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JOHN A. CREIGHTON V. SAMUEL FINLAYSON ET AL.

FILED NOVEMBER 19, 1895. No. 5559.

1. **Principal and Agent.** The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he has. (*Oberne v. Burke*, 30 Neb., 581.)
2. **Counter-Claim:** REMITTITUR. Evidence examined, and *held* to sustain the finding of the jury, that the contract made the basis of the defendant's counter-claim was made with defendant by plaintiff's agent, and that the making of such contract was within the scope of the agent's authority.

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

McCoy & Olmsted, for plaintiff in error.

George F. Witlum, contra.

RAGAN, C.

John A. Creighton sued Samuel Finlayson and his partner in the district court of Douglas county to recover $45.85, which he alleged was due him from the defendants for rent of room 13, in what is called the "Creighton Block," in the city of Omaha, from the 28th of April to the 23d day of June, 1888. Finlayson pleaded a counter-claim of $74 and had a verdict and judgment, to reverse which Creighton has prosecuted to this court a petition in error.

1. The first assignment of error is that the verdict is not supported by sufficient evidence. It was admitted on the trial that Finlayson was indebted to Creighton for rent in the sum of $45.85, and the only issue litigated related to Finlayson's counter-claim. The testimony tended to show, in behalf of Finlayson, that he and his partner had

been tenants of Creighton in said room 13 since the spring of the year 1885; that they were job printers and had in said room, during their occupancy of it, printing presses and printing material; that in the month of May, 1888, Creighton, by his agent, one Daugherty, wrote them a letter, stating that Creighton had been advised that the fire insurance companies had agreed to increase the risks of insurance more than 100 per cent on buildings, or property in buildings, in which were located printing establishments, and requesting Finlayson and his partner to secure other premises; that at divers times between that date and the 18th of June conversations and negotiations took place between Finlayson and Creighton, through his agent Daugherty, in reference to Finlayson moving out of the leased premises; and that, on the 18th of June, Daugherty agreed with Finlayson that if the partners would remove at once from the Creighton property, Creighton would pay the necessary expenses incurred in removing; that they did move out on the 23d of June; that the expenses necessarily incurred in moving were $74. The evidence on behalf of Creighton traversed the foregoing, but the evidence is sufficient to sustain the finding of the jury, that Creighton, through his agent, agreed with Finlayson that if he would move out of the leased premises, Creighton would pay the necessary expense of the removal, and the evidence is sufficient to sustain the finding of the jury that the necessary expenses of said removal were $74. It is insisted, however, by the plaintiff in error that if this contract was made, it lacked consideration. We do not think so. Looking at the situation of the parties, as disclosed by the evidence, if Creighton promised to pay the expense of the removal if Finlayson would at once remove and he did so, it certainly cannot be successfully urged that the contract lacked consideration to support it. Another argument is that the evidence does not show that Finlayson complied with his contract. The testimony is,

that Creighton's agent said, "If you will move right out, move right away," etc. It is now argued that Finlayson did not comply with the contract and move right away, but postponed his removal from May to the 23d day of June, but this argument assumes that the contract was made in May, whereas the evidence tends to show that it was made on the 18th of June, and that Finlayson at once looked up another location and began packing his printing material and preparing to remove, and finally vacated the premises on the 23d of June. Again, it is insisted that the evidence does not support the finding of the jury, that Daugherty, as Creighton's agent, was invested with authority to make the contract made the basis of Finlayson's counter-claim. It appears from the testimony offered in behalf of Creighton that Daugherty was his agent for the leasing and managing and collecting of the rents of his property. Whether the making of such a contract as the one pleaded by Finlayson was within the scope of his authority, was made a question of fact for the jury and properly submitted to them under the instructions of the court. We cannot say, as a matter of law, that Daugherty's agreement to pay Finlayson the costs of removing from the premises was beyond the scope of his authority as Creighton's agent, when we consider the facts and circumstances in evidence in the case. The apparent authority of an agent which will bind a principal is such authority as an agent appears to have by reason of the actual authority which he has. (*Oberne v. Burke*, 30 Neb., 581; *Johnston v. Milwaukee & Wyoming Investment Co.*, 46 Neb., 480.) Daugherty had the authority to lease the premises of Creighton, to collect the rents, and look after the management and property generally. This was his actual authority, and we think the evidence sufficient to sustain the finding of the jury, that in making the contract with Finlayson he did not go beyond the scope of his agency.

2. The second assignment of error is that the court erred in giving to the jury on its own motion the following instruction: "In this case the defendants claim in their answer by way of counter-claim that the plaintiff agreed with them, in consideration of their moving from said premises, to compensate them for the expense of moving; and that the evidence shows that such expenses amounted to about $70 or $75." The criticism made upon this instruction is that by it the court expressed his opinion to the jury that the evidence showed that the necessary expense of Finlayson's removal was $70 or $75. There is no merit whatever in this criticism. The court told the jury what the defendants claimed in their answer by way of counter-claim, and that the defendants claimed that the evidence showed that the expense of removal was $70 or $75.

3. The third argument relied upon for reversal of the judgment is that the verdict is excessive. The jury found a verdict in favor of Finlayson for $40. The court required a remittitur of $4.02, and thereupon rendered judgment against Creighton for $35.98. Under the pleadings and the admitted evidence Creighton was entitled to be credited with rent $45.85; interest upon this sum at seven per cent per annum from the 28th of April, 1888, to the 21st of September, 1891, that being the first day of the term of court at which the judgment was rendered, $10.95 nearly, or a total of $56.80. The amount of counter-claim pleaded by Finlayson was $74. If the jury found that the expense of removal was $74, he was entitled to interest on this at seven per cent per annum from the 18th of June, 1888, to the first day of the term of court, or $16.85, making a total of $90.85. The difference between $90.85 and $56.80 should have been the verdict of the jury, or $34.05. The judgment, as already stated, was $35.98, or $1.93 too much under the evidence. Finlayson will have permission to remit from the judgment $1.93 within twenty days, and in case of his doing so, the judg-

ment of the district court will be affirmed; and in case of his failure to do so, the judgment will be reversed.

JUDGMENT ACCORDINGLY.

WIGTON & WHITHAM v. WILLIAM G. SMITH.

FILED NOVEMBER 19, 1895. No. 7509.

1. **Action Against Attorneys to Recover Money Collected:** CONTRACT: PLEADING: INSTRUCTIONS. The plaintiff in his petition alleged that the defendant, an attorney at law, had received from the clerk of a district court the sum of $—— for his, the plaintiff's, use; that he had demanded said money of defendant and the latter had refused to pay it over, and that said defendant had not come into the possession of said money by virtue of any contract with him, the plaintiff. The defendant answered admitting the receipt and retention of the money sued for; that it was paid to said clerk of the district court by a railroad company in satisfaction of a judgment obtained against it by the plaintiff; that defendant was plaintiff's counsel in that case, and that the money sued for was the amount of compensation which the plaintiff agreed the defendant might retain out of said judgment for his services in obtaining it. On the trial the district court instructed the jury as follows: "You may by your verdict allow the defendant such amount for his services and expenses as you may believe from a fair consideration of all the testimony in the case he is entitled to receive." *Held*, That the plaintiff, under the allegations in his petition, was entitled to recover all the money for which he sued or none; that the defendant, under the allegations of his answer, was entitled to retain all the money in his hands or none, and that, therefore, the instruction was erroneous.

2. **Pleading.** A plaintiff must recover, if at all, on the cause of action stated in his petition. It is not the province of a reply to introduce new causes of action. *Hastings School District v. Caldwell*, 16 Neb., 68, and *Savage v. Aiken*, 21 Neb., 605, followed.

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

Wigton & Whitham, pro se.

H. C. Brome and *Mapes & Hazen, contra.*

RAGAN, C.

In the district court of Madison county William G. Smith recovered a judgment against Wigton & Whitham, a copartnership engaged in the practice of law, and they have brought such judgment here for review. To a proper understanding of the errors assigned for a reversal of this judgment it becomes necessary to summarize the pleadings.

Smith in his petition alleged that on the 23d day of March, 1888, Wigton & Whitham received from the clerk of the district court of Platte county the sum of $10,795.25 for his, Smith's, use; that before the filing of his petition he had demanded the payment of said money from Wigton & Whitham and they had refused to account for and pay over any of said money except the sum of $7,668.50, leaving a balance due Smith of $3,126.75; that said Wigton & Whitham obtained said money from the clerk of the district court of said Platte county by virtue of no contract with him, Smith.

Wigton & Whitham in their answer alleged that in September, 1881, Smith was the owner of a claim or cause of action for damages against a railroad company; that he then employed Wigton as his attorney to collect said claim from said railroad company by suit or compromise; that he, Smith, agreed to advance and pay all expenses and costs incurred by Wigton in the prosecution or settlement of such claim, and to pay Wigton as compensation twenty per cent of all the money received from said railroad company on account of said claim; that Wigton accepted said employment and undertook the collection of said claim on the express condition that Smith would advance and pay the expenses and costs necessarily incurred by Wigton in the settlement or prosecution of the claim; that Wigton

was unable to effect a compromise of the claim, and in July, 1882, brought suit for Smith against the railroad company; that Smith failed and neglected to advance or pay any of the expenses or costs incurred by said Wigton in the prosecution of said suit, and that he, Wigton, was compelled to and did advance and pay such costs and expenses; that the suit brought by Wigton against the railroad company was by the district court of Madison county dismissed; that Wigton, or Wigton & Whitham, prosecuted to the supreme court of Nebraska a petition in error to reverse said judgment of dismissal, and that said supreme court did reverse the said judgment of dismissal of said case, and thereupon it was agreed between Wigton and Smith that the contract existing between them in reference to the collection of Smith's claim for damages against said railroad company should no longer be in force. In September, 1885, a new contract was entered into between Smith and Wigton & Whitham, in and by which they agreed to prosecute the action of said Smith against said railroad company to final judgment and collect the judgment when obtained, and to loan to Smith the money necessary to pay the costs and expenses, including the costs and expenses already advanced by Wigton, that might be incurred in the future prosecution of the case; that if such action should be terminated by one trial in the district court, Smith should pay Wigton & Whitham, as compensation for their services, forty per cent of the amount of the judgment recovered and collected; if the case should be tried more than once in the district court, or if the case should again be taken to the supreme court, Smith was to pay Wigton & Whitham for their services a sum equal to fifty per cent of the judgment recovered and collected; that when the suit was finally terminated Wigton & Whitham should collect the judgment, deduct therefrom whatever should be owing to them for moneys loaned by them to Smith, and to pay the costs and expenses of carrying on said litigation; that in case Smith

should finally fail to recover, Wigton & Whitham should have nothing for their services; that said case was tried the second time in the district court of Madison county and resulted in a verdict for Smith; that this verdict was, on motion of the railroad company, set aside and a new trial ordered; that in 1886 a change of venue was taken in said case and the same removed to the district court of Platte county, where it was again tried in January, 1887, and resulted in a verdict in favor of Smith in the sum of $10,000; that the railroad company prosecuted a petition in error to the supreme court to reverse this judgment; that the supreme court affirmed the judgment on the 6th of January, 1888; that on the 23d day of March, 1888, the railroad company paid to the clerk of the district court of Platte county the sum of $10,795.25 in full of said judgment; that Wigton & Whitham received the amount of such judgment from the clerk of the district court of Platte county; that they deducted from the same $344.80, the amount of money advanced and paid by them for Smith for costs and expenses, and paid one-half of the remainder, to-wit, $5,225.48, to Smith, as per the terms of their contract.

To this answer Smith replied: An admission that he employed Wigton in 1881 to collect his claim against the company; that he agreed to pay him for his services twenty per cent of the money collected; that in 1883 Wigton stated to him, Smith, that he would not further prosecute the suit against the railroad company unless Smith would agree to pay him a sum equal to forty per cent of the amount recovered; that he was compelled to and did agree to pay said Wigton forty per cent of the amount recovered; that such agreement was without consideration. The other averments of the reply amounted to a general denial of the allegations of the answer.

It is obvious from these pleadings that Smith, under the allegations of his petition, was entitled to recover all the money for which he sued, or none at all. Having alleged

in his petition that the money for which he sued was received by Wigton & Whitham from the clerk of the district court of Platte county for his use, and not by virtue of any contract existing between him and Wigton & Whitham, his case must stand or fall on the allegations of that petition. The averments of his reply cannot be looked to to help out his petition. A plaintiff must recover, if at all, on the cause of action stated in his petition. It is not the province of a reply to introduce new causes of action. (*Hastings School District v. Caldwell*, 16 Neb., 68; *Savage v. Aiken*, 21 Neb., 605. Wigton & Whitham having admitted the receipt of the amount of the judgment rendered in favor of Smith against the railroad company, having admitted that they retained in their hands fifty per cent of the judgment collected, and having pleaded that they did and do so under and by virtue of an express contract with Smith, if this averment of their answer was established, they were entitled to a verdict in their favor and a judgment dismissing Smith's cause of action. If the contract pleaded by Wigton & Whitham in their answer was not established, the judgment should have been against them for all the money claimed by Smith in his petition.

While the jury was deliberating upon its verdict it made in writing this inquiry of the district judge: "Can the jury allow Wigton & Whitham their expenses in railroad cases if only allow forty per cent? A. J. Stafford, Foreman." To this inquiry the court answered in writing as follows: "You may by your verdict allow the defendants such amount for their services and expenses as you may believe from a fair consideration of all the testimony in the case they are entitled to receive." This instruction was erroneous, and the verdict of the jury being for about one-half the sum sued for, shows on its face that the instruction was prejudicial to Wigton & Whitham. There was no issue in the case as to what the services rendered by Wigton & Whitham for Smith were reasonably worth. There was no

claim made in either pleadings or evidence by any party to the suit that Wigton & Whitham were or were not entitled to retain out of the Smith judgment such an amount of money as would be a reasonable compensation to them for the services they had rendered him. As already stated, Smith's claim in his petition was that they had and held in their possession the entire judgment collected, less the amount they had paid him, for his use; that he had demanded this money of them and that they had refused to pay it over. In other words, the petition of Smith was framed upon the theory that Wigton & Whitham had been guilty of a tort in collecting and retaining this judgment. On the other hand, Wigton & Whitham claimed the right to retain the money for which they were sued under and by virtue of an express contract with Smith, and there was no room in this case, under any view of the pleadings, for the court to tell the jury that they might fix the value of the services of Wigton & Whitham at such an amount as the jury might believe from the evidence they were entitled to receive. (*Mayer v. Ver Bryck*, 46 Neb., 221.)

The judgment of the district court is reversed and the cause remanded with instructions to the district court to grant the parties to the suit leave to replead if they so desire.

REVERSED AND REMANDED.

CALVIN M. BURKETT V. JANE E. CLARK ET AL.

FILED NOVEMBER 19, 1895. No. 5675.

1. **Executions:** DUTIES OF OFFICERS. Sections 491*a*, 491*b*, 491*c*, and 491*d*, Code of Civil Procedure, examined, and the duties of an officer holding an execution for the sale of real estate found to be as follows: (1) To levy the execution upon said real estate; (2) to call an inquest of two disinterested freeholders of the

county where the real estate is situate and administer to them an oath to impartially appraise the interest of the execution defendant in the real estate levied upon; (3) to make application in writing to the county clerk, clerk of the district court, county treasurer, and town, city, or village treasurer, where the real estate is situate, requesting such officers to certify to him the amount and character of all liens existing against the real estate levied upon which are prior to the lien under which the officer desires to sell; (4) with said freeholders to impartially appraise at its real value in money the interest of the execution defendant in the real estate about to be sold; (5) to forthwith deposit a copy of the appraisement made, together with the written application made by him for liens to the county, town, city, and village officers, and the certificates furnished by such officers to him in the office of the clerk of the court from which the execution issued; (6) to immediately thereafter advertise the real estate for sale.

2. ———: ORDER OF SALE. The terms "execution" and "order of sale" are used interchangeably in such statutes, and either is but a written command, under the seal of the court, authorizing and directing the officer to whom it is directed to execute the court's judgment. (*Kelley v. Vincent*, 8 O. St., 415.)

3. ———: LEVY. To levy an execution is to do the acts by which an officer sets apart and appropriates, for the purpose of satisfying the writ, a part or the whole of a defendant's property. (*Lloyd v. Wykoff*, 11 N. J. Law, 218.)

4. ———: ———. What acts must be performed by an officer, in order that they may constitute a levy upon real estate sought to be sold under an execution issued on a judgment at law, not decided.

5. **Order of Sale:** LEVY. Since real estate ordered to be sold by a decree in equity has by such decree already been appropriated and set apart to satisfy the decree, no actual levy thereon need be made by an officer holding an execution by which he is commanded to sell such real estate.

6. ———: DECREE. It is thought such an order of sale should contain, or have attached thereto, a copy of the decree, as the officer in making such sale must strictly follow the terms of the decree. (*Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281.)

7. ———: DUTY OF SHERIFF. The word "forthwith," found in section 491*d* of the Code, means immediately; without delay; directly,—regard being had to the nature of the act required to be performed. (*Moffat v. Dickson*, 3 Colo., 313.)

8. ———: ———. The copy of the appraisement, together with the written application for liens and the certificates of liens mentioned in said section 491*d*, must be deposited in the office of the clerk from which the execution issued, before the sale is advertised.

9. ———: ———. The sentence, "It may be deposited any time before sale," found in the third paragraph of the syllabus of *La Flume v. Jones*, 5 Neb., 256, overruled.

10. ———: ———. The object of the statute in requiring an officer to deposit the appraisement made, the application for liens, and the certificates of liens furnished, before advertising the sale, is to afford the execution defendant and plaintiff an opportunity to know at what value the property has been appraised, to examine and ascertain what liens have been certified as existing against the property, and, if a mistake has been made, to afford them time and opportunity to make application to the court to which the execution is returnable for an order vacating the appraisement before the sale occurs.

11. ———: APPRAISEMENT: OBJECTIONS. The sheriff and freeholders in making the appraisement act judicially, and objections that the value put on the property is too high or too low must be made and filed in the case with a motion to vacate the appraisement before the sale. (*Vought v. Foxworthy*, 38 Neb., 790.)

12. ———. Section 490 of the Code is a legislative sanction and adoption of the ancient writ of *venditioni exponas*,—a writ by which an officer is commanded to sell property already levied upon. (Freeman, Executions, sec. 57; *Bellingall v. Duncan*, 3 Gilm. [Ill.], 477.)

13. **Judicial Sales.** By section 504 of the Code the legislature made the writ of *venditioni exponas* applicable to sales of real estate.

14. **Executions.** The life of an execution from a court of record is limited by section 510 of the Code to sixty days from its date, and must be returned within that time, whether it be the original or an *alias* writ.

15. ———: APPRAISEMENT: SALE. Section 495 of the Code construed, and *held* to be a limitation on the power of an officer to advertise and offer for sale real estate more than twice under one appraisement.

16. ———: RETURN. An officer holding an execution and having levied the same upon real estate, whether he has offered it for sale or not, and if he has offered it for sale, whether he has sold

it or not, must return the execution within sixty days from its date, stating what he has done under it.

17. ——: APPRAISEMENT. An officer is required to make but one appraisement of real estate until it has been twice advertised and twice offered for sale, whether under an original or an *alias* writ.

18. ——: ——. An officer has no authority to cause real estate to be re-appraised until it has been twice advertised and twice offered for sale.

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

W. H. Morris, for plaintiff in error.

J. H. Grimm, *E. W. Metcalfe*, and *M. H. Fleming*, *contra*.

RAGAN, C.

In the district court of Saline county Jane E. Clark and others brought suit against Calvin M. Burkett to foreclose an ordinary real estate mortgage. In due time a decree was rendered as prayed, the property sold, and Burkett appeared and resisted the confirmation of the sale, which was, however, confirmed, and he has prosecuted to this court a petition in error to reverse the judgment or decree of confirmation. The order of sale was dated and issued September 1, 1891, and the sheriff caused the property to be appraised twice and twice offered it for sale, once in the month of October and once in the month of November of said year. The property, however, was not sold on either of those occasions for want of bidders. The sheriff, then, without returning his order of sale, on the 18th of November advertised the property for sale a third time, and sold it on the 21st of December. This is the sale in controversy. On the 23d of November the sheriff caused this property to be re-appraised. December 10 he filed in the office of the clerk of the district court, from which his execution or order of sale was issued, the re-appraisement made by him of the prop-

erty, and on the 22d of December he filed in the office of the clerk of the district court the certificates of liens existing against the property made by the clerk of the district court, the county treasurer, and the register of deeds of Saline county, and on the same day he returned the order of sale, reciting that he had appraised the real estate and sold it; but the return omitted all mention of the first appraisement of the real estate, its having been twice advertised for sale, twice offered for sale, and not sold for want of bidders. Burkett insisted before the district court that the sale made should not be confirmed and insists here that the judgment of confirmation should be reversed for the following reasons:

1. That the sheriff advertised the premises for sale before re-appraising them and before filing in the office of the clerk of the district court the re-appraisement made of the premises, together with the certificates furnished him by the clerk of the district court, the register of deeds, and the county treasurer, in pursuance of the statute. The question presented involves the construction of sections 491*a*, 491*b*, 491*c*, and 491*d* of the Code of Civil Procedure. These sections, so far as material here, are as follows:

"Sec. 491*a*. Whenever, hereafter, execution shall be levied on any lands and tenements, the officer levying the same shall call an inquest of two disinterested freeholders, who shall be residents of the county where the lands taken on execution are situated, and administer to them an oath impartially to appraise the interest of the person, or persons, or corporation against whom the execution is levied, in the property so levied upon, and such officer, together with said freeholders, shall appraise said interest at its real value in money, and such appraisement shall be signed by such officer and said freeholders, respectively.

"Sec. 491*b*. That for the purpose of the appraisement mentioned in the last preceding section, the officer and the freeholders therein named shall deduct from the real value

of the lands and tenements levied on, the amount of all liens and incumbrances for taxes or otherwise, prior to the lien of the judgment under which execution is levied, and to be determined as hereinafter provided, and which liens and incumbrances shall be specifically enumerated, and the sum thereafter remaining shall be the real value of the interest therein of the person, or persons, or corporation against whom or which the execution is levied.

"Sec. 491*c*. It shall be the duty of the county clerk, the clerk of the district court, and the county treasurer of the county, and the treasurer of the village, town, or city, wherein such levy is made, for the purpose of ascertaining the amount of the liens and incumbrances upon the lands and tenements so levied upon, on application of the sheriff in writing, holding such execution, to certify to said sheriff, under their respective hands and official seals, the amount and character of all liens existing against the lands and tenements levied on, which are prior to the lien of such levy, as the said liens appear of record in their respective offices. * * *

"Sec. 491*d*. The officer holding such appraisement shall forthwith deposit a copy thereof, including his application to the officers enumerated in section 3 of this act, and their official certificates as in said section provided, in the office of the clerk of the court from which such execution issued, and shall immediately advertise and sell said real estate, lands, and tenements agreeably to the provisions of this act." * * *

What do these sections require of an officer holding an execution for the sale of real estate? We first remark that these sections of the statute make no distinction between an ordinary execution issued on a judgment at law and an execution or order of sale based on a decree in equity. The terms "execution" and "order of sale" are used interchangeably. The duties of an officer as to appraising real estate which is about to be sold are the same, whether he be

selling on execution based on a law judgment or an equity decree. Whether the writ which the officer holds be called an execution or an order of sale, it is but a written command, under the seal of the court, authorizing and directing him to execute its judgment (*Kelley v. Vincent*, 8 O. St., 415); and in cases like the one at bar, where the officer is commanded to sell real estate to satisfy a decree of foreclosure of a mortgage against it, it would seem to be the better practice to embody in, or attach to, the order of sale a copy of the decree, for the reason that the officer, in making such a sale, must do so in strict conformity to the terms of the decree. (*Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281.)

Recurring to the statutes just quoted, we observe that section 491*a* declares that whenever an execution shall be levied on any land, the officer levying the same shall, etc. This would seem to imply that the first duty of an officer after receiving an execution, commanding him to sell real estate, would be to levy upon such real estate. What is a levy? To do the acts by which a sheriff sets apart and appropriates, for the purpose of satisfying the command of a writ of execution, a part or the whole of a defendant's property. (Anderson's Law Dictionary; *Lloyd v. Wykoff*, 11 N. J. Law, 218.) Just what acts must be performed by an officer in order that such acts may constitute a levy upon real estate sought to be sold under an execution issued on a judgment at law is a question not presented by this record and not decided, and we are not aware of any statute which defines a levy or declares what an officer holding an execution must do in order that his acts may constitute a levy upon real estate; but since to levy an execution is to set apart and appropriate the property of a certain person for its satisfaction, we are quite clear that an officer holding an execution or order of sale, in and by which he is commanded to sell certain real estate therein described for the satisfaction of such execution, is not obliged, in or-

der to perform the duty of levying upon such real estate, to go upon the same, take possession of any part of said real estate, put up a notice upon said real estate, or make proclamation thereon to the effect that he has levied upon it, since the court by the decree has already by its judgment set apart and appropriated, as it were, the real estate described for the satisfaction of the execution in the officer's hands. The next step such an officer is required to take by said section 491*a* is that he shall call an inquest of two disinterested freeholders, who shall be residents of the county where the lands taken on execution are situate, and administer to them an oath impartially to appraise the interest of the person against whom the execution is levied. The next duty of such officer is prescribed by section 491*c*, and requires that he shall make an application in writing to the county clerk, the clerk of the district court, and the county treasurer of the county where the real estate is situate, requesting said officers to certify to him the amount and character of all liens existing against the real estate levied upon, which are prior to the lien under which the officer desires to sell; such liens to be certified as they appear of record in the office of said officers. It is to be noted that this section now requires such an application to be also addressed to the treasurer of the village, town, or city in which such real estate is situate, but this requirement was not in force in 1891, when this case arose. The next duty required of such an officer is found in section 491*a*, which commands him and said freeholders to impartially appraise, at its real value in money, the interest of the execution defendant in the real estate about to be sold. This appraisement of the execution defendant's interest is to be performed in accordance with said section 491*b*, which requires the sheriff and two freeholders, acting as appraisers, to deduct from the real value of the real estate levied upon the amount of all liens and incumbrances for taxes or otherwise existing against the real estate and which are

prior liens to the lien on which the officer is about to sell. The officer having levied upon the property, and having appraised the interest of the execution defendant therein, section 491*d* provides that he "shall forthwith deposit a copy of" the appraisement made, together with the written application made by him to the clerk of the district court, county treasurer, and register of deeds, and the certificates furnished by them to him, in the office of the clerk of the court from which the execution which he holds was issued. After this deposit has been made, the statute (Code, sec. 491*d*) provides that the officer "shall immediately advertise the real estate." It will thus be seen that the officer holding an execution for the sale of real estate has not authority to advertise the same for sale until he has levied upon it, caused it to be appraised, and deposited in the office of the clerk from which the execution in his hands was issued a copy of the appraisement made by him and the two freeholders, together with the application in writing for liens made by him to the clerk of the district court, the county treasurer, and the register of deeds, and the certificates which such officers furnished him in pursuance of said application.

The word "forthwith," found in section 491*d*, means immediately; without delay; directly,—regard being had to the nature of the act required to be performed. (*Inman v. West Fire Ins. Co.*, 12 Wend. [N. Y.], 452; *Moffat v. Dickson*, 3 Colo., 313; *Bennett v. Lycoming County Mutual Ins. Co.*, 67 N. Y., 274.) But whatever the technical meaning of "forthwith" in this statute, and whether the facts and circumstances of a particular case would excuse and protect an officer who neglected or delayed the depositing of the appraisement, one thing is beyond all question, viz., that the appraisement must be deposited before the sale is advertised. The statute must be construed as if it read: "The officer holding such appraisement shall forthwith deposit a copy thereof and thereupon shall immedi-

ately advertise," etc. He shall advertise after he has deposited a copy of the appraisement, not before.

In *La Flume v. Jones*, 5 Neb., 256, in the third point of the syllabus it was said that such an appraisement might be deposited any time before sale. In this case LAKE, C. J., speaking for the court, said: "The next point relied on is, that the 'sheriff failed to deposit a copy of the appraisement * * * with the clerk.' In answer to this objection it may be said that the record is silent as to when such copy was in fact deposited. It shows simply that a copy of the appraisement was, in fact, deposited. It will in such case be presumed that the sheriff did his duty, and made the deposit before the publication of the notice of the sale." There is no doubt but that this is law, but, unfortunately, the learned chief justice continued as follows: "But even if the sheriff had neglected his duty in this respect, it would not be ground for setting the sale aside, if it were in fact deposited before the sale took place," and cited in support of this last remark *Merritt v. Borden*, 2 Dis. [O.], 503. In the case cited section 433 of the Code of Civil Procedure of the state of Ohio was construed. That section contained the identical language found in section 491*d* above quoted, and the court said: "The question submitted to this court is this: Whether the inquisition taken by the sheriff was filed with the clerk within the time required by section 433 of the Code. It appears the advertisement for the land was published before the inquisition was filed, and we have held in general term that no publication can be legally made until the sheriff has deposited a copy of the valuation in the clerk's office. The language of the section is: 'The officer receiving such return shall forthwith deposit a copy thereof with the clerk of the court from which the writ issued, and immediately advertise and sell such real estate agreeably to the provisions of this title.' We shall adhere to the construction we then gave to the

statute, having found no reason since it was announced why it should be changed or in any particular modified." The decision in *La Flume v. Jones, supra,* was entirely correct under the facts of the case, but all that was said by the chief justice in that case, to the effect that the failure of the sheriff to deposit the appraisement before advertising the sale would not be ground for setting it aside, was *dictum,* and the last sentence in the third point of the syllabus, viz.; "It may be deposited any time before sale," is overruled. In the case at bar the officer advertised the property for sale before he appraised it, did not file the appraisement made until some eleven days before the sale occurred, and, so far as the record shows, he did not file a copy of the application made by him for liens existing against the real estate. The object of this statute in requiring an officer to deposit in the office of the clerk of the court from which the execution issued, before advertising the sale, a copy of the appraisement made, a copy of his application for liens, and the certificates of liens made by the clerk of the district court, register of deeds, and the county treasurer, is to afford the execution defendant and plaintiff an opportunity to know at what value the property has been appraised and to examine and ascertain what liens have been certified as existing against the property, and, if a mistake has been made, to afford them time and opportunity to make application to the court to which the execution is returnable for an order vacating the appraisement before the sale occurs. Generally, this can only be done before the sale, since the sheriff and the freeholders in making the appraisement act judicially, and objections that the value put on the property is too high or too low must be made and filed in the case with a motion to vacate the appraisement before the sale occurs. (*Vought v. Foxworthy,* 38 Neb., 790.)

2. The second alleged irregularity of the officer relied on here for reversing the decree of confirmation is the sell-

ing of the property under the execution of September 1. The contention is that the life of the execution had expired prior to the date of the sale. The contention involves an examination and construction of sections 490, 504, 510, and 495, Code of Civil Procedure. These sections of the statute have all been in force in this state since 1866. Section 490 provides, in substance, that when an officer has levied an execution on goods and chattels and the same have not been sold for want of bidders, the officer must return the writ of execution, and that thereupon the plaintiff in execution may sue out another writ directing the sale of the property already levied upon. Section 504 provides: "If lands and tenements levied on, as aforesaid, are not sold upon one execution, other executions may be issued to sell the land so levied upon." Section 510 provides: "The sheriff or other officer, to whom any writ of execution shall be directed, shall return such writ to the court to which the same is returnable, within sixty days from the date thereof." Said section 490 is but a legislative sanction and adoption of the ancient writ known as "*venditioni exponas.*" Mr. Freeman, in his work on Executions, section 57, thus defines it: "This writ is, therefore, properly defined as the writ which compels an officer to proceed with the sale of property levied upon under a *fieri facias.*" (*Bellingall v. Duncan*, 3 Gilm. [Ill.], 477.) At common law, real estate could not be sold on execution, but it may under our statutes be taken for the satisfaction of a judgment at law in the absence of finding personal property out of which to satisfy the writ; and by said section 504 the legislature has made the writ of *venditioni exponas* applicable to sales of real estate; and the legislature, by said section 510, has limited the life of an execution to sixty days, whether it be an original or *alias* writ. In view of these provisions of the statute it was the duty of the officer in the case at bar to return the execution issued to him, of date September 1, to the court to which it was

made returnable within sixty days from said date, unless some other provision of the statute authorized him to retain the execution and proceed under it after it had expired.

