINGS & LOAN ASSOCIATION, APPELLANT.

FILED MAY 15, 1894. No. 5408.

1. **Mechanics' Liens.** The failure of an account and its accompanying statement filed to secure a mechanic's lien to disclose affirmatively that such filing is within the requisite time to entitle to the lien claimed, operates to defeat the relation back of such lien as against liens in existence before the filing of such account.

2. ———: MORTGAGES: PRIORITIES. A mortgage, from the date of being filed for record, takes priority of mechanics' liens for labor done or material furnished when no part of such labor was done and no part of such material was furnished before such mortgage was filed. Following *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207, and *Hoagland v. Lowe*, 39 Neb., 397.

APPEAL from the district court of Sheridan county. Heard below before BARTOW, J.

Albert W. Crites, for appellant.

T. S. Tripp, Thomas L. Redlon, R. M. Magee, D. B. Jenckes, W. H. Fanning, and *Spargur & Fisher, contra.*

RYAN, C.

On August 29, 1891, James Chappell, as plaintiff, filed his petition in the district court of Sheridan county, Nebraska, wherein were made defendants William H. Smith, Fanny A. Smith, Excelsior Lumber Company, Michigan Savings & Loan Association, Charles W. Raymond, Tobias J. Thompson, John Reid, Lyon & Boyd, A. L. Pense, Frank A. Fafek, George W. Churchill, Charles S. Bates, Ira Longcor, Spargur & Fisher, John D. Zernetts & Co., and Robert McNair. In the petition it was alleged that William H. Smith was, at the various times to which reference was made in the petition, and at the date of its filing still continued to be, the owner of lot 29, block 7, in the village of Hay Springs, and that Fanny A. Smith had, at all times referred to in said petition, a dower interest in said lot, for the reason that said Fanny A. Smith was the wife of William H. Smith. The plaintiff, by his petition, sought to have a mechanic's lien declared, decreed, and enforced in his favor superior to the rights of all the defendants as to the lot above referred to, and several of the defendants, by way of cross-petition, sought like relief on claims of the same character as against the plaintiff and each co-defendant. By the default of Fannie A. Smith, Tobias J. Thompson, Charles W. Raymond, George W. Churchill, and John D. Zernetts & Co. there was ended the necessity of considering their rights or interests. By the decree the mechanics' liens were, so far as pertinent to our inquiry, declared of equal priority, each, however, being established as paramount to the rights of the Michigan Savings & Loan Association under its mortgage on said premises made by William H. Smith and his wife Fanny A. Smith. This mortgage bore date September 1, 1890, was acknowledged September 9, 1890, and was duly filed for record October 27, 1890. There was found due the Michigan Savings & Loan Association the sum of $604.50,

with seven per centum per annum interest thereon from September 6, 1890. No one appeals from this finding, so that for the purposes of this case it may be assumed as correct. The savings and loan association, just mentioned, appealed from that part of the decree which subordinated the lien of the mortgage to each mechanic's lien established, and which adjudged that said association was liable for the amount of said established mechanics' liens. At the very threshold of our inquiries we observe that the money judgment against the Michigan Savings & Loan Association cannot be sustained, for there is no evidence whereby to substantiate the claim that this association was a party to the erection of a building on the premises described. It is true it agreed to loan money to Smith to be used for that purpose, but it in no sense was a promoter of his building scheme within the lines laid down in *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719; *Millsap v. Ball*, 30 Neb., 728; *Pickens v. Plattsmouth Investment Co.*, 37 Neb., 272; *Holmes v. Hutchins*, 38 Neb., 601, and *Hoagland v. Lowe*, 39 Neb., 397.

1. It was stipulated on the trial that on November 24, 1890, W. A. Chappell, as contractor of defendant Smith, filed the affidavit and account for a lien exhibited in the petition, upon which, at the time of the trial, there was due a balance of $765.38, and that said account and claim for a lien had been, by W. A. Chappell, assigned to plaintiff. The claim for a lien was in the form and filed as shown by the following excerpt from the brief submitted on plaintiff's behalf in this court:

"MECHANIC'S LIEN.

"Filed November 24, 1890, at 7 A. M.

"W. H. SMITH, Dr., To W. A. CHAPPELL.

To material furnished and labor performed, as per contract hereto attached, marked 'A,' eleven hundred, $1,100 00

To four days' work, at three dollars per day... 12 00

To furnishing material and laying of 2,108 feet of wall, at 18c. per cubic foot.....	$379 53
1890.	$1,491 53
By cash received....	400 00
Balance due.....	$1,091 53

"Dated November 21, 1890. W. A. CHAPPELL."

"HAY SPRINGS, NEBRASKA, September 6, 1890.

"This contract, made and entered into on this day by and between William Chappell, party of the first part, and W. H. Smith, party of the second part, witnesseth: Party of the first part agrees to build the sides and east end of a building to be located on lot 29 of block 7, in Hay Springs, Nebraska; to place the walls in the ground two feet, and walls to be eighteen inches thick and twenty-six feet high from bottom of same, and the building to be twenty-five by sixty feet, and to furnish stone, mortar, and all material for same, and to do the said work all in good, substantial, and workmanlike manner; and also to plaster said building, the whole of the lower and upper stories of said building, with good three-coat hard finish work, furnishing all material for same, and to begin said work immediately and carry on the same as fast as possible without any unnecessary delay. W. H. Smith agrees to dig trench for said wall and pay said party of the first part as said work progresses, and on completion of said work, the sum of eleven hundred ($1,100) dollars. It is agreed further that at the two front corners of said building party of the first part is to lay such stone for same as party of the second part may furnish for same.

"Witness our hands this 6th day of September, 1890.

"W. A. CHAPPELL.

"R. M. MAGEE. W. H. SMITH.

"In addition to the above, parties hereto agree as follows, to-wit: That whatever is extra in amount of work

and material on account of changes in plans, the said Wm. Chappell shall be paid eighteen cents per cubic foot, and agrees to take as part pay for said work one three-year-old bay colt horse, weight about 1,050 pounds, at $125.

"W. H. SMITH.
"W. A. CHAPPELL.

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

"I, O. H. Bailey, do hereby certify the foregoing is a true and correct copy of the original contract entered into by and between W. A. Chappell and W. H. Smith.

"Witness my hand and seal this 22d day of November, 1890.

"[SEAL.] O. H. BAILEY,
"*Notary Public.*

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

"W. A. Chappell, being first duly sworn, on his oath says that the foregoing itemized account of the work, labor, skill, and materials furnished by this affiant for the said W. H. Smith under a written contract, a copy of which is hereto annexed, for the erection of a stone building on lot 29, in block 7, in the village of Hay Springs; and this affiant further says that he has, and hereby claims, a lien on the said premises for the full amount of said account, to-wit, the sum of $1,091.53, with interest thereon at the rate of seven per cent per annum from the 21st day of November, A. D. 1890; and further this affiant says not.

"W. A. CHAPPELL.

"Subscribed in my presence and sworn to before me, this 21st day of November, 1890.

"[SEAL.] T. S. TRIPP,
"*Notary Public.*

Section 3, article 1, chapter 54, Compiled Statutes, requires that "any person entitled to a lien under this chapter shall make an account in writing of the items of labor,

skill, machinery, or material furnished, or either of them, as the case may be, and after making oath thereto shall, within four months of the time of performing such labor and skill, or furnishing such machinery or material, file the same," etc. The mortgage to the Michigan Savings & Loan Association was filed for record October 27, 1890, from which time, ordinarily, the lien of the mortgage would have priority. The mechanics' lien law affords an exception to this general rule, for though the claim therefor was not filed until November 24, yet in a proper case the claim of the lienor would antedate the rights of a mortgagee under a mortgage filed a month before. To justify such priority by relation, the claimant must substantially comply with the specific statutory provisions which entitle him to this special remedy. (*Vide Richards v. Commissioners of Clay County*, 40 Neb., 45, and authorities therein cited.) In *Noll v. Kenneally*, 37 Neb., 879, the fourth paragraph of the syllabus is as follows: "The failure of an account filed to secure a mechanic's lien to state the dates the various items of materials were furnished will not vitiate the lien, if it appears from the account and affidavit thereto attached that such materials were furnished within the requisite time to entitle the claimant to a lien therefor." In neither the statement of account, the affidavit thereto attached, nor in the contract is it made to appear that the furnishing of the material or the performance of the labor was within four months previous to the date on which the claim for a lien was filed. The paragraph of the syllabus just quoted inferentially countenances very strongly the conclusion that if the claim filed wholly fails affirmatively to show that labor was performed or material furnished within such time of filing the claim, as by statute a limit is fixed for that purpose, the lien has no relation back as against other liens on the property improved. This result seems fair and is reasonable. It is consistent with the provisions of the statute, and is, therefore, adopted as the

true construction of the mechanics' lien law. The plaintiff's claim to a mechanic's lien must, therefore, be adjudged inferior to the rights of the mortgagee, the Michigan Savings & Loan Association. This result is attained only in respect of the claim of plaintiff for a lien of $765.38 on the grounds above stated. As to the other claim for $57, filed for record February 17, 1891, which also was assigned by W. A. Chappell to the plaintiff, it was conceded on the trial that the labor was performed and material furnished December 9, 1890. The mortgage to the savings and loan association, however, was filed for record October 27, 1890, a time long prior to the doing of this work and furnishing this material; hence, this mechanic's lien must also be subordinated to that of the mortgage. (*Henry & Coutsworth Co. v. Fisherdick*, 37 Neb., 207; *Hoagland v. Lowe*, 39 Neb., 397.) In respect to the claim of the Excelsior Lumber Company for a balance of $104.60, the same observations are applicable, for while there was a stipulation in open court that the material was furnished between September 22 and November 28, 1890, neither the account containing this item in gross, nor the affidavit in connection therewith, fixed the date whereon the material was in fact furnished. The claim was filed December 12, 1890, and cannot be held to relate back to a period anterior to the filing of the mortgage.

2. The claim for a mechanic's lien in favor of Ira Longcor, filed on January 22, 1891, was for 9,000 brick furnished October 17, 1890. This was before the mortgage to the Michigan Savings & Loan Association was filed for record. The mortgage lien is therefore inferor to that of Mr. Longcor. There was found by the trial court the right to a mechanic's lien in favor of the Michigan Savings & Loan Association. From this no appeal has been taken, and its priority will not, therefore, be disturbed. It ranks with the lien in favor of Ira Longcor. The trial court found that the mechanic's lien claimed by Lyon &

Boyd should be enforced as prior to the mortgage to the Michigan Savings & Loan Association. As the right to this mechanic's lien had its rise in the delivery of an iron store front on the same day on which was filed the above mortgage, the priority decreed by the court will not be disturbed.

3. The claim of the Excelsior Lumber Company, of $21.13, was for material furnished December 19, 1890; that of Anthony Doyle, of a balance of $61.50, assigned to Spargur & Fisher, was for material furnished November 12, 1890; that of Frank A. Fafek, for $85, was for material furnished December 1, 1890. The lien of the mortgage to the Michigan Savings & Loan Association, filed October 27, 1890, is, therefore, superior to each of these liens. The liens which are of equal priority between themselves and superior to all others are the mechanics' liens of Ira Longcor, of Lyon & Boyd, and of the Michigan Savings & Loan Association. The mortgage made to the association last named is second in rank and subject only to the mechanics' liens named in the sentence just preceding this. The two mechanics' liens of the Excelsior Lumber Company, that in favor of Anthony Doyle, assigned to Spargur & Fisher, and that of Frank A. Fafek, rank in the third class, each in this class being of equal priority with every other, and all being subject to the liens of the first and second classes respectively. The claims of Gilbert McNair upon the judgment of Robert McNair were decreed inferior to all the above liens, and as no steps have been taken to review this portion of the decree it will remain undisturbed.

The judgment of the district court is reversed and this cause is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

FRANK STRATTON, ADMINISTRATOR, v. O. C. TARPENNING.

FILED MAY 15, 1894. No. 5427.

Trusts: ACTION AGAINST TRUSTEE: PLEADING. In an action at law against an alleged trustee, for interest and profits derived from depositing in a bank in his own name money intrusted to him for safe keeping only, *held*, that the failure to charge that any specified amount of interest or profit had in fact accrued to the alleged trustee by reason of such deposit rendered the petition demurrable, for the reason that no cause of action was therein stated.

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

Good & Good and *M. B. Reese*, for plaintiff in error, cited: *Jenkins v. Jeffrey*, 29 Pac. Rep. [Wyo.], 189; *Randolph County v. Ralls*, 18 Ill., 30; Wells, Jurisdiction, p. 48; 12 Am. & Eng. Ency. Law, pp. 299, 302, 303; 1 Boone, Code Pleading, sec. 259; Bispham, Equity, secs. 92, 138, 142, 143, 148; *Keech v. Sandford*, 1 White & T. L. Cas., 62; Perry, Trusts, sec. 427; *Featherstonaugh v. Fenwick*, 17 Ves. [Eng.], 298; *Johnson's Appeal*, 8 Atl. Rep. [Pa.], 36; *Jenkins v. Doolittle*, 69 Ill., 415; *Baker v. Disbrow*, 18 Hun [N. Y.], 29; *Baker's Appeal*, 13 Atl. Rep. [Pa.], 494.

George I. Wright, *contra*, cited: Parsons, Contracts, [7th ed.], ch. 13; *Second Nat. Bank of St. Louis v. Grand Lodge*, 98 U. S., 123; Bishop, Contracts, sec. 318; Perry, Trusts, secs. 2, 95.

RYAN, C.

On the 16th day of October, 1891, there was filed in the office of the clerk of the district court of Saunders county

a transcript from a justice of the peace of said county. Afterwards a petition was filed, in which were the following averments, to-wit: That Joshua B. Davis died on August 23, 1889, leaving a will which was successfully contested; that while the contest was pending there was entered into, for the reasons therein recited, the following agreement:

"Articles of agreement, made by and between the Bankers Life Association of Des Moines, Iowa, party of the first part, and F. M. Stratton, executor named in the paper purporting to be the last will and testament of J. B. Davis, party of the second part, and Mary Davis Johnston, Munn Davis, Oscar K. Davis, and Harriet E. Davis, claiming to be the heirs of Harriet K. Davis, deceased, wife of the late J. B. Davis, deceased, parties of the third part, witnesseth:

"That whereas, the said J. B. Davis, deceased, was a member of the Bankers Life Association of Des Moines, Iowa, in good standing, and at the time of his decease held certificate number 5121 for $2,000; and whereas, the proper beneficiary in said certificate number 5121 is entitled to receive thereupon the full sum of $2,000, and the further sum of $52, guaranty fund, paid by said deceased member, J. B. Davis, which obligation the said Bankers Life Association of Des Moines, Iowa, fully and freely acknowledge and wishes now and at once to pay the same and to be discharged; and whereas, doubts have arisen as to the proper party to whom payment should be made, the said Harriet K. Davis, wife of said J. B. Davis, deceased, having died before J. B. Davis, and the parties of the third part claiming the proceeds of said certificate by virtue of being heirs of said Harriet K. Davis, and the parties of the second part claiming the proceeds by virtue of the provisions of a paper purporting to be the last will and testament of said J. B. Davis, deceased:

"Now, therefore, it is mutually agreed by and between the aforenamed parties of the first, second, and third parts,

hereinabove named, that the Bankers Life Association of Des Moines, Iowa, shall pay over to the Honorable O. C. Tarpenning, county judge of Saunders county, Nebraska, the proceeds of said certificate, that is to say, the full sum of two thousand dollars ($2,000), and the further sum of fifty-two dollars ($52), guaranty fund, paid by said member, J. B. Davis, deceased, and the receipt therefor, hereto attached, shall operate as a full and complete acquittance and discharge of the Bankers Life Association from all further liability on said certificate number 5121 and release said association from all costs, liabilities, and other expenses of any kind or character whatsoever; and said amount so paid shall be held by said county judge in trust for the parties legally entitled thereto, and go as directed by the order and direction of the county court of Saunders county, Nebraska, having jurisdiction to hear and determine the proper direction of the proceeds of said certificate No. 5121.

"In testimony whereof, and for the purposes herein set forth, we have hereunto set our hands at Wahoo, Nebraska, on this 28th day of December, 1889.

"This contract executed and signed in duplicate.

"BANKERS LIFE ASSOCIATION OF
DES MOINES, IOWA,
"By JAMES W. MCDILL,
"*Judicial Director.*

"F. M. STRATTON,
"*Executor named in the paper purporting to be the last will and testament of J. B. Davis, deceased.*

"MARY DAVIS JOHNSTON,
"MUNN DAVIS,
"OSCAR K. DAVIS,
"HARRIET E. DAVIS,
"*Heirs of Harriet K. Davis,*
"By GOOD & GOOD,
"*For said Heirs.*

"The above stipulation and agreement between the par-

ties therein named this day approved by me, December 28, 1889. O. C. TARPENNING,

"*County Judge Saunders County, Nebraska.*

"Received of the Bankers Life Association of Des Moines, Iowa, by the hands of James W. McDill, judicial director of said association, the full sum of two thousand dollars ($2,000), proceeds of said certificate No. 5121, and the further sum of fifty-two dollars ($52), guaranty fund, paid by the member holding said certificate No. 5121, and hereby repaid to me, to be by me held and disposed of as in the stipulation and agreement hereto attached, to be by me distributed to the parties legally entitled thereto.

"Witness my hand at Wahoo, Nebraska, this 28th day day of December, A. D. 1889. O. C. TARPENNING,

"*County Judge.*"

The petition averred that the defendant had paid over to the plaintiff the said sum of $2,052, but has ever refused, and still refuses, to pay anything more. Plaintiff further averred that after the contest had been concluded, plaintiff was duly appointed and qualified as the administrator of Joshua B. Davis, and made other averments, which shall hereinafter receive attention. There was a prayer for judgment in the sum of $172.64 and costs. A demurrer was sustained to this petition. One ground of this demurrer was that the petition did not state facts sufficient to constitute a cause of action.

It is argued by the plaintiff in error that the defendant, in respect to the funds intrusted to him, was a trustee and was, therefore, chargeable with interest, because a trustee cannot be permitted to profit himself by the use of trust funds in his hands. The only allegations in the petition relative to this contention were in the following language: "That under and by virtue of said agreement the Bankers Life Association of Des Moines, Iowa, on the 28th day of December, 1889, paid into the hands of said defendant the said sum of $2,052 (being the proceeds of said certificate)

as such trustee; that on the 30th day of December, 1889, said defendant deposited the said trust fund of $2,052 in the First National Bank of Wahoo, Nebraska, to his own credit, and thereby converted the same to his own use and benefit and received the profits thereof, and continued to so use and receive the said money and profits until the 10th day of March, 1891, when plaintiff, having been appointed administrator of said estate, became and was entitled to receive said sum of money from the hands of said defendant, together with the interest and profits thereon accrued during the time the same had been so held and used by said defendant as aforesaid; and it became and was the duty of said defendant to pay over to plaintiff said sum of money and interest thereon, which, at the legal rate, was the sum of $172.64, making a total of $2,224.64 then due and owing to plaintiff from defendant." In general terms it was still further alleged that the defendant retained, and still retains, to his own use and benefit the sum of $172.64 of the money so converted and appropriated to his own use and benefit, and still refuses to pay said sum of money, although often requested so to do, to the plaintiff's damage in said sum of $172.64. There was no averment that the defendant had actually received any stated sum of interest or profit on account of the deposit of the fund intrusted to him for safe keeping. This was not a proceeding in equity to compel an accounting by a trustee, and for not alleging what amount was due from defendant, as in such case there was no excuse. Originally, this action was begun before a justice of the peace, and the analogies of the practice in equity have, therefore, no application. To fix the liability of the defendant in an action at law there should have been in the petition definite averments of such facts as would have rendered the defendant liable.

In respect to the deposit of the money in the bank there were allegations made apparently with the view of holding the defendant liable for a conversion. If this was the

theory upon which the petition was drawn, it should have contained averments of facts showing damage to plaintiff, and a showing that defendant had withheld profits derived from, and by reason of, such deposit, would have met this requirement. The averment that he deposited the money in a bank to his own credit and received the interest and profits thereon, without stating that in fact there was either interest or profit, fell short of disclosing a cause of action in plaintiff's favor. It seems, however, to have been assumed that an allegation that the defendant had converted the trust money to his own use by depositing it in a bank to his own credit, necessarily rendered him liable for interest—probably under the provisions of the statute. The charge that the money was converted to defendant's use was expressly qualified by the statement, in that connection, that such conversion resulted from the deposit made as above indicated. The money was intrusted to defendant to be held for, and paid over to, whomsoever should be adjudged entitled to receive it. The agreement authorizing this made no requirement that the trustee should do more than keep safely the money and pay it over when it should be ascertained to whom payment should be made. There would be no warrant in the agreement for limiting deposit of this money to the safe of the trustee, nor for a requirement that it should be carried about by him. He was to receive nothing for keeping it safely, and it seems to us that the inference that he had appropriated the money to his own use is not warranted by the mere fact that he made a deposit of it in a bank to his own credit. From the averments of the petition it seems that no complaint is made that the principal sum was not forthcoming as soon as the terms of the contract required the defendant to pay it over, and we can see no reason, under the allegations of the petition, why the defendant impliedly should be held liable for interest. As has already been stated, there is no direct allegation that any interest or profit had been received, much

less was there an attempt to fix the amount under either designation. For these reasons, if for no other, the petition failed to state a cause of action. The judgment of the district court is

AFFIRMED.

WILLIAM DARST V. JAMES LEVY & BRO.

FILED MAY 15, 1894. No. 5621.

Review: ATTACHMENT. The overruling of a motion to dissolve an attachment of mortgaged chattels, presented by the mortgagor alone, will not be reviewed when upon the hearing of the motion it was shown that the rights of the mortgagor had been foreclosed under the mortgage referred to, and when there is in the record evidence sufficient to justify the conclusion that the mortgage was by the mortgagor executed with intent to defraud or delay his creditors.

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

Brome, Andrews & Sheean, for plaintiff in error.

W. W. Morsman, contra.

RYAN, C.

On the 28th day of May, 1891, plaintiff in error, a wholesale dealer in liquors and cigars at Omaha, executed to his father, Jacob Darst, a resident of Peoria, Illinois, a chattel mortgage on the stock of plaintiff in error to secure payment of notes given to his father, as was claimed on behalf of plaintiff in error, for money loaned him by his father. At the same time plaintiff in error made to the Merchants National Bank of Omaha a chattel mortgage on the same stock of goods to secure payment of the sum

of $14,000 due said bank. On the 29th day of May, 1891, defendant in error commenced an attachment suit against plaintiff in error on three accepted drafts, amounting in the aggregate to $2,304.88. The right to an attachment was predicated upon the averment that the plaintiff in error had "assigned and transferred his property with the intent to defraud his creditors and to hinder and delay his creditors in the collection of their debts." Jacob Darst replevied the mortgaged property from the sheriff, who had levied thereon the attachment issued as above described, and before the hearing of the motion to dissolve said attachment had foreclosed his aforesaid mortgage. As the debt to the bank was, to the extent of $10,000, contracted on the faith of a letter of credit given by Jacob Darst to plaintiff in error, Jacob Darst paid that amount to the bank. There was made by plaintiff in error a motion to dissolve the attachment levied upon his mortgaged stock. This motion could be considered only in so far as the *bona fides* and rights of the plaintiff in error were concerned. (*McCord v. Krause*, 36 Neb., 764.) The motion to dissolve the attachment was overruled, whether because at the time the motion was presented plaintiff in error had no interest whatever in the property attached by reason of a foreclosure of the mortgage previously had, or because the court found against him on the evidence adduced, we can only conjecture. In either event there is presented by the record no sufficient reason for disturbing the finding of the trial court. The judgment of the district court is

AFFIRMED.

ALLEN T. RECTOR V. GEORGE CANFIELD.

FILED MAY 15, 1894. No. 5256.

1. **Review:** WEIGHT OF EVIDENCE. Where there is sufficient evidence to justify a verdict it will not be disturbed merely because of the comparative number of witnesses on each side, or on account of mere probabilities as to the comparative weight of the testimony considered alone on the record in this court.

2. **Exceptions to Instructions:** REVIEW. To a review of alleged errors in giving or refusing an instruction an exception is indispensably a prerequisite.

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

Jacob Fawcett and *F. M. Sturdevant*, for plaintiff in error.

C. A. Baldwin, contra.

RYAN, C.

While it is possible that counsel for plaintiff in error may have gone outside the record for some of the facts, their epitome of the pleadings and facts involved will sufficiently answer our purpose. In their brief counsel say: "The pleadings in the case show that some time in December, 1888, or January, 1889, the defendant Miller and the plaintiff Canfield made a trade, Canfield trading off his interest in the furniture of a hotel in Omaha known as the "Canfield House," Miller agreeing to give in exchange therefor the lots in controversy in this case. At the time of the trade Miller was constructing some small dwellings on these two lots, and it seems the agreement was that he was to go on and complete the dwellings and mortgage the lots for $1,000, and then convey them, subject to this mortgage of $1,000, to Canfield. Canfield delivered possession

of the hotel to Miller, and Miller executed to Canfield the bond sued on in this case, with the defendant Rector as surety thereon. Shortly after this Miller conveyed the property to someone else and skipped the country between two days, leaving Canfield and defendant Rector in the lurch on this deal. Demand was made upon Rector to pay the penal sum of the bond, which he declined to do, for the reason, as stated in his answer, that Canfield had not been damaged to exceed the sum of $600. The court below held properly that the measure of damages in this case was the value of the property which Miller failed to convey to Canfield at the time he should have conveyed it."

In reference to the value of the property which Miller failed to convey to Canfield the testimony was conflicting, and in support of the verdict of $1,585 for Canfield there were fewer witnesses than there were of those whose testimony had a tendency to justify a verdict for a less amount. It was a case wherein the jury upon the evidence might properly have found that the estimate of defendant's witnesses as to value was more nearly correct; its finding for the plaintiff was not without ample support. Under such circumstances the verdict will not be disturbed upon the assumption that it was unsupported by the evidence. The suggestion in argument, that the giving of some instructions, and the refusal of others when asked, was erroneous, cannot be considered, because no exception is shown to have been taken to the ruling of the court on either of these questions. The judgment of the district court is

AFFIRMED.

HOME FIRE INSURANCE COMPANY OF OMAHA, NEBRASKA, V. ANTHONY MURRAY.

FILED MAY 15, 1894. No. 5044.

1. **Review:** ACTION ON INSURANCE POLICY: TIME. By a clause in an insurance policy issued by defendant it was provided that no suit should be maintainable unless commenced within one year from the loss. A petition was filed within the time limited to recover for an alleged loss of a part of the property insured. The question as to whether or not jurisdiction had been obtained of the defendant was presented by its motion to dismiss, for the alleged reason that the action had not been commenced within the time limited by the contract for that purpose. *Held*, That the ruling adversely to defendant must be deemed conclusive when presented for review neither by its motion for a new trial nor by its petition in error.

2. **Limitation of Actions:** CONTRACTS. The provision of section 19, title 2, Code of Civil Procedure, that "an action shall be deemed commenced, within the meaning of this title, as to the defendant, at the date of the summons which is served on him," is applicable to the limitations of the statute designated as title 2 aforesaid, and cannot be used to supplement a special distinct limitation created solely by agreement of the parties thereto.

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

Fawcett, Churchill & Sturdevant, for plaintiff in error.

H. M. Uttley, contra.

RYAN, C.

1. This action was brought in the district court of Holt county on one of the policies of the defendant which insured the plaintiff to the amount of $500,—"$250 on work horses, * * * and on cattle not to exceed $35 on each, wherever they may be, against loss or damage by winds, cyclones, or tornadoes." The plaintiff alleged in

his petition that on January 12, 1888, while this policy was in force, there passed over the premises of plaintiff tremendous storms of wind and tornadoes, whereby there were caused to perish and die twenty-seven head of plaintiff's cattle, of the reasonable value of $25 each, from which it resulted that plaintiff was damaged in the sum of $250, and that on or about January 15, 1888, plaintiff, in writing, notified defendant of the loss on said stock and demanded the adjustment and payment of said loss, with which defendant has ever refused compliance. Plaintiff further alleged that there was due him by reason of said loss the sum of $650, for which sum he prayed judgment, with seven per cent interest thereon reckoned from the 12th day of January, 1888. This petition was filed May 10, 1888, and therein the defendant was described by its correct name. Immediately upon the filing of the petition a summons was issued in which the defendant to be served was designated as the "Home Insurance Company," etc., the word "Fire" being omitted. On the 12th day of May, 1888, the sheriff made return that he had served the defendant on May 11, 1888, by delivering to each member of the firm of Roberts & Wagers, and to Milton McDermitt, each of said parties then being agents of defendant in Holt county, a true and certified copy of the summons aforesaid, with the indorsements thereon. On the 28th of August, 1888, plaintiff's motion for default was filed, and on November 13 thereafter the defendant, by its attorneys, Roberts & King, specially appeared, made objection to the jurisdiction of the court, and alleged that the writ and service ought to be quashed for the reason that no summons had ever issued against the Home Fire Insurance Company. The record shows that the facts relied on in this special appearance were made known to the court by the affidavits of Roberts, Wagers, and McDermitt respectively, but as neither of these affidavits appear in the record we are uninformed as to their contents. This objection on

special appearance was, on November 14, 1888, sustained by the court, and the motion of plaintiff for a default was overruled. An alias summons was by the court thereupon ordered to issue for the defendant, pursuant to which order such summons issued January 29, 1889. This was returned as served by leaving a copy with Milton McDermitt, chief officer of the agency of said company in Holt county. Upon the special appearance of J. J. King as counsel for defendant the writ and service were quashed upon a showing that McDermitt did not sustain to the defendant the official relation recited in the sheriff's return. On the 20th of April, 1889, an "alias summons," as it is designated, was issued, and service returned thereon as made by delivering to Milton McDermitt, as agent of the defendant, a copy of the summons with the indorsements thereon. May 13, 1889, another special appearance was made, and by the affidavit of Charles J. Barber, an officer of the defendant, it was shown that McDermitt was not the agent of said defendant. On May 14, 1889, another summons was issued, which accomplished its purpose of bringing in the defendant to make its defense. The defendant having appeared, first filed a motion to dismiss the action for the reasons following: "That plaintiff's right to commence, maintain, and prosecute this action became and was forever extinguished and barred by the contract under which plaintiff seeks to recover, on and after the 12th day of January, A. D. 1889, for the reasons following: * * * Said contract * * * contains a provision or stipulation of the parties that no suit or action against this company shall be sustainable in any court of law or chancery unless commenced within one year next after such loss shall occur, any statute of limitation to the contrary notwithstanding." Following the above language the motion stated that the loss was alleged to have occurred on January 12, 1888, whereas the only service had upon defendant was made one year and four months after said

alleged loss. Upon this showing it was by the motion claimed that the court had no jurisdiction of the cause of action alleged. In resistance of this motion the plaintiff made a showing of the above described issues of summons, and specifically alleged that on each (except on the one marked "Exhibit 3," the nature of which we cannot determine, because it is not in the record) due service was made upon the proper agent of the defendant. Upon due consideration of the motion to dismiss the action the same was by the court overruled. Whether or not the court had obtained jurisdiction of the defendant within one year after the loss was a question of fact presented by this motion and the showing in resistance thereof, upon consideration of which the court found adversely to the defendant. An exception was taken to this ruling, but its correctness is presented in no way for review either in the motion for a new trial or in the petition in error, and hence must be accepted as the final disposition of this question. Possibly the insurance company may insist that this is extremely technical, but in solving technical contentions technical rules are peculiarly applicable and effective. *Similia similibus curantur.*

2. It is insisted that there was error in permitting plaintiff to amend his petition and his reply. The amendment of the petition was by substituting the word "perish" for the word "famish." We are left to our own judgment as to the particular place in the petition where this substitution occurred. There is in the certified copy of the petition, as it appears in the record, the allegation that by tremendous storms of wind and tornadoes twenty-seven head of plaintiff's cattle were caused to perish and die, and we assume that originally the word "famish" stood where now is found the word "perish." In reference to the amendment of the reply the assignment of error in the motion for a new trial was that the court erred in permitting plaintiff to amend his reply so as to deny knowledge of

the clause in his policy of insurance limiting the time within which he could commence his action. When leave was given to amend the reply no exception was taken, so that this question could not be reviewed, even if it possessed any merit. The amendment of the petition was clearly a matter of discretion with the court, and certainly this discretion was cautiously as well as wisely exercised in this instance. At the very commencement of the trial the defendant objected to the introduction of evidence at that time and asked leave to withdraw a juror and continue the case because of the several amendments to the pleadings. The record shows that the presiding judge said:

"If counsel for defense prove by affidavit that they have been placed at a disadvantage by the amendments made, or that such amendments have rendered them unable to proceed to trial, then a continuance may be had.

"Defendant asks five or ten minutes' time to make an affidavit for continuance on the grounds that it was not prepared to meet the amendments in plaintiff's reply. The same having been allowed by the court, and the time having expired, defendant withdraws its application for time to make a showing for a continuance."

It would require a showing of great injustice, in the exercise of its discretion by the trial court, to entitle the defendant to a review upon such proceedings as are above recited.

3. The defendant insists that there was error in the refusal of the court to give, at defendant's request, the following instruction, to-wit: "You are instructed that if any other element except wind, cyclones, or tornadoes contributed to cause the death of the cattle described in the plaintiff's petition, you should find for the defendant." The court instructed the jury that there had been no evidence justifying a finding of the existence of a tornado, and that "if winds caused the death of plaintiff's cattle indirectly and remotely, defendant would not be liable, and

your verdict should be for the defendant. To make defendant liable for the death of plaintiff's cattle caused by winds, such winds must have (in addition to the requirements in these instructions before mentioned) been the efficient and controlling cause of the death of the cattle in question." In a preceding part of the instruction given, and to which reference was made in the above clause in parenthesis, there was used, as to what it was essential that plaintiff should prove to entitle him to a recovery, this language: "That being then and there a wind storm arose, and which wind storm then and there killed and destroyed, and was the immediate, direct, and proximate cause of the death of said cattle." In the instructions given the ground was as completely covered as defendant was entitled to have it. There was, therefore, no prejudicial error in refusing the instruction asked.

4. Complaint is made in various forms as to the submission by the court to the jury of the question whether or not plaintiff was aware of the existence of the clause in the policy requiring him to begin an action in one year from the date of the loss. The loss occurred on January 12, 1888. The petition was filed May 10 following. To fix the time when the action was begun the plaintiff in error refers us to section 19, title 2, Code of Civil Procedure, which is as follows: "An action shall be deemed commenced, within the meaning of this title, as to the defendant, at the date of the summons which is served on him." If the plaintiff in error was insisting upon the statute of limitation found in title 2 of the Code of Civil Procedure, the above language would be entitled to weight, for it provides that "an action shall be deemed commenced, within the meaning of this title, [2], * * * at the date of the summons which is served on him." Whether or not parties to a contract may establish between themselves a period of limitation different from that fixed by statute, it is not necessary to determine. We are fully convinced that even if this is allowa-

ble, it is a right which must rest wholly in contract, and that to render the contract limitation effectual in shortening the statutory limitation no resort can be had to provisions applicable in terms solely to such limitations as are fixed by the statute. The requirement that plaintiff should show that he was unaware of the limitation of time fixed by the policy as to his right to commence an action may have been erroneous; in any event, it was not error prejudicial to the rights of the insurance company. Whether or not the commencement of the action contemplated by the limitation fixed in the policy was met by filing plaintiff's petition was not an inquiry hedged by statute. The failure to commence the action within a stated time therein fixed by the statute of limitations, if at all permissible to be shown, could only be made available as might any other special matter of defense dependent alone upon the terms of the policy. In a general way the jury were instructed, among other matters necessary to be shown, that it should appear that the action had been commenced within one year from the loss. If this did not with sufficient directness present this question to the jury, an instruction should have been asked by defendant upon that point. This was not done; neither was any exception taken to the requirement as made by the instruction of the court. The only ruling had upon the jurisdiction of the court, as dependent on service having been made within the time required by the policy, was by motion, which was overruled. The ruling upon this motion, however, as has already been noted, has not been assigned as error either in the motion for a new trial or in the petition in error. It is evident that in this condition of the record the defendant in the trial court (now the plaintiff in error) is in no condition to urge as error any ruling made or instruction given as to the time within which this action should have been begun.

There are other contentions made with apparently a less degree of confidence than those above insisted on. We

have examined into them and find no justification in their importance for an extended notice, much less is there discovered any prejudicial error. The judgment of the district court is

AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY v. GEORGE W. MORGAN.

FILED MAY 15, 1894. No. 5217.

1. **Master and Servant:** RAILROAD COMPANIES: JOINT OCCUPANCY OF GROUNDS: LIABILITY FOR DAMAGES. Where two railroad companies jointly occupy the same property, such as depot grounds, switch yards, and tracks, each company is bound to exercise ordinary care to prevent injuring the employes of the other; and if an employe of one company, while in the discharge of his duties on such grounds and without negligence on his part, is injured by the negligence of the employes of the other company, such company is liable therefor.

2. **Negligence:** QUESTIONS FOR JURY. Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting and where different minds might reasonably draw different conclusions as to these questions from the facts established. *American Water-Works Co. v. Dougherty*, 37 Neb., 373, followed.

3. ———: INSTRUCTIONS. The existence of negligence should be proved and passed upon by the jury as any other fact. It is improper to state to the jury a circumstance or group of circumstances as to which there had been evidence on the trial and instruct that such fact or group of facts amounts to negligence *per se*. At most, a jury should duly be instructed that such circumstances, if established by a preponderance of the evidence, are proper to be considered in determining the existence of negligence. *Missouri P. R. Co. v. Baier*, 37 Neb., 235, followed.

4. ———: MASTER AND SERVANT: QUESTIONS FOR JURY. Two companies, Omaha Company and St. Paul Company, jointly used and occupied a station with its switch yard and tracks in

the city of N. A boy twelve years of age and his father were in the employ of the St. Paul Company as car cleaners. Opposite where the boy was engaged in cleaning a car and beyond a long side track, filled at the time with cars, stood a tool house in which the employes of the St. Paul Company kept their tools. The cars standing on the side track were no part of any train, nor were the cars at the time being switched on or off the side track. The boy was directed by his father to take some oil cans to the tool house, to do which it was necessary for him to cross the side track. He obeyed, crawling under the cars on the side track, left the cans at the tool house, and started to return to his work and father, crawling as before on his hands and knees, under the cars on the side track, and while thus under the cars the employes of the Omaha Company, without giving any signal or warning thereof, suddenly and with great force backed an engine and freight train against the cars standing on the side track, and injured the boy. *Held*, (1) That the boy, being an employe of the St. Paul Company, was not a trespasser or mere licensee on the railroad grounds, but was rightfully there; (2) that the backing of the freight train and engine, without any signal or warning, against the cars standing on the side track was evidence of negligence on the part of the Omaha Company, but whether such act was or was not negligence, the time, place, and all the circumstances considered, was a conclusion for the jury; (3) that the boy's crawling under the cars standing on the side track was evidence of negligence on his part, but whether by such act, the time, place, and all the circumstances considered, he was guilty or not of contributory negligence was a conclusion for the jury.

5. **Negligence:** INFANTS. The law does not require a child of tender years to exercise the same degree of prudence and care for its safety that is required of a person of mature age and discretion. If such a child exercises the ordinary care and caution reasonable for one of its age and discretion it satisfies the requirements of the law.

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

The facts are stated by the commissioner.

John M. Thurston, *W. R. Kelly*, and *L. S. Wilson*, for plaintiff in error:

There was not sufficient evidence to support a verdict

for the plaintiff, and there was such contributory negligence on his part as should have precluded a recovery under proper instructions of the court. (*Sutton v. New York C. & H. R. R. Co.*, 66 N. Y., 243; *Lewis v. Baltimore & O. R. Co.*, 17 Am. Rep. [Md.], 521; *Northern C. R. Co. v. State*, 31 Md., 357; *Central Railroad & Banking Co. v. Dixon*, 42 Ga., 327; *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo., 671; *O'Mara v. Delaware & H. C. Co.*, 18 Hun [N. Y.], 192; *Chicago & N. W. R. Co. v. Cass*, 73 Ill., 394; *Baltimore & O. R. Co. v. Depew*, 40 O. St., 126; *Rumpel v. Oregon S. L. & U. N. R. Co.*, 35 Pac. Rep. [Idaho.], 700; *Sweeney v. Old Colony & N. R. Co.*, 10 Allen [Mass.], 368; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass., 208; *Frazer v. South & N. A. R. Co.* 1 So. Rep. [Ala.], 85.)

No negligent and dangerous practice can grow into a binding custom. (*Hill v. Portland R. Co.*, 55 Me., 438; *Central Railroad & Banking Co. v. Ryles*, 13 S. E. Rep. [Ga.], 584.)

While the instructions of the court in a general way, covered the law of negligence and contributory negligence of defendant and plaintiff, they were indefinite and vague as relating to the facts in the case at issue, leaving to the jury to form conclusions where they should have been instructed as a matter of law on vital points at issue. (*Toomey v. Southern P. R. Co.*, 24 Pac. Rep. [Cal.], 1076; *Burlington & M. R. R. Co. v. Wendt*, 12 Neb., 76; *Mulherrin, v. Delaware, L. & W. R. Co.*, 81 Pa. St., 375; *Reading & C. R. R. Co. v. Ritchie*, 102 Pa. St., 425.)

A minor is bound to assume all dangers within his comprehension which he voluntarily incurs. (Thompson, Negligence, p. 1181; 4 Am. & Eng. Ency. Law, p. 62; *Viets v. Toledo, A. A. & G. T. R. Co.*, 55 Mich., 120; *McGinnis v. Canada Southern Bridge Co.*, 49 Mich., 466; *Williams v. Churchill*, 37 Mass., 243; *Hathaway v. Michigan C. R. Co.*, 51 Mich., 253.)

Wigton & Whitham, contra:

Plaintiff had as much right to use and enjoy the privileges of the yard and side tracks as defendant. He was not a trespasser, nor was he a mere licensee, but was there of right in the discharge of his duties, and defendant's employes owed to him the duty of active vigilance, of warning of some kind, before moving the cars among which he was passing while engaged in his work. (1 Thompson, Negligence, 461, 462; *Goodfellow v. Boston, H. & E. R. Co.*, 106 Mass., 461; *Noble v. Cunningham*, 74 Ill., 51; Pierce, Railroads, 275, 276, 349, 350; *Chicago & N. W. R. Co. v. Goebel*, 10 N. E. Rep. [Ill.], 369, 372; *Farley v. Chicago, R. I. & P. R. Co.*, 9 N. W. Rep. [Ia.], 230; *Pennsylvania R. Co. v. Backes*, 24 N. E. Rep. [Ill.], 563.)

Because of the contract relations between the two railroad companies the defendant owed to the plaintiff the same duty to care for his safety that it owes to a passenger. (Patterson, Railroad Accident Law, p. 222.)

A railroad company must provide for a careful lookout in the direction that the train is moving, in places where people, and especially where children, are liable to be upon the track. If they do not, and a person has been injured, then the company may, in the absence of contributory negligence, be held liable. (*Butler v. Milwaukee & St. P. R. Co.*, 28 Wis., 487; *Ewen v. Chicago & N. W. R. Co.*, 38 Wis., 613; *Farley v. Chicago, R. I. & P. R. Co.*, 9 N. W. Rep. [Ia.], 230; *Frick v. St. Louis, K. C. & N. R. Co.*, 5 Mo. App., 435; *Cheney v. New York C. & H. R. R. Co.*, 16 Hun [N. Y.], 415; *Townley v. Chicago, M. & St. P. R. Co.*, 11 N. W. Rep. [Wis.], 55; *Byrne v. New York C. & H. R. R. Co.*, 10 N. E. Rep. [N. Y.], 541; *St. Louis, A. & T. R. Co. v. Crosnoe*, 10 S. W. Rep. [Tex.], 342; *Swift v. Staten Island R. T. R. Co.*, 25 N. E. Rep. [N. Y.], 378; *Omaha & M. R. Co. v. McDaneld*, 31 N. E. Rep. [Ind.], 837.)

The relation of master and servant did not exist between

plaintiff and defendant, and plaintiff, therefore, did not assume the ordinary risks incident to the work of defendant. (*Pennsylvania R. Co. v. Backes*, 24 N. E. Rep. [Ill.], 563; Shearman & Redfield, Negligence, sec. 101.)

If two companies use the same railroad or station, each, however, employing its servants independently of the other, the one company is liable for the torts of its servants to those of the other in the same manner as to strangers. (Pierce, Railroads, 370; *Christman v. Philadelphia & R. R. Co.*, 21 Atl. Rep. [Pa.], 738; *Iltis v. Chicago, M. & St. P. R. Co.*, 41 N. W. Rep. [Minn.], 1040.)

There was no error in giving or refusing instructions. (*Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *Atchison & N. R. Co. v. Bailey*, 11 Neb., 332; *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583; *McGuire v. Chicago, M. & St. P. R. Co.*, 37 Fed. Rep., 54; *Cleveland Rolling Mill Co. v. Corrigan*, 20 N. E. Rep. [O.], 466; *Western & A. R. Co. v. Young*, 10 S. E. Rep. [Ga.], 197; *Swift v. Staten Island R. T. R. Co.*, 25 N. E. Rep. [N. Y.], 378.)

RAGAN, C.

George W. Morgan, a boy about twelve years of age, by his next friend, sued the Omaha & Republican Valley Railway Company (hereinafter called the "Omaha Company") in the district court of Madison county for damages for a permanent injury which he alleges he sustained through the negligence of said Omaha Company's agents and employes. Morgan had a verdict and judgment, and the Omaha Company brings the case here for review.

The evidence in the record establishes, and tends to establish, the following facts: The Omaha Company and the Chicago, St. Paul, Minneapolis & Omaha Railroad Company (hereinafter called the "St. Paul Company"), at the date of the injury of Morgan, owned and used jointly and in common a station, yards, and tracks in the city of Norfolk, the main track of said companies making one con-

tinuous line. This main line passed northeast and southwest on a curve through a portion of the city of Norfolk and on the northwest side of the passenger station at that place. Parallel to this main track, and a few feet north and west thereof, was a side or switch track, and parallel thereto was still another side track. These side tracks were 1,630 feet in length. At the time young Morgan was injured, about 7:30 o'clock in the afternoon of the 20th of June, 1890, these side tracks were filled with cars; but the cars were no part of any train. At this time a train of the St. Paul Company occupied the main line near the east end of the station platform. Nearly opposite this St. Paul train, northwest from it and beyond the two side tracks, stood a tool house of the St. Paul Company's in which the car cleaners and repairers of that company kept their tools, oil cans, etc. Some distance to the southwest of the station stood the engine house used by the Omaha and St. Paul Companies for the storing and cleaning of their engines. There was an engine of the Omaha Company in the yards at this time; it was hauling a freight train, and just prior to the accident occupied with its train the main track between the station and the engine house. It was necessary to remove this engine and freight train from its position on the main track between the engine house and station in order that the engine of the St. Paul Company, which was standing near the station on the main track, might be taken to the engine house. The cars standing on the middle side track extended some six hundred feet, or twenty car lengths, southwest from a line drawn from the tool house to the coaches of the St. Paul Company standing on the main track, and about the same distance north and east of such line. Young Morgan and his father were at that time, and had been for some three years, in the employ of the St. Paul Company as car cleaners in the city of Norfolk. It was, amongst other things, their duty on the arrival of a train to dust and sweep and clean the coaches, to see that they

were supplied with coal, and the lamps filled with oil, etc. Immediately prior to the accident young Morgan and his father were engaged in cleaning out the coaches of the St. Paul Company, which had just arrived and were standing, as stated above, near the station on the main track. Young Morgan was assisting his father and working under his directions, but was in the pay and employ of the St. Paul Company. The father directed his boy to take some oil cans to the tool house mentioned above. The boy went across the side tracks, crawling under the cars thereon to the tool house, left his oil cans there, and attempted to return to his work, and while on his hands and knees crawling under the draw-bar or coupler of two of the freight cars standing on the middle track, the trainmen of the Omaha Company, having pulled the freight train off the main track, backed it up from the southwest towards the northeast against the cars standing on the middle track, and young Morgan was caught by the wheels and had both his legs broken. It was usual and customary, and even necessary for the employes in the yard, while engaged in car cleaning, oiling, and coaling cars, and such like duties, to pass under cars standing on the tracks. The employes of the Omaha Company were aware of this. Although the rules of the Omaha Company required the engine bell to be rung while switching, it was not done at the time of this accident. The engine and freight train were backed with unusual force against the cars on this middle track, in violation of the Omaha Company's rules. The engine at the time was not in charge of the engineer, but of a fireman. The trainmen of the Omaha Company were in a hurry, endeavoring to clear the main track. The object of backing the freight train onto the middle track was to not take any of the cars standing on that track therefrom. It was unnecessary for the freight train to be backed on the middle track, as it could have been pulled out on the main track beyond the engine house. No signal of any kind was

given before backing this freight train against the cars on the middle track. Young Morgan had been trained and instructed to listen for signals before going under cars. At the point he passed under the cars he could not see the engine backing up the middle track southwest of him because of the curve, the distance, and the cars on the track. The first intimation he had that the cars on the middle track were to be moved was the noise of their bumping together while he was under them. The freight engine and train struck the cars standing on the middle track with sufficient force to drive them back northeast half a car's length. The engineer and fireman of the Omaha Company, on the subject of a signal being given prior to the backing of the freight train against the cars on the side track, testified as follows:

The fireman:

Q. What was done about the ringing of the bell while that train was in motion and while that switching was going on?

A. Well, I always ring the bell and did that night. I ring the bell whenever the cars are moving.

Q. How do you know? Do you recollect doing that?

A. Because it is my business.

Q. That is what makes you so sure then?

A. Yes, sir.

The engineer:

Q. Do you know whether there was any signal by the ringing of the bell or the whistle while the train was in motion?

A. We always ring the bell. We don't blow the whistle; it would scare teams.

Q. In a location like that you never use the whistle?

A. No, sir; only when there is something standing on the track.

Q. What did you say about the bell being rung?

A. It was rung going over the crossing.

Cross-examination:

Q. You don't remember that night in particular, only because it was the custom?

A. No, sir.

Q. You rang the bell when you went down there to make the coupling, and you rang the bell when you pulled out of the middle of the track?

A. Yes, sir.

Q. The only reason that you know that is because it is the custom?

A. Yes, sir.

Four contentions are relied on here for a reversal of this judgment.

1. That the verdict of the jury in finding the Omaha Company guilty of negligence is not supported by the evidence. The negligence charged to the Omaha Company was that while Morgan was in the act of passing under the cars on the middle track, the Omaha Company negligently backed with great and unnecessary force its freight engine and train against the cars standing on the middle track. It is not disputed by the Omaha Company that it pulled its freight train and engine off the main track and pushed it back against the cars standing on the middle track at the time that Morgan was passing under said cars on said middle track. The dispute relates chiefly to the force with which the freight train was driven back against the cars and as to whether any signal was given before such movement took place. We think the evidence sustains the findings of the jury that the freight train and engine were driven back against the cars standing on the middle track with great force and without any signal of any kind being given prior thereto. But it is said by counsel for the Omaha Company that "the accident occurred upon the private grounds of the company and upon the track where Morgan had no right except at least as a mere licensee." The undisputed evidence is that this station, and the yards and tracks,

were jointly owned or used by both the Omaha and St. Paul Companies and that young Morgan, at the time he was injured, and for some years prior thereto, was an employe of the St. Paul Company. Morgan then was neither a trespasser nor a licensee on these railroad grounds. He had the same rights there that the employes of the Omaha Company had, and this brings us to the consideration of another question. As an employe of the St. Paul Company, what duty did the Omaha Company and its employes owe to young Morgan?

In *Pennsylvania R. Co. v. Gallagher*, 15 Am. & Eng. R. Cases [O.], 341, one Gallagher was in the employ of the Baltimore & Ohio Railroad Company as a car inspector and repairer. The Pennsylvania Company's railroad track crossed the Baltimore & Ohio railroad track at Mansfield, Ohio, at which place there was a track called a transfer track. Gallagher was repairing a car belonging to the Baltimore & Ohio Railroad Company, standing on this transfer track. His minor son, eleven years of age, brought him his dinner, and Gallagher, while repairing the car, requested his boy to assist him, which the boy did, and while he was assisting him, and while both the father and son were under the car being repaired, the Pennsylvania Company, without signal of any kind, backed some cars with great force on this transfer track, striking the car under which Gallagher and his son were, and injuring the boy. He then, by his next friend, sued the Pennsylvania Company for damages, and one of the defenses was that the boy had no right upon the grounds. But the supreme court of Ohio overruled this defense, saying: "The father did not exceed his powers in calling upon his son for temporary assistance, and though a contingency might have been possible in which the Baltimore & Ohio Company might have raised a question as to the son's right to recover of it in an action for injuries received through his father's carelessness, such possible contingency would not excuse a

want of due care on the part of the Pennsylvania Company. Charles Gallagher was not a trespasser, nor wrongfully on the premises where he was injured, and we cannot reach the conclusion that he bore such a relation to the Baltimore & Ohio Railroad Company that while rendering needed assistance to that company, in compliance with the directions of its agent with such implied authority, he was placed beyond the pale of protection against the carelessness of the plaintiff in error."

In *Illinois Central R. Co. v. Frelka,* 110 Ill., 498, the facts were: The Illinois Central Railroad Company and the Michigan Central Railroad Company jointly occupied certain depot grounds on which each maintained its separate railroad tracks in the city of Chicago. Frelka was in the employ of the Michigan Central Railroad Company. His duties were to be performed at the stock yards. He was necessarily crossing the tracks of the Illinois Central Railroad Company for the purpose of boarding a caboose standing upon a track of the Michigan Central Railroad Company to take him to the stock yards, and while crossing the tracks, an engine of the Illinois Central Railroad Company running in the yard, without the ringing of a bell or the sounding of a whistle, struck him and he was injured, and for which he sued that company for damages. One argument of the counsel for the Illinois Central Railroad Company, as appears from the reported opinion, was that Frelka was not in the employ of the Illinois Central Railroad Company; that he was not intending to enter any caboose of that company; that the company held out no inducement for him to cross its tracks; that he was not upon their grounds upon any license, express or implied. The supreme court of Illinois answering this argument said: "When these two companies agreed * * * to a joint occupancy of the depot and depot grounds, and located their tracks as we now find them, they were bound to know their business could not be successfully carried on without

their respective servants, in the discharge of their duties, having to pass over each other's tracks, and hence it is but reasonable to conclude they impliedly consented this might be done, and the fact that this was done * * * without objection affords the strongest evidence this was the understanding of the parties. * * * Under the facts as the jury must have found, the appellant owed the same duty to the servants of the Michigan Central Railroad Company when crossing the former's tracks in the regular discharge of their duties that it did to its own servants when crossing the same tracks."

In *Watson v. Wabash, St. L. & P. R. Co.*, 19 Am. & Eng. R. Cases [Ia.], 114, Watson was in the employ of a lumber company and was sent with his wagon and team to haul lumber from a car standing on a side track of the railroad. Watson was on the car loading lumber into his wagon backed up against the end of the car. He was warned of the approach of an engine, and fearing for the safety of his horses attempted to step down from the car, using the coupling link to rest his foot upon. While in that position another car was kicked and thrown violently against the car he was unloading, by which he was injured. No warning was given Watson that cars were being switched or thrown onto this track. The defense of the railroad company was that the evidence failed to show any negligence on its part. The supreme court of Iowa overruled this objection, deciding that "a railroad company that allows cars, without warning, to be thrown violently back against other detached cars that are being unloaded, whereby a teamster engaged in unloading the cars is injured, is guilty of negligence, and, in the absence of contributory negligence on the part of the party injured, is liable therefor." The court said: "If the plaintiff was rightfully there, the company owed him the duty of such care as is necessary for the safety of all persons engaged as he was; and it is not for the company's employes to close

their eyes and excuse themselves by saying that they did not know that any one was being imperiled. That the plaintiff was in fact rightfully there appears to us to be clear. The car had been placed where it was for the purpose of being unloaded by the owner of the lumber, and the owner of the lumber had sent the plaintiff to unload it."

These authorities establish the rule that where two railroad companies occupy the same property jointly, such as depot grounds, switch yards, and tracks, each company must exercise ordinary care to prevent injuring the employes of the other, and that if an employe of one company while on such grounds in the discharge of his duty, without negligence on his part, is injured by the negligence of the employes of the other company, such company will be liable therefor.

2. It is next urged that young Morgan was guilty of such contributory negligence as precludes his recovery. In *American Water-Works Co. v. Dougherty*, 37 Neb., 373, the doctrine of this court on the subject of contributory negligence is thus stated: "Issues as to the existence of negligence and contributory negligence and as to the proximate cause of an injury are for the jury to determine when the evidence as to the facts is conflicting, and where different minds might reasonably draw different inferences as to these questions from the facts established." The same rule is also laid down in *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642; *Omaha Street R. Co. v. Craig*, 39 Neb., 601, and cases there cited.

The evidence in the case at bar shows that young Morgan was, at the time he was injured, in the discharge of his duty as an employe of the St. Paul Company; that it was necessary for him to cross the middle track in the performance of the duties about which he was engaged; that this track was filled with cars; that these cars formed at the time he was injured no part of any train. No cars

were being taken from this track for the purpose of making up a train, and no cars were being switched for the purpose of storing them onto this track. He had been in the employ of the St. Paul Company in and about these yards for some three years. He had been trained and cautioned to listen for signals, and not to pass under or between cars when in motion or when he might apprehend danger. The fact that he crawled under the cars was evidence of negligence on his part, but we cannot say that by so doing he was guilty of such negligence as precludes his right to recover. That was a question properly submitted to the jury, and we cannot say that their conclusion is unsupported by the evidence. Had the cars under which young Morgan crawled been a part of a train standing upon a track, or had the cars been in motion, or had he gone under the cars after the ringing of a bell or the sounding of a whistle, it might be different. Whether he was guilty of negligence in crawling under these cars at the time and place and under the circumstances that he did, and while engaged in performing the duties of his employment, is a question about which reasonable men might honestly differ.

In *Goodfellow v. Boston, H. & E. R. Co.*, 106 Mass., 461, Goodfellow was in the employ of a contractor who was building a supporting wall for the railroad company. While engaged in this work Goodfellow stood on a side-track of the railroad holding a guy rope, and while thus engaged an engine of the railroad company, without giving any signal of its approach, backed down on the side track and injured Goodfellow, who sued the company for damages. The *nisi prius* court directed a verdict for the railroad company on the ground that the evidence showed that Goodfellow was injured through his own negligence by standing upon the side track of the railroad. The supreme court of Massachusetts reversed this ruling, holding that on the evidence a jury would be warranted in finding that

Goodfellow at the time he was injured was in the exercise of due care.

In *Christman v. Philadelphia & R. R. Co.*, 21 Atl. Rep. [Pa.], 738, Christman was in the employ of a rolling mill on whose grounds were some tracks of the railroad company. The company had unloaded a car of iron on the grounds and Christman was engaged in carrying this iron into the mill. In doing this he had to cross a track of the railroad company's between the pile of iron and the mill. On this track were standing some freight cars. To faciliate his work he uncoupled two of these cars and passed between them in going to and fro between the iron pile and the mill. While engaged in his work he saw a switch engine pass up the track, and surmising that the cars which he had uncoupled might be moved he replaced the coupling and started back after another piece of iron. Just at that moment the cars were jammed together and he was injured. The defense was that he was guilty of contributory negligence, but the supreme court of Pennsylvania overruled the defense and said: "Was the plaintiff so clearly guilty of contributory negligence that the court was bound to say so as a matter of law? Plaintiff was there in the prosecution of his work. The iron was between the tracks and he necessarily had to cross one of them to go to the mill. * * * To faciliate his work he widened the passage between the cars by taking out the coupling. * * * Much stress is laid by appellant on the fact that plaintiff had been employed on or about the switch for several months and had knowledge of the danger during the operation of shifting. * * * It was * * * relevant, as showing knowledge which bore upon the question of negligence; but this knowledge had a double edge. While conveying notice of danger, it also conveyed notice of the time likely to elapse and the warning customarily given before the danger became imminent. It was in evidence that, after the plaintiff saw the engine go up, fifteen or

twenty minutes were occupied in coupling the cars to be taken out and getting the train together. It is also in evidence that the two cars between which the injury occurred were not defendant's cars and not to be taken out. Under these circumstances it certainly was not plaintiff's duty immediately on seeing the engine go up to cease work and stand idle for the fifteen or twenty minutes required in the operation of shifting. How long he might prudently continue work, and what amount of observation he was bound to give to the progress of coupling the cars and approaching his locality, depended upon too many elements to enable the court to say there was any fixed standard of prudent conduct to which he was bound to conform. That, under the circumstances in evidence, was a question for the jury."

3. That the court erred in instructing the jury on its own motion. One instruction objected to is as follows: "And if you believe from the evidence in this case that the defendant, by its agents, servants, or employes in charge of its engine and cars, or on or about the 20th of June, 1890, at its yards in Norfolk, unnecessarily, negligently, and carelessly backed said engine and cars upon one of the switches in said yards, and at a time when the plaintiff was crossing the said switch, and in consequence of which the plaintiff was run over by the cars then standing on said switch, and injured, as alleged, you should then determine from all the evidence the place where said accident occurred, the nature and character of the work the defendant was engaged in at the time, the character and condition of the yards at the time, and from these, and all the other facts, circumstances, and evidence before you, say whether the said acts of the defendant were necessary in the operation of said railway, or whether they were unnecessarily, carelessly, and negligently done; and if you believe from the evidence before you that the said acts of defendant were unnecessary and negligent, then you should inquire whether, from the evidence, the plaintiff, at the

time of the said injury complained of, in view of the work he was engaged in and the manner of performing it, the place where the injury occurred, his knowledge of the condition of the yards at the time, the plaintiff's position at the time the accident occurred, and from these, and all the other facts and circumstances in evidence in the case, say whether plaintiff was guilty of negligence that contributed to the injury complained of; and if you find the plaintiff was guilty of no negligence, nor of any act that contributed to the injuries, then the plaintiff is entitled to recover; but if you find from the evidence that the plaintiff was guilty of any negligent act or omission on his part that contributed to the injury complained of, then he cannot recover, and you should find for the defendant." The criticism on this instruction is that it directed the jury to consider as an element of the railroad company's liability whether the backing of the freight train and engine against the cars on the middle track was a necessary act. We think that the evidence is sufficient to sustain the finding that this act of the company was wholly unnecessary; but the criticism on the instruction is not a fair one, as the instruction tells the jury that the backing of the freight train on the middle track must not only have been unnecessarily done, but must have been negligently and carelessly done as well. We do not think that the plaintiff in error was prejudiced by this instruction.

Another instruction complained of by the plaintiff in error is as follows: "The defendant alleges that plaintiff's injuries were the result of his own negligence, and not the negligence of the defendant. In determining whether or not the plaintiff's injuries were caused by his own negligence you are instructed that the same degree of care is not required of a child of tender years and limited experience that is required of an ordinary grown person. Unless you find from the evidence that the plaintiff, at the time he was injured, failed to exercise that degree of care for

his own safety which a person of his age, development, and experience would naturally and ordinarily use in the same situation and under the same circumstances, then you will find that the plaintiff has not been guilty of any such negligence as will defeat his recovery on that ground." This instruction stated the law correctly. In *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90, the company was sued for the killing of a child asleep on its track. The district court instructed the jury that if they believed from the evidence that Samuel Grablin, by reason of his being so young, was incapable of exercising any more care or discretion than he did exercise at the time of the accident, then contributory negligence was not imputable to him. Grablin was, at the time he was killed, a child about eight years of age. This court approved of that instruction. In *Rauch v. Lloyd*, 31 Pa. St., 358, the supreme court of Pennsylvania, in discussing the question of charging a child with negligence, said: "He acted like a child, and he is not to be judged as a man."

Complaint is also made because of the refusal of the trial court to instruct the jury as follows:

"The court instructs the jury that if a person attempts to pass under cars standing upon a crowded side track at the station, and using the roads and tracks for railroad purposes, and in and about the making up of trains, such conduct is negligence; and that if you shall find from the evidence there had been a custom on plaintiff's part grown up by plaintiff's practice to pass under the cars at such times, such custom will not relieve him of the consequence of such negligence, and if you believe from the evidence that under such circumstances the plaintiff was injured, he cannot recover, even if you shall further find from the evidence that the cars were suddenly started up or moved without giving the usual signal therefor. Under such circumstances you should find for the defendant.

"The jury is instructed that if they believe from the evidence that the plaintiff attempted to crawl under the bumpers of the freight cars at the time of the accident, he did not exercise ordinary care and caution, and his failure to exercise such care and caution, and voluntarily putting himself in a known dangerous position, is not excused by proof that plaintiff or other persons had been in the habit of going under cars in the same manner, and the jury is further instructed that no question of expediency or convenience warranted the plaintiff in incurring such known danger.

"The testimony being uncontradicted that the plaintiff attempted to crawl under the freight cars standing on the track in the yard of the defendant without taking the precaution to ascertain with reasonable certainty that there was no probable or impending danger in so doing, such action on the part of the plaintiff was negligent and contributed directly to the accident, and therefore the jury must so find."

Neither of these instructions should have been given. In *Missouri P. R. Co. v. Baier*, 37 Neb., 235, it was held: "The existence of negligence should be proved and passed upon by the jury as any other fact. It is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amounts to negligence *per se*. At most, the jury should duly be instructed that such circumstances, if established by a preponderance of the evidence, are properly to be considered in determining the existence of negligence." (*Omaha Street R. Co. v. Craig*, 39 Neb., 601, and cases there cited.) By these instructions, and each of them, the court was requested to charge the jury, in effect, that young Morgan, in crawling under the cars at the time and place that he did, was guilty of negligence. A trial court may instruct a jury that a certain act or omission is evidence of negligence, but it is for the jury to

find the conclusion. There was no error in refusing to give these instructions. The judgment of the district court is

AFFIRMED.

EDGAR E. HARDIN ET AL. V. JOSEPH SHEUEY ET AL.

FILED MAY 15, 1894. No. 5442.

Conspiracy: EVIDENCE: REVIEW. The record in this case examined, and found to contain no evidence to support the verdict of the jury rendered against the plaintiffs in error.

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

L. M. Pemberton and *F. B. Sheldon*, for plaintiff in error Hardin.

C. E. Bush and *Griggs, Rinaker & Bibb*, for plaintiff in error Buckley.

Rickards & Prout, J. E. Bush, and *N. T. Gadd, contra.*

RAGAN, C.

On the 26th day of May, 1887, Joseph Sheuey was the owner of two hundred acres of land in Pawnee county. On this day he conveyed it to one Herman Kludas. On the 23d day of August, 1887, Kludas and wife conveyed the land to one E. J. Miller, and on August 24, 1887, Miller conveyed forty acres of the land to one S. A. Gadd, and on the same date S. A. Gadd and her husband mortgaged the land to one Truesdell for $400. On the 6th of October, 1887, Mrs. Gadd and husband made a second mortgage upon this land to one Geer. On the 7th of No-

vember, 1887, Mrs. Gadd and husband conveyed this forty acres to said Geer, and on the 2d day of January, 1888, Geer deeded the forty acres to one Edgar E. Hardin. On August 27, 1887, Miller mortgaged one hundred and sixty acres of the two hundred acres of land which was conveyed to her by Kludas, to S. A. Gadd for $1,500, and on August 30, 1887, this mortgage was assigned to one Edee. On the 16th of September, 1887, Miller conveyed the one hundred and sixty acres of land to L. M. Buckley. S. A. Gadd was the wife of Nathan T. Gadd, a lawyer, we are sorry to say, then residing in Liberty, Nebraska. E. J. Miller was a sister of Mrs. Gadd. Hardin obtained title to forty acres of the land as follows: In May, 1887, and from that time until January 1, 1888, he was in copartnership with Geer, conducting a banking and loan business. About the 27th of May, 1887, Sheuey made a note to Nathan T. Gadd for $500. This note Gadd sold and indorsed to Geer & Hardin, after they had ascertained from Sheuey that his note to Gadd was a valid obligation. In August, 1887, Gadd applied to Geer & Hardin for a loan upon this forty acres of land, the title to which his wife held by the deed from Miller, and Geer & Hardin placed a loan of $400 on the land for Gadd, or Mrs. Gadd, the mortgage being made to Truesdell. At this time Gadd was also indebted to Geer & Hardin, and to secure his own debt and the Sheuey note he made the mortgage to Geer on the 6th of October, 1887, and these debts remaining unpaid, Gadd and his wife made an absolute deed of the land to Geer on the 7th of November, 1887; but this deed was intended as a mortgage. January 1, 1888, Geer & Hardin dissolved partnership and in the settlement of their business Geer quitclaimed his interest in this forty acres of land to Hardin. Buckley claims title to one hundred and sixty acres of the land originally deeded by Sheuey to Kludas. His title came through Miller by the deed of the 16th of September, 1887, and the consideration which he paid for

the land was $400 in cash and the assumption of the $1,500 mortgage placed thereon by Miller on August 27, 1887, and the assumption of another mortgage placed thereon by Sheuey before he conveyed to Kludas.

Joseph Sheuey brought this suit in the district court of Gage county, making Herman Kludas, Edgar E. Hardin, Nathan T. Gadd, Sarah A. Gadd, E. J. Miller, and L. M. Buckley defendants. In his petition Kludas alleged that the parties made defendants had conspired together for the purpose of depriving him of his real estate by falsely and fraudulently representing to him that his wife, from whom he then was living apart, was about to institute criminal proceedings against him on a charge of arson, and that other members of his family were about to commence a civil action against him, and would take away all of his property unless he would deed it to some friend who would save it for him; that all said statements were false and fraudulently made for the purpose of depriving Sheuey of his property; that in pursuance of said conspiracy of the defendants, and in pursuance of their false and fraudulent representations, he was induced to and did convey his property to Kludas; and that soon after said conveyance, the defendants still conspiring together to defraud the plaintiff, prompted and induced him, by false representations and threats of imprisonment, to leave his home and go to the state of Colorado, and that while he was in said state the several conveyances of the real estate noted above were made and delivered for the purpose of defrauding him of his property and carrying out the conspiracy entered into by the parties defendant. The case was tried to a jury and a verdict and judgment rendered in favor of Sheuey against all the defendants, and Hardin and Buckley only bring the judgment rendered against them here for review. There is on file a petition in error of Kludas, but no briefs or arguments are made on his behalf and the judgment against him will be affirmed as of course.

There are numerous errors assigned, only one of which it is necessary to notice. We have searched the record in vain for any evidence whatever to support the verdict rendered by the jury so far as Hardin and Buckley are concerned. It would subserve no useful purpose to quote the testimony, or any of it; nor is it necessary to express any opinion as to the correctness of the finding of the jury as to the other defendants. This court will not weigh conflicting evidence, nor pass upon the credibility of witnesses, nor reverse the finding of a jury because it reached a conclusion different from what this court would upon the same testimony; but this verdict cannot stand, because there is absolutely no evidence whatever that either Hardin or Buckley had any knowledge of, or took any part in, the transactions which Sheuey alleges were fraudulent, and by which he alleges he was deprived of his property. The judgment of the district court, so far as Edgar E. Hardin and L. M. Buckley is concerned, is

REVERSED AND REMANDED.

PATRICK S. HUGHES V. INSURANCE COMPANY OF NORTH AMERICA.

FILED MAY 15, 1894. No. 5633.

1. **Insurance:** POLICY: CONDITIONS FORBIDDING OTHER INSURANCE: WAIVER. A fire insurance policy contained this claues: "That the having of other insurance thereon [the insured property], or any part thereof, valid or invalid, prior or subsequent, not made known to this company, and consented to hereon, will render this policy void." *Held*, (1) That the violation of this provision by the assured in procuring additional insurance on the property without the knowledge or consent of the first insurer did not render the policy issued by it void, but voidable at the election of said first insurer; (2) that the

provision was a reasonable one, not unconscionable, illegal, nor contrary to public policy; (3) that it was inserted in the insurance contract for the benefit of, and might be waived by, the insurer.