It seems to be the contention that the officer was authorized to cause the property in controversy to be re-appraised and offer it for sale under such re-appraisement on the execution of September 1, notwithstanding it had expired, and that authority for this contention is found in section 495. That section is as follows: "In all cases where real estate may hereafter be levied upon, by virtue of any execution or order of sale, and shall have been appraised, and twice advertised and offered for sale, and shall remain unsold for want of bidders, it shall be the duty of the officer to cause a new appraisement of such real estate to be made, and successive executions or orders of sale may issue at any time in vacation, after the return of the officer 'not sold for want of bidders,' at the request of the plaintiff or his attorney." We do not so understand it. The statute is a limitation upon the power of an officer to more than twice advertise and offer for sale real estate under one appraisement. But for this statute an officer would be compelled to make but one appraisement of real estate which he desired to sell under execution. He might go on indefinitely offering and advertising the property for sale and thus incumbering it with unnecessary costs and expenses. We reach the conclusion, therefore, that when the officer in the case at bar had caused the real estate to be appraised and had first offered it for sale in October, and it was not sold for want of bidders, that he then should have returned his writ to the court to which it was made returnable, setting forth what he had done under it, as he could not have again advertised the property for thirty days and offered it for sale within the life of the execution. Having returned his writ, the plaintiff in the execution, in either vacation or term time, might, by virtue of the provisions of said sections 495 and 504, have taken out an-

other writ commanding the officer to again advertise and offer for sale the lands already levied upon and appraised under the former writ. If the officer had once levied upon the lands and once appraised them and had twice offered them for sale and they were not sold for want of bidders, he should have returned his writ of execution stating what he had done; and if the plaintiff in execution sought to, and did, take out another writ, then it became the duty of the officer, under the third writ, to cause the real estate to be re-appraised and again advertised for sale. In other words, it amounts to this, that an officer holding a writ of execution, and having levied the same upon real estate, whether he has offered it for sale or not, and if he has offered it for sale, whether he has sold it or not, must return the execution within sixty days from its date, stating what he has done under it; and for a failure to return the writ in such time he is liable to be amerced under the provisions of section 513 of the Code. But an officer is required to make but one appraisement of real estate until it has been twice advertised and twice offered for sale, whether under the original writ or an *alias*, and he has no authority to cause real estate to be re-appraised until it has been twice advertised and twice offered for sale under the former appraisement. What is said herein with reference to the return of an execution or order of sale has no application to a case of an officer holding a certified copy of a decree, in and by which decree specific real estate is ordered sold.

The decree of the district court confirming the sale is reversed and the cause remanded with instructions to tax to the complainants in the decree the costs of this proceeding, the costs of the second and third advertisements of the property, and the costs of its second appraisement.

REVERSED AND REMANDED.

ADDISON B. JOHNSTON ET AL. v. MILWAUKEE & WYOMING INVESTMENT COMPANY.

FILED NOVEMBER 19, 1895. NO. 7367.

1. **Principal and Agent:** CORPORATIONS. One dealing with the agent of a business corporation, in a matter relating to its business operations and not involving its corporate functions, is not charged with notice of its by-laws.

2. ———: ———. Therefore, the apparent authority of such agent cannot be extended or restricted by such by-laws in the absence of actual notice thereof.

3. ———: CUSTOM AND USAGE: EVIDENCE. Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority. Whether or not an act is within the scope of an agent's apparent authority is to be determined under the foregoing rule as a question of fact from all the circumstances of the transaction and the business.

4. ———: ———: ———. Evidence of such apparent authority is not restricted to proof of general custom or to proof that the agent had previously performed similar acts to the knowledge of the principal. The nature of the business, usage not amounting to a general custom, and the fact, if it exists, that the principal is at a great distance and the agent apparently entirely in charge of the business, may in proper cases be, among other things, elements for consideration.

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

See statement in opinion and a former report in 35 Neb., 554.

John L. Webster, for plaintiffs in error:

A manager of a live stock company would have author-

ity to sell its cattle without any provision in the charter or by-laws creating the office of manager. (*Hamm v. Drew*, 83 Tex., 77.)

Every person dealing with a corporation is bound to take notice of its by-laws as well as of its articles of incorporation. (*Bockover v. Life Association of America*, 77 Va., 91; *Bocock v. Alleghany Coal & Iron Co.*, 82 Va., 920; *Relfe v. Rundle*, 103 U. S., 222.)

The presumption is that an agent in charge of property at a point remote from the home office of the company is clothed with authority to transact all business touching such property. (*Rathbun v. Snow*, 123 N. Y., 343; *Hamm v. Drew*, 83 Tex., 77; *Whitaker v. Kilroy*, 70 Mich., 638.)

When the plaintiff company made Adams its agent in charge of its property in Wyoming, it necessarily clothed him with the functions of a general agent, and gave him apparent authority to sell the property and should not now be heard to say that the powers of Adams were special, and not general. (*Grafius v. Land Co.*, 3 Phila. [Pa.], 447; *Lee v. Pittsburg Coal & Mining Co.*, 56 How. Pr. [N. Y.], 376; *Duncan v. Hartman*, 143 Pa. St., 595; *Spangler v. Butterfield*, 6 Colo., 356; *Sacalarias v. Eureka & P. R. Co.*, 18 Nev., 155; *Adams Mining Co. v. Senter*, 26 Mich., 73; *Ceeder v. Loud Lumber Co.*, 86 Mich., 541; *State v. Heckart*, 49 Mo. App., 280.)

The sale of the cattle by Adams was within the scope of his apparent authority. (*Atlantic & P. R. Co. v. Reisner*, 18 Kan., 458; *Louisville, E. & St. L. R. Co. v. McVay*, 98 Ind., 398; *Barnett v. Gluting*, 3 Ind. App., 421; *Over v. Schiffling*, 102 Ind., 196; *Badger Lumber Co. v. Ballentine*, 54 Mo. App., 180; *Austrian v. Springer*, 94 Mich., 343; *Banner Tobacco Co. v. Jenison*, 48 Mich., 459; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill., 427; *Louisville Coffin Co. v. Stokes*, 78 Ala., 372; *Talladega Ins. Co. v. Peacock*, 67 Ala., 253.)

In support of an argument in favor of the contention

that the Milwaukee & Wyoming Investment Company ratified the sale, reference was made to the following authorities: *Hughes v. Ins. Co. of North America*, 40 Neb., 627; *Cook v. Tullis*, 18 Wall. [U. S.], 338; *Starks v. Sikes*, 8 Gray [Mass.], 609; *Dispatch Line v. Bellamy Mfg. Co.*, 12 N. H., 205; *Planters Bank v. Sharp*, 4 S. & M. [Miss.], 75; *McMahan v. McMahan*, 13 Pa. St., 376; *Ogden v. Marchand*, 29 La. Ann., 61; *Charles v. State*, 11 Ark., 389; *United States Express Co. v. Rawson*, 106 Ind., 215; *Goss v. Stevens*, 32 Minn., 472; *Ruggles v. Washington County*, 3 Mo., 496; *Shoninger v. Peabody*, 57 Conn., 42; *Russ v. Telfener*, 57 Fed. Rep., 973; *Persons v. McKibben*, 5 Ind., 261; *Perkins v. Boothby*, 71 Me., 91; *Mayor v. Ray*, 19 Wall. [U. S.], 484; *Taylor v. Conner*, 41 Miss., 722; *First Nat. Bank of Las Vegas v. Oberne*, 121 Ill., 25; *Baer v. Lichten*, 24 Ill. App., 311; *Thompson v. Peck*, 115 Ind., 512; *Moriarity v. Stofferan*, 89 Ill., 528; *Harding v. Parshall*, 56 Ill., 219; *Nichols v. Shaffer*, 63 Mich., 599; *First Nat. Bank of Trenton v. Badger Lumber Co.*, 54 Mo. App., 327; *Southern Oil Works v. Jefferson*, 70 Tenn., 581; *Gelatt v. Ridge*, 117 Mo., 555; *Long v. Osborne*, 59 N. W. Rep. [Ia.], 14.

J. W. Sparks and *George H. Noyes, contra:*

The plaintiff at the time of the commencement of this suit was the owner and entitled to the possession of the cattle replevied, and was entitled to a verdict, unless the defendants procured a valid title by purchase from Adams. (*Levi v. Booth*, 58 Md., 305.)

The burden of proof to establish that Adams had been held out by the plaintiff as possessing an apparent authority greater than his real authority, and as having an authority to sell the cattle, rested upon the defendants. (*Baltimore & Ohio Employees Relief Association v. Post*, 122 Pa. St., 579; *Hays v. Lynn*, 7 Watts [Pa.], 525; *American Life*

Ins. & Trust Co. v. Schultz, 82 Pa. St., 46; *Bond v. Pontiac, O. & P. A. R. Co.*, 62 Mich., 643.)

The mere fact that the plaintiff had entrusted the care, management, and possession of the cattle to Adams, gave him no authority to sell them. Nor did the directions to ship the cattle to commission merchants, to be sold by them in the market, give any authority to him to make a sale. (*Warder v. Rublee*, 42 Minn., 23.)

The defendants could not base any right in this action upon the ground that they dealt with Adams as having apparent authority to sell the cattle, unless it appeared from the evidence that they knew of facts giving him such apparent authority, and acted upon such appearances in the transaction of purchasing the cattle. (*People v. Bank of North America*, 75 N. Y., 561; *Eckart v. Roehm*, 43 Minn., 271.)

Although authority on the part of an agent may, in proper cases, be implied from the words and conduct of the parties, or from the circumstances of the case, yet the extent of the authority so implied cannot exceed the necessary and legitimate effect of the facts from which it is inferred, but must be limited to the performance of like acts under like circumstances. The authority, if implied at all, can only be implied from facts. (*Kane v. Barstow*, 22 Pac. Rep. [Kan.], 588.)

Unless the jury found from a fair preponderance of the evidence, that Adams had performed acts of a character similar to the acts performed by him as disclosed by the evidence prior to the sale of the cattle, and that the plaintiff, after knowledge thereof, ratified such prior similar acts, they would not have been justified in finding that Adams possessed the apparent authority to sell the cattle. (*Eckart v. Roehm*, 43 Minn., 271; *Graves v. Horton*, 38 Minn., 66; *People v. Bank of North America*, 75 N. Y., 561; *Reynolds v. Continental Ins. Co.*, 36 Mich., 131; *McKindly v. Dunham*, 55 Wis., 515; *Kane v. Barlow*,

22 Pac. Rep. [Kan.], 588; *Banks v. Everest*, 35 Kan., 687.)

If there was anything known to defendants at the time, likely to put a reasonable business man upon inquiry as to the authority of Adams, then it was their duty to inquire how far the acts of Adams were in pursuance of the limitations put upon his authority by the plaintiff. If the defendants failed or neglected to make such inquiries, they could not claim to be protected in dealing with Adams as having apparent authority to sell. (*Hurley v. Watson*, 68 Mich., 531; *Rust v. Eaton*, 24 Fed. Rep., 830.)

The company gave Adams no implied or apparent authority to sell. (*Bickford v. Menier*, 107 N. Y., 490; *Dodge v. McDonnell*, 14 Wis., 553*; *New York Iron Mine v. First Nat. Bank*, 39 Mich., 644; *Coquillard's Admr. v. French*, 19 Ind., 274; *Billings v. Morrow*, 7 Cal., 171; *Hodge v. Combs*, 1 Black [U. S.], 192; *Hawtayne v. Bourne*, 7 M. & W. [Eng.], 595; *Hampton v. Mathews*, 14 Pa. St., 105; *Swazey v. Union Mfg. Co.*, 42 Conn., 556.)

The rights of the parties being determined as of the date of the commencement of the suit, proof of what happened subsequently thereto is unavailing to show ratification. (*Powell v. Henry*, 96 Ala., 412; *Wittenbrock v. Bellmer*, 57 Cal., 12.)

The following authorities were also cited upon the question of ratification: *Flagg v. Flagg*, 39 Neb., 229; *Pemigewasset Bank v. Brackett*, 4 N. H., 557; *Corbett v. Swinbourne*, 8 Ad. & El. [Eng.], 673; *Hornfager v. Hornfager*, 6 How. Pr. [N. Y.], 279; *Hope v. Brinkerhoff*, 4 Edw. Ch. [N. Y.], 660; *Hoyt v. Sheldon*, 4 Abb. Pr. [N. Y.], 59; *Ormsbee v. Brown*, 50 Barb. [N. Y.], 436; *Farwell v. Myers*, 59 Mich., 179.

IRVINE, C.

This was an action of replevin for 250 head of cattle by the defendant in error against the plaintiffs in error. On

the first trial there was a verdict and judgment in favor of the defendants in the district court. This judgment was reversed by this court. (*Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb., 554.) The case has been retried, resulting in a verdict and judgment for the plaintiffs, and the defendants now prosecute error. The evidence is substantially the same as on the first trial, and the facts having been stated somewhat in detail in the former opinion, we refer to that and will not restate them, except that, in view of one argument now made, it should perhaps be stated that the business of the corporation, as set forth in its charter, is "buying, selling, raising, shipping, exchanging, and dealing in all kinds of cattle, horses, and other live stock, in the territory of Wyoming," etc., and that the duties of the manager, as provided by the by-laws, and as briefly referred to in the former opinion, are prescribed as follows: "The manager and assistant manager shall reside and keep their office in the territory of Wyoming and shall have the charge and management, subject to the orders of the directors, of all the affairs and property of the company in said territory."

On the former hearing the case was decided solely on the effect of the evidence as to a custom in Wyoming whereby the manager of a cattle ranch, it was claimed, had power to sell cattle therefrom, and the court in the former opinion laid down certain rules for the determination of that question alone; that is, as to what was necessary in order to establish a custom vesting in the manager authority to so dispose of cattle. As now presented an entirely different question arises. On the trial in the district court a special verdict was taken whereby, under instructions conformable to the former opinion, the jury found that no such custom prevailed. The jury also found that prior to the sale of the cattle in question Adams had not, with the plaintiff's knowledge, performed any similar acts, and under a peremptory instruction there was a finding

that Adams possessed no actual authority to make the sale. There were other findings not material to the questions which we shall consider. The former opinion strongly implied a holding that no actual authority existed for the sale made by Adams, and we shall not here reconsider that question. The judgment in favor of the plaintiffs was evidently entered on the theory that, in the absence of such actual authority, or apparent, conferred either by a custom of business or by the exercise of prior similar acts, the plaintiffs could not be bound by Adams' acts. One instruction given by the court clearly shows that the judgment proceeded on this theory. This instruction was as follows:

"An act is within the apparent authority of the agent when it is of like character as that of prior acts performed by him for the same principal, and which such principal, knowing the same, sanctioned or ratified. The act of an agent within his apparent but not within his real authority will bind his principal only in case the person dealing with such agent knew of such prior acts and dealt with the agent in reliance thereon; and in this case you are instructed that unless you find from a preponderance of the evidence that Thomas R. Adams had prior to the sale of these cattle performed acts of a similar character, and that the plaintiff, after knowledge or notice thereof, sanctioned or ratified such prior similar acts, then you will not be justified in finding that Adams possessed the apparent authority to sell the cattle in question. The defendants cannot base any rights in this action upon the ground that they dealt with Thomas R. Adams as having the apparent authority to sell the cattle unless it appears from the evidence that they, or one of them, knew of facts giving such apparent authority to Adams, and acted upon such appearances in the transaction of purchasing the cattle in question.

"The mere fact that the plaintiff had entrusted the care, management, and possession of these cattle to Thomas R. Adams, gave him no authority to sell them. Although

authority on the part of an agent may in proper cases be implied from the words and conduct of the parties, or from the circumstances of the case, yet the extent of the authority so implied cannot exceed the necessary and legitimate effect of the facts from which it is inferred, but must be limited to the performance of like acts under like circumstances. The authority, if implied at all, can only be implied from facts."

In the light of all the instructions it was clearly the view of the court that, it having disposed of the question of actual authority, and the jury having found that no such general custom existed as would, under the former opinion of the court, confer authority upon the agent, no apparent authority could exist unless by the exercise by the agent of such authority in the past, supplemented by knowledge of those acts on the part of the company, and by similar knowledge on the part of defendants, relied on by them in making the purchase. It is familiar law that a principal is bound by the acts of his agent, not only when performed within the scope of his actual or implied authority, but when within the scope of apparent authority conferred upon him by the principal. There have been many cases distinguishing in this respect between a general agent and a special agent; and perhaps this distinction is not without value, although in most cases it simply throws back one step the process of investigation. Indeed, with regard to acts of corporations it has often been said that the only general agents are its directors acting in their corporate capacity. Strict application of the distinction would, therefore, constitute all acts of corporations not performed under a resolution of the board of directors the acts of special agents, and would require all persons dealing with corporations, except in pursuance of such resolutions, to proceed at their peril. This at one stage of the law might have been a proper doctrine, but the courts must take notice of the fact that the province of corporations is now vastly enlarged; that corporations

now exist, not only for the transaction of public or ecclesiastical affairs, but for the purpose of carrying on ordinary business transactions. We have now private corporations, not only operating railroads and other institutions having *quasi*-public functions, but also corporations conducting banks, manufacturing establishments, live stock raising, as in the present instance, and even retail shops. The domain of individual enterprise has, in other words, been invaded by corporations, and in the conduct of such enterprises we can see no reason and no principle of law requiring the application of rules to such corporations different from those applying to individuals under similar circumstances, except where the acts relate to the operations of the corporation in its capacity as such. What we mean to express by this is that in transactions having no relation to the corporation in its corporate capacity, but solely in regard to the conduct of its business affairs, the general principles applicable to individuals should apply.

It is argued that one dealing with a corporation is, as a matter of law, bound to take notice of its charter and of its by-laws; that one cannot, therefore, claim any right under the act of an agent of a corporation whose authority by its by-laws is so restricted as to invalidate such an act; that the converse of this must be true, and that, therefore, one dealing with an agent of a corporation, empowered by its by-laws to perform a particular act, may protect himself under such by-law, although he had no actual notice thereof and although by specific instructions the agent had been forbidden to perform such act. Following out this line of argument, it is contended that the by-law providing for a manager conveyed upon him authority to sell cattle, and that such authority could not, as against a stranger, be restricted by private instructions. To this, however, we cannot assent, although it has received some support from the courts. Certain cases in the New York supreme court lend credit thereto, but they are rudely disturbed by the state-

ment of the court of appeals (*Rathbun v. Snow*, 123 N. Y., 343), that "by-laws of business corporations are, as to third persons, private regulations, binding as between the corporation and its members or third persons having knowledge of them, but of no force as limitations *per se* as to third persons of an authority which, except for the by-laws, would be construed as within the apparent scope of the agency." An opinion of the supreme court of Virginia (*Bocock's Executor v. Alleghany Coal & Iron Co.*, 82 Va., 913) also is in support of the contention, but its force as authority is destroyed by the fact that it is based on a flagrant misquotation of a decision of the same court in *Bockover v. Life Association*, 77 Va., 85, the court in that case having correctly quoted from *Relfe v. Rundle*, 13 Otto, [U. S.], 222. The earlier Virginia case and the case in the supreme court of the United States relate to an entirely different question. Both courts laid down an entirely different doctrine, and the opinion in the later Virginia case disregards the point in controversy in the cases cited, and very materially misquotes the language of the court. The better doctrine is that of the New York court of appeals in *Rathbun v. Snow*, already quoted, when restricted to the business operations of the corporation, and not applied to the performance of corporate acts, such as the issuance of bonds or like acts where the corporate powers are themselves involved, as distinguished from the particular exercise of powers clearly possessed by the corporation, by subordinate agents thereof.

The sale of these cattle was clearly within the power of the corporation, the only question was the apparent authority of this particular agent of the corporation to make the sale, and we may thus divest ourselves in the present inquiry of all investigation as to corporate functions, and consider whether or not there was error in the judgment independent of the fact that the plaintiff is a corporation. A review of the authorities bearing on the question would

be almost endless, and their confusion is such that it would hardly be profitable. We conceive that the rule whereby a principal is bound by the acts of his agent beyond his actual authority, but within its apparent scope, is founded in the first place on the maxim that where one of two innocent persons must suffer, it should be that one who misled the other into the contract (Story, Agency, sec. 443), and this doctrine is founded on a broad principle of equitable estoppel or estoppel *in pais*. We conceive that a proper statement of it, with reference to such a case as we have before us, is as follows: That where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform on behalf of his principal a particular act, such particular act having been performed, the principal is estopped, as against such innocent third person, from denying the agent's authority to perform it. We do not think that in order to bring a case within this principle it is in all cases necessary to show that by general custom, as defined in the former opinion of the court, such agents have such authority; nor do we think that it is necessary in all cases to show that the same agent had previously performed similar acts; that such acts were known to the principal; that the third person also knew of them, and relied on them in the transaction, or even that similar agents had in the past performed such acts. A number of elements may influence the solution of the question. In this case the corporation was located in Milwaukee, in the state of Wisconsin. It was formed for the purpose of doing business in Wyoming, and most of its business was there conducted. The very fact that the corporation and its general officers held their office at a remote point was an element for consideration. (*Rathbun v. Snow, supra.*) One might be justified in dealing with a person in apparent management of the business in Wyoming, where the

office of the corporation was in a distant state, where he would not be so justified if he found the general offices and general officers of the corporation at or near the place where the business was conducted. Furthermore, the general nature of the business and its requirements was an element for consideration. (*Montgomery Furniture Co. v. Hardaway*, 16 So. Rep. [Ala.], 29.) It might well be that one would be justified in buying ripe fruit from one found in charge of orchards where he might not be justified in dealing with such a person in goods not perishable in their nature. Business usage might have its influence, although not so general and uniform as by implying notice to the principal to also imply that such custom was in view when the agent was appointed. We mention these instances merely by way of illustration, and we hold that the apparent authority of the agent, beyond his actual authority, does not depend solely upon custom or solely on the performance of previous similar acts, whether known or unknown to a person dealing with him, but that, subject to the general rule we have above stated, and to general legal principles, the question is one of fact to be determined by the jury under all the circumstances of the transaction and the business, as disclosed by the evidence.

It follows that the special findings referred to were insufficient whereon to found the judgment, and that the instruction quoted was erroneous.

REVERSED AND REMANDED.

LUKE S. OTIS v. ZERI M. BUTTERS.

FILED NOVEMBER 20, 1895. No. 5763.

Review: UNAUTHENTICATED TRANSCRIPT: DISMISSAL. A petition in error will be dismissed out of this court when founded upon a transcript not authenticated by the certificate of the clerk of the trial court.

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

Allen G. Fisher and *A. W. Crites*, for plaintiff in error.

C. H. Bane, contra.

NORVAL, C. J.

Each assignment in the petition in error, as well as every proposition discussed in the brief, is predicated upon matters disclosed solely by the supplemental transcript filed by the plaintiff in error in this court on July 9, 1894, and which alone contains the purported judgment sought to be reviewed. This transcript cannot be recognized by us, inasmuch as it is not authenticated by the certificate of the clerk of the court below, as by statute required. Following *Moore v. Waterman*, 40 Neb., 498, and *McDonald v. Grabow*, 46 Neb., 406, decided herewith, the petition in error is dismissed.

DISMISSED.

GEORGE PFLUEGER V. STATE OF NEBRASKA.

FILED NOVEMBER 20, 1895. No. 6783.

1. **Jury:** ORDER TO SUMMON. It is not error for the trial court in a prosecution for a felony to order the summoning by the sheriff of persons qualified to serve as jurors, in anticipation of a demand for talesmen after the regular panel shall have been exhausted.

2. **Homicide:** INSANITY AS DEFENSE: EVIDENCE. In a prosecution for murder, the defense relied upon being insanity at the time of the homicide, an order previously made by the proper county board finding the accused to be a fit subject for treatment in the hospital for the insane is, at most, evidence of the defense relied upon, and raises no conclusive presumption that the accused was at the time in question insane in the sense that he is not accountable for the act charged.

3. ———: CONFESSIONS. Statements in the nature of confessions by the accused *held* voluntary and rightly admitted in evidence.

4. ———: INSANITY: EVIDENCE OF NON-EXPERT WITNESS. A non-expert witness may in a prosecution for murder, the necessary foundation therefor having been laid, be examined as to his opinion regarding the sanity of the accused, and may state whether in his judgment the latter was able to distinguish between right and wrong with respect to the particular crime charged.

5. ———: ———: ———. The opinions of non-expert witnesses who have known the accused for fifteen years and who met and observed him almost daily for six weeks or more immediately preceding the commission by him of a homicide, their attention being particularly directed to his mental condition, are admissible as bearing upon the question of his sanity.

6. ———: ———: INSTRUCTIONS. Instructions defining insanity as defense in prosecutions for murder examined and approved.

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

The facts are stated in the opinion.

C. C. McNish and *A. R. Oleson*, for plaintiff in error:

The court erred in overruling the objections of accused to summoning jurors by special venire. (*Dupont v. McAdow*, 9 Pac. Rep. [Mont.], 925; *Lincoln v. Stowell*, 73 Ill., 246; *Kennon v. Gilmer*, 4 Mont., 450.)

Where insanity is once shown to exist it will, unless from a temporary cause, be presumed to continue until the contrary is made to appear. (*Physo-Medical College v. Wilkinson*, 9 N. E. Rep. [Ind.], 167; *State v. Wilner*, 40 Wis., 304; *Rogers v. Walker*, 6 Pa. St., 371; *Cochran's Will Case*, 1 T. B. Mon. [Ky.], 264.)

Where insanity is relied upon as a defense in a criminal action, and testimony has been offered which rebuts the legal presumption that the accused was sane, the burden is upon the prosecution to establish beyond a reasonable doubt that he possessed sufficient mental capacity to comprehend the nature of the act complained of. (*Wright v. People*, 4 Neb., 407; *Hawe v. State*, 11 Neb., 537; *Hart v. State*, 14 Neb., 572; *Anderson v. State*, 25 Neb., 550; *Ballard v. State*, 19 Neb., 609; *Polk v. State*, 19 Ind., 170; *Stevens v. People*, 31 Ind., 485.)

If the prisoner raises a reasonable doubt as to his sanity, it is necessary that the state should prove mental soundness beyond a reasonable doubt. (*Guetig v. State*, 66 Ind., 94; *State v. Crawford*, 11 Kan., 32.)

Where insanity is shown to exist a short time before the act, the evidence should show sanity at the time or the jury should acquit. (*State v. Johnson*, 40 Conn., 136.)

There was error in the rulings as to the effect to be given the proceedings of the commissioners of insanity. (*Hutchinson v. Sandt*, 4 Rawle [Pa.], 234.)

The court erred in permitting non-expert witnesses to testify as to the mental capacity of the accused. (*Shultz v. State*, 37 Neb., 481.)

If the state failed to prove beyond a reasonable doubt

that the accused had recovered from insanity before the commission of the crime, he should have been acquitted. (*In re Gangwere*, 14 Pa. St., 428; *Imhoff v. Witmer*, 31 Pa. St., 245; *Klohs v. Klohs*, 61 Pa. St., 247.)

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

In an argument to sustain the ruling of the lower court as to the manner of selecting the jury reference was made to the following authorities: *Dodge v. People*, 4 Neb., 229; *McElvoy v. State*, 9 Neb., 157; *Clough v. State*, 7 Neb., 324.

The counsel for plaintiff in error argued that the finding of the commissioners of insanity and the order of the district court directing the accused to be confined in the hospital for the insane adjudicated the question of the prisoner's insanity. This proposition is supported neither by reason nor authority. (*Dewey v. Allgire*, 37 Neb., 6; *Leggate v. Clark*, 111 Mass., 308; *Knox v. Haug*, 48 Minn., 58; *Wheeler v. State*, 34 O. St., 394.)

The confessions were properly admitted in evidence. (*Furst v. State*, 31 Neb., 403; *Heldt v. State*, 20 Neb., 496.

POST, J.

This is a petition in error by George Pflueger, who seeks the reversal of a judgment of the district court for Cuming county, whereby he was convicted of murder in the second degree, the crime charged being the killing of his wife, Anna Pflueger.

1. The first of the allegations of error which we shall notice is that which relates to the manner of selecting the jury. It is shown by the transcript that an information was filed by the county attorney on the 27th day of January, 1893, charging the plaintiff in error with the crime of murder in the first degree. On May 15, following, a

second information was filed, charging the same offense, that first mentioned having been quashed on motion of the accused, and on the same day the sheriff was ordered to summon thirty-six additional jurors. We find no record of the order last mentioned, but the direction to the sheriff was in writing, under the seal of the court, and commanded the summoning of thirty-six good and lawful men from the body of the county to appear before said court on the following day to serve as petit jurors. From the sheriff's return, made May 16, it appears that the required number of jurors (therein named) had been summoned in accordance with the command of said writ. On the day last named, the accused having entered a plea of not guilty, the selection of a jury was begun, whereupon the following proceedings were had, quoting from the bill of exceptions:

"This exhausts the jurors of the regular panel who are in attendance. As some of the jurors have not reported, defendant asks that the regular panel be exhausted before proceeding further, which request is granted without objection by the plaintiff. Court now takes a recess until 1:30 o'clock P. M. of the same day.

"On the reconvening of court at 1:30 P. M., pursuant to adjournment, it being reported by the sheriff that the remainder of the jurors drawn on the regular panel are unavoidably and excusably absent, the special venire of thirty-six names is resorted to for the purpose of filling the panel. Counsel for the defendant at this time object to the calling of any of the jurors summoned by the special venire in this case, for the reason that the list has not been prepared as required by the Statutes of Nebraska, being section 6093 thereof (sec. 465*a*, Criminal Code), and for the further reason that said special venire was ordered issued in this case before ever the information upon which the jury is now being impaneled was filed. Objection overruled, to which ruling the defendant excepts."

As each of said special venire-men was passed for cause

by the state, a challenge was interposed by the accused in substantially the same language, viz.: "Counsel for defendant challenges the juror for cause, and for the further reason that he is a special talesman called by the sheriff upon the venire issued before information was filed." Upon one of such challenges the following proceedings appear:

"Counsel for defendant challenges the juror Wilde, on the ground that he is one of the jurors called by the special venire not issued according to law. Counsel for plaintiff objects to the challenge, for the reason that on yesterday afternoon, at about 5 o'clock, C. C. McNish, counsel for defendant, stated to the court that there would not be over eight jurors in the regular panel that would be competent to sit as jurors, in his opinion, and that it would require a long time to impanel a jury, and that the court then suggested that it would be well that a special venire should issue for thirty-six talesmen to expedite the impaneling of a jury when the regular panel was exhausted; that upon consultation with the court and counsel on both sides, the court ordered the special venire, upon which the juror, to whom the objection is now made, was called by the sheriff. Counsel for defendant objects to the record being made in this form, for the reason that neither this defendant nor his counsel have requested the issuance of a special venire in this case.

"By the Court: Then let the record read that the special venire was ordered by the court with the knowledge of counsel on both sides and without any objection being made by either side,—with the knowledge of and without any objection of counsel.

"Counsel for defendant objects for the further reason that that was upon another information, to which the defendant had filed a motion to quash, and in the neighborhood of four hours before this information, upon which the defendant is now upon trial was filed. Objection overruled, to which ruling defendant excepts."

Our chief difficulty is in determining the facts rightly, inferable from the foregoing record. If the so-called special venire was merely to assist the sheriff by securing the attendance of competent talesmen, and if the talesmen required were, in fact, called by him in the impaneling of the jury, the error alleged is not apparent, since the accused has been tried by jurors selected by the person and substantially in the manner prescribed by law. The only authority found in the statutes for a special venire is that contained in section 465*a*, Criminal Code, above mentioned, and which is confined to cases in which one of two or more persons charged in the same indictment has demanded a separate trial. The court may in such cases order a special venire to be drawn and summoned in the manner therein specified, and no other. Provision is made by section 664, Civil Code, for the calling of juries in certain cases by the sheriff, and for the filling by him of the panel for the term when incomplete, but the selection of talesmen for particular causes, after the regular panel shall have been exhausted, is governed by the rules of the common law. It is by section 282, Civil Code, expressly provided: "The general mode of summoning, impaneling, challenging, and swearing the jury is not changed by this code." The selection of talesmen is by the common law entrusted to the discretion of the sheriff (Thompson, Trials, 27; Murfree, Sheriffs, 394), and the right to rely upon that discretion is a substantial right which, to the accused in a prosecution for a felony, cannot be denied. But we cannot, from the foregoing record, say that there was in this instance any departure from the established practice. All presumptions are in favor of the regularity of the proceedings of the district court, and the record being silent upon the subject, we conclude that there exists no substantial ground of complaint by the accused with respect to the rulings referred to.