2. **Principal and Agent:** RATIFICATION: INSURANCE. The acceptance by a principal of the fruits of an unauthorized contract made by his agent is a ratification of such agent's conduct, and said ratification relates back to the date of the performance of the act ratified, and the principal is bound by the effects thereof, and the results flowing therefrom, as much so as if he had himself performed the act.

3. **Insurance:** OTHER INSURANCE: WAIVER: POLICY. Where it is stipulated in a contract of insurance that the insurer shall not be liable thereon, or that said insurance contract shall be void if, without the insurer's knowledge or consent, the insured shall procure additional insurance on the insured property, and the insured violates said insurance contract by so procuring additional insurance, then the first insurance contract is voidable at the election of the insurer, and such violation is a defense against the insured in a suit upon said first policy, unless it be shown that said violation of the first insurance contract was brought about through fraud or mistake, or has been waived by said first insurer.

4. ———: ADDITIONAL POLICIES. *German Ins. Co. v. Heiduk*, 30 Neb., 288, followed and reaffirmed.

ERROR from the district court of Holt county. Tried below before BARTOW, J.

See opinion for authorities upon the questions discussed.

H. M. Uttley, for plaintiff in error.

Jacob Fawcett and *F. M. Sturdevant*, *contra*.

RAGAN, C.

Patrick S. Hughes sued the Insurance Company of North America in the district court on a policy of fire insurance to recover the value of a building destroyed by fire owned by said Hughes and insured by said insurance company. At the close of the testimony the district court

directed a verdict for the defendant, upon which judgment was rendered, and Hughes brings the case here on error.

The policy sued upon contained this provision: "That the having of other insurance thereon [the property], or any part thereof, valid or invalid, prior or subsequent, not made known to this company and consented to hereon, will render this policy void." The policy sued on was issued on the 19th day of June, 1889, and insured the property of Hughes for $800 until the 19th day of June, 1890. On the 4th day of July, 1889, Hughes procured another policy of insurance upon said property from the Phœnix Insurance Company of New York. This policy was also for $800 and insured the property for one year. The taking out of this second policy by Hughes was not consented to by the Insurance Company of North America, and not known to it until after the destruction by fire of the property insured in February, 1890. The defense made in the district court to this suit by the insurance company was the procuring on the insured property by Hughes of the second policy of insurance. The evidence establishes without dispute that Hughes procured the second insurance policy at the time and in the manner stated above. Is this violation by Hughes of said clause in the first insurance policy a defense for the insurance company in a suit upon the policy? We think it is. We do not think that Hughes' violation of this provision in the policy rendered the contract void, but simply voidable at the election of the insurance company. The provision is a reasonable one. It is not unconscionable nor illegal, nor is it contrary to public policy. It is a provision inserted in the policy for the benefit of the insurer and a provision which the insurance company may waive. It is designed as a check upon the disposition of the evil-minded to over-insure their property and destroy it. But where such a provision is violated by the insured it will furnish the insurance company, if it elects to avail itself of it, a complete de-

fense to a suit for a loss under the policy brought by the insured, unless it be shown that such violation of the policy on the part of the insured was brought about through fraud or mistake, or was waived by the insurance company after it became aware thereof. In *German Ins. Co. v. Heiduk*, 30 Neb., 288, the facts were: Heiduk insured his property with the German Insurance Company. The policy provided for $400 of other and concurrent insurance, which Heiduk at once placed with the German Insurance Company. The policy also provided that Hughes must obtain the written consent of the German Insurance Company for all additional insurance on the insured property or he should not recover from it in case of loss. After Heiduk had placed the $400 of concurrent insurance permitted by the policy of the German Insurance Company, he procured the Orient Insurance Company of Hartford, Connecticut, to issue to him another policy of $500 on the same property insured by the German Insurance Company. The property insured was destroyed by fire, and Heiduk brought suit against the German Insurance Company on its policy. It set up as a defense the procuring by Heiduk of the additional policy from the Orient Company, in violation of the terms of the policy sued upon. This court, speaking through the present chief justice, NORVAL, held that the procuring by Heiduk of the additional insurance from the Hartford Company, in violation of the provisions of the policy he had obtained from the German Insurance Company, was a defense to that company against Heiduk's suit. The facts of the case at bar are within the principles decided in *German Ins. Co. v. Heiduk, supra*, and controlled by that case.

Two arguments are relied upon here by counsel for Hughes to overthrow the defense of the insurance company in this case:

1. It is said that Hughes himself did not procure the additional insurance policy from the Phœnix Company and

that he did not authorize any one to procure it for him and had no knowledge of its being procured at the time it was issued. It appears from the testimony that Hughes resided on a farm near the city of O'Neill, Nebraska; that the insured property was a store building in that city, and that one Hynes was the agent of Hughes for the purpose of renting and looking after the store building. There is no evidence that Hynes had any authority from Hughes to insure the store building. It appears, however, that Hughes was indebted to Hynes, and on or about the 4th day of July, 1889, the latter procured from the Phœnix Insurance Company the additional policy spoken of above, in the name of Hughes. It does not clearly appear that Hughes knew of the existence of the additional policy until after the property was destroyed by fire. Soon after the destruction by fire of the property, however, Hughes made a settlement with the Phœnix Insurance Company and obtained from that company $400, in satisfaction of his claims against it by reason of the destruction of the insured property by fire. Here, then, was a ratification by Hughes of the act of Hynes in procuring this additional policy of insurance, and this ratification related back to the date of the issuing of the policy, and Hughes became bound by the effects thereof, and by the results flowing therefrom, as much so as if he had himslf procured the policy of insurance. The acceptance by a principal of the fruits of an unauthorized contract made by his agent, with full knowledge of all the facts, is a ratification of such agent's conduct.

2. The policy of insurance issued by the Phœnix Insurance Company contained a provision identical with the provision quoted above from the policy sued on. It is now argued by counsel for Hughes that inasmuch as he did not disclose to the Phœnix Company at the time he procured this policy the existence of the policy in suit, that the Phœnix policy was never in force, and, therefore, he may en-

force the policy in the suit, notwithstanding his violation of its provisions by procuring other insurance on the property. In other words, the contention of Hughes is that the Phœnix Company's policy never went into force and was never a valid insurance on his property, and that by the provisions of the policy in suit he was only prohibited from procuring other valid insurance. We do not think that the policy issued by the Phœnix Company was absolutely void. Like the policy in suit, it was voidable at the election of the Phœnix Company. If that company saw fit, it might waive the fraud perpetrated on it by Hughes in procuring from it the policy of insurance without disclosing to it that the property was already insured in another company. There is another thing to be said of this argument. By the provisions of the insurance contract entered into between Hughes and the Insurance Company of North America, Hughes in effect promised that he would not procure any additional insurance upon the property without the knowledge and consent of that company. He has violated his agreement in that respect, and when this violation is pleaded against him as a defense in a suit in which he seeks to enforce the contract, he then pleads in avoidance of such defense that, although he attempted to violate his contract, he did not succeed, because the contract that he made for additional insurance was not valid, for the reason that he procured it by fraudulently concealing from the party with whom he made it the existence of the contract sued on. We decline to adopt any such jugglery. To permit Hughes to say that the Phœnix Insurance Company's policy never had any validity is to permit him to take advantage of his own wrong. The courts will interpret and enforce the contracts of parties as made and understood by them when such contracts were entered into upon a valuable consideration and without fraud or mistake. It is not to be denied that the argument made here by the learned counsel for the plaintiff in error seems to have received

the approbation of some courts of eminent respectability. (*Hubbard v. Hartford Fire Ins. Co.*, 33 Ia., 325; *Knight v. Eureka Fire & Marine Ins. Co.*, 26 O. St., 664; *Fireman's Ins. Co. of Dayton v. Holt*, 35 O. St., 189; *Thomas v. Builders Mutual Fire Ins. Co.*, 119 Mass., 121; *Germania Fire Ins. Co. v. Klewer*, 22 N. E. Rep. [Ill.], 489.) But an examination of these cases discloses the fact that the provision of the insurance policies examined and construed therein, with perhaps one or two exceptions, did not contain the words "valid or invalid" found in the provision of the policy sued upon. We think the better rule, and the one supported by the weight of authority, is that where an insurer stipulates in the contract of insurance that it shall not be liable thereon, or that the insurance contract shall be void if, without its knowledge or consent, the insured shall procure additional insurance upon the insured property, and the assured violates such insurance contract by so procuring additional insurance, that then the first insurance contract is voidable at the election of the insurer, and such violation thereof is a defense against the insured in a suit upon such first contract, unless it be shown that such violation of the insurance contract in the procuring of the additional insurance was brought about through fraud or mistake, or has been waived by the first insurer. (*Phœnix Ins. Co. v. Lamar*, 106 Ind., 513; *Barnard v. National Fire Ins. Co.*, 27 Mo. App., 34; *Continental Ins. Co. v. Hulman*, 92 Ill., 145; *Zinck v. Phœnix Ins. Co.*, 60 Ia., 266; *Keyser v. Hartford Fire Ins. Co.*, 33 N. W. Rep. [Mich.], 756.) The learned district court was entirely right in instructing the jury to return a verdict in favor of the insurance company, and its judgment is

AFFIRMED.

ANTONE GANZER V. KATIE SCHIFFBAUER.

FILED MAY 15, 1894. No. 5346.

1. **Review:** BRIEFS: MISCONDUCT OF ATTORNEYS. It is conduct reprehensible in the highest degree for counsel in their briefs and arguments in this court to indulge in reflections upon the integrity of the district judges. Briefs filed here containing such reflections will not be considered by this court, but ordered stricken from the files.

2. **Judgments:** POWER OF COURTS TO MODIFY. The power of a district court over its own judgment during the term at which it is rendered is entirely discretionary; but the discretion of the court as to the vacation or modification of a judgment ends with the adjournment of the term at which such judgment was rendered, and neither the court nor the judge has any authority to vacate or modify a judgment rendered by it after the term at which it was rendered, except for the causes and in the manner prescribed by the statute, and except in the exercise of its general equity powers. *Smith v. Pinney*, 2 Neb., 139, followed.

3. **Petition to Vacate Judgment:** GROUNDS: PLEADING. A defendant, after the close of the term of court at which a judgment was rendered against him, filed a petition to vacate such judgment on the grounds that neither he nor his counsel was present during such term of court, nor had any knowledge of the date of the session before its adjournment; that he wrote the clerk of the court, inquiring for the date of the term prior thereto, but received no reply; that by the usual route of travel he lived and was served with summons four hundred and fifty miles from the place of holding said court; that he employed one of a firm of three lawyers to defend his case, but the counsel so employed was in attendance upon the supreme court during the session of court at which such judgment was rendered, and neither of his partners knew anything of defendant's case, nor had anything to do with its management. *Held*, That these facts do not show that defendant was prevented by unavoidable casualty or misfortune from defending his suit, within the meaning of section 602 of the Code of Civil Procedure, and that, therefore, the petition does not state a cause of action.

4. **Attorney and Client:** DUTIES OF MEMBER OF LAW FIRM. When one member of a law firm is retained or employed, such

employment or retainer is that of the entire firm, and it is the duty of the attorney retained or employed to fully inform his partners of all engagements he has undertaken on behalf of the firm, and impart to them all the facts within his knowledge bearing upon the case.

ERROR from the district court of Scott's Bluff county. Tried below before CHURCH, J.

Allen, Robinson & Reed, for plaintiff in error.

M. J. Huffman and *W. J. Richardson*, for defendant in in error, cited: *Hastings School District v. Caldwell*, 16 Neb., 72; *Smith v. Groves*, 24 Neb., 549; *Lieby v. Ludlow*, 4 O., 492; *Spencer v. Thistle*, 13 Neb., 229; *Bernstien v. Brown*, 23 Neb., 64; *Morrill v. Taylor*, 6 Neb., 252.

RAGAN, C.

On the 19th day of April, 1890, Katie Schiffbauer, formerly Ganzer, brought a suit in the district court of Scott's Bluff county against Antone Ganzer and William Ganzer to set aside and have declared void a mortgage and deed made by her upon certain real estate to Antone Ganzer, upon the grounds that said mortgage and deed were obtained from her without consideration and by fraud. The parties made defendants were personally served with summons, but William Ganzer did not appear in the case. On the 12th day of May, 1890, Antone Ganzer, by his attorneys, Messrs. Allen, Robinson & Reed, filed a demurrer to the petition of Mrs. Schiffbauer. The district court of Scott's Bluff county convened on the 25th day of May, 1890. On the 27th day of May, 1890, the case was called and the demurrer to the petition overruled. On the 29th day of May, 1890, Antone Ganzer not appearing further in the case and no one appearing for him, the court proceeded to a trial of the case and rendered a decree canceling the deed and mortgage made by Mrs. Schiffbauer to her father, Antone Ganzer. On the 23d day of June, 1890, Antone

Ganzer, by his counsel, Messrs. Allen, Robinson & Reed, filed in the district court of Scott's Bluff county a duly verified petition for a new trial of the case of Mrs. Schiffbauer against Antone Ganzer and others. The substance of this petition is as follows:

1. A denial of the truth of the averments in Mrs. Schiffbauer's petition, which she filed for the cancellation of the deed and mortgage.

2. That the plaintiff, in the petition for a new trial, then, and for ten years prior thereto, had lived on a farm in Madison county, Nebraska, at which place he was served with summons in the case brought by Mrs. Schiffbauer against Antone Ganzer, and distant four hundred and fifty miles by the direct and usual course of travel from the county seat of Scott's Bluff county; that on the 12th day of May, 1890, he had caused a demurrer to be filed to the petition of Mrs. Schiffbauer against him, sending said demurrer by mail to the clerk of the court of Scott's Bluff county, and inquiring of said clerk when the court would be in session; that he received no information from the clerk as to when the session of the court would be held and did not know of the May, 1890, term of said court until after it had adjourned.

3. That he was not present at the time the district court ruled on the demurrer filed to Mrs. Schiffbauer's petition, nor at any time during said term of court; that he had employed Mr. Allen, of the law firm of Allen, Robinson & Reed, to conduct the defense of the case brought by Mrs. Schiffbauer; that Mr. Allen, on behalf of the firm, had undertaken said defense; that Mr. Allen, on the 24th day of May, 1890, was called to Lincoln, Nebraska, to attend a term of the supreme court, and remained there until the first of June following, and on his return home first learned that at the May, 1890, term of the Scott's Bluff county court it had decided the case brought by Mrs. Schiffbauer and adjourned; that neither of the other members of the

firm of Allen, Robinson & Reed knew anything about the case, nor had anything to do with its management.

To this petition for a rehearing Mrs. Schiffbauer demurred, on the ground that the same did not state facts sufficient to entitle Antone Ganzer to a new trial. The court sustained the demurrer and dismissed the petition for a new trial, and Antone Ganzer brings this ruling of the court here for review.

Counsel for the plaintiff in error, in their brief filed here, say: "The judgment [Schiffbauer v. Ganzer] was a 'snap judgment,' to which the judge hearing the demurrer seems, from the record, to have been a party. * * * This ruling was made either by an ignoramus, or with the ulterior purpose of wronging the plaintiff in error." This statement of counsel is reprehensible in the highest degree. It is as uncalled for as it is undignified. Counsel must confine their arguments to the merits of the cases in hand, and not indulge in libels upon the trial judges, or cease to practice in this court. The brief filed herein by counsel for plaintiffs in error will be stricken from the files.

Did the court err in sustaining the demurrer of Mrs. Schiffbauer to the petition of Antone Ganzer for a new trial? This petition was filed after the adjournment of the term of court at which the decree of Mrs. Schiffbauer against Antone Ganzer was rendered. Section 602 of the Code of Civil Procedure provides: "A district court shall have power to vacate or modify its own judgments or orders, after the term at which such judgment or order was made: First—By granting a new trial of the cause, within the time and in the manner prescribed in section 318. Second—By a new trial granted in proceedings against defendants constructively summoned, as provided in section 77. Third—For mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order. Fourth—For fraud practiced by the successful party in obtaining the judgment or order. Fifth—For erroneous proceedings

against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings. Sixth—For the death of one of the parties before the judgment in the action. Seventh—For unavoidable casualty or misfortune, preventing the party from prosecuting or defending. Eighth—For errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in section 442. Ninth—For taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned, or otherwise legally notified of the time and place of taking such judgment." The power of a district court over its own judgment during the term at which it is rendered is entirely discretionary; but the discretion of the court as to the vacating or modifying its judgments or orders ends with the adjournment of the term at which such judgment was rendered or order made, and a court or judge has no authority to vacate or modify or set aside any judgment rendered by it after the term at which it was rendered, except for the causes and in the manner prescribed by the statute, and except in the exercise of its general equity jurisdiction. (*Smith v. Pinney*, 2 Neb., 139.)

If the facts stated by the plaintiff in error in his petition entitle him to a new trial, it is because such facts come within the seventh subdivision of section 602 of the Code quoted above, viz., that he was prevented by unavoidable casualty or misfortune from defending the suit of Mrs. Schiffbauer against him. The reason he alleges as to why he was prevented from defending that suit are that he did not know at what time the district court of Scott's Bluff county would be in session, and that the counsel he employed had business in this court at the time the Scott's Bluff district court was in session, and that the other members of the firm of Allen, Robinson & Reed did not know anything about the case of the plaintiff in error, nor have

anything to do with the management of it. These facts do not show that the plaintiff in error was prevented from defending his suit by unavoidable casualty or misfortune. The fact that the plaintiff did not know when the district court of Scott's Bluff county would be in session is no excuse for his failure to attend there and defend his case. (*Smith v. Pinney, supra.*) Neither is it any excuse for the plaintiff in error that the counsel he employed to attend to his case neglected to do so. The failure of Allen, Robinson & Reed to ascertain at what time the district court of Scott's Bluff county would be in session and to be present there and defend the suit of the plaintiff in error may afford him a cause of action against them, but the neglect of the counsel of plaintiff in error affords no reason why the district court should have granted the plaintiff in error a new trial; nor does the fact that the plaintiff in error resided four hundred and fifty miles distant from the place where the action against him was to be tried afford him any excuse, under the facts stated in his petition, for not being present at the trial of the suit brought by Mrs. Schiffbauer. He was not compelled to employ counsel living at a distance from the county seat of Scott's Bluff county. If he chose to do so, and the counsel employed, either through neglect or by reason of having engagements elsewhere, failed to attend at the time of the trial of the case, such engagements and such failure of counsel were neither unavoidable casualties nor misfortunes within the meaning of the statute. Nor is there any merit whatever in the averment that Robinson and Reed, members of the firm of Allen, Robinson & Reed, knew nothing of the plaintiff in error's case and had nothing to do with it. When one member of a law firm is retained or employed, such employment or retainer is that of the entire firm, and it is the duty of the attorney retained or employed to fully inform his partners of all the engagements he has undertaken on behalf of the firm, and impart to them all the

facts within his knowledge bearing upon said case. The judgment of the district court is

AFFIRMED.

JORDAN & MCCARTHY V. DEWEY & STONE.

FILED MAY 15, 1894. No. 4159.

1. **Attachment:** PLEADING. Attachment, though sometimes called an ancillary or auxiliary proceeding, is nevertheless, in all essential respects, a suit. The affidavit of a plaintiff made to obtain the writ of attachment, and the affidavit of a defendant, when made, denying the truth of the averments of the plaintiff, constitute the pleadings in the proceeding.

2. **Motion to Dissolve Attachment:** TRIAL: OPENING AND CLOSING. The party issuing the attachment is entitled to the opening and closing on the hearing of a motion to dissolve, and on him is the burden of proof. *Olds Wagon Co. v. Benedict*, 25 Neb., 372, followed. (*Dolan v. Armstrong*, 35 Neb., 339.)

3. **Attachment:** TRIAL ON MOTION TO DISSOLVE: ISSUES: EVIDENCE. Where the grounds for the issuing of an attachment are alleged in the language of the statute, and the defendant denies by affidavit the truth of the averments made to obtain such attachment, and moves to dissolve the same, the court before whom the proceeding is pending should by an order require the plaintiff in attachment, within a reasonable, fixed time, to file such affidavits or other evidence as he desires or relies upon to sustain the averments made by him to obtain the issuing of the attachment writ; and the defendant, in a reasonable, fixed time thereafter, to file such affidavits or other evidence as he desires or relies upon to traverse, explain, or avoid the case made by the plaintiff's evidence; and the plaintiff, in a reasonable, fixed time thereafter, to file such affidavits or other evidence as is applicable in rebuttal.

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

T. J. Doyle and *M. B. Gearon*, for plaintiffs in error, cited: *Parmer v. Keith*, 16 Neb., 92; *Peru Plow & Wheel Co. v. Benedict*, 24 Neb., 345; Maxwell, Pleading & Practice, 508; *Wilson v. Shepherd*, 15 Neb., 15.

J. R. Hanna, contra, cited: Maxwell, Pleading & Practice [5th ed.], 508; *Dolan v. Armstrong*, 35 Neb., 339; *Olds Wagon Co. v. Benedict*, 25 Neb., 372; *Ellison v. Tallon*, 2 Neb., 14; *Steele v. Dodd*, 14 Neb., 496; *Johnson v. Steele*, 23 Neb., 82; *Holland v. Commercial Bank of Weeping Water*, 22 Neb., 571; *Mayer v. Zingre*, 18 Neb., 458; *Brome v. Cuming County*, 31 Neb., 363; *Pierpont v. Crouch*, 10 Cal., 315; *Leighton v. Walker*, 9 N. H., 59; *Bartlett v. King*, 12 Mass, 545; *People v. Van Nort*, 64 Barb. [N. Y.], 205; *Dexter & Limerick Plank Road Co. v. Allen*, 16 Barb. [N. Y.], 15; *Daviess v. Fairbairn*, 3 How. [U. S.], 636; *United States v. Tynen*, 11 Wall. [U. S.], 88; *United States v. Claflin*, 97 U. S., 546; *Wilson v. Shepherd*, 15 Neb., 15.

RAGAN, C.

Dewey & Stone brought an action in the district court of Greeley county against Jordan & McCarthy on two promissory notes of $250, each dated March 1, 1888, and due in thirty and sixty days. At the same time they filed an affidavit for and caused a writ of attachment to be issued and levied upon the property of Jordan & McCarthy. Jordan & McCarthy filed a motion to discharge this attachment, and at the same time filed an affidavit in which they denied the truth of all the allegations in the affidavit made by Dewey & Stone to obtain the attachment. Dewey & Stone then filed a number of affidavits in support of their attachment. Jordan & McCarthy then filed a number of affidavits explaining and tending to disprove the frauds charged by Dewey & Stone in their affidavits in support of their attachment proceeding. The affidavits so filed by

Jordan & McCarthy the district court, on motion of counsel for Dewey & Stone, struck from the files and refused to consider. The motion to discharge the attachment was overruled and judgment rendered in favor of Dewey & Stone on the notes and an order made sustaining the attachment, and Jordan & McCarthy bring the case here for review. Numerous errors are assigned, one only of which it will be necessary to notice, viz: Did the court err in striking from the files and refusing to consider the affidavits of Jordan & McCarthy filed by them traversing the facts set up in the affidavits of Dewey & Stone in support of their attachment proceeding?

Dewey & Stone in their affidavit for attachment alleged the following grounds therefor against Jordan & McCarthy:

"1. That they were about to remove their property or a part thereof out of the jurisdiction of the court with intent to defraud their creditors.

"2. That they were about to convert their property into money for the purpose of placing it beyond the reach of their creditors.

"3. That they had property and rights in action which they concealed.

"4. That they had assigned, removed, or disposed of their property, or a part thereof, with intent to defraud their creditors.

"5. That they had fraudulently contracted the debt or incurred the obligation sued on."

The affidavits filed by Dewey & Stone to support these wholesale charges of fraud contained no testimony to support any of them except the fifth,—that Jordan & McCarthy fraudulently contracted the debt sued on. The testimony on that point was as follows: In February, 1886, the Bradstreet Mercantile Agency wrote to Jordan & McCarthy, requesting them to inform it, the Bradstreet Agency, of their—Jordan & McCarthy's—financial condi-

tion; their names; ages; their capital stock; their property; their liabilities, etc.; and enclosed them a blank for that purpose. Jordan & McCarthy filled out this blank, signed it and returned it to the Bradstreet Agency. In this blank, amongst other things, not material here, they stated that they had started into business on the 25th day of February, 1886, with a capital of $3,000; that they had succeeded one Moriarty; that they had never failed in business; that they estimated the value of the stock they had on hand at $1,000; that they had in cash at that time $600; that they owned three horses, two colts, twenty-five head of cattle, which they valued at $1,000; that they had just purchased the business they owned, a hardware stock, of one Moriarty and owed him $1,700 therefor, but would pay him $900 in sixty days and the balance in a year; that they had a fair stock on hand and owned two hundred and forty acres of good land, clear except a mortgage of $500, and that they did not owe any other debts.

The evidence of Dewey & Stone tended to show that after Jordan & McCarthy had made this statement to the Bradstreet Agency, the agency furnished the statement or a copy of it to them, Dewey & Stone, and that they gave Jordan & McCarthy credit for the debt sued on on the strength of this statement. The record does not show just when the debt, evidenced by the two notes sued on by Dewey & Stone, was contracted. The notes, however, as already stated, were dated March 1, 1888. The evidence that Dewey & Stone gave this credit of March 1, 1888 to Jordan & McCarthy on the strength of a statement that they made to the Bradstreet Mercantile Agency in February, 1886, though competent evidence, it must be said was worth very little. The evidence contained in the affidavits of Dewey & Stone also tended to show that the statement made by Jordan & McCarthy to the Bradstreet Agency in February, 1886, was false. The affidavits filed by Jordan & McCarthy, and which the district court

struck from the files, were mainly directed to showing that the statement made by Jordan & McCarthy to the Bradstreet Agency in February, 1886, were true, and, it must be conceded, that Jordan and McCarthy in these affidavits, if the facts therein stated are true, showed beyond question that the statement made by them to the Bradstreet Agency was then in all material respects true. The learned district judge must have made the ruling that he did upon the theory that Jordan & McCarthy, at the time they filed their affidavit denying the truth of the allegations in the affidavits of Dewey & Stone for the attachment, were at that time compelled to file all the affidavits upon which they relied for a dissolution of the attachment, and that, therefore, Jordan & McCarthy had no right to file affidavits controverting the affidavits of Dewey & Stone filed in support of their attachment. Is this the rule? In Maxwell's Pleading and Practice, at page 508, that author states the rule as follows: "Where the motion to discharge the attachment is made upon affidavits on the part of the defendant, or other evidence and papers in the case, he should be required to file all the affidavits and evidence on which he intends to rely to secure a dissolution of the attachment." We do not think this rule is sound. It is not one calculated to protect the rights of parties nor to subserve the ends of substantial justice. The case at bar is an apt illustration. Here, Dewey & Stone, to secure an attachment, allege five distinct statutory grounds. How were Jordan & McCarthy to know what act of theirs Dewey & Stone relied upon as fraudulent? All that they could reasonably do in the first instance, it seems to us, was what they did do,—file an affidavit denying the allegations of fraud set out by Dewey & Stone and put them upon their proofs. It must be borne in mind that Dewey & Stone, in their affidavit for the attachment, stated no fact that would afford Jordan & McCarthy any notice as to what transaction of theirs Dewey

& Stone thought was fraudulent. They simply stated in their affidavit conclusions. These allegations were in the language of the statute and were sufficient; but the question we are dealing with is, how were Jordan & McCarthy to know as to what transactions of theirs Dewey & Stone relied upon to sustain their allegations of fraud? Can it be possible that Jordan & McCarthy, at the time they filed their motion to discharge the attachment, in order to meet the charge of Dewey & Stone that they had removed their property out of the jurisdiction of the court, were compelled to go into an explanation of all the sales and conveyances and incumbrances they had made of their property since they began business? Were they obliged to explain the sales of their stock and their real estate, if they made such sales, and show what they had done with the proceeds? And in order to meet the charge that they had rights in action which they concealed, were they obliged to schedule all their assets of every name and nature in order to anticipate what Dewey & Stone might possibly allege in their affidavits? And were they obliged to secure a copy of the statement made to the Bradstreet Agency two years before and set it out and then collect the proof to show that this statement when made was true, in anticipation of Dewey & Stone's offering in evidence facts to show that the statement made by them to the Bradstreet Agency was false? We do not think such a rule a just one. An attachment is sometimes called a special proceeding; sometimes an ancillary or auxiliary proceeding; but it is nevertheless, in all essential respects, an action or a suit. The affidavit required to be made for obtaining the issuing of the attachment writ is analogous to a petition, and the affidavit of a defendant, when made, denying the truth of the averments of the plaintiff corresponds to an answer, and these affidavits constitute the pleadings in the attachment proceeding. The party suing out the attachment is entitled to the opening and closing on a motion to dissolve, and on him is the

burden of proof. (*Olds Wagon Co. v. Benedict*, 25 Neb., 372; *Dolan v. Armstrong*, 35 Neb., 339.) When an affidavit is filed to procure an attachment, and the grounds for the issuing of such attachment are alleged in the language of the statute, and the defendant denies by affidavit the truth of the averments made to obtain such attachment, and moves to dissolve the same, the court or judge before whom the proceeding is pending should by an order require the plaintiff in attachment, within a reasonable, fixed time, to file such affidavits or other evidence as he desires or relies upon to sustain the averments made by him to obtain the issuing of the attachment writ; and the defendant, in a reasonable, fixed time thereafter, to file such affidavits or other evidence as he desires or relies upon to traverse, explain, or avoid the case made by the plaintiff's evidence; and the plaintiff, in a reasonable and fixed time thereafter, to file such affidavits or other evidence as is applicable in rebuttal. We think the learned district judge erred in striking from the files the affidavits of Jordan & McCarthy, for which ruling the judgment of the district court sustaining the attachment must be and is reversed.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. MIRANDA WYMORE, ADMINISTRATRIX.

FILED MAY 15, 1894. No. 5168.

1. **Negligence:** QUESTION FOR JURY. Questions of negligence and contributory negligence, where the facts are such that from them different minds may reasonably draw different conclusions, are for the jury and not for the court to determine.

2. **Railroad Companies:** DUTIES TO PERSONS ON RIGHT OF WAY. A railroad company does not discharge its whole duty by refraining from wantonly injuring a trespasser upon its tracks after observing his position. It is bound in all cases to exercise reasonable care to avoid injuring all persons who are known to be, or who may be reasonably expected to be, upon its right of way.

3. **Release and Discharge:** RAILROAD COMPANIES: DEATH OF EMPLOYE: DAMAGES: RIGHTS OF WIDOW AND CHILDREN. A railroad company had connected with it a relief department composed of employes who contributed certain amounts from their wages towards an insurance fund for their relief when injured and for the relief of beneficiaries named in case of death. The railroad company collected the funds, furnished the necessary clerical force, and guarantied payment of loss. A member of this association agreed that in consideration of the amounts paid by the company, the acceptance of benefits for injury or death should operate as a release and satisfaction of all claims for damages against the company arising from such injury or death which could be made by him or his legal representatives. He was killed in an accident upon the railroad. The beneficiary named was his widow, who accepted the benefit, and by instrument in writing received it "in full satisfaction and discharge of all claims or demands on account of or arising from the death of said deceased which I now have or can hereafter have" against either the relief fund or the railroad company. Subsequently, as administratrix, she brought suit for damages against the railroad company on behalf of herself and children. *Held*, (1) That the deceased's contract did not of itself waive a right of action; (2) that neither that contract, nor the acceptance of the money or release of liability by the widow, operated to bar a right of action by the administratrix on behalf of the children; (3) that her voluntary acceptance of the benefit and release of the company did operate to bar any action for her own benefit.

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

The facts are stated by the commissioner in the opinion.

T. M. Marquett and *J. W. Deweese*, for plaintiff in error: The railroad company is not liable for damages which

result to a person on account of his walking or being upon a railroad track or private grounds of the company at a place where he has no right to be, and other than a public or private crossing recognized as such, except where the company is guilty of wanton or willful negligence after discovering the position of the person so injured. (*Spicer v. Chesapeake & O. R. Co.*, 12 S. E. Rep. [W. Va.], 553; *Blight v. Camden & A. R. Co.*, 21 Atl. Rep. [Pa.], 995; *Hargreaves v. Deacon*, 25 Mich., 5; *Dlauhi v. St. Louis, I. M. & S. R. Co.*, 16 S. W. Rep. [Mo.], 281; *Ross v. Texas & P. R. Co.*, 44 Fed. Rep., 44; *Woodruff v. Northern P. R. Co.*, 47 Fed. Rep., 689; *Palmer v. Chicago, St. L. & P. R. Co.*, 14 N. E. Rep. [Ind.], 70; *Tennis v. Interstate C. R. T. R. Co.*, 25 Pac. Rep. [Kan.], 876; *Toomey v. Southern P. R. Co.*, 24 Pac. Rep. [Cal.], 1074; *Masser v. Chicago, R. I. & P. R. Co.*, 27 N. W. Rep. [Ia.], 776; *Baumeister v. Grand Rapids & I. R. Co.*, 34 N. W. Rep. [Mich.], 414; *Scheffler v. Minneapolis & St. L. R. Co.*, 21 N. W. Rep. [Minn.], 711; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St., 378; *Mason v. Missouri P. R. Co.*, 27 Kan., 83; *Carrico v. West Virginia C. & P. R. Co.*, 14 S. E. Rep. [W. Va.], 12; *Savannah & W. R. Co. v. Meadows*, 10 So. Rep. [Ala.], 141; *Burlington & M. R. R. Co. v. Wendt*, 12 Neb., 76; *Clary v. Burlington & M. R. R. Co.*, 14 Neb., 235.)

The member of the relief association is not bound to accept the benefits due under his contract of membership, nor is his beneficiary bound to accept the same; but it is merely optional with him or his beneficiary. It gives them a choice and an option whether they will bring suit for damages if they think the company is liable, or whether they will accept the benefits under the relief association contract. Such a contract is not against public policy, nor unreasonable, nor void. (*Fuller v. Baltimore & Ohio Employes' Relief Association*, 67 Md., 433; *Martin v. Baltimore & O. R. Co.*, 41 Fed. Rep., 128; *Graft v. Baltimore*

& O. R. Co., 8 Atl. Rep. [Pa.], 206; *Spitze v. Baltimore & O. R. Co.*, 23 Atl. Rep. [Md.], 308; *Owens v. Baltimore & O. R. Co.*, 35 Fed. Rep., 718; *State v. Baltimore & O. R. Co.*, 36 Fed. Rep., 655; *Ohio & M. R. Co. v. Heaton*, 35 N. E. Rep. [Ind.], 687.)

Stipulations of settlement and receipts given are held to be good, and enforced in courts of law; and no action can be maintained on account of a cause of action which is settled until the settlement is set aside for fraud or mistake. (*Snider v. Adams Express Co.*, 63 Mo., 383; *Wallace v. Chicago, St. P., M. & O. R. Co.*, 25 N. W. Rep. [Ia.], 772; *Gould v. Cayuga County Nat. Bank*, 86 N. Y., 84; *Pennsylvania R. Co. v. Shay*, 82 Pa. St., 202; *Glenn v. Statler*, 42 Ia., 109; *Butman v. Hussey*, 30 Me., 263; *Moorman v. Collier*, 32 Ia., 138; *Belger v. Dinsmore*, 51 N. Y., 170; *Mateer v. Missouri P. R. Co.*, 16 S. W. Rep. [Mo.], 848; *Hinkle v. Minneapolis & St. L. R. Co.*, 31 Minn., 434; *Guldager v. Rockwell*, 24 Pac. Rep. [Col.], 556.) No action can be maintained where a release has been given, until it has been set aside, and whatever has been received, paid or tendered back. (*First Nat. Bank of Barnesville, O., v. Yocum*, 11 Neb., 328; *East T., V. & G. R. Co. v. Hayes*, 10 S. E. Rep. [Ga.], 351; *Doane v. Lockwood*, 115 Ill., 490; *Oswego Starch Factory v. Lendrum*, 57 Ia., 573; *Gulliher v. Chicago, R. I. & P. R. Co.*, 13 N. W. Rep. [Ia.], 429.)

J. S. Kirkpatrick, also for plaintiff in error.

Sullivan & Gutterson, contra.

IRVINE, C.

This was an action under chapter 21, Compiled Statutes, by Miranda Wymore, as administratrix of John K. Wymore, deceased, against the plaintiff in error for damages caused by the death of said John K. Wymore. On the 25th day of August, 1890, at about 2 o'clock in the morn-

ing, a special freight train of the plaintiff in error reached the station of Mullen, bound west. The operator at Mullen was instructed by the train dispatcher to hold the special for an east-bound train. The operator gave the order to the conductor, and after the lapse of two or three minutes the train pulled away from the station westward. There was a side track south of the main track with a switch at each end. The special stopped after it had passed the west switch. The brakeman at the rear of the train opened the switch and boarded the train. The train backed upon the side track. After it had passed upon the side track, the brakeman at the front end of the train undertook to close the switch, but his key failed to open the lock. While he was struggling to close the switch the east-bound train came in sight around a curve. There is evidence tending to show that it was running at a rate of about thirty miles an hour. The brakeman signaled it to stop and then renewed his efforts to close the switch. The evidence also shows that an open head-light is a signal that the main track is obstructed and that the head-light of the west-bound special was left open. There is evidence tending to show that the engineer of the east-bound train endeavored to stop his train after he saw the brakeman's signal, but he evidently failed to do so, for the east-bound train entered the switch, collided with the west-bound train, and the result was that the two engines and a number of cars were heaped together upon the two tracks and upon the space between them. Wymore was a section foreman in the employ of the railroad company and resided in a section house upon the right of way of the railroad south of the tracks, west of the station and almost due south of the point where the west-bound engine stood at the time of the collision. A young lady named Wilgus had come to Mullen that day for the purpose of taking a passenger train which was due at Mullen about half past three in the morning. She had gone to Wymore's house and she and

Wymore left the house for the depot about 2 o'clock. When the wreck was cleared away their dead bodies were found beneath the wreck and between the side track and the main track. A public roadway accessible from Wymore's house crossed both tracks between Wymore's house and the station, which was situated north of the main track. The inference is that Wymore and Miss Wilgus, on leaving the house, found the roadway blocked by the west-bound train on the side track, and in the effort to reach the station, crossed the side track at a point almost north from Wymore's house and were proceeding between the two tracks towards the depot when the wreck occurred. There was evidence tending to show that the tracks were at that point from fifteen to twenty-five feet apart. The negligence alleged as constituting the cause of action was the delay of the conductor of the west-bound train in side-tracking his train; the running of the train westward to enter the side track from the west switch instead of from the east; the failure of the company to provide the brakeman with a proper key to the switch, and the running of the east-bound train at a high and dangerous rate of speed as it approached the station and switch. The railroad denies negligence and avers contributory negligence. There was a verdict and judgment for the plaintiff, from which the railroad prosecutes error.

The assignments of error argued relate to the instructions. The second instruction given by the court is as follows:

"Negligence is the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury; and in this connection the court instructs you that it was the duty of the railroad company to provide and furnish its employes with proper and suitable machinery, implements, and equipments to operate its trains with reasonable safety.

In considering whether the company has been guilty of negligence, you will inquire whether the switch which led to the side track was kept locked, and whether the company furnished the brakeman, whose duty it was to unlock said switch, a key which the person charged with the duty of furnishing such key had reason to believe was suitable for the purpose intended, and if you find that there was negligence on the part of the company in this particular, and that because of the failure to furnish such key the injury occurred and the death of the deceased was thereby caused, and you further find that the deceased was rightfully upon the premises and killed there by reason of the company's negligence, you will find for the plaintiff; and in considering the question whether the deceased was rightfully upon the premises where his body was found, I instruct you that a railway company has a right to obstruct a public road by permitting its cars to remain upon the same for the period of ten minutes, that a person traveling on foot, after waiting such time, has a right to go around the obstruction, and that if the deceased, after so waiting, went around the obstruction and at the time he did so, was vigilant and careful to avoid apparent danger he was not guilty of contributory negligence."

The first objection to this instruction is based upon the argument that the company owed no duty to a trespasser upon its grounds except where the company was guilty of wanton or willful negligence after discovering the position of such trespasser. A number of cases are cited in support of that argument. The same argument was advanced in the case of *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90, and this court refused to adopt the doctrine contended for. It is true that no special duty is in such case devolved upon the railroad company in favor of the particular person injured, but the general duty still does remain of operating its trains with due regard to the safety of all persons who are or who may be reasonably expected to be

exposed to danger by reason of any failure to exercise reasonable care. The consequence of adopting the doctrine contended for may be illustrated by the language used in one case in which it is announced, and a case which is cited by the plaintiff in error evidently for the purpose of calling attention to this particular language. In *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St., 375, the court says: "There is as perfect a duty to guard against accidental injury to a night intruder into one's bed chamber as there is to look out for trespassers upon a railroad where the public has no right to be." Surely counsel cannot expect this court to accept without question the authority of a case where the author of the opinion has felt compelled to resort to such language as this to justify the conclusion reached. Even in the case cited it is intimated that the company would be bound to exercise ordinary care,—a dictum which mitigates to some extent the barbarity of the language quoted. What constitutes ordinary care in such a case depends largely upon circumstances. We can conceive a case where the right of way of the railroad is protected by fences, where ample means of ingress are offered the passenger by absolutely safe methods, and where the attempt of a person to approach a station along the right of way would be so hazardous, so difficult, or so unusual that a jury could hardly be justified in finding that the company in operating its trains should be required to exercise any precaution to avoid injuring such persons. On the other hand there are many stations in this state where the station house stands upon the open prairie, where the means of approach are by roads which are nothing more than partly beaten paths over the prairie, where the most convenient and the generally used means of access is over and along the company's tracks. In such a case the company has every reason to expect that persons having occasion to approach its station probably will be found near the station and along and upon its tracks, and a jury might

reasonably find a company wanting in due care in the operation of its trains under such circumstances where such an inference, under the circumstances first mentioned, would be unreasonable.

It is also objected to this instruction that there was no evidence upon which to found that portion of it wherein the jury was told that negligence might be inferred, in case the facts were so found, from the failure of the company to furnish the brakeman a key suitable for the purpose intended. The evidence upon this point is that this key had been furnished the brakeman the day before; that all the keys and locks upon the line were uniform, the keys being furnished from the supply department through the division superintendent to the brakemen and conductors; that this key had operated by unlocking switches at Alliance the day before, but that repeated attempts to unlock this switch with it proved unavailing. We think this evidence is sufficient to found the instruction. In a matter so important as the proper opening and closing of switches the jury could properly infer that the company was negligent in sending out a brakeman equipped with a key which it was not known would properly control all the locks which he might have occasion to use. The evidence showed without contradiction that this key would not unlock this particular lock, and there was no evidence tending to show that any test had been made of it before the accident or that any precautions had been taken to ascertain its safety.

The third objection made to the instruction quoted is directed to that portion of it which told the jury that the company might obstruct its road for a period of ten minutes, and that a traveler, after waiting such time, had a right to go around the obstruction, and if in doing so he was vigilant and careful to avoid apparent danger, he would not be guilty of contributory negligence. We can see an objection to this language in its reference to the period of ten minutes, which counsel concede was based upon a mis-

taken belief as to the existence of a statute or ordinance. This error operated in favor of the railroad company, for the undisputed evidence was that the west-bound train had not been upon the side track ten minutes when the collision occurred, and the deceased could not have waited for that length of time. Therefore the inference from the instruction would be that he was guilty of contributory negligence as a matter of law in going around the train within that period.

After the jury had retired it returned with the following question: "Had the deceased the right to go upon the premises where he was killed without waiting for the expiration of ten minutes, or was he bound to wait before going around the train?" The first portion of the answer made to this question was as follows: "He was not bound to wait. He had the right to go around the train and if he was vigilant and careful to avoid apparent danger. He was not guilty of contributory negligence simply by going around the train, unless he was struck while standing on the track of the railroad, or so close to it that a train moving upon the track would have extended so far beyond it as to reach him and injure him." The court followed this language by much more, not in response to the question asked, but not in its nature prejudicial to the railroad. We think, however, that there was error in the language we have quoted. The instruction first quoted practically told the jury that attempting to cross the track before waiting ten minutes would constitute contributory negligence. This was error in favor of the company. The instruction last quoted as peremptorily told the jury that attempting to cross at any time was not contributory negligence, provided the deceased was vigilant and careful in crossing. Whether or not such an act would constitute contributory negligence would depend upon circumstances. If one attempts to cross a track, observing a train near him and approaching at a high rate of speed, he might be guilty of

contributory negligence, no matter how alert he might be or how careful he was to avoid injury in making the attempt. The attempt itself might, under such circumstances, be negligence. On the other hand, seeing the west-bound train back upon the switch, if no other train was near, and if the circumstances indicated that the west-bound train was not about to move forward, the attempt to cross in front of it could hardly be said to be negligence. Vigilance in crossing would be a sufficient protection. Under the familiar rule in this state the question should have been left to the jury as to whether or not, under the circumstances of this case, the deceased had observed that degree of caution which a man of reasonable prudence would exercise, not only in the manner of his crossing the tracks and passing along the side track, but in making the attempt to do so at all. For this error we think the cause must be reversed and remanded for a new trial.

The defendant pleaded, and the evidence shows, that an organization existed, of a very peculiar constitution, known as the Burlington Voluntary Relief Department. The scheme of this association was that the employes of this and certain other associated companies contributed certain amounts from their wages to the association. These amounts were withheld by the company from their pay. These payments constituted a species of insurance fund to be paid out to the employe in case of injury or to a beneficiary named by him in his application for membership in case of his death. The railroad furnished the clerical force for the management of the department, kept the custody of the funds, and paid to the association interest upon monthly balances. It also guarantied the payment of losses. The deceased was a member of this association, and the beneficiary named was his wife, the plaintiff herein. His application for membership contained the following provision: "I also agree, that in consideration of the amounts paid and to be paid by said company for the maintenance of the relief de-

partment, the acceptance of benefits from the said relief fund for injury or death shall operate as a release and satisfaction of all claims for damages against said company arising from such injury or death, which could be made by me or my legal representatives." After Wymore's death Mrs. Wymore made application for the payment of the death benefit. It was paid to her, and she at the same time executed and delivered a document acknowledging its receipt "in full satisfaction and discharge of all claims or demands on account of or arising from the death of said deceased which I now have or can hereafter have, whether against the said relief fund, the said Chicago, Burlington & Quincy Railroad Company, or any other corporation associated therewith in administration of their relief departments." In reply she pleaded that this release had been obtained from her by threats upon the part of the company that she and her children would be turned out of the section house unless she executed it. We cannot consider the issue thus raised, for the reason that the court excluded all testimony as to such threats. Upon this defense the court instructed the jury essentially that notwithstanding such transaction, if, upon the other issues, the jury should find for the plaintiff it should allow "such damage as the evidence shows the plaintiff and her children sustained in a pecuniary sense, and no more," and from that sum deduct $500, which was received by the plaintiff from the relief department. This instruction was erroneous. If the contract, either of the deceased or of the plaintiff, was void, the $500 should not have been deducted; but the railroad company could not complain of that error. If, on the contrary, either contract was valid, the instruction was bad for that reason. Similar contracts have been the subject of considerable litigation of late years. We do not think that the general question of their validity is involved in this case. It is argued that they are against public policy, in so far at least as they attempt to relieve

employers from liability for negligence. It is also argued that they are *ultra vires* of the railroad company, as being contracts of insurance which the railroad has no power to make. These and similar questions we do not here decide. We are quite satisfied that the deceased did not and could not by such a contract release the company from liability under chapter 21 of the Compiled Statutes, being the act in this state corresponding to that known as "Lord Campbell's Act." By that act it is provided that whenever the death of a person shall be caused by the wrongful act, negligence, or default, and the act, negligence, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, then the person who would so be liable shall be liable to an action notwithstanding the death. We are aware that many cases hold that under such an act, if the party injured had compromised and accepted satisfaction previous to his death, there can be no further action. (Cooley, Torts, 264, and cases cited.) But this contract was not a compromise or satisfaction. The deceased did not waive his right of action, but only provided in the contract that the receipt by his beneficiary of the death benefit should constitute a release, and the constitution of the association in evidence shows in many places that it was contemplated that the member might elect to maintain his action or accept the benefit. It is true that the supreme court of Maryland has held under a similar state of affairs that where the mother was named as a beneficiary and the widow recovered damages under Lord Campbell's act a similar provision in the contract of membership was a good defense to the association in an action by the mother for the benefit. (*Fuller v. Baltimore & Ohio Employes' Relief Association*, 67 Md., 433.) We have two or three remarks to make, however, about that case. In the first place it was a suit upon a contract in the nature of a contract of insurance, and the result might be justified by a strict construction of the contract. The posi-

tion of the railroad company in an action for damages might be different. In the next place, it appears from that case that the railroad company compelled all its employes to become members of the association, and we are certainly not prepared to commit ourselves to the doctrine that a master may enforce a compulsory agreement to release him from the consequences of his own negligence. We are also aware that in several cases it has been held that the release by a person injured operates as a valid release, and that the contract in such case is not against public policy. (*Graft v. Baltimore & O. R. Co.*, 8 Atl. Rep. [Pa.], 206, a case decided without an opinion and not in the official reports; *Owens v. Baltimore & O. R. Co.*, 35 Fed. Rep., 715; *Martin v. Baltimore & O. R. Co.*, 41 Fed. Rep., 125.) As against these federal cases there might be set off the opinion of Judge Gresham in *Roesner v. Hermann*, 8 Fed. Rep., 782, declaring a contract with a master seeking to relieve him from liability for negligence void, as against public policy.

We repeat that the broad question is not before us. If the facts exist as claimed by the plaintiff, the circumstances were such that Wymore might have maintained an action had he lived. He had not waived his right of action. He undertook to contract that the beneficiary named in the contract might waive it by accepting the benefit; but this action is not for the benefit of his estate, but for that of his widow and next of kin, and the measure of damages is not what he might have recovered had he lived, but their pecuniary loss by reason of his death. Whether or not he could, by a compromise after the accident before his death, deprive them of their right of action, he could not contract away their rights before the injury and without their consent; nor could he contract that the widow might, after his death, deprive the next of kin of their remedy. The children, of whom there were eight, were not beneficiaries in the contract, and his contract and the widow's accept-

ance of a sum for her benefit did not discharge the right of action on the children's behalf. The widow, in accepting her benefit, acted individually and not as an administratrix. In maintaining this action she proceeds in her representative capacity, and is not estopped, so far as the rights of others are concerned, by her acts as an individual. We think, therefore, that the action could properly be maintained, notwithstanding the deceased's contract of membership and the widow's acceptance of the benefit and release of the company, so far as necessary to enforce the rights of the children. Plaintiff's position is, however, different. Disregarding the replication of duress as not now presented to us, we must take it that after the cause of action accrued she voluntarily accepted a sum of money in discharge and satisfaction of the company's liability. A similar case was presented in the case of *State v. Baltimore & O. R. Co.*, 36 Fed. Rep., 655. The court there considered itself bound upon the question of public policy by the decision of the court of appeals of Maryland in the case we have cited, but added: "It is also to be considered that the release pleaded as a discharge was executed by the plaintiff after the cause of action upon which she sues had arisen. The insurance upon the life of her husband did not affect her rights at all, as it was made payable to her husband's mother. She had no contractual relations with either the railroad company or the relief association, and cannot complain of any contract made with her husband as being against public policy, because she is unaffected by any such contract except so far as she herself has chosen to respect it since his death." The court accordingly held that the release bound her. We think this reasoning is sound. She had a right to compromise with the company after her husband's death, so far as her own rights were concerned. It is suggested that the release in this respect was without consideration, but this is not true. Under the contract for the insurance she was not absolutely entitled to it, but only be-

came so upon releasing the company. We think that the agreement she so made with the relief department, after the cause of action accrued, for the benefit of the company may be enforced by the company. By the instruction referred to the jury was directed to ascertain the damages which both plaintiff and her children had sustained. The court should have confined the jury to a consideration of the damages sustained by the children.

REVERSED AND REMANDED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. CHARLES W. WILGUS, ADMINISTRATOR.

FILED MAY 15, 1894. No. 5689.

1. **Negligence:** QUESTIONS FOR JURY. Questions of negligence and contributory negligence, where the facts are such that from them different minds may reasonably draw different conclusions, are for the jury and not for the court to determine.

2. **Railroad Companies:** DUTIES TO TRESPASSERS. A railroad company does not discharge its whole duty by refraining from wantonly injuring a trespasser upon its tracks after observing his position. It is bound in all cases to exercise reasonable care to avoid injuring all persons who are known to be, or who may be reasonably expected to be, upon its right of way.

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

Marquett & Deweese, J. A. Kilroy, J. S. Kirkpatrick, and *A. W. Agee,* for plaintiff in error.

Sullivan & Gutterson, contra.

IRVINE, C.

Minnie M. Wilgus was killed through a collision of two freight trains on the plaintiff in error's road at Mullen

and this action was brought by her father as administrator to recover damages on account of her death. The accident was the same which resulted in the death of John K. Wymore, and the opinion in the case of *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb., 645, contains a full statement of the facts. The evidence in this case differed but slightly from that in the Wymore case. Upon the trial of this case one witness testified that the switch key in question had failed to open the lock of another switch the day before the accident. In this case the engineer and fireman of the east-bound train were upon the stand and testified that the east-bound train was running only at ten or twelve miles an hour when it entered the switch, contradicting the plaintiff's witness in this respect. There were no other material differences in the evidence in the two cases. What has been said in the opinion in *Chicago, B. & Q. R. Co. v. Wymore* as to the law of negligence and contributory negligence is entirely applicable to this case and need not be repeated. The instructions here were, however, in strict accordance with the law as announced in the Wymore case. The assignments of error relating to the instructions, so far as they are presented in the briefs, refer only to the refusal to give the instructions asked by the railroad company. Of these the fourth and ninth are the only ones to which plaintiff in error especially directs attention. The fourth was as follows: "If you find that the said Minnie M. Wilgus, just prior to her death, desired to cross the tracks and depot grounds of the defendant company, in order to reach the defendant's depot, and that the public roadway was at that moment obstructed by a train standing on the side track, this fact would not justify her in going upon the private grounds of the company across and between the tracks and side tracks, and in front of and near the trains which were moving or were liable to move in order to reach the depot, that in such case it would be her duty to go upon the public crossing and

wait a reasonable time until the crossing was made clear so that she might pass over in safety; and if you find that she did not do this, but chose to go between the tracks and among and near to the trains and engines moving, or standing ready to move, and by reason thereof was killed on account of a collision between the trains, then she would be guilty of such contributory negligence as to defeat the plaintiff's right to recover in this case." This instruction was objectionable for the same reason that the instruction given to the jury after retirement in the Wymore case was held erroneous. By that instruction the jury was absolutely told that crossing the tracks and passing around the train did not constitute contributory negligence. By the instruction we are considering the jury would have been told that doing so constituted contributory negligence. We repeat that, under the circumstances of this case, whether or not these persons were guilty of negligence in attempting to pass around the train was a question for the jury and not for the court.

The ninth instruction requested was as follows: "If you find from the evidence that the accident by which Minnie M. Wilgus lost her life was caused by a defect in the switch key furnished to one of the switchmen of the defendant and of which the defendant and its employes had no actual notice; that said key had been used by such switchmen in one or more other switch-locks of the same pattern, and worked properly in such other lock or locks but would not work in the switch-lock where the accident occurred by reason of some latent defect, that is, some defect which could not be detected by ordinary care and observation, then you are instructed that the defendant would not be liable for any damages caused by said defect in such key, and your verdict should be for the defendant. In determining whether or not such defect could have been discovered by ordinary care and prudence you should consider all the evidence tending to show that said key worked

properly or would not work in other switch-locks of the same pattern." This instruction was objectionable for the same reason,—transforming a question of fact into one of law. It told the jury that as a matter of law the company had performed its duty in reference to the key, if the key had been found to work properly in one or more locks, and if its defect was not discoverable by ordinary observation. Whether the testing of a key which was expected to operate in all the locks of the road in only one of those locks was the exercise of proper care is by no means so clear as to justify a peremptory instruction. The safe operation of trains required that these keys should surely and promptly open any lock which the person carrying the key would have any occasion to use, and a test upon one lock where the consequences of a defect are so serious would certainly not evince any very high degree of care. We think the true rule on this subject was stated in the first instruction given at the request of the plaintiff, whereby the jury was told that its inquiry should be upon this subject whether by reasonable examination and observation the defect could have been discovered by the company at the time of or before the delivery of the key to the brakeman.

Counsel have not called special attention to the other instructions, the refusal to give which is complained of, and it will be unnecessary for us to refer to them in detail. Those which correctly expressed the law were substantially covered by the court's instructions. Several of them, however, were objectionable, as withdrawing questions of negligence from the jury upon subjects upon which reasonable minds might draw different inferences.

It is urged that the evidence was insufficient to sustain the verdict. This assignment is based upon the argument made in the Wymore case, that the company owed no duty to these people except not to wantonly injure them, and that their action in going along the company's tracks was

negligence as a matter of law. It is unnecessary to reconsider these questions.

JUDGMENT AFFIRMED.

CHARLES T. JENKINS V. WILLIAM MITCHELL.

FILED MAY 15, 1894. No. 5332.

1. **Review:** ASSIGNMENTS OF ERROR. An assignment of error as to the giving *en masse* of certain instructions will be considered no further than to ascertain that any one of the instructions was properly given. *Hiatt v. Kinkaid*, 40 Neb., 178, followed.

2. **Replevin:** PLEADING: EVIDENCE. Under a general denial in replevin the defendant may show any facts tending to disprove the plaintiff's ownership or right of possession.

3. ——: INSTRUCTIONS. Therefore, where the defendant answered by a general denial, followed by a special pleading of facts admissible under the general denial, it was not error for the trial court in stating the issues to the jury to state the defense as consisting of a denial of the plaintiff's claims.

4. ——: PARTNERSHIP PROPERTY: BURDEN OF PROOF. The defense in an action of replevin being that plaintiff and defendant were partners and the property in controversy partnership property, the burden of proof is upon the plaintiff to establish his exclusive right.

5. ——: ——: VALUE OF POSSESSION. Where one partner, by a writ of replevin, takes partnership property from the possession of the other, the value of the latter's possession should be assessed at the full value of the property, as no accounting can be had in that action to determine defendant's actual interest.

6. **Jury:** CHALLENGES: REVIEW. Assignments of error based upon overruling challenges to jurors will not be considered unless the record discloses that the challenging party exhausted his peremptory challenges.

7. **Review:** ADMISSION OF EVIDENCE. Certain rulings upon the admission of evidence examined, and *held* not to be erroneous.

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

Thomas Darnall, Charles T. Jenkins, and *M. B. Reese,* for plaintiff in error.

R. C. Noleman, contra.

IRVINE, C.

This action was replevin by the plaintiff in error against the defendant in error for a number of law books and certain office furniture. The property was delivered to the plaintiff under the writ. The answer began with a general denial of all allegations not expressly admitted. It then alleged *in extenso* that the plaintiff and defendant were partners; that the property replevied had been purchased for the partnership and was partnership property. The trial resulted in a verdict and judgment for the defendant, from which plaintiff prosecutes error.

The first eight assignments of error relate to the giving and refusal of instructions. In the motion for a new trial error is assigned upon this subject as follows: "The court erred in giving the instructions 1, 2, 3, 4, 5, and 6 on its own motion, and duly excepted to by the plaintiff. Second —The court erred in refusing instructions 1 and 2 asked by the plaintiff, to which the plaintiff then and there excepted." Under these assignments, therefore, if any one of the instructions in either group so assigned *en masse* was correct, the assignment must be overruled as to that group. (*Hiatt v. Kinkaid,* 40 Neb., 178; *McDonald v. Bowman,* 40 Neb., 269.)

Looking first at the instructions given by the court of its own motion the first is as follows: "The jury is instructed by the court that plaintiff, by his petition, claims to have been the owner and entitled to the immediate possession of the chattels in controversy at the commencement

of this action. Defendant denies by his answer the claims of the plaintiff." This is one of the instructions particularly complained of, it being argued that it did not properly present the issues. We think that the instruction properly stated the issues. The plaintiff's right to recover depended upon his right of possession, and a denial by the defendant of plaintiff's allegations of ownership and right of possession was sufficient to admit any evidence going to defeat plaintiff's claim. (*Aultman v. Stichler*, 21 Neb., 72; *Richardson v. Steele*, 9 Neb., 483; *Merrill v. Wedgwood*, 25 Neb., 283; *Cool v. Roche*, 15 Neb., 24; *Towne v. Sparks*, 23 Neb., 142.) Indeed, the plea of property in defendant is mere matter of inducement to the traverse of plaintiff's claim of property and has been held not itself to be traversable. (*Reynolds v. McCormick*, 62 Ill., 412.) All the special matter pleaded might, therefore, have been stricken out and the general denial would have been sufficient to put in issue all the contested facts. It was not necessary for the trial court to state the immaterial portions of the pleadings, and the instruction quoted properly presented the issue.

Upon the assignment based upon the refusal of plaintiff's instructions it might be sufficient to say that the first instruction asked was a statement of the issues, and as we have held that the court correctly stated them, it was not error to refuse an instruction stating them in other language. By examining the second instruction, however, we are able to in effect consider several other arguments relating to the court's instructions which we are precluded from considering by themselves. By this instruction the court was asked to charge the jury that the burden of proof was upon the defendant to establish that the property replevied belonged to the partnership. This is not the law. The plaintiff undertook to replevy the property from the defendant. In order to prevail, it was incumbent upon him to show that he had at the commencement of the action the

right to the immediate possession of the property as against the defendant. The defendant was not required, in order to defeat the action, to show that there was any interest in himself. It is clearly the law, and this was conceded, that one partner may not maintain replevin against another for partnership property. If, therefore, it appeared that this was partnership property, the plaintiff must fail, and it devolved upon the plaintiff by a preponderance of the evidence to establish his exclusive right. To have instructed the jury that the burden was upon the defendant by a preponderance of the evidence to show that the property belonged to the partnership would have been equivalent to saying that the presumption was in favor of the plaintiff's exclusive right and that he must recover unless the evidence preponderated against him.

One instruction given by the court related to the measure of defendant's recovery. While we cannot consider this assignment as such, the verdict conformed thereto, and the assignment that the verdict was contrary to law and the evidence may possibly be sufficient to cover the question raised. The jury found in accordance with this instruction, that the value of the property was $310, and the value of defendant's interest one-half that sum. Judgment was rendered for $155, together with interest. It is clear that in an action of replevin there can be no settlement of partnership accounts (*Chandler v. Lincoln*, 52 Ill., 74), and the court, therefore, could not determine in this action the exact interest of the defendant. It is probable that where a partner, by a writ of replevin, seizes partnership property in possession of the other partner, the judgment in such an action should be such as to restore the parties to their position before the action began, which would require, unless the property was returned, a judgment against the plaintiff for its full value, leaving their ultimate rights to that fund, as well as to others, for determination in a proper proceeding. Certain it is that the

plaintiff cannot be permitted in effect to succeed in replevin through the impracticability of maintaining a partnership accounting in such an action. If, then, the defendant is in such case entitled to any judgment and his precise interest cannot be determined, it would seem to follow that the judgment must be for the full value. The plaintiff was, therefore, not prejudiced by the court's directing the defendant's interest to be fixed at one-half that sum. The objection to this proceeding, which the plaintiff in error urges, is that such a judgment would constitute an adjudication as to this property which would be a bar to an inquiry in regard thereto in an accounting between the parties. If this result follows, which we do not determine, it must be because, by ignoring the partnership and asserting an individual ownership, he is estopped from thereafter asserting partnership rights. He is not estopped upon the principle of *res judicata*, for the sufficient reason that the issues would not be the same in the two actions. The replevin suit merely determines that he is not the exclusive owner, and that he was not entitled to possession as against the other. The judgment simply restores the defendant to the position he occupied before the plaintiff's wrongful act. A return of the property under the judgment would still leave it partnership property, to be considered in an accounting between the parties, and there is no reason why the payment of the value should not create a fund to be considered in the same way.

Error is assigned upon the refusal of the court to sustain challenges to two jurors for cause. We will not consider whether there was error in the court's rulings, for the reason that if there was it was without prejudice, the record not disclosing whether these jurors actually served or that the plaintiff exhausted his peremptory challenges. (*Palmer v. People*, 4 Neb., 68; *Burnett v. Burlington & M. R. R. Co.*, 16 Neb., 332; *Curran v. Percival*, 21 Neb., 434; *Nowotny v. Blair*, 32 Neb., 175.)

The remaining assignments refer to the evidence. The following question and answer appear in the examination of the plaintiff: "I now hand you Exhibit F, and ask you what it is? A. That is a note of $100, given to the State National Bank, Lincoln, signed by myself and father, which was in payment of the first note, and I borrowed some extra money to live on." This answer was stricken out on motion of the defendant, as immaterial. There had already been evidence tending to show that the plaintiff purchased the property in controversy in Lincoln for $285, paying $25 in cash and giving notes for $100 and $160, signed by plaintiff, defendant, and plaintiff's father, to secure the remainder; that the plaintiff and his father had made a note for $50 to the State National Bank, and from the proceeds of that note the $25 in cash had been paid. There was no claim that the property originally belonged to the plaintiff and had afterwards passed to the partnership, but the question at issue was whether or not the purchase had been on behalf of the partnership. Who ultimately made the payment was immaterial to this question, except as it might throw light on the purpose of the purchase. Confessedly, the cash payment had been made by the plaintiff from the proceeds of a loan secured by him and his father. The fact that upon the maturity of that loan he borrowed further money from the same source and executed a new note extending the original obligation, could throw no light upon the issue. The case was somewhat confusing to the jury at best and the trial court did right in refusing to permit this affair to be further traced.

Several assignments relate to the admission in evidence of the following document:

"ALLIANCE, NEB., Nov. 27, 1888.

"It is hereby mutually agreed by and between Chas. T. Jenkins and Wm. Mitchell, partners in the law business under the firm name of Jenkins & Mitchell. Now this agreement witnesseth: That the said firm dissolve partner-

ship; that Chas. T. Jenkins assume all debts now owing by the partnership for books, rent, or other partnership business standing out at this date.

"In testimony of this agreement we have hereunto set our hands this 27th day of November, 1888.

"Witness."

The plaintiff admitted that the document was in his handwriting, and the defendant testified that it had been presented to him by plaintiff before the books were replevied, after a talk about dissolving the partnership. The objections made to this instrument and the evidence relating to it were that it was "incompetent and immaterial, not signed, and prior to the time of bringing the action." It was competent as being in the handwriting of the plaintiff, and there being evidence tending to show that it had been presented by plaintiff. It was material as an admission that there were books belonging to the partnership, its weight for that purpose being for the jury. That it was not signed was no proper objection, it not being sought to enforce the instrument as an agreement, but evidently merely to offer it as an admission. That it was made before the action arose, was rather in favor of its admission than against it.

The following question was asked of Col. Pace, from whom the property was purchased: "Is there any balance still due you for the books and to whom do you look for the pay, and what, if any, security do you hold?" An objection to this question was sustained. It was entirely immaterial to whom Col. Pace looked for his pay. He might have been entirely ignorant of the existence of any partnership and might have supposed that he was dealing exclusively with plaintiff, and as between him and plaintiff that may have been the case, but this would not affect the relations between plaintiff and defendant. This portion at least of the question was objectionable, and the ruling of the court was, therefore, right.

It was shown over plaintiff's objections that during the existence of the partnership plaintiff and defendant executed a chattel mortgage to secure a partnership debt upon a portion of the property in question. A copy of the mortgage was admitted, the objection as to its being a copy being waived, but its competency and materiality were objected to. We think that this evidence was competent and material, as in the nature of an admission that the books were partnership property.

There are several other assignments in relation to the admission and exclusion of evidence. Some relate to the exclusion of evidence which was afterwards admitted and remained undisputed, and the error was thereby cured. One answer was properly stricken out as not responsive to the question, and the substance of it was later admitted in response to a proper question. Some of the rulings were of the same nature as those already discussed and need not be again referred to.

It is assigned that the verdict was not sustained by the evidence. We have examined the evidence carefully, and think the verdict was in accordance with the clear weight thereof. There is no material error in the record and the judgment is

AFFIRMED.

WALTER MOISE v. W. C. POWELL.

FILED MAY 15, 1894. No. 4778.

1. **Appeal from Justice Courts:** APPEARANCE IN APPELLATE COURTS. Where the law expressly forbids an appeal in a certain class of cases, the appearance of the appellee does not confer jurisdiction upon the appellate court. In such case there is a want of jurisdiction of subject-matter. *Minneapolis Harvester Works v. Hedges*, 11 Neb., 46, distinguished.

2. ———: JURISDICTIONAL AMOUNT. Where a case was tried to a jury in a justice's court, the right to appeal depends upon the amount claimed in the bill of particulars. Where the prayer is for judgment for $20, the defendant cannot insist upon the allowance of interest in addition to that sum for the purpose of giving him the right to appeal.

3. ———: ———: CONSTITUTIONAL LAW. Sections 985 and 1017 of the Code of Civil Procedure, forbidding appeals from judgments of justices of the peace where not more than $20 is claimed in the bill of particulars and the case is tried to a jury, are not repugnant to the constitution.

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

St. Clair & McPheely, for plaintiff in error, cited: *Minneapolis Harvester Works v. Hedges*, 11 Neb., 46.

Godfrey & Godfrey, contra.

No briefs on behalf of defendant in error.

IRVINE, C.

The defendant in error Powell sued the plaintiff in error Moise before a justice of the peace for damages alleged to have been sustained by the injury of defendant in error's buggy while in the possession of plaintiff in error. The prayer was for judgment for $20. There was a trial to a jury and a verdict and judgment for the defendant in error for $20. The plaintiff in error filed an undertaking in appeal, and thereafter, within the statutory time, filed a transcript in the district court for the purpose of taking an appeal. Later, the district court, on application of the defendant in error, gave him leave to file his petition in twenty days from the date of the order, which was beyond the statutory time for filing a petition. Still later, the defendant in error moved to dismiss the appeal, for the reason that the amount claimed by him did not exceed the sum of $20, that the cause was tried to a jury in the justice court,

and that the action was not appealable. This motion was sustained, and from that order error is prosecuted.

Section 985 of the Code of Civil Procedure is as follows: "If either the plaintiff or defendant, in his bill of particulars, claims more than $20, the case may be appealed to the district court; but if neither party demands a greater sum than $20, and the case is tried by a jury, there shall be no appeal." Section 1017 is as follows: "Appeals in the following cases shall not be allowed: * * * Second—In jury trials, where neither party claims in his bill of particulars a sum exceeding $20." * * * It was, doubtless, under these statutory provisions that the district judge dismissed the appeal.

In the brief of the plaintiff in error it is suggested that the appearance of the defendant in error in the district court, and his obtaining an extension of time to file his petition, waived any defect of jurisdiction. It is proper to say, however, that counsel in that connection express very frankly their own doubt as to the soundness of that suggestion, but they cite *Minneapolis Harvester Works v. Hedges*, 11 Neb., 46, in support of that view. In that case it was held that where the defendant, in an action before a justice of the peace, had failed to appear and then undertook to appeal from a judgment rendered by default, the appellee waived the objection to the appeal by appearing in the district court and filing pleadings to the merits. Prior thereto it had been held (*Clendenning v. Crawford*, 7 Neb., 474) that because a judgment rendered by a justice of the peace in the absence of a party may be set aside upon motion for that purpose, no appeal would lie until after such a motion had been made. This was upon the principle that the setting aside of the judgment was a complete remedy in the justice's court and was a special provision giving a remedy other than appeal, and that this remedy must be exhausted before an appeal could be taken. The district court was not excluded by statute from exer-

cising jurisdiction of appeals in such cases, but the right to appeal was denied because the remedy in the inferior court had not been exhausted. Therefore, *Minneapolis Harvester Works v. Hedges* simply held that joining issues in the appellate proceedings constituted a waiver of the appellant's right to insist upon that rule. In this case the statute absolutely forbids an appeal where the amount claimed is not more than $20, and the case was tried to a jury. Therefore, in such a case the district court has no jurisdiction of the subject-matter, and the appellee, by appearing, does not waive that objection.

The plaintiff in error also contends that the defendant in error, if entitled to recover at all, was entitled to interest, and that interest added to the $20 damages by him claimed made the amount in controversy more than $20, and therefore rendered the case appealable. The defendant in error did not pray judgment for interest, but only for $20. Whether or not he was entitled to interest in such a case need not be decided. In *Finch v. Hartpence*, 29 Neb., 368, the plaintiff prayed judgment for $20 with interest, and after an appeal had been taken moved to dismiss the appeal because he had filed a remittitur reducing the amount claimed to $19. The court held that the amount claimed in the bill of particulars determined the right to appeal, and that the plaintiff, by reducing the amount of his demand, could not defeat that right. In *Northern P. R. Co. v. Booth*, 14 Sup. Ct. Rep., 693, the supreme court of the United States held that where judgment had been rendered for $5,000, and the defendant, after judgment, procured it to be increased so as to include interest, such action was inoperative to give the supreme court jurisdiction in error. This case was stronger than that we are considering. There it was conceded that the right to review depended upon the amount of recovery and the judgment had actually been entered for the larger amount. Here the right to appeal depends upon the amount claimed, and certainly the appel-

lant cannot be permitted to insist upon the allowance of an amount greater than was either claimed or recovered in order to give him the right to appeal.

The principal objection is that the sections of the Code of Civil Procedure referred to are unconstitutional. The constitutional provisions referred to are sections 6 and 24 of the bill of rights. Section 6 is as follows: "The right of trial by jury shall remain inviolate, but the legislature may authorize trial by a jury of a less number than twelve men, in courts inferior to the district court." Section 24 is as follows: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." The sections of the Code referred to do not conflict with these provisions. Section 6 guaranties a jury trial, but expressly permits the legislature to provide, as it has done, for a jury of less than twelve men in inferior courts. Such a jury the parties have had the benefit of. Section 24 guaranties the right to be heard in the court of last resort, but not necessarily by appeal. It is only requisite that a resort to that court should be permitted by appeal, error, or otherwise. The plaintiff in error might have filed his petition in error in the district court and had the case there reviewed, and thence might have proceeded to this court. The statute does not, by forbidding an appeal to the district court, prevent his being here heard. It merely deprives him of one method of review, leaving another and adequate remedy open to him.

JUDGMENT AFFIRMED.

GERMAN NATIONAL BANK OF HASTINGS V. FRANK W. LEONARD.

FILED MAY 15, 1894. No. 5589.

1. **Evidence:** STATEMENTS IN OTHER SUIT: ESTOPPEL. The testimony of a witness in an action to which he was not a party may be proved in a subsequent action to which he is a party as an admission, but the fact of his having been a witness in such other action does not operate to estop him by the record thereof.

2. **Judgments:** SETTLEMENT: DECEIT: RIGHTS OF THIRD PERSONS: PLEADING. Suit was brought by A against a bank, alleging that B, being indebted to A, had paid into the bank the amount of the indebtedness to the use of A. The bank answered, among other things alleging that in an action by a third person against the bank, B, and others it was determined that the amount due A had been included in a mortgage from B to the bank, and that the judgment rendered in that case against B in favor of the bank did not include A's indebtedness. *Held*, That these averments stated no defense.

3. **Fraudulent Conveyances:** THIRD PERSONS: RATIFICATION. Where a conveyance is fraudulent against creditors, and certain creditors attack it and defeat it upon that ground, another creditor is not by that fact required to treat it as void, but may still ratify it and enforce rights given him thereunder.

4. **Instructions:** FAILURE TO GIVE: REVIEW. Before error can be predicated upon the failure of the court to present a particular feature of a case to the jury, the party complaining should, by an appropriate instruction, request the court to charge upon that feature.

5. **Documentary Evidence:** ADMISSIONS. Book entries, made by a party in the regular course of his business, are admissible in evidence on behalf of the adverse party when in the nature of admissions.

6. **Witnesses:** LEADING QUESTIONS. The permission of leading questions is reversible error only for an abuse of discretion of the trial court in permitting them.

7. ———: ANSWERS: REVIEW. In order to predicate error upon the admission of an answer not responsive to the question put a witness a motion should be made to strike out the answer for that reason.

8. **Evidence:** TESTIMONY IN OTHER CASE: REPORTER'S NOTES. The testimony of a witness in another case may be proved by any witness who heard the testimony, and who, with or without the aid of a memorandum, may speak from his own memory as to such testimony. The reporter's notes are not the only or best evidence as to such testimony.

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

See opinion for statement of the case.

Batty, Casto & Dungan, for plaintiff in error:

A compromise effected by the parties with all the facts before them, and without fraud or bad faith on the part of either, will not be disturbed. (*Thompson v. Sawyer*, 14 S. W. Rep. [Ky.], 909; *Gilek v. Stock*, 33 Ill. App., 147; *Mills v. Miller*, 2 Neb., 313.)

In order to rescind the settlement on the ground of fraud Leonard must surrender the benefits derived under it. The fact he has failed to do so is a recognition of the settlement, and he is bound by it. (*Hart v. Gould*, 62 Mich., 262; *Snailham v. Isherwood*, 23 N. E. Rep. [Mass.], 1135; *Town's Adm'r v. Waldo*, 20 Atl. Rep. [Vt.], 325.)

Where the consideration for a promise proves to be a nullity, the promise has no legal force or effect. (*Swan v. Ewing*, Morris [Ia.], 453; 1 Addison, Contracts, sec. 6; 1 Parsons, Contracts, p. 462, and cases cited.)

A promise to pay the debt of another is not binding unless supported by a valuable consideration. (*Strough v. Brown*, 38 Hun [N. Y.], 307; *Chapman v. City of Brooklyn*, 40 N. Y., 372; *Foss v. Richardson*, 15 Gray [Mass.], 303; *Darst v. Brockway*, 11 O., 462; *Spring v. Coffin*, 10 Mass., 31; *Steel v. Hobbs*, 16 Ill., 59; *Leach v. Tilton*, 40 N. H., 473; *Rice v. Peet*, 15 Johns. [N. Y.], 503; *French v. Millard*, 2 O. St., 44.)

Capps & Stevens and *W. P. McCreary, contra*, contend-

ing that the defendant in error was not bound by the judgment, cited: *Calderwood v. Brooks*, 28 Cal., 151; *Thompson v. Clark*, 4 Hun [N. Y.], 164; 2 Black, Judgments, sec. 549; *Foster v. Derby*, 1 Ad. & El. [Eng.], 783; *Wilson v. Davot*, 5 Bos. [N. Y.], 619; *Hunt v. Haven*, 52 N. H., 162.

The jury found that a material fact was concealed from Leonard by the plaintiff in error. Leonard was not, therefore, bound by the compromise. (*Faulkner v. Klamp*, 16 Neb., 174; *Treitschke v. Western Grain Co.*, 10 Neb., 360.)

IRVINE, C.

A proper consideration of some of the errors in this case demands a statement of the pleadings. The defendant in error, Leonard, brought the action against the plaintiff in error (hereinafter referred to as the "bank"), alleging in his petition that on the 12th day of December, 1889, one George A. Stewart, being then indebted to the plaintiff, paid into the bank to his use $764.60; that on July 1, 1890, the bank paid plaintiff $450, and that there remained due the sum of $314.60, with interest. He further averred that at the time the $450 was paid, the bank represented to plaintiff that plaintiff's claim against Stewart was dependent upon a certain chattel mortgage given by Stewart to the bank, and that the uncertainty of the bank's being able to sustain the mortgage made plaintiff's claim uncertain, concealing the fact that Stewart had deposited in the bank the full amount of plaintiff's claim; that plaintiff relied upon the representations made, and not knowing that his claim had been paid to the bank in full, he was induced to accept $450 in settlement, but that the settlement was fraudulent by reason of the representations and concealment referred to. A motion was subsequently made to require the plaintiff to make his petition more specific by stating what officers of the bank made the representations. This motion was overruled and that action of the district court is assigned as error. This assignment may here be

conveniently disposed of. The motion was not made until December 14, 1891. An answer had been filed December 15, 1890, and an amended answer December 11, 1891. The motion came too late, and was properly overruled for that reason if for no other. Such a motion should be made before answer. The amended answer referred to averred that in an action wherein W. J. Stewart was plaintiff and George A. Stewart, the German National Bank, and others were defendants it was found that the bank held notes against George A. Stewart, secured by mortgages, amounting to $4,969.44; that the mortgage given by Stewart to the bank "was given in addition to the alleged indebtedness to the bank to secure the claim of one Frank W. Leonard for $764.60, and one Sanford Idell for the sum of $95, then creditors of the said George A Stewart;" that in that suit there was found due to the bank $4,377; that the amount so found due was the amount of the bank's mortgage with the claims of Leonard and Idell deducted; that this action is based upon the same claim which was deducted from the bank's judgment against Stewart; that that action is now pending in the supreme court. The bank further averred that Leonard and the bank made a compromise of Leonard's claim, whereby Leonard agreed to take, and did take, $450 in full and complete settlement. As a further defense it was averred that Leonard was a witness in the case of Stewart v. Stewart, and testified therein, among other things, that the claim he had against Stewart was a part of the amount secured by the bank's mortgage, and the bank therefore alleged that Leonard was a privy to such case and bound by the judgment The answer closed with a general denial. There was a trial to a jury and a verdict and judgment for the plaintiff, from which the bank prosecutes error.

While the case is not free from difficulties, the questions presented by the record rest upon familiar principles. The chief difficulty arises in making such an analysis as to

clearly develop the principles involved. In order to do so we shall first examine the assignments of error relating to the instructions.

The first instruction requested by the bank was refused. It was as follows: "The court instructs the jury, that if they find from the evidence that the question of the rights under, and validity and *bona fides* of the mortgage given by George A. Stewart to the German National Bank, defendant herein, was adjudicated in the case of W. J. Stewart v. George A. Stewart and others, as between this defendant and the creditors of said George A. Stewart and that the claim of said plaintiff was included in said mortgage and was part of the indebtedness secured thereby, and you further find that said mortgage was declared by this court to be fraudulent and void as against the creditors of said George A. Stewart, and you further find that the plaintiff in this action claimed to be and was at that time a creditor of said George A. Stewart for the same claim sued on in this action and testified as a witness in said action of W. J. Stewart v. George A. Stewart and others, then you must find for the defendant." This instruction was evidently framed upon the theory that Leonard, by testifying in the case of Stewart v. Stewart and others, became bound by the judgment in that case. There are several objections to this instruction. In the first place Leonard was not a party to Stewart v. Stewart, nor did he stand in privity with any of the parties thereto. The testimony which he gave in that case could properly be used, as it was in fact used, for the purpose of contradicting his evidence here and for the purpose of showing admissions by him made. Beyond that his testimony in that case, or the fact that he testified at all, was wholly irrelevant. The proposition that a person by becoming a witness in a case does not become a party to it and is not estopped by the judgment rendered is axiomatic. In the next place, all that was pleaded in regard to the former case was that the amount of Stewart's in-

debtedness to Leonard was included in the bank's mortgage; that Leonard had so testified, and that the judgment there rendered in favor of the bank did not include that amount. This was insufficient to state any defense. The deposit with the bank of the amount of Stewart's claim was not by the answer connected with any of these averments, and for all that appeared upon the pleadings the bank may have absolutely assumed Leonard's claim and depended upon the mortgage merely for indemnity. Indeed, the decree in Stewart v. Stewart introduced in evidence shows that that is what the court there found. The failure of that indemnity would not operate to defeat the plaintiff's claim. In the next place, that portion of the instruction which stated that if the mortgage had been declared void as against the creditors of Stewart, and plaintiff was a creditor, he could not recover was palpably vicious. While the statute uses the word "void" the uniform construction has been that such a conveyance is good as between the parties and is void only as to such creditors as attack it. If the instrument was a fraud against creditors, Leonard might have disregarded it, but he also had the right at his election to treat it as valid and assert any claim he might have under it. He has taken this course, and the fact that other creditors exercised their election differently does not affect his right. The court, therefore, properly refused this instruction.

The second instruction asked by the bank was also refused and reads as follows: "The court instructs the jury that if you find from the evidence that the claim of plaintiff as against defendant herein is based upon the promise of the defendant made to George A. Stewart, to the effect that the defendant would assume and agree to pay plaintiff's claim against said George A. Stewart if the amount thereof were included in a mortgage given by said George A. Stewart to defendant and was so included, and that said security was all the consideration defendant received for said prom-

ise, and you further find that the rights under, and the validity of said mortgage was adjudicated in the action of W. J. Stewart v. George A. Stewart and others, and was declared by this court to be fraudulent and void as between the defendant and the creditors of said George A. Stewart, then you are instructed that there was no valid consideration for the said promise of defendant to pay plaintiff, and you must find for the defendant." What has already been said as to the answer is applicable for the purpose of showing that this instruction was not pertinent to the issues. The theory sought to be presented by the instruction was this: That if A gives to B a mortgage, and in consideration of the giving of that mortgage and for such consideration alone B promises to pay the debt of A to C and the mortgage afterwards fail, then in such case C cannot enforce against B such promise. Whether this is correct as a proposition of law or not we do not decide, for the reason that the answer was insufficient to present such issues.

Instruction No. 3, requested by the defendant, was to the effect that although the jury might find that the bank promised Stewart to pay plaintiff's claim, still, if it found that subsequently plaintiff and the bank compromised the claim and agreed upon a different amount to be paid in full settlement, and further that the bank had paid that amount, then the verdict should be for the bank. This instruction was modified by adding: "if you find such settlement was *bona fide* on the part of the defendant." The modification of this instruction is assigned as error. The modification we think quite proper. The pleadings had squarely attacked the compromise as fraudulent, and the *bona fides* of the settlement, and not the fact that one had been reached, was the very question in issue. If the instruction stood quite alone, it might be open to criticism, as implying that the burden of proof of *bona fides* was on the bank; but by the modification of the instruction given at the request of the plaintiff, as well as by an instruction given by the court

of its own motion, the jury was told in the most emphatic terms that the presumption was in favor of *bona fides* and that it devolved upon the plaintiff by a clear preponderance of evidence to establish the fraud. In discussing the instructions the argument is made that the plaintiff could not avoid the settlement without returning the money already received. There is very respectable authority for holding that where in such a case a sum of money has been received in satisfaction of a greater sum, when the settlement is attacked, the money received shall be simply applied as a payment *pro tanto* and it is not necessary to tender it back. A case illustrative of this doctrine is *Town v. Waldo*, 62 Vt., 118, where a certain sum of money and also a heifer had been given in settlement. It was held necessary to return the heifer, but not the money. However, we do not decide this question, for the reason that no instruction was either given or requested upon the subject. This was an action at law and no equitable relief was sought. If the bank desired to raise this defense, it should have requested an instruction to the jury.

Mr. Fuller, the cashier of the bank, was called as a witness by the plaintiff. Books were produced which he testified were kept in the course of the bank's business, were books of original entry, the entries made about the time of the transaction; that they were made by an employe of the bank whose duty it was to make them; that the witness had general supervision over the entries; that he had examined the entries; that he believed them correct. An entry showing a credit to Leonard of $764.60 on December 12, 1889, was thereupon offered in evidence and received over plaintiff's objection. All the preliminary evidence we have referred to was also objected to. The following then occurred: "Please read what was offered from that book to the jury." There was no objection made to this, and the witness then read the entry. The assignment of error upon this point is as follows: "The court erred in

admitting the following evidence: * * * The testimony of witness Fuller in relation to the books of the bank, as appears on pages 9 and 10 of the bill of exceptions." We have no doubt that the entry was admissible upon the proof made. It was not a matter of proving accounts under the statute, but the entry made upon books of the bank by the proper employe, under the supervision of the cashier, was competent evidence as an admission by the bank. It was not competent after the offer to permit the witness to read what purported to be the entry. The entry itself should have been offered in evidence, read by counsel, or exhibited to the jury. But this proceeding was not objected to.

One assignment relates to a question put to the plaintiff. The question is objected to as leading and the answer as not responsive. This evidence was as follows: "State whether or not you ever learned that the money had been deposited to your credit in the German National Bank." Answer: "Well, after the suit between Stewart and Stewart." The permission of leading questions is reversible error only where the trial court has abused its discretion in that respect. We cannot see any impropriety in this question, or that prejudice could have possibly resulted. As to the answer, it was fairly responsive to the question, but no motion was made to strike it out, and error could not be predicated upon it as irresponsive for that reason.

Error is also assigned for permitting a witness to testify as to statements made by the president of the bank during his testimony in the case of Stewart v. Stewart. The objection made is that it was not the best evidence. This objection is not well taken. It was made upon the theory that the reporter's notes constitute better evidence. Counsel have mistaken the effect of these notes. In *Spielman v. Flynn*, 19 Neb., 342, it was indeed held that a certified copy of the reporter's notes was admissible where the original would be, but this case did not hold that parol

evidence was inadmissible to prove the fact of the testimony. But at the same term it was held (*Lipscomb v. Lyon*, 19 Neb., 511) that the reporter might testify as to the fact of the testimony, using his notes as memoranda, but that a transcript of the notes themselves would not be admissible as original evidence. We are quite clear that any witness who was present and heard the testimony, and with or without the aid of a proper memorandum is able to speak from his own memory, may prove the fact of the testimony and that the reporter's notes are not such a record as to constitute the only or primary evidence of such fact.

The sufficiency of the evidence is questioned. There is ample competent evidence tending to show that Stewart gave his note to the bank for the amount of Leonard's claim; that the bank agreed with him to satisfy it; that it credited Leonard upon its books with the full amount, These were the essential features of plaintiff's case in chief. The only affirmative defense sufficiently pleaded is the compromise. Upon this there is evidence tending to show that Leonard did not know of the bank's absolute promise, or of the fact of the credit; that officers of the bank represented to him that his recovery would depend upon sustaining the mortgage and the amount realized therefrom, and that he accepted the $450, relying upon these representations, and in ignorance of the bank's absolute agreement to pay and assumption of the debt. Here was a material concealment, if not a misrepresentation. We think it was sufficient to sustain the verdict. With the conflicting evidence we have nothing to do, nor can we consider, as against Leonard's rights, the unfortunate position which the bank claims to be in, of losing its own security and at the same time being compelled to pay Leonard's claim. The two cases resulting in this state of affairs were between different parties. The facts in one or another may have been incorrectly decided, but we must take each case as it

is presented and cannot deny to this plaintiff the rights to which the facts found by the jury entitle him, because in another case between different parties a conclusion was reached which may perhaps have been inconsistent with the conclusion reached here.

JUDGMENT AFFIRMED.

RAGAN, C., not sitting.

GRAND ISLAND SAVINGS & LOAN ASSOCIATION, APPELLEE, V. JULIETTE MOORE ET AL., IMPLEADED WITH CHARLES WASMER, APPELLANT.

FILED MAY 15, 1894. No. 5092.

1. **Transcript for Review.** The transcript of a record filed in this court for the purpose of appeal imports absolute verity, and in considering the appeal must be treated as the sole and exclusive evidence of the facts.

2. **Mortgage Foreclosure:** DEFICIENCY JUDGMENT: PLEADING. It seems that under a prayer for the foreclosure of a mortgage and for general relief a personal judgment may be allowed for a deficiency.

3. ——: ——: ——: AMENDMENT. Where the prayer is in such form, and after confirmation of sale the plaintiff files a motion praying for a deficiency judgment, serving notice thereof upon the defendant, such motion will be treated as an amendment of the prayer of the petition.

4. **Mortgages:** DEFICIENCY JUDGMENTS. A judgment for a deficiency may be rendered against one who purchased the mortgaged property after the mortgage was made and in his purchase assumed and agreed to pay the mortgage debt. *Cooper v. Foss*, 15 Neb., 515, followed.

5. ——: ——. A mortgagee will not be precluded from obtaining a judgment for a deficiency upon the ground that he knowingly procured too great an amount to be found due upon the mort-

gage when, in the proceedings for the deficiency judgment, the finding of the amount due in the decree is mutually disregarded and a new accounting had.

6. **Pledges.** In the absence of special equities a pledgee of personal property will not be required to exhaust his security before enforcing his personal remedy upon the debt.

7. ———: PROVISION TO DECLARE DEBT DUE: NOTES. A note and a mortgage securing it, made contemporaneously, are to be construed together. Therefore, where a note is payable on or before a date named and the mortgage contains a provision that in certain contingencies, prior to that date, the mortgagee may elect to declare the whole amount due, *held*, that such provision in the mortgage authorizes the mortgagee upon the happening of such contingencies to proceed not only to foreclose the mortgage but also to enforce the personal liability upon the note.

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

Thummel & Platt, for appellant.

Abbott & Caldwell, *contra*.

IRVINE, C.

This is an appeal from a deficiency judgment rendered against the appellant Wasmer. The transcript is very incomplete as to the proceedings prior to the motion for judgment. Counsel have stated many facts in the briefs as to which the record is entirely silent. It appears that in November, 1890, the plaintiff began the action against Juliette Moore, George H. Moore, Charles Wasmer, and the wife of Wasmer, to foreclose a mortgage made by the Moores to the plaintiff. In addition to the usual averments it was charged that Wasmer had purchased the mortgaged premises since the giving of the mortgage and in his purchase thereof assumed, agreed to pay, and became responsible for the payment of the mortgage debt. Neither the summons or return, subsequent pleadings, nor decree appears in the transcript. We must, therefore,

presume that jurisdiction was acquired and that the decree was of such a character as to warrant the subsequent proceedings. The transcript does contain an order of sale and return, an order of confirmation, and for a deed. Subsequently to the order of confirmation, the plaintiff filed a paper styled "Motion for Deficiency Judgment," as follows: "Now comes the plaintiff and calls attention to the fact that the decree and finding of the court, together with the officer's return, shows that there is still a large amount of the sum found due unpaid after applying the entire proceeds of the sale of the mortgaged property, to-wit, $1,137.58, with interest thereon at ten per cent from the 14th day of March, 1891, the date of said sale, which amount is still due to the plaintiff and unpaid. Plaintiff therefore prays judgment and execution against the defendant Charles Wasmer for said sum with interest and costs." Thereafter Wasmer filed a paper styled an "Answer," reciting that he had been served with notice to show cause, if any, why judgment should not be rendered against him for the deficiency, and for such cause averring, first, that no proper petition was filed in the original action; second, that the petition did not pray for a deficiency judgment; third, that the petition did not state a cause of action against Wasmer; fourth, that there was a defect of parties defendant; fifth, that no service had been had upon the Moores; sixth, because the plaintiff made proof of more than was due, well knowing that Wasmer was entitled to a large credit and the plaintiff holding in its possession stock in the plaintiff corporation as security for what remained due; seventh, that the proceeding was premature and the note not due. The fourth and fifth of these objections may be dismissed with the statement that the record fails absolutely to show any facts upon which they could be based. We shall take up the other objections in their order in connection with the arguments upon which they are founded.

1. The first objection is based upon the proposition that the

petition in the case was not filed in the district court. It would be inferred from the briefs that the clerk neglected to place a filing mark upon the petition, but noted the filing upon a wrapper in which it was contained. The point is unimportant, however, because the record recites distinctly "that on the 8th day of November, 1890, there was filed in the office of the clerk of the district court of Hall county a petition in the words and figures following." The record is absolutely conclusive upon this point.

2. The second objection is based upon the failure of the petition to pray for a deficiency judgment. The prayer was "for a finding of the amount due on said claim and for a decree of foreclosure, an order of sale of the said property to satisfy the said claim, and for such other and further relief as is just and equitable." Whether a deficiency judgment can be allowed under a prayer for general relief is a question not free from doubt, and its solution is rendered more difficult, rather than aided, by such authorities as we have been able to find. It would seem that under the general rule that a prayer for general relief permits the allowance of any relief applicable to the case and not inconsistent with the particular relief demanded, such a prayer would be sufficient to authorize the rendition of a judgment for the deficiency. The courts have, however, exhibited a tendency to depart from this general rule in such cases, but their decisions are largely based upon statutes more or less differing from those of this state. Counsel contend that the case of *Brownlee v. Davidson*, 28 Neb., 785, implies that no special prayer for a deficiency judgment is necessary. We cannot see in that case any such implication. On the contrary it does appear clearly from that case that at some stage of the proceedings the plaintiff must ask for a deficiency judgment before error can be predicated upon failure to allow it. This is the only authority cited in the briefs. We have, however, pursued the investigation somewhat further.

In *Giddings v. Barney*, 31 O. St., 80, under a similar prayer, the court discussed a statute which it was claimed permitted a mortgagee in one action to foreclose his mortgage and obtain a personal judgment upon the debt. It was held that the personal judgment could not be allowed under a prayer similar to that in the case under consideration, but the court disclaimed the intention to deny the power of awarding execution for a balance due after the property was exhausted. The inference is that such relief could be had.

In *Foote v. Sprague*, 13 Kan., 155, the petition asked for a foreclosure and sale, and that execution should be issued for the balance. A personal judgment was rendered. The supreme court held that where the prayer was no more defective than in that case it might be amended at any time, and upon petition in error would be considered as amended.

In Wisconsin the statute permits a deficiency judgment only where it is demanded. In *Ollinger v. Liddle*, 55 Wis., 621, a prayer for execution for any balance was held sufficient to meet the requirement of the statute.

In Kentucky, under a prayer for foreclosure and general relief, it was held in *Hansford v. Holdam*, 14 Bush [Ky.], 210, that the rendition of a deficiency judgment was erroneous where the defendant made no defense to the action; but this was because a statute provided that if no defense be made the plaintiff cannot have judgment for any relief not specifically demanded. This principle would seem quite clear.

In New York the statute is similar to that of Kentucky, and the cases in that state usually cited as holding that a special prayer is necessary are based upon the statute, and intimate that where a defense is made the rule would be different. (*Simonson v. Blake*, 20 How. Pr. [N. Y.], 484; *Peck v. New York & N. J. R. Co.*, 85 N. Y., 246.)

The result of these cases seems about as follows: In Ohio we have a dictum that the general prayer is sufficient;

in Wisconsin, a liberal construction given to a special prayer to make it conform with the statute; in Kansas, an implication that a special prayer is necessary, but a defective prayer treated as amended so as to supply the defect; in New York and Kentucky, an inference that the general prayer is sufficient where the defendant, by making a defense, has deprived himself of the protection of a statute demanding a different rule. We have not in this state any statute similar to those of Wisconsin, New York, or Kentucky. The protection afforded defendants in default by those statutes is partially given here by section 64 of the Code of Civil Procedure, providing that in an action for the recovery of money only there shall be indorsed on the writ the amount for which judgment will be taken, if the defendant fail to answer, and that if the defendant fail to appear, judgment shall not be taken for a larger amount and the costs. In *Jones v. Null*, 9 Neb., 57, it was held that a suit to foreclose a mortgage was not an action for the recovery of money only. Still, we are not required to decide what rights the defendant would have on failure to appear in such a case if there was no indorsement upon the writ. The record contains neither the process, the answer, nor the decree. If the appearance of defendant was necessary to give the court power to act, it must be presumed that there was such appearance. It would seem, therefore, that the prayer was sufficient to justify the rendition of the deficiency judgment, but if not, then we are quite clear that it might be amended with notice to the defendant so as to ask for the judgment, and the motion for the judgment, especially where it is couched in such language as it was here, should be treated as an amendment. The record shows affirmatively that notice of the motion was served upon the defendant and that he appeared in response thereto. The amendment was also in time. It came before the judgment was rendered, and no attempt was made to take advantage of any finding affecting the right to the judgment

which may have been contained in the original decree. The right to the judgment was tried upon its merits, subsequent to the motion, and after defendant's appearance to the motion.

3. The petition does state a cause of action against Wasmer. It avers that Wasmer became a purchaser of the property, in his purchase assuming, agreeing to pay, and becoming responsible for the payment of the debt alleged. These averments bring the case within the rule stated in *Cooper v. Foss*, 15 Neb., 515.

4. The note to secure which the mortgage was made was for $1,000, with interest at ten per cent per annum from date. It bore date March 23, 1886. It was stipulated upon the hearing that the amount found due in the decree was $1,564. The property sold for $524. The plaintiff is a building and loan association, apparently operating under chapter 16, sections 145 to 148*r*, Compiled Statutes. It appeared that when the Moores borrowed the money $550 was at once repaid to the association for stock; that the stock was pledged to the association as additional security; that subsequently other payments had been made. The question of the constitutionality of the statutes referred to is not argued in this case and we will not consider it. What the defendant claims we understand to be, first, that making proof of the face of the note with interest, without allowing credit for the moneys repaid the association, amounted to a fraud which vitiated the decree; and, secondly, that the association holding the stock should be required to exhaust it before enforcing Wasmer's personal liability. Upon the first point it is sufficient to say that in the proceedings resulting in the deficiency judgment there was a new accounting regardless of that had upon the foreclosure, and Wasmer thereby obtained all the relief to which he was entitled because of the excessive finding in the decree. The property did not sell for enough to pay what was justly due, so that taking that fact in connection

with the fact that the finding in the supplementary proceeding was based upon a new accounting, Wasmer was in nowise prejudiced. There is some little conflict in the evidence as to the credits, but we think the evidence clearly preponderates in favor of the finding of the trial court. Upon the second point, we are not able to ascertain certainly from the record whether the credits were made upon the basis of a surrender of the stock or as absolute credits. If upon the former, it amounted to exhausting the security afforded by the stock; if upon the latter, the principle would apply that the holder of a pledge may pursue his personal remedy if he so elect, regardless of the pledge; and the debtor, in the absence of special circumstances, cannot require the security to be first resorted to.

5. The last objection made is that the proceeding was premature. The note was made payable on or before March 23, 1892, with the following provision: "The payer has the option of paying the interest as above at the end of each year or of having it added to the principal to draw thereafter the same rate of interest." The mortgage, as alleged in the petition, provided that if the mortgagors should fail to pay the money when due, or to pay taxes or insurance, or to pay the dues and fees on the stock as they became due, then the plaintiff might elect to pay the same and declare the whole amount due and payable at once. The default alleged was the failure to pay dues and fees upon the stock, and it must be presumed that the court found upon proper evidence that there had been such default. The writer was at first of the impression that where the note is absolute and the mortgage contains such a provision, the provision should be restricted to the remedy by foreclosure, rendering the debt due for the purpose of foreclosure only, but leaving the maturity of the debt for the purpose of enforcing the personal liability to be determined by the note itself. The adjudications do not, however, bear out this view. In this state it has been determined that in de-

ciding such questions the note and mortgage should be construed together. (*Fletcher v. Daugherty*, 13 Neb., 224; *Lantry v. French*, 33 Neb., 524.) This principle alone would not be decisive of the question, for the reason that, construing the two instruments together, the fact that the stipulation referred to was contained in the mortgage and not in the note might be taken as an evidence of the intention of the parties to restrict the effect of the stipulation to the enforcement of the mortgage. *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind., 510, was a case much like that before us. A personal judgment had been rendered in the foreclosure case and it was there held that the provision in the mortgage should be construed in connection with the note, and that a failure to pay interest coupons entitled the mortgagee to a personal judgment for the whole debt. *First Nat. Bank of Sturgis v. Peck*, 8 Kan. 660, was a suit upon notes under similar conditions. The court there held, in an opinion by Brewer, J., that the notes and mortgage were to be construed together, that all the notes became due upon the failure to pay one, and that the statute of limitations ran against all from that time. In *Gregory v. Marks*, 8 Biss. [U. S.], 44, Judge Blodgett held on a similar question that such a clause in the mortgage permitted the creditor to pursue the personal remedy upon the notes, although the notes contained no such provision. In his opinion he states that he was for some time in doubt because of a dictum in a Missouri case upon the subject, to the effect that the clause in the trust deed was put there only for the purpose of marshalling the security and not for the purpose of maturing the notes. He does not refer to the Missouri case by title or otherwise. Judge Blodgett's decision was rendered in 1877, and in 1878 the supreme court of Missouri held in *Noell v. Gaines*, 68 Mo., 649, where two notes by their terms matured at different dates, but a trust deed securing them provided that if the maker should fail to pay the debt or interest when the

same became due, then both should become due and payable, that an indorser of the second note was discharged by failure to make demand and give notice of dishonor of the second note at the time of the holder's election to take advantage of the provision in the trust deed. In the opinion a dictum in *Mason v. Barnard*, 36 Mo., 384, was disapproved. The latter was probably the case to which Judge Blodgett referred. We think, therefore, that the mortgagee had the right, upon default in payment of dues upon the stock, to elect to declare the whole debt due, not only for the purpose of foreclosing, but also for the purpose of enforcing the personal liability.

JUDGMENT AFFIRMED.

HARRISON, J., took no part in the decision.

M. F. WARD V. JOHN J. URMSON.

FILED MAY 15, 1894. No. 4758.

1. **Review:** FAILURE TO ENTER DECREE. This court will not review on appeal or error a decree rendered by the district court, prior to the formal entry of such decree upon the journal of the trial court.

2. ———: MEMORANDUM OF DECREE. A memorandum for a decree made by a judge of the district court upon his calendar will not authorize a review of the case in this court before such decree is extended in due form and apt language upon the court journal.

ERROR from the district court of Frontier county. Tried below before COCHRAN, J.

James A. Williams and *R. M. Snavely*, for plaintiff in error.

Sands & Cheney and *Robert Ryan*, *contra*.

NORVAL, C. J.

This action was brought in the court below by Burton and Harvey to foreclose a mortgage upon the northeast quarter of section 8, township 8, range 27 west, executed by John J. Urmson and wife. The mortgagors, M. F. Ward and others, were made defendants to the suit. Ward filed a cross-petition setting up the recovery of a judgment by Tyra Nelson in the county court of Frontier county against the said John J. Urmson, for the sum of $167.50 and costs, the filing of the transcript thereof in the district court of said county, the assignment of the judgment to Ward, and praying that the same be declared a lien upon said premises, subject to said mortgage. To this cross-petition John J. Urmson answered, denying that said judgment was a lien upon the premises, alleging that he acquired title to said land under and in pursuance of the homestead laws of the United States, and "that the debt for which said judgment was rendered, and out of which said judgment grew, was incurred before patent for said land was issued to the defendant by the government of the United States, in whom the title in and to said premises was before the entry of said premises as aforesaid by this defendant." No reply was filed to this answer. The district court entered a decree foreclosing the mortgage, without deciding whether said judgment was a lien upon the premises. Ward prosecutes a petition in error, alleging that the lower court erred in finding and decreeing that said judgment was not a lien upon the premises.

From the stipulation of the parties contained in the bill of exceptions it appears that the land in question was entered under the homestead laws of the United States by John J. Urmson; that he duly made final proof on September 14, 1885, and received the usual receiver receipt; that on July 11, 1887, the debt for which said judgment was rendered was contracted by said Urmson subsequent

to the making of the final proof, but prior to the date of the patent for said lands issued to Urmson by the United States.

The only point urged by counsel for plaintiff in error is whether the lands acquired from the United States under the act of congress entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, are liable to sale on execution to satisfy an ordinary judgment obtained for a debt contracted by the patentee before the issue of the patent, but after the date of the final receiver's receipt. We are precluded from now entering upon a discussion of the question, for the reason we have no competent evidence before us to show that the same was adjudicated in the court below. In the transcript prepared for this court is a copy of that portion of the journal kept by the clerk of the district court containing the decree of the foreclosure of the mortgage; but this decree does not in any manner determine whether the judgment is a lien upon the premises. Attached to and made a part of the bill of exceptions filed herein is a copy of the entry made in the case by the district judge on the trial docket, which reads as follows:

"Nov. 25, '90. Trial to court on petition, pleadings, and the evidence. The court finds that the judgment of Tyra Nelson in sum of $167 and $7.55 costs, obtained against John J. Urmson and assigned to M. F. Ward, was obtained upon a debt by entryman John J. Urmson, who entered land mortgaged under provisions of United States homestead laws, and is exempt from lien of said judgment. Said judgment declared no lien upon premises. The court finds that the debt upon which judgment of M. F. Ward was rendered was contracted after date of final receiver's receipt, and prior to issuance of patent on said land. Costs taxed to defendant M. F. Ward, herein taxed at $——. Motion of defendant for new trial. Motion overruled and excepted to by defendant M. F. Ward. Forty days allowed to prepare bill of exceptions."

This in no proper sense can be regarded as the judgment or decree rendered by the court in the case, but it is merely a memorandum of the decision made by the trial judge upon his docket for the guidance of the clerk in entering the decree upon the court journal. (*Gage v. Bloomington Town Co.*, 37 Neb., 699; Elliot, Appellate Procedure, secs. 118, 119; *Traer Bros. v. Whitman*, 56 Ia., 443; *Knapp v. Roche*, 82 N. Y., 366; *Hall v. Hudson*, 20 Ala., 284; *Gilpatrick v. Glidden*, 82 Me., 201.) In the case last cited it is said "a mere order for a decree before it is extended in due form and in apt and technical language is not a final decree, or a complete record of the judgment of the court." POST, J., speaking for this court, in his opinion in *Gage v. Bloomington Town Co., supra*, says: "Although it is customary for the judge to enter in the trial docket, or calendar, notes or minutes of the orders made, such entries are not made pursuant to the requirements of any statute, and are not, strictly speaking, parts of the record of the court." Mr. Black, at section 106 of volume 1 of his work on Judgments, in discussing the distinction between rendition and entry of judgment, says: "There are certain purposes, however, for which a judgment is required to be duly entered before it can become available or be attended by its usual incidents. Thus, as above remarked, this is a prerequisite to the right to appeal; and so a judgment must commonly be docketed before it can create a lien upon land, and in some of the states (though not all) the priority among different liens is determined by their respective dates of docketing. And again, the record entry of a judgment is indispensable to furnish the evidence of it, when it is made the basis of a claim or defense in another court. But with these exceptions, a judgment is independent of the fact of its entry; and in all cases, the distinction between rendition and entry is substantial and important." To the same effect is *Los Angeles County Bank v. Raynor*, 61 Cal., 145. This court has held that "the time within which an

appeal may be taken from a decree of the district court does not begin to run until such decree has been entered of record, so that it is within the power of the appellant to comply with the statute regulating appeals by filing in this court a certified transcript of the proceedings of the district court." (*Bickel v. Dutcher*, 35 Neb., 761.) It is only from a final order, judgment, or decree that an appeal or proceedings in error will lie, and until the decree or judgment pronounced by the court has been spread upon the journal it cannot be reviewed here, since section 586 of the Code declares that "the plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified." And the statute provides in what book the clerk shall enter all judgments. Section 443 reads as follows: "All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action." A transcript of the proceedings of the trial court must contain a copy of the judgment or order entered on the court journal which is sought to be reviewed. So far as this record discloses there has never been any legal entry of a decree in the case respecting the lien of the judgment, hence the proceedings were prematurely brought to this court. The petition in error is therefore

DISMISSED.

RYAN, C., having been of counsel, took no part in the decision.

GERMAN INSURANCE COMPANY OF FREEPORT, ILLINOIS, v. CALEB DAVIS.

FILED JUNE 5, 1894. No. 5554.

1. **Action on Fire Insurance Policy:** LIMITATION. Under a policy of insurance providing that no action thereon can be maintained unless commenced within six months after the fire, and that the damages should be payable sixty days after satisfactory proofs of loss shall have been received by the company, an action upon the policy is not barred if commenced within six months from the expiration of the sixty days. (*German Ins. Co. v. Fairbank*, 32 Neb., 750; *Fireman's Fund Ins. Co. v. Buckstaff*, 38 Neb., 150.)

2. **Insurance:** PREMISES UNOCCUPIED. Where the premises were occupied by tenants of insured at the time the risk was written, and the policy so specified, a stipulation in the policy making it void in case the premises became vacant and unoccupied without the consent of the company is not violated, so far as to defeat the recovery for the loss, by the fact that the evening before the fire, without the knowledge or consent of the insured, such tenants moved out of the building. (*Liverpool & London & Globe Ins. Co. v. Buckstaff*, 38 Neb., 146.)

3. ———: PROOFS OF LOSS: NOTICE. A provision in a policy of insurance that the insured in a case of loss should forthwith give notice thereof in writing to the company, and within sixty days from date of the fire furnish preliminary proofs of his loss, is valid and binding upon the insured, and in an action upon the policy it is necessary for the plaintiff to prove that such notice and proofs of loss were furnished, or that the company waived the same.

4. ———: ———: WAIVER. A letter by the secretary of a fire insurance company, written after the proofs of loss were due under the policy, acknowledging the receipt of a letter written by the policy holder regarding his claim for loss, and also stating that the matter therein referred to was in the hands of the company's state agent, who would give it his attention as early as possible, and admonishing the insured to be patient, does not waive the conditions requiring the insured to furnish proofs of loss within a specified time.

5. ———: ———: ———: ADJUSTER'S AUTHORITY: EVIDENCE. Where the acts of an adjuster are relied upon to establish a

waiver of proofs of loss, or of deficiencies therein, it must be shown that such person was clothed with power to represent the company in adjusting the loss.

6. **Instructions** should be based upon the evidence in the case.

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

The opinion contains a statement of the case.

Higgins & Garlow, for plaintiff in error:

The company is not liable, because the building was unoccupied at the time of the fire. (*White v. Phœnix Ins. Co.*, 20 Ins. L. J. [Me.], 900; *Burlington Ins. Co. v. Gibbons*, 19 Ins. L. J. [Kan.], 546; *Lancy v. Home Ins. Co.*, 19 Ins. L. J. [Me.], 878; *Continental Ins. Co. v. Kyle*, 19 Ins. L. J. [Ind.], 720; *Fehse v. Council Bluffs Ins. Co.*, 18 Ins. L. J. [Ia.], 319.)

Notice and proof of loss must be given as required by the terms of the contract. (2 Wood, Fire Insurance, secs. 436, 437; *Central City Ins. Co. v. Oates*, 18 Ins. L. J. [Ala.], 764; *McCann v. Ætna Ins. Co.*, 3 Neb., 198; *Trask v. State Fire & Marine Ins. Co.*, 72 Am. Dec. [Pa.], 622; *Weidert v. State Ins. Co.*, 19 Ins. L. J. [Ore.], 740.)

Proof of loss was not waived. (*Kelly v. Sun Fire Office*, 20 Ins. L. J. [Pa.], 407; *Patrick v. Farmers' Ins. Co.*, 80 Am. Dec. [N. H.], 197; *German Ins. Co. v. Fairbank*, 32 Neb., 750; *Central City Ins. Co. v. Oates*, 18 Ins. L. J. [Ala.], 764; *Knudson v. Hekla Fire Ins. Co.*, 43 N. W. Rep. [Wis.], 954; *Girard Fire & Marine Ins. Co. v. Hebard*, 95 Pa. St., 45; *Gould v. Dwelling House Ins. Co.*, 21 Ins. L. J. [Mich.], 328.)

The suit was not commenced in time. (*Patrick v. Farmers' Ins. Co.*, 80 Am. Dec. [N. H.], 197; *Muse v. London Assurance Corporation*, 20 Ins. L. J. [N. Car.], 515; *Ripley v. Ætna Ins. Co.*, 86 Am. Dec. [N. Y.], 362; *Fullam v. New York Union Ins. Co.*, 66 Am. Dec. [Mass.], 462; *Keim*

v. Home Mutual Fire & Marine Ins. Co. of St. Louis, 97 Am. Dec. [Mo.], 291; *Travellers Ins. Co. v. California Ins. Co.*, 45 N. W. Rep. [N. Dak.], 703; *Merchants Mutual Ins. Co. v. Lacroix*, 14 Am. Rep. [Tex.], 370.)

Courts will not give to plaintiff by construction what he failed to secure by agreement. (*Chambers v. Atlas Ins. Co.*, 19 Ins. L. J. [Conn.], 181; *Howard Ins. Co. v. Hocking*, 19 Ins. L. J. [Pa.], 280; *Johnson v. Humboldt Ins. Co.*, 91 Ill., 92; *Garido v. American Central Ins. Co. of St. Louis*, 8 Pac. Rep. [Cal.], 512; *Virginia Fire & Marine Ins. Co. v. Wells*, 3 S. E. Rep. [Va.], 349; *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. [U. S.], 386.)

Grimison & Thomas, contra:

The notice of loss was sufficient. (*Continental Ins. Co. of New York v. Lippold*, 3 Neb., 391; *Insurance Co. of North America v. McLimans*, 28 Neb., 653; Wood, Fire Insurance, sec. 430.)

There was sufficient proof of loss. (*Vangindertaelen v. Phœnix Ins. Co. of Brooklyn*, 51 N. W. Rep. [Wis.], 1122; *Billings v. German Ins. Co. of Freeport*, 34 Neb., 502; *Searle v. Dwelling-House Ins. Co.*, 25 N. E. Rep. [Mass.], 290; *Gristock v. Royal Ins. Co.*, 47 N. W. Rep. [Mich.], 549; *German-American Ins. Co. v. Etherton*, 25 Neb., 505; *Phenix Ins. Co. of Brooklyn v. Munger*, 30 Pac. Rep. [Kan.], 120.)

Defects in proofs of loss were waived. (*Union Ins. Co. v. Barwick*, 36 Neb., 223; *Vergeront v. German Ins. Co. of Freeport*, 56 N. W. Rep. [Wis.], 1096; *St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb., 351; *Billings v. German Ins. Co.*, 34 Neb., 502.)

The action was not barred. (*Barnes v. McMurtry*, 29 Neb., 178; *German Ins. Co. v. Fairbank*, 32 Neb., 751.)

The building was not vacant within the meaning of the policy. (*German Ins. Co. v. Penrod*, 35 Neb., 273; *Liverpool & London & Globe Ins. Co. v. Buckstaff*, 38 Neb., 146.)

NORVAL, C. J.

This action was brought by Caleb Davis against the German Insurance Company of Freeport, Illinois, upon a fire insurance policy of $725, covering plaintiff's one-story frame, shingle roof, building, and three billiard tables therein, said building being situate in the village of Avoca, Cass county, and occupied by tenants as a saloon and billiard hall. The policy was issued January 23, 1889, for the period of one year. The insured property was totally destroyed by fire April 26, 1889. The amended petition contains the usual allegations in such an action. The answer, after admitting certain averments of the petition and denying others, alleges four substantive defenses, namely:

1. The plaintiff willfully, unlawfully, and fraudulently caused to be set the fire which destroyed the building and contents, for the purpose of obtaining from the defendant the insurance money.

2. That the action is barred by the limitation clause in the policy.

3. That the policy was not in force at the time of the fire, by reason of the building being vacant and unoccupied.

4. That the plaintiff failed and neglected to furnish notice and proofs of said fire and loss within the time required by the contract.

To the answer the plaintiff replied by a general denial, also setting up that the defendant had waived the stipulation in the policy as to the notice and proofs of loss. The trial resulted in a verdict and judgment for the plaintiff in the sum of $808.80, and from an order denying a new trial defendant prosecutes error.

It is quite probable that the building was set on fire by an incendiary, but there is absolutely no proof in the record which in the least degree tends to connect the plaintiff therewith, while the uncontradicted evidence shows that neither the plaintiff nor his son had anything to do with

the burning of the building. It is not insisted in the brief of the company that they had. The first defense need not therefore be considered further.

By the policy it is provided that the damages are "to be paid in sixty days after the loss shall have been ascertained, in accordance with the conditions of the policy, and satisfactory proof of the same shall have been made by the insured, and received at the principal office of the company in Freeport, Illinois, unless the property be replaced or this company shall have given notice of its intention to rebuild, or repair the damaged premises." The policy also contains this clause:

"XXV. No suit or action of any kind against this company for recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within the term of six months next after the fire; and in case any suit or action be commenced against this company after the term of six months next after the fire, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim thereby so attempted to be enforced, any statute of limitation to the contrary notwithstanding. Also, that this policy is made and accepted upon the above expressed terms and conditions."

On the night of the 26th of April, 1889, the fire occurred. The record is absolutely silent as to the time the suit was commenced. The transcript shows that an amended petition was filed in the court below on the 17th day of April, 1890. The original petition is not in the record before us, nor is there anything to indicate the date of the filing thereof, or when the summons was issued. The answer avers that the suit was not brought until the 16th day of December, 1889, but this averment was denied by the reply. In view of this condition of the record we might presume that the action was instituted within six months from the occurrence of the fire, but since the plaint-

iff in error in its statement of the case in the brief says that the petition was filed December 16, 1889, and service soon thereafter was made on the company, and as the defendant in error in his brief does not deny the correctness thereof, we will accept as a fact that the action was commenced on said date, or more than seven months subsequent to the fire. Counsel for the insurance company insist, and they have cited many authorities from other states to sustain their position, that, under the provisions of the policy, the action was barred in six months after the fire, while counsel for the insured contends that the six months limitation period did not commence to run until the right of action fully accrued. Special limitations in contracts similar to the provisions in this policy are now generally sustained by the courts, although it must be conceded that the decisions are not in harmony as to the time the period of limitation begins to run. Some hold that it dates from the fire or loss, and others from the time the insured had the right to bring suit upon the policy. This court, by its former decisions, is committed to the doctrine last stated.

In *German Ins. Co. v. Fairbank*, 32 Neb., 750, by the terms of the policy it was stipulated that the damages should be paid in ninety days after notice and proofs of loss are received by the company. The policy contained the following clause: "It is mutually agreed that no suit or action against this company upon this policy shall be sustained in any court of law or equity unless commenced within six months after the loss or damage shall occur; and if any suit or action shall be commenced after the expiration of six months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding." The suit was not brought upon the policy until eight and a half months after the loss, and it was held that the cause of action did not accrue before the expira-

tion of ninety days after proofs of loss were received, and that the action was not barred until the expiration of six months from that time. The opinion cites the following authorities, which sustain the construction there given: *Ellis v. Council Bluffs Ins. Co.*, 64 Ia., 507; *Miller v. Hartford Fire Ins. Co.*, 70 Ia., 704; *McConnell v. Iowa Mutual Aid Association*, 79 Ia., 757; *Matt v. Iowa Mutual Aid Association*, 46 N. W. Rep. [Ia.], 857; *Hay v. Star Fire Ins Co.*, 77 N. Y., 241; *Killips v. Putnam Fire Ins. Co.*, 28 Wis., 472. The conditions in the policy in the case of *German Ins. Co. v. Fairbank, supra*, are almost identical with those contained in the policy before us, the only difference being that in the precedent cited the language used in the limitation clause is "unless commenced within six months after the loss or damage shall occur," while by this policy the action must be brought "within the term of six months next after the fire." There is no substantial difference between the two provisions. The date of the "fire" and the date of the "loss" are the same.

In *Fireman's Fund Ins. Co. v. Buckstaff*, 38 Neb., 150, this court had under consideration a policy, which, in addition to the usual provision that loss should not become payable until sixty days after the proofs of loss are received by the company, contained a condition that "no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or chancery * * * unless such suit or action shall be commenced within six months after the occurrence of the fire by reason of which the claim for loss or damage is made; and should any suit or action be commenced against this company after the expiration of the aforesaid six months, lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding." It was held that suit upon the policy could be brought within six months from the expiration of sixty days next after

proofs of loss are received by the company, and that an action brought within that time is not barred.

These decisions of our court are decisive of the case at bar upon the question of limitation, and following them we hold that the limitation does not run from the date of the fire, but from the time the cause of the action accrued. (See *Friezen v. Allemania Fire Ins. Co.*, 30 Fed. Rep., 352; *Hong Sling v. Royal Ins. Co.*, 30 Pac. Rep. [Utah], 307; *Case v. Sun Ins. Co.*, 23 Pac. Rep. [Cal.], 534.)

Plaintiff in error contends the insured has violated the following provision of his policy:

"XV. This policy should not cover unoccupied buildings; and if the premises shall be vacated without the consent of this company indorsed hereon, * * * this policy shall cease and determine."

When the insurance was written the building was occupied by Davis and Peters as tenants of the insured, and the policy recited that the premises were occupied by them as a billiard hall and saloon. About 6 o'clock of the evening of April 26, 1889, the tenants moved out of the building their stock of liquors and cigars, but left in the building the billiard tables. The fire occurred some time during the night after the removal. The insured, when the policy was issued, as well as at the time of the fire, lived at Schuyler and had no notice that the tenants intended to or had moved, nor had there been returned to him the key of the building. It does not appear that the lease had even expired. Plaintiff in error argues that under the facts detailed above the building was "vacant and unoccupied," within the meaning of that term as used in the policy, and further, that the trial court erred in its instruction upon this point, which instruction is in the following language:

"12. The jury are instructed that the policy of insurance in this case provides that 'this policy shall not cover unoccupied buildings, and if the premises insured shall be

vacated without the consent of this company indorsed thereon, * * * this policy shall cease and determine,' and if the jury from the evidence believe that at the time of the fire the premises were unoccupied without the consent of the defendant, then this policy had ceased and the jury should find for the defendant. The word 'unoccupied' in the policy is to be construed in its ordinary and popular sense, and applied to a saloon building it means such want of occupancy as usually or ordinarily attends, or is exercised over, a saloon building while being operated as a saloon; however, if in the evidence the jury believed that the saloon building in question had been vacated late in the evening of the day preceding the fire, and that the plaintiff was then at the city of Schuyler, and so far away from said building that the time intervening between the hour of vacation and the hour of the fire was not reasonably sufficient to permit the plaintiff to reoccupy it, after the vacation and before the fire, then said saloon could not be considered to be vacated within the terms of the policy."

Plaintiff in error relies upon, and cites in its brief, many cases to show that the premises had become vacant and unoccupied, and they fully sustain its contention. Upon this question the authorities are again conflicting and an attempt to harmonize them would be unsuccessful. The words "vacant and unoccupied," when used in a policy of insurance, should be construed in view of the uses and purposes for which the building is adapted, which must have been within the contemplation of the parties when the contract was entered into, also whether the parties contemplated that the premises were to be occupied by the assured or by a tenant. The meaning of the words "vacant and unoccupied," when used in a policy upon a dwelling, is not the same as when used in a contract of insurance on a store building, livery stable, or a school house. It will hardly be contended that a policy on a school building is not in

force during the summer vacation of the schools, although there is no person in the building during that period. The use to which the building is adapted and devoted has much to do in determining whether it is vacant or unoccupied. Each case must be determined upon its own peculiar facts. If the premises were to be used by a tenant, as in the case at bar, a mere temporary vacancy during a change of tenants ought not to be held to avoid the insurance.

In *Liverpool & London & Globe Ins. Co. v. Buckstaff*, 38 Neb., 146, the policy contained a clause in regard to a vacancy and unoccupancy of the building substantially like the one in this suit. There the policy was upon a hotel, which, at the time the risk was written, was occupied by a tenant, and was to remain so occupied. The hotel was closed to the public on October 20, the tenant moved out on the following day, leaving a small portion of the furniture and some other personal property. On the night of October 21 the building burned. The insured had not taken possession of the building, nor had he received from the tenant the keys therefor. The court, in construing the provision of the policy, in the opinion say: "Some of the authorities hold that the vacation of a building during the time necessary for the changing of tenants of the assured will be fatal under the ordinary terms and conditions in a fire insurance policy. But we are unwilling to go that far. It seems to the writer that such a temporary vacancy was a contingency contemplated by the parties, and against which the provision was not intended to apply. Many recent authorities so hold. In *Hotchkiss v. Phœnix Ins. Co.*, 76 Wis., 269, Lyon, J., in construing the term 'vacant or unoccupied' in an insurance policy, observes: 'Under certain circumstances premises may be vacant or unoccupied, when under other circumstances premises in like situation may not be so, within the meaning of that term in insurance policies. Thus, if one insures his dwelling house, described in the policy as occupied by himself as

his residence, and moves out of it, leaving no person in the occupation thereof, it thereby becomes vacant or unoccupied; but if he insures it as a tenement house, or as occupied by a tenant, it may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence that the parties did not understand that the house should be considered vacant, and policy forfeited or suspended, according to its terms, immediately upon the tenants leaving it. This distinction was made in some of the cases, in *Lockwood v. Middesex Mutual Assurance Co.* 47 Conn., 561; *Whitney v. Black River Ins. Co.*, 9 Hun [N. Y.], 39; 1 Wood, Insurance, sec. 91, pp. 208-210, and cases cited.' The following sustained the above doctrine: *Traders Ins. Co. v. Race*, 29 N. E. Rep. [Ill.], 846; *Home Ins. Co. v. Wood*, 47 Kan., 521; *Roe v. Dwelling House Ins. Co.*, 23 Atl. Rep. [Pa.], 718; *American Central Ins. Co. v. Clarey*, 28 Ill. App., 195; *City Planing & Shingle Mill Co. v. Merchants, Manufacturers & Citizens Mutual Ins. Co.*, 40 N. W. Rep. [Mich.], 777. We are satisfied that the trial court was justified in finding that the premises were not 'vacant and unoccupied,' within the meaning of that term in the policy."

Although we have considered the question anew, and examined the cases cited by plaintiff in error, we are satisfied that the doctrine announced in the case just quoted from is sound and should be adhered to. The instruction on this feature of the case, already quoted, is based upon the facts as disclosed in the evidence, and announces a correct proposition of law. The jury was justified in finding from the evidence that the premises were not vacant and unoccupied within the meaning of the policy.

The clause of the policy on which the defense is chiefly based is the thirteenth, which provides: "The insured

sustaining loss or damage by fire under this policy shall forthwith give notice thereof in writing to this company, and within sixty days from the date of such fire shall deliver as particular an account of his loss and damage as the nature of the case will admit, signed with his own hand, and shall accompany the same with his oath or affirmation declaring the said account to be true and just, * * * the building was occupied at the time of the loss and who were the occupants of such building, and when and how the fire originated, with all the details thereof, so far as he is informed, knows, or believes. * * The insured shall furnish full plans and detailed specifications of the building, * * * which plans and specifications of the property damaged or destroyed as is practicable to be made. * * * Proofs of loss must be completed and forwarded to the company within sixty days after date of fire, and must bear the certificate of a magistrate, notary public, or clerk of a court of record nearest the place of loss and not concerned in the loss as a creditor or otherwise, nor related to the assured, stating that he has examined into the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud or evil practice, sustained loss on the property insured to the amount which such magistrate, notary public, or clerk shall certify to. Failure to comply with these terms and conditions within the time prescribed shall cause forfeiture of all claims under this policy." The courts have almost uniformly sustained stipulations in contracts of insurance similar to the above. It is also firmly settled by the adjudications in this state that such conditions are inserted in the policy for the benefit of the underwriter, but that compliance therewith by the insured may be waived by the company. (*German Ins. Co. v. Fairbank*, 32 Neb., 750; *Billings v. German Ins. Co.*, 34 Neb., 502; *St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb., 351; *German-*

American Ins. Co. v. Barwick, 36 Neb., 223; *Western Home Ins. Co. v. Richardson*, 40 Neb., 1.)

In the case under review the plaintiff, before he was entitled to recover, was required to establish by competent evidence either that notice and proofs of loss were furnished the company within the time stated in, and according to the requirements of, the policy, or that the defendant waived the same. The contention of the learned counsel of the company is that the testimony in the case fails to show the insured gave the notice and furnished the proofs of loss according to the stipulations of the policy, or that the company waived the same.

Mr. Davis testified that the next day after the fire, or the next day but one, he wrote a letter to the company at Freeport, Illinois, also to James R. Wash, at Lincoln, the general agent for this state, notifying each of the loss; that the letters, after being enclosed in envelopes properly addressed, and postage prepaid, were deposited in the post-office at Avoca, and the same were never returned to him; that on the 17th day of June, 1889, the plaintiff below, accompanied by one John Marquette, went before Mr. Hinners, a justice of the peace living at Avoca, and procured the latter to make out the proofs of loss, which, on being completed, were subscribed and sworn to by Davis before the justice, and were mailed to the company on the same day; that Davis wrote the company regarding his loss on July 3, 1886, to which he received the following reply:

"FREEPORT, ILLINOIS, July 6, 1889.

"*Caleb Davis, Esq., Schuyler, Neb.*—DEAR SIR: In reply to yours 3d inst, would say that the matter therein referred to is in the hands of our state agent, Mr. J. R. Wash, of Lincoln, Nebraska, who will give it his attention as early as possible. Have a little patience, as these matters cannot well be reached at one time, they being quite numerous at this season of the year.

"Yours truly, WM. TREMBOR."

Mr. Davis further testified that after receiving the above letter he called upon the state agent, Mr. Wash, at Lincoln, and held a conversation with him about the matter, but received no definite answer about what the company proposed to do; that on the 14th day of September, 1889, Davis made out before Justice Hinners an additional or supplemental proof of loss, which was duly sworn to, and on that day mailed to, and was subsequently received by, the company; that insured has never received from the company, or any one purporting to act for it, any notice, or intimation, that the proofs of loss furnished by him were insufficient or defective, nor were they ever returned to him.

Wm. Trembor, the secretary of the company, in his testimony admits receiving, the day after the fire, a telegram from Mr. Conley, the local agent of the defendant at Avoca, notifying him that the building described in the policy had been burned; but states that the company never received any notice from Mr. Davis, or any one representing him, bearing date of April 27, 1889; that he did not receive the notice and proof of loss dated June 17, 1889, but did receive the affidavit or proof made in September of that year, which was referred to Mr. Wash of Lincoln, who was in charge of the company's business in Nebraska at that time; that had witness not received the telegram from Conley, the company would not have known that the property had been destroyed until many months after the loss.

Mr. Wash testified, in effect, that he never received any letter or notice of loss dated about the 28th or 29th of April, 1889, purporting to come from Mr. Davis, or any one acting for him, with reference to the loss in question.

The foregoing is a brief synopsis of the testimony relating to notice and proofs of loss. On the one side is the positive testimony of Mr. Davis that notices of loss were mailed both to the company and its state agent soon after

the fire, and on the other there is the testimony, equally as positive, of the secretary of the defendant, Mr. Trembor, and of the state agent, Mr. Wash, that such notices were never received by them. The policy required the insured, in case of loss, to forthwith give notice thereof in writing to the company. Such notice may be sent through the mails, and when transmitted in that manner, if received by the company, the requirements of the policy would be complied with. We think the plaintiff's testimony, in connection with the letter of July 6, sufficient to warrant the jury to base a finding that the notice of loss sent by Mr. Davis to the company was received, and yet the testimony on the part of the defendant would have been sufficient to sustain a finding the other way on that question. In regard to the preliminary proofs of loss it will be observed that the policy requires that they be "forwarded to the company within sixty days after the date of the fire." If the evidence of Mr. Davis is to be credited, preliminary proofs of loss were transmitted to the company by mail on the 17th day of June, 1889, which was within the period named in the policy. The evidence as to the receipt of the same is quite as unsatisfactory as that relating to the receipt of notice of the loss. In fact the making and sending to the company of the proofs of the loss in September, without any explanation in the testimony why second proofs were sent, tends strongly to strengthen the theory of the defense that no other proofs were ever furnished by the plaintiff. As to the alleged proofs of the date of June 17, the evidence falls far short of showing that the same complied with the stipulations of the policy. The only testimony upon the subject was given by Mr. Davis, and he says, when asked to give the contents of the writing, that it stated "the building was burned, the size of the building and the value of the building, the billiard table, two billiard tables, one pigeon-hole table, with all its contents; the valuation was $825, I think, if my memory

serves me right." If the proofs contain nothing more, they did not meet the requirements of the policy, as a reference to the contract will readily disclose. But it is said the company waived any defect or informality in the proofs by the acts of its secretary and its state agent. All the secretary did was to write the letter of July 6. Waiver could not be inferred from that alone. It was not sent until after the expiration of sixty days in which the preliminary proofs of loss should have been made. Neither did Mr. Wash recognize the validity of the claim for damages when Mr. Davis went to see him about it. In fact the testimony is very meager as to what transpired between Mr. Davis and Mr. Wash at that time. It appears that one Westover was present and heard the conversation, but he was not called at the trial as a witness. It was attempted to be shown that in May, 1889, one Roundtree came to Avoca to adjust the loss, but it does not appear that he had any authority from the company to act, while on the other hand there is proof tending to show that he was not authorized to adjust the loss. If he was clothed with power to represent the company, then perhaps what he did might be held to be a waiver of any deficiencies in the preliminary proofs of loss.

Complaint is made of the giving of the eighth instruction, which is as follows: "The jury are instructed that if from the evidence they believe that the fire occurred on or about the 26th day of April, 1889, and that on or about the 27th day of April, 1889, the plaintiff gave the defendant notice and proof of loss, and that again on the 17th day of June, 1889, the plaintiff again in writing gave defendant notice in writing and proof of loss in writing, and if the jury from the evidence believe that these notices and proofs or accounts were not in exact conformity with the terms of the policy and these notices and account or proof of loss were accepted or retained by the defendant without objection, or without suggestion that they did not conform

to the terms of the policy and did not object to them for that reason, then the defendant is estopped from claiming that said notices and accounts of loss were not given in the time and manner required by the terms of the policy." In two important particulars this instruction was not based upon the evidence. There was no testimony that the plaintiff gave the company in April "proof of loss." Plaintiff claims to have sent in that month a notice of the loss merely. Again, the instruction assumed there was evidence before the jury from which they might find that two notices and proof of the loss were accepted and retained by the company, one in April and the other in June, while, as already stated, no proofs of loss were ever forwarded in April, so far as the record before us discloses. For the reasons stated the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

JOHN CRUMAY V. ANDREW J. HENRY.

FILED JUNE 5, 1894. No. 5242.

Appeal: APPEARANCE: FAILURE TO DEFEND BEFORE JUSTICE

A defendant, who has made a general appearance in an action before a justice of a peace, may a peal from a judgment against him, even though he was not present at the trial, and did not contest the case in said court upon the merits.

ERROR from the district court of Howard county. Tried below before COFFIN, J.

T. T. Bell and *W. H. Thompson*, for plaintiff in error.

Kendall & Taylor, contra.

NORVAL, C. J.

Andrew J. Henry brought this action in the justice court against John Crumay upon an account. Plaintiff recovered a judgment before the justice, and the defendant prosecuted an appeal to the district court of the county, where, on motion of the appellee, the appeal was dismissed on the ground that the defendant did not make sufficient appearance in the justice court to entitle him to appeal said cause.

The only question presented for decision is whether the appeal was properly dismissed. This court has held in several cases that when a defendant fails to appear in an action against him in a justice court, but permits a judgment to be taken against him by default, he cannot appeal therefrom to the district court. In such case his remedy is to have the default set aside under section 1001 of the Code. (*Clendenning v. Crawford*, 7 Neb., 474; *Minneapolis Harvester Works v. Hedges*, 11 Neb., 46; *Strine v. Kingsbaker*, 12 Neb., 52; *Crippen v. Church*, 17 Neb., 304; *Western Mutual Benevolent Association v. Pace*, 23 Neb., 494.) Where the defendant has once appeared in the action he is not entitled to have the judgment against him set aside, even though he absented himself on the day of trial; but may appeal. (*Strine v. Kaufman*, 12 Neb., 423; *Raymond v. Strine*, 14 Neb., 236; *Andrews v. Mullin*, 14 Neb., 248; *Cleghorn v. Waterman*, 16 Neb., 226; *Smith v. Borden*, 22 Neb., 487; *Carr v. Luscher*, 35 Neb., 318; *Sullivan v. Benedict*, 36 Neb., 409.) A defendant may appeal where he has appeared at the trial, but offered no affirmative proof (*Baier v. Humpall*, 16 Neb., 127); or where he absents himself on the day of trial, but has appeared merely for the purpose of filing a motion for security for costs (*Raymond v. Strine*, 14 Neb., 236); or to dissolve an attachment (*Crippen v. Church*, 17 Neb., 304); or where he has caused subpœnas to issue for witnesses (*Howard*

Bros. v. Jay, 25 Neb., 279); or where he has applied for a change of venue, which was denied (*Wagner v. Evers*, 20 Neb., 183); or for a continuance, which was granted (*Steven v. Nebraska & Iowa Ins. Co.*, 29 Neb., 187). Where the defendant appears before the justice for the sole purpose of objecting to the jurisdiction of the court over his person, it is not such an appearance as will entitle him to an appeal from a judgment rendered against him. (*McCormick Harvesting Machine Co. v. Schneider*, 36 Neb., 208.)

Some of the earlier cases in this court contain expressions to the effect that an appeal will not lie to the district court from a judgment of a justice of the peace, except a defense on the merits has been interposed, but the later decisions upon the subject state the doctrine broadly if the defendant has at any time made a general appearance in the case before the justice, he may appeal from the judgment rendered against him, notwithstanding he was not present on the day of trial. The later utterances of the court on the question are sound and will be adhered to. In the case under consideration the transcript of the justice's docket shows this entry on the day the summons was returnable:

"Now on this 25th day of June, 1891, this cause came up to be heard upon the bill of particulars of the plaintiff, and the defendant having appeared personally, and having failed to answer said bill of particulars, and having left the court room, making no further appearance in said cause, was heard upon the evidence of the following witnesses for the plaintiff, to-wit: A. J. Henry, Caroline Henry, Neal Lambert, and A. E. Ferris.

"Upon consideration whereof the court finds there is due the plaintiff from the defendant the sum of $35.95, and it is therefore considered and adjudged that the plaintiff recover from the defendant the sum of $35.95, and the same to draw seven per cent interest from date, and also to recover his costs in the sum of $13.50."

It also appears that a diminution of the record was suggested in the district court, and an amended transcript of the justice docket was filed therein, which, in addition to the quotation above, contains the following:

"Now the defendant appeared in the court room five minutes before 11 o'clock, the hour for trial being 10 o'clock, and did not present his showing for a change of venue until after court had been called and the hour passed, and when told by the court that he thought it was insufficient and ought not to be granted, and while discussing the matter, he grabbed his paper from the table and left the court room saying, repeatedly, that he had nothing further to say in the cause, ordering the court to do as he liked with the cause, and did not give the court a chance to file his papers, or ask him to do so, and he took his papers with him."

The foregoing entries, together or alone, conclusively show that the defendant made a general appearance in the case before the justice. It is manifest that the purpose of his appearing was to obtain a change of the place of trial, and not for the purpose of objection to the jurisdiction of the court over the subject-matter of the suit or of his person, else the justice would have so stated. The fact that the defendant did not appear until "five minutes before 11 o'clock, * * * and did not present his showing for a change of venue until after court had been called and the hour past," did not constitute a special appearance. A party may appear generally in a case at any time during its pendency, even after judgment. The appearance was general, and continued to be such until the defendant, upon being informed by the justice that his motion for a change of venue was insufficient, "grabbed his papers from the table and left the court room." The fact that the application for a change of venue was not filed, or that defendant "grabbed his papers," is immaterial. It was the duty of the justice to have done the former, and it would have been

quite as becoming had the defendant omitted the latter; but we are unwilling to hold that the appearance of a party is not general merely because he had been rude. Under the decisions of this court the defendant was entitled to an appeal, and the district court erred in denying him that right. The judgment is reversed, the appeal reinstated, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

AMERICAN INVESTMENT COMPANY, APPELLANT, V. WILLIAM H. NYE ET AL., APPELLEES.

FILED JUNE 5, 1894. No. 5564.

1. **Mortgages:** JUDICIAL SALES: APPOINTMENT OF MASTER COMMISSIONER: DISCRETION OF COURT. The district court has the power to appoint some proper disinterested person, other than the sheriff of the county, as master commissioner to make the sale of real estate under a decree of foreclosure. Such appointment rests in the sound discretion of the trial court, and its ruling will not be reviewed where no abuse is shown.

2. **Review:** FINAL ORDER. The ruling of the district court denying plaintiff's application for the appointment of a special master commissioner to make the sale of the mortgaged premises is not reviewable in this court prior to the rendition of a final decree of foreclosure.

APPEAL from the district court of Brown county. Heard below before KINKAID, J.

Logan & Bisbee and *L. K. Alder*, for appellant.

P. D. McAndrew, contra.

NORVAL, C. J.

Appellant brought an action in the court below against William H. Nye and wife for the foreclosure of a real

estate mortgage. Subsequently plaintiff, by leave of court, filed an amendment to its petition, praying the appointment of one P. J. Murphy, or some suitable person other than the sheriff, as special master commissioner to make the sale of the real estate. W. H. Magill, the sheriff of the county, was permitted, over the plaintiff's objection, to intervene and file an answer to the amended pleading. The question of who should be appointed to make the sale was heard upon affidavits, and the court overruled the application for the appointment of a special master commissioner. From this decision plaintiff appeals.