2. It is next contended that the district court erred in determining the effect to be given to an order of the com-

missioners of insanity for Cuming county, finding the accused insane and a fit subject for custody and treatment in the hospital for the insane. It is disclosed by the record that on the 28th day of October, 1891, an affidavit was lodged with the clerk of the district court, alleging that the accused was insane and a fit subject for treatment; that the hearing thereon was continued on his application from time to time until November 10, on which date the order first mentioned was made. It is also shown that while the accused was being conveyed to the hospital for the insane at Norfolk, a writ of *habeas corpus* was allowed by Hon. Isaac Powers, Jr., judge of the ninth judicial district, at his instance, for the purpose of inquiring into the cause and legality of his detention; that a commission was appointed by said judge to take testimony and determine therefrom whether or not he was insane, and that thereafter, on the 26th day of December, upon a finding that he was insane, the accused was remanded to the custody of the sheriff, but escaped from the latter without having been actually committed to the hospital. It is argued that these findings should be construed as an adjudication of the question of the sanity of the accused; that as such they are conclusive in this prosecution, and that the court should have directed a verdict in his favor on the ground that he was insane at the time of the homicide and, therefore, not accountable for his act. In that view we are unable to concur. The examination contemplated by chapter 40, Compiled Statutes, entitled "Insane," is *ex parte*, and for the purpose simply of determining whether a particular person is a fit subject for treatment in the hospital for the insane. Practically the same question was presented to this court in *Dewey v. Allgire*, 37 Neb., 6, where, referring to the statute mentioned, it is said: "By section 54 of the same chapter the term 'insane,' as used in the act, is defined to include every species of insanity or mental derangement. * * * The records of similar proceedings have been held inadmissible

in such cases as we are now considering, in *Leggate v. Clark*, 111 Mass., 308, and in *Knox v. Haug*, 48 Minn., 58, and we think the reasoning in those cases is sound. In the case of *Wheeler v. State*, 34 O. St., 394, it was held that while such inquisitions were not even *prima facie* evidence of insanity, they were admissible as tending to prove the fact; but the authorities cited in the opinion in the latter case are all based upon inquisitions *de lunatico*, and the court seems to have mistaken the distinction between the subjects of inquiry in the two proceedings. We think that these records were improperly admitted in evidence." We have at this time no reason to question the soundness of the conclusion there stated, or to doubt its applicability to the facts of the case at bar. The findings were not only received in evidence, but the jury were instructed that they established *prima facie* the insanity of the accused and imposed upon the state the burden of proving that he was sane at the time of the homicide. The ruling complained of, if erroneous, did not prejudice the rights of the accused and presents no ground of complaint by him.

3. It is claimed that the court erred in receiving evidence of certain confessions of the accused on the ground that they were not shown to have been voluntarily made by him; but that contention is without support in the record. The statements proved were evidently voluntary in the strictest sense of the term, and within the rule frequently asserted by this court. (See *Heldt v. State*, 20 Neb., 496, and *Furst v. State*, 31 Neb., 403.)

4. Among other witnesses called by the state in rebuttal to establish the sanity of the accused was the latter's brother, Henry Pflueger, who, from his relation to the former, was, it is conceded, competent to testify as a non-expert witness. He was, however, over the objection of the accused, examined by counsel for the state, as follows:

Q. Now, in your opinion, did he [the accused] at that time [the day of the homicide] have sufficient mind to tell the difference between right and wrong?

A. Oh, yes. He knew the difference between right and wrong.

Q. Did he have sufficient mind to know the difference between right and wrong as to the crime of murder?

A. Yes.

Q. Now, in your opinion, did he on that day have mental capacity enough to know the difference between right and wrong as to the crime of murder?

A. Yes; I think he knew that day between right and wrong.

Q. Did you think that on the 20th day of February, 1892 [the day preceding the homicide], he had sufficient mind to know the difference between right and wrong as to the crime of murder?

A. Yes.

The objections, it should be stated, go to the form of the questions only, no exception being taken to the answers on the ground that they are not responsive. This case, on the record quoted, differs from *Shults v. State*, 37 Neb., 481, relied upon by counsel for the accused. In that case non-expert witnesses were by the district court permitted to testify that the prisoner did in fact know the difference between right and wrong at the time of the homicide charged, and on review upon petition in error to this court it was held that for obvious reasons the testimony should have been confined to the opinions of the witnesses, leaving the jurors to draw their own inferences therefrom. The killing being conceded, the vital question is, whether the accused is accountable for his act, and which depends for its solution upon whether he was, or was not, at the time he took the life of the deceased, able to distinguish between right and wrong with respect to the particular act involved. Tested by that rule it would seem that the evidence complained of was rightly admitted. (*State v. Lewis*, 20 Nev., 333; *Carr v. State*, 24 Tex. App., 562; *United States v. Guiteau*, 1 Mack. [D. C.], 498; Rodgers, Expert Testi-

mony, secs. 69, 71.) *Shults v. State*, so far as it asserts a different view, is modified to conform to the rule asserted by the authorities above cited.

5. It is alleged that the court erred in permitting Crawford and Briggs, witnesses for the state, to testify regarding the sanity of the accused, but we think otherwise. Said witnesses had known the accused for more than fifteen years, and each had seen and observed him almost daily from the commencement of the proceedings before the commissioners of insanity, on the 28th day of October until December 17, following, their attention having been particularly directed to the question of his mental condition. The foundation was otherwise sufficient and the witnesses qualified to testify under the rule in *Shults v. State, supra.*

Exception is taken to the refusing of certain instructions requested by the accused, but there is no error in the ruling assigned, since the propositions therein stated had been given in the charge of the court.

6. Finally, it is said that the court erred in giving the third instruction requested by the state. It is sufficient, without entering into a discussion of the paragraph assailed, that it was examined and approved by this court in *Thurman v. State*, 32 Neb., 226. We find no error in the record and the judgment is

AFFIRMED.

CITY OF OMAHA V. JAMES G. MEGEATH ET AL.

FILED NOVEMBER 20, 1895. No. 5893.

1. **Municipal Corporations:** IMPROVEMENT OF STREETS: LIABILITY OF ABUTTING OWNERS. **Where a strip of ground surrounding a tract of land designed for a public park was conveyed by parties who owned other land outside of and abutting upon the said strip upon the express conditions in the deed of**

conveyance, that the grantee should lay out and improve said strip as a street and forever after keep the same in good repair and order at its own expense, such city, for improving or keeping in repair such street, cannot require payment by its grantors because of their ownership of the aforesaid abutting property, and the same exemption from liability exists in favor of one who has since purchased a part of said abutting property.

2. ——: ——: INJUNCTION. Under the above circumstances an injunction will lie to restrain a sale being made by the city of any of the abutting property aforesaid, and against the collection from any owner of such adjacent property, of the cost of improving or of keeping in repair any portion of said street.

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

The facts are stated by the commissioner.

W. J. Connell, for plaintiff in error:

The contract made by the giving and acceptance of the deed with the condition as written was such that it could benefit only the grantors and their heirs. The form of the contract is well known to the law, and it is equally well known that under such a contract no third parties, under any circumstances, can derive any benefits or legal rights whatever. In addition to the intention which the law imputes to the grantors from the peculiar form of the contract adopted by them, the deed on its face, and in express terms, confines all benefits reserved by the condition to the parties executing the instrument, and their heirs. A breach of the condition named in the deed cannot be enforced in a court of equity, because equity will not enforce forfeitures, and because, for a breach of such conditions, the party entitled to sue has an adequate remedy at law. The defendants, having full notice of the exact form of the agreement created by the deed, are presumed to know its legal effect was to confine all benefits arising thereunder to the grantors and their heirs, and that, therefore, no acts of the city done

in fulfillment of the contract could create an estoppel in favor of the defendants. (*Chute v. Washburn*, 46 N. W. Rep. [Minn.], 555; *McElroy v. Morley*, 19 Pac. Rep. [Kan.], 341; *Bangor v. Warren*, 34 Me., 329; *Hooper v. Cummings*, 45 Me., 359; *Warner v. Bennett*, 31 Conn., 468; *Schulenberg v. Harriman*, 21 Wall. [U. S.], 63; *Ruch v. City of Rock Island*, 97 U. S., 693; *Guild v. Richards*, 82 Mass., 317; *Skinner v. Shepard*, 130 Mass., 180; *Cross v. Carson*, 8 Blackf. [Ind.], 138; *Fonda v. Sage*, 46 Barb. [N. Y.], 122; *Southard v. Central R. Co.*, 26 N. J. Law, 21; *Norris v. Milner*, 20 Ga., 563; *Smith v. Brannan*, 13 Cal., 107; *Nicoll v. New York & E. R. Co.*, 12 N. Y., 132; *Jones v. St. Louis, K. C. & N. R. Co.*, 79 Mo., 97; *Martin v. Skipwith*, 6 S. W. Rep. [Ark.], 516; *Missouri Historical Society v. Academy of Science of St. Louis*, 8 S. W. Rep. [Mo.], 346; *Messersmith v. Messersmith*, 22 Mo., 372.)

Kennedy & Learned, contra:

The execution, delivery, and acceptance of the deed constituted a contract between the parties. (*Cooper v. Foss*, 15 Neb., 516; *Shamp v. Meyer*, 20 Neb., 223; *Keedle v. Flack*, 27 Neb., 836; *Stover v. Tompkins*, 34 Neb., 465; *Hayne v. Cummings*, 16 C. B., n. s. [Eng.], 20; *Dunlap v. Mobley*, 71 Ala., 102; *Paschall v. Passmore*, 15 Pa. St., 295; *Wier v. Simmons*, 55 Wis., 637; *People v. Gosper*, 3 Neb., 285; *Hamilton v. Thrall*, 7 Neb., 210; *Newlean v. Olson*, 22 Neb., 717; *Whitney v. Union R. Co.*, 11 Gray [Mass.], 363.)

As to the burdens assumed by the city with respect to the avenues, and as to the construction of the contract by the parties, the following cases were cited: *City of Chicago v. Sheldon*, 9 Wall. [U. S.], 50; *School District v. Estes*, 13 Neb., 52; *Harbach v. Miller*, 14 Neb., 9; *Rathbun v. McConnell*, 27 Neb., 239.

The city had power to make the contract and relieve the

property in question from special assessments for local improvements. (*State v. Wilson*, 7 Cranch [U. S.], 164; *Home of the Friendless v. Rouse*, 8 Wall. [U. S.], 430; *Tomlinson v. Branch*, 15 Wall. [U. S.], 460; *First Division St. Paul & P. R. Co. v. Parcher*, 14 Minn., 224; *McGee v. Mathis*, 4 Wall. [U. S.], 143; *City of Chicago v. Sheldon*, 9 Wall. [U. S.], 50; *City of Dayton v. Pease*, 4 O. St., 100; *Argenti v. City of San Francisco*, 16 Cal., 256; *Allegheny City v. McClurkan*, 14 Pa. St., 81; *Hitchcock v. City of Galveston*, 96 U. S., 341; *Caldwell v. Rupert*, 10 Bush [Ky.], 179; *Craycraft v. Selvage*, 10 Bush [Ky.], 696; *Maher v. City of Chicago*, 38 Ill., 267; *City of Chicago v. People*, 56 Ill., 327; *Fisher v. Prowse*, 2 Best & S. [Eng.], 770; *Boughner v. Clarksburg*, 15 W. Va., 394; *Humphrey v. Pegues*, 16 Wall. [U. S.], 244; *Wilmington R. Co. v. Reid*, 13 Wall. [U. S.], 264; *Farrington v. Tennessee*, 95 U. S., 679; *Dodge v. Woolsey*, 18 How. [U. S.], 331; *Pacific R. Co. v. Maguire*, 20 Wall. [U. S.], 36; *Northwestern University v. People*, 99 U. S., 309; *O'Donnell v. Bailey*, 24 Miss., 386; *Grand Gulf R. Co. v. Buck*, 53 Miss., 246; *Atwater v. Woodbridge*, 6 Conn., 223; *Landon v. Litchfield*, 11 Conn., 250.)

The agreement was to run with the land for the benefit of subsequent purchasers. (*State v. Wilson*, 7 Cranch [U. S.], 164; *McGee v. Mathis*, 4 Wall. [U. S.], 155; *Tomlinson v. Branch*, 15 Wall. [U. S.], 465; *Duffy v. New York & H. R. R. Co.*, 2 Hilton [N. Y.], 496; *Morse v. Aldrich*, 19 Pick. [Mass.], 449; *Kellogg v. Robinson*, 6 Vt., 276; *Birdsall v. Tiemann*, 12 How. Pr. [N. Y.], 551; *Trustees of Watertown v. Cowen*, 4 Paige Ch. [N. Y.], 510; *Barrow v. Richard*, 8 Paige Ch. [N. Y.], 351; *Whatman v. Gibson*, 9 Simons Ch. [Eng.], 196; *St. Andrews Lutheran Church's Appeal*, 67 Pa. St., 512; *Hills v. Miller*, 3 Paige Ch. [N. Y.], 254; *Winfield v. Henning*, 21 N. J. Eq., 188; *Whitney v. Union R. Co.*, 77 Mass., 359; *Merrifield v. Cobleigh*, 4 Cush. [Mass.], 178; *Astor v.*

Miller, 2 Paige Ch. [N. Y.], 68; *Van Horn v. Crain*, 1 Paige Ch. [N. Y.], 455.)

The defendants in error had a right to bring and maintain this action, not only because the contract was made for their benefit, but to prevent illegal and unauthorized burdens being cast upon their lots. (*State v. Birkhauser*, 37 Neb., 521; *Pacific Bridge Co. v. Kirkham*, 54 Cal., 558; *Butler v. Board of Supervisors of Saginaw County*, 26 Mich., 22; *In re Rhinelander*, 68 N. Y., 105; *Brush v. City of Detroit*, 32 Mich., 43; *City of Leavenworth v. Laing*, 6 Kan., 274; *Philbrook v. Kennebec*, 17 Me., 196; *Lattimer v. Livermore*, 72 N. Y., 174.)

John M. Thurston, also for defendants in error.

RYAN, C.

This action was brought in the district court of Douglas county by the owners of certain lots for a decree perpetually restraining the city of Omaha from collecting certain assessments upon the property of the petitioners lying contiguous to streets which surround Hanscom Park. The parties who sought the relief aforesaid, under A. J. Hanscom and James G. Megeath, the original proprietors of the whole tract, were owners by *mesne* conveyances of lots described as owned by each petitioner respectively. There was a decree as prayed, and the review of this judgment is sought by the city of Omaha upon its petition in error. There was no bill of exceptions, hence we must assume that each fact well pleaded in the petition was established by sufficient competent proof, and we are equally bound to assume the failure to prove all essential affirmative propositions contained in the answer.

It was alleged in the petition that the city of Omaha, prior to November 7, 1872, entered into negotiations with Andrew J. Hanscom and James G. Megeath for the purpose of securing from them and their wives a portion of their

land to be used by said city as a public park. It was further averred that the result of said negotiations was that a deed was made by A. J. Hanscom and James G. Megeath, their wives joining therein, to the city of Omaha, on November 7, 1872, of grounds for a park and a street around it; that the grantors named received no consideration for making said deed, except the benefit which would accrue to the remaining real estate of the grantors by reason of the location, improvement, and maintenance of said public park and the street or avenue surrounding the same; that the chief inducement moving said grantors to donate and convey said property was that the performance of the city on its part of all the terms and conditions contained in said deed would enable said grantors to lay out the remaining portion of their several tracts of land into lots and blocks fronting and abutting on the street or avenue lying adjacent to and surrounding said park; that said property fronting and abutting on said avenue around said park, by reason of said conditions that the said city would improve and keep in repair said avenue and park, would be more desirable for residence and other purposes; that it was well understood by the city of Omaha at the time it received and accepted said conveyance that said deed was executed by grantors for and in consideration of the benefits aforesaid which would attach especially to the lots and land fronting and abutting upon the avenue around said park. It was further alleged in the petition that by the acceptance of the aforesaid conveyance the city of Omaha was bound by the requirements of the deed whereby said conveyance was made, and that at the time of said conveyance the grantors therein named owned all the property adjacent to and facing upon the avenue surrounding Hanscom Park, and that, relying upon the faithful performance by the city of Omaha of all the terms and conditions of their said deed, the aforesaid grantors proceeded to lay out, subdivide, and plat all of the said real estate fronting and abutting upon said avenue around

said park into lots; that by *mesne* conveyances the petitioners in the district court had become owners of certain of these several lots, as in the petition described, and that, thereby, all of the conditions of the said conveyance to the city of Omaha inured to the benefit of the several owners of the aforesaid lots. It has already been indicated what relief was sought against the plaintiff in error, and against what threatened invasion of the rights of the several property owners, who joined in asking relief against the city, such relief was prayed. It is not necessary that the conditions attached to that part of the conveyance, affecting only the public park grounds, should be set out at length. For our purposes it is sufficient to refer to that part of the deed which vested in the city of Omaha the title to a strip of land eighty feet wide, which surrounded said park, for a highway or public street, and, in connection therewith, to quote the conditions affecting the same. In respect to this strip the language of the conditions was as follows: "Upon these express conditions, that it shall be forever used and occupied as a public street or highway, and that the said city of Omaha shall lay out and improve said street or highway, and shall forever keep the same in good order and repair, at the expense of said city of Omaha; and in case of failure or neglect to comply with any or all of said conditions, then, and in that case, the title to said street or highway shall revert back and reinvest in the parties of the first part, their heirs or assigns, according to their original interests."

The city of Omaha, it was alleged in the petition, had caused the highway or street surrounding Hanscom Park to be paved, and there was raised no question that this paving was properly done, and that, as done, it was in compliance with the requirement that the city should improve said highway and keep the same in good order and repair. Plaintiff in error, however, insists that the sole remedy available to any one was by re-entry for condition

broken, and this, it was contended, resulted from the provisions of the deed itself. It was argued that the law abhors forfeitures, and that, even if a right to enforce a forfeiture existed, it must be denied to the defendants in error, because, by law, the right of re-entry for condition broken is limited to the grantors and their heirs. For the purposes of this case it might be conceded that the provisions of the deed under consideration amount to conditions subsequent, and that it therefore results that for any breach of these conditions there is available only one remedy,—a right of re-entry for conditions broken limited to the grantors and their heirs. In this case these propositions could have no applicability, for by the original petition no breach was alleged. Practically, it was therein conceded that the city, in paving as it had, had complied with the conditions imposed upon it by the provisions of the deed. The grounds of complaint were that the city, after having so paved the streets around the park, was attempting to compel payment for a part of such paving by the owners of lots which front upon this paved street. There was in the deed to the city no condition that, if it sought to compel payment in this manner, the original grantors of such street to the city, or any one else, might re-enter as for breach of a condition subsequent. Indeed, there is in the deed no recognition of a possibility of the assertion of such a right of the city to repayment of the expenses incurred, either in improving or keeping in repair this highway or street. As against the original grantors, the city could not consistently have required that its title should be recognized, and at the same time have insisted, in the face of the above conditions, that such grantors should improve and keep in repair, or, what amounts to the same thing, pay for improvements and repairs already made. Against such an attempt to ignore its obligations, no redress was provided in the deed. As against an attempt by the exercise, under the circumstances, of its power of taxation to compel such grantors to pay for

such improvements or repairs of the street, which the city, upon sufficient consideration, was bound to make, a court of equity would decree proper relief. This does not seem seriously to be questioned by the plaintiff in error, but its objection, apparently, is that the defendants in error are not entitled in this respect to be subrogated to the rights and remedies of the original grantors of the street to the city. In *Fisher v. Beard*, 32 Ia., 346, H. P. Scholte, the original proprietor of a tract of land, had designated upon the plat thereof a certain square as a public park, and had sold lots facing said square to parties who had relied upon such proprietor's representation that the said square would always be a public park. Afterwards, the designation "Public Park" was, by the proprietor, changed on the plat to "Garden Square," and still other lots facing thereon were sold upon the faith of representations by said proprietor made, that the aforesaid square should forever remain a public park. Subsequently, the original proprietor, without consideration therefor, conveyed the square in question to his wife, who, after his death, became the wife of R. H. Beard. It was alleged in a petition for an injunction that some of the plaintiffs were owners of lots facing this square by virtue of deeds from Scholte and his wife, while others of the petitioners had purchased their lots from the grantees of Scholte, and that the defendant, Mrs. Beard, was about to lay off the aforesaid square into lots and sell the same for the erection thereon of buildings for the different purposes of trade and business, to the prejudice and injury of all the plaintiffs. An injunction against the threatened injuries was, by the supreme court of Iowa, held proper, in favor not only of the original purchasers, but as well in favor of their grantees. In the discussion of this case, Miller, J., delivering the opinion of the court, said: "The right or easement acquired by the original purchasers from Scholte became affixed to the lots fronting on the square, in the nature of a covenant running with the land, and passed

to subsequent grantees of the lots, without any special assignment or conveyance thereof. Whoever purchased one of these lots to which the easement was attached became entitled thereto, and whoever became the grantee of the square upon which this easement was a burden, with notice thereof, would take the same burdened with the easement." In *Trustees of the Village of Watertown v. Cowen*, 4 Paige Ch. [N. Y.], 510, it was held that the grantee of a lot adjoining a public square, who had a special covenant from his grantor, a former owner of the lot, that the square should be kept open for the benefit of his lot and should not be built upon, might file a bill in equity to restrain his grantor from violating this covenant. These principles we have not found questioned in any adjudicated case, and most certainly they are just and equitable. The facts of the case at bar fall within the reason of these rules, and accordingly they should be applied. The city of Omaha, when it accepted the grant of the highway surrounding Hanscom Park, did so subject to the conditions expressed in the deed of conveyance of such highway. Since the city has become vested with this title there has arisen no occasion or justification for resort to a remedy by re-entry, for no condition subsequent has been violated. There has, however, been an attempt to compel the owners of lots fronting upon such highway to pay for what the city was bound itself, upon a sufficient valuable consideration, to do. By virtue of its right to levy taxes and assessments the city is able to do this injustice without resort to the courts. The parties, whose rights are invaded in this manner, have no remedy by virtue of a right of re-entry, or what has been by some courts recognized as a substitute therefor—an action of ejectment. In *Morris v. Merrell*, 44 Neb., 423, the rule laid down was that "where public officers are proceeding illegally under claim of right, they may be enjoined," and in support of this proposition several adjudicated cases were cited. The same redress is available against attempts to

do what the city by its contract obligations is bound not to do, as was above announced by this court with regard to proceedings in other respects illegal. The judgment of the district court was right and is

AFFIRMED.

DAVID P. REDMAN V. HENRY VOSS.

FILED NOVEMBER 20, 1895. No. 5753.

1. **Trial:** RULINGS ON EVIDENCE: REVIEW. The established rule of this court is that to enable it to review an error alleged to have been committed by a district court in the admission or rejection of evidence the testimony admitted or rejected must be specifically assigned in the petition in error.

2. **Instructions:** EXCEPTIONS: REVIEW. It has been the settled rule of this court since the decision of *McReady v. Rogers*, 1 Neb., 124, that a general exception to a charge to a jury is unavailing unless the entire charge is erroneous.

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

James W. Carr, for plaintiff in error.

J. W. West and *Charles Ogden*, *contra*.

RAGAN, C.

Henry Voss, in the district court of Douglas county, recovered a money judgment against David P. Redman, and the latter has brought the same here for review, assigning as reasons for its reversal the following alleged errors:

1. That the court erred in admitting irrelevant, immaterial, and incompetent testimony. This assignment is too indefinite. The established rule of this court is that to enable it to review an error alleged to have been committed

by a district court in the admission or rejection of evidence the particular evidence admitted or rejected must be specifically assigned in the petition in error.

2. That the court erred in his statement of the case to the jury. The record does not disclose that the plaintiff in error took any exception to the statement of the case as made to the jury by the trial court, and an examination of the statement discloses that it was a concise and faultless exposition of the issues made by the pleadings.

3. That the court erred in giving paragraphs numbered 1, 2, 3, 4, and 5 of the instructions given by the court on its own motion. This assignment of error cannot be sustained for two reasons: (1.) The only exception noted to the instructions of the court is in the following language: "Counsel for both plaintiff and defendant except to the instructions of the court to the jury." It has been the settled rule of this court since the decision of *McReady v. Rogers*, 1 Neb., 124, that if the charge of the court to the jury contains more than one proposition, and any portion of it be correct, each specified point deemed erroneous must be pointed out and separately excepted to, and that a general exception to such charge is unavailing. (2.) The only instructions given to the jury in this case were those given by the trial court upon his own motion, and an examination of the charge shows it to be not only not erroneous but beyond criticism.

4. That the verdict of the jury is not sustained by sufficient evidence. We think it is. Voss claimed that he had made some plans and specifications for a building for Redman at the latter's instance and request at an agreed price of $300. Redman admitted making the contract with Voss for the plans and specifications, but claimed that the agreement was that a building erected in conformity with such plans would not cost to exceed $6,000, and if it did, that he, Redman, should not pay anything for the plans; and that a building could not be erected according to the

plans furnished by Voss for less than $8,000. The evidence offered by each party tended to sustain his contention.

An examination of the entire record leads us to the conclusion that not one debatable proposition of law is presented in this proceeding. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. GEORGE W. BERGE, V. ISAAC W. LANSING ET AL.

FILED NOVEMBER 20, 1895. No. 7619.

1. **Office and Officers:** TIME TO QUALIFY: BONDS. Sections 7 15, and 17, chapter 10, Compiled Statutes, should be construed together, and when so construed the effect of section 17 is to require one who has been re-elected or re-appointed to an office to qualify therefor by taking the oath and filing the bond, where a bond is required, in the same manner and within the same time as one for first time elected.

2. ——: ——: ——. Section 15, chapter 10, and section 101, chapter 26, Compiled Statutes, are not in conflict and are *in pari materia* and should be construed together. Section 101 provides that certain events shall create vacancies in office. Section 15 adds another event creating a vacancy, to-wit, neglect of the person elected or appointed to have executed and approved, and to file within the time provided, his official bond.

3. ——: ——: ——. Section 15, chapter 10, Compiled Statutes, providing that "If any person elected or appointed to any office shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant," construed, and *held* to create a condition precedent to the right of a person so elected or appointed to be inducted into office. NORVAL, C. J., and RAGAN, C., dissenting.

4. ——: ——: ——. *Held, further*, That such provision is self-executing, and that unless the official bond, where one is required, is filed within the time provided by law, the person elected loses all right to the office and the vacancy can be filled without any

previous judicial determination of the fact. NORVAL, C. J., and RAGAN, C., dissenting.

5. ——: VACANCIES: CONSTITUTIONAL LAW. Section 20, article 3, of the constitution, providing that "All offices created by this constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind," does not prohibit the legislature from providing that vacancies in office may arise from other events, the state constitution being restrictive in its character and not a grant of power.

6. ——: ——. It seems that a distinction exists between the ousting from office of one already legally inducted and the exclusion of one not yet inducted because of his failure to perform a condition precedent.

7. ——: ——: COUNTY JUDGES. Under existing constitutional and statutory provisions, where a vacancy occurs in the office of county judge and the unexpired term exceeds one year, it should be filled by election. Whether it may be filled by appointment provisionally until the time for a general election, *quære.*

8. **Elections:** PUBLICATION OF NOTICE. The validity of an election does not depend upon the publication of the election notice. If, under existing circumstances, a particular office is to be filled, an election for that office is not invalid because the filling thereof was not included in the published notice of election, at least where it appears that the electors generally were apprised of the fact and voted on the question.

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

See opinions for reference to authorities.

C. C. Flansburg, W. M. Morning, and *G. W. Berge,* for plaintiff in error.

Allen W. Field, J. R. Gilkeson, N. Z. Snell, and *E. P. Brown, contra.*

IRVINE, C.

The essential facts charged in the information herein are as follows: That at the general election of 1891 Isaac

W. Lansing was elected county judge of Lancaster county, and that he duly qualified and discharged the duties of his office; that at the general election in 1893 Lansing was re-elected to said office and a certificate of election issued to him, but that he did not execute any official bond or file the same in the office of the county clerk within ten days after the 4th day of January, 1894, but that on the 25th day of January, 1894, Lansing did file a good and sufficient bond, which was on the 26th day of January approved by the county board. The relator then charged that by virtue of the failure of Lansing to file his official bond within the time provided by law the office became vacant; that the relator was nominated by two political parties entitled to have their nominations placed upon the official ballot as a candidate for county judge to fill the vacancy so created; that the county clerk in the notice of election for 1894 did not include the office of county judge as one of the offices to be filled, but that he placed the name of the relator and the name of another candidate upon the official ballot and upon the sample ballots, which were duly distributed, and that the voters had general knowledge of the candidacy and of the fact that votes were being cast for said office; that the total number of votes cast in said county at the election of 1894 was 12,060; that there were cast for Zara Wilson for county judge 1,663 votes, and there were cast for relator 4,746 votes; that said vote was duly canvassed and the relator declared elected, and the certificate of election issued to him; that the relator executed a good and sufficient official bond and took the oath of office, which was duly indorsed upon said bond; and that the county board, in pursuance of a writ of *mandamus* issued from the district court, within due time approved said bond; that relator was eligible to the office of the county judge. It is further charged that at the time proceedings were brought one Joseph Wurzburg was temporarily discharging the duties of county judge by appointment by the county board

during the temporary absence and disability of Lansing. Judgment of ouster was prayed against Lansing and Wurzburg. The district court sustained a general demurrer to the information and entered judgment for the respondents.

The first question presented by the record, and the question of chief importance in the case, is whether the failure of Lansing to present his bond within the time provided by law deprived him of the right to the office. The statutes bearing upon the subject are as follows:

Compiled Statutes, chapter 10:

"Sec. 5. Official bonds, with the oath indorsed thereon, shall be filed in the proper office within the times as follows: Of all officers elected at any general election on or before the first Thursday after the first Tuesday in January next, succeeding the election; of all appointed officers within thirty days after their appointment; of officers elected at any special election, and city and village officers, within thirty days after the canvass of the votes of the election at which they were chosen.

"Sec. 7. The official bonds of all county, precinct, and township officers shall be approved by the county board. * * * All such bonds shall be filed and recorded in the office of the county clerk. * * *

"Sec. 15. If any person elected or appointed to any office shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant, and such vacancy shall thereupon immediately be filled by election or appointment as the law may direct in other cases of vacancy in the same office.

"Sec. 17. When the incumbent of an office is re-elected or re-appointed he shall qualify by taking the oath and giving the bond as above directed; but when such officer has had public funds or property in his control, his bond shall not be approved until he has produced and fully accounted for such funds and property; and when it is ascer-

tained that the incumbent of an office holds over by reason of the non-election or non-appointment of a successor, or of the neglect or refusal of the successor to qualify, he shall qualify anew within ten days from the time at which his successor, if elected, should have qualified."

Compiled Statutes, chapter 26:

"Sec. 101. Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows: 1. The resignation of the incumbent. 2. His death. 3. His removal from office. 4. The decision of a competent tribunal declaring his office vacant. 5. His ceasing to be a resident of the state, district, county, township, precinct, or ward in which the duties of his office are to [be] exercised, or for which he may have been elected. 6. A failure to elect at the proper election, there being no incumbent to continue in office until his successor is elected and qualified, nor other provisions relating thereto. 7. A forfeiture of the office as provided by any law of the state. 8. Conviction of any infamous crime, or of any public offense involving the violation of his oath of office. 9. The acceptance of a commission to any military office, either in the militia of this state, or in the service of the United States, which requires the incumbent in the civil office to exercise his military duties out of the state for a period not less than sixty days."

Lansing in 1893 was elected as his own successor, and section 17 is, therefore, applicable to the case. The effect of this section is to require that one who is re-elected to an office shall qualify by taking a new oath and giving a new bond "as above directed;" that is, as directed in regard to officers for the first time elected, by the former provisions of the chapter in which section 17 appears. This requires conformity with the provisions of sections 5, 7, and 15 above quoted. The object of section 17 was manifestly to place one re-elected to an office, so far as qualifying for the

office is concerned, upon the same footing as one for the first time elected. Therefore sections 15 and 17 must be read together as if section 17 read "When the incumbent of an office is re-elected or re-appointed, he shall qualify by taking the oath and giving the bond as above directed. And if any incumbent of an office re-elected thereto shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant." The provision for vacancy because of the failure to file the bond within time is not repugnant to the provisions of section 101 above quoted. It is practicable to construe the two sections together, and they should, therefore, be so construed, being *in pari materia*, and not conflicting. Section 101 provides for nine cases of vacancy, all but one contemplating events happening after the induction of the officer into office. Section 15 adds another cause of vacancy, relating to the failure of the person elected to comply with the conditions precedent to his induction. A difference in the language of these two sections is important, and it may be well at this point to call attention thereto. By section 101 it is simply provided that the office "shall be vacant upon the happening of either of the following events." By section 15 it is provided that a failure to have the bond approved and filed within the time limited by law shall "*ipso facto*" create a vacancy.

It is contended by the relator that by virtue of section 15 Lansing's failure to have his bond approved and filed within the time provided by law of itself created a vacancy in the office; that by such failure Lansing lost his right to the office and was not reinvested with the right by the subsequent approval of his bond. By the respondents it is contended that the provisions of section 15 are not self-executing; that, so far as the time for filing the bond is concerned, the statutes are directory only; that Lansing, notwithstanding his default, had a defeasible title, and that

the subsequent approval of his bond was a waiver of his default and rendered his title indefeasible. The application of the statute to all officers renders the question of considerable general importance, and we have, therefore, sought light upon the construction of the act from the decisions of other courts with relation to statutes analogous in their object.

In some of the cases cited in the respondents' brief, or in opinions referred to in that brief, the expressions on the subject are entirely *obiter*. Thus, in *Creighton v. Commonwealth*, 83 Ky., 142, the person elected had never made any attempt to qualify, and what was said in regard to irregular qualification was entirely foreign to the case. In *State v. Hadley*, 27 Ind., 496, the question was not as to the effect of a failure to file the bond within time, but as to the event from which the time began to run, and the court held that properly computed it had not expired when the bond was filed. *State v. Ring*, 29 Minn., 78, was a prosecution of a treasurer for embezzlement for not paying over moneys to a successor in office. A resolution appointing the successor attached to the appointment a condition that bond should be given in two days. The bond was not given for three days. The court held that the county commissioners could waive and had waived the performance of this condition, but as the condition was created by their own resolution and not by statute, this case throws no light on the present. *State v. Colvig*, 15 Ore., 57, was a case arising under a statute which contained no provision fixing the time for filing the oath of office. The court held that a fair construction of the law gave the officer some time after his term began to file the oath and then added that statutes fixing the time are generally construed as directory, an observation purely theoretical, inasmuch as there was no statute fixing the time.

There is another class of cases which were suits on official bonds tendered and approved after the statutory time.

The best considered of these cases hold the bond valid, not because the statute fixing the time was directory merely, but because the officer became a *de facto* officer, or because the officer and his sureties were estopped from asserting the invalidity of the bond, they having tendered it and it having been accepted and the officer having acted under it. Such cases are *Sprowl v. Lawrence*, 33 Ala., 674; *State v. Porter*, 7 Ind., 204; *Crawford v. Howard*, 9 Ga., 314; *State v. Toomer*, 7 Rich. [S. Car.], 216; *Dunphy v. Whipple*, 25 Mich., 10; *Williams v. School District*, 21 Pick. [Mass.], 75; *McElhanon v. Washington County*, 54 Ill., 163; *City of Chicago v. Gage*, 95 Ill., 593. All these cases did not go upon the ground stated. Thus, *State v. Porter*, *supra*, merely says that the failure of the officer to give bond within the time provided "did not necessarily vacate his office," an ambiguous expression which is not elucidated, as we shall hereafter see, by the later decisions of the Indiana court. An analysis of the opinion in *State v. Toomer*, *supra*, shows that the court gave three reasons for holding the bond valid: First, that its invalidity was no defense to sureties; second, that the principal was an officer *de facto*; and third, that the statute was directory only. But the opinion cites three prior South Carolina cases. (*Kottman v. Ayer*, 3 Strob., 92; *McBee v. Hoke*, 2 Spears, 138*; *Hampton v. Levy*, McCord, 107.) The first two of these cases went upon the ground that the officer was one *de facto*, and the last upon the ground that the parties to the bond were estopped to deny its validity. Having given two sufficient reasons, founded upon prior adjudications, for the result reached, the superadded statement that the statute was directory thereby lost much of its force. The Illinois cases are distinctly placed on grounds other than those taken in most of the cases in this class. In *McElhanon v. Washington County* the court said that the statute authorized a new bond to be given whenever the original became insufficient, and that it appearing that the bond sued on was given at a time later than the

original bond should have been filed, it would be presumed that it was a new bond given under the statute to take the place of the original. This case, therefore, throws no light on the present. In *City of Chicago v. Gage* the statute under consideration provided that if the bond were not given in the time provided by law the person elected "shall be deemed to have refused the office;" and another provision of the statute was that in such event the office "shall become vacant." The court in this case based its decision upon the ground that the statute was directory, doing so chiefly from considerations of public policy and reluctance to enforce what the court considered a forfeiture. We are of the opinion that the decision would rest on safer ground if it proceeded upon the reasons given in a majority of such cases; but as the court saw fit to rest it upon the directory character of the statute, it is a case which would support the contention of respondents were the statutes alike. But actions upon bonds given out of time and direct proceedings to oust an officer for failing to qualify according to law present very different questions for consideration. Before leaving this class of cases we wish to observe that in a number of them the court held the bond invalid as an official bond, but sustained it as a voluntary bond, and wherever this course was adopted the decisions tend rather to sustain the position of the relator than that of the respondents.

A few of the cases were collateral attacks by impeaching the validity of the acts of an officer who qualified too late. *Stokes v. Kirkpatrick*, 1 Met. [Ky.], 138, was a motion to quash a summons on this ground. The statute provided that the failure to qualify as required by law "shall be a misdemeanor, and on conviction such officer shall be removed from office by judgment of the court where the conviction is had." Another provision of the statute was that in such case the office "shall be considered vacant." The court held, construing these two provisions together, that

the office only became vacant on conviction and judgment. We do not see how a different result could be reached under such a statute; but it has no application to this case. Of a very different character is the case of *Clark v. Ennis*, 45 N. J. Law, 69. The statute provided that if such officer "shall neglect, refuse, or be unable to give bond with sureties as aforesaid, agreeably to the directions of this act, at the time or times herein limited, the office of such sheriff shall immediately expire, and be deemed and taken to be vacant, and if such sheriff shall thereafter presume to execute the office of sheriff, then all his acts and proceedings done under color of office shall be absolutely void." The court, reviewing decisions under different statutes, reached the marvelous conclusion that the office did not expire and that the sheriff's acts and proceedings were not void. The constitutionality of the statute was not doubted, and the case is perhaps the clearest instance which has ever fallen within the writer's observation of a court's undertaking by judicial interpretation to repeal a valid legislative enactment, because in the judgment of the court a different law would be more desirable. Such authority we emphatically refuse to follow.

Still another class of cases is illustrated by *Ex parte Candee*, 48 Ala., 386, and *State v. Carneall*, 10 Ark., 156. These were cases whereby it was sought to oust an officer who had already been regularly inducted into office, and they proceed upon the ground that an office so acquired is a vested property right of which the incumbent cannot be divested without due process of law. That the court in each case took this view is evident from later decisions of the same states. Thus, *State v. Tucker*, 54 Ala., 205, expressly overrules *Ex parte Candee*, as well as *Sprowl v. Lawrence*, *supra*, in so far as those cases expressed the opinion that the failure to qualify within time operated as a defeasance and not as a condition precedent, and *Falconer v. Shores*, 37 Ark., 386, distinguished *State v. Carneall*, on

the ground that the latter was a proceeding to oust an officer already inducted, while *Falconer v. Shores* raised the question as to whether the officer had ever been properly inducted; the court holding that he had not, because he did not tender his bond within the time provided by law, that this was a condition precedent to his taking office, and that he had thereby lost all right thereto.

We now reach a class of cases more directly in point, and several of these, if we disregard the peculiar phraseology of our own statute, sustain the respondent's contention. *State v. Churchill*, 41 Mo., 41, was an action in *quo warranto*. The statute is not cited, but, as nearly as the writer can ascertain, the statute then in force required the giving of a bond in ten days, but contained no provision for the consequences of a failure to give it; while another section provided for the renewal of bonds and for a forfeiture of the office for failure to properly renew them. The court held that the provision in regard to original bonds was directory only, and we can see no fallacy in that conclusion under such a statute. Other Missouri cases are to the same effect. *Worley v. Smith*, 81 N. Car., 304, was also *quo warranto*, and the court held that the incumbent remains legally in office until ousted by judicial proceedings. The statute is not quoted, but from the language of the court it would seem that its provisions were manifestly to that effect, although the court does not intimate what the proceedings should be, and unless the statutes provided special proceedings, we cannot see how they could be brought unless by *quo warranto*, as was attempted. *State v. Ruff*, 4 Wash., 234, was an action in the nature of *quo warranto*. The statute provided that for a failure to qualify within time the office "shall become vacant." The court said that "courts abhor forfeitures," and that therefore the statute should be construed as directory, or, to use the precise language of the court, "declaratory," but adds that if the statute had provided that the office should "*ipso facto*" become va-

cant, a different question would be presented. From the decision two judges out of five dissented; and to courts inclined to adopt the policy of construction followed by the New Jersey court in *Clark v. Ennis*, we would commend a perusal of the dissenting opinion of Judge Dunbar in *State v. Ruff*, who said: "Nor do I think that a plain statutory enactment, setting forth specifically circumstances under which an office becomes vacant, should be construed out of existence by the mere statement of the theoretical rule that 'forfeitures are abhorred by the courts.' What the courts abhor should be of very little consequence. The vital question is, what did the legislature intend? I think it is an excellent idea for courts to give to statutory language its plain and ordinary meaning." In *Commissioners of Knox County v. Johnson*, 124 Ind., 145, there was an appeal from the refusal of the commissioners to accept a bond tendered out of time. The statute provided that on a failure to present the bond within time the office "shall immediately become vacant." The opinion of the court, written by Judge Elliott, is to the effect that the statute was directory, and not mandatory, and that the failure to file the bond within time did not vacate the office. On this point the court cites, among other cases, *State v. Porter*, 7 Ind., 204, and *Mayor of City of Indianapolis v. Geisel*, 19 Ind., 344. We have already commented upon *State v. Porter*. *Mayor of City of Indianapolis v. Geisel* grew out of the following facts: Geisel and others had been elected councilmen from the eight and ninth wards of Indianapolis. They took the oath of office and presented their certificates of election. Thereupon a motion was made in the council to exclude them, to which an amendment was offered as follows: "That as too many democrats lived in said wards (eighth and ninth), the judiciary committee be directed to report an ordinance repealing the ordinance creating said wards." This motion, with the amendment, was carried. The circuit court issued a mandate commanding the council to admit

the excluded members, and the supreme court affirmed the judgment in a brief opinion discussing no question of law. The syllabus of the case is as follows: "There is no point of interest decided herein, but the facility with which objects may sometimes be attained by the 'law's delay' is well illustrated." The other Indiana cases cited by Judge Elliott were cases decided without an opinion, simply referring to the last case. On this slender basis of authority Judge Elliott based his opinion, and the court its decision, in *Commissioners of Knox County v. Johnson*, apparently forgetting and in nowise referring to the fact that in *State v. Johnson*, 100 Ind., 489, the court had unanimously held, Judge Elliott himself writing the opinion, that, under a statute providing that for a failure to present his bond within the time limited the "office shall become vacant," the person elected lost all right to the office and could not thereafter present his bond and require its approval. With all due respect to the Indiana court we must protest that such a line of decisions does not appeal to one's reason. Of all the cases cited in support of the position of the respondents, that most nearly in point is the case of *Atchafalaya Bank v. Dawson*, 13 La., 497. The charter of the bank provided that for a failure or refusal to pay specie for the period of ninety days, the charter should "become *ipso facto* forfeited." The court held that this statute did not mean what it said; that the words "*ipso facto*" lent no force to the act, and that the failure to pay specie was only a ground of forfeiture and did not work a forfeiture; but the court seems to have been moved to a decision of this case by the fact that it was an attempt by collateral proceedings to question the existence of a corporation and did not consider that its decision had any bearing on a case like the present, because *State v. Beard*, 34 La. Ann., 273, was a case precisely like the case we are considering, the statute providing that the failure to qualify within the time provided "shall operate a vacation of such office," and the

court held that a failure to so qualify within the statutory time forfeited all rights to the office, that the office by that fact became vacant and an appointment might be made to fill the vacancy, citing *Hurford v. City of Omaha*, 4 Neb., 336.

So far as the cases we have already referred to offer any support for the position of the respondents, they are met by the following cases holding that a failure to qualify within time is a failure to perform a condition precedent to the right of taking the office. For the sake of brevity we omit a full quotation of the statutes and quote only the words which follow what is, in substance, the premise that "a failure to qualify within the time provided," etc.: "Shall forfeit his right to the office." (*Falconer v. Shores*, 37 Ark., 386.) "Becomes vacant." (*People v. Taylor*, 57 Cal., 620; *People v. Perkins*, 85 Cal., 509; *People v. Shorb*, 100 Cal., 537.) "Shall become vacant." (*State v. Matheny*, 7 Kan., 327.) "Vacates his office." (*State v. Tucker*, 54 Ala., 205, overruling, on this point, *Sprowl v. Lawrence*, 33 Ala., 674, and *Ex parte Candee*, 48 Ala., 386, relied on by respondents.) "Deemed vacant." (*In re Office of Attorney General*, 14 Fla., 277.) "Shall be vacant." (*State v. Johnson*, 100 Ind., 489.) "Shall operate a vacation of office." (*State v. Beard*, 34 La. Ann., 273.) "Shall thereby become vacant." (*Bennett v. State*, 58 Miss., 556.) "Shall immediately become vacant." (*People v. Common Council of City of Brooklyn*, 77 N. Y., 503.) "Before entering upon the discharge of any functions as officers of this state, must take and subscribe the following oath." (*Childrey v. Rady*, 77 Va., 518; *Owens v. O'Brien*, and three other cases, 78 Va., 116.)

It will thus be seen that the overwhelming weight of authority, under statutes much less mandatory than our own, is to the effect that where a time is prescribed within which one in order to be inducted into an office must take the oath or file a bond, the taking of the oath or the filing

of the bond is a condition precedent to the right to enter upon the office, and that the right is absolutely lost by a failure to perform the condition within the time limited. There is no question involved in this case as to whether the holding of an office is a vested property right. It is not here contended that there is anything in our constitution which prohibits the legislature from requiring an oath of office or the giving of a bond as a condition precedent to the exercise of official functions. The only question is whether the legislature has required it. Were the statute much less distinct in its terms, and were we to follow the general current of authorities elsewhere, we would be obliged to hold that such a condition precedent did attach; but evidently for the purpose of permitting no room for doubt upon the question, the legislature has adopted language which, as strongly as any language could, conveys the idea that the bond must be filed within the time limited or the person elected loses all right to the office. The language of the statute is that a neglect to have the bond approved and filed within the time limited shall "*ipso facto*" vacate the office. If possible, in construing a statute every word thereof must be given effect, and if we give the term "*ipso facto*" any effect it must be in the way indicated. The term has in law a very well defined signification. Rapalje's Law Dictionary defines it "by the very act itself." Anderson's Law Dictionary defines it "by the mere fact." Bouvier defines it "by the fact itself. By the mere fact, a proceeding *ipso facto* void is one which has not *prima facie* validity but is void *ab initio*." Possibly a closer translation of the Latin term would be "by the fact itself," but under any possible construction of the term, if we are to give it any force, it means that the failure to file the bond within the time limited shall of itself operate a vacation of the office, and not that a judgment of a court based upon that failure shall be required to operate such vacation. When the question was first proposed to us, we recalled to our minds the use of

the term in discussions of the law in relation to forfeitures, for the purpose of distinguishing forfeitures which took place because of office found from forfeitures *ipso facto*,—that is, by reason of the event creating the forfeiture independent of judicial action; but the generally accepted signification of the term, coupled with its use in cases like the present, renders it unnecessary for us to investigate the authorities from the standpoint suggested. Among the cases presenting questions precisely like that before us, in which the term "*ipso facto*" is used in the sense of causing the failure to file the bond itself to vacate the office without the necessity of any judicial proceeding to accomplish that object, are the following: *State v. Beard*, 34 La. Ann., 273; *State v. Peck*, 30 La. Ann., 280; *State v. Cooper*, 53 Miss., 615; *Bennett v. State*, 58 Miss., 556; *Kearney v. Andrews*, 10 N. J. Eq., 70; *People v. Carrique*, 2 Hill [N. Y.], 93; *People v. Nostrand*, 46 N. Y., 381; *Foot v. Stiles*, 57 N. Y., 399; *People v. Green*, 58 N. Y., 295; *State v. Ruff*, 4 Wash., 234; *King v. Godwin*, Douglas [Eng.], 398; *Milward v. Thatcher*, 2 T. R. [Eng.], 81. In each of the foregoing cases the term was used, and precisely in this sense, and these cases cover most of the states which, under different statutes, have adopted the directory theory, implying clearly that the use of this particular term in the statutes of those states would have compelled a different result and one in accordance with our conclusion and with the weight of authority elsewhere. We therefore think that whether the result be reached by a review of the authorities or by an inspection of the statute itself, our legislature has declared in unmistakable terms that where an official bond is required it must be filed within the time provided by law, and that its filing within time is a condition precedent to the induction into office of the person elected; that Lansing did not present his bond within time; that he failed thereby to perform a condition precedent, and that he thereby lost all right to claim the office

unless his right was saved by a constitutional question, which next arises for consideration.

The constitution (article 3, section 20) provides: "All offices created by this constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind." It is contended that the expression of these events as creating vacancies is the exclusion of all others, and there are a few decisions in other states lending color to the argument. It would be a sufficient answer to this contention to say that this court has always carried in view the principle that the state constitution is not to be considered as a grant of power, but that its provisions are purely restrictive and that legislation is valid unless prohibited by the state or the federal constitution. Therefore, in such cases as the present, the maxim "*Expressio unius est exclusio alterius,*" is not applicable, and the legislature may adopt any provision not prohibited by the constitution. (*State v. Lancaster County,* 4 Neb., 537; *State v. Dodge County,* 8 Neb., 124; *State v. Bean,* 16 Neb., 681; *Shaw v. State,* 17 Neb., 334.) To put it differently, the constitutional provision quoted creates a vacancy upon the happening of any of the events covered by the provision, and the legislature would be prohibited by that provision from enacting any law whereby such an event would not create a vacancy. But it is not prohibited from enacting that vacancies shall be otherwise created. But aside from this, section 20, article 3, of the constitution manifestly refers to events occurring after an induction into office. The case presented is not one of that character. It is not the case of ousting one already legally inducted into office for events occurring after his induction, but, on the contrary, it is questioning the right of one to claim an office in the beginning. The distinction has already been alluded to, but throughout it should be borne in mind that we are here discussing the right of a person to claim a term of

office, and not the right of another or of the public to oust one from a term already legally begun.

The next question which arises is as to the right of the relator himself to claim the office. Section 21, article 6, of the constitution, provides: "In case the office of any judge of the supreme court, or of any district court, shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor shall be elected and qualified, and such successor shall be elected for the unexpired term at the first general election that occurs more than thirty days after the vacancy shall have happened. Vacancies in all other elective offices provided for in this article [which includes the office of county judge] shall be filled by election, but when the unexpired term does not exceed one year, the vacancy may be filled by appointment, in such manner as the legislature may provide." Therefore, in case of vacancy in the office of the county judge, the constitution does not provide for filling the vacancy, but the general provision applies, that it shall be by election; provided, however, that where the unexpired term does not exceed one year the vacancy may be filled by appointment as the legislature may provide. The legislature has provided as follows: "Vacancies shall be filled in the following manner: In the office of the reporter of the supreme court, by the supreme court; in all other state and judicial district offices, * * * by the governor. * * * In county and precinct offices, by the county board." (Compiled Statutes, sec. 103, ch. 26.) "Appointments under the provisions of this chapter shall be in writing and continue until the next election at which the vacancy can be filled, and until a successor is elected and qualified." (Sec. 105.) "Vacancies occurring in the office of county judge * * * shall be filled by appointment as provided in section one hundred and three." (Sec. 107.) Here the unexpired term did exceed one year and, therefore, was to be filled by elec-

tion. Whether it would have been proper, under existing laws, to have filled the vacancy by appointment until the election is not a question involved in this case, and is one which we do not consider, because, conceding that a vacancy existed which should have been filled by appointment provisionally, the failure of the proper officers to make the appointment would render it none the less necessary to fill the office by election at the succeeding general election. There is, so far as we can find, no provision for a special election in such case, and if there were one, the failure of the proper officers to call such special election would not deprive the electors at the next general election of the right or of the duty of filling the office.

This brings us to the final question—the validity of the election in so far as it may be affected by the fact that the office of county judge was not one included in the notice of election for 1894. In *State v. Skirving*, 19 Neb., 497, which, by the way, is also in point on the principal question presented, it was said that the exercise of the right to fill such a vacancy did not depend on the notice or want of one. That it was generally understood by the electors of the county that a vacancy existed and they sought to fill said vacancy, nearly all having cast their ballot for one of the candidates named. It was therefore held that the election was valid, but the court disclaimed any intention of passing upon the question as to the validity of such an election had but a small percentage of the voters participated therein. In *State v. Thayer*, 31 Neb., 82, the court allowed a writ of *mandamus* to compel the canvass of the votes under similar circumstances. The governor had not included in his proclamation of the election the filling of the office in question. The court held that the provision in regard to proclamation was one of convenience for the purpose of calling attention to the contingency, but said: "It is not believed that it touches the foundation of the right and power of the people under the statute to fill such

vacancy at the general election designated by law," and added thereto the statement that "whether the people had executed their right doubtless may in some instances depend upon the fact of their having actual notice of the existence of a vacancy." In *State v. Van Camp*, 36 Neb., 91, *State v. Thayer*, *supra*, was approved. This case related to the regularity of a nomination under what is called the "Australian Ballot Law," it being claimed that the nomination was irregular because one county was not included in the call for the convention and was not represented. The court said it would not "so construe the law as to disfranchise the voters of that county for any such irregularity." Here the information alleges that it was generally known that the relator and one Wilson were candidates for the office of county judge to fill the vacancy and that together they received the votes of more than half the voters voting at the election. The case therefore falls within the rule in the foregoing decisions, and the election was valid, notwithstanding the fact that the filling of this office was not one of the objects included in the notice of election.

What has been said in this opinion relates to the case under consideration as presented by the record, and to the statutes brought under consideration. We do not wish to be understood as questioning the propriety of those decisions which hold provisions of the general character referred to directory rather than mandatory, where the language is ambiguous or fairly susceptible of that interpretation. We are, however, compelled, in order to avoid judicial legislation, to reach the conclusion already indicated in this case. Whether or not the law is wise is a question with which the court has nothing to do. The legislature has declared it, its constitutionality has not been questioned, and our sole office is to determine the legislative intent. The consequences are matters for legislative consideration and not for the consideration of the court.

REVERSED AND REMANDED.

NORVAL, C. J., and RAGAN, C., dissenting.

It is evident that the question whether Lansing's failure to execute, have approved, and filed his official bond by the first Thursday after the first Tuesday in January, 1894, created a vacancy in the office of county judge, must depend upon the construction of the following language found in section 15, chapter 10, Compiled Statutes: "His office shall thereupon *ipso facto* become vacant." What is the meaning of the expression "shall thereupon *ipso facto* become vacant"? We think a fair construction of this phrase is that "his office shall at that time, by reason of such neglect, become vacant." Is this section of the statute mandatory or directory merely?

In *State v. Matheney*, 7 Kan., 327, the statute under consideration provided: "The bond and oath of the county clerk must be filed with the treasurer of the county," etc. "Every county office shall become vacant upon the refusal or neglect of the officer to deposit his oath and bond of office within the time prescribed by law." Matheney was elected county clerk, executed his bond, and took the oath of office required by law, and within the time required by law, and entered upon the duties of his office, but neglected to deposit his oath and bond with the county treasurer within the time prescribed by the statute, and the court held that the failure of Matheney to deposit his bond and oath of office with the county treasurer of the county within the time required by law—twenty days after his term of office began—created a vacancy in the office. The court said: "There can be no mistake as to the meaning of these statutes. Whatever may be the rule, independent of the statute, the plain provision of the law is, that not only a refusal, but a neglect simply, to deposit the official oath and bond within the time prescribed vacates the office. We may not add to nor take from the law. It may seem a matter of trivial importance whether a bond and oath, executed and

taken, are filed within twenty or thirty days; but that is a matter for the legislature to consider. They have power to establish a rule. Having established it, our plain duty is to enforce it."

A statute of California provided: "An office becomes vacant on the happening of either of the following events before the expiration of the term: * * His [the officer elect's] refusal or neglect to file his official oath or bond within the time prescribed." (Political Code of California, sec. 996.) Taylor was duly elected sheriff, but neglected to file his official oath or bond within the time prescribed by the statute and the supreme court of that state in *People v. Taylor*, 57 Cal., 620, held that the neglect to file the bond within the time prescribed created a vacancy in the office.

The charter of the city of Brooklyn, New York, provided that if an alderman of said city should be elected to and accept any other public office, "his office as said alderman shall immediately become vacant." One O'Reilly was an alderman in the city of Brooklyn, and while holding that office was elected to and accepted the office of congressman of the United States, and the court of appeals of New York, in *People v. Common Council of the City of Brooklyn*, 77 N. Y., 503, held that O'Reilly's acceptance of the office of congressman created a vacancy in the office of alderman. The court, in effect, held that the quoted statutes were mandatory.

There are other cases holding that such a statute as the one we have under consideration is mandatory; but we think, however, that the weight of authority is to the effect that all such statutes are directory.

A statute of New Jersey provided that sheriffs should renew their bonds in November annually; and "That if any sheriff * * * shall neglect, refuse, or be unable to give the bond with sureties as aforesaid * * * at the time or times herein limited, the office of such sheriff

shall immediately expire and be deemed and taken to be vacant." (Revision of New Jersey, p. 1099, sec. 10.) The statute further provided: "All such acts and proceedings done [by a sheriff] under color of office [after having neglected or refused to renew his bond] shall be absolutely void." The supreme court of New Jersey, in *Clark v. Ennis*, 45 N. J. Law, 69, construing these statutes, said: "It is clear, I think, both upon reason and authority, that a statute declaring an office vacant for some act or omission of the incumbent after he enters upon his duties does not execute itself;" and held, in effect, that the statute was directory.

The charter of the city of Chicago provided that all city officers who were required to give bonds for faithful performance of official duties should "file their bonds with the city clerk within fifteen days after their election," etc. The charter further provided that when bonds should not be filed with the city clerk within fifteen days after the official canvassing of the votes, "the person so in default should be deemed to have refused said office, and the same should be filled by appointment as in other cases;" and in case a bond so filed should not be approved and a satisfactory bond should not be filed within fifteen days after such disapproval, the person so in default should "be deemed to have refused said office, and the same should be filled as above provided;" and further, the charter made it "the duty of the clerk to notify all persons elected to office of their election, and unless such persons should respectively qualify within fifteen days thereafter the office should become vacant." It was held in *City of Chicago v. Gage*, 95 Ill., 593, that these provisions, in respect to the time within which official bonds were required to be filed, were not mandatory, but merely directory. The municipal authorities were empowered, in their discretion, to declare a vacancy, or to waive the default as to the mere time of filing the bonds, and to accept and approve it when afterwards

filed. The mere default in that regard would not, of itself, operate to vacate the office. The court said: "The position is, that the provision requiring a bond to be filed by the treasurer elect within fifteen days after the official canvass has been declared is mandatory, and that a failure to file the bond within the time *eo instanti*, upon the termination of the time, absolutely vacates the office. It is insisted, on the contrary, that the sections of the charter on this subject taken together were intended merely to empower the mayor and council, in their discretion, to declare a vacancy and appoint a successor, or to waive the default as to the mere time of filing bond, and to accept and approve it when afterwards filed; therefore a failure to file in time does not of itself annul or avoid the right or title to the office, but merely renders it voidable or defeasible. That if the officer files his bond strictly in time, his right and title to the office are indefeasible. If he files it afterwards, and it be accepted and approved, his right and title thereupon become equally indefeasible. This latter seems a reasonable construction, and is one which we are disposed to adopt. Gage derived his title to the office from election. The law does not favor forfeitures, and 'in enforcing forfeitures courts should never search for that construction of language which must produce a forfeiture, when it will bear another reasonable construction.'"

A statute of Washington provided: "Every office shall become vacant upon the happening of either of the following events: * * * His [the officer elect's] refusal or neglect to take his oath of office within the time prescribed by law." The supreme court of that state in *State v. Ruff*, 29 Pac. Rep., 999, construing this statute, held that the failure of the officer to take his oath of office within the time prescribed by law did not work a forfeiture of his right to the office, but simply authorized the proper authorities to declare the office vacant, and fill it by appointment. (See, also, *State v. Justices of the County Court*, 41 Mo., 44; *State v.*

County Court of Texas County, 44 Mo., 230; *Foot v. Stiles*, 57 N. Y., 399.)

A statute of Indiana provided: "County school superintendents, within thirty days from the issuing of the proclamation by the governor announcing the making of a contract for furnishing school books, and every county superintendent hereafter elected before he enters upon his official duties, shall enter into a special bond, and upon the failure of any county school superintendent to give such bond his office shall become immediately vacant." A county school superintendent elected after the passage of the act gave a general bond and entered upon his duties, but failed to give a special bond within thirty days after his election. In *Commissioners of Knox County v. Johnson*, 24 N. E. Rep. [Ind.], 148, the supreme court of that state, construing this act, said: "But it by no means results from the construction we have given the statute that the appellee lost his title to the office to which he was elected and into which he had been legally inducted. It is held by our own and other courts that statutes requiring official bonds to be filed within a designated time are directory and not mandatory. Upon this question the authorities are harmonious." The court then cited a number of authorities and continued: "This rule is carried very far, for it is held, without substantial diversity of opinion, that unless the statute makes the filing of a bond within a limited time a condition precedent to the right to the office, a failure to file it within the time prescribed will not work a forfeiture of the right to the office nor create a vacancy."

A statute of Louisiana provided that for the failure or refusal of a bank to pay specie for the period of ninety days its charter should become *ipso facto* forfeited. In construing this statute the supreme court of that state, in *Atchafalaya Bank v. Dawson*, 13 La., 497, said: "It would certainly be difficult to find in our language stronger terms, or to combine them with more force, for the purpose

of expressing the consequences of an act. * * * It is provided * * * that on the suspension or refusal of payment in specie for more than ninety days, the charter shall be *ipso facto* forfeited and void. * * * I do not understand the words '*ipso facto*' as having any other import than the corresponding term 'by the effect of the act,' made use of in the Code."

Respondent's case falls within the principle of these last cited cases, and controlled by the weight of authority we reach the conclusion that said section 15 is directory, and not mandatory, in so far as its provisions are under consideration here; that the section is not self-executing; that the execution and filing of an official bond by respondent for his second term of office was not a condition precedent to his right to enter upon and to discharge the duties of his office for the second term; that since respondent was already in office as county judge, was re-elected to succeed himself, and since he held under his first election and qualification until his successor should be elected and qualified (Compiled Statutes, sec. 104, ch. 26), he held office under his second election by a defeasible title from the time of his neglect to execute and file his official bond; that is, he held the office by a title capable of being divested at any time by the proper legal authorities; and that the execution and filing of his official bond by respondent, coupled with the neglect and failure of the proper authorities to declare the office vacant or to take any steps to that end prior to the time that respondent did execute and file his bond, saved the forfeiture incurred, and barred and precluded a subsequent judgment that the office was vacant by reason of respondent's default.

N. N. BRUMBACK ET AL. V. GERMAN NATIONAL BANK OF BEATRICE.

FILED DECEMBER 7, 1895. No. 6228.

1. **Jurors:** CHALLENGE: REVIEW. It is the settled law of this state that error cannot be predicated upon the overruling of a challenge to a juror for cause, when the record does not disclose that the complaining party has exhausted all his peremptory challenges.

2. **Negotiable Instruments:** PRINCIPAL AND SURETY. When a note is signed by the principal and four sureties, an agreement between the principal and such sureties that it is not to be delivered to the payee until a certain other person signs as surety, which condition is not complied with, constitutes no defense, unless the payee had notice or knowledge of the agreement at the time of the delivery, or of facts which should have induced inquiry.

3. **Instructions:** REVIEW. It is not reversible error to refuse to give an instruction not applicable to the evidence, or one which has been covered by instructions given by the court on its own motion.

4. **Judgment for Plaintiff in Action on Note.** *Held*, That the evidence sustains the verdict.

5. **Trial:** VERDICT. It is not error to refuse to submit a form of verdict to the jury which is not responsive to all the issues in the case.

6. **Verdict:** OBJECTIONS TO FORM. Objections to the form of a verdict should be made in the trial court at the time of its rendition, to be of any avail in this court. *Roggenkamp v. Hargreaves*, 39 Neb., 540, followed.

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

J. E. Cobbey, for plaintiffs in error.

George A. Murphy, contra.

NORVAL, C. J.

This action was brought by the German National Bank of Beatrice against the plaintiffs in error upon a promissory note, of which the following is a copy:

"$1,500. BEATRICE, NEB., May 1, 1892.

"Sixty days after date I, we, or either of us, promise to pay to the German National Bank, of Beatrice, Neb., or order, fifteen hundred dollars, value received, payable at the German National Bank in Beatrice, Nebraska, with interest at the rate of 10 per cent per annum from due.

"BEATRICE RAPID TRANSIT & POWER CO.,
"By N. N. BRUMBACK, *Pres.*
"L. E. SPENCER, *Sec'y.*
"L. E. SPENCER.
"N. N. BRUMBACK.
"S. K. DAVIS.
"CHAS. L. SCHELL."