In *State v. Holliday*, 35 Neb., 327, after quoting sections 451, 452, 453, and 852 of the Code of Civil Procedure, this court said: "It will thus be seen that, while a sheriff may sell real estate under a mortgage foreclosure, and as he has given bond for his official acts and is presumed to be familiar with his duties, he is usually appointed for that purpose or permitted to conduct the sale. The court, however, may appoint another to perform that duty. The court is presumed to act impartially and for the best interests of both the creditor and debtor. * * * The officer making the sale, whether he be sheriff, or a master commissioner appointed by the court, is so far under its orders as to be answerable to it for any abuse of his powers or violations of his duty, and, no doubt, the court, upon the proper application, and being convinced that there was danger of an abuse of power on his part, may remove him and appoint another in his place. Neither the court itself, nor any of its officers, has any right to show partiality or unfairness in the performance of his functions, and it is the duty of the court to see that its officers do not give cause for suspicion of wrong."

The statute, as we read it, does not confer upon a plaintiff the right to dictate the person who shall make the sale of the mortgaged premises. Whether the sheriff, or some disinterested person in his stead, shall be appointed to con-

duct or make the sale of real estate under a decree of foreclosure rests in the sound legal discretion of the trial court, and unless there has been an abuse of discretion in that regard, and prejudice has resulted therefrom, this court will not disturb the decision.

In the case before us we are precluded from reviewing the ruling complained of, because the record fails to disclose that a decree of foreclosure has yet been entered in the district court. The overruling plaintiff's application is not a final order. So far as this record shows, the action is still pending and undisposed of on the merits in the district court, and therefore the order in question is subject to review there up to the time of the rendition of the decree of foreclosure, if one should be granted. Should a decree be denied, there will be no necessity for a sale. The appeal is dismissed.

APPEAL DISMISSED.

OCTAVE BOUSCAREN V. NORMAN H. BROWN ET AL.

FILED JUNE 5, 1894. No. 5531.

1. **Pleading:** JUDGMENT FOR DEFENDANT IN DEFAULT OF ANSWER. Every material averment in a petition, for the purposes of the action, stands admitted by operation of law when no answer is filed, and when the petition states a cause of action it is error to render judgment in favor of a non-answering and defaulting defendant.

2. **Landlord and Tenant:** LEASE. Where a lease stipulates that the lessee shall pay the rent for a definite period upon the demised premises, the mere acceptance of the rent by the lessor from the assignee of the lease will not discharge the lessee, even though the lessor had knowledge of the assignment, and that the assignee had gone into possession.

3. **Instructions:** TRIAL. Instructions should be applicable to the

pleadings and evidence. An instruction which substantially withdraws from the jury, or leaves them at liberty to disregard, a material fact established by the evidence is erroneous.

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

Cavanagh, Thomas & McGilton, for plaintiff in error:

Neither the assignment of a lease nor the acceptance by the lessor of rent from the assignee releases a lessee from a covenant to pay rent. (*Bailey v. Wells,* 8 Wis., 39; *Fletcher v. McFarlane,* 12 Mass., 43; *Port v. Jackson,* 17 Johns. [N. Y.], 238; *Walton v. Cronly,* 14 Wend. [N. Y.], 64; *Kunckle v. Wynick,* 1 Dal. [U. S.], 305*a*; *Barhydt v. Burgess,* 46 Ia , 476.)

Hall, McCulloch & English, contra.

NORVAL, C. J.

This action was brought by plaintiff in error to recover rent alleged to be due upon a written lease made by him to the defendants in error. The petition alleges, substantially, that on the 10th day of March, 1889, plaintiff, by a lease in writing, demised and let to the defendants certain premises in the city of Omaha, known as the "Omaha Stables," and situate on lot 5, block 149, of the said city, for the term of one year from said date, for which said lessees agreed to pay as rent the sum of $195 per month, payable upon the first day of each month during the term; that defendants entered into possession of the said premises on the date of said lease and have paid the stipulated rents until the 1st day of July, 1889, but of the sums becoming due since said date no part has been paid, except there was received on the date last aforesaid $150, a like sum on the 1st day of August, and $150 on September the 1st. The defendant Gustave B. Hengen did not answer, but made default. The defendant Norman H. Brown, for his sep-

arate answer, admits the execution and delivery of the lease, and denies all other averments in the petition. For further answer he alleges that plaintiff sold said barn and the ground lease to one Walker on or about June 19, 1889, to take effect on the 1st day of July following, and about the same time the defendants sold what personal property they had in said barn to said Walker, who took possession of the same with the knowledge and consent of plaintiff and in compliance with a written agreement entered into between said plaintiff and said Walker; that plaintiff thereby released defendants from any further obligation under said lease. The answer further alleges that said Walker and said plaintiff, by himself or others, since July 1, 1889, have been in possession of said barn, and that defendants have fully paid the rent up to the time of their yielding possession, and aver that they are not indebted to plaintiff in any sum whatever. The allegations of the answer are put in issue by the reply of the plaintiff. There was a verdict for the defendants and judgment thereon, to reverse which plaintiff prosecutes error to this court.

The judgment cannot stand as to the defendant Hengen, since he confessed the averments to the petition by failing to answer, and allowing his default to be entered. (*Hardy v. Miller*, 11 Neb., 391.) Besides, plaintiff read on the trial the deposition of Hengen, which established every material allegation of the petition, and the liability of not only Hengen, but that of his co-defendant Brown. Under the pleadings, as well as by Hengen's own positive testimony admitting his liability, plaintiff was entitled to a verdict against him. The evidence adduced on the trial was conflicting. That given on behalf of the defendant Brown tended to establish the defense set up in his answer, namely, that the lease described in the petition was surrendered and canceled about the first of July, 1889, and that defendants were released from all liability for rent under

the lease after said date. Testimony of the plaintiff is to the effect that the lease was not terminated until January 1, 1890, when by agreement of both parties it was surrendered. Plaintiff is corroborated by the evidence of the defendant Hengen, who testified by deposition. All the witnesses agree that about the last of June, 1889, the defendants sold their livery stock and turned over the lease to one J. A. Walker, who immediately took possession of the stables, and paid to plaintiff as rent on the premises $450, as follows: $150 on July 1, and a like sum on the first day of each of the two following months. Plaintiff was not the owner of the ground upon which the stables stood, but held it under a lease from another. About the time of the transfer of the livery stock plaintiff was negotiating with Walker for the sale of the demised building to him, which resulted in the parties entering into a conditional contract of sale, but the conditions on Walker's part to be kept were never complied with. Subsequent to the making of this conditional agreement Walker paid the rents as above stated, the July payment being made by Hengen for him, receipts given for the same being made in his name. The defendant Brown claimed in the court below that the acceptance of rent from Walker discharged the lease, and upon this theory he requested, and the court gave, the following instruction:

"3. The jury are instructed that if you believe from the evidence that plaintiff, at the time he made a contract of sale of the premises in controversy, knew that defendants were also selling their livery business to the same party, and that said party so purchasing afterwards paid the rent, or any part thereof, to said Bouscaren, which rent was accepted by him as coming from said party, knowing he was in possession of said premises, such acts would release the defendants."

Undoubtedly it was competent for Bouscaren, by an express agreement, or by his acts, to have released Brown and

Hengen; but did he do so, and did the instruction fairly submit that question to the jury? There is evidence in the record tending to show that Walker went into possession under the defendants. In other words, he acquired their rights under the lease. It is true he paid a portion of the rents to the plaintiff, but the mere acceptance of this rent, even though Bouscaren at the time knew Walker was in possession, did not release Brown and Hengen from the obligation to pay the rent stipulated by them to be paid in the lease. The supreme court of Wisconsin in *Bailey v. Wells*, 8 Wis., 33, in passing upon the question, uses this language: "The authorities are clear that where the lease contains a covenant to pay the rent, the lessee continues liable therefor, notwithstanding the fact that the lease may have been assigned, and the lessor may have accepted rent of the assignee. This doctrine is founded upon the principle that the lessee having contracted and agreed to pay the rent, he is not released from his obligation, though the lease happens to have been assigned. (*Fletcher v. McFarlane*, 12 Mass., 43; *Port v. Jackson*, 17 Johns. [N. Y.], 238; *Walton v. Crownley*, 14 Wend. [N. Y.], 64, and cases there cited.) In the present case, Bailey, for a good and valuable consideration, entered into an agreement to pay the rent which might become due upon the lease, and he is bound by this agreement, though the lease may have been assigned and the lessor may have assented to the assignment." The rule just stated is supported by *Fanning v. Stimson*, 13 Ia., 42; *Barhydt v. Burgess*, 46 Ia., 476; *Harris v. Heackman*, 17 N. W. Rep. [Ia.], 592.

It cannot be successfully maintained that Bouscaren assented to the surrender of the premises by plaintiffs in error by agreeing to sell the barn to Walker. As previously stated, this contract was not absolute, but conditional. It was expressly stipulated in the contract that the title to the stable or barn should remain in the plaintiff until the consideration was paid in full. The purchase price was

$2,500, payable $500 every thirty days until the full amount was received. None of the payments were ever made. The instruction quoted omitted to submit to the jury certain evidence in the case. To the question, "At the time you had this conversation with Mr. Hengen, about the 1st of July, 1889, when he paid you the $150 rent, you may state to the jury what was said, if anything, in reference to releasing Brown and Hengen, or not releasing them from liability," the plaintiff testified that "Mr. Hengen told me at that time that he and Mr. Brown had made arrangements to turn over the stable to Mr. Walker, and that he wanted me to make that receipt for $150 as coming from Walker, and I objected to it, because I told him that I didn't know whether the agreement I had made with Mr. Walker would be carried out, and didn't want to release Brown and Hengen in any way. He told me it wouldn't be a release, and that Mr. Walker would go in there as the agent of Brown and Hengen until such time as the contract would be carried out sufficiently to satisfy me. And I told him, under these circumstances, that I would give him the receipt, as he asked it, for $150, and in case the agreement wasn't carried out, that the money, the remainder of the rent, would have to be paid by Brown and Hengen, and that Mr. Walker wouldn't be recognized in any other way but as the agent of Brown and Hengen, to which he acquiesced, and on that statement I gave him the receipt he asked for." Mr. Hengen testified that plaintiff was to notify defendants in writing when Walker paid the first $500, and that it was agreed, upon such payment being made, Brown and Hengen's obligations under the lease were to end and not until then; that he told Bouscaren that he might consider Walker the agent of Brown and Hengen until said first payment had been made by Walker; that the lease was terminated by Brown and Hengen turning over, or assigning, their lease to one J. H. Wood on January 1, 1890. The above testimony is uncontradicted,

yet it was wholly ignored by the charge referred to. Instructions to a jury should be based upon the pleadings and evidence, and an instruction which withdraws from the jury, or leaves them at liberty to disregard, material evidence is erroneous. Judgment reversed and cause remanded.

REVERSED AND REMANDED.

P. B. MURPHY ET AL. V. MARY J. GOULD.

FILED JUNE 5, 1894. NO. 5122.

1. **Assignments of Error:** INSTRUCTIONS: REVIEW. An assignment of error directed generally against a group of instructions is insufficient, and will be considered no further than to ascertain that any one of such instructions was properly given. *Hiatt v. Kinkaid*, 40 Neb., 178, followed.

2. ——: ——: ——. An assignment in a petition in error, "That the court erred in refusing to give the instructions requested by the defendants," is so general and indefinite that it will be considered no further when it is found that any one of such instructions was properly refused.

3. **Trial:** INSTRUCTIONS. When the substance of an instruction requested has already been fairly given in other instructions, it need not be repeated.

4. **Special Findings:** DISCRETION OF COURT: REVIEW. Interrogatories for special findings may be submitted to the jury or refused in the discretion of the trial court, and unless there has been an abuse of discretion in that regard, the ruling will not be disturbed. (*Floaten v. Ferrell*, 24 Neb., 347.)

5. **Assignments of Error:** REVIEW. An assignment, "errors of law occurring at the trial of said cause, and duly excepted to," although sufficient in a motion for a new trial, is not specific enough, when contained in a petition in error, to secure a review of the rulings of the trial court on the admission or exclusion of testimony.

6. **Sufficiency of Evidence:** BILL OF EXCEPTIONS: REVIEW.

The supreme court cannot examine the question whether the verdict is sustained by the evidence, when the evidence adduced on the trial is not made a part of the record by a bill of exceptions.

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

W. H. Westover, for plaintiffs in error.

Thomas L. Redlon, contra.

NORVAL, C. J.

This action was brought in the court below by Mary J. Gould, for herself and her minor children, against the principals and sureties upon two liquor dealers' bonds to recover damages for loss of means of support occasioned by the sale of intoxicating liquors by P. B. Murphy & Son and Henry Harrison, the principals in said bonds, to Willard Gould, the husband of said plaintiff. The trial resulted in a verdict and judgment against the defendants for the sum of $500, to reverse which the saloon-keepers and their bondsmen prosecute error to this court.

The first three assignments of error relate to the giving and refusing of instructions, which are stated alike in the petition in error and motion for a new trial, as follows:

"1. The court erred in giving instruction numbered 1, 2, 3, and 4, on its own motion.

"2. The court erred in giving instructions marked and numbered 1, 2, 3, 4, 5, and 6, asked by plaintiff.

"3. The court erred in refusing to give the instructions requested by the defendants."

Assignments of error similar to the above were held bad, after a careful review of the authorities, by RYAN, C., in his opinion in *Hiatt v. Kinkaid*, 40 Neb., 178. The third and fourth paragraphs of the syllabus in that case are in the following language:

"3. An assignment in a petition in error, that the trial court erred in refusing to give a group of instructions asked, will be considered no further when it is found that the refusal of any one of such instructions was proper.

"4. An assignment of error as to the giving *en masse* of certain instructions will be considered no further than to ascertain that any one of such instructions was properly given."

In the case under consideration the trial judge gave on his own motion but five instructions, the first of which is in this language:

"1. This action is brought to recover from defendants for alleged damages to the means of support of the plaintiff, and that of her minor children, by reason, as it is charged in the petition, of defendants P. B. Murphy & Son and Henry Harrison selling to the husband of plaintiff, and father of the said minor children, intoxicating liquors on and from the 7th day of May, 1888, to the 6th day of February, 1890, in the village of Hay Springs, state of Nebraska."

The foregoing is a brief and concise statement of the nature of the plaintiff's case as presented by the petition. The instruction was above criticism, and, taken in connection with the second instruction of the same series, fairly presented both sides of the controversy to the jury.

The second assignment of error covers all the instructions given at the request of the plaintiff below, there being six in number. Instruction numbered 1 of this group reads as follows:

"1. You are instructed that, by the law of this state, every person who sells or gives intoxicating liquors to another, and thereby, in whole or in part, causes the intoxication of such person, is liable to the wife of the person so becoming intoxicated for any injury she may sustain to her means of support resulting as a consequence of such intoxication."

The doctrine enunciated in the foregoing first request to charge has been sanctioned by this court in every decision upon the subject from *Roose v. Perkins*, 9 Neb., 304, to the present time, and is the settled law of this state. (See *Elshire v. Schuyler*, 15 Neb., 561; *Kerkow v. Bauer*, 15 Neb., 150; *McClay v. Worrall*, 18 Neb., 44; *Warrick v. Rounds*, 17 Neb., 411; *Wardell v. McConnell*, 23 Neb., 152; *Jones v. Bates*, 26 Neb., 693.) By plaintiff's sixth request the jury were told, in effect, that the sale of intoxicating liquors may be shown by the proof of circumstances. There can be no doubt that the sale of liquors, like any other fact, may be established by circumstantial evidence alone, as well as by direct testimony. Having reached the conclusion that the first instruction given by the court on its own motion, and plaintiff's first and sixth request to charge, were properly given, the first and second assignments of error are, without further consideration, overruled.

Three instructions were requested by the defendants below, and were refused. The substance of No. 1 was fully covered by the instructions given, therefore it was not error to repeat it. Since the refusal of one of defendants' requests was proper, the third assignment in the petition in error is overruled.

The fourth assignment of error is based upon the refusal of the trial court to submit to the jury special findings requested by the defendants. The submission of questions for special findings rests largely with the sound discretion of the trial court, and unless there has been an abuse of discretion, the granting or refusing a request for a special finding will not be disturbed. (*Floaten v. Ferrell*, 24 Neb., 347; *Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb., 582; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb., 356; *Missouri P. R. Co v. Baier*, 37 Neb., 225.) We are unable to review the decision of the court in refusing to submit interrogatories for special findings, for the reason the evidence taken on the trial is not in the record before us.

The fifth assignment in the petition in error is "errors of law occurring at the trial of said cause, and excepted to by defendants." This assignment is too general and indefinite to have required any consideration at our hands, even were the rulings of the trial court preserved by a bill of exceptions, which was not done in this case. (*Lowe v. City of Omaha*, 33 Neb., 587.)

The sixth and last assignment, "the verdict is contrary to, and not sustained by, the evidence," cannot be examined, for the obvious reason that the evidence was not brought into the record by a bill of exceptions. The judgment is

AFFIRMED.

CHARLES A. GLAZE V. WILLIAM N. PARCEL.

FILED JUNE 5, 1894. No. 4952.

1. **An assignment of error** in a petition in error, that "the court erred in overruling the motion for a new trial," such motion containing five separate and distinct grounds, is too general, since it does not point out or suggest wherein the verdict and judgment were erroneous.
2. **Where no exceptions were taken** to instructions when read, they will not be reviewed.
3. **Errors assigned in a petition in error** will not be considered, unless pointed out in the briefs filed in this court.

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

T. Fulton Gantt, for plaintiff in error.

William Neville and *Grimes & Wilcox, contra.*

NORVAL, C. J.

This was an action in replevin brought by plaintiff in error before a justice of the peace to recover the possession

of ninety-one head of cattle. The property was taken under the writ, and possession thereof delivered to the plaintiff. The appraised value of the stock being in excess of the jurisdiction of a justice court, the cause was duly certified under the statute to the district court, where the issues were made up by the parties filing proper pleadings. A trial to a jury resulted in a verdict and judgment in favor of the defendant, and the plaintiff brings the record here, praying a reversal.

Prior to the introduction of any testimony, it was stipulated by the parties in open court that plaintiff was the owner of the cattle in controversy on and prior to the 12th day of December, 1889. On said date the cattle were delivered by plaintiff to the defendant, under and in pursuance of the following written agreement entered into between the parties:

"Article of agreement, between C. A. Glaze, party of the first part, and W. N. Parcel, of the second part, witnesseth: That in consideration of the following, that C. A. Glaze, of the first part, does hereby deliver unto the said W. N. Parcel ninety-one head of steers to be fed for the purpose of fattening, the ages of which are one and two-year-olds; the weight is at present sixty-eight thousand and eleven (68,011) pounds, on the basis of two and three-fourth cents per pound, which the said W. N. Parcel hereby agrees to allow the said C. A. Glaze five per cent, as interest on the principal; also that he will feed the cattle in good shape, the same as any prudent feeder would do, until such time as the cattle are in proper shape to ship to market, with the intention of obtaining the best results therefrom. Said cattle to be delivered and weighed at Wellfleet, Nebraska, then they are to be shipped and the expenses are to be paid equally by the foregoing parties. Then it is further agreed that, if the said cattle shall sell so as to net above three and one-fourth cents per pound in Wellfleet, then, in that case, the foregoing parties do hereby

agree to divide the profits equally, and in case they shall not net three and one-fourth cents at Wellfleet, then the loss is to be paid equally, the ownership of said cattle to remain with the said C. A. Glaze until they are sold and delivered, which is to be done by mutual consent, it being understood that the two-year-olds are to be sold and delivered by the 1st of November, 1890, and the yearlings to be sold and delivered by the 1st of August, 1891.

"Given under our hands this 12th day of December, 1889.

C. A. GLAZE.
"WM. PARCEL.

"Witness:
"C. C. HAWKINS."

The defendant, upon the trial in the lower court, contended, and in his brief here insists, that he had an agister's lien upon the cattle in controversy for their feed, and hence was entitled to the possession of the stock. The plaintiff, on the other hand, argues that the defendant violated the terms of the contract above set out, by attempting to ship, without plaintiff's knowledge or consent, a large number of the cattle to market as his own, and for that purpose, prior to the bringing of this suit, had delivered the cattle at the railroad station for shipment, and therefore by that forfeited all rights under the contract, including the right of possession of the cattle and the statutory lien for their keep. The jury by their verdict found against the latter contention, and the determination of the question whether there has been such a breach of the contract by the defendant as to work a rescission thereof and to entitle plaintiff to maintain replevin would necessitate an examination and consideration of the evidence contained in the bill of exceptions. We cannot review the testimony for the purpose of ascertaining whether it supports the verdict, since the point is not raised by the petition in error. There are eleven assignments of error in the petition in error, the first and second are based upon the rulings of the trial

court on the admission and exclusion of testimony, the third to tenth inclusive relate to the giving of instructions, and the eleventh is in the following language: "The court erred in overruling a motion for a new trial." The motion for a new trial filed in the court below, a copy of which is in the record, discloses that it contained five separate and distinct grounds for a new trial. The eleventh, or last, assignment in the petition in error is therefore too general, and cannot be considered in this court. A petition in error must point out the particular ground or grounds of error relied upon for a reversal of the judgment.

It is claimed that the fourth paragraph of the court's charge is erroneous and misleading. No exception was taken to this, or any of the other instructions, at the time the charge was read, therefore the giving of the same cannot be reviewed. (*Levi v. Fred*, 38 Neb., 564.) For the same reason the third instruction, given at the request of the defendant, will not be considered.

The remaining errors assigned in the petition in error will not be referred to or discussed, since they have not been pointed out in the brief of the unsuccessful party.

JUDGMENT AFFIRMED.

NORFOLK STATE BANK, APPELLANT, V. MARTIN T. MURPHY ET AL., APPELLEES.

FILED JUNE 5, 1894. No. 5658.

Judgment: TIME LIEN ATTACHES: MORTGAGES. A judgment of a district court in an action commenced prior to the term at which it was rendered, except a judgment by confession, is a lien upon the lands and tenements of the judgment debtor within the county from the first day of the term, no matter on what day of the term it was actually pronounced; and where a

mortgage on the real estate of the defendant is executed and recorded during the term, but before the rendition of such judgment, the lien of the judgment is superior to that of the mortgage.

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

See opinions for citations.

Wigton & Whitham, for appellant.

Wharton & Baird, contra.

NORVAL, C. J.

On the 24th day of June, 1890, appellee Fred W. Gray commenced an action in the district court of Douglas county against Martin T. Murphy to recover the amount due on a promissory note executed by Murphy. Summons was duly served upon Murphy on June 26, and at the September, 1890, term of said court, to-wit, on the 3d day of January, 1891, Gray recovered a judgment in said action against Murphy for $1,285.49 and costs. The September term, 1890, of the district court of the county of Douglas convened on the 22d day of September. After the commencement of said suit, and while the same was pending, on the 29th day of November, 1890, Murphy and his wife gave to appellant, the Norfolk State Bank, a mortgage upon certain real estate in Douglas county to secure the payment of a promissory note for $4,676.70, executed by Murphy to cover his overdrafts on the bank. The property described in the mortgage was owned by Murphy prior to the commencement of the term of court at which the judgment aforesaid was rendered. On the 11th day of September, 1891, the Norfolk State Bank brought its action in the court below to foreclose said mortgage, to which the Murphys, Fred W. Gray, and others were made defendants. Gray filed an answer, setting up said judgment, and

praying that the same be decreed a lien on the premises included in plaintiff's mortgage prior to the lien of the mortgage. Upon the trial a decree was entered foreclosing the mortgage, but making the lien thereof junior to the judgment lien of Gray.

The sole question to be decided on this appeal is, which lien has priority, the mortgage or judgment? The determination of the question necessitates an examination of section 477 of the Code of Civil Procedure, which reads as follows:

"Sec. 477. The lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered; but judgments by confession, and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution."

The language just quoted is too plain to admit of more than one construction, and that is, all judgments rendered in a district court in actions brought therein prior to the term, except judgments by confessions, become liens upon the real estate of the judgment debtor situate within the county from the first day of the term. At common law all judgments of a court of record relate back to the first day of the term, and are regarded as rendered on that day, no matter on what day of the term they were actually entered. Our statute is declaratory of the rule of the common law, and places all judgments of a district court, except rendered on confession, or in cases in which actions were instituted during the term, upon equality in regard to liens. The judgment of Gray has relation to the first day of the term at which the same was recovered, and was a lien upon the lands owned by Murphy within the county from the first day of such term. The same construction was

placed upon the statute in *Miller v. Finn*, 1 Neb., 294, and was followed in the case of *Colt v. Du Bois*, 7 Neb., 391.

It is insisted by counsel for plaintiff in error that the section quoted merely determines the priority of liens of judgment creditors as between themselves; and further, that the lien of a mortgage duly recorded during a term of court, and before the entry of a judgment at that term, is paramount to the lien of a judgment. We are unable to so construe the statute. It in express terms declares that "the lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered." Plainer language could not have been selected. The lien of a judgment does not attach merely to the debtor's interest in lands when the judgment is obtained, but to whatever interest therein he possessed on the first day of the term at which the same was entered. To hold otherwise would be to make the law, and not simply to apply the same. A judgment being a lien upon real estate from the first day of the term, such lien is superior to the lien of a mortgage subsequently given by the debtor. To adopt the construction contended for by counsel would be injecting words into the statute by judicial interpretation, which we have no power to do. Had the legislature intended that the doctrine of relation as to lien of judgments should not apply where a mortgage is recorded before the judgment is actually entered, it would have used apt words indicative of such purpose. Our conclusion is that the lien of the mortgage is junior to that of the judgment. The construction we have given the section does not conflict with the prior decisions of this court cited in the brief of counsel, as a cursory examination of the cases will disclose.

In *Galway v. Malchow*, 7 Neb., 285, certain judgments were recovered against Malchow after the recording of a mortgage given by him to the plaintiffs. By mistake the land intended to be included in the mortgage was described

as being in section 28 instead of section 33. It was held that the lien of the judgments were subject to the equity of the mortgage. The proposition we have been discussing was not involved nor passed on in that case. That decision simply affirms the doctrine that a judgment upon real estate is subject to all prior equities existing against the debtor at the time of its becoming a lien. This court did not undertake to decide at what date the lien of a judgment attaches to the lands of the defendant. The rule stated in *Galway v. Malchow* has been reaffirmed and applied in *Metz v. State Bank of Brownville*, 7 Neb., 165; *Mansfield v. Gregory*, 8 Neb., 434, 11 Neb., 297; *Leonard v. White Cloud Ferry Co.*, 11 Neb., 338; *Dewey v. Walton*, 31 Neb., 819. It is unnecessary to point out the difference between the facts upon which they were decided and those in the case we are considering. It is sufficient to say that in none of the cases mentioned was section 477 of the Code before the court for consideration, nor was the question raised by this record discussed therein. Under the above authorities a judgment lien is subject to all prior liens on the land of the defendant; but this principle does not militate against the construction we have given section 477. Had plaintiff's mortgage been made before the term of court at which Gray's judgment was entered, although recorded subsequent thereto, the cases would have some bearing here; but it was not so made, hence the judgment lien antedates the mortgage. The effect of the decisions of this court is that a creditor acquires no better right to his debtor's property than the latter himself has. The lien of a judgment is subordinate to all equities which existed in favor of third parties when the lien of the judgment attaches. In other words, the lien of a judgment is limited to the actual interest the debtor has in the property.

Another decision of this court relied on by the appellant is *Horn v. Miller*, 20 Neb., 98. It was there ruled that the time within which to perfect an appeal taken from a

decree of the district court begins to run from the date on which the court formally announces its conclusion and judgment, and not from the date on which the clerk enters the same on the court journal. *Horn v. Miller* was expressly overruled in *Bickel v. Dutcher*, 35 Neb., 761, it being there decided that the time within which an appeal may be taken does not commence running until the decree is entered of record. For the purposes of an appeal, the date of a judgment is deemed to be the time it is actually spread upon the records, but that is no reason for holding that the lien of a judgment does not attach until that time. The language of the section relating to the time for perfecting appeals is quite different from the provision on the subject of judgment liens. For the purpose of an appeal the date of a judgment is regarded as having been rendered at one time, while for the purpose of binding the lands of the debtor, by legal fiction, it is considered as having been entered at a date often anterior to the time it was pronounced by the court.

The decisions of this court to the effect that a judgment does not become a lien upon the lands of the defendant, as against a subsequent purchaser, without notice, until properly indexed have no application to the case at bar, since plaintiff is not such a purchaser. It is not even a good-faith mortgagee. The bank did not extend credit to Murphy on the strength that the land was free from liens, but the mortgage was given to secure a prior indebtedness of the mortgagor. When the security was taken the officers of the bank knew, or ought to have known, that the records of the district court of Douglas county disclosed that the action was pending against Murphy, and that a judgment might be recovered therein during the term which would be a lien on the land. We are unable to perceive that the statute relating to *lis pendens*, section 85 of the Code, has any bearing upon the question under consideration, since in actions at law to recover money judgments, merely,

no notice of their pendency is required to be given to third parties. It is only in a suit brought to affect the title to real property that the statute requires that notice *lis pendens* shall be given. The pendency of an action to recover a money judgment is of itself notice to any one purchasing the lands of the defendant during a term of court that before the close of the term the plaintiff may recover a judgment therein which will be a lien upon said real estate. We know that text-writers state the general rule to be that judgments do not relate back to the first day of the term so as to create a lien on the real estate of the defendant anterior to their rendition, and such is the trend of decisions of the courts in most of the states. But it should be remembered that all the states, excepting a few, have statutes which in express terms provide that judgments shall become liens upon the lands of the debtor, either from the date on which they are rendered, or the last day of the term. (Black, Judgments, sec. 443.) Such, however, is not the common law rule, nor is it the doctrine in states having statutes similar to our own. Mr. Black, in his treatise on Judgments, at section 441, observes that "it was the rule of the common law (and this rule still obtains in some of the states) that the judgments of a court of record all relate back to the first day of the term, and are considered as rendered on that day; and therefore their lien will attach to the debtor's realty from the beginning of the term, and will override a conveyance or mortgage made on the second, or any succeeding day, although actually prior to the rendition of the judgment." True, the same author in the next section says that "as against intervening purchasers it may be regarded as settled that the lien of a subsequent judgment will not attach, justice forbidding that in such a case it should relate back to a time anterior to the conveyance;" citing *Morgan v. Sims*, 26 Ga., 283; *Pope v. Brandon*, 2 Stewart [Ala.], 401, 20 Am. Dec., 49. The same doctrine is stated in a note on page 115 of volume 12

American & English Encyclopedia of Law, and the following, in addition to the Georgia case above referred to, are cited in support thereof: *Skipwith v. Cunningham*, 8 Leigh [Va.], 272; *Withers v. Carter*, 4 Gratt. [Va.], 407; *Brockenbrough v. Brockenbrough*, 31 Gratt. [Va.], 580.

An examination of the foregoing authorities will disclose that all but one fall far short of sustaining the principle they are cited to support.

In *Withers v. Carter*, 4 Gratt. [Va.], 407, a judgment and a decree were rendered at the same term of court, the former eleven days before the latter. The question was whether they were both of equal priority. The court held that the lien of the judgment was superior to that of the decree, inasmuch as the case in which the decree was obtained was not in such a situation as to entitle plaintiff to a final adjudication on the first day of the term. We quote the following from the syllabus of the case: "The fiction of law which gives a judgment relation to the first day of the term applies to all cases in which the judgment might have been rendered on that day, but not to a case in which it could not have been then rendered." The above case was cited with approval and followed in *Yates v. Robertson*, 80 Va., 475.

Skipwith v. Cunningham, 8 Leigh [Va.], 271, was this: At the October term, 1827, of the superior court of Petersburg, to-wit, on the 17th day of October, Humbertson Skipwith, executor, recovered a judgment against one Richard M. Cunningham for $4,187.88. The October term should have commenced on the 15th day of October, but owing to the failure of the judge to attend sooner the court did not actually convene until three days later. On the 13th day of October, 1827, Cunningham executed a deed of trust upon his real estate to secure certain creditors, which deed was recorded on October 15. The court adhered to the doctrine laid down in the former decisions in *Mutual Assurance Society v. Stanard*, 4 Munf.

[Va.], 539, and *Coutts v. Walker*, 2 Leigh [Va.], 268, to the effect that a lien of a judgment relates back to the commencement of a term at which it was recovered and has priority over a deed of trust on the land of the defendant executed on or after the first day of the term. The court also held that the day on which the court actually commences its session, and not the day appointed by law for the beginning of the term, should be regarded as the first day of the term. The court in the syllabus say: "It is well settled as a general rule, that the lien of a judgment upon the land of the debtor relates back to the commencement of the term at which the judgment was obtained, and overreaches a deed of trust on the land executed by the debtor on or after the first day of the term. But the term is not considered as necessarily commencing on the day appointed by law for its commencement. A deed admitted to record on the day appointed for commencing the term, but before the day on which the court actually commences its session, will be unaffected by the lien of the judgment."

In *Brockenbrough v. Brockenbrough*, 31 Gratt. [Va.], 580, the question arose as to which of the two judgments was the prior lien, both being rendered at the same term of court, one on the first day thereof, and the other on the last day. The court held that both judgments related back to the first day of the term, and that there was no priority between them. Burks, J., observes: "It is further contended that if the judgment is not void the appellant's judgment has priority as a lien. The latter was a judgment by default in a pending suit, and has relation to the first day of the term of court in which it was rendered. The judgment of Settle was confessed in the same court and on the first day of the same term. Both must be treated as judgments rendered on the same day, at the same time. Neither has precedence over the other in point of time. In such case the court takes no notice of the fractions of a day;" citing *Coutts v. Walker*, 2 Leigh [Va.],

268; *Skipwith v. Cunningham*, 8 Leigh [Va.], 271; *Withers v. Carter*, 4 Gratt. [Va.], 407; Freeman, Judgments, secs. 369, 370.

Morgan v. Sims, 26 Ga., 283, was based upon a statute entirely different from section 477 of the Code of this state. In Georgia the statute relating to the liens of judgments provides that the property of the defendant "shall be bound from the signing of the first judgment; but where several judgments shall be of equal date the first execution delivered to the sheriff shall be first satisfied." (Cobb, Analysis and Forms, 89.) Under such a provision the court very properly held that the judgment was a lien from the time of the signing thereof, and that the doctrine of relation did not apply.

In the Alabama case, *Pope v. Brandon*, 2 Stewart [Ala.], 407, the doctrine contended for by appellant herein was held and applied. Other cases may be found which are in line with *Pope v. Brandon*, but they are almost wholly influenced by local statutes. The following authorities sustain the construction we have given section 477 of the Code: *Urbana Bank v. Baldwin*, 3 O., 65; *Jackson v. Luce*, 14 O., 514; *Davis v. Messenger*, 17 O. St., 231; *Doe v. Bank of Cleveland*, 3 McLean [U. S.], 140; *Mutual Assurance Society v. Stanard*, 4 Munf. [Va.], 539; *Coutts v. Walker*, 2 Leigh [Va.], 268; *Horsley v. Garth*, 2 Gratt. [Va.], 474; *Kellerman v. Aultman*, 30 Fed. Rep., 888; *Farley v. Lea*, 4 Dev. & Battles Law [N. Car.], 169; *Norwood v. Thorp*, 64 N. Car., 682; *Porter v. Earthman*, 4 Yerg. [Tenn.], 358.

The case of the *Urbana Bank v. Baldwin*, 3 O., 65, was this: Josiah Baldwin conveyed to C. and E. B. Cavileer certain real estate in Clark county, the deed bearing date November 21, 1820. The November term, 1820, of the court of common pleas of that county commenced on the 20th day of that month, and on the same day the Urbana Bank commenced a suit against Baldwin and others.

After service of summons, and on the 25th day of the same month, judgment was rendered against the defendants served upon confession. Subsequently, on September 4, 1826, the real estate conveyed to the Cavileers was levied upon to satisfy the judgment. A motion was made by the purchasers under Baldwin to set aside the levy. The supreme court held that the judgment was a lien upon the land, although it had been sold by the judgment debtor four days prior to the rendition of the judgment, but subsequent to the commencement of the term of court.

In *Jackson v. Luce*, 14 O., 514, the facts were these: At the April term, 1842, of the court of common pleas of Ashtabula county, which commenced on the 10th day of the month, plaintiff recovered a judgment against the defendants for $1,474.37. The judgment was obtained by confession on April 20. On April 7 the defendants executed a mortgage to one Eastman upon certain real estate in the county to secure the sum of $2,300, which mortgage was filed for recording on April 12. In an action brought to settle the priorities of the lien of the judgment and mortgage the court held that the judgment operated as a lien upon the land from the first day of the term, and was superior to the lien of the mortgage.

Bank of Cleveland v. Sturges, 2 McLean [U. S.], 341, arose in Ohio. It was a contest between a mortgagee of real estate and a judgment creditor of the mortgagor. The judgment was recovered the second day of the term of court, and the mortgage was recorded the same day. It was ruled that under the statute of Ohio the lien of the judgment was paramount, since it took effect on the first day of the term. To the same effect is *Doe v. Bank of Cleveland*, 3 McLean [U. S.], 140.

It is urged that the two Ohio cases referred to and the decisions reported in 2 and 3 McLean were decided under a statute materially different from the one relating to the liens of judgments in this state. The statute in force in

Ohio when said cases arose declares "that the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term at which judgment shall be rendered, in all cases where such lands lie within the county where the judgment is entered, and all other lands, as well as the goods and chattels of the debtor, shall be bound from the time they are seized in execution." (Laws of Ohio, 1824, p. 108; Swan's Ohio Statutes, 1841, p. 467; 3 Chase's Statutes, 1709.) The only difference between the foregoing provision and our section 477 is this: Under the Ohio statute, all judgments, whether by confession or not, become liens from the first day of the term at which they are entered, while under ours, judgments by confession and judgments rendered at the same term at which the actions are commenced become liens from date of rendition. All other judgments in this state relate back to the first day of the term, and are liens from that date. It requires no argument to show that the Ohio decisions, to which reference have been made, are entitled to great weight in construing our statute; in fact, the statutory provisions of the two states being so nearly alike, and ours having been adopted in 1858, after the highest court of Ohio had construed the section above quoted, the precedents are almost, if not quite, conclusive upon the question under consideration. Our section 477 is precisely the same as section 421 of the present Code of Ohio, which was enacted in that state in 1853. (Swan's Statutes, 1854, p. 675.) After the legislature of Ohio had adopted the statute relating to liens of judgments, of which ours is a literal copy, the supreme court of that state in 1867, in *Davis v. Messenger*, 17 O. St., 231, held that a judgment operates as a lien upon the lands of the defendant from the first day of the term, and is superior to a mortgage recorded during the same term, although prior to the date of the judgment. In that case the plaintiff recovered a judgment against Joseph

Johnston in the court of common pleas of Union county at the May term, 1859, of said court, which began at 12 o'clock noon on the 9th day of said month. The judges of said court, under and in pursuance of the statute of that state, issued an order specifying that the term would commence at 10 o'clock on said day, which order was spread upon the journal of the court, as required by said law. Johnston executed a mortgage to the defendant Messenger on one hundred and twenty acres of land situated in said county, and owned by Johnston, which mortgage was delivered for record on the 9th day of May, 1859, at 11 o'clock A. M. The trial court held that the lien of the judgment did not attach until the court actually commenced, and that the lien of the judgment was junior to that of the mortgage. On error to the supreme court the judgment was reversed, the court holding that the judgment lien had priority over that of the mortgage. This case is precisely in point.

A construction has been placed on section 477 of the Code in *Kellerman v. Aultman*, 30 Fed. Rep., 888, which arose in the circuit court of the United States for this district. On the 4th day of February, 1883, the defendants recovered a judgment against one Van Slyke in a suit commenced in October, 1882. The judgment was rendered at the January term, 1883, the term commencing on the first Monday in January. On January 17, 1883, but prior to the entry of the judgment, Van Slyke conveyed the lands in controversy, which he had owned for several years, to the plaintiff's grantor. Execution was issued and levied upon said lands under said judgment, and plaintiff brought an action to restrain the sale thereunder. Judge Brewer, after citing section 477 of the Code, held that the judgment was a lien from the first day of the term, and took priority in date over the conveyance.

We have been unable to find, although we have made diligent search, a single decision under a statutory provis-

ion similar to the Nebraska statutes which sustains the contention of counsel for appellant. We do not think that the district court erred in giving the judgment priority over the mortgage. The decree is

AFFIRMED.

IRVINE, C., having presided in the court below, took no part in the above decision.

RYAN, C., dissenting.

The case at bar presents the question of priority as between the lien of a judgment rendered in a case continued from a former term, as against the rights of a mortgagee under a mortgage taken and recorded prior to the rendition of the judgment, but during the same term. The writer hereof conceives that there is a difference in priority between mere liens upon real property, both of them having their origin during the same session of court, and the lien of a judgment rendered during a term, but subsequent to a conveyance by deed of the property attempted to be charged with the lien of a judgment. In the latter case it would seem that at the time of the rendition of the judgment the defendant is possessed of no interest in the real property upon which a general judgment could be operative, hence the difference in the principles above stated.

Section 477 of the Code of Civil Procedure provides that "the lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered," etc. There are other classes of cases included within the provision of this section, but the language quoted is all that is applicable to the matter under consideration. It is contended that the term "the lands and tenements of the debtor" refers to the first day of the term at which judgment is rendered, and that, therefore, this provision should be construed as though it read,

the lands and tenements of the debtor which he owned on the first day of the term shall be bound for the satisfaction of a judgment rendered, no matter at what time during that term. In passing it may be observed that the literal construction contended for would exclude any lands or tenements of the debtor acquired subsequently to the first day mentioned, a conclusion which has been repudiated by this court. It seems to the writer hereof that a more natural and reasonable construction would be that which would cause a paraphrase of the language to read as follows: The lands and tenements of the debtor owned by him when the judgment is rendered shall be bound for the satisfaction thereof, from the first day of the term at which such judgment is rendered. Any other construction renders the judgment lien operative against lands not owned by the debtor when the judgment is entered, a construction which seems incompatible with several of the decisions of this court.

In *Colt v. Du Bois*, 7 Neb., on page 394, is found the following language of Judge GANTT, referring to the lien of a judgment upon real property acquired after the rendition of a judgment: "The lien is neither a *jus in re* nor a *jus ad rem*, and amounts only to a security against subsequent purchasers and incumbrances. (4 Kent, Com., 437.) It confers only the right to levy on the land to the exclusion of other adverse interests subsequent to the rendition of the judgment, and this right applies to all the lands and tenements of the debtor in the county where the judgment is entered, whether held by him at the time of the rendition or subsequently acquired."

In *Galway v. Malchow*, 7 Neb., 285, the subject under discussion was whether or not the lien of a judgment should be declared paramount to the lien of a mortgage as against lands which the mortgage, by reason of a mistake, failed properly to describe, and it was held that the judgment was within the class of cases against which the mortgage

had become effective irrespective of the record thereof as provided by section 16, chapter 43, Revised Statutes. Judge LAKE, discussing the lien of the judgment in this case, said: "And this lien is a legal one and does not exceed 'the actual interest which the judgment debtor had in the estate at the time the judgment was rendered.' (*Brown v. Pierce*, 7 Wall. [U. S.], 205.) It is well settled that a judgment lien on the land of a debtor is subject to every equity which existed against the debtor at the rendition of the judgment, and courts of equity will always limit the lien to the actual interest of the judgment debtor. (Freeman, Judgments, sec. 357, and cases cited; *Swartz v. Stees*, 2 Kan., 236.)"

In *Berkley v. Lamb*, 8 Neb., on page 399, will be found the following language of MAXWELL, C. J., to-wit: "In the case of *Colt v. Du Bois*, 7 Neb., 391, it was held that the lien of a judgment attaches to all the lands and tenements of the debtor in the county where the judgment is rendered, whether held by him at the time of its rendition or subsequently acquired. We adhere to that decision, but the lien of the judgment attaches only to the interest of the debtor in the land (*Filley v. Duncan*, 1 Neb., 145; *Uhl v. May*, 5 Neb., 157; *Galway v. Malchow*, 7 Neb., 285), and the lien can attach to no greater interest than that owned by the debtor." COBB, J., approved of the line of argument of the chief justice, and the dissent of LAKE, J., is mentioned at the end of the above opinion, but there is given no statement of the grounds of that dissent, though, in view of his language in *Galway v. Malchow*, quoted above, it could hardly have applied to the portion of the opinion of the chief justice just quoted. This inference finds countenance in the following language in the opinion filed by LAKE, J., in *Mansfield v. Gregory*, 11 Neb., on page 298: "The lien of an ordinary judgment on the real estate of the debtor is not specific but general, and is subject to all prior liens, either legal or equitable. (*Metz v. State Bank of*

Brownville, 7 Neb., 165.) Such lien does not exceed the actual interest of the judgment debtor in the land and is subject to every equity therein existing against the debtor at the time of its rendition. (*Galway v. Malchow*, 7 Neb., 285.)"

In *Leonard v. White Cloud Ferry Co.*, 11 Neb., 338, and in *Dewey v. Walton*, 31 Neb., 819, this court again reiterated and enforced the rule that the lien of a judgment could attach to no greater interest in the land than the defendant possessed, citing the authorities above referred to and quoted from. This may, therefore, be accepted without question as fully settled in this state, and it therefore becomes important to consider what interest a defendant retains in real property after his conveyance thereof. Section 50, chapter 73, Compiled Statutes, provides that "every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonbly inferred from the terms used."

In *Edminster v. Higgins*, 6 Neb., 265, this court had under consideration the right of a vendor to a vendor's lien upon real property for its purchase price, and MAXWELL, J., in the opinion filed, used the following language immediately following section 50, *supra*, which he had just quoted: "The obvious intention of the registry act is to give notice to all persons who may have occasion to ascertain whether there has been any prior incumbrance or conveyance of any real estate, and the notice given by the record is as effectual in law as personal notice to the party to be affected by it. The policy of our law is to discourage secret liens and to require all instruments affecting the title of real estate to be entered of record. The law thus places the means within the reach of every one desiring to purchase real estate of ascertaining the condition of its title." The opinion just referred to contains the following language almost at its close: "We are clearly of opinion that the doctrine of a vendor's lien in a case like the one at bar

is repugnant to our statutes in relation to real estate, and is, therefore, no part of our law." It is difficult to imagine why these considerations are not applicable to the lien of a judgment obtained after the first day of the term at which it was rendered, as affecting a conveyance meantime made by the defendant. It may be claimed, however, that the pendency of the action constructively affects with notice of the result all parties who contemplate purchasing real property of the defendant. The law governing *lis pendens* is found in section 85 of the Code of Civil Procedure. It provides that "when the summons has been served, or publication made, the action is pending so as to charge third persons with notice of pendency, and while pending, no interest can be acquired by third persons in the subject-matter thereof, as against the plaintiff's title." This language is followed by a long proviso, probably intended to require the filing in the office of the county clerk, or register of deeds, of a notice defining the object of the action, its subject-matter, etc. As this proviso was intended as a limitation most likely, though as to its effect there is no great certainty, the part above quoted is that upon which alone, if at all, a judgment lien in the case supposed can be made effective as against the purchaser of real estate. It cannot escape observation that by the provisions of section 85 notice is implied to third parties of the pendency of the action, and that while the action is pending third persons can acquire no interest in such subject-matter as against the plaintiff's title.

As has already been noted, it was stated in *Colt v. Du Bois*, 7 Neb., 394, by Judge GANTT in delivering the opinion of this court, that a judgment lien is neither a *jus in re* nor a *jus ad rem*, and amounts only to a security against subsequent purchasers and incumbrancers. The language of section 85 implies that notice *lis pendens* is restricted entirely to the plaintiff's title to the subject-matter in dispute and, therefore, could operate only where the sub-

ject-matter litigated is a *jus in re* or a *jus ad rem.* The case of the *Lincoln Rapid Transit Co. v. Rundle,* 34 Neb., 559, quotes from text-writers of approved authority, illustrating the origin, necessity, and application of the rule of *lis pendens,* laid down in section 85 of the Code of Civil Procedure, harmoniously with the views just expressed. The conclusion is irresistible that the pendency of a suit which finally culminates in a judgment during the term is not notice that such a lien may arise incidentally thereto as against a conveyance meantime made, for the very good and sufficient reason that it is not justified by the terms of section 85 just referred to. If a purchaser is not bound by the notice *lis pendens* as to the liens incident to and arising out of a judgment subsequently rendered against his grantor, and if the judgment lien is effective only against the interest of the judgment defendant, as it is believed has been conclusively shown by the decisions of this court, the conclusion is inevitable that the lien of the judgment can have no relation back of its origin to the prejudice of a purchaser of real property of the defendant pending suit for the recovery only of a money judgment. This conclusion has been reached on other lines of inquiry, as will appear by the following quotations and the cases cited in support of each:

"A judgment will not be considered to relate to the first day of the term for the purpose of giving it priority over a conveyance to a purchaser for value and without notice." (12 Am. & Eng. Ency. of Law, page 115, citing in note the cases following: *Morgan v. Simms,* 26 Ga., 283. See, also, *Skipwith v. Cunningham,* 8 Leigh [Va.], 272; *Withers v. Carter,* 4 Gratt. [Va.], 407; *Brockenbrough v. Brockenbrough,* 31 Gratt. [Va.], 580.)

In section 442 of Black on Judgments is found the following language: "As against intervening purchasers, it may be regarded as settled that the lien of a subsequent judgment will not attach, justice forbidding that in such

a case it should relate back to a time anterior to the conveyance;" citing *Morgan v. Simms*, 26 Ga., 283, and *Pope v. Brandon*, 2 Stew. [Ala.], 401, 20 Am. Dec., 49.

In section 369 of Freeman on Judgments the rule is thus stated: "However the fiction of law by which judgments are considered as being rendered on the first day of the term may affect one judgment lien in a contest with other liens of the same nature, it seems to be generally conceded that it cannot prejudice the interests of *bona fide* purchasers. Whenever a purchaser before the signing of judgment without notice, and without being guilty of any fraud, acquires an interest in real estate, that interest cannot be charged with the lien of any judgment subsequently entered against his grantor, though such judgment might, as between itself and other judgments, rank as though entered at the beginning of the term and at some time prior to its actual rendition. In Virginia the rule that judgments relate to the first day of the term has always prevailed, unless the court in fact met for the term on a day subsequent to that appointed by law for the first day of the term, in which case a judgment lien was decided not to overreach a conveyance recorded before the day on which the court met, though after the time when it ought to have met. In order to rank as of the first day of the term at which it was rendered, the judgment must be the final determination of an action which was in such a condition that it might have been tried and disposed of on the first day if it had happened to have the first place on the calendar. The reason why judgments rendered at different dates were ever treated as of equal rank was because all the cases ready to be tried at the opening of a given term were equally entitled to the precedence arising from being first decided; and in order to avoid giving any suitor an advantage due entirely to the fortuitous circumstance that his cause was first called for trial, it was thought proper, by aid of a legal fiction, to assign his judgment a place in

nowise superior to that assigned to others equally entitled to precedence."

It is the belief that an examination of the cases upon this subject will sustain the utterances of the text-writers quoted from, in relation to conveyances of real estate made during the term at which judgment is rendered. The language last above quoted indicates the reason why the statute fixed the rule as between the lienors by virtue of judgments, and it is believed that portion of the statute should not be extended so as to include rights other than those in the nature of liens upon the property in the hands of a judgment debtor at the time of the rendition of judgment.

In thus broadly stating the rule as to conveyances made during the term at which judgment is subsequently rendered, the case of *Kellerman v. Aultman*, 30 Fed. Rep., 888, has not been overlooked. In the case referred to, Brewer, circuit judge, after quoting section 477 of the Code of Civil Procedure, used the following language: "As the action in which the judgment of *Aultman v. Van Slyke* was rendered was commenced before the January term, the plain import of the language of this section carried the judgment lien back to the first of the term and to a day before the conveyance of Van Slyke. This section is identical with those found in the statutes of Ohio and Kansas, and has by the courts of this state, as well as of those, received a uniform construction. (*Urbana Bank v. Baldwin*, 3 O., 65; *Jackson v. Luce*, 14 O., 514, *Davis v. Messenger*, 17 O. St., 231; *Kiser v. Sawyer*, 4 Kan., 503; *Miller v. Finn*, 1 Neb., 294; *Colt v. Du Bois*, 7 Neb., 394.) In this last case the court uses this language: 'The rule will not be questioned that under our statute relative to judgment liens, all judgments rendered during the term in actions commenced prior thereto are liens on all the lands of the debtor within the county from the first day of the term.' These authorities, especially those from the supreme court of this state, construing the effect of one of its statutes,

puts the question at rest." It is clear from the language of Brewer, J., just quoted, that his opinion was largely based upon the language quoted from *Colt v. Du Bois*, 7 Neb., 393. As illustrating the slight examination which the learned judge must have given to that case, it will be profitable to examine the facts under consideration in the case of *Colt v. Du Bois*. From the opinion of GANTT, C. J., we learn that on the 18th of October, 1872, O. J. Martin, one of the defendants, acquired possession of a certain tract of land in Lancaster county, Nebraska. The remaining statement of facts I quote from the opinion, as well as the language quoted by Brewer, J., in the connection in which it occurred. That "in August, 1872, Isaiah Koppuck commenced an action against O. J. Martin in the district court of said county, and on the 30th of October, 1872, at a regular term of said court which was begun on the 1st day of the same month, he recovered a judgment against said defendant Martin in said action. Afterwards Koppuck assigned this judgment to defendant J. W. Hartley, who thereby became the legal owner of the same. On the 2d of November, 1874, O. J. Martin and Ann, his wife, executed and delivered to S. C. Colt, plaintiff in error, a mortgage on all the above described lands. The plaintiff complains that under these facts the court below erred in deciding that the Koppuck judgment assigned to Hartley had priority of lien over his mortgage. It is insisted that the judgment in this case has relation to the first day of the term at which it was rendered, and as all the lands described were subsequently acquired by defendant O. J. Martin, the judgment created no lien upon any of these lands, though the title was acquired before the rendition of the judgment, and, therefore, the plaintiff's mortgage has priority of lien over the judgment. The rule will not be questioned that under our statute relative to judgment liens, all judgments rendered during the term in actions commenced prior thereto are liens on all the lands

of the debtor within the county from the first day of the term. This interpretation is given to the statute in the case of *Miller v. Finn*, 1 Neb., 294, and it places all such judgments entered at the same term upon equality in regard to liens, and thereby does equal justice to creditors whose judgments are necessarily entered on different days of the terms."

The quotation which has just been made includes the language quoted by Brewer, J., which he regards as decisive of the question as to the rights of a grantee under a deed made during a term at a date prior to the rendition of the judgment. The case actually under consideration by this court in the case of *Colt v. Du Bois, supra*, involved the right of a judgment lien-holder as against a mortgagee, not as against the grantee under a deed. The case of *Miller v. Finn*, relied upon by Brewer, J., in that opinion, is correctly and fully summarized in the language which we have just quoted from *Colt v. Du Bois*. It will thus be seen that in neither of the Nebraska cases relied upon by Brewer, J., was there involved any question of the rights of the holder of real estate under a deed. This distinction is important in view of the provisions of section 50, chapter 73, that every conveyance of real estate shall pass all the interest of the grantor therein unless a contrary intent can be reasonably inferred from the terms used. As to a mortgage, the provisions of section 55 of said chapter 73 are that, "in the absence of stipulations to the contrary, the grantor of real estate retains the legal title and right of possession thereof." And the rule governing mortgages affords no analogy as to the principle which should be applied to absolute conveyances.

The other cases cited by Brewer, J., in *Kellerman v. Aultman* are equally wide of the mark. For instance, in *Urbana Bank v. Baldwin*, 3 O., 65, the entire opinion of the court is as follows: "The case may be a hard one, but the law is clear in favor of the plaintiff's lien. The suit was pending

on the first day of the term, and when that is the case the judgment relates back to that date, no matter on what day of the term it was confessed. There can be no reason for the court to restrain the words of the statute in this case that would not apply to every other. It does not follow that the lien must extend to the first day of the term if no process was then pending. It is sufficient, however, to decide that case when it comes up for decision." The principle decided in the case of *Jackson v. Luce*, 14 O., 514, cited by Brewer, J., in support of his conclusion, is comprehensively stated in the syllabus in the following language: "A judgment entered by confession during the term of court of common pleas operates as a lien upon the land of the judgment debtor from the first day of the term, and is to be preferred to the lien of a mortgage, executed before, but not recorded till after the commencement of the term." The sole remaining case cited by Brewer, J., is that of *Kiser v. Sawyer*, 4 Kan., 503, in which the court had under consideration the term "lands, tenements, and hereditaments," and the question was, whether or not a statute providing that the lands and tenements should be bound for the satisfaction of a judgment included an equitable as well as a legal interest therein. It was held in that case that the lien of a judgment operated against the equitable as well as the legal estate in lands and tenements of the debtor, which equitable estate might be reached under the provisions of the Kansas statute applicable to cases of that kind. This was the only question that was decided, and as the supreme court of Kansas reached a different conclusion from that attained by this court in the case of *Nessler v. Neher*, 18 Neb., 649, in which the lien of a judgment was held not to attach to a mere equity in real estate, the Kansas case is of no value in the matter under discussion. From this review of the authorities relied upon by Brewer, J., it is apparent that the opinion rendered by him in the case of *Kellerman v. Aultman* has very little practical value,

for it is evident that he gave the case but very hasty consideration. The positive terms in which the contrary rule is laid down in Black on Judgments, in the American & English Encyclopedia of Law, and in Freeman on Judgments, supported as these text-writers are by the authorities cited, should have a much greater weight than should be accorded to the opinion of Judge Brewer referred to.

In view of the language of our statute, the former holdings of this court, the great injustice which would be wrought by any other holding, it is believed that the lien of a judgment which is rendered subsequent to a conveyance by the defendant of real property ought not to be held superior to, or in contravention of, the interest the grantee acquired by such conveyance.

RAGAN, C., concurs.

STATE OF NEBRASKA, EX REL. BARRETT SCOTT, V. J. G. CRINKLAW, SHERIFF.

FILED JUNE 5, 1894. No. 6871.

1. **Habeas Corpus.** The writ of *habeas corpus* is not a corrective remedy, and is never allowed as a substitute for appeal or writ of error.

2. **Jury:** CRIMINAL LAW: CONSTITUTIONAL LAW. The object of the provision in section 11 of the bill of rights, for the trial of criminal prosecutions in the county or district where the crime is alleged to have been committed, was to embody in the fundamental law of the state the rule of the common law by which the accused was entitled to a trial before a jury of the vicinage or neighborhood, in order that he might have the benefit of his good character.

3. **Criminal Law:** JURISDICTION OF COURTS. By the word "district," as used in the section named, is not meant judicial district, but that portion of the territory of the state over which a

court may at a particular sitting exercise power in criminal matters. (*Olive v. State*, 11 Neb., 1.)

4. ———: ———. The word "district," as used therein, may, and generally does, refer to the county where the crime is supposed to have been committed, but also includes any and all territory, by law, attached to such county for judicial purposes.

5. **The constitutional right to a trial before a jury of the county** or district where the crime is alleged to have been committed is a mere personal privilege of the accused, and not conferred upon him from any considerations of public policy.

6. **Criminal Law:** CONSTITUTIONAL RIGHTS OF ACCUSED: WAIVER. It follows that such right may be waived by the accused, and in practice will be held to be waived by an application for a change of venue under the provisions of the Criminal Code.

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

See opinion for statement of the case.

Brome & Jones and *R. R. Dickson*, for plaintiff in error:

The imprisonment of plaintiff in error in the common jail of Antelope county is unlawful, for the reason that the district court of Antelope county could not acquire jurisdiction of the cause pending against plaintiff in error, or of his person, except with his consent. (Bill of Rights, sec. 11; *State v. Knapp*, 19 Pac. Rep. [Kan.], 728; *Wheeler v. State*, 24 Wis., 52; *Osborn v. State*, 24 Ark., 629; *Swart v. Kimball*, 43 Mich., 443.)

George H. Hastings, Attorney General, and *N. D. Jackson, contra*, cited: *Shaw v. Cade*, 54 Tex., 307; *Harrison v. State*, 3 Tex. App., 558; *Brown v. State*, 6 Tex. App., 286; *Ex parte Hodges*, 59 Ala., 305; *Olive v. State*, 11 Neb., 3; *Jenkins v. California Stage Co.*, 22 Cal., 538; *Lynes v. Eldred*, 47 Wis., 426; *State v. Hale*, 65 Ia., 575; *Baxter v. People*, 7 Ill., 578.

POST, J.

The plaintiff in error, who had previously been arrested on an indictment found by the grand jury of Holt county within the fifteenth judicial district, charging him with the crime of embezzlement, applied to the district court of said county for a change of venue to some other county of the same district. His application was by motion, on the ground that a fair and impartial trial could not be had in Holt county. The court found the showing accompanying said motion to be sufficient, and that the prisoner was entitled to a change of venue; and accordingly ordered the place of trial to be changed to Antelope, an adjoining county within the ninth judicial district. The prisoner, still insisting upon a change of venue, excepted to the order naming as the place of trial a county outside of the fifteenth district. Subsequently, having been delivered to the sheriff of Antelope county and committed to the jail therein, he applied to Judge Robinson of the ninth district for a writ of *habeas corpus*, alleging that he was illegally imprisoned in the last named county. He asked to be discharged, on the ground that the order of the district court of Holt county was without authority and void, and conferred upon the court of Antelope county no jurisdiction over his person or of the prosecution against him. Upon a final hearing the writ was denied and the prisoner remanded to jail, whereupon the cause was removed into this court by petition in error. The error assigned is the denial of the writ of *habeas corpus*, and presents for consideration a single question, viz., did the district court of Holt county, in changing the place of trial to a county of another district, exceed its jurisdiction? The writ of *habeas corpus* is not a corrective remedy, and is never allowed as a substitute for an appeal or writ of error. If, therefore, the order in question was authorized by law or is erroneous, in the sense that the remedy therefor is in the usual course by appel-

late proceedings, the writ was properly denied. The reliance of the plaintiff in error is upon the provision contained in section 11 of our bill of rights, viz.: "In all criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

The provision of the Criminal Code for change of venue is found in section 455, viz.: "All criminal cases shall be tried in the county where the offense was committed, unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein, in which case the court may direct the person accused to be tried in some adjoining county." Naturally, the first inquiry suggested in this connection is the interpretation to be given the word "district" in the section of the bill of rights above quoted. Counsel for plaintiff in error insist that, according to the natural and only reasonable construction thereof, it must be held to mean judicial districts. In support of that contention we are referred to the case of *State v. Knapp*, 19 Pac. Rep. [Kan.], 728. That case, we concede, is in point and fully sustains the claim of counsel in this; and if the question were a new one in this state we might without hesitation follow so eminent an authority as the supreme court of Kansas; but we cannot, when viewed in the light of our own decisions, regard the question as an open one in this jurisdiction. The precise question here involved was carefully considered in the case of *Olive v. State*, 11 Neb., 1, in which the conclusion was reached that by the term "district," as here used, is meant the precise portion or division of the territory of the state over which the court may, in criminal matters, exercise power at any particular sitting; and to that construction we are satisfied to adhere. We know, judicially, that at the time of the adoption of the present constitution in 1875 nearly if not quite one-half of the territory of this state was outside of

the organized counties and was known as "unorganized territory." By general law then in force such territory was for judicial purposes attached to adjoining organized counties. In the case cited Olive was charged with the crime of murder alleged to have been committed in the unorganized territory directly west of Sherman county, and attached thereto for judicial purposes. It was held, in effect, that the county above named, together with such unorganized territory, constituted a trial district, and that an act of the legislature which denied to the accused a jury drawn from said district was violative of the constitution and void; and that conclusion, viewed in the light of conditions existing when the constitution was framed, is not only reasonable, but appears to be a natural and logical inference from the provision thereof under consideration. It is important while pursuing the present inquiry to keep in view the object of that provision. As said by Judge LAKE in *Olive v. State*, the grand design thereof is to secure to the accused a trial by a jury from the vicinage or neighborhood where the crime is supposed to have been committed. By the term "vicinage," at common law, was meant "the county where the act is committed." (4 Black., Com., 350.) It should be remembered, too, in this connection that the constitution of 1866 contained no such provision as the one under consideration. The object then, as we have seen, was to embody in the fundamental law of the state an ancient rule of the common law by which is secured to the accused, in criminal cases, a substantial right. The idea that it was intended to include the territory within which the accused is known and where his good character will avail him is a reasonable one, and consistent with recognized principles of the law; but if held to apply to and include the territory of a judicial district, the reason of the rule appears to be wanting. By another provision of the constitution of 1875 the state was divided into judicial districts, some of which included territory hundreds of miles

in extent. A construction by which a trial district is held to apply to such an extent of territory to us appears neither reasonable nor logical. It is a fact, attested by the judicial history of the state, that citizens were, prior to the adoption of the present constitution, put upon trial before juries of strangers, at distant places, in some instances hundreds of miles from their homes, although within the judicial district where the crimes were supposed to have been committed. That practice appears to have been the particular evil for which the provision before us was designed as a remedy. By that provision the right of trial before a jury of the vicinage, not expressly recognized by the first constitution, and actually denied in some instances, was preserved without repealing the provisions for trial for crimes committed in the unorganized territory. (*Ex parte Crawford*, 12 Neb., 379.) It follows that while the word "district," as used in the bill of rights, may, and generally does, refer to the county where the crime was committed, it also includes any and all territory attached thereto for judicial purposes. It follows, also, that it cannot be held to mean the judicial district within which the prosecution was commenced.

2. The right of trial within the county or district is a mere personal privilege of the accused and not conferred upon him from any consideration of public policy. It may, therefore, be waived by him, and in practice must be held to be waived by an application for a change of venue under the provisions of our Criminal Code. (Bishop, Criminal Procedure, 50; *State v. Potter*, 16 Kan., 80.) As already intimated, the question of the regularity of the proceedings before the district court of Holt county is not involved in the present controversy. It is sufficient for the purpose of this case that the court, in changing the place of trial to Antelope county, did not exceed its jurisdiction and its order is not therefore void. The judgment of the district court is

AFFIRMED.

M. E. SMITH ET AL. v. E. J. PHELAN ET AL.

FILED JUNE 5, 1894. No. 5139.

1. **Voluntary Assignments:** CHATTEL MORTGAGES. Where several chattel mortgages are made and delivered simultaneously, covering all the property of the mortgagor, to secure different creditors, leaving other creditors unsecured, such transaction does not constitute a voluntary assignment for the benefit of creditors, although there may have been an agreement among the mortgagees to share *pro rata* in the proceeds of the mortgaged property.

2. **Replevin:** CHATTEL MORTGAGES: EVIDENCE. In an action of replevin, where the plaintiff claims possession under a chattel mortgage, it is error to admit evidence tending to prove mere irregularities in the foreclosure of the mortgage by the plaintiff subsequent to the commencement of the action.

3. **Fraudulent Conveyances:** EXCESSIVE SECURITY. Where the value of property mortgaged largely exceeds the amount of the debt secured thereby, such fact is a badge of fraud as against creditors; but the question of fraud is one of fact to be addressed to the jury, and not of law.

4. **Replevin:** PLEADING AND PROOF: REVIEW. Where the plaintiff in replevin alleges an absolute ownership, and the evidence, received without objection, proves a special ownership through a chattel mortgage, the defense successfully interposed being that said mortgage was fraudulent as to creditors, the defendant cannot afterward, in proceedings by petition in error in this court, assert that there is a fatal variance between the petition and the proofs.

ERROR from the district court of Greeley county. Tried below before COFFIN, J.

Bartlett, Crane & Baldrige and *Paul & Templin,* for plaintiffs in error.

J. R. Hanna and *T. J. Doyle, contra.*

POST, J.

This was an action of replevin in the district court of Greeley county by the plaintiffs in error against the defendant in error to recover possession of a stock of goods claimed by the former under a chattel mortgage executed by F. H. Farnsworth and D. R. Pomeroy in the firm name of Farnsworth & Pomeroy. Verdict was returned in favor of the defendant, and judgment having been entered thereon, the case was removed to this court for review upon the petition in error of the plaintiffs.

For several years previous to the month of July, 1890, Farnsworth & Pomeroy were engaged in business as general merchants in Greeley county. During said period they became indebted to various wholesale dealers for merchandise, and in the month named such indebtedness amounted to the sum of $3,217. In addition to which they were indebted to the Mead Investment Company in the sum of $2,100. On the 12th day of June said partners, being unable to meet their obligation, without consulting plaintiffs, executed in favor of the latter a mortgage upon their entire stock of goods and other personal property, together with certain real estate in Greeley county, to secure four notes of $2,000 each, maturing respectively January 1, 1891, July 1, 1891, January 1, 1892, and July 1, 1892. Said mortgage was placed on file by the makers on the 2d day of July, and the plaintiffs, being notified of such fact, immediately repudiated the transaction and refused to accept said notes or mortgage. The next day plaintiffs' representative visited Farnsworth & Pomeroy and procured the execution of the mortgage through which they claim in this action, to-wit, for $1,607.22 and covering the stock of goods in controversy. At the same time Farnsworth & Pomeroy executed mortgages on the same property to McCord, Brady & Co., Dewey & Stone, Gilmore & Ruhl, C. M. Henderson & Co., and S. A. Or-

chard, in amounts ranging from $59.75 to $606.59, and amounting in the aggregate to $1,610.48. Said mortgages were given priority in the order named, it being stipulated that each in its order was subject to those preceding it, and all subject to the mortgage of the plaintiffs. Plaintiffs took immediate possession under their mortgage, and, with the consent of the mortgagors, were proceeding to dispose of the property at private sale, when it was taken from them by the defendant herein, as sheriff, by virtue of an order of attachment in an action in which the Mead Investment Company was plaintiff and Farnsworth & Pomeroy were defendants. This action was then instituted by the plaintiffs, and the property having been delivered to them, was advertised and sold in bulk, the plaintiffs becoming the purchasers for the amount of their claim. Shortly thereafter plaintiffs sold the stock to H. H. Farnsworth, a relative of the mortgagor of that name, for the sum of $2,000. Of that sum, $676 was retained by the plaintiffs, being the amount of their original claim less the proceeds of sales previously made by them, and the balance distributed among the other mortgagees according to priority. The grounds upon which the mortgage of plaintiffs is assailed sufficiently appear from the following instructions given at the request of the defendant, to which exception was duly taken.

"1. If you find from the evidence that the mortgage upon which plaintiff claims title to the property in controversy included all the property of the mortgagors at the time it was given, and at or about the time of its execution other mortgages were executed to divers creditors with the understanding and agreement that M. E. Smith & Co. were to take possession of the property and from the proceeds thereof pay said secured creditors *pro rata*, and at said time the mortgagors, Farnsworth & Pomeroy, were indebted to defendant in the sum of $2,100 and made no provision for securing or paying said debt, then, and in that event,

said arrangement would be in the nature of an assignment and void, and plaintiff cannot recover.

"2. If you find that the action was not commenced until after sale of property under mortgage, then you are instructed a notice to foreclose a chattel mortgage is made by advertisement published in some newspaper in the county in which such sale is to take place, and in case no newspapers are printed therein, by posting up notices in at least five public places in said county, two of which shall be in the precinct where the mortgaged property is to be offered for sale, and such notices shall be given at least twenty days prior to the day of sale.

"3. When a mortgagee delivers notice of foreclosure of a chattel mortgage to a publisher of a newspaper, said mortgagee makes such publisher of such newspaper his agent for the purpose of publishing such notice, and is bound by the act of said publisher in so far as they relate to the publication of such notice."

In giving the above instructions the learned district judge evidently followed the case of *Bonns v. Carter*, 20 Neb., 566; but that case was overruled in *Jones v. Loree*, 37 Neb., 816. In the last named case it was held that where several chattel mortgages are made and delivered simultaneously to secure different creditors, the delivery being to the one of the mortgagees who acts for the others as well as himself, such transaction does not constitute an assignment for the benefit of creditors and is not void for that reason as to creditors of the mortgagor; and substantially the same doctrine was announced in *Hershiser v. Higman*, 31 Neb., 531, and *Hamilton v. Isaacs*, 34 Neb., 709. Since the instruction given is in direct conflict with the cases cited, it follows that the giving thereof was error, for which the judgment of the district court must be reversed.