The petition contains the usual averments. Two answers were filed, one by the Beatrice Rapid Transit & Power Company, and the other by the individual defendants. The answer of the corporation defendant avers, in effect, that it executed the note upon the understanding and agreement that plaintiff was to secure the signature of one G. M. Johnston to the note, and that the secretary and president of said defendant had no authority or power to sign said note upon any other condition, which fact was known to the plaintiff and its managing officer; that the note was only to be delivered upon Johnston's signature to said note being obtained by said plaintiff, and that said condition has never been fulfilled or carried out. The individual defendants answer setting up that they each signed the note as surety, and upon the express understanding that it should not be delivered and was not to be a binding obligation until the same was signed by each of the individual defendants and the said G. M. John-

ston; that the name of the latter was never procured, nor was the instrument ever delivered. The reply denies each averment in the answers contained. Upon a verdict being returned in favor of the plaintiff for the full amount of the note, the corporation defendant filed a motion for a new trial, and the individual defendants joined in another motion for a new trial upon substantially the same grounds, which motions were overruled, and judgment entered upon the verdict. Two petitions in error were filed, one by the corporation defendant, and one by the remaining defendants.

The first three assignments of error relate to the refusal of the court to excuse the jurors Fred Hallingsworth, M. S. Glass, and G. W. Martin, for the reason the *voir dire* examination of each disclosed that he was indebted to, and did business with, the plaintiff. Whether these persons were disqualified from sitting as jurors in the cause we will not stop to determine. Conceding, for the purposes of this case, that they were incompetent jurors, still a reversal cannot be had upon that ground, for two reasons: First, the record fails to show which party challenged the jurors for cause or excepted to the ruling thereon. If the challenges were interposed by the plaintiff, and the jurors were retained over its objection and exception, clearly the defendants are not in position to have the decision of the court thereon reviewed here. Again, it does not appear that the defendants either exhausted all, or availed themselves of any, of their peremptory challenges. For this latter reason alone, the error, if any, in the overruling of the challenges for cause is without prejudice. (*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; *Blenkiron v. State*, 40 Neb., 11; *Jenkins v. Mitchell*, 40 Neb., 664.)

The next three assignments, the fourth, fifth, and sixth, are as follows:

"4. The court erred in compelling defendants to exhaust their peremptory challenges in excluding the three jurors above named.

"5. The court erred in restricting defendants to three peremptory challenges.

"6. The court erred in forcing the defendants to exhaust their peremptory challenges in removing from the jury men who were under financial obligations to plaintiff."

Not one of the foregoing assignments is well taken, inasmuch as there is nothing in the record to indicate that the defendants were limited by the court to three or any other number of peremptory challenges, or that they challenged a single juror peremptorily. Error cannot be presumed, but must affirmatively appear, in order that a reviewing court may take cognizance thereof.

Assignments 7 to 19, both inclusive, relate to the giving and refusing of certain instructions, but only three of which, seventh, ninth, and tenth, are discussed in the brief of plaintiffs in error. The others will be regarded as waived.

It is insisted that the court erred in giving the following instruction at the request of the plaintiff:

"1. The court instructs the jury that though you may believe from the evidence that the makers of the note signed the said note with the understanding and agreement that one Johnston should sign the same, and that they should not be bound on said note unless said Johnston signed also, yet, unless the plaintiff bank had knowledge of this arrangement it would not bind them or be a defense to said note, and your verdict should be for the plaintiff."

A single criticism is made upon this instruction, and that is, it is inapplicable to the facts established on the trial. As to this point, counsel for plaintiffs in error, in the brief filed, says: "The undeniable evidence is that Spencer, one of the signers of the note, was made by the bank, defendant in error, its agent to secure the signatures of the other parties to the note, so that agreements or state-

ments made to him by the signers would be binding upon the bank, whether it had actual knowledge thereof or not." We have been unable to find a scintilla of evidence from which the inference can be drawn that the bank authorized Mr. Spencer, or any one else, to procure the signatures to the note. The note in suit was given in renewal of another note of the same amount signed by all of the plaintiffs in error and one Johnston for the sum of $1,500. All the individual signers of the note in controversy were stockholders of the Rapid Transit & Power Company. Spencer, being the secretary of the corporation, obtained the signatures to the note, and in so doing he acted for and on behalf of himself and his co-signers, and not as the agent of the payee of the note. So notice to Spencer was not notice to the bank. The debt was that of the corporation defendant, the other signers being sureties merely. The fact that it was the understanding or agreement between the makers of the paper that Johnston was also to execute the note as surety before the delivery thereof, is no defense, unless the payee had notice or knowledge of the condition at the time the instrument was accepted by the bank, and the court correctly so charged. (*Lombard v. Mayberry*, 24 Neb., 679; Brandt, Suretyship [2d ed.], sec. 402; *Deardorff v. Foresman*, 24 Ind., 481; *Merriam v. Rockwood*, 47 N. H., 81; *Stoner v. Millikin*, 85 Ill., 218; *Selser v. Brock*, 3 O. St., 302; *Passumpsic Bank v. Goss*, 31 Vt., 315; *Haskins v. Lombard*, 16 Me., 140.) Even though there existed such an agreement, and the bank had notice thereof, it would be no defense as to the principal maker, since its liability would not be changed by the fact that Johnston did not sign, as it had no right to look to the sureties for contribution. (Brandt, Suretyship, sec. 402.)

The defendants asked this instruction: "The jury are instructed that if they believe from the evidence that the note sued on was signed by the parties defendant in this action with the understanding that it was to be signed by

another party before becoming operative as a note, then they will find for the defendants." This request was given with the following modification: "If you find from the evidence that such understanding and such an agreement was made and entered into between the plaintiff and the defendants." The objection that the modification of the instruction was erroneous is, we think, fully met by what has been said in the discussion of the instruction asked by the plaintiff. The change or modification is not subject to the criticism made by the defendants below, that it was not called for by the evidence, and calculated to mislead the jury. The instruction as changed was not only applicable to the case, but considered in connection with the remainder of the charge fairly submitted to the jury the disputed questions of fact.

Error is assigned for the refusal of the trial court to give the defendants' second instruction, which was thus: "The jury are instructed that it was proper for the signers of the note in suit to make the taker of the note their agent to secure other signatures to the note, which were to be obtained by the plaintiff, as taker of said note, before said note became operative; and if the jury believe from the evidence that such agreement was made and was not carried out on the part of the plaintiff, then they will find for the defendants." Undoubtedly, where a note is executed and delivered to the payee and by him accepted upon the promise or agreement that the instrument should be subsequently signed by another as maker, the execution and delivery would not be complete until the signature of such other person had been procured, and the jury were so informed by the charge of the court. Defendants' second request was faulty, in that it assumes as a fact that the bank was to secure other signatures to the instrument after the delivery thereof. There is no evidence that the officers of the bank so agreed. There is evidence, it is true, tending to show that one person, Mr. Johnston, was also to exe-

cute the note, but there is in the record testimony disputing this. So far as the instruction was correct, it was fully covered by the instructions given.

Complaint is made in the brief of the rulings of the court on the admission of testimony, but these decisions cannot be reviewed here, because of the insufficiency of the assignments relating thereto in the petition in error, the assignments being too indefinite to indicate the particular rulings claimed to be erroneous.

As to the sufficiency of the evidence to support the verdict, it is enough to say that without commenting upon the testimony at length, upon due consideration of it all, we are satisfied that there is not an entire lack of evidence to sustain the finding and judgment. There was a conflict in the testimony, but the weight to be given thereto was for the jury, and as a reviewing court we will not disturb the verdict, although we might have found differently had we heard the case originally.

The individual defendants asked the court to submit to the jury a form of verdict finding for them alone, which request was denied. In this there was no error, since it did not find either for or against the corporation defendant. Plaintiff was, in any view of the case, entitled to a verdict against the Rapid Transit & Power Company and the draft of verdict prepared and submitted by the sureties was imperfect, in that it did not so provide.

Complaint is made of the form of verdict returned, which is as follows:

"We, the jury in this case, being duly impaneled and sworn, do find for the plaintiff and assess its damages at $1,601.25. F. AULT,
"*Foreman.*"

The verdict is not objectionable as being indefinite in not specifying who the finding is against. The damages are assessed in favor of the plaintiff and against all of the defendants. Nothing could be plainer. Had the verdict

been in favor of some of the defendants and against others, then it would have been necessary to specify which ones the finding was in favor of and which against. The verdict is the usual form of a general one in favor of the plaintiff. Again, objection was first made to the form of the verdict in the motion for a new trial. This was too late to be of any avail. Objection should have been made at the time of the rendition of the verdict. (*Parrish v. McNeal*, 36 Neb., 727; *Roggenkamp v. Hargreaves*, 39 Neb., 540.) Judgment is

AFFIRMED.

GEORGE METZ V. STATE OF NEBRASKA.

FILED DECEMBER 7, 1895. No. 7708.

1. **Criminal Law:** SEPARATE TRIALS: INDICTMENTS. Defendants jointly indicted for a felony, in the discretion of the court, may be separately tried, on motion of either the state or a defendant.

2. ———: ———: OBJECTION. Objection to a severance comes too late after the formation of the jury.

3. **Burglary:** STOREHOUSE. A building, erected upon a farm, designed and used for the purpose of storing corn after it is husked, is a storehouse and warehouse within the meaning of section 48 of the Criminal Code defining burglary.

4. ———: EVIDENCE. Evidence examined, and *held* sufficient to establish that the burglary was committed in the night season.

5. ———: ———. A breaking necessary to constitute the crime of burglary may be by any act of physical force, however slight, by which the obstruction to entering is forcibly removed.

6. **Criminal Law:** WITNESSES: INSTRUCTIONS. Error cannot be successfully assigned upon the omission of the trial court to instruct the jury in a criminal prosecution that the failure of the defendant to testify creates no presumption against him, where no instruction presenting such special feature of the trial was requested.

7. **Instructions:** ASSUMPTIONS OF FACT. It is error to give an instruction which assumes a controverted material fact upon which there is a conflict of testimony.

8. ——: ERROR. The giving of an erroneous instruction is reversible error, although a correct exposition of the law on the same point has been given to the jury.

9. **Burglary:** POSSESSION OF STOLEN GOODS: EVIDENCE. That a building was burglariously entered, and property stolen therefrom was, soon thereafter, found in the exclusive possession of the accused, do not, alone, raise a presumption of law that he is guilty of the burglary. The inference to be drawn from such facts is for the jury alone to determine, when considered in connection with all the other facts proven.

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

Alex. Altschuler, *J. C. McNerney*, and *Frank D. Eager*, for plaintiff in error.

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

NORVAL, C. J.

An information was filed in the district court of Lancaster county charging George Metz and Frank Milehem with the crime of burglary, by feloniously breaking and entering, in the night time, the storehouse and warehouse of one Jasper N. Binford. Metz, without objection on his part until after the jury were selected and sworn, was given a separate trial which resulted in a verdict of guilty. A motion for a new trial was overruled, and he was sentenced to an imprisonment of two years' duration, and to pay the costs of prosecution; from which he prosecutes a petition in error.

Objection is made that the plaintiff in error was tried separately and not jointly with Frank Milehem, with whom he was jointly charged in the information. Section 465

of the Criminal Code declares: "When two or more persons are indicted for felony, each person so indicted shall, on application to the court for that purpose, be separately tried," etc. Under this statute severance and separate trials of persons jointly indicted or informed against are permissible in felonies, at the discretion of the court. The application to award separate trials may come from the prosecuting officer as well as the defendants. (*State v. Marvin*, 12 Ia., 499, *Allen v. State*, 10 O. St., 287; *Stewart v. State*, 58 Ga., 577.) The record in this case fails to disclose upon whose motion the severance was granted; nor does it appear that any objection or exception was made by the plaintiff in error to a separate trial until after the selection of the jury. This was too late to make the exception of any avail. (*State v. McLane*, 15 Nev., 345; *McJunkins v. State*, 10 Ind., 140.)

The plaintiff in error questions the sufficiency of the evidence to sustain the verdict. The record shows that the prosecuting witness owned a building eight feet by twelve feet and twelve feet high, which was filled with ear corn. There was left an opening near the top through which the corn was thrown into the building, or crib as it is called by some of the witnesses. During the night of August 8, 1894, without the knowledge or consent of Mr. Binford, a board near the bottom of this crib or building was removed, which let a quantity of the corn fall upon the ground. About twelve bushels of this corn was put into a wagon and hauled to Mr. Metz. Early in the morning of August 9, the wagon and team were tracked by several persons to the prisoner's house, the corn in question was found in his possession, and the team and wagon were identified as belonging to the prisoner. In addition to the facts and circumstances detailed above, the state produced as a witness one Henry Grossman, who testified, substantially, that Metz came to the witness and tried to induce him to falsely testify in this case, and that he, Metz, purchased the corn in

dispute from him. A written memorandum of such alleged sale, written by Metz in the account book kept by the witness, was introduced in evidence at the trial. The defendant called witnesses to establish an *alibi*,—that the prisoner was at home at the time the burglary was committed; also, that he purchased the corn from one Connely, and paid him for it. Notwithstanding this testimony, we are constrained to hold that the facts and circumstances detailed by the witnesses for the state were sufficient to justify the jury in reaching the conclusion that Metz participated in the burglary and the stealing of the corn.

The point is made in the brief of counsel for plaintiff in error, that the building, which the evidence disclosed was burglarized, is not the one that is described in the information, nor yet one of those mentioned in the section of the statute defining burglary. Whether this contention is well founded is the question which is now to be considered. Section 48 of our Criminal Code declares: "If any person shall, in the night season, willfully, maliciously, and forcibly break and enter into any dwelling house, kitchen, smoke house, shop, office, storehouse, mill, pottery, factory, watercraft, school-house, church or meeting house, barn or stable, warehouse, malt house, still house, railroad car factory, stationhouse, or railroad car, with intent to kill, rob, commit a rape, or with intent to steal property of any value, or commit any felony, every person so offending shall be deemed guilty of burglary, and shall be imprisoned in the penitentiary not more than ten nor less than one year." The information in the case charges the breaking and entering by the prisoner of a warehouse and storehouse. It will be observed that the provision of the Criminal Code copied above does not contain the word "corn-crib," but, among the buildings subject to burglary, the section enumerates a warehouse and a storehouse. If the building which was broken and entered by the accused is neither a warehouse nor storehouse, within the meaning of the statute

under consideration, then it is plain the crime charged has not been committed, and the judgment of conviction cannot stand. The question lies within a narrow compass, and is simply whether the words "warehouse" and "storehouse," as employed in the statute, can either, and if so, which, of them be so construed as to include a building in which corn is stored. "Warehouse" is defined by the Century Dictionary thus: "A house in which wares or goods are kept; a storehouse." And the same authority defines storehouse: "A house in which things are stored; a building for the storing of grain, food-stuffs, or goods of any kind; a magazine; a repository; a warehouse; a store." Bishop, Statutory Crimes, section 293, defines the word "warehouse" as follows: "In popular language, and by the better opinion in legal, this word signifies an apartment or building for the temporary deposit of goods. Therefore, a cellar wherein they are kept, to be removed when wanted for sale, or a railroad depot for the reception of goods and passengers, is a warehouse." 1 Wharton, Criminal Law, section 794c, says the word "storehouse" is a wider term than warehouse, and includes a storeage for family as well as for business purposes. The definition of "corn-crib," as given by Webster's Dictionary, is "a crib for storing corn." The evidence on the trial showed that the building broken and entered was what is commonly called a "corn-crib." It was erected on the farm of the prosecuting witness and designed and used by him for the exclusive purpose of storing corn raised upon the farm, after it was husked. In the light of the foregoing definitions we are fully satisfied that the building in question was a "storehouse and warehouse" within the intent and meaning of the statute defining burglary, and was correctly so described in the information. In *Wilson v. State*, 24 Conn., 57, it was ruled that a banking house is a store, shop, or warehouse within the meaning of the statute making it burglary to break and enter a shop, store, or warehouse

of another with the intent to steal. (See *Hagan v. State*, 52 Ala., 373.) In *Ray v. Commonwealth*, 12 Bush [Ky.], 397, it was decided that a granary built and used for keeping and preserving farming implements, etc., was not improperly described in the indictment as a warehouse. Under the statute, the breaking and entering the building must have been done in the night season in order to constitute burglary. It is insisted that there is a total failure of proof to show that the offense laid in the information was committed in the night time. The undisputed evidence is to the effect that the prosecuting witness, Binford, was working near the crib on August 8 until night and it was then undisturbed; that the next morning about daylight, Mr. McGee, one of his neighbors, came over and waked Mr. Binford, who arose, went out to the crib and discovered that it had been broken open and some of the corn taken therefrom. It was further proven by the defendant's own witnesses that Mr. Metz' horses and wagon, together with the corn which was found in his possession the morning after the crime was committed, were brought to his home about 12 o'clock of the night of August 8. The foregoing evidence was sufficient to establish that the burglary was committed during the night season.

The accused did not take the witness stand in his own behalf. It is argued that the court erred in not instructing the jury that the defendant's neglect so to do created no presumption against him. By section 473 of the Criminal Code it is provided: "In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal." The defendant having availed himself of the protection of the statute, he might have requested the court

to instruct the jury that no presumption of guilt arose from his failure to testify; but he did not request the court to so charge, and error cannot be successfully assigned upon the omission of the court to give such an instruction on its own motion. This conclusion is no manner conflicts with the holdings of this court that in criminal prosecutions it is the duty of the court, whether requested or not, to present the issues to the jury by proper instructions. Manifestly a charge is erroneous which has the effect to withdraw from the consideration of the jury an essential issue in the case. But a trial court is not bound to instruct upon a special feature of a trial, like the failure of the prisoner to testify, unless so requested.

The fourth and fifth assignments of error, that the verdict is contrary to the third and fourth paragraphs of the instructions, require no special attention. They are disposed of by what has already been said in this opinion.

Two instructions requested by the defendant were refused, which are the basis of the sixth and seventh assignments. We are precluded from reviewing the defendant's requests to charge, since no exceptions were taken to them at the time of their refusal. (*Baldwin v. State*, 12 Neb., 61; *Heldt v. State*, 20 Neb., 492.)

We discover no error in the fifth instruction given by the court on its own motion. By it the court told the jury that a breaking essential to constitute the crime of burglary may be by any act of physical force, however slight, whereby any obstruction to entering is forcibly removed. This is in line with the rule stated by leading text-writers on criminal law, as well as the decisions of the courts of this country. It was also applicable to the facts in the case at bar.

Exception was taken in the court below to the sixth paragraph of the charge to the jury, and the giving thereof is assigned for error. The instruction is as follows:

"6. If you believe from the evidence, beyond a reason-

able doubt, that soon after the burglary of the storehouse or warehouse of the said Jasper N. Binford and the larceny of the corn therefrom, portion of the said corn so stolen was in the exclusive possession of the defendant George Metz, you are instructed that this circumstance, if so proven, is presumptive, but not conclusive, evidence of the defendant's guilt, and you should consider this circumstance, if so proven, to your satisfaction, along with the other evidence in the case in arriving at your verdict, giving it such weight and effect as you think it entitled to, and giving the defendant the benefit of any reasonable doubt of guilt."

The foregoing was erroneous for more than one reason. By it the court assumed that a burglary and larceny had been committed. The accused, during the entire trial, strenuously insisted that such were not the facts, and it was prejudicial error for the court to assume as established the *corpus delicti*. True, that question was submitted to the jury for their determination by another instruction, but that did not cure the error indicated in the instruction quoted, since the jury would be left in doubt as to which instruction should guide them in their deliberations. (*Ballard v. State*, 19 Neb., 609.) The instruction under consideration is bad, for the reason it misdirected the jury as to the presumption arising from the possession of stolen property. In a prosecution for larceny, some of the courts say that the exclusive possession by the defendant of the property stolen recently after the theft, unexplained, is *prima facie* evidence of guilt. Other courts, including ours, lay down the doctrine that in larceny cases no such presumption exists, but that the effect to be given to the fact of possession of stolen property is solely for the jury to determine, when considered in connection with all the other facts and circumstances disclosed on the trial. (*Robb v. State*, 35 Neb., 285; *Dobson v. State*, 46 Neb., 250.) In *Robb v. State, supra*, the writer used this unfortunate expression, which is now withdrawn: "It is only where the

possession of goods recently stolen is unexplained that the presumption *prima facie* of guilt arises." From the general scope of the opinion in that case it is obvious that the court intended to, and did, decide that no presumption of guilt arises from the mere fact of possession of stolen property, but that the inference to be drawn from such fact is alone for the jury, when weighed in connection with all the evidence adduced on the trial. The presumption of guilt never arises from the mere possession of stolen property, unless the defendant has come into such possession recently after the theft, and such possession is unexplained, even in states where the rule of presumption prevails. Both of these elements are omitted from this instruction. The bare possession of stolen property is not, alone, presumptive evidence of the burglary. In burglary it is necessary that the breaking and entering be committed in the night-time, and the presumption will not be indulged that the breaking and entering were in the night season from the fact alone the defendant was found in possession of the fruits of the crime; but in prosecutions for burglary, like those for larceny, the effect to be given to the fact of possession is solely for the jury. (1 Wharton, Criminal Law, sec. 813; *People v. Gordon*, 40 Mich., 716; *People v. Beaver*, 49 Cal., 57; *People v. Hannon*, 85 Cal., 374; *Methard v. State*, 9 O. St., 363.) It is true, as suggested by the attorney general, that the sixth instruction in this case is almost identically the instruction given in *Whitman v. State*, 42 Neb., 841, which was approved by this court. In that case the point was not made that the trial court assumed that a burglary and larceny had been committed, nor was that feature of the charge reviewed. Again, the instruction in that case, as was said by RYAN, C., "confined the presumption which might be entertained to larceny of the goods themselves;" while in the case at bar the jury were told that the presumption might be indulged from the fact of possession of the stolen property that the defendant was

guilty of the burglary. It is obvious that the instruction that we have been considering is the more objectionable of the two. Nevertheless, the instruction in the Whitman case is contrary to the rule announced in *Robb v. State*, and *Dobson v. State, supra*, and in so far as the decision in *Whitman v. State* conflicts with the two cases mentioned it is overruled. It was error to give the sixth instruction, for which the case must be reversed. The trial judge was, doubtless, led to make this mistake by our prior decision.

The conclusion reached makes it unnecessary to examine the other assignments of error. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CHRIS DEHNING, ADMINISTRATOR, V. DETROIT BRIDGE & IRON WORKS.

FILED DECEMBER 7, 1895. No. 5904.

1. **Master and Servant:** RISKS OF EMPLOYMENT. A person who contracts to perform labor or services for another is presumed to have so contracted in view of the risks ordinarily incident to or connected with the employment. He assumes all such risks.

2. ———: ———. An employe assumes the risks arising from defective appliances used or to be used by him, or from the manner in which a business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment or continues in it without complaint or objection as to the hazards.

3. ———: ———: NEGLIGENCE. The above rule has been modified in this state as follows: "Where the servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such character that they may not be safely used by the exercise of reasonable

skill and caution, he does not, as a matter of law, assume the risk of injury from accident resulting from the master's negligence." (*Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Lee v. Smart*, 45 Neb., 318.)

4. **Trial:** DIRECTING VERDICT. When the evidence is insufficient to sustain a verdict for plaintiff, it is proper practice for the trial court to direct a verdict for defendant.

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

The opinion contains a statement of the case.

Bradley & De Lamatre, for plaintiff in error:

The employer, by law, owes a duty toward the employe independent of any action on the part of the employe, and that is, to furnish suitable and safe machinery and appliances for the performance of the labor required of the employe, and the more dangerous or hazardous the employment the greater the care and duty. (*Toledo, W. & W. R. Co. v. Fredericks*, 71 Ill., 294; *Camp Point Mfg. Co. v. Ballou*, 71 Ill., 417; *Richardson v. Cooper*, 88 Ill., 270.)

Where the servant is injured by reason of defective appliances placed in his hands by the master or his agent, the master is liable for damages, unless he can clearly show that he has used due care in the selection or manufacture of the same. (*Weems v. Mathieson*, 4 McQ. [Scot.], 215; *Feltham v. England*, L. R., 2 Q. B. [Eng.], 33; *Warner v. Erie R. Co.*, 39 N. Y., 468; *Chicago & N. W. R. Co v. Sweet*, 45 Ill., 202; *Northcoate v. Bachelder*, 111 Mass., 322; *Noyes v. Smith*, 28 Vt., 59; *Robinson v. Blake Mfg. Co.*, 143 Mass., 528; *Garneau v. Palmer*, 28 Neb., 310.)

The following cases were also referred to in the argument of counsel for plaintiff in error: *Crutchfield v. Richmond & D. R. Co.*, 78 N. Car., 300; *Rummell v. Dilworth*, 111 Pa. St., 343; *Lent v. Burlington & M. R. R. Co.*, 11 Neb., 204; *Holmes v. Boydston*, 1 Neb., 358; *Johnson v.*

Missouri P. R. Co., 18 Neb., 696; *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583.

Breckenridge & Breckenridge, and *L. F. Crofoot, contra:*

Plaintiff's decedent assumed the ordinary risks of employment. (*Sjogren v. Hall*, 18 N. W. Rep. [Mich.], 812; *Richards v. Rough*, 53 Mich., 212; *Norfolk & W. R. Co. v. Jackson*, 85 Va., 489; *Baker v. Western & A. R. Co.*, 68 Ga., 699; *Hough v. Texas & P. R. Co.*, 100 U. S., 213; *Marsh v. Chickering*, 101 N. Y., 396.)

The fact that an accident has happened raises no presumption of negligence against the person sought to be charged. (*Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St., 375; *Nitro-Glycerine Case*, 15 Wall. [U. S.], 524; *Curran v. Warren Chemical Co.*, 36 N. Y., 153; *Frech v. Philadelphia, W. & B. R. Co.*, 39 Md., 576; *Bond v. Smith*, 113 N. Y., 378; *Huff v. Austin*, 46 O. St., 386; *Bahr v. Lombard*, 21 Atl. Rep. [N. J.], 190; *East Tennessee R. Co. v. Maloy*, 77 Ga., 237; *Michael v. Stanley*, 23 Atl. Rep. [Md.], 1094.)

Under the undisputed facts defendant is not liable. (*Titus v. Bradford, B. & K. R. Co.*, 20 Atl. Rep. [Pa.], 517; *Knight v. Cooper*, 14 S. E. Rep. [W. Va.], 999; *Anthony v. Leeret*, 105 N. Y., 591; *Moulton v. Gage*, 138 Mass., 390; *Sweet v. Ohio Coal Co.*, 47 N. W. Rep. [Wis.], 182; *Gibson v. Erie R. Co.*, 63 N. Y., 449; *Naylor v. Chicago & N. W. R. Co.*, 53 Wis., 661.)

The court properly directed a verdict for defendant. (*Hiatt v. Brooks*, 17 Neb., 38; *Osborne v. Kline*, 18 Neb., 344; *Lea v. McLennan*, 7 Neb., 143; *Grant v. Cropsey*, 8 Neb., 205; *Reynolds v. Burlington & M. R. R. Co.*, 11 Neb., 186; *Hammond v. Jewett*, 22 Neb., 363; *Hall v. First Nat. Bank of Fairfield*, 30 Neb., 99; *Burns v. City of Fairmont*, 28 Neb., 866; *Berger v. St. Paul. M. & M. R. Co.*, 39 Minn., 78.)

HARRISON, J.

This action was instituted by the plaintiff as administrator of the estate of Adam C. Dehning, deceased, to recover damages alleged to have been sustained through the death of the son of plaintiff, who lost his life while in the employ of the defendant, and, it is further claimed, through the negligence of defendant. It was stated, in substance, in the petition that the defendant was, on or about September 15, 1890, engaged in the construction of a viaduct extending several blocks on and above Tenth street, in the city of Omaha; that Adam C. Dehning was, on or about the date mentioned, employed by defendant to heat rivets used in fastening together certain parts of the viaduct; that such heating was done in a small forge, which was placed upon planks laid on the framework of the upper portion of the viaduct, at a distance of about thirty feet from the ground or the surface of the street beneath; that coal was used as fuel for the forge and was kept on the ground beneath the structure; that a part of the labor to be performed by Adam C. Dehning was to procure this coal from where it was placed on the street, for use in the forge, whenever needed. The allegations in respect to the negligence of defendant were of the placing of the forge upon the viaduct in such a manner that it subjected the employe to risks of bodily injury, or endangered life, and failure to provide safe and proper appliances for use in operating the forge, or suitable safeguards, or safe and secure approaches, walks, or planks for use in passing over the framework of the viaduct in going to or from the platform upon which the forge worked by the young man Dehning was situated. It was further pleaded that by reason of the negligence of defendant, and without any fault or negligence on the part of Adam C. Dehning, on the 15th day of October, 1890, he fell from the viaduct to the ground below and was killed. There was an answer in which,

so far as we need to notice it, there was a denial of any negligence attributable to defendant, and a statement that: "Whatever dangers or risks of injury there were in and about the premises upon which the said Adam C. Dehning, deceased, was employed, the same were open, apparent, plainly visible, and necessarily forced upon the attention of the said deceased. This defendant alleges the fact to be that the said injuries resulting in the death of deceased were received by him by reason of his exposure to the risks incidental to the business, and also by reason of and owing to his own carelessness and negligence in not paying proper care and attention to his surroundings at the time he received the injuries which occasioned his death." When the case was placed upon trial before the court and a jury, the counsel for defendant interposed an objection to the reception of any testimony on behalf of plaintiff, for the reason that the petition did not state facts sufficient to constitute a cause of action. This objection was sustained and the plaintiff was allowed to amend his petition, which he did, stating, in addition to what was pleaded in the original petition: "And plaintiff further alleges that at the time when the deceased entered into the employment of defendant as above alleged he was required to work at a far less dangerous height and in a much less dangerous situation, but that after being so in the employ of defendant for some weeks prior to the receipt of the injury complained of, the place or position in which the deceased was required to perform his labor became much higher from the ground and far more dangerous, and by reason of the premises it became and was the duty of the defendant to provide other, different, safe, and suitable safeguards, platforms, passageways, and appliances to enable the deceased to prosecute his required work with safety, and that although the full extent of the dangers to which deceased would be subjected by such negligence of duty on the part of the defendant was not fully known to deceased,

yet that deceased did apprehend some increased dangers by reason thereof and requested of the person in charge of the works for defendant that some other, different, and safer platforms, passageways, or appliances should be furnished him in the prosecution of his required labors, and he was assured that such additional safeguards, passageways, ropes, and other appliances would be furnished as the work should progress; and relying therein the deceased continued in such said employ until and up to the receipt of the fatal injury by him in such said employ as hereinbefore stated, yet the defendant wholly disregarded its duty in that behalf." The answer to the first petition was allowed to remain on file as an answer to the amended petition, and was so treated. There was a trial of the issues, and at the close of the introduction of the testimony counsel for defendant moved the court, for certain stated reasons, to instruct the jury to return a verdict for defendant. This motion was sustained and the jury were instructed accordingly, and returned a verdict for defendant, in conformity to which, after motion for new trial heard and overruled, judgment was entered.

The counsel for plaintiff state in their brief that they present but two points for the consideration of this court: "First—Can the plaintiff recover without first having proven that deceased called the attention of defendant to the lack of necessary safeguards, and got a promise from defendant to supply them, but received the fatal injury before they were supplied? Second—Did the trial court commit an error in taking the case from the jury because these facts were not fully proven?" The correct solution of and answer to the first depends to a large extent upon what were the duties and rights which reciprocally devolved upon and accrued to the respective parties to the contract of employment, by reason of such contract, by entering into it, or at all times during its continuance, and especially in reference to any dangers necessarily or probably incident

or attached thereto. There is no question which can successfully be raised in regard to the correctness of the rule of law which sets forth the duty of the employer to provide suitable and safe appliances proper for the use of the employe in the performance of the labor to which he is assigned and to properly guard the employe from dangers; but it is also true that when a party becomes the employe of another to perform certain labor, he assumes all risks ordinarily incident to the business. It will be presumed that he made the contract with reference to the risks ordinarily appertaining to the particular employment, and that he had notice of all risks which were open and obvious, or ought to have been, to a person of his experience and understanding, and if he continues in the employment, after full knowledge of defects in or lack of appliances, or risks to which he is exposed, which may be dangerous, and makes no complaint, but voluntarily accepts the risks, if subsequently injured by reason thereof, there can be no recovery. (Cooley, Torts, sec. 552, and cases cited; Wood, Master & Servant, secs. 326, 335; 2 Thompson, Negligence, note 15, p. 1008; McKinney, Fellow-Servants, sec. 30; *Moulton v. Gage*, 138 Mass., 390; *Sweet v. Ohio Coal Co.*, 47 N. W. Rep. [Wis.], 182; *Gibson v. Erie R. Co.*, 63 N. Y., 449, s. c. 20 Am. Rep., 552; *Yates v. McCullough Iron Co.*, 16 Atl. Rep. [Md.], 280; *Casey v. Chicago, St. P., M. & O. R. Co.*, 62 N. W. Rep. [Wis.], 624, and cases cited therein; Bailey, Master's Liability for Injuries to Servant, 169, 170, 171; *Missouri P. R. Co. v. Baxter*, 42 Neb., 793.)

In the case at bar it appears that Adam C. Dehning, the loss of whose life is the basis of the action, applied to the superintendent or foreman of the work in progress on the viaduct for employment, and during the course of the conversation at that time stated in regard to his fitness for and knowledge of the work to be performed, "that he was a rivet heater and used to work up high, * * * was used to the work. He didn't say how long he had worked

at it, but he could do it." He secured employment and was set to work heating rivets in a small or portable forge, which rested on a plank platform twelve feet long and four feet wide placed upon the top of and supported by the framework of the structure being built; that on September 15, 1890, when he commenced work, the position of the forge on the viaduct was such that it was at an elevation of some ten or twelve feet from the ground or street. He continued at the same work during the succeeding days up to and including a portion of October 13, 1890. As the work upon the viaduct progressed, the forge used by young Dehning and its platform were moved along to different positions on the top of the structure so that it was at all times convenient to the men who were connecting the parts of the viaduct and to whom, after heating the rivets, it was the duty of the rivet heater to carry and deliver them. On October 13, 1890, the forge used by the young man Dehning was at a place on the bridge which made its height from the ground some twenty-seven feet, and he, needing coal, went below to procure it, and while returning and walking to the forge, a distance of about thirty feet, on a stringer or part of the framework, from a point at which he reached the top of the structure by a ladder from the ground, and when he had almost reached the platform and was apparently in the act of placing the nail keg, which contained the coal, on the platform, he fell to the ground and was killed. There was also evidence which tended to disclose that there were some others engaged in the same duties as the young man Dehning at another or other forges than the one used by him, and that when they desired coal they went to the ground, and after filling a vessel similar to the one used by him, tied or looped a rope around it and drew it up to the platform on the bridge; that rope was furnished for any necessary purpose; that there was lumber from which walks on and over the open framework of the bridge could have been laid if they were desired, and also

that the ladder by which the ascent from the ground to the top of the framework of the structure was made could have been moved from the position it occupied on October 13, 1890, to one where any person going up it, on reaching the top would have been very near, or almost upon the platform of the forge used by Dehning. But however the facts may have been in respect to all these matters, it is clear that the risks of the employment, including the carrying of coal, the appliances to be used, the manner in which it was done and to be done, were apparent and obvious, and that during the time that Dehning had worked (almost a full month) he must have acquired full knowledge, must have been aware of them, and there was an entire failure to show that he made any complaint or asked for any changes to be made, and it must be inferred that he voluntarily accepted and assumed them. A full and careful review of all the testimony satisfies us that it was wholly insufficient to authorize or sustain a verdict for plaintiff, and this being true, the action of the court in directing a verdict for defendant was proper and correct.

We deem it best here to notice some decisions of this court in which a modification of the rule herein declared and applied to the existing facts, was announced and adopted. One of the cases alluded to is that of *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578. It was there said: "The facts in this case may be briefly stated to be that the defendant in error had, for about two years, been in the employ of the plaintiff in error as a locomotive engineer on its railroad; that he had had charge of this particular engine for a considerable part of this time. Toward the latter part of this employment he noticed what he conceived to be evidences of weakness in that part of the locomotive known as the throat sheet. He called the attention of the proper officers and agents of the plaintiff in error to this fact, and upon examination it was thought there was no immediate danger, and he was instructed to continue with the

engine until such time in the near future as they could effect an exchange and cause the necessary repairs to be made. Afterward, seeing, as he thought, increasing signs of weakness in that part of the boiler, he again, and on several occasions, called attention to the facts, when he was informed that another engine would be furnished him in a given time and requested to continue with the one in question until that time, which he did, and for two days longer, when the accident occurred. During this time he was careful to keep the steam at a comparatively low pressure, and supposed that with this precaution there was no immediate danger. It is not claimed, and cannot be, that the explosion was caused or brought about by any negligent act of his. Under these circumstances it seems to us that the true rule might be stated to be, that if the defective machinery, though dangerous, is not of such a character that it may not be reasonably used by the exercise of care, skill, and diligence, the servant does not assume the risk. If the servant, in obedience to the requirement of the master, makes use of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the master would be liable for a resulting accident. At least such a rule is as favorable to the plaintiff in error as could, in our opinion, be reasonably required by it, and especially would this be true when it is shown that the master was fully informed of the apparent danger and the machinery used upon his request and judgment. (*Snow v. Housatonic R. Co.*, 8 Allen [Mass.], 441; *Colorado C. R. Co. v. Ogden*, 3 Colo., 499; *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St., 389; 2 Thompson, Negligence, 967; *Keegan v. Western Railroad Corporation*, 8 N. Y., 175.)" We desire particularly to challenge attention to the facts that the employe had informed the proper officers and agents of the employer of the defects in the machinery, and been instructed to continue its use until a time

in the near future, coupled with the promise of an exchange and to have the necessary repairs made.

Another case in which the modification of the general rule was recognized is *Lee v. Smart*, 45 Neb., 318. The party suitor in that case, it appears, was employed by a lumber merchant, in the city of Omaha, in the capacity of a teamster, his work being the hauling of lumber. The writer of the opinion, POST, J., after stating the modification of the rule as announced in *Sioux City & P. R. Co. v. Finlayson*, says: "That the case at bar is within the exception there recognized, is apparent from a brief reference to the evidence in the record. The plaintiff, according to his own testimony, discovered the day after he entered the defendant's service, that there were no blocks in the brake-bars of the wagon assigned to him, and asked the defendant if it was necessary to fix them, to which the latter replied that other men had used the wagon without being fixed, and that he [the plaintiff] could, because the streets were level. The plaintiff appears to have had little knowledge regarding the weight of the load in question, but according to the testimony of Mr. Fry, who assisted in putting the lumber onto the wagon, it consisted of 2,945 feet of green poplar, weighing upwards of 8,500 pounds, or more than twice the weight of a reasonable load under the circumstances. Said witness testified further, that when the wagon was about three-fourths loaded, he called the defendant's attention to the fact that there was danger of overloading it, to which the latter replied that he wanted to put on a heavy load, as he was obliged to pay toll on crossing the bridge. The plaintiff, who, it is shown, had never crossed the river by means of the bridge mentioned, experienced no difficulty until he had started down the grade at the east end of the bridge, when, as claimed, without fault on his part, he lost control over the team in the manner and with the result above stated. The trial court, on this evidence, correctly declined to advise the jury that the plaintiff, as a

matter of law, assumed the risk of accident, although he knew, or might with reasonable diligence have known, that there was danger in thus using the wagon without a brake, heavily loaded as it was; and by proper instructions the question was submitted whether in attempting to cross said bridge the plaintiff exercised reasonable caution, or whether, in so doing, he was guilty of contributory negligence."

In the case of the *Sioux City & P. R. Co. v. Finlayson* the evidence clearly developed that there had been a complaint or objection to the proper person or persons of the unsafe and defective condition of the machinery, and a continuance of its use by requirement of the employer under promise that the subject of complaint should be removed or remedied; and in the case of *Lee v. Smart* it was shown that objection was made to the imperfect or defective condition of the brake to the wagon, and its further use was by direct requirement of the employer, and in both cases it further appeared that the machinery and appliances, although unsafe, were such as might be safely used by the exercise of reasonable skill and care on the part of the employe. The facts in these cases placed them clearly and unmistakably within a well-defined and recognized exception to the general rule, and they are not, in the doctrine announced in the decisions of them, in conflict with the rule applied in the present case, but plainly distinguishable from the case at bar, in which there were no facts shown which called for any modification of the general doctrine or made it within the exception thereto.

The opinion in the case of *Kearney Electric Co. v. Laughlin*, 45 Neb., 390, which was filed on the same day as the opinion in *Lee v. Smart, supra*, and was cited therein, and which cited, in support of the views therein expressed, the case of *Sioux City & P. R. Co. v. Finlayson, supra*, and also *Lee v. Smart*, turned mainly upon the proposition that the risks or hazards of the employment in which the plaintiff was engaged when injured were not obvious, open,

and apparent, and were of such a character that he did not have knowledge of them and could not be charged with knowledge, and the facts of the case were such as to entirely withdraw it from the operation of the general rule. There is no conflict between the rules stated in the opinion in that case and in the present case. The judgment of the district court is

AFFIRMED.

IRVINE, C., took no part in the decision.

COMMERCIAL STATE BANK OF CRAWFORD V. WILLIAM H. KETCHAM.

FILED DECEMBER 7, 1895. No. 5838.

1. **Replevin**: AFFIDAVIT: JUSTICE OF THE PEACE. The affidavit required by the provisions of the Code of Civil Procedure, in an action commenced before a justice of the peace to recover the possession of specific personal property, is the basis of the action and is jurisdictional and must be filed before a valid writ can issue.

2. ———: ———. Where the original affidavit in an action of replevin contains a defective statement of the necessary averments of the plaintiff's rights or claims, it may be amended to make clear or certain that which was indefinite or uncertain.

3. ———: ———: AMENDMENT: CORPORATIONS. When in an action of replevin, instituted by a corporation or partnership, the affidavit is made by some person for the corporation or partnership, it must, in its averments, refer to the rights and claims of the corporation or firm and not those of the affiant, and if, in each necessary allegation, it refers to the claims of the affiant, the affidavit will be treated as in favor of the affiant individually, and insufficient to authorize the issuance of an order of delivery in favor of the corporation or firm, and where such writ was issued and is attacked by motion to quash on the ground of insufficiency of the affidavit, such affidavit may not be amended so as to make it one in favor of the corporation or partnership.

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

E. W. Dailey and *A. W. Crites*, for plaintiff in error.

Allen G. Fisher, *contra*.

HARRISON, J.

In an action of replevin commenced before a justice of the peace of Dawes county by the Commercial State Bank of Crawford against William H. Ketcham the affidavit filed to procure the issuance of the writ of replevin was as follows: "R. G. Smith, cashier Commercial State Bank of Crawford (a Nebraska corporation), being duly sworn, deposes and says that he has a special ownership and is entitled to the immediate possession of the following described goods and chattels, to-wit: One entire newspaper outfit and job office used formerly by publishing the Crawford *Clipper*, and job office and Marsland *Tribune*, now used in the newspaper and job office of the Crawford *Tribune*, comprising presses, type racks, subscription lists, fixtures, and everything used in operating the newspaper and job office of the Crawford *Tribune* in Crawford, Nebraska, and that the said property is wrongfully detained by one William H. Ketcham; that the said property was not taken in execution or any order or judgment against him, nor for the payment of any tax, fine, or amercement assessed against him, nor by virtue of an order of delivery issued in replevin, nor any other *mesne* or final process issued against this affiant." The writ was issued, served, and returned, the appraisement of the property showing a value exceeding $200, the proceedings were certified and the case transferred to the district court as is provided by section 1039 of the Code of Civil Procedure. In the district court a motion was made by the defendant to quash the writ for the reason that there never had been any affidavit filed as a basis for

the issuance of the writ, or, to more clearly state the ground of the motion, that the affidavit filed with the justice of the peace to obtain the writ of replevin alleged the special ownership of the property sought to be recovered to be in R. G. Smith, and also set forth its detention from him, and that no affidavit was filed stating ownership, general or special, in the plaintiff and the detention of the property as against its rights of property and possession. Pending the hearing of this motion the attorneys for plaintiff tendered and asked leave to file what was styled an "amended affidavit in replevin," in which was stated that plaintiff had a special ownership in the property in controversy and its wrongful detention by the defendant in opposition to plaintiff's right of possession. The request of plaintiff for leave to amend was denied and the motion of defendant sustained and the writ quashed, and, on demand of defendant, a jury was impaneled and inquiry made in regard to his right of property and possession and his damages. The result was a verdict and judgment in favor of defendant. The plaintiff presents the case here for review, the principal error alleged, and of which complaint is made, being the refusal of the trial court to permit the filing of what was offered as an amended affidavit.

It is contended by counsel for plaintiff that an affidavit filed in an action of replevin is a pleading, within the meaning of section 144 of our Code of Civil Procedure, which provides that any pleading, process, or procedure may be amended in furtherance of justice before or after judgment, on such terms as may be just, by correcting a mistake in any respect, or by inserting other allegations material to the case, and any proceeding, may, by amendment, be made conformable to the provisions of the Code; that an affidavit in replevin may be amended, and that the affidavit presented in the case at bar as an amendment should have been allowed. Filing an affidavit in replevin has been held in this court to be a proceeding, and that the af-

fidavit, if defective, may be amended. (*Wilson v. Macklin*, 7 Neb., 50.) But it has also been stated that when the object of the action is to obtain the possession of property alleged to be wrongfully detained by defendant, the filing of the affidavit prescribed by the statute is a prerequisite to the issuance of the writ, is jurisdictional, or, if none is filed, the writ is a nullity. (*Bardwell v. Stubbert*, 17 Neb., 485, and cases cited.) In replevin before a justice of the peace the affidavit is the basis of the suit, is that upon which the jurisdiction is predicated, and, unless it is filed, there is no jurisdiction. (Cobbey, Replevin, secs. 525, 526, 528, 529.) Where a corporation or partnership is plaintiff, although the affidavit is made by some person for the corporation or firm, it must state the possession or right of possession sought to be asserted is that of the corporation or the firm, and where the party making the affidavit is alleged to be connected with the corporation or firm, or a member thereof, and the affidavit further states the interest in the property to be that of the affiant and a violation of his rights individually, the proceeding is one in his behalf as an individual, and not in favor of the corporation or firm. (Cobbey, Replevin, sec. 562; *McEvoy v. Hussey*, 64 Ga., 314; *McClain v. Cherokee Iron Co.*, 58 Ga., 233.) The affidavit in the case at bar did not allege interest in the property existing in the bank; did not assert that it had any right in the property in controversy, either special or general, or that any right belonging to it had been violated; but, on the contrary, in each particular in respect to which an allegation, either positive or negative, was necessary in the statements of the affidavit it referred to the affiant and not the bank. This being true, in our view the affidavit was in behalf of the affiant and not the bank, and not the subject of amendment in favor of the bank, or, as proposed in the affidavit tendered, in which the interest and rights of the bank were stated. It was not an indefinite or defective statement, necessary to entitle the bank to the

issuance of the writ of replevin, but there was an entire absence or lack of such statement, and further, a positive setting forth of the rights of another party (the affiant) to demand the writ to issue.

To support their contention that the affidavit in this case was properly amendable, and that the trial court erred in deciding that it was not, counsel for plaintiff especially direct attention to a decision of the supreme court of Kansas (*Meyer v. Lane*, 40 Kan., 491) and one of this court (*Lewis v. Connolly*, 29 Neb., 222). In the case cited decided by the Kansas court it appears that an action was "commenced by Daniel Lane against Meyer Bros., S. C. Lang & Co., et al., to obtain possession of a stock of drugs and fixtures valued at $1,000. An affidavit was filed by George S. Chase, the attorney of Lane, and an order of delivery obtained, and the property turned over to him. Meyer Bros. et al. filed a motion to set aside the order of delivery upon the ground that the affidavit did not state that the plaintiff was the owner of the property and entitled to its immediate possession. The affidavit was defective, but subsequently, George S. Chase, an attorney of Daniel Lane, filed an amended affidavit relating back to the time of the filing of the original. This affidavit cured all defects in the original affidavit, if such defects could be cured by amendment; but also stated that the plaintiff Daniel Lane was a minor, being under twenty-one years of age. Thereupon Meyer Bros. et al. filed their motion to strike out the amended affidavit on the grounds that the plaintiff had no legal capacity to sue, and that the affidavit was not amendable. The motion was overruled and defendants excepted." The court held: "An original affidavit in replevin may be amended so as to state sufficiently what has already been stated informally and indefinitely." From this we conclude that there was not an entire failure to state the facts necessary to be alleged in the affidavit, but that there was an indefinite or defective statement of them.

Lewis v. Connolly, the case referred to of the opinions of this court, it appears, was an action of replevin commenced in the district court of Cherry county, in which the clerk, upon the filing of the petition in the case and no other or further affidavit or statement by the plaintiff, issued the writ. In order to a thorough understanding of the case of *Lewis v. Connolly*, and the applicability of the rule therein announced in the case at bar, we deem it best to specially call attention to the manner of instituting an action of replevin in the district courts of this state, and also before justices of the peace, and some of the points of difference. In this, as in other cases commenced in the district court, the first proceeding is the filing of a duly verified petition, in which is stated the plaintiff's cause of action, and the plaintiff may at the commencement of the suit, or at any time before answer, claim the immediate possession of the property the possession of which is the subject and object of the suit, by filing with the clerk the affidavit as prescribed by statute. (See secs. 181, 182, Code of Civil Procedure.) In an action before a justice of the peace an action to recover the possession of specific personal property shall not be brought until the prescribed affidavit is filed by plaintiff. (Secs. 1033, 1034, Code of Civil Procedure.) In the first the petition is the foundation of the action, and the affidavit the basis for the issuance of the writ; in the second the affidavit serves the double purpose, being the basis of the action and also for the issuance of the order of delivery. In the case of *Lewis v. Connolly, supra*, it was held: "Where a petition in an action of replevin contained nearly all the allegations required in the affidavit prescribed by section 182 of the Code, and was verified upon the belief of the plaintiff and filed in the clerk's office and a writ of replevin issued thereon, the writ is voidable and not void, and the court, upon such terms as may be just, may permit an affidavit in proper form to be made and filed as of the date of the com-

mencement of the action;" and in the body of the opinion it was stated: "Where it is sworn to positively, no doubt a pleading in a proper case may perform the office of a pleading and also of an affidavit, but it cannot do so where the oath is upon mere belief. The reason for this is so apparent that it need not be stated. The affidavit, however, was not void, but merely voidable. It was on file properly sworn to as a petition and was regarded by the clerk as sufficient. It differs from a case where no oath was on file. In the latter case the court would have no jurisdiction, while in the former, there being an imperfect oath, the court has jurisdiction, and may, upon such terms as may be just, permit an amended affidavit to be filed to relate back to the time of bringing the action. The court, therefore, should have sustained the objections to the affidavit and permitted a new one to be filed." It will readily be seen that in the case to which we have alluded, and also the one cited in the Kansas report to which reference has been made, that there was that on file which was treated by the court in each instance as sufficient, though imperfect, to vest the court with jurisdiction and to be the proper subject of amendment. Not so in the case at bar. Here, in a case commenced in justice court, where the affidavit gives jurisdiction of the action and also to issue the writ, there was not an imperfect oath, or an uncertain or doubtful statement of any claim to the property or its possession in the plaintiff, but a total lack of such statement, and instead thereof positive averments of such rights in a person other than plaintiff. The judgment of the district court is

AFFIRMED.

ZIBE JONES V. JOSEPH DRISCOLL.

FILED DECEMBER 7, 1895. No. 5716.

1. **Appeal from Justice Courts:** TRANSCRIPTS. In error proceedings from a justice of the peace to reverse a judgment because it was alleged by affidavit that less than six jurors found the verdict upon which was based such judgment, the recitations of the transcript must prevail over contradictory statements embodied in the affidavit.

2. **Trial:** VERDICT: WAIVER OF OBJECTIONS. A litigant who does not object to mere irregularities in receiving a verdict, when the existence of such irregularities is known to him at the time they occur, cannot complain of them for the first time upon error proceedings in the district court.

3. **Contracts:** DAMAGES: SET-OFF. A cause of action arising upon contract may properly be pleaded by way of set-off in an action brought for the recovery of damages. Following *Raymond v. Green*, 12 Neb., 215.

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

James Hassett and *H. C. Lefler*, for plaintiff in error.

James P. Grove, contra.

RYAN, C.

This action originated before John Thomas, a justice of the peace of Sarpy county, and was afterwards transferred to W. A. Wooley, another justice of the peace. A judgment having been rendered in favor of the plaintiff by the justice of the peace last named, the defendant prosecuted error proceedings to the district court, wherein the judgment which had been rendered by the justice of the peace was reversed. In the petition in error upon which this reversal was had the grounds upon which the reversal was sought were stated in this language:

"First—Five jurors were sworn to try the said cause, and sat upon the trial thereof, but no verdict was rendered by said jury; but three members of the said jury were present in open court at the rendition of such alleged verdict purporting to be the verdict of the original jury sworn to try the cause.

"Second—After the jury were sworn to try the cause, the plaintiff, by his attorney, moved the court to strike the second part or division of the defendant's bill of particulars, the same filed as an offset for rental of twenty acres of land at three dollars per acre, with interest from the 23d day of January, 1891, and due December 1, 1891; and said motion was sustained by said justice and the defendant's set-off was stricken, against defendant's objection."

The transcript of the justice of the peace showed a return of a verdict by the jury. It also showed that one juror, by agreement, had been excused. No question is raised as to this particular juror, but it is insisted that there were present when the verdict was returned but four jurors. The transcript, however, only shows that, when the verdict was returned, the jury was asked if it was their verdict and four jurors responded in the affirmative. By affidavit an attempt was made to show that one juror in fact was not present, but the record discloses no objection made to receiving the verdict when it was returned, neither does it seem that the alleged irregularity existed or was urged at all until it was presented for consideration in the district court. This was too late. (*Wasson v. Palmer*, 13 Neb., 377; *Scott v. Waldick*, 12 Neb., 5.) The above quotation from the averments of the petition in error, passed upon in the district court, sufficiently describes the counterclaim as it appears elsewhere in the record; but the transcript considered in the district court, which is certified to this court, begins with a recitation of the receipt by Mr. Wooley, as a justice of the peace, of a transcript of the docket of Mr. Thomas, another justice of the peace, and of

the papers in this cause. This is followed by a minute showing when the cause was set for trial, and that notice thereof had been given the parties. Immediately succeeding is a copy of the answer of the defendant, and then, in due order, the further proceedings in the case. Nowhere, however, are we able to find any description of the nature of the plaintiff's cause of action. Evidently the justice of the peace who tried the case certified only as to the docket entries originally made by himself, and omitted to show the nature of the record made by the justice of the peace before whom the action was begun. By this oversight, most likely, the bill of particulars was omitted from the transcript filed in the district court. This, however, is not specially material, for, even if suit was commenced for the recovery of damages, it was proper to set up by way of a set-off any cause of action arising upon a contract which, before the commencement of the action, was held by the defendant. (Code of Civil Procedure, sec. 104; *Raymond v. Green*, 12 Neb., 215.) In any view we take of this case, therefore, the judgment of the district court was correct and accordingly it is

AFFIRMED.

STORZ & ILER v. L. M. FINKLESTEIN.

FILED DECEMBER 7, 1895. No. 5860.

1. **Contracts:** PUBLIC POLICY: UNLAWFUL CONSIDERATION. No action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law.

2. ——: ——: ——: SALES. Plaintiff sued the defendant for the purchase price of beer to which the defendant by way of counter-claim pleaded payment for a license to sell beer, which, as defendant alleged, plaintiff had agreed to furnish to enable defendant to make such sales. By reply, plaintiff alleged a

custom in accordance with which a retail traffic in beer had been carried on by defendant under and by virtue of a license held by the plaintiff, which traffic in legal effect was a violation of the statute of Nebraska regulating traffic in liquors. *Held*, That for the purchase price of beer sold under these circumstances plaintiff was not entitled to recover against the defendant.

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

See opinion for reference to authorities.

Lake, Hamilton & Maxwell, for plaintiff in error.

Estabrook & Davis and *C. E. Clapp, contra.*

RYAN, C.

This action was brought by the plaintiff in error, a partnership firm engaged in the manufacture of beer, to recover of defendant the sum of $707.06, the price of certain beer alleged to have been furnished by plaintiff to defendant in the month of June, 1889. By way of counter-claim the defendant alleged that the beer was furnished him by plaintiff under a written agreement which required that the plaintiff should furnish the license necessary under the laws of Nebraska; that plaintiff had neglected to provide this license, and that in consequence of such neglect the defendant had been required to pay the sum of $1,000 for such license. By reply the plaintiff averred that if the defendant had taken out a license it was to enable him to sell vinous and spirituous liquors and not to enable him to perform his contract with the plaintiff. There was also in the reply this language: "The plaintiff further alleges that there is and has been since long before September 1, 1888 [the date of a written contract between plaintiff and defendant], a usage and custom existing and prevailing among brewing companies generally, and particularly in the state of

Nebraska, and in the city of Omaha, for each of said brewing companies to operate, in connection with its brewery, a bottling department for the purpose of bottling beer of its own manufacture exclusively; that under said usage and custom said bottling department had been conducted under the liquor license issued to the brewery and through an agent who receives beer from the brewery at a fixed price, and who operates the bottling department as a part of, and in the interest of, the said brewery; that the contract referred to in the defendant's answer was entered into by the plaintiff and the said defendant with knowledge of, and with reference to, said usage and custom, and that said usage and custom thereby became and is a part of said contract." Upon the trial defendant admitted that he owed plaintiff the amount claimed, and a verdict was accordingly returned. Thereupon defendant moved for a dismissal of the plaintiff's action and for a judgment for costs for the reason that "the pleadings upon their face show that the sales for which plaintiff sought to recover were made in pursuance of an unlawful contract between the plaintiff and the defendant, and for the further reason that the contract under which the sales were made, contemplated the resale of said beer by the defendant with the intent and for the purpose, on the part of the said plaintiff, of enabling the defendant to resell contrary to law." This motion was sustained and judgment was accordingly rendered against the plaintiff for costs.

From the fact that the plaintiff brought suit for the price of the beer agreed upon between himself and the defendant, it is clear that the defendant was not a mere agent for the sale of the plaintiff's beer. The petition was framed upon the theory that plaintiff had sold the defendant the beer for which suit was brought, though the use of the word "sale," or any equivalent term, was avoided. It is equally clear that as a retail vendor of liquor the defendant was by section 25, chapter 50, Compiled Statutes, required

to pay a license of $1,000, his place of business being, as it was, in the city of Omaha. By the reply there was alleged a custom with reference to which the parties litigant had contracted whereby the obligation to pay the required license was avoided, which arrangement was clearly in violation of the statute above referred to. The plaintiff, however, insists that since the defendant had admitted that he had obtained the beer from plaintiff and was owing that amount, judgment should have been accordingly rendered. This admission did not amount to a confession of judgment, neither did the verdict thereon returned, restricted as the jury was by the instruction of the court that the counterclaim was not by them to be considered. The question whether or not a recovery should be had by one of the two parties to a contract for the violation of a statute still remained open for determination by the court upon the pleadings. Whether or not this question was correctly decided by the court is the only one with which we are concerned.

The plaintiff has cited only one adjudged case which is directly in point, and as the principle upon which that case proceeds must be far-reaching in its effects, the extent of its recognition, as well as its soundness, will now be considered at some length. The case referred to is *Manchester & L. R. Co. v. Concord R. Co.*, 20 Atl. Rep. [N. H.], 383, in which there is quoted with approval the following language found in 2 Morawetz, Private Corporations, section 721: "If an agreement is legally void and unenforceable by reason of some statutory or common law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality or there are other reasons of public policy why the courts should refuse to grant any relief in the case. * * * These

doctrines have been applied repeatedly in suits arising out of contracts entered into by corporations, although prohibited by statute or by the common law; and, although the contracts are held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received." A review of the authorities cited in support of these propositions does not tend to establish the doctrine announced.

It was held in *White v. Franklin Bank*, 22 Pick. [Mass.], 181, that a suit could be maintained upon an entry in a deposit book made by defendant's cashier by which, in effect, the bank became bound to pay at a future time the amount of plaintiff's deposit, because the statute of Massachusetts prohibited banks from assuming such liability. In the opinion we find the following language: "The second objection, and that on which the defendant's counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that where money has been paid by one of two parties to the other on an illegal contract, both being *participes criminis*, no action can be maintained to recover it back. The rule of law is laid down by Lord Kenyon in *Howson v. Hancock*, 8 T. R. [Eng.], 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely *malum prohibitum*, the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases. The rule as stated by Comyn, in his treatise on Contracts, will reconcile most of the cases which are apparently conflicting. When money has been paid upon an illegal contract, it is a general rule, that if the contract be executed, and both parties are *in pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of *indebitatus assumpsit*

for money had and received. And this distinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that the plaintiff should recover. (2 Comyn, Law of Contracts, 109.)" The inhibition of the statute was with reference to the incurring by the bank of an indebtedness payable at a future day certain. The entry in the deposit book was as follows: "Dr. Franklin Bank, in account with B. F. White, Cr. 1837, Feb. 10th. To cash deposited, $2,000. The above deposit to remain until the 10th day of August. E. F. Bunnell, Cashier." This entry was held to be within the inhibition of the statute. The party forbidden was the one which violated the provisions of the statute; the depositor was by no means *in pari delicto*, therefore he was held entitled to recover the amount of his deposit. This distinction in principle was recognized in *Sackett's Harbor Bank v. Codd*, 18 N. Y., 240, and the liability of the defendant was accordingly adjudged to exist.

The action in *Dill v. Inhabitants of Wareham*, 7 Met. [Mass.], 438, was to recover back the sum of $500 paid by the plaintiff to the town of Wareham for the privilege of taking oysters within its limits. The power of the town to grant the privilege was denied by the statute, and, upon the refusal of the town to allow the privilege paid for, the suit was brought as indicated. Chief Justice Shaw, in delivering the opinion of the court, said: "In regard to the sum of five hundred dollars, as it appears that was received by the treasurer and went to the use of the town, and was so received in advance, upon a consideration which has

failed, it must be regarded as money had and received by the town to plaintiff's use; and therefore the action for that sum will lie."

In *Episcopal Charitable Society v. Episcopal Church in Dedham*, 1 Pick. [Mass.], 371, a note had been given by the rector and wardens of the church upon request of the church society, which money had been not only borrowed for, but had been used by, the church society, and it was held that such society was bound to pay the amount so borrowed, even though there existed no direct legal authority in the rector and wardens to bind the church. As will be seen by the title of this case it was an action by the lender of the money to recover the amount loaned, hence the principle laid down by Mr. Morawetz, even if abstractly correct, was not applicable as it might have been if the rector and wardens after having paid the note had sued the church society to recover the amount so paid.

The syllabus in *Whitney v. Peay*, 24 Ark., 22, begins with the statement: "The state issued bonds for the use of the Real Estate Bank, the bonds being prohibited by law from being sold for less than the par value thereof;" but this proposition cuts no special figure in the case, for these bonds having been pledged as security for a loan, the sole questions determined were as to the rights and liabilities of the original pledgee and his assignee of the pledge and of the assignee of such assignee among themselves as to the respective loans on the property pledged. The court held that the bonds must be returned to the original pledgor upon payment of the amount to secure which originally such pledge was made, notwithstanding the fact that by subsequent pledges of the bonds a loan of a larger sum had been effected.

The recovery of judgment in *Philadelphia Loan Co. v. Towner*, 13 Conn., 248, was for an amount loaned in Pennsylvania. It was held in this case that the laws of Pennsylvania should govern, and that as the charter of plaintiff

had provided that "nothing therein contained should be construed to authorize the company to discount notes," and the loan of money upon which the interest was reserved in advance constituted a discount, therefore no recovery could be had upon the note. The right of the loan company to recover judgment upon another theory which was recognized by the supreme court of errors of Connecticut is thus fairly stated in one paragraph of the syllabus: "Where a corporation, having power to sue and be sued and to loan money under certain restrictions, made a loan, and afterwards took a note as security in contravention of the provisions of its charter, it was held, in a suit on such note with the money counts, that although there could be no recovery on the note, the money loaned, with the legal interest, might be recovered on the money counts." This principle was the only one involved in *Vanatta v. State Bank of Ohio*, 9 O. St., 27.

In *Foulke v. San Diego & G. S. P. R. Co.*, 51 Cal., 365, the opinion was very brief and was correctly summarized in this language of the syllabus: "The provision in the act concerning railroad corporations that 'no contract shall be binding on the company unless made in writing,' refers only to contracts wholly executory; but the action against the corporation on such verbal executory contracts must be brought upon an implied promise and the recovery must be limited to the value of the benefit received by the corporation." The lease of a certain part of a line of railroad was not authorized by the stockholders of the company by which said line was owned, as required by statute, and said lease was therefore held void. Inasmuch as the transaction was not tainted with any immorality, a recovery of just compensation for the use of the road was allowed without reference to the unauthorized lease. (*Farmers Loan & Trust Co. v. St. Joseph & D. C. R. Co.*, 1 McCrary [U. S.], 247.)

In *Madison Avenue Baptist Church v. Baptist Church*

in Oliver Street, 73 N. Y., 82, there had been an attempted union of the two church societies under an agreement that one should be merged in the other, which should be bound for and pay the debts of both. This was *ultra vires*, but while the arrangement existed, and was supposed by all parties to be binding, debts were paid by the church supposed to be the sole survivor, for the church supposed to have been merged in it. The court of appeals held that for money so paid, the church whose debt had been thus paid was liable.