2. The giving of instructions 2 and 3 was also error. The rights of the parties herein depend upon the question who was entitled to possession of the property at the time

of the commencement of the action, and not upon the proceedings subsequently taken by the plaintiffs in the foreclosure of the mortgage. Unless there has been a substantial compliance with the essentials to a valid foreclosure, the plaintiffs may, in a proper proceeding, be required to account to non-consenting creditors for the value of the property less the amount of their claim. (*Rockford Watch Co. v. Manifold*, 36 Neb., 802.) But that question is not involved in this controversy.

3. It is also urged that the mortgage of plaintiffs is void for the reason that the security largely exceeds the amount of the debt; but, as we have seen, the execution of the several mortgages was practically one transaction, said mortgages amounted in the aggregate to $3,217.70, and the value of the property, according to defendant's evidence, did not exceed $3,631.12. The disparity between the value of the property and the amount of the indebtedness is not so great as to raise a presumption of fraud in the transaction. A careful examination of the cases bearing upon the subject will show the doctrine of this court to be that the taking of security greatly in excess of the debt secured is a badge of fraud only. Cases may arise where the disparity between the debt and the security is so great as of itself to warrant the inference of fraud; but the question is ordinarily one of fact to be addressed to the jury, and not one of law for the court.

4. Lastly, it is contended that there was a fatal variance between the allegations of the petition and the proofs. The basis of this claim is the fact that in their petition the plaintiffs alleged an absolute ownership of the property, while their reliance is upon a special interest through their mortgage; but by reference to the record we observe that the objection is made for the first time in this court. The mortgage was received in evidence without objection by the defendant, who tendered the issue of fraud and evidently recovered upon that ground. He should not now

be permitted to contend that that issue was not presented by the pleadings. It is an established rule of this court that parties will be restricted to the theory upon which cases are prosecuted and defended in the trial court. (*Smith v. Spaulding*, 40 Neb., 339.) The judgment is reversed and the cause remanded for further proceedings in the district court.

REVERSED AND REMANDED.

M. C. STEELE, RECEIVER, v. J. W. ASHENFELTER, CONSTABLE.

FILED JUNE 5, 1894. No. 6884.

A mortgage of chattels to be thereafter acquired is invalid as against purchasers and attaching creditors of the mortgagor.

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

J. E. Cobbey, for plaintiff in error, cited: *Mitchell v. Winslow*, 2 Story [U. S. C. C.], 630; *Langton v. Horton*, 1 Hare [Eng. Ch.], 549; *Seymour v. Canandaigua & N. F. R. Co.*, 25 Barb. [N. Y.], 284; *Holly v. Brown*, 14 Conn., 255; 2 Cook, Stock & Stockholders [3d ed.], sec. 857; *Pierce v. Emery*, 32 N. H. 484; *Coe v. McBrown*, 22 Ind., 252; *Raymond v. Clark*, 46 Conn., 129; *Buck v. Seymour*, 46 Conn., 156; *Phillips v. Winslow*, 18 B. Mon. [Ky.], 431.

A. J. Hale, contra, cited: Herman, Chattel Mortgages, sec. 46, and cases cited; *Pennock v. Coe*, 23 How. [U. S.], 117.

POST, J.

This was an action of replevin in the district court of Gage county. A trial was had before a court without a jury, which resulted in a finding and judgment for the defendant, whereupon the cause was removed to this court by petition in error. The material facts are as follows:

The Beatrice Rapid Transit & Power Company on the 28th day of February, 1891, executed a mortgage upon all of its corporate property and all property to be thereafter acquired by it. On the 8th day of September, 1893, one Hale recovered judgment against said company in the county court of Gage county for $46.21. On the same day an execution was issued thereon and placed in the hands of the defendant as constable for service. The defendant, in order to satisfy said execution, levied upon certain property owned by the aforesaid corporation, purchased by it subsequent to the execution of the mortgage, but which was intended for use in the extension of its lines and business. Some time subsequent to the last mentioned date the plaintiff was appointed receiver for said company on the suggestion of the holders of the mortgage bonds, and brought this action to recover the property above mentioned, which was still held by the defendant by virtue of the aforesaid execution.

It will be seen from this statement that the question presented is, whether, as against Hale, the execution plaintiff, the mortgage includes the after-acquired property of the mortgagor. The question thus presented is one upon which the authorities are by no means harmonious. The doctrine of *Holroyd v. Marshall*, 10 H. L. Cases [Eng.], 191, has been recognized by many of the courts in this country. In those jurisdictions the rule is that while at law a mortgage of after-acquired property confers no rights as against purchasers and attaching creditors, in equity it is effectual to charge the property, when acquired by the mortgagor, with

an equitable lien, which will prevail not only as against the latter, but also as against attaching creditors. The distinction above noted between the rule at law and in equity can of course have no place under our practice where the two remedial systems are blended into one. Therefore, if the corporation, for which the plaintiff stands, by its mortgage acquired a lien which is enforceable in equity as against the execution plaintiff, such lien is available to him in this action. If the question was an open one in this state, the cases which recognize the rule in *Holroyd v. Marshall* would be entitled to great consideration, but we regard it as settled by the case of *Cole v. Kerr*, 19 Neb., 553, in which it is distinctly held that a mortgage of a crop to be planted conveyed no lien upon crops subsequently raised by the mortgagor as against judgment creditors of the latter.

2. Plaintiff in error has referred us to the statute authorizing railroad and street car companies to mortgage their property, but we find therein no ground for his contention. By the first named provision (Cobbey's Statutes, sec. 612) railroad companies are authorized to convey by mortgage or trust deed all property owned by them at the time of the execution thereof, and all property, personal and real, which they may thereafter acquire. This authority is found in the Revised Statutes of 1866, page 231, under the title "Corporations." The other provision to which reference is made is found in section 632, Cobbey's Statutes, and authorizes the mortgaging by a street car company of "property, in whole or in part, including its real and personal property and franchises." This provision is contained in section 6 of the act of 1889, entitled "Street Railway Consolidation," and is merely declaratory of the common law. The purpose of the section is apparent from the subsequent provisions containing limitations with respect to the rate of interest and denomination of bonds. We can find in the statutes cited no support for

plaintiff's claim. The judgment of the district court is accordingly

AFFIRMED.

L. STRICKLER v. HENRY W. FOEGEL.

FILED JUNE 5, 1894. No. 5615.

1. **Continuance.** The provision of section 961 of the Civil Code, for continuance by a justice of the peace of causes pending before him for a period not exceeding ninety days, has no application to causes in the county court proper and not within the jurisdiction of the county judge as a justice of the peace.

2. ———. Causes pending in the county court are continued by operation of law from term to term until disposed of, and the court will not lose jurisdiction thereof by reason of delay in bringing them to trial.

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

Grimes & Wilcox, for plaintiff in error.

H. D. Rhea, contra.

POST, J.

This is a petition in error from a judgment of the district court of Lincoln county affirming a judgment of the county court therein. It is shown by the record that on the 14th day of January, 1891, the defendant in error filed in the county court his bill of particulars, in which he claimed judgment against the defendant below, plaintiff in error. Summons was on the same day issued, returnable February 2. On the return day the defendant therein appeared and moved to strike the "petition" on the ground

that it was not properly verified, which motion was sustained, as was also a motion to strike the amended petition. The cause was then, by agreement, continued to the 19th day of May following. On the last named day the plaintiff was, on motion of the defendant, required to make his petition more definite and certain, and allowed thirty days within which to amend. No further action appears to have been taken until the 9th day of December following, when, on motion of the plaintiff, the defendant was defaulted and a trial had. The result of that trial was a finding in favor of the plaintiff for $244.50, a finding in favor of the defendant for $148, and judgment for the plaintiff for balance shown in his favor by the findings of the court.

The only point made in the brief of the plaintiff in error is that the court had lost jurisdiction of the cause by reason of the time intervening between the 19th day of May and the 9th day of December. In support of that proposition we are referred to section 961 of the Civil Code, which provides that a justice of the peace may continue causes pending before him for a period not exceeding ninety days. We have no means of ascertaining definitely what the cause of action was, or whether it was within the jurisdiction of a justice of the peace, as the bill of particulars is not found in the record. The inference is, however, that the cause was one for the county court proper, and not within the jurisdiction of the judge thereof as a justice of the peace. For instance, the return day of the summons was more than twelve days from the date thereof, which is the limit allowed when the writ is issued by a justice of the peace; also, the finding in favor of the plaintiff for an amount exceeding the jurisdiction of a justice of the peace. These facts warrant the conclusion that it was a term cause. In any event, it was the duty of the plaintiff in error to bring up sufficient of the record to show affirmatively the error alleged. Such is the recog-

nized rule in appellate proceedings. What has been said is a sufficient answer to the argument of the plaintiff in error. The cause was on the docket of the county court proper, and was continued from term to term by operation of law. The provision of the Code above cited is accordingly inapplicable. It follows that there is no error in the record and that the judgment must be

AFFIRMED.

GUTTA PERCHA & RUBBER MANUFACTURING COMPANY v. VILLAGE OF OGALALLA.

FILED JUNE 5, 1894. No. 5396.

1. **Municipal Corporations:** CONTRACTS: RATIFICATION. The contract of a municipal corporation which is invalid when made, as in violation of some mandatory requirement of its charter, can be ratified only by an observance of the conditions essential to a valid agreement in the first instance.

2. ——: ——: ——. But where the forms or conditions prescribed are not intended as a limitation upon the powers of the corporation, a compliance with such conditions is not essential to a binding ratification.

3. ——. One who deals with a municipal corporation must, at his peril, take notice of the powers conferred by its charter, and whether the proposed indebtedness is in excess of the limitation imposed thereby.

4. **Records:** EVIDENCE. Where the question at issue is the existence of a particular record, any person who has made an examination of the office or books where it should be found, and shows sufficient knowledge of the subject, is competent to testify to the non-existence of such record.

ERROR from the district court of Keith county. Tried below before CHURCH, J.

See opinion for statement of the case.

J. R. Brotherton and *Tibbets, Morey & Ferris,* for plaintiff in error:

Defendant in error cannot repudiate its contract after receiving the benefits thereof, and the court erred in refusing to admit testimony to prove that the city received the benefit of the property purchased. (*Clark v. Dayton,* 6 Neb., 193; *Follmer v. Nuckolls County,* 6 Neb., 213; *Grand Island Gas Co. v. West,* 28 Neb., 852; *Ward v. Town of Forest Grove,* 25 Pac. Rep. [Ore.], 1020; *San Francisco Gas Co. v. City of San Francisco,* 9 Cal., 469; *Fister v. La Rue,* 15 Barb. [N. Y.], 323; *Tyler v. Trustees of Tualation Academy,* 14 Ore., 485; *Pixley v. Western P. R. Co.,* 33 Cal., 183; *City of Cincinnati v. Cameron,* 33 O. St., 336; *Brown v. City of Atchison,* 39 Kan., 37; *Columbus Waterworks Co. v. City of Columbus,* 29 Pac. Rep. [Kan.], 762.)

Contracts openly made by the officers of a corporation and within the knowledge of the incorporators, who have acquiesced in and received the value of them, are binding upon the corporation, although not expressly authorized in its charter. (1 Dillon, Municipal Corporation [4th ed.], sec. 444; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.,* 118 U. S., 290; Boone, Law of Corporations, sec. 101; *Whitney Arms Co. v. Barlow,* 63 N. Y., 62; *Darst v. Gale,* 83 Ill., 136; *Zottman v. City of San Francisco,* 20 Cal., 96.)

The principal cannot avail himself of the benefits of the act and repudiate its obligations. This rule applies as well to corporations as to individuals. (*Leggett v. New Jersey Manufacturing & Banking Co.,* 1 Sax. Ch. [N. J.], 541; *Frankfort & Shelbyville Turnpike Co. v. Churchill,* 6 T. B. Mon. [Ky.], 427; Mechem, Agency, sec. 167.)

Grimes & Wilcox, also for plaintiff in error.

Albert Muldoon and *John J. Halligan, contra,* contending that the contract was *ultra vires,* that the board of

trustees could not ratify the contract so as to make it binding against the village by accepting and using the goods, and that the village was not estopped to plead *ultra vires*, cited: Consolidated Statutes, sec. 2912; Dillon, Municipal Corporations [4th ed.], secs. 130, 444, 457, 461, 462, 936; *Nash v. City of St. Paul*, 11 Minn., 110; *Brady v. Mayor of City of New York*, 20 N. Y., 312; *City of Bryan v. Page*, 51 Tex., 532; *San Diego Water Co. v. City of San Diego*, 59 Cal., 517; *People v. May*, 9 Col., 81; *Mosher v. Independent School District of Ackley*, 44 Ia., 122; *McDonald v. Mayor of City of New York*, 68 N. Y., 23; *City of Blair v. Lantry*, 21 Neb., 253; *National State Bank of Mt. Pleasant v. Independent District of Marshall*, 39 Ia., 490; *French v. City of Burlington*, 42 Ia., 614; *Powell v. City of Madison*, 107 Ind., 106; *Law v. People*, 87 Ill., 385; *Agawam Nat. Bank v. South Hadley*, 128 Mass., 503; *Burrill v. City of Boston*, 2 Clif. C. C. [U. S.], 590; *Litchfield v. Ballou*, 114 U. S., 190.

POST, J.

This was an action by the plaintiff in error against the defendant in error in the district court of Keith county to recover the price of certain hose, hose carts, reels, ladders, and other apparatus of like character in common use by town and village fire companies. It is alleged that said property was sold and delivered to the defendant, at its request, on the 29th day of April, 1887, for the agreed price of $569, and for which amount judgment was demanded. An answer was interposed, in which it was alleged, in substance, that although the board of trustees of the defendant village entered into an agreement to purchase from the plaintiff the property mentioned in the petition and for the price therein stated, said agreement is void, for the reason that no appropriation had previously been made for the purchase of said property, or that was available for said purpose; and that during the municipal years of 1885 and 1886 and

1886 and 1887 said village had made no appropriation, by ordinance, resolution, or otherwise, for the defraying of any part of the expenses thereof, and that said defendant never received or appropriated said property or otherwise ratified said agreement. The reply was, in substance, a general denial of the allegations of the answer. The provision of statute relied upon by the defendant is section 89 of chapter 14, Compiled Statutes, entitled "Cities of the Second Class and Villages," which reads as follows: "No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided." The evidence introduced at the trial fully sustains the allegations of the answer as to the failure of the village to make an appropriation available for the payment of the plaintiff's claim, whereupon the latter offered to prove by witnesses present that the village had received the property in controversy, paying the freight thereon, and had used it continuously since that time. That offer was rejected on the objection of the defendant village, and a verdict of no cause of action returned under the direction of the court. Judgment was subsequently entered upon the verdict, whereupon the cause was removed to this court by the petition in error of the plaintiff company.

There is practically but one question for consideration, and which is fairly presented by the offer and ruling above named. In this connection it should be remarked that no claim is made that this case is within any of the exceptions contemplated by the statute quoted. The cases bearing upon the question of the power of municipal corporations to ratify their unauthorized contracts are confusing

and apparently irreconcilable. It would subserve no useful purpose to examine them at length in this connection or to attempt a statement of the grounds upon which they rest. It is sufficient that there is one principle which seems to run through them all, viz.: If a contract is invalid when made, because in violation of some mandatory requirement of statute, it will be deemed *ultra vires*, and can be ratified only upon the conditions essential to a valid agreement in the first instance; but where the formalities prescribed or conditions imposed are not intended as a restriction upon the corporate power, a binding ratification may be made in a different mode. (*Town of Durango v. Pennington*, 8 Col., 257; *McCracken v. City of San Francisco*, 16 Cal., 623; *San Diego Water Co. v. City of San Diego*, 59 Cal., 522; *Cory v. Freeholders of Somerset*, 44 N. J. Law, 445; *Keeny v. Jersey City*, 47 N. J. Law, 449; *Newman v. City of Emporia*, 32 Kan., 456; *McBrian v. City of Grand Rapids*, 56 Mich., 103; *McDonald v. Mayor of City of New York*, 68 N. Y., 23; *Smith v. City of Newburgh*, 77 N. Y., 130; *Agawam Nat. Bank v. South Hadley*, 128 Mass., 509; Dill, Municipal Corporations [4th ed.], 457.) It is plain that the statute under consideration is mandatory and an express limitation upon the powers of cities and villages of the class to which it applies. Indeed, stronger language could not have been used, and its meaning is too apparent for construction. It is the recognized doctrine that whoever contracts with a municipality must, at his peril, take notice of the powers conferred by its charter and whether the proposed indebtedness is in excess of the limitations imposed thereby. (*Hodges v. City of Buffalo*, 2 Denio [N. Y.], 110; *Lowell Five Cents Savings Bank v. Winchester*, 8 Allen [Mass.], 109; *People v. May*, 9 Col., 80; *Law v. People*, 87 Ill., 385; *French v. City of Burlington*, 42 Ia., 614.) As said in the case last named, "any other rule leaves the taxpayer at the mercy of the officers of the city and contractor, and would render the constitutional provision nugatory.

Such a result cannot be contemplated or allowed to prevail." And if a recovery is sanctioned upon a contract like this, on the ground that it has been subsequently ratified, surely legislative restrictions upon corporate powers is in vain. It would then be within the power of willing or corrupt officers to accomplish by indirection that which is prohibited in the most explicit terms of the statute or charter. There may be cases in which considerations of equity and good faith will impose upon a municipal corporation the duty of returning property, or its equivalent, where an action would not lie upon contract, express or implied. That question is, however, not presented by the record of this case and is not decided.

2. The defendant was permitted, over the objection of the plaintiff, to prove by a witness called for that purpose that he, witness, had examined the minutes of the proceedings of the village board for the years beginning in May, 1886, and ending May, 1887, and that said minutes contained no record of any appropriation for the purchase of the apparatus in controversy, or for defraying any of the expenses of the village during said period. Exception was taken to that ruling, which is also assigned as error. The objection urged to the testimony of the witness is that it is secondary only. A sufficient answer to that objection is that the record referred to by the witness had previously been offered in evidence by the plaintiff and received without objection. We must presume that the book being in evidence, the court and jury were fully advised with respect to its contents, as far at least as material to the question at issue. But it was not secondary evidence. That contention is based upon an entire misconception of the rule, which excludes only that evidence which of itself indicates the existence of more original sources of information. (1 Greenleaf, Evidence, 82.) Any person who has examined offices or records, and shows a sufficient knowledge of their contents, will be permitted to testify that a par-

ticular fact does not appear of record therein. (*Cross v. Pinckneyville Mill Co.*, 17 Ill., 54.) There is no error in the record and the judgment of the district court is

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY APPELLANT, V. HITCHCOCK COUNTY, APPELLEE.

FILED JUNE 5, 1894. No. 4789.

Taxation: RAILROAD PROPERTY. By section 39 of the revenue law personal property of a railroad company outside of its right of way is required to be listed for taxation by the authorities of the counties in which it is situated, without regard to the use for which it is designed.

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

W. S. Morlan, *T. M. Marquett*, and *J. W. Deweese*, for appellant, cited: *Burlington & M. R. R. Co. v. Lancaster County*, 7 Neb., 33, 15 Neb., 251; *Red Willow County v. Chicago, B. & Q. R. Co.*, 26 Neb., 668; *Santa Clara County v. Southern P. R. Co.*, 118 U. S., 394; *South Platte Land Co. v. City of Crete*, 11 Neb., 345; *Touzalin v. City of Omaha*, 25 Neb., 817; *Peoria, D. & E. R. Co. v. Goar*, 118 Ill., 134; *Pfaff v. Terre Haute & I. R. Co.*, 108 Ind., 144.

House & Blackledge, *contra*, cited: *State v. Republican V. & W. R. Co.*, 27 Neb., 853; *Republican V. & W. R. Co. v. Chase County*, 33 Neb., 759.

POST, J.

This is an equitable proceeeding by the appellant railroad company to restrain the collection of taxes assessed by the authorities of Hitchcock county for the year 1889 on

personal property, consisting of rails, ties, and other material on its right of way in said county, and designed for use in the construction of a line of road through said county and thence west into the state of Colorado. It is alleged that said property, was for the year in question returned for taxation to the auditor of public accounts and subsequently assessed at its actual value by the state board of equalization, in accordance with the provisions of section 40 of the revenue law. The appellee, by answer and stipulation, at the trial admitted all of the allegations of the petition, except that the property described was situated on the appellant's right of way at the time it was listed for taxation. The district court found that said property was situated outside of the right of way, and therefore taxable by the local authorities, and entered a decree dismissing the petition, from which an appeal was taken by the plaintiff to this court. From the kind and quantity of said material, in connection with the other facts in evidence, it is plain that it was designed for the construction of the plaintiff's projected line of road. Such material was situated on land known as lot 8, along four separate side tracks or spurs, apparently laid for convenience in loading and unloading. The inside track was 186 feet from the center of the main line at the nearest point on said lot, from which it is apparent that the property in controversy was not situated on the plaintiff's right of way. By provision of section 39 of the revenue law the plaintiff company was required to return to the auditor of public accounts, for taxation by the state board, the number of miles of road in each organized county of the state, and the total number of miles in the state, including the road-bed, right of way, and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock, and personal property necessary for the construction, repair, or successful operation of its road, which is qualified by a proviso in

the following language: "*Provided, however,* That all machine and repair shops, general office buildings, storehouses, and also all real and personal property outside of said right of way and depot grounds, as aforesaid, of and belonging to any such railroad and telegraph companies, shall be listed for taxation by the principal officer or agent of such companies, with the precinct assessors of any precinct of the county in which said property may be situated, in the manner provided by law for the listing and valuation of real and personal property."

It is contended by the plaintiff that the character of the property and the use for which it is designed, and not its precise location, is the test which should be applied in determining whether it is taxable by the state board or the local authorities, but we cannot so construe the section mentioned without ignoring the plain language of the proviso. It would seem that the intention of the legislature was rather to provide a fixed and arbitrary rule for the taxation by the state board of the property of railroad and telegraph companies within their right of way and depot grounds and all other property by the local authorities. The provision under consideration is not found in the revenue law of 1879, but was adopted as an amendment thereto in 1881. By the original act railroad companies were required to return to the auditor of public accounts for taxation, not only the number of miles of track, rolling stock, depot grounds, repair shops, furniture, and fixtures, but all other personal property belonging to the corporation. The declared purpose of the amendment is to except from the operation of the above general provision the property enumerated therein, including all real and personal property outside of the company's right of way and depot grounds. It follows that the material described in the petition was taxable by the authorities of Hitchcock county and that the decree of the district court should be

AFFIRMED.

FRANK MALLARD ET AL., APPELLEES, V. FIRST NATIONAL BANK OF NORTH PLATTE, APPELLANT.

FILED JUNE 5, 1894. NO. 5307.

1. **Homestead:** EVIDENCE OF ABANDONMENT. The act of registering as a voter is not conclusive upon the question of the residence of the party registered, in an action to relieve a piece of real estate of the lien created by the levy of an attachment writ on real estate claimed as a homestead, but is a fact to be considered, as any other portion of the testimony in the case, and to be given such weight as it seems entitled to under the rules governing the consideration of evidence; and especially is this true in this case, where it is a disputed point in the testimony as to whether defendant appeared in person before the board of registration and effected the registration, or it was done by some other person.

2. **Abandonment of Homestead:** INTENTION. In order to establish the abandonment of a homestead there must be an intention to change the residence and an actual change.

3. **Homestead:** EVIDENCE: REVIEW. The evidence examined, and *held* sufficient to sustain the finding and judgment of the court.

APPEAL from the district court of Lincoln county. Heard below before CHURCH, J.

The opinion contains a statement of facts.

T. C. Patterson, for appellant:

A homestead, to be exempt, must be owned and occupied by a resident of this state. (Compiled Statutes, sec. 1, ch. 36; *Bowker v. Collins*, 4 Neb., 496.)

When Mr. Mallard removed to Colorado with his family and there established his home, where he continued to reside for nearly two years, renting his former homestead in Nebraska, he abandoned his Nebraska homestead and acquired a residence in Colorado. (*Vasey v. Board of Trustees*

of Washington County, 59 Ill., 188; *Swaney v. Hutchins*, 13 Neb., 266; *Carr v. Rising*, 62 Ill., 14; *Cahill v. Wilson*, 62 Ill., 137; *Jarvais v. Moe*, 38 Wis., 440; *Cabeen v. Mulligan*, 37 Ill., 230; *Titman v. Moore*, 43 Ill., 169.)

Mr. Mallard's exercise of political privileges in Colorado is conclusive on the question of his residence. (5 Am. & Eng. Ency. of Law, 870, 871; *Kellogg v. City of Oshkosh*, 14 Wis., 678; *Smith v. Mattingly*, 13 S. W. Rep. [Ky.], 719; *Kutch v. Holly*, 14 S. W. Rep. [Tex.], 32; *Shelton v. Tiffin*, 6 How. [U. S.], 162.)

Appellees cannot defeat the attachment lien by moving onto the premises after judgment was obtained. (*Bowker v. Collins*, 4 Neb., 496.)

What the wife may have said, done, or intended, can have no bearing on this case, for the reason that her residence, as a matter of law, must follow her husband's as long as the marital relation is maintained. (Thompson, Homestead & Exemptions, sec. 276; 5 Am. & Eng. Ency. of Law, 869; *Swaney v. Hutchins*, 13 Neb., 268; *Barber v. Barber*, 21 How. [U. S.], 582.)

J. S. Hoagland, contra, contending that appellees had not by their absence abandoned their homestead, cited: *Lindsay v. Murphy*, 76 Va., 428; *Austin v. Swank*, 9 Ind., 109; *Mark v. State*, 15 Ind., 98; 9 Am. & Eng. Ency. of Law, 493, 502; *Bradshaw v. Hurst*, 57 Ia., 745; *Leake v. King*, 85 Mo., 413; *Guy v. Downs*, 12 Neb., 532.

HARRISON, J.

On the 11th day of June, 1891, the appellees filed a petition in the district court of Lincoln county, and commenced an action against appellant, alleging that appellees were the owners and in possession of lot 8 in block 106, in the city of North Platte, in said county, together with the dwelling house situated thereon, which they were occupying as a home and had so occupied since January, 1890;

that they were husband and wife and had a son eleven years of age dependent upon them for support, and owned no other lands, town lots, nor houses subject to exemption; that on or about December 3, 1890, while they were temporarily absent from this state, the appellant procured an attachment to be issued from the district court of Lincoln county, and levied upon the premises above described, and on a service by publication procured a judgment in the attachment proceedings and an order for the sale of the attached property; that prior to the issuance of the order of sale the appellees duly served a notice upon appellant of the homestead character of the premises and their claim of its exemption; that appellant and the sheriff to whom the order of sale was issued have ignored the notice so given and refused to set apart the premises claimed, or any portion thereof, to appellees as a homestead, and threaten to sell and have advertised, and are threatening to and will sell, the premises to satisfy the judgment; that the debt upon which the attachment suit was founded was contracted during the time that appellees were occupying the premises herein described as their homestead, which fact was known to appellants at the time the indebtedness was incurred; that the lot described is of record in the name of Frank Mallard, of appellees, but appellees have contributed jointly and almost equally in money and labor to and for its purchase and improvement, to make a home for themselves and family, and that it is of less value than $2,000. The prayer of the petition was for an injunction restraining the sale of the property and the setting off to appellees of the premises as a homestead. Appellant answered denying each and every allegation not admitted in its answer; admitted that appellees were husband and wife, and that the title to the lot in controversy was of record in the name of Frank Mallard, the husband and head of the family; pleaded the commencement of the attachment suit, the obtaining of the judgment, issuance of the order for the sale

of this and other property attached to satisfy the judgment, and further pleaded that at the time the judgment was entered, and for more than two years prior thereto, appellees were, and had been, actual residents and citizens of the state of Colorado and not residents of this state, and not entitled to any exemptions; and further alleged damages from the issuance of the order of injunction in this case, and prayed for dissolution of the injunction and judgment for damages. The appellees' reply was a general denial of all new matter contained in the answer. A trial of the issues was had, which resulted in a finding in favor of appellees, that the premises constituted the home and homestead of appellees, worth less than $2,000, and were exempt from forced sale, and a decree was rendered making the injunction perpetual, from which the appellants have perfected an appeal to this court.

The testimony in the case is to the effect that the appellees were husband and wife; that they had one son, and commenced living in the premises in controversy either during the year 1880 or 1881; that the husband was a painter by trade and had been employed in North Platte, but could obtain no further work to do there, and in September, 1889, went to Denver to get something to do, and in this was successful, but during the month of December was taken sick, and sent to North Platte for his wife, who was then yet living in the house there. She at this time, in compliance with his request, went to Denver, and after her arrival there the appellees boarded for a short time; then, as a matter of economy, it being quite expensive boarding and he being without work a portion of the time, and a part of the time unable to labor because of sickness, they rented a house and sublet all but two rooms, in which two rooms they lived until they left Denver for North Platte, the wife in April, 1891, and the husband some time in June of the same year. When the wife left North Platte for Denver, in December, 1889, she placed

the greater part of their household goods, etc., which they had been using while residing in the house and on the premises in North Platte, in the carriage house situated thereon and leased the house, reserving no part of it except the clothes press, and the rent money was sent to them in Denver and used by them there to pay board and other expenses of living. During their stay in Denver the wife returned to North Platte twice, and the evidence shows that during this entire time they were making efforts to obtain employment again in North Platte with a view to returning there to their home, but were at no time able to do so. The boy, their son, was with them while they were in Denver.

T. C. Patterson was sworn and testified in behalf of appellants and stated that he was in Denver while appellees were there, for the purpose of settling the claim of the bank upon which the attachment suit was founded, and tried to prevail upon appellees to execute and deliver to him, for the bank, a mortgage upon certain property, including the premises in controversy, securing the payment of the claim. The following is an excerpt from his testimony on this subject as it appears in the record:

Q. You had a mortgage for this upon another house and lot in town?

A. Yes, sir.

Q. Did you ask them to give a mortgage on this property?

A. I did.

Q. What did they say?

A. Mr. Mallard said he would do it.

Q. What did Mrs. Mallard say?

A. She refused to.

Q. Upon what grounds did she refuse to?

A. She said she would not give it.

Q. Didn't she say because it was her home?

A. No, sir; she said she would not give a mortgage on it because we could not take it.

Q. What reason did she give because you could not take it?

A. Because it was exempt.

This shows, we think, conclusively, how Mrs. Mallard thought about this property being her home, and what her intentions were in regard to it. It is shown by the evidence on the part of appellants that Frank Mallard, the husband, was registered for voting purposes in Denver during the spring of 1891, and this fact, it is strenuously contended by counsel for appellants, is conclusive in their favor upon the point of the intention of Frank Mallard, and established his abandonment of the homestead and residence in North Platte. Mallard testifies on this point that he never registered in Denver, but that he was working for the Tramway Street Car Company at the time it is claimed that he registered as a voter; that the company attended to the registration of its employes, and that if his name appeared in the list of registered voters, it was not placed there by or through any efforts of his personally, but by someone else, and it does not appear, or is not shown, that he voted. The weight of authority probably may support the general rule that the exercise of the right of suffrage is conclusive in determining the question of the residence of the party, but in this case it is not shown that Mallard exercised the right of the elective franchise. The evidence only goes to the extent of showing that his name appeared in the list of registered voters, and one witness, a member of the board of registration, testifies that Mallard came before the board personally and procured this to be done. This last fact Mallard denies. Registration is an act which qualifies the person for exercising the right to vote. It is a necessary preliminary step, without which the person cannot legally deposit his ballot; but, when viewed in the connection of the person's intention of abandoning his former residence, we do not think it is entitled to be considered as of so conclusive a character as the

act of voting. The deposit of the ballot is the final action, to which the others are merely preparatory and incidental, and as such possesses, in the mind of the voter, greater significance as an act, and must awaken more thought, and while he might no doubt go through the formalities of a registration, either at the suggestion or request of his employers or fellow workingmen, and yet when he reached the polls to deposit his ballot it would cause him to pause and hesitate and finally abandon the purpose, understanding, as he must, that it severed him from his old home and residence and fixed the new. We do not think that the fact of registration, even if it be conceded that it was procured to be made by the party in person (which was a point on which the testimony in the case was conflicting), would be conclusive proof of the abandonment of the homestead, but would be a fact to be considered, as any other fact in the case, and to be given such weight as it was entitled to under the rules governing the consideration of testimony.

In this case the premises sought to be subjected to sale and payment of the debt through the medium of attachment proceedings was the home and homestead of the debtors at the time the debt was contracted, and as such exempt; and this was known to the creditor, the bank, of appellants, hence it did not, when the debt was created, consider this property or look to it as in any manner a security for the amount of the debt, or rely upon it as being in the future liable to be subjected to the satisfaction of the claim. The judge before whom the case was tried in the district court, in view of all the testimony adduced by either party, reached a conclusion favorable to appellees, and establishing their homestead right in the property in suit and its continuance, and we think his conclusion was a correct one; and if we did not feel convinced from a thorough examination of all the evidence that he was right, his finding was made on conflicting evidence on the main point in

dispute in the case, and as there was not a clear preponderance of the evidence against his finding, it is, according to a well settled rule of this court, conclusive upon appeal. (*Brown v. Hurst*, 3 Neb., 353; *McLaughlin v. Sandusky*, 17 Neb., 110; *Worthington v. Worthington*, 32 Neb., 334; *Courtnay v. Price*, 12 Neb., 188.) The judgment of the district court is

AFFIRMED.

PETER ZEHR V. GEORGE C. MILLER.

FILED JUNE 5, 1894. No. 4762.

Review: FAILURE TO FILE MOTION FOR REHEARING. The rule is well established that this court will not review the judgment and proceedings of a district court on a petition in error unless a motion for a new trial was made in the district court presenting the alleged errors for its consideration and determination.

ERROR from the district court of Furnas county. Tried below before COCHRAN, J.

Dudgeon & Dudgeon, for plaintiff in error.

D. T. Welty, contra.

HARRISON, J.

On the 16th day of March, 1891, the defendant in error filed a petition in the district court of Furnas county and commenced an action against the plaintiff in error, Peter Zehr, a justice of the peace of Burton's Bend precinct, in said county, the object and purpose of which was to obtain a writ of *mandamus* to issue to plaintiff in error, commanding him to act in the approval of an appeal bond in a case which had been determined before him adversely to the de-

fendant in error. Plaintiff in error answered, issues were joined, and a trial to the judge of the district court resulted in a finding in favor of the relator and an order for the issuance of the writ. To reverse such finding and judgment the respondent Zehr prosecutes a petition in error to this court. There are several assignments of error in the petition, but an examination of the bill of exceptions and record discloses that the plaintiff in error did not file any motion for a new trial in the district court, and, in accordance with the well established rule of this court, that where a party fails to move for a new trial in the court below, he cannot raise a question on error to this court. The errors, if any committed, are not properly before this court and cannot be reviewed. (See *Seeley v. Smith*, 29 Neb., 549; *Manning v. Cunningham*, 21 Neb., 288; *Becker v. Simonds*, 33 Neb., 680; *Fitzgerald v. Brandt*, 36 Neb., 683; *Gray v. Disbrow*, 36 Neb., 857; *Smith v. Spaulding*, 34 Neb., 128; *Withnell v. City of Omaha*, 37 Neb., 621.) The judgment of the district court must be

AFFIRMED.

OLIVER BOUVIER V. LEWIS STRICKLETT.

FILED JUNE 5, 1894. No. 4878.

1. **Review**: FAILURE TO EXCEPT TO INSTRUCTIONS. An exception must be taken to the giving of instructions in a civil case in order to review them in this court. (*Darner v. Daggett*, 35 Neb., 696.)

2. ———: TRIAL. The action of the trial court in admitting certain evidence over objections of plaintiff in error considered, and *held* not erroneous.

3. ———: HARMLESS ERROR. The ruling of the court in excluding a certain portion of the testimony offered on behalf of plaintiff

in error examined, and *held*, that if erroneous, it was not prejudicial.

4. **Riparian Rights:** AVULSION. Where the middle of the channel of a stream of water constitutes the boundary line of a tract of land, and the water undermines the banks and the soil "caves in" and mixes with the water and is washed away, the owner of the land must stand the loss; and the middle of the new channel formed for the river by such process, if a new channel is thus formed, will constitute the boundary line of the tract of land.

5. ———: ACCRETION: BOUNDARY LINES. Where a stream of water is the boundary line of a tract of land, and it suddenly abandons its channel, and makes for itself a new course or bed, by cutting across a neck or bend, as it did in the case at bar, the middle of the old channel or bed of the stream still constitutes the boundary line of the tract of land, though it may be dry, or no water flowing therein.

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

John Lothrop, for plaintiff in error.

W. C. Walton and *Jesse T. Davis*, *contra*.

HARRISON, J.

August 9, 1889, the plaintiff filed a petition in ejectment in the district court of Washington county, which was as follows: "The plaintiff complains of the defendant for that said plaintiff has a legal estate in and is entitled to the possession of the following described premises, to-wit: The north half of the southeast quarter of section number 21, in township 18 north, range 12 east, in Washington county, Nebraska; and said defendant, ever since the first day of April, 1888, has unlawfully kept and still keeps the plaintiff out of the possession thereof. The plaintiff therefore prays judgment for the delivery of the possession of said premises to him." To which the defendant filed the following answer:

"1. The above named defendant now comes, and for answer to plaintiff's petition filed in this cause says he denies each and every allegation in said petition contained except such facts as are hereinafter admitted to be true or otherwise answered or explained.

"2. This defendant admits that he is in possession of a tract or piece of land containing about forty acres, but denies that it is any part of the land set forth in plaintiff's petition, and this defendant denies that he unlawfully keeps the plaintiff out of the possession thereof.

"3. And this defendant, further answering, says that this court has no jurisdiction over the subject-matter of this action, for the reason that said land so occupied by this defendant and claimed by the said plaintiff is a tract or parcel of land known as Humphries island, which is now in the state of Iowa, and not within the jurisdiction of this court. Wherefore this defendant prays to be dismissed with his costs."

A jury was waived and trial had to the court, resulting in a finding and judgment for the defendant, which, on motion of plaintiff, was set aside and a new trial granted. At the next term of the court the case was tried to the court and a jury. The jury rendered a verdict for the defendant as follows: "We, the jury, duly impaneled and sworn in this cause, do find, at commencement of this action, the defendant was entitled to the possession of the north half of the southeast quarter of section 21, township 18, range 12 east of the 6th principal meridian." The plaintiff filed a motion for a new trial, which was argued, submitted, and overruled, and judgment was entered, on the verdict, for the defendant. Plaintiff brings the case to this court on petition in error. The following is a copy of the motion for a new trial:

"The plaintiff moves the court for a new trial of this cause for the following reasons:

"1. The verdict is not sustained by sufficient evidence.

"2. The verdict is contrary to law.

"3. The verdict is contrary to the fourth paragraph of the instructions given by the court.

"4. The court erred in giving the seventh paragraph of instructions.

"5. Error of law occurring at the trial and excepted to by plaintiff."

One assignment of error is to the effect that the court below erred in giving instruction No. 7. This, as will be noticed by the above copy of motion for a new trial, was presented by the motion for the ruling of the lower court; but an examination of the record shows that no exception to the giving of this instruction was noted or preserved in the district court, and, in accordance with a well settled rule of this court, the assignment will not be considered. (See *Darner v. Daggett*, 35 Neb., 695, and cases cited.)

Another assignment of error is in the following language: "The court erred in excluding from the jury page 610 of the field notes of the surveyor general, marked 'Exhibit B' in transcript, which ruling was excepted to by plaintiff." Exhibit B, referred to in this assignment, purports to be a portion of a certified copy of the field notes of the original survey of public lands in Washington county, this state, on file in the office of the surveyor general, and were probably competent evidence, but the action of the court, if erroneous, was not prejudicial, for the reason that the evidence sought to be introduced would have shown with reference to the land in the portion of section 21 covered by the notes of the survey, and its position in relation to the Missouri river as contained in the following excerpts from Exhibit B: "Intersect the right bank of the Missouri river and set a meander post for corner fractional sections 21 and 22. * * * Intersect the right bank of the Missouri river and set a meander post for corner fractional sections 20 and 21." These disclose that the section was fractional and bounded by the Missouri river on one

of its lines. It was conceded by all the parties to the action, and at all times during the trial, that the river formed one of the boundary lines of this land, and the only dispute was over the question of where the true course of the river was, and these field notes did not tend in any manner to elucidate this query, or to establish the position the river occupied at any time relative to the land, except that it was one boundary line, and where, with reference to the other corners of the land, it was situated at the time of the survey, but, as will develop in the further consideration of the case, this would not determine in any degree the main proposition in the issues, and it was not therefore prejudicial error to exclude this testimony.

The next assignment of error, the sixth, is as follows: "The court erred in admitting in evidence the answer of Nathan Carter to the question of defendant, 'How often were you in the habit of seeing the river, say, from the time you first came here thirty years ago up to the summer of 1866,' under objection of plaintiff." This was a preliminary question and one by which it was sought to show the acquaintance of the witness with the river in its course, at or near the land in dispute, during the thirty years he had testified that he resided in the vicinity of it, and thus lay the foundation for the further testimony to be elicited from the witness in reference to what changes had occurred in the course or channel of the river during the time to which his attention might afterward be directed, and we think the interrogatory was a competent and proper one, and it was not erroneous to allow it to be answered.

The only other assignment of error to be considered is that the verdict was not sustained by the evidence. The plaintiff in the court below introduced deeds and other evidences of title in himself to the southeast quarter of section 21, in township 18 north, of range 12 east of the 6th principal meridian. The land in controversy is the north half of the above described tract. The plaintiff

further showed that in 1857, when the government survey was made, and during several years prior thereto, this disputed tract of land was all in Nebraska, or that the Missouri river ran east of it, and that the southeast quarter of this particular section (21) was all on the Nebraska side of the river. The plaintiff Bouvier testified in regard to the changes which afterwards occurred in the course of the river, that there was a gradual recession of the water from the Iowa side or bank to the Nebraska bank and an undermining of the latter and what may be termed a "caving in" of the top soil of the bank. This commenced probably at as early a date as it is shown that any witness examined knew the land, and continued during several years, until in 1865 or 1867 the channel of the river was in what was known as the De Soto lake or De Soto channel, this being far over on the Nebraska side, and there was a formation of soil on the other side of this channel, which was called a horseshoe island, or "Humphries island," as it was designated by some of the witnesses, this land so formed being the particular tract in dispute. The situation of the channel of the river remained as above indicated until, at some date during 1870, 1871, 1872, or 1873, it was not very definitely stated by the various witnesses when, by a sudden change in the course of the river it cut off or ran across a "neck," as it was denominated by the witnesses, and made a channel, by which this land, together with the house in which Stricklett then resided, was apparently placed on the Nebraska side of the river. By the first of these changes in the course of the Missouri river the then owner of the land suffered a loss from what may be termed a natural decretion of the land, and the riparian owner on the Iowa side gained the accretion, or formation, of land caused by the recession of the river and its deposits of soil contiguous to his land.

In the case of *State of Nebraska v. State of Iowa*, 12 Sup. Ct. Rep. [U. S.], 396, in which the boundary line

between the states of Iowa and our own state was in dispute, such boundary being the middle of the same river as in the case at bar, the Missouri, the source of the litigation between the two states being the changes in the course of the river by which its channel or bed had been changed in location, the respective states were claiming jurisdiction over the same tract of land, the question to be determined was the position or location of the middle of the main channel of the river, it was held: "Where the middle of a stream is the boundary between states or private land-owners, that boundary follows any changes in the stream which are due to a gradual accretion or degradation of its banks;" and in the text of the opinion, written by Mr. Justice Brewer, it is stated: "It is settled law that when grants of land border on running water and the banks are changed by that gradual process known as 'accretion,' the riparian owner's boundary line still remains the stream, although during the years, by this accretion, the actual area of his possessions may vary. In *New Orleans v. United States*, 10 Pet. [U. S.], 662, 717, this court said: 'The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss in this way, he cannot be held accountable for his gain.' (See *Jones v. Soulard*, 24 How. [U. S.], 41; *Banks v. Ogden*, 2 Wall. [U. S.], 57; *Saulet v. Shepherd*, 4 Wall. [U. S.], 502; *County of St. Clair v. Lovingston*, 23 Wall. [U. S.], 46; *Jefferis v. East Omaha Land Co.*, 134 U. S., 178;" and see, also, *Lammers v. Nissen*, 4 Neb., 245; *Wiggenhorn v. Kountz*, 23 Neb., 690; *Gill v. Lydick*, 40 Neb., 508.) From this we conclude that when the river gradually made

the change from the Iowa side to the De Soto channel, or, as some of the parties testifying called it, the old channel, this channel then became the boundary line of plaintiff's land. It may be said that the change was not so gradual as to come within the rule of accretion, which is thus stated in *County of St. Clair v. Lovingston*, 23 Wall. [U. S.], 46: "The test as to what is gradual and imperceptible in the sense of the rule is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the progress was going on;" but in *State of Nebraska v. State of Iowa, supra*, on this subject it was held: "The law of accretion applies to the Missouri river, notwithstanding that, owing to the swiftness of its current and the softness of its banks, the changes are more rapid and extensive than in most other rivers;" and in the text it is said: "The Missouri river is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely of quicksand. * * * The current is rapid, far above the average of ordinary rivers; and by reason of the snows in the mountains there are two well known rises in the volume of its waters, known as the April and June rises. The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. Whenever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great. Frequently where, above the loose substratum of sand, there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the substratum of soil into the river; so that it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. Notwithstanding this, two things

must be borne in mind, familiar to all dwellers on the banks of the Missouri river, and disclosed by the testimony: that while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water and giving to the stream that color which in the history of the country has made it known as the 'muddy' Missouri; and also that while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual, and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process. There is no heaping up at an instant, and while the eye rests upon the stream, of acres or rods on the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams in the matter of accretion is in the rapidity of the change, caused by the velocity of the current, and this in itself in the very nature of things works no change in the principle underlying the rule of law in respect thereto. Our conclusions are that, notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side and onto

the other, the law of accretion controls on the Missouri river as elsewhere; and that not only in respect to the rights of individual land-owners, but also in respect to the boundary lines between the states. The boundary, therefore, between Iowa and Nebraska is a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream."

The first changes in the course of the channel of the river, as shown by the testimony of the witnesses in the case at bar, were such as clearly bring them within the rule which the foregoing quotation so aptly and ably sets forth or pictures in words. We will now leave this phase of the changes and turn to the one effected during the 70's, when the river, at the time of a freshet or rise, cut through the bend on the Iowa side of the land in controversy and thus immediately changed its channel to the north and eastward of this tract of land, placing it apparently on the Nebraska side of the river. By this change, which is termed an "avulsion," the boundary did not change, but still remained the old, or De Soto, channel, and ownership of land remained in the party owning it at the time of the avulsion, and the owner of the land on the Nebraska side, to which it was apparently added or made contiguous, acquired no right or claim to it. We again refer to *State of Nebraska v. State of Iowa, supra,* where on this point it was held: "But where the change is of a sudden and rapid character, such as occurs when a river forms a new course by cutting through a bend, the boundary does not follow the change but remains in the middle of the old channel;" and Mr. Justice Brewer makes the following statement of the rule: "It is equally well settled that where a stream which is a boundary, from any cause, suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary, and that the boundary remains as it was in the center of the old channel, although no water may be flowing therein. This sudden and rapid change

of channel is termed in the law 'avulsion.' In Gould, Waters, sec. 159, it is said: 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates;'" and cites 2 Black., Com., 262; Angell, Water-Courses, sec. 60; *Trustees of Hopkins Academy v. Dickinson*, 9 Cush. [Mass.], 544; *Buttenuth v. St. Louis Bridge Co.*, 123 Ill., 535; *Hagan v. Campbell*, 8 Port. [Ala.], 9; *Murry v. Sermon*, 1 Hawks [N. Car.], 46. Justice Brewer further on this subject quotes from Vattel, page 121 (book 1, c. 22, sec. 268): "For if I take possession of a piece of land, declaring that I will have for its boundary the river which washes its side, or if it is given to me upon that footing, I thus acquired beforehand the right of alluvion, and consequently I alone may appropriate to myself whatever additions the current of the river may insensibly make to my land. I say 'insensibly,' because in the very uncommon case called 'avulsion,' when the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such a manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner. The civil laws have thus provided against and decided this case when it happens between individual and individual." (See, also, *Wiggenhorn v. Kountz, supra*, and *Gill v. Lydick, supra*, Nebraska cases hereinbefore cited.) Applying these rules of law to the facts developed in the case at bar, we conclude that the channel formed for the river by its first and gradual change of course became the boundary line of the plaintiff's land, and that by the second and sudden change the boundary was not changed or affected; and it follows that, according to the testimony adduced in the case, he had no right or ownership in the tract of land in dispute. Congress established in 1846 the middle of the main channel of the Missouri river as the boundary line of Iowa,

and in 1867 the same was established as the boundary line of Nebraska, but this could not, and did not, affect the boundary line of plaintiff's land; it had been surveyed by the government in 1857, according to the evidence, and the United States had parted with the title to the person who was the source of the title vested in the plaintiff Bouvier, and whether the line was placed in Iowa or Nebraska by the establishment of the boundary line between these states could have no effect on the plaintiff's title to the land or any portion of it. The judgment of the lower court is

AFFIRMED.

HENRY ARMANN V. JOSIAH H. BUEL.

FILED JUNE 5, 1894. No. 5051.

1. **Review:** INSTRUCTIONS: ASSIGNMENTS OF ERROR. Where instructions are grouped together by numbers in one paragraph of a petition in error and no assignment of error is made to each instruction separately, it is not specific and definite enough, and the exceptions to the instructions will not be further considered than to ascertain that any one of them was without error.

2. ———: CONFLICTING EVIDENCE. A finding not clearly wrong will not be disturbed if the evidence is conflicting and there is sufficient testimony to support the finding.

3. **Subscription:** CONSIDERATION. A subscription paper was signed by several persons, by which they agreed to contribute certain sums to attain an object sought to be attained by all. The promise of each of the subscribers was a good consideration for the agreement or promise to pay embodied in the subscription of the others, and the promise of each enforceable by the action of the person to whom the subscription ran or was directed, provided he had complied or fulfilled the terms or conditions upon which the subscriptions were made.

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

The opinion contains a statement of the case.

J. C. Crooker and *Robert Ryan*, for plaintiff in error, contending that the subscription was without consideration and void, cited: *Livingston v. Rogers*, 1 Cai. Cas. [N. Y.], 583; *Walton v. Walton*, 70 Ill., 142; *Pearson v. Pearson*, 7 Johns. [N. Y.], 26*; *Grover v. Grover*, 24 Pick. [Mass.], 261; Chitty, Contracts [9th Am. ed.], pp. 53–55; 1 Parsons, Contracts, pp. 234, 475; *Klosterman v. Olcott*, 27 Neb., 685.

W. M. Morning, contra:

Where several persons promise to contribute to a common object desired by all, the promise of each is a good consideration for the promise of the others, and can be enforced by suit when the corporation or person to whom the subscription runs has incurred obligations on the faith of such subscriptions, and has complied with the conditions upon which they were made. (*Fremont Ferry & Bridge Co. v. Fuhrman*, 8 Neb., 103; *Security State Bank v. Raine*, 31 Neb., 517; *Hale v. Ripp*, 32 Neb., 263; *Trustees of Methodist Episcopal Church of Illinois v. Garvey*, 53 Ill., 401; *McClure v. Wilson*, 43 Ill., 356; *George v. Harris*, 4 N. H., 535; *Philomath College v. Hartless*, 6 Ore., 158; *Barnes v. Perine*, 12 N. Y., 18; *M'Auley v. Billenger*, 20 Johns. [N. Y.], *89; *Thompson v. Mercer County*, 40 Ill., 379; *McDonald v. Gray*, 11 Ia., 508; *Petty v. Trustees of Church of Christ*, 95 Ind., 278; *Galt's Executor v. Swain*, 9 Gratt. [Va.], 633; *Cumberland V. R. Co. v. Baab*, 36 Am. Dec. [Pa.], 132.)

HARRISON, J.

On the 7th day of April, 1890, the plaintiff (defendant in error here) filed in the district court of Lancaster county the following petition:

"Comes now the plaintiff and for his cause of action against said defendant says: That on or about the 22d day of November, 1887, the defendant, among others, promised and agreed in writing to pay to this plaintiff the sum of $25 for the location of thirteen acres of land for and erecting thereon a depot and switch grounds for the Missouri Pacific Railroad Company, at and near the home of said defendant in Lancaster county, Nebraska, which agreement was signed by the said defendant, the consideration thereof being the location of and erecting thereon at said depot or switch grounds near the home of defendant, and that this plaintiff should deed said ground, without price or payment thereof, to the said railroad company, which this plaintiff did, the said depot and switch grounds were located thereon, but the said defendant, although often requested, has failed and refused and neglected to pay said $25.

"Wherefore said plaintiff prays judgment against said defendant for $25, together with interest thereon at seven per cent per annum from said 22d day of November, 1887, and costs of this action."

And afterwards the defendant (plaintiff in error in this court) filed an answer as follows:

"The defendant, in answer to said plaintiff's petition, denies that on or about the 22d day of November, 1887, or at any other time, that he promised and agreed in writing to pay the plaintiff the sum of $25 for the location of thirteen acres of land for the erection thereon a depot and switch grounds for the Missouri Pacific Railroad Company at or near his home, or at any other place in Lancaster county, Nebraska.

"2. And the defendant also denies that any agreement was ever signed by him, the consideration thereof being for the location of and erection thereon a depot or switch grounds near the home of the defendant; and also denies that in consideration thereof that the plaintiff should deed said railroad company, and which the plaintiff did so deed, etc.

"3. But this defendant avers that the plaintiff did, for his own purpose and interest, convey certain lands to said railroad company for depot and switch purposes, and for his own interest and benefit, by laying out thereon a town site and plat, thereby making great profit. This defendant denies he ever, by himself or with others, promised and agreed in writing to pay the plaintiff the sum of $25 for the location of thirteen acres of land for and erecting thereon a depot and switch grounds for the Missouri Pacific Railroad Company at any place whatever.

"4. Defendant denies that the plaintiff ever made any conveyance to the Missouri Pacific Railroad Company of any land whatever, but he avers the fact to be that the plaintiff did propose to said company that if said company would locate a station on the plaintiff's farm, the plaintiff would give the said company a deed of the necessary depot grounds and for switch purposes, and that thereby the plaintiff might lay out a town site, which proposition was accepted by said company, and a station was established on the plaintiff's farm, called Sprague, by reason whereof the plaintiff has been greatly benefited and his other lands have been enhanced a hundred-fold, and this defendant is in nowise benefited or profited thereby.

"5. Further answering, the defendant denies making or signing an agreement to pay $25, or any other sum whatever payable to the plaintiff for any purpose or cause whatever, and denies each and every other material allegation not hitherto fully answered or denied."

To which defendant in error replied, denying all new matter contained in the answer. A trial of the issues to the court and a jury resulted in a verdict for the plaintiff Buel. A motion for a new trial was filed for Armann, and on hearing was by the court overruled and judgment rendered for Buel on the verdict and in accordance with its findings, to reverse which Armann brings the case here on petition in error.

The fourth paragraph of the motion for a new trial reads as follows: "The court erred in overruling the exceptions of the defendant to the first, second, third, fourth, fifth, sixth, and seventh instructions given by the court on its own motion;" and the fourth assignment of error in the petition was thus stated: "The court erred in overruling the exceptions of the defendant to the first, second, third, fourth, fifth, sixth, and seventh instructions given by the court on its own motion." By an examination of the instructions contained in the record as numbered above, we are satisfied that nearly, if not all, of them, when considered together, are free from error, and this brings this assignment of error within the rule announced by this court in *Hiatt v. Kinkaid,* 40 Neb., 178, where it was held: "An assignment of error as to the giving *en masse* of certain instructions will be considered no further than to ascertain that any one of such instructions was properly given." See, also, *McDonald v. Bowman,* 40 Neb., 269, and *Jenkins v. Mitchell,* 40 Neb., 664, in which the above doctrine was followed. The exceptions to the instructions cannot be considered. This leaves but two questions in this case for our consideration, viz., did Henry Armann sign or authorize the signing of the agreement in writing sued upon in the sum of $25; and if so, was it binding upon him?

The alleged "agreement in writing," as it was denominated in the case, was what is generally known as or called a "subscription paper." The evidence on the point of the authorization by Armann of the signing of the paper for him is conflicting upon but one point. He claims that he authorized one Mitchell to sign it for him, but limited the sum to $15, while Mitchell, on the other hand, testifies that he was told by Armann to place his name on the paper and make the amount subscribed $25, and there is some other testimony in the case which may be said to be corroborative of the evidence of Mitchell on this point, but there is ample evidence to support the finding of the jury

on this portion of the issues and it will not be disturbed. (See *Huff v. Nims*, 11 Neb., 363; *Riley v. Melquist*, 23 Neb., 475; *Omaha & R. V. R. Co. v. Brown*, 29 Neb., 493.) The agreement or subscription paper upon which this suit was instituted is as follows:

"Nov. 22, 1887.

"We, the undersigned, do bind and pledge ourselves to pay to J. H. Buel the amount opposite our names, for the purpose of securing thirteen acres of land for depot and switch grounds for the Missouri Pacific railroad on the N. E. ¼ of sec. 33 and S. E. ¼ of sec. 28, T. 8, R. 6 E. Payable when said railroad is completed at said point and depot erected."

Under this heading followed a number of names with amounts, ranging from $25 to $100, set opposite to them, among which was the name of the plaintiff in error, and opposite his name the figures $25. It is insisted by counsel for plaintiff in error that this subscription could not and did not bind Armann for the payment of the amount of his subscription, because there was no consideration for his promise, and no mutuality of promise. The testimony in this case shows conclusively that the defendant in error performed all the conditions of the contract on his part to be performed or promised, and that the agreement by plaintiff in error and others to pay the amounts was the inducement for him to do so. This action on his part entitled him to collect the several sums of the parties who had agreed to pay them, including Armann, plaintiff in error. In *Homan v. Steele*, 18 Neb., 652, which was an action upon a subscription paper, and in its facts and the rules of law applicable thereto a parallel case with the one at bar, it was held: "Where several promise to contribute to a common object desired by all, the promise of each is a good consideration for the promise of the others, and can be enforced by suit when the corporation or person to whom the subscription runs has incurred obligations on the faith of

such subscriptions, and has complied with the conditions on which they were made." As to this point see, also, *Fremont Ferry & Bridge Co. v. Fuhrman*, 8 Neb., 99; *George v. Harris*, 4 N. H., 535.

In the text of the opinion of *Homan v. Steele, supra*, it was stated: "In this case, however, the allegations of the petition are, and the proof shows, that in consequence of the promise of the defendant and others, the plaintiffs were induced to purchase the lot in question and erect the building thereon. They acted upon the faith of these subscriptions, and that is a sufficient consideration. In 2 Kent, Com., sec. 465, it is said: 'A valuable consideration is one that is either a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made. Any damage, or suspension, or forbearance of a right will be sufficient to sustain the promise.' That is, a benefit or advantage accruing to the party who makes the promise, or some inconvenience or injury sustained by the party to whom the promise is made, is sufficient to support a contract;" and see cases cited in support of the text. In the case at bar all these elements existed, the promise by the several parties to contribute to accomplish the object desired by all, the offer of the amounts subscribed to defendant in error to induce him to part with the title to his property, and his actions thereafter in fulfillment of the terms and conditions to be performed on his part. We think the defendant in error was clearly entitled to his action upon the subscription paper against plaintiff in error, and there was no reversible error in the proceedings of the district court as presented in the record in this court. The judgment of the lower court is

AFFIRMED.

RYAN, C., having been of counsel, took no part in the decision.

ANTON BERNEKER V. STATE OF NEBRASKA.

FILED JUNE 5, 1894. No. 6931.

1. **Criminal Law:** ASSIGNMENTS OF ERROR: INSTRUCTIONS: REVIEW. An assignment of error as to the giving *en masse* of certain instructions will be considered no further than to ascertain that any one of such instructions was properly given. (*Hiatt v. Kinkaid*, 40 Neb., 178.)

2. **Receiving Stolen Goods:** INSTRUCTIONS AS TO VALUE. The language of an instruction with reference to the value of goods received, the prisoner being on trial for the alleged crime of receiving stolen goods, examined, and *held* not eroneous or objectionable.

3. **Criminal Law:** REPUTATION: EVIDENCE. Character, according to its legal construction, is a fact, and means the estimate in which the individual is held in the community in which he lives; and it is not error on the part of a trial court to exclude the knowledge of a witness, purporting to have been gained by personal acquaintance or dealings with the individual whose character is in question, as only the general reputation of such individual is admissible.

4. ———. The action of the court in sustaining objections of counsel for the state, to questions put to a witness on behalf of plaintiff in error, examined, and *held* not erroneous.

5. ———: ASSIGNMENTS OF ERROR: REVIEW. An assignment of error in the following terms: "The court erred in admitting evidence of defendant's receiving property at dates subsequent to the receiving on which and for which he was convicted," *held*, to be too indefinite, in that it is too general and failed to designate any particular or specific portion of the testimony of which complaint is made.

6. ———: INDORSEMENT OF NAMES OF WITNESSES ON INFORMATION. The indorsement of the name of a witness on the copy of the information contained in the transcript of the case raises the presumption that such indorsement was made at the proper time, and in the absence of proof to the contrary such presumption will prevail.

7. **Trial:** INTRODUCTION OF EVIDENCE. Where a question is asked a witness, to which objection is made, which is sustained,

the party desiring the evidence must offer to prove the facts sought to be introduced in evidence. (*Mathews v. State*, 19 Neb., 330.)

8. **Review:** AFFIDAVITS: BILL OF EXCEPTIONS. An affidavit which it is claimed was used in the hearing of motion for a new trial, but the record does not disclose whether it was used or presented at the hearing of the motion, cannot be considered for any purpose in this court unless presented by bill of exceptions and thus made a part of the record in the case.

9. **Sufficiency of Evidence.** The evidence examined, and *held* sufficient to support the verdict.

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

Weaver & Giller, for plaintiff in error.

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

HARRISON, J.

During the February, A. D. 1894, term of the district court of Douglas county, on March 2, there was an information filed in said court, charging the plaintiff in error with the crime of receiving stolen property, certain goods and merchandise, of the alleged total valuation of $90.25. A trial was had to the court and a jury, which resulted in a verdict of guilty, the value of the property being assessed in the verdict at the sum of $35.15. Motion for a new trial was filed for the plaintiff in error, which, on hearing, was overruled and the plaintiff sentenced to a term of three years in the penitentiary, to reverse which judgment and sentence these proceedings in error were instituted.

The first assignment of error which is urged in the brief of counsel for plaintiff in error herein is stated as follows: "The court erred in instructing the jury that before they could convict the defendant they must find the value of the goods to be $35 or upwards. (See record, page 4, instruction No. 3.)" The exceptions to the instructions were

couched in the following language: "The defendant excepts to instructions numbered 3, 4, 5, and 6 given by the court on its own motion," and the fourth ground of the motion for a new trial stated: "The court erred in giving instructions 3, 4, 5, and 6 of its own motion," and in the petition in error, wherein the plaintiff in error complains of the instructions, the same words are used as in the motion for a new trial, and the instructions grouped together in one paragraph of the assignments. It is not claimed that any of the instructions are erroneous, or even defective, except No. 3, and an examination of them discloses that some, if not all, are entirely applicable to the facts developed in the case on trial, and free from error, which brings this assignment within the rule announced in *Hiatt v. Kinkaid*, 40 Neb., 178, in which case it was held by this court that "an assignment of error as to the giving *en masse* of certain instructions will be considered no further than to ascertain that any one of such instructions was properly given." (See, also, *McDonald v. Bowman*, 40 Neb., 269, and *Jenkins v. Mitchell*, 40 Neb., 664, since decided, and in which the rule above quoted was approved and followed.) This would effectually dispose of this assignment and obviate any necessity for further consideration of it; but inasmuch as the plaintiff in error, in his motion for a new trial, has further complained of this same instruction No. 3 in the following words: "That the court erred in instructing the jury that in order to find defendant guilty they must find the value of the property received by him to be $35 or upwards," we will give it further notice. The instruction complained of reads as follows: "The facts necessary to be established by the evidence beyond a reasonable doubt to warrant a conviction of the defendant are: That the defendant, at or about the time named in the information, and at and within the county of Douglas and state of Nebraska, received the goods described in the information, or some of them; that the same were the goods of the Fremont, Elkhorn & Mis-

souri Valley Railroad Company; that the goods received by defendant had been stolen; that defendant received the goods knowing them to have been stolen, and with the intent to defraud the owner, the Fremont, Elkhorn & Missouri Valley Railroad Company, and that the value of the goods was $35 or upwards. If these facts have not been established beyond a reasonable doubt, you should acquit the defendant; if all these facts have been established beyond a reasonable doubt by the evidence, you should convict the defendant." Here the court stated the essential elements of the crime alleged to have been committed and necessary to be proved by the state beyond a reasonable doubt before it could claim a conviction of the prisoner by the jury then trying the prisoner, and in the portion of the instruction in which the value was referred to the court did no more than to use the same or like language to that employed by the lawmaker who framed the statute wherein the crime for which the plaintiff was being prosecuted is defined. The portion of section 116 of the Criminal Code under which the plaintiff was being prosecuted, to which attention is directed, is as follows: "If any person shall receive or buy any goods or chattels of the value [of] thirty-five dollars or upwards, that shall be stolen or taken by robbers with intent to defraud the owner, or shall harbor or conceal any robber or thief guilty of felony, knowing him or her to be such, every person so offending shall be imprisoned in the penitentiary no more than seven years nor less than one year." We are satisfied that no prejudice could have resulted to plaintiff in error from the giving of the instruction containing the sentence indicated in regard to value, simply defining, as it did, one of the constituent elements of the alleged crime as it was defined in the statutes, which prohibited the crime and provided a punishment for its commission.

It is further complained that the court erred in refusing to permit the plaintiff in error to show that his reputation

for honesty was good in the community in which he resided. The offer of the proof was contained in the evidence of but one witness, Henry Habbens. The portion of the record in which the examination of this witness appears is as follows:

Henry Habbens, being called on behalf of defendant and duly sworn, testified as follows:

Examined by Mr. Weaver:

Q. State your full name to the jury, Mr. Habbens.

A. Henry Habbens.

Q. Where do you reside?

A. 1408 North Eighteenth street, Omaha.

Q. How long have you lived in Omaha?

A. Twelve years.

Q. Are you acquainted with the defendant, Mr. Berneker?

A. Yes, sir.

Q. How long have you known him?

A. Between four and five years.

Q. What is your business?

A. I am engaged in the brewing business—Omaha Brewing Association.

Q. You say you have known the defendant about four years?

A. I think it has been between four and five.

Q. State from your acquaintanceship with the defendant what you would say about his being an honest, upright, straightforward man?

Objection by the state, as irrelevant, immaterial, and incompetent, defendant not having been put upon the stand. Sustained. Defendant excepts.

Q. State, Mr. Witness, if you are acquainted with the general reputation of the defendant for industry, uprightness, and being a straightforward man.

Objection by state, as irrelevant, incompetent, and immaterial. Sustained. Defendant excepts.

Q. Mr. Habbens, are you acquainted with the general reputation of the defendant for honesty and uprightness, and being a straightforward man, in the community in which he lives?

Objection by the state, as irrelevant, incompetent, immaterial, and no foundation laid for the question.

Q. And among those with whom he associates?

Objection sustained. Defendant excepts.

Q. From your acquaintanceship with the defendant, what would you say as to his being an honest, straightforward, upright man?

Objection by state, as irrelevant, incompetent, and immaterial. Sustained. Defendant excepts.

Q. State whether or not you have had any dealings with the defendant in the last three or four years, and during your acquaintanceship with him.

A. Yes, sir; I have.

Q. To what extent?

Objection by state, as irrelevant, incompetent, and immaterial. Overruled. State excepts.

A. I have seen him probably two or three times a week, and have done business with him, probably to the amount of $20,000 or $30,000 a year.

Q. Do you know what his general reputation is for industry, uprightness, and fair dealing, straightforward man, among the people with whom he lived and with whom he deals?

Objection by the state, as incompetent, irrelevant, immaterial, no proper foundation laid for the question, and having been already gone over. Sustained. Defendant excepts.

Q. From your knowledge of the defendant and your business dealing with him, what can you say as to his being an honest, upright, and straightforward man?

Objection, as irrelevant, incompetent, immaterial, and having already been ruled upon. Sustained. Defendant excepts.

Q. From your business dealings with the defendant, do you know whether or not he is an honest, straightforward, upright person?

Objection by state, as incompetent, irrelevant, immaterial, and leading, already been gone over, question having been asked and ruled upon. Sustained. Defendant excepts.

Q. You may state what you know about the defendant's being an honest, straightforward, upright man.

Objection by state, as irrelevant, incompetent, and immaterial, already been gone over and ruled upon by the court. Sustained. Defendant excepts.

Defendant offers to show by the witness that the defendant is an honest, straightforward, upright person.

Objection by state, as irrelevant, incompetent, and immaterial, already been gone over and ruled upon by the court. Sustained. Defendant excepts.

The Court: The court has not and does not propose to deprive counsel of the right to prove, if he can, the matters offered, provided he puts a proper question for the purpose of calling out such proof.

It was unquestionably the right of plaintiff to introduce evidence of his character or reputation, for they are convertible terms, for honesty in the community in which he resided, or his general reputation for honesty, but "character is a fact which is proved by another fact, general reputation. It cannot be shown by evidence of particular and specific facts, but may be proved by negative testimony. It must, therefore, be proved by witnesses who are acquainted with the general reputation of the person whose character is in issue, and this acquaintance must be shown before the evidence will be admitted. The individual opinion of the witness is inadmissible." (3 Am. & Eng. Ency. Law, 114, and notes.) "Character, in the sense in which the term is used in jurisprudence, means the estimate attached to the individual by the community, not the real

qualities of the individual as conceived by the witness. In other words, it is not what the individual in question really is, but what he is held to be by the society in which he moves." (Wharton, Criminal Evidence, ch. 2, sec. 58.) "The particular trait or kind of character to be proved must, of course, be determined from the nature of the question in issue. * * * One may have an excellent reputation for some things, and a very bad one for others." (*Indianapolis Journal Newspaper Co. v. Pugh*, 33 N. E. Rep. [Ind.], 991.)

A perusal of the examination of the witness Habbens discloses that there was not any question asked him that was not objectionable, viewed in the light of the above rules in reference to evidence of reputation, either in seeking to call out testimony of some other trait than honesty or the reputation of the party (not generally, but in a limited sense), either the opinion of the witness formed alone from his acquaintanceship with him, or the plaintiff's character among his associates. This last is what is asked for in the least objectionable interrogatory propounded during the whole examination of the witness. Furthermore, the only offer to prove made, it will be remembered, was in the following words: "Defendant offers to show by the witness that the defendant is an honest, straightforward, upright person." This was clearly bad, as the offer is to show by the witness, not the reputation or character of the party in question, but to show by the witness his opinion or estimate of them; and immediately following this the court made the following statement: "The court does not propose to deprive counsel of the right to prove, if he can, the matters offered, provided he puts a proper question for the purpose of calling out such proof;" but the witness was excused, and there was no further effort to prove the reputation of Berneker. We can discover no error in this portion of the record in the least degree prejudicial to the plaintiff in error. He was given ample opportunity to

show his reputation or character for honesty in the proper manner, but failed to do so.