In *Tracy v. Talmage*, 14 N. Y., 162, it was held that, although the vendor was a party to the illegal contract, he was not *in pari delicto* within the rule which forbids the court to grant one party to an illegal contract or transaction relief against the other, and that where parties to a contract or transaction not *malum in se*, but prohibited by a statute, are not equally guilty, courts may afford relief to the less guilty party.

In *United States Express Co. v. Lucas*, 36 Ind., 361, it was held that an agent who had received money for which the company was liable could not as a defense to an action of the company, his principal, set up that his said principal had failed to file in the proper recorder's office a statement of the capital employed in its business, as required by statute.

From this review of the principal authorities cited to sustain the rules quoted from 2 Morawetz, Private Corporations, section 721, it is shown to be extremely probable that no court, except such perhaps as may have been misled by his statements, has ever enforced the aforesaid principle laid down by Mr. Morawetz, that "If an agreement is legally void and unenforceable by reason of some statutory or common law prohibition, either party to the agreement who has received anything from the other party must account to the latter for what has been so received." Equally without judicial sanction is his next proposition, that

"Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case." The correct rule was quoted from the language of Lord Mansfield in *Holman v. Johnson*, 1 Cowper [Eng.], 343, by Eyre, C. J., in *Lightfoot v. Tenant*, 1 Bos. & P. [Eng.], 551. This language is as follows: "The objection that a contract is immoral or illegal sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this, *ex dolo malo, non oritur actio.*—No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted." After this introduction Lord Mansfield stated the question to be, "whether the plaintiff's demand is founded upon the ground of any immoral act or contract, or upon the ground of his being guilty of anything which is prohibited by a positive law of this country." These clearly stated principles were recognized and enforced in *Spurgeon v. McElwain*, 6 O., 442; *Banchor v. Mansel*, 47 Me., 58; *Hubbell v. Flint*, 13 Gray [Mass.], 277; *Hull v. Ruggles*, 56 N. Y., 424; *Skiff v. Johnson*, 57 N. H., 475; *Aiken v. Blaisdell*, 41 Vt., 655; *Foster v. Thurston*, 11 Cush. [Mass.], 322; *Hooker v. De Palos*, 28 O. St., 251; *Ruckman v. Bryan*, 3 Den. [N. Y.], 340; *McKinnell v. Robinson*, 3 M. & W. [Eng.], 434; *Mosher v. Griffin*, 51 Ill., 184; *Raymond v. Leavitt*, 46 Mich., 447.

In *Wilde v. Wilde*, 37 Neb., 891, an action for divorce,

the rule was applied that the courts will refuse to enforce contracts which are manifestly contrary to public policy or sound morals. The following language is quoted from *Luce v. Foster*, 42 Neb., 818: "When any portion of the consideration is illegal, the promise cannot be enforced unless there are several promises, and that which relates to the bad consideration can be distinguished and separated from the others. In other cases the promise is unenforceable. All the text-writers so state the rule. (See, for instance, Wharton, Contracts, 339; Anson, Contracts, 191; Pollock, Contracts, 338.) The rule is so well settled that a reference to adjudications is unnecessary." The first paragraph of the syllabus of *Gould v. Kendall*, 15 Neb., 549, is as follows: "No court of law or equity will lend its assistance in any way towards carrying out an illegal contract, therefore such contract cannot be enforced by one party against the other, either directly, by asking the court to carry it into effect, or indirectly, by claiming damages or compensation for a breach of it." In the body of the opinion of the case last cited there is an analysis of the case of *Brooks v. Martin*, 2 Wall. [U. S.], 70, which by the supreme court of New Hampshire in *Manchester & L. R. Co. v. Concord R. Co., supra*, was cited as a leading case in support of the erroneous doctrine stated in section 721 of Morawetz on Private Corporations. By this analysis it was clearly shown by Judge COBB that in the case of *Brooks v. Martin* a recovery was sanctioned, chiefly because between the parties litigant there had existed a partnership and the property of the partnership had been the product of the money furnished by the party who had brought the suit. The discussion of this proposition may fittingly be closed by quoting from the above mentioned opinion delivered by Judge COBB his quotation from the language of Chief Justice Marshall in *Armstrong v. Toler*, 11 Wheat. [U. S.], 268, as follows: "Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled than that

no action can be maintained on a contract, the consideration of which is either wicked in itself, or prohibited by law." No argument is necessary to illustrate the applicability of the rule just quoted to the facts of this case. The judgment of the district court is

AFFIRMED.

IRVINE, C., did not take part in the determination of this case.

DAVID M. HOUGH ET AL., APPELLEES, V. JAMES E. STOVER ET AL., APPELLANTS.

FILED DECEMBER 7, 1895. No. 5847.

1. **Erroneous Judgments:** COLLATERAL ATTACK. In a collateral proceeding a judgment irregularly rendered cannot be assailed on that ground, provided the court which rendered such judgment had proper jurisdiction.

2. **Review:** CONFLICTING EVIDENCE. Questions of fact determined upon conflicting evidence will not be reviewed in the supreme court.

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

Andrew Bevins and *Lake, Hamilton & Maxwell*, for appellants.

Henry P. Stoddart and *William E. Healey*, *contra*.

RYAN, C.

The appeal in this case is from a judgment subjecting certain real property in Douglas county to the payment of a judgment in favor of appellees against James E. Stover. This real property had been conveyed by James E. Stover

and his wife to William H. Duffield, by whom it was conveyed to Fred Bitterolf, whose daughter was the wife of James E. Stover.

The first question argued is that the judgment, for which the real property was decreed liable, was rendered against James E. Stover alone, whereas the action was brought against James E. Stover and Annie Stover, copartners as James E. Stover & Co. It is insisted that the judgment should have been rendered against the firm, for the reason that firm property should be applied to the payment of partnership indebtedness before the debt of an individual member of the firm should be paid therewith. This objection hardly comes with a good grace from the individual partner whose debt has been paid, and at any rate the judgment was not void. Possibly the district court, if its attention had been properly called to this condition of affairs in the suit wherein judgment was rendered against James E. Stover, might have corrected such irregularity, if found to exist, and require correction. It is clear, however, that the alleged irregularity can avail nothing in the case under consideration, for the court had jurisdiction of James E. Stover. (*Taylor v. Coots*, 32 Neb., 30; *Trumble v. Williams*, 18 Neb., 144.)

It would subserve no useful purpose to detail at length or even to epitomize the evidence upon consideration of which the district court found the conveyance of James E. Stover and his wife fraudulent as against creditors, for, as is quite common, it is found scattered through a series of transactions, each of which considered singly does not sufficiently establish fraud, yet, when considered in their relations to each other, the aggregation of proofs is quite convincing. It is sufficient for all purposes to say, generally, that there was sufficient proof of fraud to justify the finding made in that respect by the district court. Its judgment is therefore

AFFIRMED.

STATE OF NEBRASKA, EX REL. J. C. HOFFMAN ET AL., v. EUGENE MOORE, AUDITOR.

FILED DECEMBER 7, 1895. No. 7720.

1. **Municipal Bonds.** The validity of municipal bonds is not affected by an apparent irregularity which does not operate as an evasion of any provision of law, or a departure from the proposition ratified by the voters.

2. ———: ANTEDATE: MANDAMUS. January 10, 1895, the Boyd county board ordered an election for the purpose of voting on a proposition to issue funding bonds. The election was held February 19, and the proposition carried. The bonds were presented for registration in April. They were in exact conformity with the proposition submitted, bore interest at six per cent, matured twenty years after date, and were redeemable at the option of the county board ten years after date, but were dated January 2, 1895, this date being a portion of the proposition submitted to vote. *Held*, That the antedating of the bonds under these circumstances was not a substantial defect.

ORIGINAL application for *mandamus* to compel the respondent to register certain bonds of Boyd county. *Writ allowed.*

C. C. Flansburg, for relators.

A. S. Churchill, Attorney General, and *W. S. Summers, Deputy Attorney General, contra.*

IRVINE, C.

This was an original application by the county commissioners of Boyd county for a writ of *mandamus* to compel the respondent, as auditor of public accounts, to register certain bonds of Boyd county. In brief, the application for the writ discloses that on the 10th of January, 1895, the relators, as county commissioners, found and determined that the indebtedness of Boyd county, evidenced by

judgments, warrants, and claims, was $20,000, and less than ten per cent of the assessed valuation of the county; that thereupon they ordered a special election to be held on the 19th day of February for the purpose of voting on the proposition of issuing bonds in the sum of $20,000, for the purpose of funding such indebtedness; that the proposition submitted was for the issue of bonds in the sum of $20,000, to be dated January 2, 1895, to draw interest at the rate of six per cent per annum, payable semi-annually, on the 2d day of July and the 2d day of January of each year, until said bonds should be paid, said bonds to run twenty years from the date thereof; provided, however, that they might be made redeemable at the option of the county board at any time after ten years from the date thereof. The proposition also provided for the place of payment and for sale at not less than par and for the levy of a tax to pay the bonds. It is further alleged that due notice of the election was given, the election held and canvassed, and said proposition found to have been carried; that on "the —— day of April, 1895," the bonds having been prepared and executed in all respects in accordance with the proposition, were presented for registration and registration refused. To this application the respondent demurred. The only question argued in support of the demurrer was that arising from the fact that the bonds bore date January 2, 1895, while the election was not ordered until January 10, or held until February 19, and the bonds not in fact issued in April, when offered for registration. The statute authorizes such funding bonds to be issued after an election authorizing the same, "to run not more than twenty years nor less than five years, with interest at a rate not to exceed seven per cent per annum, payable semi-annually; * * * *Provided*, That such bonds may be made redeemable at any time after five years, at the option of the county board." (Compiled Statutes, sec. 133, art. 1, ch. 18.) It is also provided that whenever a bond of any county

shall be presented to the auditor for registration, the auditor shall detach as many interest coupons as shall mature before the first taxes levied to meet the same shall become due and collectible. (Compiled Statutes, sec. 37, ch. 9.) We think that in this case the antedating of the bonds in nowise affects their validity or regularity. If the effect of such antedating were to evade the operation of any law, the case would be different. Thus, if to antedate the bonds were in effect to provide a higher rate of interest than permitted by law or authorized by the voters, this would be a substantial defect, but the statute last cited, requiring the detaching of coupons, would render it impossible for any claim for interest to accrue prior to their actual registration. So if the effect of antedating were to make the bonds mature, or to make them redeemable in a shorter period than the law permits, this, too, would be a substantial defect. But the bonds might, under the statute, be made to mature in any time from five to twenty years. The proposition contemplated the antedating, and the bonds issued in conformity thereto would, therefore, mature within the statutory period. They might be made redeemable in any time, not less than five years. Under the proposition they were made redeemable in ten, so that the period of redemption was within the statute. The antedating of the bonds in nowise rendered them in conflict with the statute, or the proposition submitted to the electors, and was in no sense a matter of substance. The case must be distinguished from such cases as *Wood v. City of Louisiana*, 5 Dill. [U. S.], 122, *City of Louisiana v. Wood*, 102 U. S., 294, and *Anthony v. Jasper County*, 101 U. S., 693, where the antedating was for the purpose of evading a registration law, which went into operation between the date of the bonds and the time of their issue; and also from such cases as *Coler v. Cleburne*, 131 U. S., 162, where the bonds were antedated and signed by the person who was mayor at the day of their date, but not mayor at the time of their actual

execution. The case is more analogous to *Flagg v. Mayor of City of Palmyra*, 33 Mo., 440; *Commissioners of Marion County v. Clark*, 94 U. S., 278; *Township of Rock Creek v. Strong*, 96 U. S., 271; and *Dows v. Town of Elmwood*, 34 Fed. Rep., 114. In *Flagg v. Mayor of City of Palmyra*, the bonds in question were aid bonds, and were dated prior to the passage of the ordinance subscribing for the stock purchased with the bonds. In this case it is said: "This is the most plausible objection to the bond, but it is only plausible. The bond complies literally with the law, in being payable twenty years after date, and bearing eight per cent interest. The objection must then be that notwithstanding the literal compliance with the law, this is a substantial departure from the manifest intention. It does not appear to be so." In *Commissioners of Marion County v. Clark* the bonds were dated September 3, 1872, but not issued until November 4, following. The bonds ran thirty years, and the court held that this time should be computed in that case from the time the bonds were actually executed and delivered, apparently applying a statute of Kansas to that effect. Under this rule, the bonds would not exceed the lawful limit and they were held valid. In *Township of Rock Creek v. Strong* the bonds were dated September 10, 1872, payable thirty years from October 15, 1872. The court held that their legal effect was precisely what it would have been had the date been inserted October 15, and that the defect was not substantial. *Dows v. Town of Elmwood* is to the same effect. All these cases support the principle upon which we base the decision, to-wit, that such an irregularity as the present does not affect the validity of the issue, where it does not affect the substance of the transaction by operating an evasion of the law or a departure from the proposition ratified by the voters.

WRIT ALLOWED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1896.

PRESENT:

HON. A. M. POST, CHIEF JUSTICE.

HON. T. O. C. HARRISON, HON. T. L. NORVAL, } JUDGES.

HON. ROBERT RYAN, HON. JOHN M. RAGAN, HON. FRANK IRVINE, } COMMISSIONERS.

COMMERCIAL NATIONAL BANK OF OMAHA V. REUBEN LIPP, ASSIGNEE OF E. F. HEMPSTEAD.

FILED JANUARY 9, 1896. No. 5771.

Voluntary Assignments: FAILURE TO PRESENT CLAIMS: DISTRIBUTION. One who through his own fault and neglect fails to present for allowance his claim against an assigned estate within the time allotted therefor by law, in conformity with the order of the county court, is forever barred, and will not thereafter be permitted to prorate with other creditors of the estate.

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

The opinion contains a statement of the case.

Montgomery, Charlton & Hall, for plaintiff in error:

Plaintiff in error should be permitted to present its claim for allowance and to share in the distribution of the assigned estate, though the claim was not filed within the time fixed by the county court. (*Powers v. Hill,* 27 Mo. App., 190; *Elwood v. Marsh,* 31 Neb., 134; *Clendenning v. Perrine,* 32 Neb., 159; *Owens v. Ramsdell,* 33 O. St., 439; *Carpenter v. Dick,* 41 O. St., 297; *Fourth Nat. Bank v. Scudder,* 15 Mo. App., 463; *Myers v. Board of Education,* 32 Pac. Rep. [Kan.], 658; *Maverick v. Heard,* 12 S. W. Rep. [Mo.], 892; *Downey v. May,* 19 Abb. N. C. [N. Y.], 177; *Beem v. Kimberly,* 72 Wis., 343; *Schriver v. Holderbaum,* 75 Ia., 33; *Smith v. McFadden,* 56 Ia., 482; *Ury v. Bush,* 52 N. W. Rep [Ia.], 666.)

Where a claim is contingent upon the result of a lawsuit, it may be filed and allowed after the determination of such suit, though the day limited for such filing has passed. (*Morgan v. Gibson,* 42 Mo. App., 234; *Tenny v. Lasley,* 80 Mo., 664; *Senat v. Findley,* 51 Ia., 20; *Farwell v. Myers,* 64 Mich., 234; *Suppigar v. Graaz,* 27 N. E. Rep. [Ill.], 22; *In re Van Norman,* 43 N. W. Rep. [Minn.], 334.)

Story & Story, contra:

Plaintiff in error should not be permitted to file its claim and have the same allowed out of time.

Plaintiff in error made its election between two remedies and is not in a position to invoke the power of a court of equity for an extension of time in which to file and prove its claim. (*Valentine v. Decker,* 43 Mo., 583; *McKindley v. Nourse,* 24 N. W. Rep. [Ia.], 750; *Lovenberg v. Nat. Bank of Texas,* 67 Tex., 440; *Clendenning v. Perrine,* 32 Neb., 155.)

While published notice of the time to file claims was sufficient, plaintiff in error had actual notice, and its claim is barred. (*Carter v. Lee*, 47 N. W. Rep. [Ia.], 1014.)

POST, C. J.

From July 1, 1889, until December 21, following, one E. F. Hempstead was engaged in the business of banking at Pawnee City, in this state, under the name and style of the Nebraska State Bank of Pawnee City. He was also engaged in furnishing electric lights under the name and style of the Pawnee City Electric Light Company. On the day last mentioned said Hempstead made an assignment for the benefit of all his creditors to A. D. Strunk, sheriff of said county. The inventory of assets executed December 30 includes the banking house and all credits of the bank; also the premises upon which was situated the electric light plant, together with all lights, lamps, wires, poles, and property of every description pertaining thereto. On the 15th day of January, 1890, a meeting of the creditors was held pursuant to notice by the county judge, at which the defendant herein was selected to succeed Strunk, the sheriff, in the execution of said trust, and in due time qualified in the manner prescribed by statute. Shortly thereafter an order was made by the county judge, requiring all claims against said estate to be presented for examination and allowance on or before March 12, 1890, notice of such order being given by publication in a local newspaper for the period of three weeks. Hempstead, for some time prior to his assignment, kept an account with the plaintiff in the name of the Nebraska State Bank of Pawnee City and had a short time previous to said date procured the plaintiff to discount certain notes, in all of which the Nebraska State Bank was named as payee. On the 13th day of January, 1890, said plaintiff commenced an action in the district court for Pawnee county in which the Nebraska State Bank of Pawnee City was

named as defendant, in which it sought to rescind the contract, under which it held the notes above mentioned, on account of the alleged fraudulent representations of Hempstead, and to recover the consideration paid therefor. An order of attachment was issued in that case, by virtue of which the banking house and assets of the bank were seized under the direction of the plaintiff, on the theory that the Nebraska State Bank was a body corporate, and that its property accordingly did not pass to the assignee above named. In said action the defendant Lipp was permitted to intervene, and on his motion the attachment was discharged by the district court, which order this court subsequently affirmed, holding that the Nebraska State Bank was not a body corporate, and that the assets of the bank passed to the assignee of Hempstead and his successor. (See *Commercial Nat. Bank v. Nebraska State Bank*, 33 Neb., 292.) Thereafter, on the 28th day of October, 1891, the plaintiff instituted this proceeding before the county judge seeking to have its said claim allowed against Hempstead's estate, which is insolvent and will not pay more than ——— per cent of the claims already allowed. Issue was joined by the answer of the assignee and a hearing had, resulting in a ruling adverse to the plaintiff, who prosecuted an appeal therefrom to the district court of Pawnee county, which resulted in a judgment affirming the order of the county judge and dismissing the appeal, and which has been removed into this court by the petition in error of the plaintiff bank.

The pleadings upon which the cause was tried in the county court and also in the district court are exceedingly voluminous. However, a brief reference to them will suffice in this opinion. Notwithstanding the fact that this cause originated before the county judge, it is in the nature of a proceeding in equity, and must be determined by the application of equitable principles. The petition, which is the basis of the proceeding, was presented to the county

judge long after the limit fixed for the presenting of claims against the estate, and the sole ground upon which relief is sought is that the plaintiff was not aware until the decision of this court in *Commercial Nat. Bank v. Nebraska State Bank, supra,* that it had a claim against Hempstead, and was not advised until about the time of the filing of said petition, to-wit, October 28, 1891, that a time had been fixed for the presentation of claims against said estate. It is provided by section 16 of the assignment law (ch. 6, Compiled Statutes): "Upon the day of the meeting of the creditors the county judge shall fix a day, not more than sixty and not less than thirty days thereafter, within which all claims against the assigned estate shall be filed, and within which the assignee or assignor, or any creditor, may file any objection, defense, set-off, or counter-claim. * * * Notice of the time so fixed shall be given in the manner hereinbefore provided for notice of the first meeting of the creditors. Any claim, objection, set-off, or counter-claim not filed on or before the date so named shall be forever barred from being considered in the settlement of said estate or participating in any dividend therein." Provision is by section 9 made for the notice here referred to by advertisement in some newspaper published and of general circulation in the county, and for the mailing of a copy thereof to each creditor mentioned in the inventory, addressed to his place of residence therein named, with postage prepaid. It is further provided: "No informality or neglect with reference to such notice shall invalidate any action taken pursuant thereto or to such order." Similar provisions have been construed as directory merely, and the claimant, in a proper case, allowed to share in the assets of the assigned estate, notwithstanding the failure to present his claim for allowance within the allotted time. But is this plaintiff in a position to invoke that rule? We think not. There is not alone an absence of evidence tending to prove ignorance on its part, of the order in question,

but there is positive evidence that it was fully advised of the time fixed for the presentation of claims. A consideration of the whole record can lead to but one conclusion, viz., that the plaintiff, with a knowledge of all the facts, elected to ignore the assignment in so far as it applied to the assets of the bank and is now chargeable with the consequences of the election thus deliberately made, for, as held in *Clendenning v. Perrine*, 32 Neb., 155, a creditor who through his own fault fails to present his claim within the time limited therefor by law is barred from participating in any distribution of the estate of the assignor. It follows that the claim of the plaintiff is without merit and that the judgment of the district court must be

AFFIRMED.

HOME FIRE INSURANCE COMPANY OF OMAHA V. BERG & STORY.

FILED JANUARY 9, 1896. No. 5902.

1. **Pleading.** New matter constituting a defense in whole or in part is not available under a general denial, but should be specially pleaded.

2. **Evidence:** ATTORNEY AND CLIENT: PRIVILEGED COMMUNICATIONS. Information voluntarily entrusted to an attorney at law, where the relation of attorney and client does not exist, is not a privileged communication under the provisions of the Code of Civil Procedure.

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

B. F. Smith and *Jacob Fawcett*, for plaintiff in error.

Capps & Stevens, contra.

POST, C. J.

This action originated in the county court for Adams county on a policy of insurance for $400, issued by the plaintiff in error, defendant below, to one Louis Carroll on a certain Clydesdale stallion, eight years old, of the value of $1,600. The cause was in due time removed to the district court of said county, where a trial was had, resulting in a verdict and judgment for the plaintiff in the sum of $200, and which has been removed into this court for review upon the petition in error of the defendant therein.

It is in the petition below, among other things, alleged that after the death of the horse insured, and after a cause of action had accrued on the policy, said Carroll, for a valuable consideration, assigned and transferred to the plaintiff a one-half interest therein, of which the defendant was in due form notified. The answer, after admitting the issuance of the policy and the death of the horse above mentioned, denies each and every other allegation of the petition, and concludes as follows: "Defendant further answering says that it has paid and settled for the loss of said horse so insured before the bringing of this suit and denies that it is indebted to Louis Carroll or Berg & Story for said loss of said horse in any sum whatever." The allegations of the petition were fully sustained by the proofs adduced at the trial, the assignment referred to therein being in writing under date of July 8, 1891, the loss having occurred June 27, previous.

On the part of the defendant it was attempted to show (1) a recession by Carroll of the assignment to the plaintiff; (2) a subsequent settlement and discharge by Carroll, the insured. The liability of the defendant company on the policy of insurance being admitted and the assignment being clearly established, it follows that the judgment should not be disturbed unless perhaps on the ground that the contract of assignment was, as claimed, rescinded by Car-

roll; but however meritorious that defense might have been under other circumstances, it is not available to the defendant company in this action. There is no rule of pleading more firmly established under our Code than that new matter constituting an entire or partial defense must be specially pleaded. (Code of Civil Procedure, sec. 99.) Inasmuch as the answer contains no reference to a recession of the assignment, further reference to the subject would be out of place in this opinion.

The only other assignment of error calling for notice is the overruling of the objection to the testimony of Mr. Olmstead on the ground that the communication sought to be elicited was privileged, having been made to the witness while acting as attorney for the defendant. The purpose of the evidence was to prove notice to the defendant company of the assignment by Carroll to plaintiffs and was without doubt admissible, since it is clearly shown from his *voir dire* examination that he did not at any time stand in the relation of attorney for the defendant. His answers, it is true, disclose the fact that while he did at one time appear for the defendant in the county court in the belief that he had been retained for that purpose, he was soon thereafter advised by Mr. Barber, secretary of the company, that his appearance was unauthorized. But, assuming the relation of attorney and client to have in fact existed, the evidence was nevertheless admissible, since it was in no sense a privileged communication, but was confined to a statement that the adjusting agent of the defendant company, having insurance on the horse in question, saw and examined the written assignment from Carroll to the plaintiffs. There being no error in the record the judgment is

AFFIRMED.

JULIUS S. COOLEY V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 6690.

Contempt: SUFFICIENCY OF COMPLAINT. A complaint is insufficient as the foundation of proceedings for constructive contempt which fails to state the facts constituting the alleged offense, and showing that the act of the accused amounts to a fraud upon the court, or tends to hinder or embarrass it in the administration of justice.

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

David Van Etten, for plaintiff in error.

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

POST, C. J.

This is a petition in error to review a judgment of the district court for Douglas county whereby the plaintiff in error was adjudged guilty of contempt of court. The basis of the prosecution below is the following order entered by the district judge on his own motion:

"STATE OF NEBRASKA
v.
JULIUS S. COOLEY AND
THEODORE GALLIGHER.

"It now appearing to the court that one Julius S. Cooley has used fraudulent means and imposed upon Charles J. Karbach in the obtaining of a certain affidavit of the said Charles J. Karbach recently filed in case entitled George A. Hoagland v. Emma L. Van Etten et al., docket X, No. 375, of this court, and it further appearing to the court that one Theodore Galligher has used fraudulent means and imposed upon George H. Fitchett and E. C. Garvin,

respectively, in the obtaining of certain affidavits of the said Garvin and Fitchett recently filed in case entitled George A. Hoagland v. Emma L. Van Etten et al., docket X, No. 375, of this court. It further appearing that the said Julius S. Cooley and Theodore Galligher procured the said affidavits of the parties as above set forth, knowing and intending that said affidavits were to be filed in this court to be used upon the hearing of said cause, to-wit, George A. Hoagland v. Emma L. Van Etten, and that the said Galligher and Cooley intended thereby to impose upon this court.

"It is therefore ordered that a *capias* issue forthwith to the sheriff of Douglas county, Nebraska, commanding him to bring the said Julius S. Cooley and Theodore Galligher before this court at 9:30 o'clock Wednesday morning next to show cause why they and each of them should not be punished for contempt of this court.

"G. W. AMBROSE,
"*Judge.*"

Upon the entry of the foregoing order a *capias* was issued, by virtue of which the plaintiff in error was arrested and at a subsequent day of the term was adjudged guilty as charged in said order and sentenced to imprisonment in the county jail for the period of ten days and to pay a fine of $50, together with the costs of the prosecution. The question of the sufficiency of the said order was raised at every stage of the proceeding and also by the petition in error. It has been frequently said that the proceeding for contempt under our system is in the nature of a criminal prosecution and that the same degree of certainty is required in stating the offense as in prosecutions under the Criminal Code. (*Gandy v. State*, 13 Neb., 445; *Boyd v. State*, 19 Neb., 128; *Johnson v. Bouton*, 35 Neb., 903; *Percival v. State*, 45 Neb., 741; *Hawes v. State*, 46 Neb., 149.) That rule is especially applicable to acts which, although not committed in the presence of the court, tend

to embarrass or prevent the orderly administration of justice and which are known as constructive contempts.

In *Gandy v. State, supra,* it is said: "The proceeding against a party for constructive contempt must be commenced by an information under oath, specifically stating the facts complained of; an attachment may then be issued, or order to show cause." In that case the information, which was prepared and filed by the district attorney, after describing a certain cause then on trial to which the defendant therein was a party, alleged that the said defendant "did willfully attempt to obstruct the proceedings and hinder the due administration of justice in said suit, then and there depending and on trial as aforesaid before said district court, in this, to-wit: By attempting to procure one George A. Abbott, Jerry Ackerman, and other persons whose names are to this affiant and informant unknown, to unlawfully seek, strive, and attempt to corrupt and influence the jurors, to-wit, * * * in their action, judgment, and decision * * * in said suit." In the opinion reversing the judgment of conviction MAXWELL, J., says: "In the case at bar there is not a single fact alleged showing an attempt on the part of the defendant to improperly influence jurors. That is there is no statement of what he did. The information therefore fails to state an offense."

In *State v. Henthorn,* 46 Kan., 613, the court say: "It is error to issue an attachment, warrant, or order of arrest for an alleged constructive contempt, without an affidavit or information containing a statement of the facts constituting the alleged contempt having first been filed with the court." (See, also, to the same effect, *In re Holt,* 27 Atl. Rep. [N. J.], 909; *Wilson v. Territory,* 1 Wyo., 155; *In re Daves,* 81 N. Car., 72; *Ex parte Wright,* 65 Ind., 508; Rapalje, Contempt, 43.)

We must not be understood as intimating that proceedings for constructive contempt may not be instituted by the court or judge. On the other hand, it is the right, if not

indeed the duty, of the tribunal whose power is defied, or whose process is obstructed, to take notice of that fact without waiting for an informant who is usually more interested in asserting his personal rights than in the vindication of the court. It is probable, too, that an order like that entered in this case is a sufficient foundation for the proceedings; but to have that effect it must contain the allegation essential to confer jurisdiction in a prosecution by affidavit or complaint. When tested by that rule, the order mentioned is clearly insufficient. If this conviction can be sustained, it must be upon the allegation that the accused "has used fraudulent means and imposed upon one Charles J. Karbach in the obtaining of a certain affidavit." Here, as in *Gandy v. State*, there is alleged no facts from which it can be found or inferred as a matter of law that the act of the accused was a fraud upon Karbach, the affiant named, or that its effect was to impose upon or embarrass the court in the administration of justice. Such a statement would be indefensible in an action for relief on the ground of fraud, not to mention a criminal prosecution. The judgment is reversed and the prosecution dismissed.

REVERSED.

THEODORE GALLIGHER V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 6691.

Sufficiency of Complaint for Constructive Contempt.

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

David Van Etten, for plaintiff in error.

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

POST, C. J.

This was a proceeding against the plaintiff in error for contempt of court and is submitted upon the record which was examined in the case of *Cooley v. State,* 46 Neb., 603, and for reasons therein stated, the judgment of conviction is reversed and the prosecution dismissed.

REVERSED.

ORMA LAWHEAD V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 7858.

1. **Indictment and Information:** DUPLICITY: BURGLARY. Different criminal acts constituting parts of the same transaction, such as burglary with intent to steal particular property, and the stealing of such property, may be charged in the same indictment or count thereof. (*Aiken v. State,* 41 Neb., 263.)

2. **Larceny:** EVIDENCE: INSTRUCTIONS. It is not error in a prosecution for larceny to charge that "the proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinary prudent men with a conviction upon which they would act in their own most important affairs or concerns of life." (*Polin v. State,* 14 Neb., 540; *Willis v. State,* 43 Neb., 102.)

3. **Criminal Law:** INSTRUCTION AS TO PENALTY. Where the jury have been fully advised respecting the distinction between grand larceny and petit larceny, it is not error for the trial court to add that they have nothing to do with the question of the penalty, and that it is their duty to render a verdict in accordance with the evidence without regard to its effect upon the accused. (*Ford v. State,* 46 Neb., 390.)

4. **Instructions.** Certain instructions *held* properly refused, the

propositions therein embraced having been given by the court on its own motion in language quite as favorable to the accused.

5. Larceny: EVIDENCE. Evidence examined, and *held* to sustain the conviction on the charge of larceny.

ERROR to the district court for Buffalo county. Tried below before SINCLAIR, J.

F. G. Hamer and *Greene & Hostetler*, for plaintiff in error.

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

POST, C. J.

The plaintiff in error was by the district court for Buffalo county adjudged guilty of grand larceny and sentenced to a term in the penitentiary, which judgment he now seeks to have reversed by means of a petition in error addressed to this court.

1. The first proposition to which we will give attention is that the verdict is contrary to law, for the reason that the indictment includes in the same count a charge of burglary as well as of larceny. The charge is in the usual form and concludes as follows: "Then and there being found in said barn, feloniously and burglariously did steal, take, and carry away, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska." It is said by counsel, "The stealing that is here charged is a burglarious stealing. * * * If the answer be that he is charged with both burglary and theft, I reply that he cannot be so charged in the same count, and that the indictment is bad for duplicity." To that proposition we cannot give our assent. It is, on the contrary, firmly established by authority that burglary and larceny, where each constitutes part of the same transaction, may be charged in the same count, and

the defendant may be found guilty of larceny only. (*Aiken v. State*, 41 Neb., 263, and authorities cited.)

2. It is next alleged that the court erred in giving the following instructions on its own motion: "The court instructs you that by a reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means an actual doubt having some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinary prudent men with a conviction on which they would act in their own most important concerns and affairs of life." The specific objection to the foregoing instruction, as made in the motion for a new trial, is to the last sentence or paragraph thereof. That portion of the instruction to which the criticism is directed is a substantial copy of the charge approved by this court in *Polin v. State*, 14 Neb., 540, *Langford v. State*, 32 Neb., 782, and *Willis v. State*, 43 Neb., 102. The use of the qualifying word "ordinary" instead of "ordinarily," as in the instruction approved, is probably the result of an error in transcribing; but however that may be, the variance is unimportant and presents a question of grammatical construction rather than a question of law.