Another assignment of error is stated as follows: "The court erred in admitting evidence of defendant receiving property at dates subsequent to the receiving on which and for which he was convicted." This assignment of error is insufficient and indefinite, in that it does not designate the particular portion of the evidence to which attention is sought to be directed, and which it is claimed the court erred in admitting. There was some testimony of the kind indicated in the above assignment, introduced during the trial of the case, but a search through the record discloses that plaintiff in error objected to only one interrogatory of those propounded, with the view to eliciting such evidence. Following the rule announced in *Graham v. Hartnett*, 10 Neb., 518, this assignment is too indefinite to be noticed or to present the question desired to be raised for review.

During the trial of this case in the district court one Thomas Bennett was sworn on behalf of the state. Counsel for the plaintiff in error interposed the following objection to his testimony: "Defendant objects to witness testifying, for the reason that his name is not indorsed on the information, a copy of which was served upon the defendant. Overruled. Defendant excepts." An examination of the copy of the original information used upon the trial, as embodied in the transcript and a part of the record here, discloses that the name of the witness Bennett appeared among the names indorsed upon it, and this raises the presumption that it was properly indorsed in the manner and at the time required by the law regulating such indorsements. This meets the objection made and the assignment of error on this point, in both the motion for a new trial and the petition in error. It is evident from an examination of some portions of the papers filed here that the point intended to be raised by the objection of counsel for the plaintiff in error was that the name of

the witness Bennett was not indorsed or did not appear upon the copy of the information served upon the plaintiff in error, and that if it appeared on the information at the time of trial it had been indorsed thereon at a time or date subsequent to its filing by the clerk and without notice to the prisoner or his attorneys, and without any knowledge on his or their part of such action. There is an affidavit attached to the papers in this court which states, in substance, that the copy of the information served upon plaintiff in error did not have indorsed upon it the name of Thomas Bennett; that after the original information was filed with the clerk of the court the name of the witness Bennett was indorsed upon it without the knowledge of or notice to the plaintiff in error or his attorneys, and that they were not aware of such indorsement until after the case against plaintiff in error was called for trial and a jury impaneled for such trial. This affidavit, it is claimed, was used on the hearing of the motion for a new trial, but whether it was used or referred to on the hearing of the motion for a new trial we are not informed and the record nowhere discloses. It is not mentioned in the record as having been used for any purpose in the court below, and has not been by name, or as an exhibit, or by reference to it, made or preserved as a part of the bill of exceptions and cannot be considered here. (See *Van Etten v. Butt*, 32 Neb., 285.)

The only other assignment of error in the case may be considered under that of the insufficiency of the evidence to support the verdict. We are satisfied, from a careful and thorough examination of all the evidence in the case on all the points involved in the inquiry, that it was ample and sufficient, and the jury warranted in the conclusion that the testimony showed the plaintiff in error guilty of the crime charged, beyond a reasonable doubt. The judgment of the district court is

AFFIRMED.

S. S. HEWITT v. COMMERCIAL BANKING COMPANY.

FILED JUNE 5, 1894. No. 5618.

1. **Review:** ASSIGNMENTS OF ERROR. An assignment of error as to the giving *en masse* of certain instructions will be considered no further than to ascertain that any one of such instructions is properly given. (*Hiatt v. Kinkaid*, 40 Neb., 178.)

2. ———: ———. An assignment in a petition in error, that the trial court erred in refusing to give a group of instructions asked, will be considered no further when it is found that the refusal of any one of such instructions was proper. (*Hiatt v. Kinkaid*, 40 Neb., 178.)

3. ———: ———. An assignment of error as to irregularities of the trial court in the preparation and giving of instructions, which assignment does not specifically designate the instruction or instructions complained of, the only allusion made thereto being by affidavits attached to the motion for a new trial, which were not further authenticated, nor incorporated in the bill of exceptions, will not be considered by this court.

4. **Fraudulent Conveyances:** INTENTION: QUESTION FOR JURY. Fraudulent intent in the execution of a chattel mortgage on a stock of goods, whereby certain creditors are preferred, is a question of fact and not of law, and one to be submitted to the jury for determination.

5. ———: PREFERRING CREDITORS. An intention to defraud cannot be inferred merely from the fact a preference was given to a certain creditor. (*Jones v. Loree*, 37 Neb., 816.)

6. ———: ———: CHATTEL MORTGAGES. A debtor in failing circumstances may lawfully prefer one or more of his creditors, and secure such creditors by mortgage or conveyance absolute, provided the transaction is in good faith and not made with intent to defraud other creditors. (*Costello v. Chamberlain*, 36 Neb., 45.)

7. **Review:** SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* sufficient to support the verdict.

ERROR from the district court of Furnas county. Tried below before COCHRAN, J.

Bartlett, Crane & Baldrige and *McClure & Anderson*, for plaintiff in error.

W. S. Morlan and *G. W. Norris, contra.*

HARRISON, J.

On the 17th day of September, 1890, the Commercial Banking Company commenced this action of replevin in the district court of Furnas county, to obtain possession of a stock of general merchandise, and its petition then filed, after stating its corporate character and giving a description of the stock, alleged, as showing its ownership and right to possession of the property, that, "On the 3d day of September, 1890, Chester H. Foland, the owner of said goods and chattels, executed and delivered to plaintiff a chattel mortgage on said goods and chattels to secure plaintiff for the sum of $3,067.57, which amount was justly and legally due plaintiff from said Chester H. Foland, and which is still unpaid, and by virtue of said chattel mortgage plaintiff took possession of said goods and chattels on the said 3d day of September, 1890, and held possession of the same until the 17th day of September, 1890, when defendant S. S. Hewitt unlawfully and forcibly took possession of the same and still holds the same in his possession. Said chattel mortgage was duly filed for record in the office of the county clerk of Furnas county, Nebraska, on said 3d day of September, 1890." The petition further contained the usual allegations of petitions in actions of replevin. The defendant, who it appears was the sheriff of Furnas county, in answer to this petition admits the existence of the banking company as a corporation; admits that the chattel mortgage was executed and delivered to it by the party on the date, for the sum, and conveying the stock of goods as pleaded in the petition, and traverses separately, or specially denies, the other allegations of the petition, and as a further defense states:

"For further and separate defense and answer to the plaintiff's petition defendant alleges that on and prior to said 3d day of September, 1890, the said Chester H. Foland was indebted to divers persons, firms, and corporations in a large amount of money, to-wit, over $2,500. Among the said persons, firms, and corporations to whom said Foland was then indebted, and who were and are creditors of the said Foland, are Darrow & Logan, R. L. McDonald & Co., D. M. Steele & Co.,Tootle, Hosea & Co., the American Hand Sewed Shoe Company, M. E. Smith & Co., Turner, Frazer & Co., besides other creditors to the defendant unknown. That for the purpose of cheating and defrauding said creditors the said plaintiff in this action caused the said Foland to execute the said chattel mortgage on the 3d day of September, 1890, for said sum of $3,067.57, and said defendant charges the fact to be that said mortgage was made with intent on the part of plaintiff and said Foland to hinder, delay, and defraud said creditors of said Chester H. Foland of their lawful rights, debts, and demands, and this defendant alleges the fact to be that said mortgage and execution thereof was not accompanied by an immediate delivery and was not followed by an actual and continued change of possession of the said property mortgaged; that on the said 4th day of September, 1890, judgments were obtained by the American Hand Sewed Shoe Company, the said D. M. Steele & Co., and R. L. McDonald & Co., for the respective amounts due and owing them from the said Chester H. Foland by confession in said suits. Executions were duly issued, and this defendant, as sheriff of Furnas county, executed said executions by taking said property described in the petition herein; and this defendant now holds the said property by virtue of said executions, which are duly, legally, and rightfully executed, and which are the same acts and doings complained of in the plaintiff's petition, and none other or different; that said executions were issued because of the said fraudulent transfer of said prop-

erty to said plaintiff." The banking company filed a reply to the answer, in which it admits the recovery of the judgments pleaded in the answer and denies each and every other allegation therein contained. There were two trials in the district court before the judge thereof and a jury, the second one of which resulted in a verdict and, after motion for a new trial regularly submitted was overruled, a judgment in favor of the banking company, to reverse which the plaintiff in error prosecuted his petition in error to this court.

There are several assignments of error which complain of the action of the court in sustaining objections to certain interrogatories propounded to witnesses during the progress of the trial, but as these are ignored in the brief filed for plaintiff in error, they will be deemed waived and will not be further noticed.

The sixth assignment of error is as follows: "The court erred in giving paragraphs 4, 6, 7, 9, 10, 11, 12, 13, and 14 of instructions to the jury given by the court on its own motion." We have examined the instructions enumerated in the above paragraph of the petition in error, and several, if not all, of them are fully pertinent to the issues in the case and correctly directed and informed the jury; and having determined this, the assignment quoted will not be further considered, agreeably to the rule announced in *Hiatt v. Kinkaid*, 40 Neb., 178, viz.: "An assignment of error as to the giving *en masse* of certain instructions will be considered no further than to ascertain that any one of such instructions was properly given." (See, also, *McDonald v. Bowman*, 40 Neb., 269; *Jenkins v. Mitchell*, 40 Neb., 664.)

Assignment No. 7 reads as follows: "The court erred in refusing to give paragraphs 2, 2½, 3, 4, 5, 6, and 7 of instructions asked for by the plaintiff in error." There are several of the instructions of those grouped in this assignment, the design of each of which was to challenge the

attention of the jury to points in the case which had already been fully and fairly covered by the instructions given by the court on its own motion, and there was no error in refusing these requested by plaintiff in error, and one, if not more of them, was not warranted by the evidence, and we must, as to this assignment, follow the doctrine of *Hiatt v. Kinkaid, supra,* holding that "an assignment in a petition in error, that the trial court erred in refusing to give a group of instructions asked, will be considered no further, when it is found that the refusal of any one of such instructions was proper."

In the ninth assignment of error it is stated as follows: "There was irregularity in the proceedings in this, that after the evidence was in, and before argument of counsel, the judge, J. E. Cochran, stated in the presence of the jury that he had prepared his instructions and had them type-written prior to the present session of court; that he had made up his mind on the question of the right of shifting security from the homestead of Chester H. Foland to the goods in controversy; that there was no question but that the said Foland had said right, and that he ought to have instructed the jury to that effect on the other trial; that the charge of the court was given upon its own motion, is partly type-written and partly in the handwriting of J. T. Lindsay, one of the attorneys for plaintiff in this action, and that that part of the instructions which is in the handwriting of J. T. Lindsay, attorney for plaintiff, was handed by said Lindsay to said court in the presence of the jury, attached to said type-written instructions as that of the court. All of which conduct of the court in the presence of the jury was irregular and prejudicial to the rights of plaintiff in error herein. Said facts appearing from the affidavits marked 'Exhibit A' and 'B' attached to the motion for a new trial, which will be found in the transcript herein." There is no instruction referred to by number in the above assignment of error, or specifically or definitely

pointed out as being the one which was partly type-written and partly in the handwriting of the attorney for defendant in error, nor was any instruction excepted to for this reason. The only manner in which the matters alluded to in this assignment of error appear in the record are by some affidavits attached to the motion for new trial, and which are not further authenticated and are not incorporated in and made a part of the bill of exceptions, and, following the rule established by this court, will not be considered. (See *Strunk v. State*, 31 Neb., 119; *Burke v. Pepper*, 29 Neb., 320; *Vallindingham v. Scott*, 30 Neb., 187.)

Another assignment of error which is insisted upon in the argument is that the verdict was not sustained by sufficient evidence. The testimony discloses that about one year prior to the date of the execution and delivery of the mortgage, which is attacked as fraudulent in this action, to the defendant in error, one Foland purchased of a Mr. Williams a stock of general merchandise and in payment therefor gave him notes secured by mortgage upon some real estate to secure the payment of such notes. The land mortgaged to Williams was, it appears, the homestead of Foland and was mortgaged in the sum of $2,000, which as a lien was prior to the lien of the mortgage given to Williams. That when the first of the notes evidencing the consideration for the sale of the stock of goods from Williams to Foland became due, Foland failed to pay it, and in a conversation then had (this being some six months subsequent to the time of the sale of the goods) Foland agreed to give Williams a chattel mortgage on the stock, Williams claiming that the land was insufficient security and not worth at forced sale to exceed the amount of the prior lien of $2,000, Foland expressing himself as perfectly willing and ready to do this if Williams would release the mortgage which he then held on the land, as such action would clear his homestead of the lien of the second mortgage; that Foland was indebted to the bank, defend-

ant in error, and on the 3d day of September, some six months after the conversation with Williams in which he agreed to execute the chattel mortgage to Williams, he went into the place of business of the banking company and there made a statement to the party in charge of its affairs that he desired to borrow some money to meet some immediate demands which were then being pressed for payment, and during the interview he stated, in substance, that if he could not borrow the money he must "go under" or "break up;" that the party there acting for the bank then asked Foland to give the bank a mortgage on his stock of goods as security for the sum he was owing it, $1,130.20; that Williams at this time came into the banking room and was called into the conversation and transaction and at once insisted that he was entitled to a first mortgage on the goods and reminded Foland of his promise he had made to give him the mortgage on the stock. The bank then tried to sell its claim to Williams, but not succeeding in this, bought his claim, which amounted to $1,937.37, and for the aggregate sum of both claims, $3,067.57, Foland executed and delivered to the bank the mortgage in evidence in this case, and by virtue of which the banking company claims the stock of goods, and the bank immediately took possession of the stock, closed the store, completed an invoice of the stock, and afterwards sold it, a portion at auction and a part of it at private sale; that during the time the goods were being sold by the bank Foland was employed as clerk and assisted in selling off the goods. It is shown that the amount of the inventory of the stock of goods was, one witness states, about $3,000, Foland testifies between $3,800 and $3,900, but that it did not sell for sufficient to pay the amount of the mortgage, which relieves the transaction of the contention of the plaintiff in error, that it was a fraudulent one, because the value of the stock was in excess of the amount of the indebtedness secured by the mortgage. The testimony further discloses that when Will-

iams sold his claim to the bank they paid him by issuing to him a certificate of deposit, due on demand to his order, for the whole amount of the claim; that of this he has since been paid about $600, the balance remaining unpaid. The above summary is a statement of the salient points in the testimony, and with the exceptions possibly of a few minor details, not materially affecting the issues or controlling in their influence in the conclusion to be arrived at from a consideration of the testimony. The transactions between the parties seem to have been, judging from the evidence, fairly, openly, and honestly conducted. The debts secured were *bona fide* debts, and the mortgage is shown to have been executed in good faith. The debtor merely exercised the right which the law accords him, of preferring creditors and paying or securing them. (See *Jones v. Loree*, 37 Neb., 816; *Lininger v. Raymond*, 12 Neb., 19.) The question of fraudulent intent was one of fact and to be submitted to the jury for their determination. (*Connelly v. Edgerton*, 22 Neb., 82; *Davis v. Scott*, 22 Neb., 154; *Riley v. Melquist*, 23 Neb., 474; *Fitzgerald v. Meyer*, 25 Neb., 77; *Feder v. Solomon*, 26 Neb., 266.) We think that the issues of fact in the case were fully and fairly submitted to the jury for their consideration and determination; that their verdict was warranted and sustained by the evidence, and clearly not against and contrary to the weight of it, and will not be disturbed or set aside. The judgment of the district court is

AFFIRMED.

HANOVER FIRE INSURANCE COMPANY V. A. J. GUSTIN.

FILED JUNE 5, 1894. No. 5185.

1. **Fire Insurance:** PROVISION OF POLICY FOR WATCHMAN: CONSTRUCTION. The statement in an application for the issuance of a policy of insurance on a planing mill, that "a watchman is kept on the premises during the night and at all other times when the works are not in operation or the workmen present," should receive a reasonable construction, and therefore the mere temporary absence of such watchman within the time contemplated did not necessarily relieve the insurer from liability for loss caused by a fire which originated during such absence.

2. ———: PROOF OF LOSS: QUESTION FOR JURY. Where the insured was orally examined as to the loss by an agent of the insurer, whose duty it was to look after and adjust its losses, and such examination was by such agent reduced to writing and by the assured subscribed and sworn to in the belief that such statement was a satisfactory compliance with the requirement of proof of loss, the question whether or not the acts or language of such agent induced such belief and excused the making of other proof with technical precision was properly left to the jury for determination.

3. ———: ATTORNEY'S FEE. The provisions of chapter 48 of the Session Laws of 1889 empower the courts of this state, upon rendering judgment against an insurance company on any policy of insurance on real property, to allow plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs of the case in which judgment is rendered.

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

The facts are stated by the commissioner.

Thomas D. Crane and *Bartlett, Crane & Baldrige*, for plaintiff in error:

The failure of the assured to comply with the requirement concerning a watchman avoids the policy. (*First*

Nat. Bank of Ballston v. Insurance Company of North America, 50 N. Y., 45; *Ripley v. Ætna Ins. Co.*, 30 N. Y., 136; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn., 19; *New York Belting & Packing Co. v. Washington Fire Ins. Co.*, 10 Bos. [N. Y.], 428; *Gloucester Mfg. Co. v. Howard Fire Ins. Co.*, 5 Gray [Mass.], 497; *Crocker v. People's Mutual Fire Ins. Co.*, 8 Cush. [Mass.], 79; *Lee v. Howard Fire Ins. Co.*, 3 Gray [Mass.], 583; *Glen v. Lewis*, 8 Exch. [Eng.], 607; *Aurora Fire Ins. Co. v. Eddy*, 49 Ill., 106; *Percival v. Maine Ins. Co.*, 33 Me., 242; *Hovey v. American Mutual Ins. Co.*, 2 Duer [N. Y.], 554; *Whitlaw v. Phœnix Ins. Co.*, 28 U. C. C. P., 53; *Blumer v. Phœnix Ins. Co.*, 45 Wis., 622; *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn., 235; *Houghton v. Manufacturers Mutual Fire Ins. Co.*, 8 Met. [Mass.], 114; Ostrander, Fire Insurance, sec. 138.)

Calkins & Pratt, contra, contending that the warranty in reference to the watchman should not be so construed as to extend to the future, cited: *Gilliat v. Pawtucket Mutual Fire Ins. Co.*, 8 R. I., 282; *O'Neill v. Buffalo Fire Ins. Co.*, 3 N. Y., 122; *Frisbie v. Fayette Mutual Ins. Co.*, 27 Pa. St., 325; *Schmidt v. Peoria Marine & Fire Ins. Co.*, 41 Ill., 295; *Stout v. City Fire Ins. Co. of New Haven*, 12 Ia., 371.

RYAN, C.

With the final submission of this case there was submitted a motion of the defendant in error to strike out of the supplemental transcript the affidavits of Thomas B. Crane and H. M. St. Clair, for the reason that they are no part of the record. This motion must be sustained, for the affidavits appear to have been attached to a motion to vacate an order allowing attorney fees to Messrs. Calkins & Pratt. Whether they were used on the hearing of this motion is left entirely to conjecture, for neither their purpose nor

their use was ever shown by the bill of exceptions. They were, therefore, improperly made a part of the record.

The defendant in error sued the plaintiff in error in the district court of Buffalo county on a policy of insurance on planing mill property in Kearney. There were $200 on engine, boiler, and tools, and $800 on planing mill and machinery. There were six policies of $1,000 each on the planing mill property, exclusive of that upon which this suit was brought. It is apparently conceded that these other policies were settled satisfactorily. These settlements were more advantageous to the insurance companies concerned than the rate fixed by the jury as that upon which plaintiff in error must settle. This fact is referred to in argument, but it can have no bearing in favor of the plaintiff in error, for settlements are often, perhaps usually, made in consideration of concessions. The evidence justified a verdict in the sum of $775, and as the plaintiff elected that the sum for which it was liable should be fixed in that way, it must accept this estimate as final.

It would subserve no useful purpose to consider in detail the several errors alleged as to the introduction of testimony, neither as respects its admission or rejection. In each ruling the action of the court was correct; indeed, no argument is made in the brief of plaintiff in error calling in question the correctness of any of these rulings. The instructions given were as follows:

"1. The burden of the proof is upon the plaintiff; before he can recover he must establish his case by a preponderance of the evidence.

"2. If you find for the plaintiff, you should allow him only the actual damages sustained, if any, and no more. You can allow nothing by way of punishing the insurance company for failing to pay the loss sustained, if there was a loss.

"3. If you find that the plaintiff sustained a loss by fire, and that the defendant is liable to pay a part of the

same by reason of the insurance policy which was issued, you will be careful to assess against the defendant company its *pro rata* share of the actual loss sustained, not exceeding the limit of liability mentioned in the policy.

"4. If you find from the evidence that the defendant's agent, shortly after the fire, made out and requested the plaintiff to sign a paper which he called a proof of loss, or which he induced the plaintiff to believe was a proof of loss, it will be considered that the defendant had knowledge of the loss, and no other or greater proof will be required, although the paper was not such a proof of loss as the policy contemplated."

The plaintiff in error asked no instructions, but contents itself with criticising in argument those given in the following very general language:

"5. The instructions given by the court on its own motion not only do not fairly present the issues, but are in effect strongly argumentative in favor of Gustin and assumptive of his right to recover.

"6. The instructions given by the court numbered 2, 3, and 4 are, whether read severally or together, very prejudicial to the company."

These propositions present no question with sufficient tangibility to require consideration.

The trial was begun with no defense pleaded of special importance in view of the evidence afterwards adduced, except the failure to make proof of loss as provided by the terms of the policy sued on. This defense was presented by the answer in the following language:

"3. This defendant, further answering said petition, states and alleges that in and by said policy of insurance it was specially provided that in case of loss or damage under said policy the assured should give immediate notice thereof to the general agent of said company in the city of New York, and as soon thereafter as possible furnish proof of loss, containing a particular account of said loss or dam-

age, signed and sworn to by said assured and by the assured only (except in case of death, and then by the legal representatives), stating when and how the fire originated, the exact nature and title of the assured and of all others in the property, the cash value of each item thereof, and the amount of loss thereon, and setting forth a copy of the written part of the policy. And the defendant further alleges that after said alleged loss no notice was given by said assured to the general agent of said defendant as required by the terms of said policy, and that no proofs of loss containing a particular account of said loss or damage was furnished as provided by the terms of said policy, and no proofs of any kind or nature of said alleged loss, if any loss there was, was furnished to said company defendant as required by the terms of said policy."

There was no immediate notice given to the plaintiff in error in the formal manner required by the provisions of the aforesaid policy. The loss was on February 17, 1890. C. E. Babcock was examined as a witness in behalf of the insurance company, and testified that he was its special agent for the state of Nebraska; that his agent advised him of the loss by fire of the planing mill; that he went to Kearney and saw Mr. Gustin on February 20, 1890; that witness said to Mr. Gustin that the policy said that witness was to examine Mr. Gustin about the fire, its origin, how he came by the property, where Mr. Gustin was during the fire, and other matters connected with the running of the mill; that Mr. Gustin told witness step by step,—in fact, told witness all about it; that witness wrote it out as it was told witness and read it over to Mr. Gustin carefully, and that Mr. Gustin signed it and swore to it before a notary public by the name of Brown. Mr. Gustin's evidence was that Mr. Babcock called this paper a proof of loss. This Mr. Babcock denied. Frank Brown, the notary public before whom the statement was sworn to, testified that Mr. Gustin asked him to swear him to the

paper designating it as a proof of loss, and that this was done in the presence of Mr. Babcock. The evidence of Norris Brown, brother and business partner of Frank Brown, was to the same effect. So also was that of Mr. Gustin. This was denied by Mr. Babcock. This affidavit of A. J. Gustin was, in substance, that he purchased the property of Thomas A. King on September 20, 1889, the consideration being $5,500 and a farm in Holt county of 160 acres; that he paid the unearned premium on $6,000 on the mill building, boiler, engine, tools, and mill machinery pending on the mill, which premium amounted to $245. There were further details concerning the conditions and consideration upon which he acquired the property. Relative to the fire he said that it occurred on February 17, 1890, about 6 o'clock P. M.; that he had left the premises a short time before the fire with his watchman, E. J. Thorpe, who went after a lock for an outside building and who said he was going to supper before he returned; that the duties of the watchman were to watch and care for the safety of the premises and do a general cleaning up and sweeping; that his time was from 5:30 P. M., to 7:30 A. M. next morning. Mr. Gustin in his affidavit further said that when he and the watchman left the premises there was no fire about them, except under the boilers and in the stove in the office; that the fire was supposed to have originated in the carpenter shop adjoining and communicating with the mill, said shop being used at the time as a store-room for moulding, sash, doors, and blinds; or, he said, the fire might have originated on the outside and south side of the mill, as one of the men had hauled manure and piled it around the bottom of the building to keep out the cold, and a cigar or something of that kind might have been the cause of the fire; that there was about $1,500 worth of stock in the mill at the time of the fire, consisting of all the various forms that lumber enter into in such an establishment for the trade, nails, and

screws; that other parties had stock in the mill as follows: Gilcrist & Co., somewhere from 3,000 to 5,000 feet yellow pine lumber; that the mill on the date of the fire was operated from 9 o'clock A. M. to 6 o'clock P. M.; that no one was interested with the affiant in the ownership of the mill property except his brother-in-law, Mr. Gilcrist, and he was only entitled to one-half of the profits for six months from the time Mr. Gustin took the mill; that his pay-roll amounted to from $75 to $200 per week, owing to volume of business; that he could not say that the operation of the mill was profitable, on account, as he supposed, of the winter season coming on. Technically this may not have fulfilled all formal requirements of the policy as to proof of loss, and yet it so nearly does so that Mr. Gustin might readily be credited when he stated that such he supposed the affidavit amounted to and was intended for. It appears from the testimony of Mr. Babcock himself that Mr. Gustin willingly submitted to the oral examination, and if there was any fact which Mr. Babcock desired explained there seems to have been no room for question that Mr. Gustin would have complied with a request for explanation. It is clear from the evidence that Mr. Babcock's special business at Kearney was to ascertain whether or not the claim of Mr. Gustin should be paid, and that if he had so decided, there would have been no occasion for this litigation. Under such circumstances it is not to be wondered at that Mr. Gustin supposed that he had fully complied with all requirements as to proof of loss, and if this conclusion was superinduced by the language or conduct of Mr. Babcock, the proof made by the affidavit of Mr. Gustin should be held good as against the company for which Mr. Babcock was the agent and representative.

During the progress of the trial the following amendment was, by leave of court, made to the answer of the insurance company: "And the defendant further alleges that the fire alleged to have occurred in the petition of the

plaintiff occurred through the fault and negligence of the plaintiff as follows: That said policy of insurance and the application of the insured, which was made a part of said policy sued upon, and the warranty upon the part of the assured, expressly provided that a watchman was to be kept on the premises insured during the night and at all other times when the works are not in operation or when the workmen are not present. And the defendant alleges that at the time said fire occurred the watchman, provided as aforesaid to be kept on said premises during the night and at all other times when the works were not in operation, was by the plaintiff requested and allowed to be away and absent from said premises after said works had ceased operations for the day; and the defendant alleges that at the time said fire occurred said watchman was away from said premises by the act, procurement, and assent of the plaintiff, and that it was during said absence of said watchman that said fire originated and started which caused the damages to said property by fire, and for which this suit is brought."

The questions and answers which it is pleaded amounted to an express warranty that a watchman was to be kept on the premises, etc., were in the following language:

21. Watchman.—Is one kept on the premises during the night and at all other times when the works are not in operation, or when the workmen are not present?

A. Yes.

Q. Is any other duty required of the watchman than watching for the safety of the premies?

A. Yes, cleaning the floors and premises.

The evidence shows that the fire occurred about half past seven o'clock, and that the watchman, with Mr. Gustin, left the premises about 6:15 o'clock. Before their departure, however, the watchman had inspected the different parts of the mill and found everything apparently safe from fire. He locked up the building and went to the business part

of the city of Kearney to buy a padlock with which to secure a door of an outside building. While he was gone he went to the depot of the Burlington & Missouri River Railroad Company and purchased a ticket for a lady friend of his, and in the interval between his leaving the planing mill and returning thereto he ate his supper. While on his way to the planing mill to resume his duties of watchman the alarm of fire was sounded. It is insisted that the absence of the watchman for the purposes named, with the assent of Mr. Gustin, necessarily avoided the policy. To this doctrine we cannot assent. Even giving the statements of the application, "that a watchman is kept on the premises during the night and at all other times when the works are not in operation," the effect of a warranty,—a claim not necessary now to be settled,—the language should receive a reasonable construction. We are aware thas on this proposition there is not accord of authorities; possibly in number they are adverse to this view, yet it is believed that the language of Judge Shaw in *Crocker v. People's Mutual Fire Ins. Co.*, 8 Cush. [Mass.], 79, is reasonable and just. He said: "The stipulation, 'a watchman kept on the premises,' inserted as it is in the body of the policy immediately after the description of the property insured, is in the nature of a warranty, and must be substantially complied with by the assured, but the terms are not explicit as to the time and manner of keeping a watch. It does not stipulate for a constant watch. It therefore requires construction as matter of law to determine what is meant in this policy by keeping a watch. It relates to a factory, to its safety against fire, and this depends upon the habit or practice in this respect, and upon the fact whether that usage has been followed. When there is an express stipulation that a thing shall be done, but the contract is silent as to the time and manner, the law holds that it must be reasonable in this respect, having regard to the object and purpose of the stipulation, in this case to the safety of

the building. If it is done in the manner in which men of ordinary care and skill in similar departments manage their own affairs of like kind, this is one strong ground to hold it reasonable and to warrant the admission of evidence of usage."

The same principle requiring a reasonable construction of the language used is recognized and enforced in *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn., 235; *Frisbie v. Fayette Mutual Ins. Co.*, 27 Pa. St., 325; *Houghton v. Manufacturers Mutual Fire Ins. Co.*, 8 Met. [Mass.], 114; *Percival v. Maine Ins. Co.*, 33 Me., 242; *Stout v. City Fire Ins. Co. of New Haven*, 12 Ia., 371. These views have quite directly received the sanction of this court in *Springfield Fire & Marine Ins. Co. v. McLimans*, 28 Neb., 846. The first paragraph of the syllabus in that case is as follows: "A mere temporary absence of the occupant of a building therefrom will not render void a policy of insurance which contains a provision that the policy shall become void in case the building becomes vacant." Discussing this proposition, MAXWELL, J., for this court said: "The first instruction above set forth submitted to the jury the question whether or not the premises were vacant within the meaning of the terms of the policy when the fire occurred. It certainly was very favorable to the company. A party by effecting insurance upon his dwelling does not thereby impliedly agree that he will remain on guard to watch for the possible outbreak of a fire. He insures his property as a precaution against possible loss. If he is indebted, his duty to his creditors requires this; and if he is not in debt, his duty to his family requires him to procure the insurance. He is not to become a prisoner on the property, however, nor to be charged with laches when, in the pursuit of his business, health, or pleasure, he temporarily leaves the property which still remains his home. The necessity of most persons for temporary absence on business or family convenience is known to every one, and must have been in the

contemplation of the insurer when the policy was issued. A policy of insurance is to be so construed, if possible, as to carry into effect the purpose for which the premium was paid and it was issued. If it does not in fact insure the property covered by it and since destroyed by fire, then the savings of a lifetime may be lost because from a technical defect which did not affect the risk, the company is enabled to evade its duty. Forfeitures are odious in law and should never be enforced unless the court is compelled to do so. (*Dickensen v. State*, 20 Neb., 81; *Estabrook v. Hughes*, 8 Neb., 496; *Hibbeler v. Gutheart*, 12 Neb., 531.) The business of an insurance company is to indemnify those of its patrons who have paid the amount demanded for the risk and sustained loss. Where the loss has not happened through the fault of the insured, why should the insurer be permitted to retain the premium and refuse to perform its contract, or upon what principle of justice are courts required to search for technical objections to relieve it from liability and thereby defraud its patrons? A substantial compliance with the contract is all that is required. A mere temporary absence, which at most is all that is shown in this case, would not affect the risk. (*Stupetski v. Transatlantic Fire Ins. Co.*, 43 Mich., 373, s. c., 5 N. W. Rep., 401; *Cummings v. Agricultural Ins. Co.*, 67 N. Y., 260; *Herrman v. Merchants Ins. Co.*, 81 N. Y., 184; *Phœnix Ins. Co. v. Tucker*, 92 Ill., 64; *Dennison v. Phœnix Ins. Co.*, 52 Ia., 451, s. c., 3 N. W. Rep., 500.)" The proofs in this case justified the application of the principles just quoted. The mere temporary absence of the watchman, accordingly, is held insufficient *per se* to relieve the insurance company of liability.

There remains but one other question, and that is as to the taxation in favor of the defendant in error of an attorney's fee of $200. This fee was taxed under the authority of chapter 48 of the Session Laws of 1889, of which section 1 provided that in case of total loss of the

insured property the amount of the insurance written in the policy shall be taken to be its true value, and that the measure of damage sustained by the party whose property was insured should be fixed accordingly. Section 2 made applicable the provisions of said act to all policies written or renewed before the date when said act went into effect, and provided that the contracts made by such policies and renewals should be considered to be contracts made under the laws of the state of Nebraska. Section 3 is as follows: "The court, upon rendering judgment against any insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as attorney fees, to be taxed as a part of the costs." It is argued that the words "upon any such policy," etc., are restrictive, and that the power to tax costs does not extend further than in cases where a total loss has been suffered. The first section of the act prescribes what the amount of the damage shall be deemed to be in cases where the loss is total, and its provisions are applicable to any policy of insurance afterward written to insure any real property in this state. This prospectively applied to all policies which should be written after the act became operative. Section 2 made the provisions of section 1 applicable to policies of insurance made or renewed prior to the time of said act taking effect. By these two sections all policies in this state upon real property were covered in the first section such as should be made after the act took effect; in the second section, such as should have been previously made or renewed; and the language of section 3 must, therefore, be held to include all policies made in Nebraska with reference to real property. It is contended, however, that the fee was improperly allowed in this case on account of certain facts probably presented by affidavits in the trial court. As the affidavits upon which presumably the motion to vacate this allowance of fees was presented have been stricken from the record in this court, we are without means of deter-

mining as a question of fact what force this showing should have received. Under such circumstances the taxation made in the trial court must be assumed to have been correct. At least, we cannot, as asked by plaintiff in error, presume the contrary. The judgment of the district court is

AFFIRMED.

DELOS F. SLAYTON V. FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY.

FILED JUNE 5, 1894. No. 5444.

1. **Negligence:** EXPLOSIVES: PERSONAL INJURIES: EVIDENCE. Where the evidence showed without question that torpedoes necessary to the operation of its railroad were deposited and kept in defendant's untenanted section house, all the doors and windows of which were securely fastened shut, and that access to and the removal of these torpedoes were effected by children, who unfastened and opened one of the windows for those, among other improper purposes, *held*, that defendant is not liable for an injury caused by the subsequent explosion of one of said torpedoes procured and removed as aforesaid.

2. **Trial:** DIRECTING VERDICT. The trial judge should without hesitation direct a verdict for the defendant when there is no evidence to support plaintiff's alleged cause of action.

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

C. H. Bane, for plaintiff in error.

John B. Hawley, *B. T. White*, *L. K. Alder*, and *W. J. Courtright*, *contra*.

RYAN, C.

This action was brought by plaintiff in error for injuries sustained by Delos F. Slayton. After all the evidence had

been introduced the court gave the jury the following instruction: "You are instructed that the evidence adduced in this case will not sustain a verdict for the plaintiff, and you are instructed to find and return a verdict for the defendant." The cause is brought to this court to determine whether the evidence justified the instruction given. The facts proved, and for the most part stated in the identical language in which the evidence is found summarized in the brief of plaintiff in error, were as follows:

The defendant occupied and owned a section house within the corporate limits of the village of Ainsworth. This section house was kept, used, and occupied by the defendant's section foreman for the purposes of lodging and boarding section hands in the employ of defendant. It was located on defendant's right of way and about forty feet from the railroad track. The section house was occupied by defendant's foreman until some time in the latter part of March, 1890, at which time the foreman obtained from the defendant leave of absence for thirty days, and, having left his goods stored in the said house, he went with his wife and children on a visit to Blair, in this state, and while so absent he engaged work at Blair, and on the 18th of April, 1890, returning to Ainsworth without his family, he packed his goods in the section house, put them on board of the cars, and shipped them to Blair, leaving the section house locked and its windows fastened, neither of them at the time being broken. The family of the section foreman, at the time he occupied the house in question, consisted of himself, his wife, and one or two small children. When he left the section house and removed his household goods therefrom there was left in a closet an open tin box containing about twenty-five or thirty torpedoes, one of which caused the injury to plaintiff in error. On the 26th of April, 1890, the section house still being vacant, Ollie Luffborough, aged twelve years, Janie Slayton, aged ten years, and Earnest Luffborough, aged seven

years, residing in close proximity to the section house, looking in at the window thereof, saw a hatchet, lantern, and an old boiler in the house. The youngest of these children inserted his fingers through an opening in the glass, drew the bolt that fastened the lower sash, while the other children raised the window, and they all entered the section house. Immediately thereafter they discovered the torpedoes in the open tin box, as they say, in a support for a chimney used as a cupboard, and not knowing what they were, began to play with them and pitched several of them into the cellar. Janie Slayton took some of the torpedoes home to play with. The other children took the old hatchet and the old lantern which they found in the house. The children carried these torpedoes some three hundred yards distant to where plaintiff in error then resided with his parents. The plaintiff in error had been fishing and returned shortly after the children had carried these torpedoes home. The mother of the children tried to open one of the torpedoes with a case knife. As soon as plaintiff in error came home his sister told him what they had found, and remarked to him that they could not open them. Plaintiff in error, a boy of twelve years of age, then placed a torpedo on the surface of the ground and struck it with a hammer, when it suddenly exploded, striking him on the cheek and eye, causing permanent injury. The torpedoes in question were used by defendant's servants to warn its employes of any danger on their line of road-bed. It appears from the testimony of the section foreman that these torpedoes had been kept in the tool house near the section house until about six months before the section house was vacated, when the section foreman removed them into the section house.

The effect of an instruction, given as this was, is discussed in section 2267 of Thompson on Trials: "The demurrer to evidence used in the ancient common law practice seems to have passed, for the most part, out of use in American

jurisdictions. In the place of it the defendant moves for a nonsuit, or requests the court to give a peremptory instruction to the jury to return a verdict for the defendant. In either case the effect is substantially the same as a demurrer to the evidence under the ancient practice. An order of nonsuit, or a peremptory instruction given in compliance with such a motion, does not undertake to decide any question of fact, but simply pronounces the law arising upon the evidence, admitting the same to be true. In this way the court pronounces upon the legal effect of the facts which the evidence may in the opinion of the jury prove. If there is no evidence tending to support the allegations of the plaintiff's declaration, petition, or complaint, it is, under all theories of procedure, the duty of the court to instruct the jury that he cannot recover."

The proofs in this case in no way tended to establish negligence on the part of the railroad company. The section house was on its right of way and subject to its control. It was occupied by one of its employes and his family as their home. It was not used for the operation of the railroad of defendant. The torpedoes were by the section foreman brought to his home and there deposited. Whatever of danger might reasonably be anticipated from this act must result to his own children or wife, and it could not be anticipated as likely to happen to others burglariously entering his home. When the section foreman left this house he locked the doors and left the windows securely fastened. It is insisted, however, that there was a hole in the window which admitted of the insertion of the hand of Earnest, whereby he was enabled to undo the inside fastenings of the lower sash, and that the existence of this opening was evidence of negligence. While the window was unfastened by a boy of seven years of age, the sash was raised and entry first made by girls of the age of ten and twelve respectively. There were taken by one of these girls a hammer and lantern and several tor-

pedoes. The removal of these articles was undoubtedly because of their supposed value or use and was the act of children who should have known better than to do as they did. The childish instinct of Earnest, the youngest of the number, cannot be extended so as to qualify the acts of his associates. If the hole in the window had been too small to admit of the insertion of the hand of Earnest, it would have been very easy for his associates to have made it larger; or if there was no hole, it was within the power of these children to make one, and in either of such cases the quality of the act differed in no respects from the means actually employed to secure possession of the personal property which was within the house. The entrances to the house, having reference to its purpose and construction, were securely closed. There could be no reasonable requirement that such a house should be provided with iron shutters so securely fastened as to preclude the possibility of entry by idle children. If this requirement is reasonable in this case, it would be in case of other residences, for, as we understand the law, the existence of negligence in such cases does not depend upon the fact that the house happens to be owned by a railroad corporation. The purpose of fastening doors and windows is to prevent ingress by strangers, it is true, yet we have never before heard it urged that a proprietor should be held liable in damages to an intruder merely because his house was not rendered absolutely impossible of entrance. The instruction was properly given requiring a verdict for the defendant. It could have subserved no useful purpose to either litigant to trust that the jury, upon the submission of the entire case to them, would exercise the same discretion as could reasonably be expected of the trial court. There was no evidence on which the verdict could be sustained, and the trial judge did but his duty in so informing the jury. Often the responsibility of determining questions which should be met by the trial judge is devolved in the last instance upon this court. This is

sometimes scarcely fair to litigants, for it frequently happens that the question to be determined is surrounded with difficulties in this court from which the trial court has comparative freedom. When the trial judge approves the jury's estimate of the weight of the evidence adduced, there arises a presumption in favor of its correctness, because both the judge and the jury have had opportunities of observing the deportment of the witnesses and their apparent candor, which are denied this court. When the trial judge is satisfied there is no evidence to sustain a verdict, it is his duty so to instruct the jury, for in such a case the merits are presented in this court untrammeled by adverse presumptions. The judgment of the district court is

AFFIRMED.

EDWARD A. OLIVER, ADMINISTRATOR, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED JUNE 5, 1894. No. 4011.

Review: ASSIGNMENTS OF ERROR. Inadequacy of the damages found by the jury cannot be considered in this court when not assigned as error in the petition in error upon which a review is sought.

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

A. N. Sullivan, for plaintiff in error.

T. M. Marquett, J. W. Deweese, and *Byron Clark, contra.*

RYAN, C.

The nature of this action and the sole questions involved are in the brief of plaintiff in error stated as follows:

"This action was brought in the district court of Cass county, Nebraska, by plaintiff in error against defendant in error, to recover for damages for wrongfully and negligently causing the death of Richard K. Letford. A trial in the district court resulted in a verdict in favor of the plaintiff for the sum of $300. Plaintiff filed a motion for a new trial, which was overruled, and a judgment entered on the verdict, to reverse which, the case is brought to this court.

"But two questions will be presented for consideration, viz., the inadequacy of the damages recovered, and error of striking from the files certain affidavits made by members of the jury as to the cause that produced this very small verdict."

The affidavits were properly stricken from the records, for they tended only to show that the verdict was agreed upon to avoid further detention in the jury room. If this manner of impeaching verdicts was permitted there could scarcely be conclusively tried to a jury a single case closely contested, supplemented by industrious affidavit-seeking. We cannot, upon affidavits or any other form of evidence, consider whether or not the verdict was for too small an amount, because in the petition in error such an assignment does not appear. The judgment of the district court is

AFFIRMED.

STARRETT BROTHERS V. PAUL C. DEERFIELD.

FILED JUNE 5, 1894. No. 5613.

Replevin: EXEMPT PROPERTY. The provisions of the statute exempting personal property from judicial process upon the filing of a prescribed inventory and affidavit are for the benefit of the family of the debtor; and for the possession of such property,

when the necessary requirements to entitle to exemption have been complied with, the head of the family may maintain replevin, irrespective of the ownership thereof being that of the husband or wife.

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

J. S. Bishop, for plaintiff in error, cited: *Mann v. Welton*, 21 Neb., 541; *People v. McClay*, 2 Neb., 8; *State v. Cunningham*, 6 Neb., 92; Maxwell, Pleading & Practice, p. 488; *Broadwater v. Jacoby*, 19 Neb., 77; *First Nat. Bank of Omaha v. Bartlett*, 8 Neb., 319; *Omaha Horse R. Co. v. Doolittle*, 7 Neb., 481; *Pope v. Hooper*, 6 Neb., 178; *Shortel v. Young*, 23 Neb., 408.

D. G. Courtnay, contra, cited: *Hamilton v. Fleming*, 26 Neb., 240.

RYAN, C.

The petition of the defendant in error on which this case, appealed from a justice of the peace, was tried in the district court of Lancaster county, omitting the formal parts, was in the following language: "Comes now the plaintiff and complains of the defendants for that he is the owner of a certain stock of goods of not more than the value of the sum of $100; that on the 21st day of September, 1891, the defendants took possession of said property. Plaintiff says that he is the head of a family, and that he has no town lots, houses, or lands, or other property than that set out in his affidavit of exemption, which was duly filed and served on the officers taking said property; and plaintiff says that he is the owner and entitled to the possession of the property set out in the inventory in the records here filed, and is attached and made a part of the petition; that the defendants wrongfully and unlawfully withhold the same from him, and would so continue to do were it not for

the bond filed in this court. Wherefore plaintiff asks judgment for the return of the goods and the costs of this action." The answer was a general denial. On these issues there was a trial to the court, resulting in a judgment for the defendant in error. There were findings of fact made by the trial court, each of which was sustained by the evidence, and they are, therefore, reproduced as correct statements of the ultimate facts involved in this controversy. Upon the facts found the trial court based conclusions of law which justified the judgment rendered. These findings of fact and conclusions of law were in the following language:

"First—That at the commencement of this action the plaintiff was the head of a family, and had neither lands, town lots, nor houses subject to exemption as a homestead.

"Second—That the property replevied in this action in the lower court has been taken by the officers under attachment proceedings against the plaintiff's wife.

"Third—That thereupon plaintiff duly filed an inventory thereof, and appraisers were appointed, who appraised the property.

"Fourth—That thereupon in said attachment proceedings, the defendants here being plaintiffs there, were by the court below ordered to deliver to plaintiff his property exempt by law so taken by defendants by attachment.

"Fifth—That defendants claimed, and under the claim retained, possession of the property in controversy; that said property did not belong to plaintiff, but to his wife, whereupon plaintiff replevied said property.

"Sixth—That the evidence fairly shows that said property belonged to plaintiff's wife, and on the 5th day of June, 1891, was of the reasonable value of $71.95.

"As conclusions of law the court finds that it makes no difference whether the property in controversy belonged to the wife of plaintiff or to the plaintiff, being exempt under the law; and that plaintiff, being the head of a family

without a homestead, and having taken the steps provided by law to regain possession thereof, was, at the commencement of this action, entitled to said property and damages of one cent. (*Hamilton v. Fleming*, 26 Neb., 245.)"

To avoid the weight by the trial court accorded to the case of *Hamilton v. Fleming, supra*, as authority, plaintiff insists that by the evidence it was shown that Mrs. Deerfield was the owner of something like $2,000 worth of property, independently of that in controversy. In the bill of exceptions there is no evidence which countenances this claim, unless, perhaps, the testimony that Mrs. Deerfield had loaned to her husband over $2,000 had that tendency. In the same connection, however, in which this evidence was given it was shown that the husband of Mrs. Deerfield had lost the money loaned him, in what way his wife could not state, for she testified that his explanations as to the loss had been very contradictory and unsatisfactory. As there was no showing of either the defendant in error or his wife having any property in respect of which exemption from judicial process could be asserted except such as was the subject-matter of this suit, the trial court properly adjudged that the defendant in error was entitled to maintain his action. Whether the husband or the wife was the owner of the property claimed as exempt was, under the circumstances, immaterial, for the exemptions provided by statute were for the benefit of the family of the debtor, and the head of such family had the right to avail the family of the provisions of the exemption law, irrespective of the technical ownership of the property claimed. The judgment of the district court is

AFFIRMED.

EMMA L. VAN ETTEN ET AL. v. EDWARD E. HOWELL.

FILED JUNE 5, 1894. No. 5148.

Evidence Contradicting Terms of Note. Evidence of a parol agreement entered into by the makers and payee of a promissory note contemporaneously with or previous to its execution, whereby it was attempted to be shown that such note was not to become due according to its plain terms, but that its collectibility depended upon the happening of an event in the future, was incompetent, and the jury was properly instructed to give it no consideration.

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

David Van Etten, for plaintiffs in error.

A. C. Troup, contra.

RYAN, C.

This suit was brought for the collection of a promissory note made by the plaintiffs in error to John W. Howell, for $512.50, due on or before three months after its date, which was March 26, 1889. One defense was that the note in suit grew out of one for $450 made between the same parties, upon which note, however, the answer alleged that there was paid to the makers thereof but $325, wherefore it was insisted all notes subsequent to the first were tainted with usury. Another defense set up by answer was that the payee of the series of notes resulting in and including that sued on had, at or before the making of each note, agreed that payment of it should not be insisted upon until there was decided in this court a case entitled *George A. Hoagland v. Emma L. Van Etten et al.* The defendants also answered that after the giving of the note last mentioned, and before it was delivered to or discounted

by plaintiff, the said plaintiff was made acquainted with all the facts and circumstances and said agreement in full, whereby he was not an innocent purchaser. Defendants further alleged, by way of answer, that before the note sued on became due, the defendants notified plaintiff of their willingness and readiness to renew the note sued upon, but that such right to renew was denied them. There was a reply in denial of the averments of the answer. Upon a verdict for plaintiff finding due the full amount of the note with interest according to its terms judgment was rendered in the sum of $592.62, to reverse which the defendants, as plaintiffs in error, bring the proceedings to this court for review.

The trial court properly ruled that no evidence was admissible when offered, and instructed the jury that none should be considered which tended to vary or contradict the terms of the several notes by showing that contemporaneously with making each an oral agreement was entered into by the makers and payee contradictory of the terms of such note.

As to the defense of usury, the jury were instructed that if the plaintiff purchased the note in suit in good faith for value, and without notice or knowledge of any usury in the transaction in which the note was given, the plaintiff took such note free from any defense of usury which the defendants might set up against the note. That the purchase of the note by plaintiff was made in the manner above indicated as being such as would afford him protection against the defense of usury, there was such satisfactory evidence that if the verdict turned upon that question alone it must have been sustained. The jury were fully and correctly instructed as to the effect of usury, if that defense by proof had been established as against plaintiff. There is no error apparent in the record, and the judgment of the district court is

AFFIRMED.

W. C. TOWNSEND v. HOLT COUNTY.

FILED JUNE 5, 1894. No. 4808.

Counties: BRIDGE CONTRACTS: BIDS. Under the provisions of section 83, chapter 78, Compiled Statutes, an increase of $500 from the contract price for the erection of a bridge cannot be enforced when such increase was contracted for without bids being required or made in respect thereto.

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

R. R. Dickson, for plaintiff in error.

E. W. Adams, contra.

RYAN, C.

The petition in this case filed in the district court alleged that on February 14, 1890, the supervisors of the defendant appointed a committee to advertise, view site, let contract, and accept a certain described bridge to be erected across the Niobrara river; that notice that sealed bids would be received for the construction of the aforesaid bridge was duly published, and that a written contract for the construction of said bridge was duly entered into between defendant, by its proper officers, and plaintiff, who by the terms of said contract was required to construct the aforesaid bridge according to the plans and specifications referred to in said contract. It appears from the petition that the original contract price of $2,880 was paid. The plaintiff alleged in his petition, however, that prior to the execution of the aforesaid contract the committee appointed by the board of supervisors of Holt county consulted with plaintiff as to the advisibility of making the bridge higher and stronger than provided by said written contract, and of changing the plans and specifications accordingly, and the

plaintiff informed said committee that the changes suggested would involve the necessity of an expenditure of $500 in addition to what the bridge would cost if built pursuant to said plans and specifications, and that plaintiff would raise the bridge ten feet higher for said sum of $500; that afterward the chairman of said board of supervisors authorized plaintiff to make such change, as did also on the same day M. D. Long, another supervisor, and that subsequently and before said work was begun John Duncan, a member of the aforesaid committee and of said board of supervisors, also authorized the said departure from the aforesaid plans and specifications, and that afterwards plaintiff was authorized by a majority of the building committee to make the above mentioned changes. Plaintiff further alleged that the changes assented to as above were made by plaintiff, whereby the cost of building the bridge was increased $500 over and above the contract price, which sum the defendant had refused to pay. There was a prayer for judgment to the amount last named. To this petition there was filed a demurrer, for the reason that the petition did not state facts sufficient to constitute a cause of action. This demurrer was sustained, and thereupon the court dismissed plaintiff's action after due exceptions taken.

Section 83, chapter 78, Compiled Statutes, provides that "all contracts for the erection and reparation of bridges and approaches thereto, for the building of culverts and improvements on roads, the cost or expense of which shall exceed one hundred dollars, shall be let by the county commissioners to the lowest competent bidder," etc. The proposed variance from the plans and specification was at a cost of over one hundred dollars, so that, however classified, this should have been let to the lowest competent bidder. The petition shows that this was not done, and the demurrer to it was, therefore, properly sustained. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. EDWARD W. SAYRE, V. EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED JUNE 5, 1894. No. 6470.

1. **Attorneys' Liens:** LEGISLATIVE APPROPRIATIONS. An attorney's lien for services rendered his client cannot be successfully asserted against money appropriated to such client by an act of the legislature while such money is in the custody or under the control of the state treasurer.

2. **Constitutional Law:** LEGISLATIVE APPROPRIATION FOR EXPENSES OF COUNTY: MANDAMUS TO AUDITOR. The legislature, by an act duly passed and approved April 5, 1893, appropriated "the sum of $7,495.73 for the relief of Scott's Bluff county, and to reimburse said county for expenses incurred in the trial of one George S. Arnold upon the charge of murder." In a *mandamus* proceeding in this court to compel the auditor to draw his warrant in favor of the treasurer of Scott's Bluff county for the amount appropriated, *held*, (1) that the act was not in conflict with either the letter or spirit of the constitution; (2) that the appropriation of this money was in the nature of a donation, and that no inquiry or objection is admissible on the part of the auditor as to whether the appropriation was just, whether it was bestowed upon an undeserving recipient, or what motives influenced the legislature to make it; (3) that the only duty left for the auditor in the premises was a ministerial one, and that he had no authority to supervise the action of the legislature by an inquiry into the actual expenditures of the county in the prosecution of Arnold. *State v. Babcock*, 22 Neb., 38, distinguished.

ORIGINAL application for *mandamus*.

M. J. Huffman and *Field & Holmes*, for relator.

George H. Hastings, Attorney General, contra.

No briefs filed.

RAGAN, C.

The legislature of 1893 passed an act (House Roll No. 278) in words and figures as follows:

"An act for the relief of Scott's Bluff county, Nebraska, and to appropriate $7,495.73 to said county.

"*Be it enacted by the Legislature of the State of Nebraska:*

"Section 1. That there is hereby appropriated out of any funds in the state treasury, and not otherwise appropriated, the sum of $7,495.73, for the relief of Scott's Bluff county, and to reimburse said county for expenses incurred in the trial of one George S. Arnold upon the charge of murder, at the adjourned July term, 1889, of the district court within and for said county; and the auditor is hereby authorized to draw his warrant upon the state treasurer for the above amount in favor of said Scott's Bluff county."

On August 5, 1893, the treasurer of Scott's Bluff county duly demanded of the auditor of public accounts that he draw his warrant upon the state treasurer, payable to the treasurer of said Scott's Bluff county, for the amount so appropriated by the legislature. The auditor declined to comply with this request, and thereupon the treasurer of Scott's Bluff county, as relator, filed in this court an application for a peremptory *mandamus* commanding the auditor to draw such warrant. The auditor answered the application and alleges the following as reasons for declining to draw his warrant:

"And this respondent further says that under the provisions of the constitution and laws of the state of Nebraska, the auditor of public accounts has authority to examine and adjust all claims against the state when presented to him, and to refuse to pay the same, when, in his opinion, the same are illegal or unjust. And this repondent alleges that he found said claim for said Scott's Bluff county unjust and illegal; that the act making the appropriation is contrary to the letter and spirit of the constitution of the state of Nebraska; that the said county of Scott's Bluff was put to some expense by reason of said trial, but the amount thereof this respondent alleges, upon information and belief, was a much less sum than the

sum alleged to have been appropriated by the legislature. * * * This respondent further alleges that heretofore, to-wit, on the 20th day of June, 1893, one Nellie M. Richardson * * * served upon this respondent * * * a notice of an attorney's lien upon said sum * * * appropriated by the legislature of the state of Nebraska for the use and benefit of said Scott's Bluff county, which said notice is in words and figures following:

"'NOTICE.

"'*To Eugene Moore, Auditor Public Accounts of the State of Nebraska:* You will take notice that I, Nellie M. Richardson, do claim an attorney's lien upon the funds appropriated by the legislature of the state of Nebraska to reimburse Scott's Bluff county for expenses incurred in the trial of George S. Arnold, in the sum of $1,500.

"'NELLIE M. RICHARDSON.'"

To this answer the relator demurs.

We will first dispose of the question of the attorney's lien attempted to be filed against this appropriation. Section 8, chapter 7, page 90, Compiled Statutes of Nebraska, provides: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party." Now, this money is not in Richardson's hands. It is in the hands of the treasurer of the state of Nebraska, and neither the state nor its treasurer are, or have been, adverse parties to any action or proceeding brought or had by Scott's Bluff county, for whom it appears Richardson is attorney. Richardson then has not brought herself within this statute, and that is one reason, at least, why she can have no lien on this money; but if Richardson has rendered services for Scott's Bluff

county, she can file her claim against the county, with the county clerk thereof, and have the county authorities of that county pass upon its merits. This court cannot audit her claim against Scott's Bluff county. The law has provided ample remedies and methods of procedure for all persons having claims against a county, and these remedies must be pursued. An attorney will not be permitted to use this court in a *mandamus* proceeding for the purpose of having the merits or amount of his claim against a county adjudicated. It may well be doubted if in any case an attorney's or other lien can be successfully asserted against money appropriated by the legislature to any person or corporation, public or private, while in the hands of, or under the control of, an officer of the state. It would be contrary to good public policy and detrimental to the due administration of the affairs of the state to permit its officers to be harassed and hindered in the discharge of their duties by parties asserting rights, either by way of attorney's liens, attachments, or garnishment proceedings, or otherwise, to funds in the hands of, or under the control of, such officers. The claim of Richardson filed with the auditor is not a lien on the money appropriated by the legislature to Scott's Bluff county, and the auditor may disregard such lien with impunity.

The next reason assigned by the auditor for not drawing the warrant to pay the appropriation is "that the act making the appropriation is contrary to the letter and spirit of the constitution of the state of Nebraska." We quote Cooley, Constitutional Limitations (4th ed., p. 210), as follows: "When a law of congress is assailed as void, we look into the national constitution to see if the grant of specified powers is broad enough to embrace it; but when a state law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the constitution of the United States, or of the state, we are unable to discover that it is prohibited." We look

in the constitution of the United States for *grants* of legislative power, but in the constitution of the state to ascertain if any *limitations* have been imposed upon the complete powers with which the legislative department of the state is vested in its creation. Congress can pass no laws but such as the constitution authorizes either expressly or by clear implication, while the state legislature has jurisdiction of all subjects on which its legislation is not prohibited. The law-making power of the state recognizes no restraints, and is bound by none, except such as are imposed by the constitution. That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is, therefore, the paramount law. Its object is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute." Tested by the rule quoted from this eminent jurist, there is nothing in the constitution of Nebraska that prohibits the legislature of the state, representing, as it does, the sovereignty of the people, from appropriating money to reimburse a county for expenses incurred by it in the prosecution of criminals. True, there is no legal obligation resting on the state to pay such expenses, but the power of the legislature to appropriate money is not limited by the legal obligations of the state. We quote again from Cooley, Constitutional Limitations (p. 599), as follows: "It must always be conceded that the proper authority to determine what should, and what should not, constitute a public burden is the legislative department of the state. * * * And in determining this question the legislature cannot be held to any narrow or technical rule. Not only are certain expenditures absolutely essential to the continued existence of a government, * * * but, as a matter of policy, it may sometimes be proper and wise to assume other burdens which rest entirely on considerations of honor, gratitude, or charity. * * * There will, therefore, be necessary

expenditures, and expenditures which rest upon considerations of policy only, and in regard to the one as much as to the other, the decision of that department, to which alone questions of state policy are addressed, must be accepted as conclusive." This appropriation may be unjust. In making it the legislature may have acted unwisely; but of these things the legislature itself is sole judge. The courts cannot inquire into either the motive or justness of the law. Their only concern is with its legality.

Finally, the auditor alleges, as a reason for his refusal to draw this warrant, that by the constitution and laws of this state he has authority to examine and adjust all claims against the state, and that while Scott's Bluff county was put to some expense in the prosecution of Arnold for murder, the amount of such expense, he, the auditor, is informed and believes, is much less than the sum appropriated by the legislature. In other words, the auditor's contention here is that, notwithstanding the legislature appropriated a specifically named sum of money for the relief of Scott's Bluff county, and to reimburse it for the expense incurred by it in the prosecution of Arnold, yet he, the auditor, is invested by the constitution and laws with the discretion to examine into and ascertain the exact amount of money expended by the county in the criminal prosecution, and then draw his warrant for such sum only as he ascertains the county expended. If by the express words of the act, or if by any reasonable construction thereof, it appeared that the legislature intended to appropriate $7,495.73, or so much thereof as might be necessary to reimburse the county, then doubtless the auditor's position would be tenable; but no such words of limitation of the amount appropriated are in the act, nor can they be read into it by any fair or reasonable construction. What was the intention of the legislature in the premises? Doubtless to fully reimburse Scott's Bluff county for the expense incurred by it in prosecuting Arnold for murder.

The appropriation of this money—a gift in fact—was within the power of the legislature, and no inquiry or objection is admissible on the part of the auditor as to whether the appropriation was just, whether it was bestowed upon an undeserving recipient, or what motives influenced the legislature to make it; nor can the auditor be heard to say that the gift was too large; that the appropriation carried more money than was required to reimburse the county for what it had expended. The only duty left for the auditor in the premises is a merely ministerial one. He has no authority to supervise the action of the legislature by an inquiry into the actual expenditures of Scott's Bluff county in the prosecution of Arnold.

Section 9, article 9, of the constitution provides: "The legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor, and approved by the secretary of state, before any warrant for the amount allowed shall be drawn; *Provided*, That a party aggrieved by the decision of the auditor and secretary of state may appeal to the district court." Now, what is meant in this constitutional provision by "claims upon the treasury" which the auditor must examine and adjust? We take it that it means claims which the state is or may be under legal obligation to pay, such as the salaries of its officers and employes, the costs of erecting buildings, and the expense attendant upon the maintenance of its prisons, asylums, schools, and other institutions. We do not think the appropriation of the specific sum by the legislature to a particularly named person as a donation, gift, or a reward, and for which the state was under no legal obligation, comes within the claims which the auditor must examine and adjust. True, "he is placed in his position as agent of the state to protect the treasury against demands not lawfully due and payable by the state; and when a claim is presented, he must ascertain whether or not there is authority of law for its pay-

ment, and if he finds such authority, that should satisfy him. If the legislature has by express enactment directed that a certain sum shall be paid to a person, and appropriated the money for such payment, the auditor's duty in the premises becomes then merely ministerial. The power conferred upon him is not to supervise the action of the state when by its legislature it has admitted and acknowledged the claim and ordered it to be paid. Where the claim is not admitted by the state, he then stands in behalf of the state, and as its agent it is his duty to determine whether or not it is admissible, and justly and legally due; but when his principal, the state, whose officer he is, acknowledges the claim and directs it to be paid, then, inasmuch as the state's regulation for the payment of money requires him to draw warrants upon the treasury before such money can be paid, his duty is, without questioning, to conform to such direction. Finding the law for its payment to exist, he must regard that as plenary evidence that it is justly due. He cannot properly question the authority of an act of legislation directing the payment of money by the state, or disregard its authority, however fully he may be convinced that the money is bestowed upon an undeserving recipient." (*Angle v. Runyon*, 38 N. J. Law, 403.) Whenever the money necessary to pay a particular claim against a state has been appropriated by the legislature, and the amount of the claim has been definitely ascertained in a manner prescribed by law, a refusal by the auditor of said state to draw his warrant upon the treasurer of the state for the payment of the claim will authorize the interposition of the courts by appropriate mandatory proceedings. (High, Extraordinary Legal Remedies [2d ed.], sec. 101.) True, the constitution makes it the duty of the auditor to adjust claims. "Adjust" means "to settle or bring to a satisfactory state, so that parties are agreed in the result; as, to adjust accounts." (Webster's Dictionary.)

We are aware that it was said in *State v. Babcock*, 22 Neb., 38, that the constitutional provision requiring claims upon the state treasurer to be examined and adjusted by the auditor applied to all claims whether by virtue of a specific appropriation or not, and that the making of a specific appropriation by the legislature for the purpose of paying a demand against the state was in no sense the auditing of such claim; but that case should be distinguished from the one here. The appropriation considered in *State v. Babcock, supra,* was for paying the expenses (incurred by the state) in the prosecution of certain persons for crimes committed in an unorganized territory of the state. By the second section of that appropriation act it was provided: "And the auditor is hereby authorized to draw his warrants for the several amounts due to the parties named in this act;" and the court said: "This language would seem to indicate that it was the purpose of the legislature that this 'outstanding indebtedness' should be paid to the parties holding the claims, upon the ascertainment by the auditor of the amounts due to each of the parties named, but of course not in excess of the sum appropriated." It is also stated in *State v. Babcock, supra:* "The legislature has no authority under the constitution to audit or adjust a claim against the state, and if money is appropriated to pay an illegal claim, or one which the state does not owe, and the auditor so finds upon examination and adjustment, it is his duty to refuse to issue a warrant, notwithstanding such appropriation;" but this point was not necessary to a decision of the case there decided, and the rule there announced should be restricted to such claims and demands as the state is under a legal obligation to pay, and not extended to appropriations of specific sums of money made by the legislature as a donation, gift, reward, or charity.

Suppose the governor should offer a reward of $1,000 for the arrest and return to the state of a fugitive from jus-

tice, and A should arrest and return the fugitive; and the legislature should, after inquiring and ascertaining that A had earned the reward, appropriate $1,000 to him for having arrested and returned the fugitive. Could the auditor inquire into the value of the time and outlay of A in arresting and returning the fugitive, and refuse to draw a warrant for only the value of A's time and expenses? In such a case, would there be any adjustment to be made by the auditor of A's claim? Would the auditor have any duty to perform in the premises but a mere ministerial one? Would he have any discretion in the premises? The legislature of 1893 (House Roll No. 85) appropriated the sum of $2,000 for the payment of damages sustained by one Maurer while engaged in the public service as a private in the Nebraska National Guards. It was recited in the act that Maurer was exposed to the cold and freezing weather, and by reason thereof he contracted rheumatism, which became chronic, and from which he suffered great physical pain and became incapacitated for work, and was prevented from following his vocation and earning a living, and that he was required to pay out large sums of money for medical care and attendance for a period of more than two years. When Maurer presents his claim to the auditor, can the latter institute proceedings to ascertain the value of the time lost by Maurer by reason of his rheumatism and sickness; the expenses paid by him for physicians, nurses, etc.? Can he call experts to testify as to whether Maurer's injury is permanent, and if so, his expectancy of life and the present worth of what he probably would have earned had he not been injured? This legislative gift, or donation, to Maurer contains an allowance for physical suffering. Can the auditor say that too much was allowed for such suffering, and reduce the appropriation accordingly? We think not; and yet he may do all these things in Maurer's case, if his contention here is correct, viz., that his duty as auditor requires him to ascertain the amount of

actual expenses incurred by Scott's Bluff county in the prosecution of Arnold, and then draw his warrant for that sum only. Such cannot be the law. If it is, then instead of a government of three co-ordinate departments, the legislative is subordinate to the executive department. The auditor is an able and conscientious officer and deserving of the highest commendation for the jealous care with which he guards the public treasury, and he acts wisely in shielding himself from liability by the decisions of the courts in cases where he is in doubt; but in the case at bar he may not only legally draw the warrant demanded by the relator, but it is his duty to do so. He has no discretion in the premises. The demurrer to the return is sustained, and the writ will issue as prayed.

WRIT ALLOWED.

NORVAL, C. J., dissenting.

Upon the question of the constitutionality of the act of the legislature under consideration, I express no opinion. While I concur in the views expressed by RAGAN, C., relating to the claim of Nellie M. Richardson for an attorney's lien, I am unable to agree to the proposition that the duty of the auditor in the premises is merely ministerial, and that he has no authority to examine into and determine the actual sums expended by the county in the prosecution of Arnold. I deem it proper to state the reasons for my dissent.

It is conceded by the majority opinion that *mandamus* would not lie "if by the express words of the act, or if by any reasonable construction thereof, it appeared that the legislature intended to appropriate $7,495.73, or so much thereof as might be necessary to reimburse the county;" and there can be no doubt of the soundness of the proposition stated. What, then, is the proper interpretation to be placed upon the statute under review? In the body of

the act it is provided: "There is hereby appropriated out of any funds in the state treasury, and not otherwise appropriated, the sum of $7,495.73, for the relief of Scott's Bluff county, and to *reimburse* said county for expenses incurred in the trial of one George S. Arnold upon the charge of murder, * * * and the auditor is hereby authorized to draw his warrant upon the state treasurer for the above amount in favor of said Scott's Bluff county." It is argued that the legislature by this act appropriated a definite and specific amount to be paid the county; that the approval of this claim required of the auditor is merely formal; and that he can exercise no discretion whatever. The statute defining the duties of the auditor, as well as the constitution, requires that officer to examine and audit all appropriations, and it has been the universal practice in the auditor's office, since the adoption of the present state constitution, to do so, and that too in cases of appropriations as specific as is the one before us. This custom must have been known to the framers of this act at the time it was adopted, and it is fair to presume that the law-makers intended that the claim of the county, which this appropriation was intended to pay, should be audited as had been the custom theretofore. The object of the legislature in passing the act was to reimburse, or make whole, the county for all the legitimate expenses incurred by it in the prosecution and trial of Arnold, and nothing further. The statute regulates the costs in a criminal prosecution for a felony, and when the offense is committed in an organized county the law requires that the county where the trial is had shall pay the costs and expenses thereof. The legislature, by this act, undertook to relieve Scott's Bluff county of this burden. The appropriation reads "for the relief of Scott's Bluff county and to reimburse said county for expenses incurred," etc. What was meant by the use of the word "reimburse"? Webster defines it thus: "To replace in a treasury or purse, as an equivalent for what has

been taken, lost, or expended; to refund; to pay back; to restore; as, to reimburse the expenses of a war." In construing statutes, words should be given their ordinary meaning, and so interpreting the language of this appropriation, it is clear to my mind that the state is only required to refund or pay to the relator the amount of costs and expenses incurred by the county in the trial of Arnold, not exceeding the sum appropriated for that purpose. The auditor was not directed by the act to draw his warrant upon the treasury for $7,495.73, but he was authorized to do so if it required that sum to reimburse the county.

Was it the duty of the auditor, under the constitution and statute, without discretion, to audit this claim? By section 9, article 9, of the state constitution it is provided that "the legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor, and approved by the secretary of the state, before any warrant for the amount allowed shall be drawn; *Provided*, That a party aggrieved by the decision of the auditor and secretary of state may appeal to the district court." In accordance with the requirements of the foregoing constitutional provision, the legislature in 1877 passed a law providing for the examination and adjustment of claims upon the state treasury. (Laws, 1877, p. 202; Comp. Stats., ch. 83, art. 8.) I here quote the entire act:

"Section 1. All claims of whatever nature upon the treasury of this state, before any warrant shall be drawn for the payment of the same, shall be examined and adjusted by the auditor of public accounts, and approved by the secretary of state; *Provided, however*, That no warrant shall be drawn for any claim until an appropriation shall have been made therefor.

"Sec. 2. The auditor of public accounts shall keep a record of all claims presented to him for examination and adjustment, and shall therein note the amount of such claims as shall be allowed or disallowed, and in case of the disal-

lowance of all such claims, or any part thereof, the party aggrieved by the decision of the auditor and secretary of state may appeal therefrom to the district court of the county where the capital is located, within twenty days after receiving official notice. Such appeal may be taken in the manner provided by law in relation to appeals from county courts to such district courts, and shall be prosecuted to effect as in such cases; *Provided, however,* That the party taking such appeal shall give bond to the state of Nebraska in the sum of two hundred dollars, with sufficient surety, to be approved by the clerk of the court to which such appeal may be taken, conditioned to pay all costs which may accrue to the auditor of public accounts by reason of taking such appeal. No other bond shall be required.

"Sec. 3. In case the appeal shall be taken as provided in section 2 of this act, and on trial thereof the district court shall be of the opinion that the decision of said officers was wrong, either in fact or law, the said court shall reverse the same, and by its order and mandate require the said auditor to issue a warrant in accordance with the provisions of section 1 of this act, upon the treasury, for such an amount as shall be determined on the trial of such appeal to be legally due thereon. If either party feel aggrieved by the said judgment, the same may be reviewed in the supreme court as in other cases.

"Sec. 4. No claim which has been once presented to such auditor and secretary of state, and has been disallowed, in whole or in part, shall ever be again presented to such officers, or in any manner acted upon by them, but shall be forever barred, unless an appeal shall have been taken, as provided in section 2 of this act.

"Sec. 5. When a claim has been in part allowed by such officers, a warrant shall be drawn as in other cases where the whole claim shall be allowed."

It will be observed that we have not only a constitu-

tional provision, but an imperative statute, which requires, before any warrant shall be drawn by the auditor upon the state treasury, that the claim must be examined, audited, and allowed by the auditor and approved by the secretary of state; and yet it is here sought to compel by *mandamus* the issuance of a warrant for the full amount named in the appropriation act, when the claim of the county has not as yet been passed upon by the auditor, nor has such claim ever been presented either to him or the secretary of state for approval. If the duty of the auditor and secretary of state, as regards the auditing of this claim, is ministerial merely, still the performance of such act is a prerequisite to the right of the auditor to draw the warrant. This is not a proceeding to require the approval of the claim, but to compel the issuance of a warrant without any approval by either of the officers named. To grant the writ is to disregard the plain requirements of both the constitution and the statute.

It is said the claims upon the treasury which the auditor is required to "examine and adjust," in the sense in which that term is used in the constitution, are "claims which the state is or may be under legal obligations to pay, such as the salaries of its officers and employes, the costs of erecting buildings, and the expense attendant upon the maintenance of its prisons, asylums, schools, and other institutions." We are unwilling to so limit the word "claims," but conclude it was employed in its broadest sense and embraces every claim against the state for money under an appropriation made by the legislature. The constitution reads "all claims," and we have no right to inject words into that instrument by judicial interpretation. That it is the right and duty of the auditor to pass upon and audit the claim under consideration, I entertain no doubt. Section 1 of the act of 1877, above quoted, speaks of "all claims of whatsoever nature." More comprehensive language could not have been employed to express the legis-

lative will. The section is too plain to leave any room for interpretation. Even though the construction adopted by my associates is the correct one, namely, "claims which the state is or may be under legal obligations to pay" are the only ones which the auditor is required to examine and audit, it is the duty of the respondent to pass upon and determine what amount of this appropriation Scott's Bluff county is entitled to receive, since the moment the act took effect, if it is a valid and constitutional law, and the majority have so found and declared, the claim of the county for expenses incurred in the prosecution of Arnold becomes a legal obligation against the state.

It is said the duty of the auditor in the premises is a ministerial one merely, and that he has no authority to inquire into the amount of money actually expended by the county in the criminal case. The constitution and the statute quoted each provide for an appeal to the district court from the decision of the auditor and secretary of state in passing upon all claims upon the state treasury. Sections 6 and 7, article 3, chapter 83, Compiled Statutes, are as follows:

"Sec. 6. All persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled, and allowed within two years after such claims shall accrue; and in all suits brought in behalf of the state no debt or claim shall be allowed against the state as a set-off, but such as has been exhibited to the auditor, and by him allowed or disallowed, except only in cases where it shall be proved to the satisfaction of the court that the defendant at the time of trial is in possession of vouchers which he could not produce to the auditor, or that he was prevented from exhibiting the claim to the auditor, by absence from the state, sickness, or unavoidable accident; *Provided*, The auditor shall in no case audit a claim or set-off which is not provided by law.

"Sec. 7. The auditor, whenever he may think it neces-

sary to the proper settlement of any account, may examine the parties, witnesses, or others, on oath or affirmation, touching any matter material to be known in the settlement of such account."

By said section 6 it is made obligatory upon all persons having claims against the state to exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled, and allowed within a specified period after the accrual of the claim; and by the seventh section the auditor is clothed with the power to administer oaths, to take testimony, and examine witnesses and the claimant, if he deems it necessary to the proper adjustment of the claim or account. The duty enjoined upon the auditor is not merely ministerial, but to a great extent he exercises judicial functions, and from an order rejecting a claim, in whole or in part, an appeal lies to the district court. The conclusion is therefore irresistible, from a consideration of the several sections of the statute already referred to, and the provisions of the constitution quoted, that the duty of the auditor in examining and adjusting claims presented against the state requires the exercise of judgment and discretion to determine not only whether such claim is a legal obligation, but whether the amount asked is justly due. After the auditor has passed upon and adjusted a claim and the secretary of state has approved the same, I concede the auditor then has no discretion in the matter of drawing his warrant upon the treasury for the amount found due.

This case comes squarely within the decision in *State v. Babcock*, 22 Neb., 38. The legislature of 1883 passed an act appropriating $6,824.14 to pay the expenses incurred in the trial of I. P. Olive and others for murder, which act named the persons and the amount of money each should receive, and authorized the auditor to draw a warrant for the several amounts due the parties named in the act. The relator applied for a *mandamus* to compel the auditor to audit his claim and to draw a warrant upon the

treasury for the same. The court denied the writ. It was insisted in that case that the duties of the auditor were ministerial, and that he had no discretion in the premises. The court, after quoting section 9 of article 9 of the constitution, say: "This language clearly implies a limitation upon the power of the legislature in the matter of auditing claims against the state. The provision is imperative. The legislature shall provide that all claims upon the treasury 'shall be examined and adjusted by the auditor and approved by the secretary of state, before any warrant shall be drawn or the money paid. These officers are, by the fundamental law of the state, made the examining board through whose hands all claims must pass, and it is not within the power of the legislature to change this tribunal. It cannot review the decision of these officers, for the section clearly points out the reviewing court. The party aggrieved may appeal to the district court. The fact that the appropriation is specific can have no weight whatever, for section 22 of article 3 of the constitution provides that 'no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law,' etc. All appropriations of money from the treasury are specific, and 'all claims upon the treasury shall be examined and adjusted by the auditor,' etc. There is no distinction in appropriations. It is true that in the section (22, art. 3) above referred to it is provided that 'no allowance shall be made for the incidental expenses of any state officer except the same be made by general appropriation,' etc., but this provision can in no way change the fact that each appropriation contained in the general appropriation bill must be a specific appropriation for the purposes or offices named, and even then an account must be rendered 'specifying each item.' Nothing could be more specific than such an appropriation. No warrant can be drawn except in pursuance of an appropriation, but the auditor may examine and adjust claims in the absence of

such action by the legislature. While it is the duty of the legislature to see that no appropriations are made except for meritorious claims, yet such is the character of the safeguards thrown around the state treasury that such appropriation is by no means a final adjustment or auditing of the claim. It simply places so much of the funds in a position to be used by the auditor and secretary when the claim is examined and adjusted by the auditor, and his action is approved by the secretary. While the legislature may set apart money to pay a claim, it cannot pay it out, nor order it to be done, except in the manner provided by law. It has no jurisdiction to audit claims, and it is powerless to apply the money thereon without the *quasi*-judicial concurrence of the officers named. If money is appropriated by that body to pay a claim, such action is not an adjudication upon its validity to such an extent as to relieve the auditor and secretary from responsibility, for their duties remain as fixed by the constitution. This construction of the constitution has been adopted by the legislature as well as by the supreme court in its former decisions." The above decision was cited with approval and followed in *State v. Moore*, 37 Neb., 507.

Towle v. State, 3 Fla., 202, was an application for a *mandamus* against the comptroller of the state, to compel him to audit, allow, and pay a legal claim against the state. The circuit court awarded the writ, and the supreme court, on appeal, reversed this judgment and dismissed the action, holding the claim could not be enforced by *mandamus*. The statute of Florida defining the duties of the comptroller in the matter of examining, auditing, adjusting, and settling of accounts and claims against the state is substantially the same as the provisions of our statute. The third and fourth paragraphs of the syllabus in the Florida case are as follows: "Where a purely ministerial act is to be done and there is no other specific remedy, a *mandamus* will be granted; but where the person against whom a *man-*

damus is prayed is invested with judicial power, or acts in a deliberative capacity, or has the power and right of deciding, the writ will not lie, except to compel him to proceed to the discharge of his duty by deciding according to the best of his judgment. The comptroller of this state, in the administration of the concerns of his office, is required to exercise judgment and discretion, and the courts cannot act directly upon him by *mandamus*, and thereby guide and control his judgment and discretion."

Angle v. Runyon, 38 N. J. Law, 403, is relied upon as an authority in the majority opinion. In New Jersey the office of the comptroller of the treasury is created by the legislature, and in that state there is no constitutional provision relating to the auditing of claims against the state, and the statutory provision upon the subject is not in all respects the same as our own. There the law directs that the comptroller "shall draw all warrants on the treasurer for the payment of all moneys directed by law to be paid out of the treasury." It might well be held under such a provision that when the legislature makes a specific appropriation of money the auditing officer has no discretion in the matter of drawing his warrant in favor of the party entitled to the appropriation. I do not think that authority should control the decision in this case, but prefer to follow the former adjudications of this court, to which reference has been already made. Under the construction adopted by the majority, there is nothing to prevent future legislatures from so framing appropriation bills as to completely deprive the auditor of the constitutional power of examining and auditing claims upon the state treasury.

I am of the opinion that the relator mistook his remedy. The statute has afforded him a plain and adequate remedy at law. He should present the claim of the county to the auditor, and if rejected, appeal from the decision. Where a party has an adequate remedy by the usual and ordinary proceedings at law, a writ of *mandamus* will not lie. This

is the settled law upon the subject. (*State v. Mayor of Omaha*, 14 Neb., 265; *State v. Kinkaid*, 23 Neb., 641.) While *mandamus* is the appropriate remedy to enforce the performance of acts on the part of public officers strictly ministerial, it will not issue to control the discretion of a public officer (*State v. Kendall*, 15 Neb., 262; *State v. Boyd*, 36 Neb., 60); nor to compel an officer exercising judicial functions to make a particular decision (*State v. Churchill*, 37 Neb., 702). Mr. High, in his work on Extraordinary Legal Remedies, after stating the rule as to the ministerial duties of auditing officers being controlled by *mandamus*, at section 102 says: "Where, however, auditing officers, entrusted by law with the duty of passing upon and determining the validity of claims against a state, are vested with powers of a discretionary nature as to the performance of their duties, a different rule from that above stated prevails. In such cases the fundamental principle denying relief by *mandamus* to control the exercise of official discretion applies, and the officers having exercised their judgment and decided adversely to a claimant, *mandamus* will not lie to control their decision, nor to compel them to audit and allow a rejected claim. The remedy, if any, for such a grievance must be sought at the hands of the legislature, and not of the courts; and where a state comptroller is vested with certain discretionary powers in the adjusting and settlement of demands against the state, he cannot be compelled to issue his warrant for the payment of a particular sum." Upon principle and authority, I am constrained to hold that the writ should be denied; and the importance of the question involved and the abuses and evils, as I conceive, liable to result from the construction given the constitution and statute by my associates, prompt me to dissent from the judgment pronounced.

DANIEL C. KAVANAUGH v. EDWARD A. BRODBALL.

FILED JUNE 5, 1894. No. 5263.

1. **Replevin.** The cardinal question in every replevin action is whether the plaintiff therein was entitled to the immediate possession of the property replevied at the commencement of the action.

2. **Chattel Mortgages:** ASSIGNMENT OF NOTES: EFFECT. One to whom a promissory note is indorsed and delivered as collateral security thereby becomes the legal owner and holder of said note and may maintain a suit thereon in his own name; and if such note is secured by a chattel mortgage, the indorsement and delivery of the note will carry the mortgage with it.

3. **Replevin.** The plaintiff in a replevin action must recover, if at all, upon the strength of his own title to the property involved and not upon the weakness of the defendant's title to said property.

4. ———: CHATTEL MORTGAGES: ASSIGNMENT OF NOTES. The payee of certain notes secured by a chattel mortgage indorsed and delivered the same to a bank as security for an indebtedness owing by him to it. During the time the bank so held said notes and chattel mortgage the said payee brought against a subsequent mortgagee of said property, who had taken possession thereof, an action of replevin, basing his right to the possession of said property on the notes and mortgage he had assigned to the bank. *Held*, (1) That the indorsement and delivery of the notes to the bank operated as an assignment to it of the mortgage which the notes were given to secure; (2) that said payee at the time he brought his action was not entitled to the immediate possession of the mortgaged property, and that his action was properly dismissed.

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

Geo. G. Bowman and *S. S. McAllister*, for plaintiff in error.

McAllister & Cornelius, contra.

RAGAN, C.

On the 11th day of January, 1889, one Bernard Strottman was indebted to Daniel C. Kavanaugh in the sum of $300 and some interest, and to secure the payment of such indebtedness on said date he executed and delivered to Kavanaugh a chattel mortgage upon some hogs, the property in controversy in this suit. On December 7, 1889, Mr. Strottman became indebted to Ottis Brothers, as an evidence of which he executed to them his note and a chattel mortgage to secure the same upon the same property mortgaged to Kavanaugh. These notes and mortgage were assigned by Ottis Brothers to one Edward Brodball, and in August, 1890, he took possession of the mortgaged property. Prior to the bringing of this suit Kavanaugh was indebted to the First National Bank of Columbus, Nebraska, and to further secure said debt he indorsed the notes given him by Strottman and delivered them to the bank, which held them at the time this action was brought, a part of the debt owing to it by Kavanaugh, and to secure the payment of which the Strottman notes and mortgage were pledged, remaining unpaid. Kavanaugh then brought this action in replevin against Brodball for the property covered by their respective mortgages. The jury, in obedience to an instruction of the district court, returned a verdict in favor of Brodball, and Kavanaugh brings the case here for review.

The only error alleged which we need consider is this ruling of the district court. The cardinal question in every replevin action is whether the plaintiff therein was entitled to the immediate possession of the property replevied at the commencement of the action. It appears from the evidence, beyond cavil, that prior to the bringing of this suit Kavanaugh had duly indorsed and delivered the Strottman notes to the First National Bank of Columbus, and that at the time the suit was brought the bank still held posses-

sion of these notes to secure the payment to it of the indebtedness owing by Kavanaugh. The indorsement and delivery by Kavanaugh of the notes given him by Strottman to the bank invested it with the legal title to said notes, and the mortgage followed the debt. Kavanaugh then, at the time this action was brought, was not entitled to the immediate possession of the mortgaged property.

In *Gamble v. Wilson*, 33 Neb., 270, one Morningstar became indebted to Gamble and to secure such indebtedness gave him a chattel mortgage or bill of sale on certain personal property. Gamble sold and transferred this note to the Buffalo County National Bank. Some time after this Morningstar left the country, leaving one Taggart in possession of the property mortgaged to Gamble, which consisted of a frame bank building, a lumber office, a safe, counter, and some fixtures. Taggart, after the disappearance of Morningstar, delivered to Gamble the keys of the building and the combination of the safe. A creditor of Morningstar attached this property and Gamble replevied it. The judgment of the district court was that Gamble's action of replevin should be dismissed. He brought that judgment to this court for review, one of the errors alleged being an instruction given by the trial court to the jury. NORVAL, the present chief justice, writing the opinion of the court and reviewing the alleged error of the trial court in giving the instruction, said: "Complaint is made in the brief of counsel for plaintiff in error to the giving to the jury the defendant's request No. 3. By it the court charged the jury in effect that if they found that prior to the bringing of the suit that plaintiff had transferred all his interest in the note for which the bill of sale was given as security to the Buffalo County National Bank, and that the bank was, at the commencement of the action, the owner of the same, then the plaintiff could not recover. The charge of the court was not only correct as an abstract proposition of law, but it was applicable in the case made by the evidence.

It was undisputed that prior to the bringing of the suit the plaintiff transferred the note, which was secured by bill of sale, to the Buffalo County National Bank. The indorsement of the note was an assignment to the bank of the bill of sale and all of the plaintiff's interest therein. The bank could have maintained replevin for the property in its own name and was the real party in interest." The only difference between that case and the one at bar is that the First National Bank of Columbus held the Strottman notes as collateral security for a debt owing to it by Kavanaugh; but one to whom a promissory note is indorsed and delivered as collateral security is the legal owner and holder of said note and may maintain a suit thereon in his own name. If any one was entitled to the possession of the property in controversy in this action at the commencement thereof by virtue of the chattel mortgage made by Strottman to Kavanaugh, it was the First National Bank of Columbus. Counsel for Kavanaugh insists that the evidence shows that Strottman was never the owner of the property which he mortgaged to Ottis Brothers, and that, therefore, the court erred in directing the jury to return a verdict in favor of the defendant in error, Ottis Brothers' assignee. We have not examined this record for the purpose of ascertaining whether it bears out the contention of counsel, as the plaintiff in replevin must recover, if at all, upon the strength of his own title to the property and not upon the weakness of that of his adversary. (*Goodman v. Kennedy*, 10 Neb., 270; *Bardwell v. Stubbert*, 17 Neb., 485.) The learned district judge was entirely right in instructing the jury to return a verdict for the defendant, and the judgment of the lower court is

AFFIRMED.

POST, J., not sitting.

L. D. RICHARDS ET AL., APPELLEES, V. JOHN D. HATFIELD, APPELLANT.

FILED JUNE 5, 1894. No. 5660.

1. **Injunction:** LACHES: EQUITY. There is no rule of law which requires an action by injunction for equitable relief to be brought within any given time. Whether the bringing of an action in equity has been unreasonably delayed, and whether the complainants therein have been guilty of laches in not bringing it sooner, are questions to be determined from the facts and circumstances in the case.

2. **Laches:** ESTOPPEL: EQUITY. The defense of estoppel by laches or unreasonable delay in the bringing of a suit in equity is of itself an equitable defense, and cannot be successfully maintained when it appears that the delay complained of as unreasonable was caused, or contributed to, by the party interposing the defense.

3. **Taxes:** PROOF OF PAYMENT. The payment of a tax, like any other fact, may be proved by the best evidence attainable.

4. **A statutory tax receipt** is only *prima facie* evidence that the taxes for which the receipt calls have in fact been paid.

5. **Taxes:** EVIDENCE OF PAYMENT. The legislature never intended by the enactment of section 103 of the revenue act, 1879, to make a tax receipt when issued or the entry of the payment of taxes, when made in the tax books mentioned in said section, conclusive evidence.

6. ———: ———. The absence from the tax books of an entry, as required by said section 103, of payment of taxes assessed against property therein described raises a presumption that such taxes have not in fact been paid; but such presumption is by no means a conclusive one.

7. ———: PAYMENT. A collector of taxes has no authority to receive in payment thereof anything but lawful money of the United States, and may refuse to accept a bank check or draft in payment of such taxes; but if a collector accepts such check or draft in payment of taxes, and afterwards receives the money thereon, such receipt operates as a payment of the tax, although the collector fails to make an entry of the payment of such taxes in his tax books, never issues to the party paying the tax a statutory receipt therefor, and embezzles the money received.

8. ——: ——: PROOF. The owner of certain lands brought a suit to enjoin a county treasurer from selling the same for taxes which he alleged to be delinquent thereon, the owner claiming in his petition that such taxes had, in fact, been paid. It appeared from the evidence that in March, 1880, the owner made and delivered to the then county treasurer his check on an Omaha bank in payment of such taxes; that said check was drawn payable to the order of the then county treasurer; that in the month of April, following, said check was, in the usual course of business, duly presented to the bank on which it was drawn and by it paid and charged to the account of the landowner. *Held*, That in the absence of all other evidence on the subject, the fair, reasonable, and logical inference was that the county treasurer, to whom said check was drawn payable and delivered, received the money thereon.

APPEAL from the district court of Antelope county. Heard below before ALLEN, J.

O. A. Williams, County Attorney, for appellant:

The action cannot be maintained on account of laches. (*North v. Platte County*, 29 Neb., 447; *Montgomery v. Noyes*, 11 S. W. Rep. [Tex.], 138; *Terry v. Fontaine*, 2 S. E. Rep. [Va.], 743; *McCartin v. Traphagan*, 11 Atl. Rep. [N. J.], 165; *Barnett v. Barnett*, 2 S. E. Rep. [Va.], 733; *Chamberlain v. Town of Lyndeborough*, 14 Atl. Rep. [N. H.], 865; Code of Civil Procedure, sec. 14; *Alexander v. Overton*, 22 Neb., 229.)

Taxes must be paid in money as provided by law. Collectors cannot receive check in payment. (Cooley, Taxation [2d ed.], 452; 2 Desty, Taxation, 694; *Elliott v. Miller*, 8 Mich., 132; *Cedar County v. Jenal*, 14 Neb., 254.)

The legislature intended to do away with the common law proof of payment with reference to taxes, and to provide proof by receipt, or by the entry of payment in the tax books, and no other mode of proof is allowable. (Consolidated Statutes, secs. 3193, 4002, 4006.)

N. D. Jackson, contra:

The appellees were not guilty of laches. (*Boman v. Wathen*, 1 How. [U. S.], 189; *Jones v. Lloyd*, 117 Ill., 597; *Bausman v. Kelley*, 38 Minn., 197; *Napton v. Leaton*, 71 Mo., 358; *Platt v. Platt*, 58 N. Y., 646; *Sedlak v. Sedlak*, 14 Ore., 540; *Lurzelere v. Starkweather*, 38 Mich., 96; *Learned v. Foster*, 117 Mass., 365.)

When the taxpayer attends at the office of the proper officer and pays to such officer the amount of his taxes and specifies the purpose for which the money is paid, he has performed the only duty the public requires of him in that regard; and the fact of such payment may be established the same as the payment of any other debt or obligation. (*Rambert v. Cohem*, 4 Esp. [Eng.], 213; *Jacob v. Lindsay*, 1 East. [Eng.], 460; *Keene v. Meade*, 3 Pet. [U. S.], 7; *Dennett v. Crocker*, 8 Me., 239; *Kingsbury v. Moses*, 45 N. H., 222; *Berry v. Berry*, 17 N. J. Law, 440; *Leatherbury v. Bennett*, 4 Har. & McH. [Md.], 392; *Ford v. Smith*, 5 Cal., 314; *Hinchman v. Whetstone*, 23 Ill., 185; *Adams v. Beal*, 19 Ia., 61.)

RAGAN, C.

L. D. Richards brought this suit in the district court of Antelope county against John D. Hatfield, the treasurer thereof, to enjoin him from selling certain lands described in the pleadings, for taxes levied thereon for the years 1872 to 1879, both inclusive, on the ground that such taxes were fully paid by the grantor of Richards and others early in the year 1880. The district court found that the taxes had been paid as alleged by Richards and others, and entered a decree perpetually enjoining the treasurer of Antelope county and his successors in office from selling the lands for the said taxes. The case is before us on appeal. The facts as disclosed by the record may be summarized as follows:

On the 1st of March, 1880, one John I. Redick was the owner of the lands described in the pleadings in this case, and about that time he entered into a contract with Richards and others to sell to them these lands and other lands in said county. By the terms of his contract Redick was to convey these lands to Richards and others free and clear of all incumbrances whatever and by deeds of general warranty. For the purpose of carrying out his contract with Richards and others, Redick, about the 1st of March, 1880, went to Oakdale, the then county seat of Antelope county, and procured the county clerk of said county to make abstracts of all the lands he had contracted to sell Richards and others. At the same time Redick requested and obtained from the county treasurer a statement of all the taxes then due and unpaid upon the lands he had contracted to sell Richards and others for the years 1872 to 1879, both inclusive. These taxes amounted at that date to $1,221, and Redick, to pay said taxes to said treasurer, drew his check on the Omaha National Bank for said some of money, payable to the order of said treasurer. King, the county treasurer, accepted this check, and shortly afterwards it was presented to the bank on which it was drawn, paid, and charged to Redick's account. At the time that Redick paid the taxes by the check aforesaid to the treasurer he did not procure from the treasurer the statutory tax receipts, for the reason that they were then not made out, and as it would require some time to make them out, the treasurer executed and delivered to Redick a receipt for the $1,221, reciting that it was in full payment of all the taxes due upon the lands which Redick had contracted to sell Richards and others, and the treasurer promised Redick at the time that he would in a few days make up the formal statutory receipts and send them to him. At the same time the treasurer certified, on the abstracts of title which Redick had procured the county clerk to make of the lands, that all the taxes assessed against said lands

for the years 1872 to 1879, both inclusive, had been fully paid. The reason that Redick did not obtain from the county treasurer at the time he paid the taxes the statutory receipts for such taxes appears to be that it would require the treasurer several days to make them out and Redick was anxious to return to his home. It is not shown by the record whether such statutory receipts were ever made out by the treasurer, but if they were they never came into the possession of Redick or the appellees. The treasurer's tax books of Antelope county contain no entries showing that any of the taxes on these lands for the years 1872 to 1879, both inclusive, or any of those years, have ever been paid. Redick took the abstracts of title made of the lands for him by the county clerk and certified by the county treasurer as above stated and the receipt for the taxes paid by him to the treasurer on the lands and turned them all over to the appellees in this case. The record does not show that the appellees ever knew, until about the time of the bringing of this suit, but that the treasurer's tax books of Antelope county showed that the taxes on these lands had been paid for the years above stated; nor does the record contain any evidence that the authorities of Antelope county at any time made any threats or efforts to collect any of the taxes on these lands for said years until about the time of the bringing of this suit. The receipt given by King, the county treasurer, and turned over to him by the appellees, was not produced on the trial, but its absence was acounted for. There is no conflict in the evidence in the case, and the only issue is whether or not the taxes on the lands for the years 1872 to 1879, both inclusive, and for which taxes the treasurer was threatening to sell the lands, had been paid by Redick, the grantor of the appellees. To reverse this decree the appellant makes the following contentions:

1. That the appellees did not bring their suit within a reasonable time, as ten years had elapsed between the date

of the payment of the taxes by Redick and the commencement of their action. In other words, the argument is that the appellees have been guilty of laches, have shown no reasonable excuse for the great delay in bringing the suit, and that their claim is a stale one. There is no rule of law which requires an action for equitable relief to be brought within any given time. Whether the bringing of such an action in equity has been unreasonably delayed, and whether the complainants therein have been guilty of laches in not bringing it sooner, are questions to be determined from the facts and circumstances in the case. In the case at bar the appellees received from their grantor in 1880, along with their conveyances for these lands, abstracts of title therefor. These abstracts contained the certificate of the then county treasurer of Antelope county that all the taxes in controversy had been paid, and the appellees also had in their possession a receipt given by the treasurer to the grantor of appellees for the money paid by said grantor to said treasurer for the taxes. We do not think that under these circumstances the appellees were required to doubt that the taxes were paid; nor that they were required to go to the treasurer's office of Antelope county and examine his tax books to ascertain if he had entered on said tax books the payment of these taxes; and if the appellees were bound to know that the tax books in the treasurer's office did not contain entries showing the payment of these taxes, still the appellees were under no obligation to bring any suit to enjoin the collection of the taxes before some effort or threat was made to collect them by the authorities of Antelope county, or certainly not before the authorities in said county set up some affirmative claim that such taxes had not in fact been paid. For aught that this record shows the threat of the present treasurer to sell the lands for the taxes of those years is the first claim ever asserted by any of the authorities of Antelope county that the taxes on the land had not been paid by

Redick. The law requires the county treasurers of the several counties in this state, in the month of November of each year, to advertise and sell all lands on which taxes have been assessed and which remain unpaid for previous years. The treasurer of this county could then have advertised this land for sale for the taxes of these years at any time since the year 1880. If the taxes were, as a matter of fact, unpaid on the lands, it was his duty to do so, and had he done so, the present suit would probably have long since been decided and the appellant would not have felt called upon to interpose the defense of laches in bringing the suit on the part of appellees. The defense of estoppel by laches or unreasonable delay in bringing an equitable suit is of itself an equitable defense, and cannot be successfully maintained when it appears that the delay complained of as unreasonable has been caused by, or contributed to by, the party interposing the defense. But it is argued by the appellant that it would be inequitable to permit the appellees to maintain this suit, for the reason that the county now has no recourse upon the bond of the county treasurer, King, by reason of the running of the statute of limitations. The answer to this argument is that if the authorities of Antelope county had discharged their duties to the people of that county, they would have discovered, long before the statute of limitations became a bar, that the county treasurer, King, had collected these taxes and embezzled the money; but the county cannot use the dereliction of duty on the part of its officers as a weapon with which to destroy the legal barrier that prevents it from compelling a citizen to pay taxes upon property already paid. Nothing in the record in this case discloses any reason why the appellees should be estopped from maintaining this action.

2. The second contention of the appellant is that the only competent evidence of the payment of the taxes in this case was either the county treasurer's statutory re-

ceipts for such taxes or entries made by the county treasurer in his tax books of their payment; and as the undisputed evidence in the record is that no entries were ever made in the tax books of the payment of these taxes, and no statutory receipt for the taxes were, so far as the evidence shows, ever made by the treasurer or delivered to Redick, that therefore the district court had before it no competent evidence on which to base its finding that Redick paid the taxes; or, to state the matter briefly, the contention of the appellant is that no evidence is competent to prove the payment of the taxes except the statutory receipt or the entry made by the tax collector in the tax books. This argument is based on appellant's construction of section 103 of chapter 77 of the revenue law (Comp. Stats., 1893), which is as follows: "Whenever any person shall pay the taxes charged on any property, the collector shall enter such payment in his book and give a receipt therefor, specifying for whom paid, the amount paid, what year paid for, and the property and value thereof on which the same was paid, according to its description in the collector's book, in whole or in part of such description as the case may be; and such entry and receipt shall bear the genuine signature of the collector or his deputy receiving such payment; and whenever it shall appear that any receipt for the payment of taxes shall be lost or destroyed, the entry so made may be read in evidence in lieu thereof," etc. We do not agree to this contention. The payment of a tax, like any other fact, may be proved by the best evidence attainable. The statutory tax receipt is *prima facie* evidence, and only *prima facie* evidence, that the taxes for which the receipt calls have in fact been paid; and the same may be said of the entry of the payment of a tax made by a tax collector in his tax books, as provided by said section 103. The legislature never intended by this section to make a tax receipt when issued, nor the entry of the payment of the taxes when made in the tax books

the only evidence that the taxes had in fact been paid; nor did the legislature intend to make such receipt or such entry conclusive evidence that such taxes had been paid. The absence from the tax books of an entry of payment of taxes assessed against property therein described raises a presumption indeed that such taxes have not in fact been paid; but such presumption is by no means a conclusive one. (*Adams v. Beale*, 19 Ia., 61; *Hinchman v. Whetstone*, 23 Ill., 185; *Berry v. Berry*, 17 N. J. Law, 440; *Wolf v. Foster*, 13 Kan., 19; *Stout v. Hyatt*, 13 Kan., 232.) In the case at bar it was not possible to produce in evidence a statutory tax receipt for the taxes paid by Redick, nor entry of payment of such taxes made by the county treasurer in his tax books, for the reason that no such receipts or entries existed; but the payment of these taxes by Redick to the treasurer, King, was proved by two living, competent witnesses who were present at the time, and it seems to us that it would be a perversion of law as well as common sense to say that the evidence of these witnesses was incompetent to prove the fact of the payment of these taxes.

3. A third contention of appellant is that taxes can only be paid in money; that a collector of taxes has no authority to receive in payment thereof anything but money, and that, as the evidence in this case shows that Redick paid the taxes to the treasurer by giving him a check on a bank therefor, therefore the evidence does not support the finding of the court that Redick in fact paid the taxes to the treasurer. We agree entirely with the contention of counsel, that no tax collector has any authority to receive in payment and discharge thereof anything but lawful money of the United States, and that if he does accept any kind of property other than lawful money in payment of taxes, such acceptance by him of such property will not operate to discharge or pay such taxes. It is doubtless true that a collector of taxes may refuse to accept a check or draft in

payment thereof and may insist upon being paid in actual money, and until such payment is made the taxes will not be discharged; but in this case King, the county treasurer, accepted in payment of the taxes a check of Redick drawn upon an Omaha bank. If this check had been protested or never had been paid, of course it would not have operated as a payment of the taxes; but the treasurer obtained the money on this check from the bank on which it was drawn, and the moment he did so he held such money as treasurer of the county in his official capacity, and the taxes to pay which it was given were from that moment paid and discharged.

4. A final contention of counsel for the appellant is that the district court had before it no competent evidence from which it could find that King, the county treasurer, actually received the money on the check given him by Redick for the taxes in controversy. The evidence shows that Redick drew his check to the order of King, the county treasurer, on the Omaha National Bank for $1,221, in payment of the taxes. This was some time in March, 1880; that early in April, 1880, a check for this amount of money, drawn on said bank, payable to the order of said treasurer and drawn by said Redick, was presented to said bank and paid and the amount thereof charged to the account of Redick. We think that the fair, reasonable, and logical inference from this testimony was the one made by the district court, that King, the county treasurer, actually received the money called for by said check. Appellant's counsel complain because the check was not produced on the trial. Very few business men can produce a check given by them in payment of a debt ten years ago. Very few business men retain possession of ordinary bank checks for ten years after their payment. The failure to produce this check in evidence on the trial of this case was a circumstance which perhaps the trial court might have considered in arriving at the conclusion as to whether or not

the taxes in controversy had been paid; but we do not regard such failure as very material. Counsel for the appellant is to be commended for the zeal which he has displayed in defending this suit, but we are constrained to say, after a careful examination of the record, that we think the law and the equities of the case are with the appellees, and that the findings and decree of the district court are correct. The decree is

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. JOHN OLESON.

FILED JUNE 5, 1894. No. 5463.

1. **Negligence:** QUESTION FOR JURY. The existence of negligence should be proved and passed upon by the jury as any other fact. It is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial and instruct that such fact or group of facts amount to negligence *per se*. At most, the jury should be instructed that such circumstances, if established by a preponderance of the evidence, are properly to be considered in determining the existence of negligence. *Missouri P. R. Co. v. Baier*, 37 Neb., 235, followed and reaffirmed.

2. ———: INSTRUCTIONS. The court may say what act or omission of a party is evidence of negligence, but it is for the jury to say what conclusion such evidence warrants. *Omaha Street R. Co. v. Craig*, 39 Neb., 601, followed and reaffirmed.

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

Marquett, Deweese & Hall, for plaintiff in error.

Stevens, Love & Cochran, contra.

RAGAN, C.

John Oleson sued the Chicago, Burlington & Quincy Railroad Company in the district court of Lancaster county for damages for an injury which he alleged he had sustained through the negligence of the servants of said railroad company. In his petition Oleson stated that in December, 1888, he was in the employ of said company and was one of a force of men engaged at said time in repairing a track belonging to said company; that he and the other men with whom he was at work were in charge of a foreman named Patrick Welsh, whose orders it was his duty to obey; that while at work upon said track, and while attempting to raise the same by means of a "jack," it became necessary to oil said "jack," and that the foreman negligently and carelessly ordered him, Oleson, to jump aboard an approaching engine then owned and operated by the company and procure a can of oil for the use of the men engaged in raising said track; that in obedience to the order of the foreman he, Oleson, attempted to jump aboard said moving engine and in doing so slipped and fell and was injured, without any fault or negligence on his part. The answer of the company was a denial of any negligence on the part of itself or foreman, and contributory negligence on the part of Oleson. Oleson had a verdict and judgment and the company brings the case here for review. There are numerous errors assigned, one only of which we notice.

Among the instructions given to the jury by the district judge was one in the following language: "If you find from the evidence that Patrick Welsh was an employe of defendant company and had control and direction of the plaintiff; if you find plaintiff was an employe of defendant at the time and place that the injury was received, and if you find from the evidence that plaintiff, as such employe, was bound by the terms of his service to obey the

orders of Welsh; that Welsh ordered plaintiff to mount an engine then approaching to procure a can of oil for use in the work being done by plaintiff and others under Welsh's control; that, under the circumstances and at the time, compliance with such order, if given, was likely to result in injury to plaintiff; that Welsh knew this, stood by and saw plaintiff obey his said orders, and had the authority and opportunity to revoke such order, if made, and failed to do so; that the plaintiff obeyed such order, and in consequence thereof was injured without fault on his part, then you are instructed that this was negligence for which the defendant was responsible, unless you find from the evidence that compliance by plaintiff with said order, if given, would carry him into such palpable, physical danger as would prevent a person of ordinary care, prudence, and intelligence from obeying such order if made." This instruction was erroneous. The order of the foreman to Oleson to get on the moving engine to procure the oil can was competent evidence to go to the jury for their consideration in determining whether or not the foreman, in making such order, under all the circumstances in evidence, was guilty of negligence; and the same may be said of the failure of Welsh to revoke such order before it had been obeyed; but it was for the jury to say whether the evidence of what Oleson did and what he omitted to do warranted the conclusion of negligence on his part. The court may say what act or omission of a party is evidence of negligence, but it is for the jury to say what conclusion such evidence warrants. (*Omaha Street R. Co. v. Craig*, 39 Neb., 601, and cases there cited.) In *Missouri P. R. Co. v. Baier*, 37 Neb., 236, it was held: "The existence of negligence should be proved and passed upon by the jury as any other fact. It is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial and instruct that such fact or group of facts amount to negligence *per se*. At most, the

jury should be duly instructed that such circumstances, if established by a preponderance of the evidence, are properly to be considered in determining the existence of negligence." We think that case states the rule of law correctly, and is decisive of the case at bar. Here the trial court grouped together a number of facts and stated to the jury that if the foreman did thus and so, and omitted to do thus and so, that such acts and such omissions on his part were negligence. The learned district judge was wrong, and the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

M. P. MUSSER & COMPANY V. JOHN KING.

FILED JUNE 5, 1894. No. 5452.

1. **Chattel Mortgages:** REPLEVIN: PRESUMPTION OF OWNERSHIP. In a replevin suit by the holder of a chattel mortgage to recover possession of the property described therein from a person other than such mortgagor, there is no presumption of law that the person who made such mortgage was at the time either the owner, or in possession, of the property mortgaged.

2. **Replevin:** PLEADING AND PROOF. In replevin, as in all other actions, the evidence should correspond to the allegations in the pleadings; and where a plaintiff in an action of replevin bases his right to the possession of the property claimed by reason of a special ownership therein or lien thereupon, he should set out in his petition the facts with reference to such special ownership or lien. *Haggard v. Wallen*, 6 Neb., 271, followed.

3. ———: EVIDENCE. The plaintiff alleged in his petition that he was the owner and entitled to the immediate possession of certain property, and that the defendant unlawfully detained the same. The defendant answered by a general denial. The plaintiff proved that a third party, prior to the date of the suit, was in debt to one T., and gave him a note therefor, and exe-

cuted a chattel mortgage on the property replevied to secure said note; that the plaintiff was the owner of said note and mortgage by assignment from T. Plaintiff then offered said note and mortgage in evidence. *Held*, That the evidence did not tend to prove the issue.

4. **A chattel mortgage**, whether in writing or not, is a pledge of personal property to secure the promise of the mortgagor or some one for whom he stands sponsor.

5. **Chattel Mortgages**: TITLE OF MORTGAGEE. The legal title to property pledged by a chattel mortgage remains in the mortgagor until divested by foreclosure proceedings and sale in pursuance of the statute; and until the title of the mortgagor is thus divested, the mortgagee has merely a lien upon the property.

6. ———: ———. The first point of the syllabus in *Adams v. Nebraska City Nat. Bank*, 4 Neb., 370, is overruled.

ERROR from the district court of Sheridan county. Tried below before BARTOW, J.

Thomas L. Redlon, for plaintiffs in error:

The mortgage of chattels vests in the mortgagee the legal title to the things mortgaged. (*Robinson v. Fitch*, 26 O St., 659; *Adams v. Nebraska City Nat. Bank*, 4 Neb., 370; *Marseilles Mfg. Co. v. Morgan*, 12 Neb., 69; *Nelson v. Garey*, 15 Neb., 535; *Tallon v. Ellison*, 3 Neb., 74; *Tompkins v. Batie*, 11 Neb., 151; Cobbey, Replevin, sec. 60, and cases cited.)

C. H. Bane, contra.

RAGAN, C.

M. P. Musser & Co. brought a suit in replevin in the district court of Sheridan county against John King, and alleged in their petition that they were the owners of and entitled to the immediate possession of certain chattels, and that John King unlawfully detained possession of said chattels from them. To this petition John King filed an answer, consisting of a general denial. King had a ver-

dict and judgment, and Musser & Co. bring the case here on error. On the trial of the case Musser & Co. proved that one William B. King, on the 16th of December, 1889, gave his note to one Nathan Tibbets, and to secure the same at the same time executed to Tibbets a chattel mortgage on the property involved in this suit; that said William B. King died insolvent on the 16th day of February, 1891, and that Tibbets had assigned the note and the mortgage securing the same to Musser & Co. After this proof was made Musser & Co. offered in evidence the note and chattel mortgage. John King objected to their introduction in evidence on the ground, among others, that no proper foundation was laid for their admission in evidence, and that they did not tend to prove the issue made by the pleadings. The district court sustained the objection and excluded the note and chattel mortgage, to which ruling Musser & Co. took an exception. No other or further evidence was offered on the trial of the case. The only error assigned here is the ruling of the district court in excluding from the jury this note and mortgage. The issue in the case was the right of Musser & Co. to the immediate possession of the property replevied, and by their petition they predicated their right to the possession of the property on their ownership of the same.

In replevin, as in all other actions, the evidence should correspond to the allegations in the pleadings. If Musser & Co. based their right, as is probable, to the possession of this property on their ownership of the note and chattel mortgage, they should have so stated in their petition. In other words, they should have pleaded the facts. If they claimed to be the actual owners of the property, an allegation that they were the owners of it was sufficient. If they claimed a special ownership in, or lien upon, the property, and predicated their right to the possession of the property on such special ownership or lien, the petition should have stated the facts in reference thereto. (*Haggard*

v. Wallen, 6 Neb., 271.) The note and mortgage offered did not tend to prove that Musser & Co. were either the owners of or entitled to the possession of the property. There was no evidence offered showing that William B. King was either the owner or in possession of this property at the time he mortgaged it to Tibbets. The law, in the absence of all evidence on the subject, will not indulge the presumption that one who made a mortgage upon chattels was either the owner of or in possession of such property at the time he made such mortgage when the holder of such mortgage seeks to recover possession by replevin of such property from a third party. (*Everett v. Brown*, 64 Ia., 420; *Warner v. Wilson*, 73 Ia., 719; *Gibbs v. Childs*, 143 Mass., 103.)

The petition in this case was doubtless framed upon the theory that the mortgagee of chattels is the owner of the legal title thereto, and in *Adams v. Nebraska City Nat. Bank*, 4 Neb., 370, it was so decided. An examination of that case, however, shows that the point was not necessary to a decision of the case. The action was brought by a mortgagee of chattels in possession thereof to restrain a sheriff from levying upon and selling said chattels under an execution against such mortgagee, and the court held that the petition did not state such a case as authorized the interference of a court of equity to restrain the sale. There can be no question but that the conclusion reached was a correct one; but the other point stated in the first paragraph of the syllabus of the case, viz., "A mortgage of chattels transfers to the mortgagee the whole legal title to the thing mortgaged," was not involved in the case. This case, if not expressly, has in effect been many times overruled by the decisions of this court; and we think it is the almost universal understanding of both the bench and the bar of the state that the mortgagee of chattels acquires only a lien upon the mortgaged property, and not the legal title thereto, by virtue of such mortgage. That

the interest of a mortgagee in chattels is that of a mere lien has been frequently recognized by this court.

In *Tompkins v. Batie*, 11 Neb., 147, it was held: "A mere tender of the amount secured by a chattel mortgage to the creditor on the day fixed for payment, although not accepted nor kept good, has the effect to release the property from the lien of the mortgage." This case was reaffirmed in *Knox v. Williams*, 24 Neb., 630.

In *Gillilan v. Kendall*, 26 Neb., 82, the court said: "The mortgagor of chattels, until foreclosure, possesses a beneficial interest in the property mortgaged, and will convey a good title by a sale of such property to one who purchases in the open market in good faith and without notice, actual or constructive, of the mortgage."

A chattel mortgage has also been recognized by this court as a mere lien upon the property mortgaged in the following cases: *Marseilles Mfg. Co. v. Morgan*, 12 Neb., 66; *Grand Island Banking Co. v. Frey*, 25 Neb., 66; *Gandy v. Dewey*, 28 Neb., 175.

In *Grimes v. Farrington*, 19 Neb., 44, the court held that the mortgagor of personal property, upon which an attachment issued against him had been levied, had the right, under the provisions of section 235 of the Civil Code, to resist the attachment by a motion to discharge the same.

In *Hamilton v. Lau*, 24 Neb., 64, the court said: "In every mortgage there is a trust created in a certain sense in favor of the mortgagor in respect to the residue or surplus after the application of sufficient of the fund to satisfy the claim of the mortgagee."

In *Jordan v. Hamilton County Bank*, 11 Neb., 499, it was held: "Where a senior mortgagee of chattels, for the purpose of depriving of his security a junior mortgagee of a part of the same property, fraudulently releases that portion on which his mortgage is the exclusive lien, the same being adequate security, he will not be permitted, to the prejudice of the latter, to go upon the property covered by the second mortgage for payment of his demand."

In *Newlean v. Olson*, 22 Neb., 717, the mortgage in controversy contained this clause: "If the mortgagee shall at any time feel unsafe or insecure, he may seize and sell as aforesaid the property." The court held that the words "feel unsafe and insecure" did not authorize the mortgagee to exercise an arbitrary discretion in taking possession of the mortgaged property, but that before he could take possession thereof the mortgagor must have done or been about to do some act tending to impair the mortgagee's security.

In *Harman v. Barhydt*, 20 Neb., 625, the court said that the transfer of one of several notes secured by a chattel mortgage was an assignment *pro tanto* of the mortgage to the person to whom such note was assigned.

Chapter 12, Compiled Statutes, 1893, prescribes one method by which chattel mortgages may be foreclosed. By section 6 of that chapter it is provided that the sale shall be in the day-time, in the county where the mortgage was first filed, or in any county where the property may have been removed by consent of parties and in which the mortgage has been duly filed. This court construed this statute in *Loeb v. Millner*, 21 Neb., 392. In that case Millner resided in Webster county and made a mortgage of some chattels to Loeb, who resided in Adams county. The mortgage was filed in Webster county, but was never filed in Adams county. Loeb took possession of the chattel property, brought it into Adams county, and advertised and sold it in pursuance of the statute just quoted. Millner then sued Loeb to recover the value of the property pledged to secure the debt, and the court held, in effect, that the advertising and sale of the property by Loeb in Adams county was a conversion by him of the property, and that he was liable to Millner for its value less the debt which Millner was owing him and which the property was pledged to secure.

These cases show that the doctrine of this court is that

the only interest which a mortgagee of chattel property has therein by virtue of such mortgage is that of a lien-holder. A chattel mortgage then, whether in writing or not, is a pledge of personal property to secure the performance of the promise of the mortgagor or someone for whom he stands sponsor. It need not be in writing. (*Conchman v. Wright*, 8 Neb., 1; *Ostertag v. Galbraith*, 23 Neb., 730; *Sloan v. Coburn*, 26 Neb., 607.) A bill of sale, absolute on its face, may be shown to be a chattel mortgage. (*Omaha Book Co v. Sutherland*, 10 Neb., 334.)

The question is, what was the intention of the parties pledging the property? If it was intended to be a security, then it is a chattel mortgage, no matter how, or in what form, the pledge may be expressed; and the legal title to property pledged by a chattel mortgage remains in the mortgagor until divested by foreclosure proceedings and sale in pursuance of the statute; and until the legal title of the mortgagor is thus divested, the mortgagee has merely a lien upon the mortgaged property. If the mortgagee of chattel property is the owner of the legal title thereto, it would seem that such property should be listed for taxes against him; and yet we do not think that any such a contention can be maintained. Would an indictment for larceny which alleged the property to be in A be sustained by proof that A's title was that of a mortgagee? By section 8, chapter 12, Compiled Statutes, 1893, it is provided that when a mortgage shall have been foreclosed as provided in the said chapter, all right of equity of redemption which the mortgagor had in such property should be and become extinguished. This is a recognition by the legislature of the mortgagor's title to personal property until the same had been divested by foreclosure proceedings. Section 9 of the same chapter makes the sale, transfer, and disposal of personal property by a mortgagor during the existence of the lien created by such mortgage a felony without first obtaining consent in writing of the

owner and holder of the debt secured by such mortgage; and section 10 of said chapter denounces as a felony a removal of the mortgaged property out of the county in which it was situate at the time it was mortgaged and during the existence of the lien created thereby. Here, again, is another legislative recognition that the legal title to mortgaged chattels remains in the mortgagor thereof until divested by foreclosure proceedings.

The first point of the syllabus in *Adams v. Nebraska City Nat. Bank*, 4 Neb., 370, must be overruled. This doctrine, that the mortgagee of chattels is the owner of the legal title thereto, is a judicial myth,—a legal fiction. Its origin is somewhat shrouded in obscurity. It probably came to England with the conquering Normans; and certain it is that it was nurtured and grew to maturity under the fostering care of the common law courts of that country. These courts professed themselves unable to give any construction to a contract except that warranted by the very letter thereof; and it was the equity courts of that country, who, by applying to contracts the doctrine of a great teacher, that "the letter killeth, but the spirit giveth life," extended to the mortgagor or pledgor of chattels the right to redeem the same by his performing the promise which the pledge was given to secure; and these courts exercised this power upon the theory—as good now as it was then—that the doctrine of forfeiture was abhorrent to the conscience of a chancellor. There are many and respectable authorities which hold to the doctrine that the mortgagee of a chattel is the owner thereof; but these cases, no matter where found, nor by whom written, have for their precedent the common-law English courts. This doctrine, whether it originated in the necessities of Venetian commerce, or had its origin in the feudal system of the Normans, is an alien to our institutions and a stranger to our jurisprudence, where the courts apply both legal and equitable remedies in the administration of justice, and

where the law requires that contracts shall be construed according to the intention of the parties thereto. It is the construction of Shylock, demanding the pound of flesh, no more nor less, because so nominated in the bond. The judgment of the district court is

AFFIRMED.

ROBERT H. OAKLEY V. VALLEY COUNTY.

FILED JUNE 5, 1894. No. 5308.

1. **Pleading:** DEMURRER. Where a plaintiff demurs to an answer of a defendant, the demurrer will be carried back to the petition, and if that be found defective, the demurrer will be overruled. *Hower v. Aultman*, 27 Neb., 251, followed.

2. **Highways:** ROAD DISTRICT FUNDS: COUNTIES. Under the revenue law of 1869 and the road law of 1866 (Gen. Stats., 1873, pp. 896, 950) money in the hands of a county treasurer belonging to the road districts of a county was held in trust by him for such road districts, and such money was at the disposal of the supervisors of said road districts, and at their disposal only, and the chairman of the board of county commissioners of a county had no authority to draw warrants against such funds.

3. **Counties:** COUNTY COMMISSIONERS: WARRANTS. Warrants issued by a board of county commissioners for a purpose not within their jurisdiction are void and do not bind the county. *Walsh v. Rogers*, 15 Neb., 309, followed.

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

Darnall & Kirkpatrick and *H. A. Babcock*, for plaintiff in error.

Charles A. Munn and *E. J. Clements*, *contra*.

RAGAN, C.

Robert H. Oakley sued Valley county in the district court thereof to recover from said county the amount called for by three certain warrants drawn by the chairman of the board of county commissioners of said county on the treasurer of said county and drawn on the road fund of districts Nos. 5, 6, and 8, respectively, bearing dates of June 10, 1875, October 5, 1875, and April 3, 1877, respectively. The petition alleged that each of said warrants, on the date drawn, were presented to the county treasurer of said county and not paid for want of funds, and that since the issuance of said warrants there had been money in the county treasury with which to pay the same; that although Oakley had repeatedly demanded payment thereof, no part of either of said warrants had been paid. To this petition the county interposed an answer alleging, in substance, that no such funds as those on which the warrants were drawn were then in existence, and that there was no money in the hands of the county treasurer on the dates when said warrants were drawn and presented for the payment thereof. To this answer Oakley demurred. The district court overruled the demurrer and dismissed the action, and Oakley brings the case here on error.

Where a plaintiff demurs to an answer of a defendant, the demurrer will be carried back to the petition, and if that is found to be defective, the demurrer will be overruled. (*Hower v. Aultman*, 27 Neb., 251.) Does this petition state a cause of action? This question must be answered by a construction of certain sections of chapter 66, revenue law of 1869 (Gen. Stats., 1873, p. 896), and chapter 67 of the law of 1866 (Gen. Stats., 1873, p. 950).

Section 30 of said chapter 66 provided the rate of taxation which county authorities might levy for all purposes. Among these purposes they had authority to levy for roads a poll tax of two dollars, or one day's work, and a land

tax in any rate not exceeding four dollars to the quarter section, such tax to be paid in money or labor, at the rate of two dollars per day, at the option of the person taxed. By section 32 of said act the county commissioners of the county were required to meet at the county seat on the first Monday of July in each year and levy the necessary taxes for the current year. By section 38 of said act it was provided that the county treasurer should be the collector of taxes; and by section 39 it was provided that road taxes might be discharged by paying cash or labor in the manner provided by section 30 of the act; and that section provided that the county treasurer should receive in payment of road and poll taxes certificates showing the performance of labor in payment of the road tax assessed. Section 40 of said chapter provided that whenever any taxes should be paid to the county treasurer he should make out and deliver to the person paying the same a receipt therefor and specify in such receipt whether the taxes were paid in cash, state warrants, county or road orders, or supervisor's receipts, as the case might be.

On June 7, 1867, the legislature passed an act which became part of said chapter 67, and is found in General Statutes, 1873, at page 958. Section 1 of this act provided that one supervisor should be elected annually in each road district. By section 5 of the act it was provided that the county treasurer, upon the order of the county commissioners, should pay the supervisor of each road district the funds in the treasury belonging to said road district, and that the supervisor should expend the money to the best advantage of his road district; and by section 6 of the act it was provided that such supervisor should give a receipt for all road taxes that had been paid in labor. By section 6 of said chapter 67 it was made the duty of each supervisor of roads to notify all able-bodied male residents between certain ages to perform one day's labor upon the roads in his district in each year. By section 7

of said chapter it was provided that if any person liable to perform road labor should fail to perform the same or pay two dollars in money in lieu thereof, the supervisor should collect such road tax by suit. By section 13 of said chapter it was provided that all moneys collec'ed by the supervisors of roads in lieu of labor and in discharge of poll taxes should be expended by him in the improvement of roads in his road district. By section 14 of said chapter it was provided that road supervisors should make an annual settlement with the board of county commissioners showing the amount of money that had come into their, the supervisors', hands by virtue of their office and how the same had been expended; and by section 15 of said chapter it was provided that one-third of all moneys paid into the county treasury in discharge of road tax should constitute a county road fund, which should be at the disposal of the county commissioners for the general benefit of the county for road purposes; and that the other two-thirds of all moneys paid into the county treasury in discharge of road tax should constitute a district road fund, which should be expended only in the road district from which it was collected.

It will thus be seen that whatever money the treasurer of Valley county had in his hands belonging to the road districts, on which the warrants in suit were drawn, he held in trust for such road districts, and such money was at the disposal of the supervisors of said road districts, and at their disposal only. In other words, the chairman of the board of county commissioners had no authority to draw a warrant against money in the hands of the county treasurer belonging to the various road districts of the county. He had no more authority to draw a warrant against the money belonging to the road districts of this county than any other citizen of the county had; nor did he have any more authority to draw warrants against the road funds in the county treasurer's hands to pay the debts

of said road districts than he had to draw a warrant against the funds of a school district in the treasurer's hands for the payment of a debt owing by such school district. Warrants issued by the county commissioners for a purpose not within their jurisdiction are void and do not bind the county. (*Walsh v. Rogers*, 15 Neb., 309.) The warrants sued upon were void. The petition did not state a cause of action. The district court was right in dismissing the action and its judgment is

AFFIRMED.

HARRISON, J., having presided on the trial in the court below, offered no opinion.

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2. Defendant cannot complain because the court did not charge the jury that the burden of proof upon a certain issue was upon plaintiff, where the instructions given did not imply the contrary. *Laing v. Nelson* 253

Carriers. See STREET RAILWAYS.

1. Where property delivered to a common carrier for shipment is destroyed *in transitu*, the measure of the shipper's damages is the market value of the property at the place of destination at the time it should have been delivered. *Atchison, T. & S. F. R. Co. v. Lawler* 356
2. Rulings on evidence relating to measure of damages for destruction of property destroyed *in transitu*, character of goods, and authority of person to go with the car, *held*, to be without error. *Id.*

Carriers—*concluded.*

3. A contract between shipper and carrier limiting liability of latter for damages to the the goods shipped, resulting from carrier's negligence, is void. *Id*..... 357

Certificates of Deposit. See NEGOTIABLE INSTRUMENTS.

Challenges. See JURY, 3.

Character. See CRIMINAL LAW, 1.

Charge. See GRAND JURY, 1.

Charters. See MUNICIPAL CORPORATIONS, 4.

Chattel Mortgages. See ATTACHMENT, 11. REPLEVIN, 11. VOLUNTARY ASSIGNMENTS.

1. The mortgagor may recover damages caused by illegal sale of chattels. *Buffalo County Nat. Bank v. Sharpe*..... 123
2. The legal title to mortgaged chattels remains in the mortgagor until divested by foreclosure. *Musser v. King*..... 893
3. A mortgage of chattels to be thereafter acquired is invalid as against purchasers and attaching creditors of the mortgagor. *Steele v. Ashenfelter*..... 770
4. The assignment and delivery of a note as collateral will carry the mortgage also; and the assignee may sue in his own name. *Kavanaugh v. Brodball*..... 875
5. When permitted by the terms of the mortgage the foreclosure sale may be made in a different county than that in which the goods were mortgaged if the mortgage has been filed in the county where the sale is to be made. *Buffalo County Nat. Bank v. Sharpe*..... 123
6. A debtor in failing circumstances, acting in good faith, may lawfully prefer certain creditors and secure them by chattel mortgage. *Hewitt v. Commercial Banking Co*..... 820
7. In an action by a mortgagee to recover attached chattels from a sheriff, the latter cannot recover merely upon a finding that the value of the goods was sufficient to satisfy both mortgage and attachment. *McDonald v. Bowman*..... 269
8. In replevin by the holder of a mortgage to recover the chattels from a person other than the mortgagor, there is no presumption that the latter was the owner or in possession at the time the mortgage was given. *Musser v. King*..... 892
9. A mortgage gives to the mortgagee no right of possession of the chattels mortgaged when the note secured is

Chattel Mortgages—*concluded.*

wholly without consideration. *McGhee v. First Nat. Bank of Tobias* 92

10. Declarations of a mortgagor, made after the execution of the mortgage, are admissible in an action between the mortgagee and creditors of the mortgagor for the purpose of establishing fraudulent intent of latter. *McDonald v. Bowman* 270

11. If such declarations are made while the mortgagor remains in possession of the property, they are admissible as part of the *res gestæ*. *Id.*

Checks. See TAXATION, 7.

Christian Science. See PHYSICIANS AND SURGEONS.

Cities. See MUNICIPAL CORPORATIONS.

Collateral Security. See BANKS AND BANKING, 1–4. REPLEVIN, 11.

Collectors. See TAXATION, 2, 3, 7.

Commissions. See REAL ESTATE AGENTS.

Compromise. See FRAUDULENT CONVEYANCES, 6.

Concurrent Insurance. See INSURANCE, 9.

Condemnation Proceedings. See EMINENT DOMAIN.

Confirmation. See EXECUTION SALES. JUDICIAL SALES.

Consideration. See CHATTEL MORTGAGES, 9. HUSBAND AND WIFE. INFANCY, 6, 7, 9. MORTGAGES, 1. SUBSCRIPTION. USURY, 4.

Conspiracy.

The record examined, and found to contain no evidence to support the verdict against part of defendants. *Hardin v. Sheuey* 623

Constables. See REPLEVIN, 1.

1. It is the duty of a constable to exercise all reasonable diligence necessary to a compliance with the mandates of an execution intrusted to him for the satisfaction of a judgment. *Steele v. Crabtree* 420

2. A constable is liable to an execution creditor for damages resulting from negligence in seeking out and levying upon available property of defendant under an execution in his hands. *Id.*

3. Notice of an application to enjoin execution, and reliance of constable upon false representation of defendant in re-

Constables—*concluded.*

gard to appeal from, and stay of, judgment upon which the execution was issued, are not sufficient excuses for failing to make a levy. *Id.*

4. The failure of a constable to levy upon property subject to execution under a writ in his hands is not excused by a subsequent demand on plaintiff for an indemnity bond, and it matters not that the bond was refused. *Id.*

5. Sec. 189 of the Code, requiring defendant to give notice within twenty-four hours that he excepts to replevin bond, does not apply to an undertaking approved by a constable in an action pending before a justice of the peace. *Thomas v. Edgerton* 25

Constitutional Law. See CRIMINAL LAW, 7–9. SUPREME COURT.

1. Secs. 985 and 1017 of the Code, forbidding appeals from justices where judgment for twenty dollars or less is claimed in cases tried to a jury, are not unconstitutional. *Moise v. Powell* 672

2. An act appropriating a definite sum of money to reimburse a county for expenses of a murder trial, and directing the auditor to draw a warrant in favor of the county treasurer for the amount appropriated, is not unconstitutional. *State v. Moore* 854

3. Sec. 25, ch. 80, Comp. Stats., in so far as it attempts to authorize the state treasurer alone to invest moneys in his hands belonging to the permanent educational funds of the state, contravenes sec. 1, art. 8, of the constitution. *State v. Bartley* 298

Contempt.

Where a court gives an inflammatory charge to a grand jury, attorneys for a person indicted thereby, who in good faith allege in respectful language that the charge is inflammatory, and move to quash the indictment on that ground, are not guilty of contempt. *Clair v. State* 534
Cobb v. State 545

Contests. See ELECTIONS.

Continuance.

1. Allowance of continuance is discretionary with trial court. *Home Fire Ins. Co. v. Murray* 601

2. Applications for continuances or postponements of hearings are addressed to the discretion of the court and will not be reviewed except for abuse of discretion. *Nebraska Loan & Trust Co. v. Hamer* 282

Continuance—*concluded.*

3. The provision of sec. 961 of the Code, for continuance in justice court for a period not exceeding ninety days, has no application to causes in the county court proper and not within the jurisdiction of the county judge as a justice of the peace. *Strickler v. Foegel* 773

4. Causes pending in the county court are continued by operation of law from term to term until disposed of. *Id.*

Contracts. See BANKS AND BANKING, 7. CARRIERS, 3. COUNTIES, 3. DEEDS. INFANCY. JUDICIAL SALES, 13. MECHANICS' LIENS, 6. MUNICIPAL CORPORATIONS, 6. PRINCIPAL AND AGENT, 2. RELEASE AND DISCHARGE. SALES, 2–4. SCHOOL LANDS. SPECIFIC PERFORMANCE. STATUTE OF FRAUDS. SUBSCRIPTION.

1. Specific performance of a contract will generally be enforced only as the contract was made by the parties. *Rice v. Gibbs* 264

2. Evidence *held* not to prove a return of property or notice of an election to rescind a contract of sale within a reasonable time. *Jones v. Wessel* 116

Contributory Negligence. See NEGLIGENCE. STREET RAILWAYS.

Conversion. See TRUSTS.

Conveyances. See BOUNDARIES. DEEDS. EXECUTION SALES. FRAUDULENT CONVEYANCES. SPECIFIC PERFORMANCE.

Corporations. See ADVERSE POSSESSION, 2. MUNICIPAL CORPORATIONS.

1. A corporation is not chargeable with knowledge, or bound by the acts of an officer in a matter in which he acts for himself. *Buffalo County Nat. Bank v. Sharpe* 123

2. Agents of corporations have no implied authority to give away corporate property or create corporate obligations gratuitously. *Robertson v. Buffalo County Nat. Bank* 235

3. Under the subscription contract set out in opinion the subscribers promised to take and pay for stock of a corporation *de jure*, not of a corporation *de facto* thereafter to be organized. *Capps v. Hastings Prospecting Co* 470

4. A *de jure* corporation is one whose right to exercise a corporate function would prove invulnerable if assailed by the state in *quo warranto* proceedings. *Id.*

5. Corporation *de jure* did not exist where there had been a failure to file articles in the office of the county clerk of

Corporations—*concluded.*

the county in which the principal place of business was to be located. *Id.*

6. A subscription of stock to preliminary articles of association, not purporting to be a contract with an existing corporation, does not estop the subscriber from afterwards denying the legal existence of the corporation in a suit by the alleged corporation upon the subscription. *Id.* 471

Costs. See INSURANCE, 16.

Fees of guardian *ad litem* should be allowed by the court and taxed and collected as costs. *Englebert v. Troxell* 196

Counsel. See ATTORNEYS. INFANCY, 6–8.

Counties. See CONSTITUTIONAL LAW, 2. HIGHWAYS. REWARD. TAXATION.

1. Injunction lies at suit of taxpayer to restrain issuance and payment of a warrant for an illegal purpose. *Ackerman v. Thummel* 95
2. Warrants issued by a board of county commissioners for a purpose not within their jurisdiction are void and do not bind the county. *Oakley v. Valley County* 900
3. Under sec. 83, ch. 78, Comp. Stats., an increase of five hundred dollars from the contract price for the erection of a bridge cannot be enforced when the increase was contracted for without bids. *Townsend v. Holt County* 852

County Clerks. See COUNTIES.

County Court. See CONTINUANCE, 3, 4.

County Judges. See TRUSTS.

County Treasurer. See COUNTIES. TAXATION.

Coupons. See MORTGAGES, 10.

Courts. See ACTIONS, 2. CREDITOR'S BILL. GRAND JURY, 1–3. JUDICIAL SALES, 8. REVIEW, 37. SUPREME COURT.

Credibility. See WITNESSES.

Creditors. See BANKS AND BANKING, 1–4.

Creditor's Bill.

1. The state is not a proper party to bring an action in the nature of a creditor's bill to determine the *bona fides* of conveyances of property claimed by a receiver to belong to the assets of an insolvent state bank. *State v. State Bank of Wahoo* 192
2. Supreme court has no original jurisdiction in such a case. *Id.*

Criminal Law. See GRAND JURY. JURY, 3. LARCENY. RAPE.

1. Where one's character is in question, only evidence of his general reputation is admissible. Knowledge of a witness, gained by personal acquaintance or dealings, may be excluded. *Berneker v. State*..... 810
2. An assignment that the court erred in admitting evidence of defendant's receiving property at dates subsequent to the receiving for which he was convicted, is too indefinite, because it fails to designate any specific testimony of which complaint is made. *Id.*
3. The indorsement of the name of a witness on the copy of the information in record for review raises the presumption that such indorsement was made at the proper time. *Id.*
4. The admission of incompetent testimony to prove a fact is harmless error, where such fact is established by other evidence. *Lamb v. State*..... 312
5. A conviction may rest on the uncorroborated evidence of an accomplice, when, considered with all the testimony, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. *Id.*
6. Where a jury returns into court and asks to have the evidence of certain witnesses for the state read by the reporter from his notes, it is error for the court to direct the evidence to be read in absence of defendant's counsel who was not notified of the procedure. *Bartell v. State*..... 232
7. By the word "district," as used in sec. 11, bill of rights, providing place of trial in criminal cases, is not meant "judicial district," but that portion of the territory of the state over which a court may at a particular sitting exercise power in criminal matters. *State v. Crinklaw*..... 759
8. The word "district," as used in sec. 11, bill of rights, may, and generally does, refer to the county where the crime is supposed to have been committed, but also includes any and all territory, by law, attached to such county for judicial purposes. *Id*..... 760
9. The constitutional right to a trial before a jury of the county or district where the crime is alleged to have been committed is a mere personal privilege of the accused, and may be waived by him. *Id.*
10. Recognizance set out in opinion *held* sufficient to comply with sec. 324 of the Criminal Code, providing for appeal from magistrate imposing fine or imprisonment. *Shupe v. State*..... 524

Criminal Law—*concluded.*

11. Under sec. 388, Criminal Code, a recognizance is not invalidated by reason of defects in the form thereof, if it appear at what court the party was bound to appear and that the court or officer before whom it was taken had the power to require and take it. *Id.*

Crops. See EXECUTION SALES, 5. MORTGAGES, 2.

Cross-Bills. See PLEADING, 7.

Cross-Examination. See FRAUDULENT CONVEYANCES, 4. WITNESSES, 3.

Crossings. See NEGLIGENCE, 6.

Damages. See CARRIERS, 1. CHATTEL MORTGAGES, 1. CONSTABLES, 2. EMINENT DOMAIN. HIGHWAYS, 1. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 1, 3, 5. RAILROAD COMPANIES, 2–5. REMITTITUR. REVIEW, 6. SLANDER.

In an action for personal injuries, when plaintiff proves his earning capacity where he resides, it is error to admit evidence of a greater earning capacity for the same period in towns where much higher wages were paid. *Omaha & R. V. R. Co. v. Ryburn*.....87, 89–91

Death by Wrongful Act. See RAILROAD COMPANIES, 5.

Declarations. See CHATTEL MORTGAGES, 10, 11.

Decrees. See JUDGMENTS. JUDICIAL SALES, 11. MORTGAGES, 12, 13. REVIEW, 35, 36.

Dedication.

The acts of the owners of land in platting it as an addition to a city, causing the plat to be recorded and conveying the land by deeds which describe the property as lots and blocks according to the plat, amount to a common law dedication to the public of that portion of the land reserved by the plat for streets. *Pillsbury v. Alexander* 242

Deeds. See BOUNDARIES, 3, 4. DEDICATION. INFANCY, 3, 6–8. STATUTE OF FRAUDS, 1.

Where a person makes with the state a contract for a deed to school land, plats the land, conveys certain lots by warranty deed and assigns the contract to another, the state subsequently conveying title to the assignee, the legal title acquired by the latter passes at once, by operation of law, to the grantee under the warranty deed by a conveyance from the assignee to the original holder of the contract. *Pillsbury v. Alexander*..... 242

Default. See EJECTMENT, 2. JUDGMENTS, 3. MORTGAGES, 9.

When a petition states a cause of action it is error to render judgment in favor of a defaulting defendant. *Bouscaren v. Brown* 722

Deferred Payments. See VENDOR AND VENDEE.

Deficiency Judgments. See MORTGAGES, 5–9.

Delinquent Taxes. See TAXATION, 2, 3.

Demurrer. See PLEADING, 6.

Description. See BOUNDARIES, 3, 4.

Directing Verdict. See TRIAL, 1.

Disaffirmance. See INFANCY.

Discretion. See CONTINUANCE, 2. GRAND JURY, 1. JUDGMENTS, 3. SPECIAL FINDINGS.

Dismissal. See APPEAL, 10. CRIMINAL LAW, 10. REVIEW, 25.

District Courts. See JUDGMENTS, 4.

Dividends. See BANKS AND BANKING, 1–4.

Documentary Evidence. See EVIDENCE, 5.

Donations. See BANKS AND BANKING, 7.

Ejectment.

1. Plaintiff must rely upon the strength of his own title and not upon the weakness of that shown by the adversary. *Bigler v. Baker* 326
2. Where vendor puts vendee in possession under a parol agreement of sale and the latter makes lasting and valuable improvements, such facts amount to a performance of the contract by him and are a sufficient defense in ejectment by vendor, notwithstanding default in payment for land. *Id.*
3. Payment of purchase money and interest into supreme court by defendant in ejectment made condition of affirmance of judgment in his favor. *Id.* 339

Elections. See RAILROAD COMPANIES, 1.

The party introducing ballots in evidence in a contest case must show that they have been preserved according to law, or that they have not been tampered with. *Martin v. Miles* 135

Electric Railways. See STREET RAILWAYS.

Eminent Domain. See HIGHWAYS. TRESPASS.

1. The valuation of property taken for a right of way for a railroad should be made as of the time of filing the petition for the assessment of damages. *Fremont, E. & M. V. R. Co. v. Bates*..... 381
2. Evidence to be considered in determining how much that part of a farm not taken has been depreciated in value by appropriation of right of way. *Id.*
3. On trial of appeal from an award in condemnation proceedings, testimony to prove rental value of farm after appropriation of right of way is competent to show depreciation in the value of the farm by the exercise of the right of eminent domain. *Id.*

Equity. See ACTIONS, 2. INJUNCTION, 2. SPECIFIC PERFORMANCE.

Error. See APPEAL.

Error Proceedings. See INSTRUCTIONS, 8. NEW TRIAL, 2. REVIEW.

Original evidence cannot be received in supreme court to contradict or alter the record of the district court. *McDonald v. Bowman*..... 269

Estoppel. See ATTACHMENT, 10. EVIDENCE, 4, 7. INSURANCE, 3, 5. JUDICIAL SALES, 5. LACHES. MECHANICS' LIENS, 6. RES ADJUDICATA. SPECIFIC PERFORMANCE, 2.

1. In a suit on a supersedeas bond the surety is estopped from alleging that a petition in error and transcript had not been filed in the supreme court by his principal at the time of the execution of the bond as recited therein. *Dunterman v. Storey*..... 447
2. Persons subscribing for the stock of an association, then acting as and assuming to be a corporation, are estopped in a suit on such subscription from questioning the legal existence of such corporation. *Capps v. Hastings Prospecting Co*..... 470
3. To constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts, upon which it is sought to make the estoppel operate, were known to the party against whom the estoppel is urged and unknown to the party urging it. *Nash v. Baker*..... 294
4. Persons who plat an addition to a city, record the plat, sell part of the land and describe it in the deeds as lots and blocks according to the plat, are estopped from claim-

Estoppel—*concluded.*

ing title to the land reserved by the plat for streets, notwithstanding the plat was not acknowledged as required by sec. 105, ch. 14, Comp. Stats. *Pillsbury v. Alexander*... 242

Estrays. See LARCENY, 1.

Evidence. See ATTACHMENT, 6, 7. BOUNDARIES, 3, 4. CARRIERS, 2. CHATTEL MORTGAGES, 10, 11. CRIMINAL LAW, 1, 4–6. DAMAGES. ELECTIONS. EMINENT DOMAIN. ERROR PROCEEDINGS. HOMESTEAD, 1. INSURANCE, 1, 5, 6. NEGLIGENCE, 7. PLEADING, 3. REPLEVIN, 12, 13. SALES, 4. SLANDER. TAXATION, 4–7. TRESPASS, 3. WITNESSES, 4, 5.

1. Evidence of a parol agreement contradicting the plain terms of a promissory note is inadmissible. *Van Etten v. Howell* 850
2. Refusal to admit original answer in evidence where an amended answer has been filed, *held*, not prejudicial error in case discussed in opinion. *McGavock v. City of Omaha*...86, 87
3. Trial of an issue as to the true course of a river where it was not prejudicial error to exclude certified copy of original field notes. *Bouvier v. Stricklett*..... 792
4. The testimony of a witness in an action to which he was not a party may be proved in a subsequent action to which he is a party, as an admission. *German Nat. Bank of Hastings v. Leonard*..... 676
5. Book entries, made by a party in the regular course of his business, are admissible in evidence on behalf of the adverse party when in the nature of admissions. *Id.*
6. The testimony of a witness in another case may be proved by any witness who heard it. The reporter's notes are not the best evidence. *Id*..... 677
7. Expert testimony is not competent, and cannot be received upon a subject of inquiry of such a character as to be within the knowledge of men of common education and experience and to require no special skill, knowledge, or experience in considering or forming an opinion upon. *Atchison, T. & S. F. R. Co. v. Lawler*..... 356

Exceptions. See INSTRUCTIONS, 7, REVIEW, 32.

Execution Sales.

1. A purchaser of real estate, at a sale thereof on execution, acquires thereby, prior to confimation only, the lien which the execution debtor had on such land. *Yeazel v. White*... 432
2. Until sale is confirmed and a conveyance of the real estate

Execution Sales—*concluded.*

executed and delivered in pursuance of such confirmation, the legal title of the execution debtor is not divested. *Id.*

3. Under sale, confirmation, execution, and delivery of deed the purchaser obtains the same title to the real estate the execution debtor had at the time the judgment under which the land was sold became a lien thereon, except as affected by subsequent tax liens. *Id.*
4. The doctrine of relation back applies only to the title. It has no necessary reference to the *quantum* of the estate which the execution debtor owned at the time the judgment became a lien. *Id.* 433
5. The owner of real estate that has been sold on execution is entitled to the possession, rents, and profits of such real estate until confirmation of the sale. The purchaser cannot legally replevy from him a crop of wild grass that was harvested after the sale but before confirmation. *Id.*

Executions. See CONSTABLES. EXECUTION SALES. EXEMPTION, 2. HOMESTEAD, 4.

Exemption. See HOMESTEAD.

1. The head of the family may replevy exempt property when the requirements to obtain exemption rights have been complied with. *Starrett v. Deerfield* 846
2. The neglect or refusal of an officer, holding an execution, to call appraisers to determine the value of property levied upon, will not deprive the owner, who has filed an inventory according to sec. 522 of the Code, of his right of exemption, but the latter may sue for the value of the property. *Bender v. Bame* 521

Expert Evidence. See EVIDENCE, 7.

Explosives. See NEGLIGENCE, 7, 8.

Factors and Brokers. See REAL ESTATE AGENTS.

False Representations.

Hardin v. Sheuey 626

Father and Child. See INFANCY, 7.

Fees. See COSTS.

Field Notes. See BOUNDARIES, 2. EVIDENCE, 3.

Final Order. See REVIEW, 21.

Findings. See REPLEVIN, 8.

Fire Insurance. See INSURANCE.

Foreclosure. See CHATTEL MORTGAGES. MORTGAGES.

Foreign Corporations. See ADVERSE POSSESSION, 2.

Forum. See TAXATION, 3.

Fraud. See FRAUDULENT CONVEYANCES. STATUTE OF FRAUDS.

Will not be presumed but must be proved by party alleging it. *Bank of Commerce of Grand Island v. Schlotfeldt* 212
Carson v. Stevens 112

Fraudulent Conveyances. See CHATTEL MORTGAGES, 10, 11. CREDITOR'S BILL. HOMESTEAD, 4.

1. A creditor of the vendor who seeks to invalidate a sale upon the ground of fraud must prove facts from which a legitimate inference of fraudulent intent can be drawn. *Bank of Commerce of Grand Island v. Schlotfeldt* 212
2. An intention to defraud cannot be inferred merely from the fact a preference was given to a certain creditor. *Id.* *Hewitt v. Commercial Banking Co.* 820
3. Fraudulent intent in the execution of a chattel mortgage preferring certain creditors is a question of fact for the determination of the jury. *Id.*
4. In an action involving the *bona fides* of a conveyance of chattels from the husband to the wife where fraud upon creditors is alleged, it is error for the court to prevent a liberal cross-examination of the parties to the transaction. *Cox v. Einspahr* 411
5. The burden is upon the wife to establish by a preponderance of evidence that her husband's conveyances to her, after he contracted debts, were not fraudulent. *Carson v. Stevens* 112
6. Where a conveyance is fraudulent, and certain creditors attack it and defeat it upon that ground, another creditor is not required to treat it as void, but may still ratify it and enforce rights given him thereunder. *German Nat. Bank of Hastings v. Leonard* 676

Freeholders. See JUDICIAL SALES, 5.

Garnishment. See ATTACHMENT.

1. Is authorized by sec. 244 of the Code only after judgment upon which an execution has been returned unsatisfied. *Whitcomb v. Atkins* 549
2. Payment of money by a garnishee, in obedience to an order of a justice of the peace, entered in a case where summons in garnishment was issued before judgment had been rendered against defendant, is no defense in a subsequent action by defendant or his assignee. *Id.*

Gifts. See BANKS AND BANKING, 7. CONSTITUTIONAL LAW, 2.

Government Corners. See BOUNDARIES, 1, 2.

Grades. See MUNICIPAL CORPORATIONS, 1.

Grand Jury.

1. Wide discretion is allowed to presiding judge in directing attention to particular subjects of inquiry. *Clair v. State*, 534
Cobb v. State 545
2. A party indicted, who honestly believes that he has been prejudiced by an abuse of discretion of the trial judge in a charge to the grand jury, may, in respectful language, allege error therein without being guilty of contempt. *Id.*
3. The existence of facts which will warrant an indictment is a question for the grand jury, and should not, as a rule, be assumed by the judge. *Clair v. State* 535
4. Charge set out in the opinion merited the criticism that it was "inflammatory." *Id.*

Guaranty. See BANKS AND BANKING, 5, 6. MORTGAGES, 10. SALES, 2–4.

Guardian Ad Litem. See INFANCY.

Guardian and Ward. See INFANCY.

Habeas Corpus.

The writ is not a corrective remedy, and is never allowed as a substitute for appeal or writ of error. *State v. Crinklaw*, 759

Harvesting Machines. See SALES, 2–4.

Highways. See NEGLIGENCE, 6.

1. Damages assessed in establishing public roads should be paid out of the road fund belonging to the road district in which the land is situated. *Ackerman v. Thummel*..... 95
2. Under the revenue law of 1869 and the road law of 1866 (Gen. Stats., pp. 896, 950), money in the hands of a county treasurer belonging to a road district was at the disposal of the supervisors thereof. *Oakley v. Valley County*, 900

Homestead.

1. In an action to discharge the lien of an attachment, registration as a voter is not conclusive upon the question of residence. *Mallard v. First Nat. Bank of North Platte*..... 784
2. In order to establish the abandonment of a homestead there must be an intention to change the residence and an actual change. *Id.*

Homestead—*concluded.*

3. Sufficiency of evidence to sustain a finding that homestead had not been abandoned. *Id.*

4. Where the ownership of a homestead, exempt before rendition of a judgment, was by *mesne* conveyances transferred from the judgment debtor to his wife, the right of the wife to assert such homestead exemption was in no way affected by the fraudulent intent with which either of said conveyances was given or received. *Munson v. Carter*..... 417

Horse Railways. See STREET RAILWAYS.

Husband and Wife. See FRAUDULENT CONVEYANCES, 4, 5. MORTGAGES, 1. REPLEVIN, 2.

The extension of time of payment of her husband's past due indebtedness is a sufficient consideration to support wife's contract as his surety for such debt. *Smith v. Spaulding*, 339

Impeachment Expenses. See AUDITOR OF PUBLIC ACCOUNTS, 1.

Improvements. See EJECTMENT, 2.

Incorporation. See CORPORATIONS, 3.

Indemnity Bonds. See CONSTABLES, 4. LOST INSTRUMENTS.

Indictment and Information. See CRIMINAL LAW, 3. GRAND JURY, 3. LARCENY, 4. RAPE.

Allegations in an information which are immaterial and unnecessary may be treated as surplusage, and be entirely rejected. *Hall v. State*..... 320

Infancy. See NEGLIGENCE, 5.

1. All contracts of an infant except for necessaries are voidable at his election within a reasonable time after he becomes of age. *Englebert v. Troxell*..... 195

2. Validity of contract of infant does not depend upon ratification. To invalidate it after minority ends he must by some act disaffirm it. *Id.*

3. The bringing of a suit to cancel a deed made by plaintiff when a minor is a sufficient disaffirmance. *Id.*

4. In case discussed in opinion, services performed by a guardian *ad litem* in defending a suit brought to foreclose a real estate mortgage executed by the infant's ancestor were not necessaries. *Id.*

5. What is a reasonable time after majority within which to disaffirm a contract made during minority must be determined from the circumstances of the case. *Id.*

Infancy—*concluded.*

6. One seeking to disaffirm a contract on the ground that he was an infant at the time of its execution must return the consideration in his possession at the time of disaffirmance. He is not required to return the equivalent of what he disposed of during minority. *Id.* 196

7. Where a father receives the consideration for an infant's deed to land and with the money buys the infant a piano, the latter, when he arrives at majority and has retained the piano, is under no legal obligation, as a condition of disaffirmance of the deed, to return the piano to the vendee or tender back the purchase money. *Id.*

8. A deed made by an infant to his guardian *ad litem* for fees for services is voidable at the election of vendor when he becomes of age. *Id.*

9. The compensation allowed an attorney as guardian *ad litem* should be taxed as part of the costs in the case; and no other, different, or greater amount can be collected. *Id.*

10. There is no such thing as an innocent purchaser of minor's property. *Id.* 211

Information. See INDICTMENT AND INFORMATION.

Injunction. See RAILROAD COMPANIES, 1.

1. Lies at suit of taxpayer to restrain issuance by county clerk and payment by treasurer of a warrant for an illegal purpose. *Ackerman v. Thummel* 95

2. Whether complainants in equity have been guilty of laches in not suing sooner should be determined from the facts and circumstances of each case. *Richards v. Hatfield*, 879

3. An injunction should not be granted in supreme court on application of the receiver of an insolvent state bank to restrain a sheriff from selling property attached under process of a district court in an action where the receiver intervened and failed to obtain a favorable ruling upon a claim that the attached property belonged to the assets of the bank. *Arnold v. Weimer* 224

Insolvent Banks. See ATTACHMENT, 1, 2. BANKS AND BANKING, 1–4. CREDITOR'S BILL.

Instructions. See BANKS AND BANKING, 6. EMINENT DOMAIN. LARCENY, 5–7. NEGLIGENCE, 4. RAPE, 3. REVIEW, 5, 10. STREET RAILWAYS, 1, 2.

1. On question of negligence, set out in opinion, and approved. *Omaha Street R. Co. v. Duvall* 33, 34

Instructions—*concluded.*

2. Not complained of in motion for new trial cannot be reviewed in supreme court. *Dunphy v. Bartenbach* 143
3. Must be considered together, and if when so construed they state the law applicable, correctly, it is sufficient. *Blakeslee v. Ervin* 130
4. An instruction which leaves the jury at liberty to disregard a material fact established by the evidence is erroneous. *Bouscaren v. Brown* 723
5. Where a party does not request an instruction upon a particular subject he cannot complain because none was given. *Laing v. Nelson* 253
   German Nat. Bank of Hastings v. Leonard 676
6. Where the substance of an instruction has already been given it need not be repeated. *Atchison, T. & S. F. R. Co. v. Lawler* 357
   Murphy v. Gould 728
7. Instructions will not be reviewed in supreme court unless they were excepted to below. *Rector v. Canfield* 595
   Glaze v. Parcel 732
   Bourier v. Stricklett 792
8. In an error proceeding an assignment that the trial court erred in refusing to give a group of instructions asked will be considered no further than to find one of the group was properly refused. *Hiatt v. Kinkaid* 178
   Murphy v. Gould 728
   Hewitt v. Commercial Banking Co. 820
9. A misstatement of the law by the court in an instruction upon a material issue in the case is reversible error, even where the correct rule is stated in other paragraphs of the charge. *Carson v. Stevens* 112

Insurance. See RAILROAD COMPANIES, 5. REVIEW, 29.

1. Ordinarily, plaintiff in an action on a policy should establish that proof of loss was made according to the terms of the policy. *Western Home Ins. Co. v. Richardson* 1
2. Where the answer puts in issue the execution and delivery of the policy, the company thereby waives the terms relating to proof of loss. *Id.*
3. Where the insurer rejects proof of loss on the ground that it was not furnished in time, insufficiency thereof is unavailing. *Id.* 2
4. After a loss, when the company denies the validity of the policy and liability thereunder, a cause of action immedi-

Insurance—*continued.*

ately accrues in favor of insured, notwithstanding the policy contains a clause giving the insurer an option either to pay the loss or replace the property damaged within a specified time. *Id.*

5. In an action on a policy relieving the company from liability unless the premium be actually paid, it was *held*, under the evidence, that payment of premium after loss related back to date of tender, and that the insurer was estopped to deny liability. *Id.*

6. It is competent for the insured, who is acquainted with the value of property destroyed at time of fire, to testify thereto. *Id.*

7. Instructions in action to recover loss under cyclone insurance policy. *Home Fire Ins. Co. v. Murray* 601

8. Violation by insured of a provision in a policy prohibiting other insurance does not render the policy void, but voidable at the election of the insurer. *Hughes v. Ins. Co. of North America* 626

9. In an action upon a policy the violation of a provision which prohibits the insured from having other insurance is a defense, unless it be shown that the violation was brought about by fraud or mistake or has been waived by the insurer. *Id.*

10. Under a policy which limits the commencement of an action thereon to six months after the fire, and gives the company sixty days after proof of loss to make payment, limitation does not begin to run against insured until expiration of the sixty days. *German Ins. Co. of Freeport v. Davis* 700

11. Moving of tenants from insured building the night before a fire without knowledge or consent of insured did not defeat recovery under a provision making the policy void in case the premises become vacant and unoccupied, when the policy recited that the building was occupied by insured's tenant. *Id.*

12. A provision requiring notice and proof of loss is valid, and in an action on the policy plaintiff must prove it was complied with or waived by the company. *Id.*

13. Letter by secretary of company to holder of policy, set out in opinion, did not waive condition requiring proof of loss. *Id.*

14. Authority of adjuster must be shown where his acts are relied upon to establish waiver of proof of loss. *Id.*

Insurance—*concluded*

15. Where insured was orally examined by company's adjuster, and made statements which were reduced to writing, signed, and sworn to in the belief that he was complying with requirements of the policy for proofs of loss, whether the agent induced such belief and excused other proof, was for the jury to determine. *Hanover Fire Ins. Co. v. Gustin* 828

16. On rendering judgment on policy of insurance on real property a reasonable attorney's fee may be allowed and taxed as costs. *Id.*

17. Case where statement in application for policy that a watchman is kept upon the premises did not relieve the insurer from liability for loss caused by fire during watchman's absence. *Id.*

Interest. See USURY.

Intervention. See RECEIVERS, 5.

Inventory. See EXEMPTION, 2.

Issues. See APPEAL, 3. REVIEW, 20.

Joinder. See REVIEW, 35.

Joint Motion. See NEW TRIAL, 2.

Joint Occupancy. See MASTER AND SERVANT.

Journal Entries. See REVIEW, 33.

Judgments. See EXECUTION SALES. HOMESTEAD, 4. MORTGAGES, 5–9. PLEADING, 4. REPLEVIN, 6–8. RES ADJUDICATA. REVIEW, 16–25, 33–36.

1. Cannot be based on evidence not in issue by pleadings, unless the pleadings are amended. *McGavock v. City of Omaha*, 65

2. Unless execution is stayed by a strict compliance with statute the judgment creditor is entitled to immediate execution. *State v. Laflin* 441
Dunterman v. Storey 447

3. Rulings of trial courts in vacating judgments at the same term at which they were rendered are discretionary, and will not be reversed where there has been no abuse of discretion. *Bigler v. Baker* 325

4. A district court has no authority to vacate or modify its judgments after the term at which they were rendered, except as provided by statute and in the exercise of general equity powers. *Ganzer v. Schiffbauer* 633

5. Allegations of petition to vacate judgment after term at

Judgments—*concluded.*

which it was rendered, referred to in opinion, are not sufficient to show that petitioner was prevented by unavoidable casualty or misfortune from defending his suit, within the meaning of sec. 602 of the Code. *Id.*

6. In a suit commenced at a former term of court, a judgment, not entered by confession, is a lien from the first day of the term at which it is rendered, and the lien of a mortgage recorded during the same term, before entry of the judgment, is inferior thereto. *Norfolk State Bank v. Murphy*..... 735

Judicial Sales. See APPEAL, 4. EXECUTION SALES MORTGAGES, 2, 14. REVIEW, 19.

1. *Caveat emptor* applies to all judicial sales. *Norton v. Nebraska Loan & Trust Co.*..... 395
2. In proceedings to enforce a decree rendered in foreclosure of a real estate mortgage for less than the amount due, the deduction by appraisers, from the value of the property, of the balance omitted from the decree, as being a subsisting lien, vitiates the sale. *Schultz v. Loomis*..... 152
3. Where a sale has been vacated for irregularities, a second and higher appraisement under an alias order is not a valid ground of objection to confirmation. *Nebraska Loan & Trust Co. v. Hamer*..... 281
4. A sale will not be vacated for inaccuracies of recitals in the published notice which were in no way prejudicial to the parties or the purchaser. *Id.*
5. An appraiser was a freeholder where he took a deed as security and afterward, but before the appraisement, paid the grantor further money under an agreement that the deed should be treated as absolute. *Id.*
6. Whether the qualifications of an appraiser may be impeached by parol evidence to show that a deed to him, absolute on its face, was in fact a mortgage, *quære.* *Id.*
7. Where it does not appear that an appraisement is unfair, a sale will not be vacated because one of the appraisers misconceived the manner of estimating the value of the property. *Id.*
8. Courts should not set aside judicial sales to satisfy debts, because of depression in business or financial stringency. *Id.*
9. An order of confirmation may be made at an adjourned term of court, and at any reasonable time after the return of the order of sale, even though such return be made be-

Judicial Sales—*concluded.*

fore the expiration of the full period permitted for that purpose. *Id.*

10. An order of confirmation is so far final that a purchaser from the person to whom a deed has regularly issued thereunder is not bound by a subsequent revocation of the order upon proceedings commenced after he has acquired title. *Hollister v. Mann* 572

11. A judicial sale must be made in accordance with the decree of the court, and the terms of the decree cannot be changed by agreement, of parties or counsel, not incorporated into the record. *Nebraska Loan & Trust Co. v. Hamer* 282

12. The officer conducting a sale is not required to entertain any bids coupled with conditions not in conformity with the terms of the decree. *Id.*

13. Until a bid is accepted it is a mere proposal and may be withdrawn by the bidder. After acceptance it becomes a binding contract and cannot be withdrawn or changed except under such circumstances as would justify the rescission or reformation of other contracts. *Id.*

Jurisdiction. See ACTIONS, 2. APPEAL, 10. CONTINUANCE, 3. CREDITOR'S BILL. CRIMINAL LAW, 7–9. REVIEW, 29, 34, 37. SUPREME COURT. TAXATION, 3.

When the receiver of an insolvent bank intervenes in an action in the district court he submits to the jurisdiction thereof. *Arnold v. Weimer* 216
Arnold v. Globe Investment Co. 225

Jury. See ACTIONS, 2. CONSTITUTIONAL LAW, 1. CRIMINAL LAW, 6.

1. Right to jury trial in supreme court. *In re Petition of Attorney General* 410

2. Object of sec. 11, bill of rights, providing for a trial in a criminal case in the county or district where the crime is alleged to have been committed. *State v. Crinklaw* 759

3. Assignments of error based upon overruling challenges to jurors will not be considered unless the record discloses that the challenging party exhausted his peremptory challenge. *Blenkiron v. State* 11
Jenkins v. Mitchell 664

Justice of the Peace. See APPEAL, 7–10. CONTINUANCE, 3, 4.

Knowledge. See SPECIFIC PERFORMANCE, 2.

Laches.

Parties who caused or contributed to delay in bringing suit in equity cannot maintain the defense of laches. *Richards v. Hatfield* 879

Land Contracts. See DEEDS. SPECIFIC PERFORMANCE, 3. STATUTE OF FRAUDS, 2.

Landlord and Tenant. See STATUTE OF FRAUDS, 2.

1. *Dunphy v. Bartenbach* 151
2. Acceptance by lessor of rent from an assignee under a lease does not release the original lessee from a covenant to pay rent for a fixed period. *Bouscaren v. Brown* 722

Larceny.

1. To constitute larceny of an estray, converted to his own use by the finder, the felonious intent to misappropriate must have existed at the time of taking the estray into his possession. *Lamb v. State* 312
2. Where the felonious intent is formed after the possession of the animal is acquired, the finder is not guilty of larceny, although he subsequently appropriates the property to his own use. *Id.*
3. In a prosecution for larceny of a stray animal it is not necessary to the conviction of the accused that, at the time of the taking of the property, he should have known, or have had reason to believe, who was the owner. *Id.*
4. An indictment charging the accused with "stealing three hogs about eleven months old, weighing about one hundred seventy-five pounds each, each of the value of twelve dollars" is sufficiently definite. *Barnes v. State* 545
5. It is not error to instruct that the jury may convict on finding the defendant guilty of "stealing" the property described. *Id.*
6. An instruction defining larceny as at common law is faulty if it omits any essential element of the crime. *Id.* 546
7. An instruction which authorizes a conviction without a finding of felonious intent is erroneous. *Id.*

Law Firm. See ATTORNEY AND CLIENT.

Lawyers. See INFANCY, 8, 9.

Lease. See LANDLORD AND TENANT, 2. STATUTE OF FRAUDS, 2.

Legislative Appropriations. See CONSTITUTIONAL LAW, 2.

Levy. See CONSTABLES, 1–4.

Libel. See SLANDER.

License. See TRESPASS, 3.

Liens. See ATTACHMENT, 1, 3. ATTORNEYS' LIENS. JUDGMENTS. MORTGAGES.

Limitation of Actions. See ADVERSE POSSESSION, 1. INFANCY, 5. INSURANCE, 10. MECHANICS' LIENS, 1. TRESPASS, 2.

Sec. 19 of the Code, providing when actions shall be deemed commenced, does not apply to limitations made by agreement. *Home Fire Ins. Co. v. Murray* 597

Lis Pendens. See JUDICIAL SALES, 10.

Loans. See PERMANENT SCHOOL FUND.

Lost Instruments.

1. Where an instrument negotiable by delivery is lost before maturity, a bond of indemnity should be required as a condition of recovery thereon. *Kirkwood v. First Nat Bank of Hastings* 485
   Kirkwood v. Exchange Nat. Bank of Hastings 497
2. Where it is clearly shown that the instrument was payable to order and not indorsed, or that it was lost after maturity, no indemnity should generally be required. *Id.*

Malice. See SLANDER, 1.

Managers of Impeachment. See AUDITOR OF PUBLIC ACCOUNTS, 1.

Mandamus. See PERMANENT SCHOOL FUND.

1. Will not lie to compel managers to audit claims for expenses of impeachment. *Barry v. State* 171
2. Will lie to compel the auditor of public accounts to draw his warrant in favor of the beneficiary under a valid legislative act appropriating a definite sum of money for a specific purpose. *State v. Moore* 854
3. Will not issue when its effect would be to reverse or vacate an order made by a court or tribunal having jurisdiction, although the order may be palpably erroneous. *State v. Laflin* 442

Maps. See BOUNDARIES, 4.

Married Women.

A married woman may contract as surety for her husband. *Smith v. Spaulding* 339

Master and Servant.

Where two railroad companies jointly occupy the same tracks,

Master and Servant—*concluded.*

each is liable in damages for the injuries its employes inflict through negligence upon employes of the other company, in absence of negligence on the part of those injured. *Omaha & R. V. R. Co. v. Morgan* 604

Master Commissioner. See JUDICIAL SALES, 12. MORTGAGES, 14.

Maxims.

"*Caveat emptor*" applies to all judicial sales. *Norton v. Nebraska Loan & Trust Co.* 395

Measure of Damages. See CARRIERS, 1.

Mechanics' Liens.

1. A mechanic's lien will not be continued in force beyond the statutory period of two years except as to such persons, including mortgagees, as are made parties to an action to foreclose within such period. *Ballard v. Thompson*, 529
2. In all cases the summons must be issued before the bar of the statute is complete, although sufficient if served thereafter. *Id.*
3. The failure of an account and statement filed to show affirmatively that the filing is within the requisite time to secure the lien claimed, operates to defeat the relation back of the lien as against liens in existence before the account was filed. *Chappell v. Smith* 579
4. A recorded mortgage takes priority over liens for labor and material no part of which was furnished before the mortgage was filed. *Id.*
5. One who furnishes material is not excluded from the benefits of a lien solely because the materials were furnished to a subcontractor of a subcontractor. *Zarrs v. Keck* 456
6. A contract between builder and owner providing that all material and labor shall be paid for promptly by the contractor so as not to be the subject of a lien, and allowing the owner to retain, out of any payment due or to become due, an amount sufficient to indemnify her against any claim for materials or labor, does not estop the contractor from claiming a lien. *Id.*

Medicine. See PHYSICIANS AND SURGEONS.

Memoranda. See WITNESSES, 4.

Metropolitan Cities. See MUNICIPAL CORPORATIONS.

Minors. See INFANCY.

Misconduct of Attorneys. See ATTORNEYS.

Monuments. See BOUNDARIES, 1, 2.

Mortgages. See JUDGMENTS, 6. JUDICIAL SALES. MECHANICS' LIENS, 3, 4.

1. Extension of time to pay a husband's debt is a good consideration for a real estate mortgage upon the wife's individual property. *Buffalo County Nat. Bank v. Sharpe* 123
2. Mature corn crop, ungathered and not taken into account by appraisers, does not pass to purchaser at judicial sale of mortgaged premises upon which it is standing. *Foss v. Marr* 559
3. An assignment by a vendee in an executory contract for the sale of land, made to secure the payment of money, is in effect a mortgage of the vendee's interest in the real estate. *Burrows v. Hovland* 464
4. A mortgage executed and delivered in good faith, for a valuable consideration, takes precedence over another mortgage on the same property previously executed but afterwards recorded, where it appears that the second mortgagee had no notice of the first mortgage. *Id.*
5. Under prayer for foreclosure and general relief a personal judgment may be allowed for a deficiency. *Grand Island Savings & Loan Association v. Moore* 686
6. Where the prayer of a petition is for foreclosure and general relief, a motion, made after confirmation, for a deficiency judgment, with proper notice, will be treated as an amendment of the prayer. *Id.*
7. Deficiency judgment may be rendered against a purchaser of land who assumed and agreed to pay the mortgage debt as part of the consideration. *Id.*
8. A deficiency judgment will not be refused mortgagee because he knowingly procured too great an amount to be found due on the mortgage, where that finding was mutually disregarded in determining amount of deficiency. *Id.*
9. When authorized by the terms of a mortgage given to secure payment of a note, the mortgagee, after default in payment of interest, may declare the entire debt due and foreclose the mortgage or enforce personal liability on the note. *Id.* 687
10. Where a mortgagee sells and guaranties payment of the bond, and, after default in payments, takes up some of the interest coupons attached thereto, he may avail himself of the same remedies as existed before the sale, subject to the rights of the holder of the bond. *Burnett v. Hoffman* 569

Mortgages—*concluded.*

11. After default of defendants in a foreclosure suit the filing of an amended petition differing from the original only in omitting an averment of an election to declare debt due, is not operative to repudiate such election. *Schultz v. Loomis* 152
12. Strict compliance with statute is necessary to obtain stay of execution of decree in a foreclosure proceeding. If a delay in filing request beyond the limited time occurs, the right to the remedy is gone. *State v. Laflin* 441
13. The ruling of a district court, in recalling an order of sale and permitting defendant to file a stay in a foreclosure suit after twenty days from rendition of decree, is not void, but may be reviewed on error. *Id.* 442
14. A district court has power to appoint a person, other than the sheriff, as master commissioner, to make sale under decree of foreclosure. *American Investment Co. v. Nye* 720

Motions. See ATTACHMENT, 5–7. BILL OF EXCEPTIONS, 1, 2. NEW TRIAL. REVIEW, 38.

Motormen. See STREET RAILWAYS, 1, 2.

Municipal Corporations. See ESTOPPEL, 4.

1. A city must give notice of its proceedings to assess damages caused by a proposed change of grade, and of the time and place where appraisers are to meet. *McGavock v. City of Omaha* 64
2. Publication of an ordinance changing the grade of a street, where the ordinance makes no provision for time and place for the appraisers to meet, is not sufficient notice to abutting property owners. *Id.*
3. Appraisement proceedings without notice will not defeat an action at law by a property owner to recover damages resulting from change of grade of a street. *Id.*
4. Powers granted to a city may be exercised by a resolution of the council, where the mode of procedure has not been prescribed by the charter. *Id.*
5. An established grade of a street cannot be changed by an ordinance which fails to provide for the appointment of appraisers and assessment of damages as required by the city charter. *Id.* 65
6. The contract of a municipal corporation which is invalid when made, as in violation of some mandatory requirement of its charter, can be ratified only by an observance of the conditions essential to a valid agreement in the

Municipal Corporations—*concluded.*

first instance. *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla* 775

7. One who deals with a municipal corporation must, at his peril, take notice of the powers conferred by its charter, and whether the proposed indebtedness is in excess of the limitation imposed thereby. *Id.*

Mutuality of Contract. See SPECIFIC PERFORMANCE, 1.

National Banks. See BANKS AND BANKING. USURY.

Necessaries.

Englebert v. Troxell 196

Negligence. See CONSTABLES, 2. STREET RAILWAYS.

1. Order of submitting negligence and contributory negligence to jury in action to recover damages for personal injuries. *Omaha Street R. Co. v. Duvall* 32

2. Instruction on questions of negligence and contributory negligence set out in opinion and approved. *Omaha Street R. Co. v. Duvall* 33, 34

3. Issues as to negligence and contributory negligence, where the evidence is conflicting and from it different minds may reasonably draw different conclusions, are for the jury. *Omaha Street R. Co. v. Loehneisen* 37
Omaha & R. V. R. Co. v. Morgan 604
Chicago, B. & Q. R. Co. v. Wymore 645
Chicago, B. & Q. R. Co. v. Wilgus 660

4. It is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial and instruct that such fact or group of facts amounts to negligence *per se*. *Omaha & R. V. R. Co. v. Morgan* 604
Chicago, B. & Q. R. Co. v. Olsen 889

5. The law does not require a child of tender years to exercise the same degree of prudence and care for its safety that is required of a person of mature age and discretion. *Omaha & R. V. R. Co. v. Morgan* 605

6. Railroad companies are liable for damages resulting from their negligence in maintaining crossings over public highways. *Omaha & R. V. R. Co. v. Ryburn* 87

7. A verdict for damages for negligence may be supported by inference, but the inference must be the logical, probable, and reasonable deduction from proved or conceded facts. *Kilpatrick v. Richardson* 478

8. Where a railroad company deposits torpedoes in its unten-

Negligence—*concluded.*

anted section house and shuts and securely fastens the doors and windows thereof, and children improperly obtain access and remove torpedoes which subsequently explode and injure them, the company is not liable for damages. *Slayton v. Fremont, E. & M. V. R. Co.* 840

Negotiable Instruments. See BANKS AND BANKING, 5, 6. EVIDENCE, 1. LOST INSTRUMENTS. MORTGAGES, 9. REPLEVIN, 11. USURY, 4.

1. A certificate of deposit of a bank, made payable to order or bearer, is negotiable, and a *bona fide* purchaser thereof for value before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper. *Kirkwood v. First Nat. Bank of Hastings,* 485
Kirkwood v. Exchange Nat. Bank of Hastings 497
2. The negotiability of a certificate of deposit is not destroyed by a stipulation that it is payable on return thereof properly indorsed, nor by a provision that it is payable in current funds, nor by a provision that it shall bear interest if left six months, but no interest after six months. *Id.*
3. A certificate showing amount of deposit; to whom payable in current funds on return of certificate properly indorsed; that deposit is not subject to check; rate of interest if left six months; no interest after six months, is overdue so as to charge purchasers with notice of equities, after the expiration of six months. *Id.*

New Trial. See INSTRUCTIONS, 2. REVIEW, 18.

1. Motion for new trial is necessary to obtain review on error. *Zehr v. Miller* 791
2. In an action by several plaintiffs, where there was a verdict against all, a motion for a new trial, made by them jointly, must be overruled if the verdict was correct against one of them. *McDonald v. Bowman* 270
Porter v. Sherman County Banking Co. 275

Notice. See BILL OF EXCEPTIONS, 3, 4. CONSTABLES, 5. CORPORATIONS, 1. INSURANCE, 12. JUDICIAL SALES, 4. MUNICIPAL CORPORATIONS, 1–3. SALES, 2–4.

Objections. See ABATEMENT. APPEAL, 3. INSURANCE, 3. REVIEW, 30. TRIAL, 6.

Office and Officers. See AUDITOR OF PUBLIC ACCOUNTS. CONSTABLES. PERMANENT SCHOOL FUND.

Officers. See BANKS AND BANKING, 7. CORPORATIONS, 1.

Official Bonds. See CONSTABLES, 5.

Onus Probandi. See BURDEN OF PROOF. FRAUDULENT CONVEYANCES, 5. REPLEVIN, 4.

Opening and Closing. See ATTACHMENT, 5.

Opinion Evidence. See EVIDENCE, 7.

Optional Contracts. See VENDOR AND VENDEE.

Orders of Sale. See MORTGAGES, 12, 13.

Ordinances. See MUNICIPAL CORPORATIONS, 2, 4, 5.

Original Jurisdiction. See SUPREME COURT.

Overruled Cases. See TABLE, *ante*, p. xxiii.

Parent and Child. See RELEASE AND DISCHARGE.

Parol Evidence. See BOUNDARIES, 3, 4. JUDICIAL SALES, 6.

Parties. See EXEMPTION, 1. MECHANICS' LIENS, 1. MORTGAGES, 10. RECEIVERS, 1, 2. REVIEW, 35.

Partnership. See ATTORNEY AND CLIENT. REPLEVIN, 4, 5.

Payment. See GARNISHMENT, 2. TAXATION, 7. VENDOR AND VENDEE.

Penalties. See PHYSICIANS AND SURGEONS.

Permanent School Fund.

By sec. 1, art. 8, of the constitution the investment of the permanent school fund is under the management of the board of educational lands and funds. Authority to invest a portion of the fund cannot, by legislative enactment, be conferred upon the state treasurer or other person. *State v. Bartley* 298

Personal Injuries. See DAMAGES. MASTER AND SERVANT. NEGLIGENCE, 7, 8. RAILROAD COMPANIES, 4, 5. STREET RAILWAYS.

Petition in Error. See ATTACHMENT, 3. NEW TRIAL, 2. REVIEW.

Physicians and Surgeons.

Any person not within the exceptions prescribed in the act creating the state board of health (Laws 1891, ch. 35), and not having complied with its requirements as to a certificate, who shall, under any pretense, operate on, profess to heal, or prescribe for, or otherwise treat, any physical or mental ailment of another, is liable to its penalties. *State v. Buswell* 158

Plats. See BOUNDARIES, 2.

The plat of an addition to a city is not void because the owners of the land platted failed to acknowledge the plat. *Pillsbury v. Alexander* 242

Pleading. See ACTIONS, 2. ATTACHMENT, 4. INSURANCE, 2. JUDGMENTS, 5. MORTGAGES, 5–7. PRINCIPAL AND AGENT, 1. REPLEVIN, 3, 12, 13. REVIEW, 32. TRUSTS.

1. Material averments of petition stand admitted when no answer is filed. *Bouscaren v. Brown* 722
2. Allowance of amendment of pleadings is discretionary with trial court. *Home Fire Ins. Co. v. Murray* 601
3. Evidence on a point not in issue by the pleadings cannot be made the basis of a judgment unless the pleadings are amended. *McGavock v. City of Omaha* 65
4. An amended petition filed after answer day, in absence of appearance by, or notice to, defendants, forms no basis for a judgment against them. *Schultz v. Loomis* 152
5. Order permitting an amended answer to be filed will not be reviewed unless the record shows an exception. *Hiatt v. Kinkaid* 178
6. Demurrer to an answer will be carried back to the petition, and if the latter is defective the demurrer will be overruled. *Oakley v. Valley County* 900
7. Where the owner of a building fails to file an answer to the cross-bill of a material-man to foreclose a mechanic's lien, he cannot, on appeal, object to a finding in favor of the material-man. *Zarrs v. Keck* 456

Pleading and Proof.

An assertion that there is a fatal variance between the pleading and proof, should not have been made for the first time in the supreme court. *Smith v. Phelan* 765

Pledges. See REPLEVIN, 11.

1. A chattel mortgage is a pledge of personal property to secure the promise of the mortgagor or some one for whom he stands sponsor. *Musser v. King* 893
2. In the absence of special equities, a pledgee of personal property will not be required to exhaust his security before enforcing his personal remedy upon the debt. *Grand Island Savings & Loan Association v. Moore* 687

Policies. See INSURANCE. LIMITATION OF ACTIONS.

Possession. See STATUTE OF FRAUDS, 2.

Practice. See ATTACHMENT, 4–7. BANKS AND BANKING, 1–4. PLEADING, 6. TRIAL. VENUE.

Preferring Creditors. See CHATTEL MORTGAGES, 6.

Premium. See INSURANCE, 5.

Presumptions. See FRAUDULENT CONVEYANCES, 1, 2.

Principal and Agent. See STATUTE OF FRAUDS, 1. USURY, 5.

1. An averment that an agent was duly authorized is sustained by proof of subsequent ratification by his principal. *Bigler v. Baker* 326

2. The acceptance by a principal of the fruits of an unauthorized contract made by his agent is a ratification of the agent's act, and relates back to the date thereof. *Hughes v. Ins. Co. of North America* 627

Principal and Surety. See ATTACHMENT, 8–10. ESTOPPEL, 1. REVIEW, 24, 25.

Priorities. See JUDGMENTS, 6. MECHANICS' LIENS, 3, 4. MORTGAGES, 4.

Proceedings in Error. See APPEAL. ERROR PROCEEDINGS. REVIEW.

Promissory Notes. See USURY, 4.

Proofs of Loss. See INSURANCE.

Public Funds. See COUNTIES, 2. PERMANENT SCHOOL FUND.

Public Highways. See NEGLIGENCE, 6. STREET RAILWAYS.

Public Lands. See SCHOOL LANDS.

Public Roads. See HIGHWAYS.

Publication. See JUDICIAL SALES, 4. MUNICIPAL CORPORATIONS, 2.

Questions for Jury. See FRAUDULENT CONVEYANCES, 2, 3. GRAND JURY, 3. INSURANCE, 15. NEGLIGENCE, 3. STREET RAILWAYS, 5.

Railroad Companies. See CARRIERS. EMINENT DOMAIN. MASTER AND SERVANT. NEGLIGENCE, 8. STREET RAILWAYS. TAXATION, 1. TRESPASS.

1. If electors have been induced through fraudulent representations of the company's agents to vote bonds, issuance of the bonds will be restrained by injunction. *Nash v. Baker* 294

Railroad Companies—*concluded.*

2. Railroad companies are liable for damages resulting from their failure to maintain proper crossings at public highways. *Omaha & R. V. R. Co. v. Ryburn* 87

3. A railroad company does not discharge its whole duty by refraining from wantonly injuring a trespasser upon its track after observing his position. *Chicago, B. & Q. R. Co. v. Wymore* 646
Chicago, B. & Q. R. Co. v. Wilgus 660

4. A railroad company is bound to exercise reasonable care to avoid injuring persons who are known to be, or who may be reasonably expected to be, upon its right of way. *Chicago, B. & Q. R. Co. v. Wymore* 645
Chicago, B. & Q. R. Co. v. Wilgus 660

5. An agreement by a member of a relief department of a railroad company, that acceptance of benefits thereunder should operate as a release and satisfaction of all claims for damages against the company arising from injury or death, which could be made by him or his legal representatives, did not of itself waive a right of action. *Chicago, B. & Q. R. Co. v. Wymore* 646

Rape.

1. An information for assault with intent to commit rape need not allege the age of defendant, nor the age of the person assaulted, where it is charged that the act was committed forcibly and against her will. *Hall v. State*... 320

2. Such an information, where it is not averred that the act was done with force and against the will of the prosecutrix, must show at the time of the assault that she was under fifteen and the accused over eighteen years of age. *Id.*

3. In a prosecution for an assault with intent to commit rape, where non-consent of female and use of force by male under eighteen are charged, it is error to instruct the jury that the defendant is guilty whether the attempted intercourse was with or without the consent of the prosecutrix and whether any force was used or not. *Id.*

Ratification. See BANKS AND BANKING, 6. FRAUDULENT CONVEYANCES, 6. INFANCY. MUNICIPAL CORPORATIONS, 6. PRINCIPAL AND AGENT.

Real Estate Agents.

1. Where agents secure a purchaser of bank stock for a commission of all purchase money in excess of par value, they are entitled to recover from the seller the amount of divi-

Real Estate Agents—*concluded.*

dends already earned which he retains as part of the consideration in excess of the face of the stock. *Blakeslee v. Ervin* 130

2. Evidence, discussed in opinion, *held* sufficient to establish contract of employment on commission, and that the services were performed. *Id* 132, 133

Receipts. See TAXATION, 4-7.

Receivers. See BANKS AND BANKING, 1-4.

1. The receiver of a state bank cannot bring an action in the nature of a creditor's bill in supreme court in the name of the state to determine the *bona fides* of conveyances of property which he claims belongs to the assets of the bank. *State v. State Bank of Wahoo* 192

2. Such an action should be brought in the name of the receiver of the bank. *Id.*

3. The receiver of an insolvent bank takes the assets thereof incumbered with all valid liens thereon which attached prior to his appointment. *Arnold v. Weimer* 216
Arnold v. Globe Investment Co 225

4. The compensation of receivers of insolvent state banks for collecting collateral security of claimants shall be fixed by the supreme court and paid from the proceeds of collaterals. *State v. Nebraska Savings Bank* 355

5. The receiver of an insolvent bank who intervenes in an action to which the bank is a party, thereby submits himself to the jurisdiction of the court in which the action is pending. *Arnold v. Weimer* 216
Arnold v. Globe Investment Co 225

Receiving Stolen Goods.

Instruction containing reference to value of goods. *Berneker v. State* 812

Recitals. See ESTOPPEL, 1.

Recognizance. See CRIMINAL LAW, 10, 11.

Records. See APPEAL, 6. ERROR PROCEEDINGS. MORTGAGES, 4. REVIEW, 12. WITNESSES, 5.

Registration. See CHATTEL MORTGAGES, 5. MORTGAGES, 4.

Relation. See EXECUTION SALES, 3, 4. INSURANCE, 5. PRINCIPAL AND AGENT, 2.

Release and Discharge.

Under an agreement by a member of a relief department of

Release and Discharge—*concluded.*

a railroad company, that acceptance of benefits thereunder should operate as a release and satisfaction of all claims for damages against the company arising from injury or death, which could be made by him or his legal representatives, acceptance of benefits and release of damages by his widow bar a right of action in her favor, but not in favor of his children. *Chicago, B. & Q. R. Co. v. Wymore* 646

Religious Liberty. See PHYSICIANS AND SURGEONS.

Remittitur.

Where a verdict is too large and the amount of excess definitely appears from the record for review in supreme court, the party in whose favor the verdict was rendered, in absence of other error, may be permitted to remit the excess and have judgment for balance affirmed. *Omaha & R. V. R. Co. v. Ryburn* 91

Replevin. See CHATTEL MORTGAGES, 7. CONSTABLES, 5. EXECUTION SALES, 5.

1. An officer, to justify his possession of attached property, in an action of replevin, must show a regularly issued writ of attachment. *Spaulding v. Overmire* 21
2. When the necessary requirements to obtain exemption rights have been performed, the head of the family may replevy exempt property, irrespective of ownership, being that of husband or wife. *Starrett v Deerfield* 846
3. Under a general denial in replevin the defendant may show any facts tending to disprove the plaintiff's ownership or right of possession. *Jenkins v. Mitchell* 664
4. Where the defense is that plaintiff and defendant are partners and the property that of the partnership, the burden is on plaintiff to establish his exclusive right. *Id.*
5. Where one member of a firm replevies partnership property, the value of defendant's possession should be assessed at its full value. *Id.*
6. Where the jury finds for defendant, the judgment must be in the alternative for the return of the property or its value. *Goodwin v. Potter* 553
7. A verdict for defendant which does not assess the value of the property, or defendant's interest therein, is fatally defective, and a valid judgment cannot be entered thereon. *Id.*
8. Finding for defendant and rendition of money judgment thereon are erroneous in a case tried to a court upon a

Replevin—*concluded.*

stipulation of facts, where the court failed to fix the value of the property taken by plaintiff under the writ. *Foss v. Marr* 559

9. Plaintiff cannot recover unless he was entitled to possession of the property at the commencement of the action. *Kavanaugh v. Brodball* 875

10. Plaintiff must recover, if at all, on the strength of his own title. *Id.*

11. Where the payee of a note secured by a chattel mortgage assigns it as collateral security, he cannot maintain replevin to recover the chattels from a subsequent mortgagee during the time the note is held as collateral. *Id.*

12. Where plaintiff bases his right of possession on special ownership or lien, he should plead the facts. Evidence should correspond to the pleadings. *Musser v. King*..... 892

13. Under allegations of ownership and right of possession, where there is a general denial, note and chattel mortgage owned by plaintiff are not admissible to prove his case, the chattels having been replevied from one other than mortgagor. *Id.*

14. Where plaintiff claims possession under a chattel mortgage, it is error to admit evidence tending to prove irregularities in foreclosure by the plaintiff subsequent to the commencement of the action. *Smith v. Phelan*..... 765

Reporter's Notes. See CRIMINAL LAW, 6. EVIDENCE, 6.

Reputation. See CRIMINAL LAW, 1.

Res Adjudicata.

1. *German Nat. Bank of Hastings v. Leonard*..... 676

2. A judgment in full force is a complete bar to a subsequent action between the parties thereto, or their privies, upon the same subject-matter litigated in the first suit. *Spear v. Tidball*..... 107

Res Gestæ. See CHATTEL MORTGAGES, 11.

Rescission. See SALES, 1.

Resolutions. See MUNICIPAL CORPORATIONS, 4.

Revenue. See TAXATION.

Reversal. See REVIEW, 35, 36.

Review. See APPEAL. ATTACHMENT, 11. BILL OF EXCEPTIONS. CHATTEL MORTGAGES, 7. CONTINUANCE, 2. CRIMINAL LAW, 3. EJECTMENT, 3. EVIDENCE, 3.

Review—*continued.*

GRAND JURY, 2. HABEAS CORPUS. INSTRUCTIONS, 2, 5, 7. JURY, 3. MANDAMUS, 3. NEGLIGENCE, 7. NEW TRIAL, 2. PLEADING, 7. REMITTITUR. WITNESSES, 1, 2.

1. Briefs should not contain reflections upon the integrity of district judges. *Ganzer v. Schiffbauer* 633
2. Judgment in a case submitted to the supreme court without briefs or oral argument will be affirmed without an examination of the record. *Zimmerman Mfg. Co. v. Tower*, 306
3. Assignments in a petition in error not relied on in the briefs will be deemed waived. *Gill v. Lydick* 508
4. Errors assigned in petition will not be considered unless pointed out in the brief. *Glaze v. Parcel* 732
5. An assignment of error as to giving *en masse* certain instructions will not be considered further than to ascertain one of them was properly given. *Hiatt v. Kinkaid* 178
   McDonald v. Bowman 270
   Jenkins v. Mitchell 664
   Murphy v. Gould 728
   Armann v. Buel 803
   Berneker v. State 810
   Hewitt v. Commercial Banking Co 820
6. Inadequacy of damages found by the jury cannot be considered upon review when not assigned as error in the petition. *Oliver v. Chicago, B. & Q. R. Co* 845
7. In order to obtain a review of alleged errors the petition in error must assign the same with such particularity as to enable the court to determine the precise ruling complained of. *Hanlon v. Union P. R. Co* 53
8. An assignment, "Errors of law occurring at the trial and duly excepted to," is not sufficient in a petition in error to secure a review of rulings on evidence. *Murphy v. Gould*, 728
9. An assignment in a petition in error, that "the court erred in overruling the motion for a new trial," is too general where five distinct grounds are urged in the motion. *Glaze v. Parcel* 732
10. An assignment of error which does not specifically designate an instruction complained of will not be considered in supreme court. Reference by affidavits not made part of the bill of exceptions is insufficient. *Hewitt v. Commercial Banking Co* 820
11. An assignment in a petition in error, that "the court erred in its rulings upon the introduction of evidence offered by

Review—*continued.*

the plaintiffs," is not sufficient to present for review the several rulings of the trial court excluding or admitting testimony. *Corelyou v. Maben*..... 512

12. An objection that the verdict is not sustained by evidence, or is contrary to law, will not be considered upon a record from which the verdict has been omitted. *Hiatt v. Kinkaid*..... 178

13. Finding not clearly wrong, where the evidence is conflicting, will not be disturbed on review. *Zarrs v. Keck*..... 457
Armann v. Buel..... 803

14. Supreme court will not retry questions of fact on petition in error, but will affirm the judgment where the evidence is conflicting, if no questions of law are presented. *Bartels v. Milleson*..... 118
Lancaster County v. Marshall..... 507

15. Verdict justified by evidence will not be reversed because of the comparative number of witnesses on each side. *Rector v. Canfield*..... 595

16. Where there is no general finding, and no special finding upon the issues upon which the form of a judgment depends, the judgment must be reversed. *Kirkwood v. First Nat. Bank of Hastings*..... 485
Kirkwood v. Exchange Nat. Bank of Hastings..... 497

17. Where the testimony is not preserved by a bill of exceptions, the supreme court will not examine the question of whether the verdict is sustained by the evidence. *Murphy v. Gould*..... 728

18. An affidavit used on hearing of a motion for a new trial cannot be considered upon review in supreme court, unless made a part of the bill of exceptions. *Berneker v. State*... 811

19. In an error proceeding to review in supreme court a ruling on a motion to vacate a judicial sale of real estate, only such questions as were presented to the lower court will be considered. *Norton v. Nebraska Loan & Trust Co*..... 394

20. Parties will as a rule be restricted in supreme court to the theory upon which the cause was prosecuted or defended in the court of original jurisdiction. *Smith v. Spaulding*, 339
Smith v. Phelan..... 765

21. Ruling denying appointment of master commissioner to sell mortgaged land is not subject to review in supreme court before the final decree of foreclosure is rendered. *American Investment Co. v. Nye*..... 720

22. The receiver of an insolvent bank who intervenes in an

Review—*continued.*

action in the district court can only have its judgment reviewed in the same manner as other litigants. *Arnold v. Weimer* 216

Arnold v. Globe Investment Co. 225

23. Filing approved supersedeas bond below and petition in error in supreme court does not suspend an order of the district court recalling an order of sale and permitting defendant to file stay after twenty days from rendition of decree of foreclosure. *State v. Laflin* 442

24. Where a surety on a supersedeas bond undertakes to pay the condemnation money and costs in case of affirmance of judgment, a failure of the principal to institute proceedings to review within the time fixed by statute operates as an affirmance. *Dunterman v. Storey* 447

25. The dismissal of an appeal from an appellate court without an examination of the case upon its merits operates as an affirmance of the judgment appealed from. *Id.* 448

26. Where a verdict is not sustained by any evidence, a judgment rendered thereon will be set aside. *Hardin v. Sheuey*, 626

27. Where a verdict is rendered for a sum much less than the amount shown by the evidence to be due, a judgment entered thereon will be set aside. *Porter v. Sherman County Banking Co.* 274

28. Proceedings below will not be reviewed on error in supreme court where there was no motion for a new trial. *Zehr v. Miller* 791

29. An order overruling a motion to dismiss a petition in an action to recover on an insurance policy, the ground of the motion being that the action was not commenced within the time limited by the policy, is conclusive when presented for review neither by a motion for a new trial nor a petition in error. *Home Fire Ins. Co. v. Murray* 597

30. Rulings sustaining objections to questions on direct examination cannot be reviewed where no statement was made to trial court of what was to be proved by the witness. *Western Home Ins. Co. v. Richardson* 11

31. No question for review arises upon a ruling sustaining an objection to an answer immaterial to the issues on trial. *Dunphy v. Bartenbach* 143

32. A ruling on an application for leave to file an amended answer cannot be reviewed where the record fails to show that an exception was taken thereto. *Hiatt v. Kinkaid* ... 178

33. A decree will not be reviewed until it has been formally

Review—*concluded.*

entered of record. Memorandum of judge is insufficient. *Ward v. Urmson* 695

34. Where the transcript of a judgment is the only paper filed in the supreme court authenticated by the certificate of the clerk of the district court, and the judgment was one within the jurisdiction of the lower court, it will be affirmed. *Moore v. Waterman* 498
Bell v. Beller 501

35. Judgment in supreme court remanding case where plaintiff in error is entitled to reversal, and cross-petition in error has been filed. *Porter v. Sherman County Banking Co* 275

36. In appeal cases, except where a jury trial is guarantied by the constitution, the supreme court upon a reversal may enter a proper decree, remand the case with directions to enter a specific judgment, retry particular issues, or proceed with a new trial of the whole case. *Id.*

37. In error proceedings, affidavits will not be received in supreme court to contradict the record of the district court. *McDonald v. Bowman* 269

38. In reviewing a ruling on a motion to vacate a judgment by default a stronger showing of abuse of discretion is required to justify reversal where the motion is sustained than where it is overruled. *Bigler v. Baker* 326

Reward.

Sec. 296, Criminal Code, authorizing counties to offer rewards for the detection or apprehension of persons charged with a felony, does not authorize the payment of such reward until conviction. *Anderson v. Pierce County* 481

Right of Way. See EMINENT DOMAIN, 3.

Riparian Rights.

1. Where the water of a river recedes imperceptibly, changing the channel of the stream and leaving the land dry, such land belongs to the riparian proprietor. In case the alteration takes place suddenly, the ownership remains according to former bounds. *Gill v. Lydick* 508

2. Where the middle of the channel of a stream constitutes the boundary line of land and the water undermines the banks and the soil caves in and is washed away, the owner must stand the loss; and the middle of the new channel thus formed will be the boundary. *Bouvier v. Stricklett* ... 793

3. Where a stream is the boundary of a tract of land, and it suddenly abandons its channel, and makes a new course by cutting across a bend, the middle of the old channel still constitutes the boundary. *Id.*

Road Districts. See HIGHWAYS, 2.

Roads. See HIGHWAYS.

Rules. See SUPREME COURT, 2.

Sales. See EXECUTION SALES. JUDICIAL SALES. VENDOR AND VENDEE.

1. One who seeks to rescind a contract is required to place the other party *in statu quo* by returning the property received within a reasonable time. *Jones v. Wessel*..... 116
2. Written notice that a harvesting machine failed to work need not be given to the seller's agent, although required by the contract of sale, where the agent's employes started and tested the harvester. *Sandwich Mfg Co. v. Feary*..... 226
3. Where an agent agreed to send a person to put a harvesting machine in order, he thereby waived the provision of the contract of sale, which required written notice to the agent in case the machine failed to work. *Id.*
4. The evidence, discussed in the opinion, *held* sufficient to sustain a finding that a purchaser of a harvesting machine, which failed to work, allowed the agent of the seller sufficient time before returning it to send a person to put it in order and that the person was not sent within a reasonable time. *Id.*

School Fund. See PERMANENT SCHOOL FUND.

School Land Contracts. See DEEDS.

School Lands.

1. The vendee in a contract for the sale of school land made to him by the state has such an interest in the land as may be made the subject of sale and mortgage. *Burrows v. Hovland*..... 464
2. The provision of a contract of sale, that an assignment shall not be valid unless indorsed on the contract, is for the benefit of the state, and the state only can insist upon a compliance therewith. The failure of the holder of a contract to make such an indorsement does not render an assignment by him void. *Id.*

Scienter. See LARCENY, 3.

Securities. See BANKS AND BANKING, 1–4.

Settlement. See RELEASE AND DISCHARGE.

Sheriffs. See CONSTABLES. JUDICIAL SALES, 12.

Sheriffs and Constables. See ATTACHMENT, 8–10. CONSTABLES. EXEMPTION, 2. REPLEVIN, 1. REWARD.

Shipments. See CARRIERS.

Slander.

1. In an action for slander, the case being one of qualified privilege, evidence of the falsity of the charges is admissible to show malice. *Laing v. Nelson* 252
2. Where portions of the language used are actionable *per se*, plaintiff may be permitted to testify that the publications complained of caused him mental anxiety and suffering. *Id.*

Special Findings. See REVIEW, 16. TRIAL, 7.

It is within the discretion of a trial judge to submit or refuse questions for special findings of jury. Where there is no abuse of discretion his ruling will not be reversed. *Atchison, T. & S. F. R. Co. v. Lawler* 356
Murphy v. Gould 728

Specific Performance.

1. Want of mutuality is no defense where the party not bound thereby has performed all of the conditions of the contract and brought himself clearly within its terms. *Bigler v. Baker* 326
2. In an action brought by a vendor against a vendee to enforce a contract to purchase real estate, the defendant is estopped from alleging against plaintiff's title defects brought to his knowledge at the time the contract was made, and where he contracted to purchase the land incumbered with the defects in the title. *Pillsbury v. Alexander* 243
3. The assignee of an optional contract for the sale of land cannot substitute his own personal liability for that of the original vendee and compel a conveyance upon tender of his own notes for the deferred payments. *Rice v. Gibbs*... 264

State and State Officers. See AUDITOR OF PUBLIC ACCOUNTS.

State Banking Board. See ATTACHMENT, 1.

State Banks. See BANKS AND BANKING, 1–4.

State Board of Health.

Act creating, construed. *State v. Buswell* 158

State Contracts. See DEEDS.

State Officers. See PERMANENT SCHOOL FUND.

Statute of Frauds.

1. The deed of an agent, executed in the presence and under

Statute of Frauds—*concluded.*

the direction of his principal, is not within the statute, and is not void for the reason that the execution thereof was not authorized in writing. *Bigler v. Baker*..... 326

2. Continued possession by a tenant is not such a part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. Possession, to have such an effect, must be clearly shown to refer to and result from the contract and not the lease. *Id.*

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See CONSTITUTIONAL LAW, 3. TABLE, *ante*, p. xlvii.

Stay. See MORTGAGES, 12, 13.

Stealing. See LARCENY.

Stock. See CORPORATIONS.

Stockholders. See CORPORATIONS.

Street Railways. See NEGLIGENCE.

1. If a motorman, in the exercise of reasonable care, could have seen plaintiff in time to check his car before it collided with plaintiff's horse, the company, in absence of contributory negligence on part of plaintiff, is liable in damages for injuring plaintiff. *Omaha Street R. Co. v. Duvall*... 29

2. If the injury resulted from the sudden fright of plaintiff's horse, by reason of which the animal sprang in front of a moving car, and the motorman could not have checked the car in time to prevent a collision, the company is not liable. *Id.*

3. The violation of statutes or city ordinances regulating the speed of street cars may be made the foundation of an action by a person protected by such legislation, who has been specially injured through such violation. *Id.*

4. Street railways have no such proprietary interest in that portion of the street occupied by their tracks as limits the right of the public to use the same as part of the public highway. *Id.*

5. Whether an injury resulting from the joint use of the company and public of streets occupied by tracks is attributable to the negligence of the company is a question of fact for the jury. *Id.*

Streets. See ESTOPPEL, 4. MUNICIPAL CORPORATIONS, 1–5.

Subcontractors. See MECHANICS' LIENS, 5.

Subscription. See BANKS AND BANKING, 7. CORPORATIONS, 3-6.

The promise of each subscriber is a good consideration for the promise of the others, and is enforceable in an action by the person to whom the subscription runs when the latter has complied with its terms. *Armann v. Buel* 803

Summons. See LIMITATION OF ACTIONS. MECHANICS' LIENS, 1, 2.

Summons in Error. See ATTACHMENT, 3.

Supersedeas. See ATTACHMENT, 3. ESTOPPEL, 1. REVIEW, 23, 24.

Supreme Court. See CREDITOR'S BILL.

1. The provision of sec. 2, art. 6, of the constitution, granting the supreme court original jurisdiction in civil cases where the state shall be a party, has been supplemented by sufficient legislation to provide the manner in which suit should be brought. *In re Petition of Attorney General*..... 402

2. Original jurisdiction will be entertained in such cases and on such terms as shall be prescribed by the orders of the court in each case before commencement of the action, and in accordance with rules already or hereafter adopted. *Id.*

Suretyship. See ATTACHMENT, 8, 9. CONSTABLES, 5. ESTOPPEL, 1. HUSBAND AND WIFE. REVIEW, 24, 25.

Surgeons. See PHYSICIANS AND SURGEONS.

Surveys. See BOUNDARIES, 1.

Table Cases Cited. See *ante*, p. xxvii.

Table Cases Overruled. See *ante*, p. xxiii.

Table Cases Reported. See *ante*, p. ix.

Table Statutes. See *ante*, p. xlvii.

Taxation. See COUNTIES.

1. Personal property of a railroad company outside of its right of way is required to be listed for taxation by the authorities of the counties in which it is situated. *Chicago, B. & Q. R. Co. v. Hitchcock County* 781

2. Where the legislature has provided a means of enforcing payment of taxes, that remedy is exclusive. *Richards v. County Commissioners of Clay County* 45

3. A non-resident's property cannot be attached in York county for taxes levied in Clay county upon property removed therefrom where no claim had been forwarded to

Taxation—*concluded.*

York county or action authorized by the proper officers thereof. *Id.*

4. Payment of a tax, like any other fact, may be proved by the best evidence attainable. *Richards v. Hatfield* 879

5. A statutory tax receipt is only *prima facie* evidence that the taxes have been paid. *Id.*

6. The presumption of non-payment of taxes arising from the absence from the tax books of an entry of payment, as required by sec. 103 of the revenue law (ch. 77, Comp. Stats.), is not conclusive. *Id.*

7. Acceptance of check and receipt of money thereon by collector in payment of taxes operated as payment, though he failed to make the proper entry on the tax books, never issued the statutory receipt, and embezzled the money. *Id.*

Tender. See INSURANCE, 5. VENDOR AND VENDEE.

Time. See JUDGMENTS, 6. MORTGAGES, 12, 13.

Title. See DEEDS. TRESPASS, 3, 4.

Transcripts. See APPEAL, 4, 6. REVIEW, 12.

Treasurers. See TAXATION.

Trespass.

1. An action of trespass *quare clausum* can only be maintained where the plaintiff had title or possession at the time of the acts complained of. *Hanlon v. Union P. R. Co* 52

2. Where trespass consists of the occupation of the land by railroad tracks, and the entry and construction of the tracks is admitted to have been beyond the period of limitations, the plaintiff, to recover, must show title in himself. *Id.*

3. Evidence that a roadmaster in charge of the construction of a track promised a person who claimed to be the owner, he would be paid for the land occupied, is insufficient to prove a license from the claimant and a recognition of his title. *Id.* 53

4. A license will not be implied from the fact of occupancy for a long time without objection on the part of the claimant, the claimant relying on adverse possession during that period to establish his title. *Id.*

Trespassers. See RAILROAD COMPANIES, 3, 4.

Trial. See APPEAL, 3. ATTACHMENT, 4, 7. BURDEN OF PROOF. CONTEMPT. CRIMINAL LAW, 6. EMINENT DOMAIN. INSTRUCTIONS. JURY. LARCENY, 5–7. REVIEW, 30. SPECIAL FINDINGS. STREET RAILWAYS, 1, 2. WITNESSES.

1. The trial judge should direct a verdict for the defendant when there is no evidence to support plaintiff's alleged cause of action. *Slayton v. Fremont, E. & M. V. R. Co.*... 840
2. The omission of plaintiff to introduce a document essential to his case is cured when defendant afterwards puts it in evidence. *Western Home Ins. Co. v. Richardson*..... 2
3. It is not the proper practice to permit a witness to answer a question without objection and then move to have the testimony excluded. *Id.*
4. Where an objection to a question is sustained, the party desiring the evidence must offer to prove the facts sought to be introduced. *Berncker v. State*..... 810
5. Error in refusing to admit the evidence of a witness is cured by a subsequent admission of the same evidence by the same witness. *Atchison, T. & S. F. R. Co. v. Lawler*... 371
6. The sustaining of an objection to an answer immaterial to the issues on trial presents no question for review. *Dunphy v. Bartenbach*..... 143
7. In actions tried by the court there must be a general finding, and if requested by one of the parties a special finding, and if this finding be vague, uncertain, or indefinite, it will not support a judgment when attacked directly. *Kirkwood v. First Nat. Bank of Hastings*..... 485
   Kirkwood v. Exchange Nat. Bank of Hastings..... 497

Trusts.

A petition fails to state a cause of action to recover from a trustee interest and profits derived from depositing trust funds in a bank, where it fails to charge that any specified amount of interest or profit had in fact accrued to the trustee by reason of the deposit. *Stratton v. Turpenning*... 587

Ultra Vires. See BANKS AND BANKING, 5, 7. MUNICIPAL CORPORATIONS, 7.

Usury.

1. *Buffalo County Nat. Bank v. Sharpe*..... 127
   Van Etten v. Howell..... 851
2. Evidence, discussed in opinion, *held* to sustain a finding that the contract sued on is tainted with usury. *Parsons v. Babcock*..... 119

Usury—*concluded.*

3. Where a national bank loans money at a usurious rate which is included in the note, in an action to enforce the contract the interest is forfeited. *McGhee v. First Nat. Bank of Tobias* 92

4. A promissory note given for already accrued interest, in part usurious, is without consideration, and suspension of the right of collection between its date and maturity in no way operates to supply this essential element otherwise lacking. *Id.*

5. Where a partner or officer in a banking corporation is the agent of an individual, and as such collects rents and, under an agreement with the principal, invests the proceeds at usurious rates, keeping an account in the bank in which he deposits all sums realized, the bank cannot set up usury as a defense to an action by the principal against it to recover his deposits. *Porter v. Sherman County Banking Co* 274

Vendor and Vendee. See DEEDS. EJECTMENT, 2. EXECUTION SALES. FRAUDULENT CONVEYANCES, 1. INFANCY, 7, 8, 10. JUDICIAL SALES, 10. MORTGAGES, 7. SCHOOL LANDS, 2.

In order to enforce a conveyance by a vendor under a contract of sale, the vendee or owner of the contract must comply with its terms. Where a deferred payment is to be made in cash, notice by a third person to the vendor that a check has been deposited in a bank for acceptance upon delivery of the deed is not a sufficient tender. *Rice v. Gibbs* 265

Venue.

When the defendant in a criminal case makes application for a change of venue under the provisions of the Criminal Code, he thereby waives the constitutional right to a trial before a jury of the county or district where the crime is alleged to have been committed. *State v. Crinklaw* 760

Verbal Contracts. See STATUTE OF FRAUDS, 2.

Verdict. See REMITTITUR. REPLEVIN, 6, 7. REVIEW, 12, 27.

Voluntary Assignments.

Several mortgages covering all of mortgagor's chattels, executed and delivered simultaneously to secure different persons, do not constitute an assignment for the benefit of creditors. *Smith v. Phelan* 765

Votes. See ELECTIONS.

Wages. See DAMAGES.

Waiver. See ABATEMENT. APPEAL, 6. BILL OF EXCEPTIONS, 4. INSURANCE, 2, 5, 9–15.

Warrants. See AUDITOR OF PUBLIC ACCOUNTS, 2. COUNTIES, 2. PERMANENT SCHOOL FUND.

Warranty. See SALES, 2–4.

Watchmen. See INSURANCE, 17.

Waters and Water-Courses. See RIPARIAN RIGHTS.

Witnesses. See CRIMINAL LAW, 1, 5. EVIDENCE. FRAUDULENT CONVEYANCES, 4. TRIAL, 3, 5.

1. Permitting leading questions is discretionary with trial court. *German Nat. Bank of Hastings v. Leonard* 676
2. A motion to strike out an answer not responsive to the question should be made in order to predicate error. *Id.*
3. It is competent on cross-examination of a witness to interrogate him in regard to any interest he may have in the result of the trial. *Blenkiron v. State* 11
4. A memorandum prepared at the time of the fact in question or soon afterward, known by a witness to be correct at the time it was made, may be used by him to refresh his memory. *Atchison, T. & S. F. R. Co. v. Lawler* 356
5. One who has made an examination of the office or books where a record should be found, and shows sufficient knowledge of the subject, is competent to testify to the non-existence of the record. *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla* 775

Words and Phrases.

1. "Adjust." *State v. Moore* 861
2. "Character." *Berneker v. State* 810
3. "District." *State v. Crinklaw* 760
4. "Inflammatory." *Clair v. State* 534, 540
5. "Necessaries." *Englebert v. Troxell* 196
6. "Reasonable time." *Id.* 195
   Sandwich Mfg. Co. v. Feary 226
7. "Reimburse." *State v. Moore* 865
8. "Steal." *Barnes v. State* 545
9. "Taxes." *Richards v. County Commissioners, Clay County,* 45

Writs. See CONSTABLES.