3. During the deliberation of the jury the following proceedings were had as disclosed by the record:

"Question by jury: 'What is the difference in punishment between grand larceny and petit larceny?'

"Answer by the court: 'Grand larceny is where the property stolen is of the value of $35 or upwards, and punishable by confinement in the penitentiary not less than one year and not more than seven years. Petit larceny is where the property stolen of the value less than $35 and is punishable by imprisonment in the county jail not exceeding thirty days, and in addition may be fined $100, and

also to make restitution to the owner of the property stolen in double its value. The court desires to add that it answers these questions in the hope that it may help your investigations, but desires to say further that it is your duty to pass upon the evidence and declare your verdict thereon irrespective of what the punishment may be. This matter is for the court. You have done your whole duty when you have passed upon the facts as shown by the evidence."

Exception was taken to the cautionary language with which the foregoing instruction concludes, and which exception is the ground of the next assignment of error. The question here presented was practically determined in *Ford v. State*, 46 Neb., 390, where it was said that "where the jury are not required to fix the punishment in a criminal prosecution, it is not error for the trial judge to refuse to instruct them as to the penalty prescribed by statute for the offense, or to permit that question to be argued to the jury." The only difference between that case and the case at bar is that in the former counsel were refused permission to comment upon the penalty for larceny in their argument to the jury, while in the latter the question was disposed of by the instruction. The court, therefore, did not err in the ruling assigned.

4. Certain witnesses for the state had been employed as detectives to procure evidence against the accused, and instructions requested by the latter regarding the weight to be given the testimony of such witnesses were refused, and which refusal is also assigned as error. The request of the accused was based upon the holding of the court in *Preuit v. State*, 5 Neb., 377, and in *Heldt v. State*, 20 Neb., 492. But the same proposition had been given in the charge of the court in language deemed by us more appropriate than that employed in the instruction approved in *Preuit v. State*. The trial court did not err, therefore, in refusing the request above mentioned.

5. The accused and Joseph Roof were jointly charged

with burglariously breaking and entering a certain barn, the property of one Paist, with intent to steal harness, corn, and other property and with the actual theft of the property therein described. Roof, it appears, was soon thereafter arrested and confessed to his participation in the theft, and also implicating the accused in said crime. In pursuance of an understanding with the former, two witnesses for the state, Gass and Overmire, secreted themselves in his cell, when, according to said witnesses, the following conversation was had, quoting from the testimony of Overmire: "Sheriff Nutter brought Lawhead in there and Roof sat on a chair toward the back end of the hall-way, and said to him, 'You can stay in there,' and then he [Nutter] went upstairs. Lawhead said, 'Hello, old man, you are here, are you?' Roof said, 'Yes, I'm here.' Lawhead said, 'How are you feeling?' Roof said, 'Pretty badly.' Lawhead said, 'Well, you old cuss, if you had not given me away as you did, we would both have been out of here.' Roof said, 'I told you not to take the harness. If you had not it would have been all right.' Lawhead said, 'I know that, but I would not give a man away.' * * * Roof said, 'What did you do with the harness?' Lawhead said, 'If I told you, you would go and tell the officers right away and it would put us both in the pen.' He said he needed the harness in his business, and Roof was kicking all the time about the harness." The foregoing statement is corroborated by Gass, although it is denied *in toto* by the accused. This evidence, it is strenuously insisted, is insufficient to sustain the judgment of conviction, and that the verdict should have been set aside upon that ground. But we think otherwise. According to the settled law of the state, a conviction may rest upon the uncorroborated evidence of an accomplice when sufficient, in connection with the other evidence, to satisfy the jury beyond a reasonable doubt of the guilt of the accused. (*Olive v. State*, 11 Neb., 1; *Lamb v. State*, 40 Neb., 312.)

In the case at bar the larceny is, as we have seen, clearly proved and is practically admitted by counsel. Roof, the accomplice, was found in possession of a part of the stolen property, and the admissions of the accused, without doubt, strongly tend to connect him with the perpetration of the crime. The evidence appears to have satisfied the jury beyond a reasonable doubt of his guilt. They were properly cautioned regarding the credit due to the testimony of the witnesses of the state, but they were, after all, the judges of the weight of the evidence, and to interfere with their verdict would be a reversal of the oft-asserted and firmly established rule of the court.

There are other propositions discussed in the brief by counsel. We have, however, noticed all questions presented by the record before us. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. GEORGE W. LEIDIGH, WARDEN OF THE STATE PENITENTIARY, V. SILAS A. HOLCOMB, GOVERNOR, ET AL.

FILED JANUARY 9, 1896. No. 8057.

1. **Constitutional Law**: STATUTES: MANAGEMENT OF PENITENTIARY. The provision of section 32, act of March 4, 1870 (Session Laws, 1870, p. 31), that all transactions and dealings of the state penitentiary shall be conducted in the name of the warden thereof, "who shall be capable in law of suing and being sued in all courts and places, in all matters concerning the said prison, by his name of office," conflicts with section 19, article 5, of the constitution of 1875 creating the board of public lands and buildings, and defining their duties, as well as the act of February 13, 1877 (Session Laws, 1877, p. 188), and was thereby repealed.

2. **Warden of Penitentiary:** BOARD OF PURCHASE AND SUPPLIES: MANDAMUS. Independent of statute, an action may be maintained on the relation of the warden of the penitentiary against the board of purchase and supplies to require them to provide the necessaries for the support of the penitentiary, in accordance with the provisions of the act of February 15, 1877, entitled "An act to regulate the purchase of supplies for the public institutions, and the executive departments of the state" (Session Laws, 1877, p. 199), since the object of such a proceeding is not the vindication of a mere private right of the relator, but the enforcement of a public duty which the respondents owe to the state.

3. ———: POWERS AND DUTIES. The powers and duties of the warden of the penitentiary are defined by the act of 1870 (General Statutes, 1873, p. 1031, ch. 76), and he continues to be, as originally designed, merely the keeper of the prison, subject to the management and control of the board of public lands and buildings, as the successor of the board of inspectors created by said act.

4. **Board of Public Lands and Buildings:** CONVICT LABOR: LEASE. The power conferred upon the board of public lands and buildings by section 17 of the act of February 13, 1877 (Session Laws, 1877, p. 194), to lease the convict labor of the state for a period not exceeding ten years, is not a continuing power, but was on the contrary exhausted by a single user.

5. **Statutes:** TITLE OF ACT: CONSTITUTIONAL LAW: CONVICT LABOR. Section 5 of the act of 1895, providing for the leasing of the convict labor until the last day of the next session of the legislature, is not within the title of said act, to-wit, "An act to annul a contract between the state of Nebraska and W. H. Dorgan, alleged assignee of C. W. Mosher, for leasing the penitentiary, penitentiary grounds, and convict labor of the state of Nebraska, * * * and to repeal all acts and parts of acts in conflict with the provisions of this act" (Session Laws, 1895, p. 237, ch. 66), and is therefore in conflict with the provision of section 11, article 3, of the constitution requiring the subjects of acts to be clearly expressed in their titles.

6. ———: ———: ———: ———. It is apparent from the whole of said act, including the title and preamble, that the words "for leasing the penitentiary, penitentiary grounds, and convict labor," as employed in the title thereof, are descriptive merely of the contract referred to, and not embracing a separate and distinct subject of legislation.

7. **Duties of Board of Public Lands and Buildings:** CONVICT LABOR: LEASE. The board of public lands and buildings is by section 19, article 5, of the constitution and the act of February 13, 1877 (Session Laws 1877, p. 188), invested with the general management and control of all of the public institutions of the state, except those for educational purposes, and may, in its discretion, lease the convict labor, penitentiary grounds, shops, and machinery therein, together with any property connected with or incident thereto.

8. ———: ———: ———. It is within the power of the board of public lands and buildings to provide by contract for the feeding and clothing of the convicts in the penitentiary as one of the considerations for the leasing of their labor; and such an agreement with a responsible lessee, who is ready and willing to perform the conditions of his obligation, would be a sufficient justification in a proceeding of this character.

9. ———: ———: ———. The contractor or lessee cannot, even with the assent of the board of public lands and buildings, usurp any of the functions of the warden as the keeper of the prison, although he may, and doubtless should, be accorded such privileges, consistent with the rules prescribed for the government of the prison and the health and safe-keeping of the convicts, as are necessary to carry into execution his agreement with the state.

10. ———: AGENTS. It being impossible for the board of public lands and buildings to personally direct the management in detail of the numerous public institutions of the state, they must, from the necessities of the case, transact much of the business pertaining to such institutions through agents of their own creation.

11. ———: ———: CONVICT LABOR. In the absence of statutory restriction, express or implied, it is within the power of said board to appoint an agent on behalf of the state to lease or manage the convict labor as well as the shops and machinery within the penitentiary.

12. ———: ———: ———. Except when furnished by the contractor pursuant to an agreement with the state, the method prescribed by statute (Session Laws, 1877, p. 199) for procuring supplies for the support of the penitentiary is exclusive, and the board of public lands and buildings cannot delegate to an agent of their own selection the disbursement of money appropriated for that purpose.

13. ——: ——: ——: CONSTRUCTION OF CONTRACT. Contract relied upon by respondents examined, and *held* a mere appointment of B., the alleged contractor, as agent of the state to lease the convict labor to third parties and to disburse the funds appropriated for the support of the penitentiary.

14. **State Treasurer:** PUBLIC FUNDS. The state treasurer, and not the chairman of the board of public lands and buildings, is charged with the general duty of receiving and disbursing the public funds, hence the latter is not chargeable upon his official bond with money of which the former is the lawful custodian.

15. **Contracts:** CONSIDERATION. Reciprocal promises as the basis of a valid agreement must be equally obligatory upon the parties, so that each may have an action thereon; otherwise such agreement is *nudum pactum.*

ORIGINAL application for *mandamus* to compel the members of the state board of purchase and supplies to meet with the relator and make estimates, and purchase provisions and supplies for the penitentiary. *Writ allowed.*

Darnall & Kirkpatrick, for relator:

Reference was made to the following cases: *White v. City of Lincoln*, 5 Neb., 505; *City of Tecumseh v. Phillips*, 5 Neb., 305; *Ives v. Norris*, 13 Neb., 254; *Miller v. Hurford*, 11 Neb., 381; *Dawson County v. McNamar*, 10 Neb., 276; *Trumble v. Trumble*, 37 Neb., 340; *People v. Denahy*, 20 Mich., 349; *Weigel v. City of Hastings*, 29 Neb., 379; *State v. Nomland*, 3 N. Dak., 427; *State v. Bartley*, 41 Neb., 277; *State v. Wallichs*, 12 Neb., 407, 15 Neb., 457, 609; *State v. Board of Public Lands & Buildings*, 7 Neb., 42; *State v. Bacon*, 6 Neb., 286; *In re Board of Public Lands & Buildings*, 18 Neb., 340, 37 Neb., 425; *Lawson v. Gibson*, 18 Neb., 137; *State v. Babcock*, 21 Neb., 599; *Stone v. Green*, 3 Hill [N. Y.], 472; *State v. Maccuaig*, 8 Neb., 215; *State v. Howe*, 28 Neb., 618.

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General, contra*, cited: *State v. Stout*, 7 Neb., 89; *State v. Lancaster County Bank*, 8 Neb., 218; *In*

re Appropriations, 25 Neb., 665; *Van Horn v. State*, 46 Neb., 62; *State v. Whittemore*, 12 Neb., 252; *State v. Ream*, 16 Neb., 681; *Stricklett v. State*, 31 Neb., 674; *Smails v. White*, 4 Neb., 353; *Sovereign v. State*, 7 Neb., 409; *People v. Mahaney*, 13 Mich., 481; *State v. Bemis*, 45 Neb., 724; *Lewis v. Stout*, 22 Wis., 236; *Commonwealth v. Green*, 58 Pa. St., 226; *Board of Supervisors v. Heenan*, 2 Minn., 281; *Bright v. McCullough*, 27 Ind., 223; *Indiana C. R. Co. v. Potts*, 7 Ind., 681; *City of St. Louis v. Tiefel*, 42 Mo., 589; *Curry v. Elvires*, 3 Vroom [N. J.], 363; *State v. Squires*, 26 Ia., 345; *State v. County Judge of Davis County*, 2 Ia., 280.

POST, C. J.

This is an original application for a writ of *mandamus*, on the relation of George W. Leidigh, as warden of the state penitentiary, to compel the respondents, as members of the board of purchase and supplies, to meet with the relator as such warden and make an estimate of the supplies necessary for the maintenance of said penitentiary for the current quarter, to advertise for bids therefor, and make contracts for such supplies in accordance with the provisions of the act approved February 15, 1877. (Compiled Statutes [ed. 1895], sec. 2, art. 12, ch. 83.) It is by the act mentioned made the duty of said board, consisting of the governor, commissioner of public lands and buildings, secretary of state, treasurer, and attorney general, at least one month previous to the first days of January, April, July, and October of each year, to meet with the warden of the penitentiary and superintendent of each of the asylums or other public institutions and determine the supplies necessary for such institutions for the quarter next ensuing, and which shall be contracted for by said board in the manner therein prescribed after advertisement in a newspaper having a general circulation in the state. It is further provided that no bids shall be considered unless accompanied

by the bonds of the proposed contractors in such amount and with such conditions as the board may prescribe, and that all supplies not furnished in accordance with the provisions of said act shall be purchased under the written instructions of said board. The respondents, except the governor (who refuses to join in resisting the relator's demand) having waived the issuance and service of the alternative writ, have filed a pleading in the nature of an answer, in which it is in substance alleged that the board of public lands and buildings, in the exercise of the authority conferred by the constitution and statutes of the state, on the 3d day of September, 1895, leased to A. D. Beemer, until the last day of the next session of the legislature, all of the convict labor in said prison, together with the grounds, yards, shops, and machinery pertaining thereto; that one of the considerations for said lease was the agreement by the said Beemer to suitably feed and clothe the convicts confined in said prison. It is further alleged that said lessee has been since the date named, and now is, ready and willing to furnish all of the supplies required for said prison and the convicts therein as by his lease provided, but that the relator has ever since said date refused, and still refuses, to accept from said lessee any supplies, or to permit him to employ any of said convicts. The lease above mentioned is here set out at length:

"This agreement, made and entered into at Lincoln, Nebraska, on this 3d day of September, A. D. 1895, by and between the state of Nebraska and H. C. Russell, J. A. Piper, A. S. Churchill, and J. S. Bartley, for and on behalf of said state, as the board of public lands and buildings of the state of Nebraska, parties of the first part, and A. D. Beemer, of Beemer, Cuming county, Nebraska, party of the second part,

"Witnesseth, that the said parties of the first part hereby grant, let, and lease to A. D. Beemer all of the property inventoried by the appraisors and umpire and purchased of

William H. Dorgan for the use and benefit of the Nebraska state penitentiary, also the labor of the prisoners confined in the penitentiary of the state of Nebraska, and all the grounds, shops, yards, and buildings and outbuildings connected with the same, and the appurtenances thereunto belonging (not hereinafter reserved), and all property belonging to the state, and the machinery for running the several branches of industry and used for the care and maintenance of the convicts therein until the last day of the session of the next session of the legislature, and agree to pay to the said A. D. Beemer the cost of feeding, clothing, and necessary expense for the care of said prisoners, and to pay the salaries of the warden, deputy warden, surgeon, and chaplain, turnkeys, usher, night watch, cell-house keepers, keeper in kitchen, and all necessary guards for the care and control of said prison and prisoners, for which the said first party agrees to pay not to exceed forty cents per day for each convict. In consideration whereof the said A. D. Beemer is to secure and furnish all possible labor for the convicts confined in said prison and to keep said convicts employed at the best possible wages, and to use his best energy and endeavor to keep them so employed, and to conduct the business of the prison in an energetic and economical manner, and to make all necessary improvements in said prison that the board of public lands and buildings may direct, to keep all the buildings, shops, yards, and grounds in a good condition, and to preserve the same from all possible damages. That the said A. D. Beemer is to have and exercise exclusive right to assign convicts to trades and occupations, to the running and management of all machinery belonging to the state and under his control, and shall see that the food furnished said prisoners is wholesome, and the clothing furnished is suitable to the comfort and health of the prisoners. For all purposes between the parties to this contract ten (10) hours shall be regarded as constituting a day's labor.

"The said A. D. Beemer, party of the second part, shall make a report on the 1st and 15th days of each month to the chairman of the board of public lands and buildings of all moneys received and paid out by him, of all his acts and doings connected with his management and control of said prison and prisoners, and to pay over to said chairman all moneys in his hands on the 1st day of each month when required by the board, less $250 per month; provided that not more than $3,000 shall be retained in any one year; and provided further, that said Beemer shall keep and have a competent book-keeper, to be paid out of the $3,000 retained by him. He shall keep an inventory of all property coming into his hands as lessee and turn over or account for the same at the expiration of his lease in as good condition as the same now is, reasonable damage by use, wear and tear, loss by fire, the acts of God, and public enemies excepted. He shall [have] the full right to control and manage all property and machinery necessary for the employment, care, and maintenance of the convicts.

"The employment of outside labor by the lessee shall be subject to the approval of the board of public lands and buildings.

"The state reserves the right to make any and all temporary or permanent improvements and buildings pertaining in any manner to the penitentiary or any part or portion thereof, and the right to use any of the prisoners, grounds, and buildings free of charge during the time of construction.

"This contract shall take effect and be in force from and after the 3d of September, A. D. 1895, and the execution of a bond by said A. D. Beemer, with good and sufficient surety to the satisfaction and approval of the board of public lands and buildings of the state of Nebraska, in the penal sum of one hundred thousand ($100,000) dollars, conditioned for the faithful performance by the said A. D. Beemer of all the stipulations and agreements on his be-

half in this contract contained. The state reserves for the use of the officers and guards the following rooms, to-wit: Rooms used by the warden in 1894, two rooms for the use of the deputy warden, the warden's office and library, and necessary rooms for the guards, said rooms to be in the main building.

"Either party reserves the right to cancel and annul said contract at any time, upon giving thirty (30) days' notice. The party of the first part guaranties the preservation of strict discipline, and for that purpose and pursuant to law retain the general management and control of said penitentiary, penitentiary grounds and convicts, and the right to employ officers and guards and to fix the salaries of all not now fixed by law. The state further reserves the right to say who shall be boarded at the expense of the state, and to fix the price to be paid for board if charge is made for the same.

"Signed, sealed, and delivered this 3d day of September, A. D. 1895.

A. D. BEEMER, *Lessee.*
"H. C. RUSSELL,
"*Com. P. L. & B.*,
"J. A. PIPER,
"*Sec'y B. of P. L. & B.*,
"J. S. BARTLEY,
"*State Treasurer*,
"A. S. CHURCHILL,
"*Att'y General*,
"*Board of Public Lands and Buildings.*

"Signed in presence of
"RECEA BIGLER.
"BRAD. P. COOK.

"It is understood that the money to be turned over by me as herein stated includes all money coming into my hands as lessee from contractors or the forty (40) cents per capita received from the state less the amount herein stated.

"A. D. BEEMER."

The relator's right to maintain this action is challenged by respondents, and defended upon two grounds, viz., (1) that such power is expressly conferred by statute; (2) that the object of the action is the enforcement of a public duty, in which the relator has, by virtue of his office as warden, a direct interest, and as such is entitled to prosecute the action in behalf of the state. The first contention is based upon the terms of the act of 1870 (General Statutes, p. 1031, ch. 76), under which the penitentiary was created. That act, in addition to the appropriation of funds for the erection and maintenance of the penitentiary, provides for the appointment by the governor of a warden who is declared to be the principal keeper of the prison, who is required to remain in constant attendance thereat, except when engaged in the performance of some other duty of his office, and to "exercise general supervision over and give necessary directions to the keepers and guards, examine whether they have been vigilant in the discharge of their respective duties, examine daily into the health of the prisoners and take charge of the real and personal estate belonging to or connected with the penitentiary." (General Statutes, p. 1038, ch. 76, sec. 31.) It is by section 32 of said act provided that all transactions and dealings of the prison should be conducted in the name of the warden, "who shall be capable in law of suing and being sued in all courts and places in all matters concerning the said prison by his name of office," etc. (General Statutes, p. 1038, ch. 76, sec. 32.)

The section last mentioned, it is claimed, conflicts with the provisions of section 19, article 5, of the constitution of 1875, and the act of February 13, 1877, "Establishing a board of public lands and buildings of the state of Nebraska, and defining their duties." (Session Laws, 1877, p. 188.) The constitutional provision mentioned reads as follows: "The commissioner of public lands and buildings, the secretary of state, treasurer, and attorney general shall

form a board, which shall have general supervision and control of all the buildings, grounds, and lands of the state, the state prison, asylums, and all other institutions thereof, except those for educational purposes, and shall perform such duties and be subject to such rules and regulations as may be prescribed by law." Section 1 of the act of 1877 provides that the officers above enumerated shall hereafter be known in law as "the board of public lands and buildings," and "shall have general supervision and control of all the public lands, lots and grounds, and all institutions, buildings, and all the grounds thereto, now owned or that may hereafter be acquired by the state, including the saline lands, * * * the state capitol building and grounds, the state penitentiary and grounds, the state hospital for the insane and grounds," etc. (Session Laws, 1877, p. 189, sec. 1.) Section 3 provides that said board "shall have general custody and charge of all buildings and institutions and the grounds thereto coming under the provisions of this act, and shall be responsible for the proper keeping and repair of the same," etc. Section 4 provides that said board "shall have power, under the restrictions of this act, to direct the general management of all the said institutions, and be responsible for the proper disbursement of the funds appropriated for their maintenance, and shall have reviewing power over the acts of the officers of such institutions and shall * * * audit all accounts of such officers, including the accounts of the commissioner of public lands and buildings, except his salary." The evident purpose of these provisions is to invest the board of public lands and buildings with the general control and management of the institutions to which they apply, accompanied by the responsibility which is a necessary incident of the power thus conferred. They are, too, in obvious and irreconcilable conflict with the provision of the prior act for the prosecution of actions relating to the management of the penitentiary in the name of the warden.

But independent of the statute we are satisfied that the relator has such a direct interest in the subject of the controversy as entitles him to prosecute this action in the name of the state. That it is the duty of the board of purchase and supplies to provide suitable food and clothing for the convicts committed to relator's charge is a proposition not controverted by respondents. Nor can we conceive of a more appropriate means of enforcing that duty in case of default than by a proceeding on the relation of the party charged with the safe keeping as well as the health and comfort of the convicts. That view, it seems, harmonizes with the spirit of the Code as well as the former utterances of this court. (*State v. Stearns*, 11 Neb., 104; *State v. Peacock*, 15 Neb., 442; *State v. Matley*, 17 Neb., 564; *State v. Farney*, 36 Neb., 537.)

The reliance of the respondents is, as already appears, the undertaking of Beemer, the alleged lessee, to maintain the prisoners. The relator, on the other hand, while conceding the duty of the board of public lands and buildings to let to contractors, on the best attainable terms, the labor of the convicts, denies the authority of said board to lease the penitentiary, the grounds thereto belonging, or the property of the state therein.

Since it is important to ascertain the source and limit of the power conferred upon the board with respect to the subject in hand, we will briefly notice the several contentions of the respondents, although not exactly in the order presented.

It is in the first place asserted that authority for said contract is found in section 17 of the act of February 13, 1877, heretofore referred to, creating the board of public lands and buildings; but in that view we cannot concur. It is sufficient, without quoting the section named, that it provides for the leasing, after advertising as therein provided, of the penitentiary and grounds, and the convict labor, for a period not exceeding ten years. The power

thus conferred is not a continuing one, but was, on the contrary, exhausted with a single user. Such is the obvious and necessary construction of the language therein employed.

It is next claimed that said contract is authorized by section 5 of the act of 1895, entitled "An act to annul a contract between the state of Nebraska and W. H. Dorgan, alleged assignee of C. W. Mosher, for leasing the penitentiary, penitentiary grounds, and convict labor of the state of Nebraska, * * * and to repeal all acts and parts of acts in conflict with the provisions of this act." (Session Laws, 1895, p. 237, ch. 66.) It is by section 5 thereof provided, "That the board of public lands and buildings shall have power and are hereby directed to manage the state penitentiary, and the said board is hereby authorized and empowered to lease the labor of convicts to responsible persons, when in their judgment the best interests of the state would be subserved thereby; *Provided*, No contract made shall extend beyond the last day of the session of the next session of the legislature." The section quoted is, it is claimed, inimical to the provision of section 11, article 3, of the constitution, viz.: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." Turning again to the title of said act we find the words "for leasing the penitentiary, penitentiary grounds, and convict labor," separated from the remaining portions thereof by commas, indicating that it was intended as an independent provision; but an examination of the whole title, together with the lengthy preamble accompanying it, leads to the conclusion that the words last quoted are descriptive merely of the contract between the state and Dorgan, as assignee of Mosher, and not embracing a distinct and separate subject of legislation. The punctuation of statutes, presumably the work of the engrosser or publisher, is of little value in their interpretation and is frequently altogether disregarded by the courts. (Sedgwick,

Construction of Statutory & Constitutional Law, p. 223; *Hammock v. Loan & Trust Co.*, 105 U. S., 77; *Gyger's Estate*, 65 Pa. St., 311; *Doe v. Martin*, 4 T. R. [Eng.], 65.) The preamble, on the contrary, while not a part of the act, will always be consulted in case of doubt or ambiguity, in order to determine the legislative intention, and has for that purpose been held entitled to greater consideration than the title itself. (Bishop, Statutory Crimes, sec. 48; *Jackson v. Gilchrist*, 15 Johns. [N. Y.], 89; *Yazoo & M. V. R. Co. v. Thomas*, 132 U. S., 174.) The preamble in this instance is in the usual form, reciting the history of the contract between Mosher and the state, the assignment thereof by the former to Dorgan, and concluding as follows: "And whereas it is desirable that said contract should be annulled and set aside before the same expires by limitation; therefore, be it enacted, etc." (Session Laws, 1895, p. 237, ch. 66.) It contains no reference to a further letting of the penitentiary or the convict labor. We think, therefore, that the title quoted must be held to contemplate merely the abrogation of the Dorgan contract, and not including the provision relied upon. (*State v. Hurds*, 19 Neb., 317; *Trumble v. Trumble*, 37 Neb., 340, and authorities cited.) Respondents also cite section 19, article 5, of the constitution above quoted, and the act creating the board of public lands and buildings in justification of their actions in the premises. The constitution, as we have seen, provides that said board shall have the general supervision and control over all the buildings, grounds, and lands of the state, the state prison, asylums, etc., and shall perform such duties and be subject to such rules and regulations as may be prescribed by law. And by the statute mentioned said board is invested with general custody of all buildings and institutions, including the penitentiary, with power to direct the general management thereof. The authority of the board by virtue of these provisions to lease the convict labor, with the machinery and property described in the agreement

with Beemer, cannot be doubted. But if the language in question was doubtful or ambiguous we would, from motives of humanity alone, hesitate long before adopting a construction which would result in the enforced idleness of the helpless convicts of the state.

It is next objected that the contract is void for the reason that it contemplates the turning over to Beemer of the entire control of the penitentiary, and is in brief a usurpation of the powers conferred by law upon the warden. The first inquiry suggested by that contention is, what are the powers of the warden, and what is his relation to the board of public lands and buildings? His authority, it must be remembered, so far as it relates to the government of the penitentiary, is defined by sections 15 and 31 of the act of 1870, which provide (1) that he shall be the principal keeper of the prison; (2) that he shall exercise general supervision over the keepers and guards, examine daily into the health of the prisoners, and take charge of the real and personal estate belonging to or connected with the prison. (General Statutes, 1873, pp. 1036, 1038, ch. 76.) But it was, as we have seen, provided by said act that the penitentiary should be erected and continued under the direction and control of a board of inspectors therein provided for. The obvious effect of the constitutional provision creating the board of public lands and buildings, and subsequent legislation thereunder, was to abolish the board of inspectors and invest the former with all the powers and functions of the latter with respect to the control and management of the penitentiary. The warden, therefore, continues to be, as originally designed, simply the keeper of the penitentiary, subject to the management and control of the board of public lands and buildings. We must not be understood as intimating that a lessee or contractor can, even with the assent of the state board, usurp any of the powers of the warden, although it is clear that he may, and doubtless should, be accorded such privileges consistent

with the rules prescribed for the discipline of the prison and the health and safety of the convicts as may be necessary to carry into execution his agreement with the state. The objection to the contract on the ground that it is an invasion of power conferred by law upon the relator as warden of the penitentiary is accordingly without merit.

Again, it is contended that the agreement under consideration is a complete abdication by the board of its constitutional functions, being a surrender to Beemer both of the management of the penitentiary and the funds appropriated for its maintenance. A more critical examination of the agreement under consideration satisfies us that while it is therein denominated a lease, such appellation is a misnomer. Said agreement is in our judgment susceptible of but one construction, viz., the appointment by the board of public lands and buildings of Beemer in behalf of the state for a fixed compensation, to lease the convict labor and to disburse the money appropriated for the maintenance of the penitentiary. That such is its true interpretation is apparent from the undertaking therein to pay Beemer, but the cost of feeding and clothing the prisoners, not exceeding forty cents each per day, and the undertaking of the alleged contractor to pay over to the chairman of the board all moneys received by him, the proceeds of the convict labor, less the sum of $3,000, to be retained as compensation for himself and book-keeper. The board of public lands and buildings is composed of the executive officers of the state, who, in addition to their ordinary duties, are members of various other boards, each claiming a considerable portion of their time and attention. For them to personally direct the management in detail of the dozen different state institutions is, as we well know, impossible, hence they must, from the necessities of the case, transact much of the business pertaining to such institutions through agents of their own creation. But while the statutes regulating their duties should be liberally con-

strued in their favor, we are not at liberty to disregard one provision of the law simply in order to render the execution of others more effective. There being no conditions imposed upon the power of the board with respect to leasing of the convict labor, it may be done through the medium of an agent appointed for that purpose. Nor do we doubt the power of the board of public lands and buildings to provide by contract for the feeding and clothing of the convicts as one of the conditions for the leasing of their labor, and such an agreement with a responsible lessee, who is ready and willing to fulfill the conditions of his obligation, would be a sufficient justification in a proceeding of this character. But Beemer's undertaking being merely to maintain the convicts with funds to be advanced by the state, and to let their labor to third persons, presents no case for the application of the rule stated, or justification of the refusal of the respondents to furnish the needed supplies in accordance with the positive requirements of the act defining their duties as members of the board of purchase and supplies, provided of course the relator is in a position to allege the invalidity of said contract in this proceeding, a question which will be hereafter considered. Another inherent vice of said contract is the provision therein for the payment by Beemer to the chairman of the board of public lands and buildings of all money realized from the leasing of the prison labor. Section 2, article 4, chapter 83, Compiled Statutes, reads as follows: "It shall be the duty of the state treasurer: First—To receive and keep all moneys of the state not expressly required to be received and kept by some other person. Second—To disburse the public money upon warrants drawn upon the state treasury according to law, and not otherwise. Third —To keep a just, true, and comprehensive account of all moneys received and disbursed," etc. The officers comprising the board of public lands and buildings are required to give bond conditioned for the faithful discharge

of their official duties, but upon none of them does the law impose the responsibility of receiving and disbursing public funds. That board, we have held, is required to audit all claims for money disbursed for the support of the public institutions of the state. (*In re Board of Public Lands & Buildings*, 37 Neb., 425.) But the act by which it was created provides for the payment of accounts when examined and allowed by it on warrants drawn by the auditor upon the state treasurer against the proper fund or appropriation. It is argued that money thus paid over would not remain in the custody of the chairman of the board of public lands and buildings, but would be used to defray the current expenses of the prison, thereby saving to the state so much of the fund appropriated for that purpose; but it nevertheless imposes upon the officer named a liability not within the contemplation of the constitution or the statute defining his duties, and for which he would not be answerable upon his official bond. The power of the legislature to impose upon sureties of public officers new and additional burdens, is a question not now before us. But it is clear, both from principle and authority, that an action would not lie upon the bond of the officer named, to-wit, the commissioners of public lands and buildings, for money received by him pursuant to the contract here involved. Such an obligation on his part is beyond and foreign to the liability assumed by his sureties. (*Manufacturers Nat. Bank of Newark v. Dickerson*, 41 N. J. Law, 448; *People v. Pennock*, 60 N. Y., 421; *White Sewing Machine Co. v. Mullins*, 41 Mich., 339; *City of Lafayette v. James*, 92 Ind., 240; Murfree, Official Bonds, sec. 650; 2 Brandt, Suretyship & Guaranty, secs. 528 and 529, and authorities cited.)

It remains to be determined whether the relator shall in this proceeding be permitted to assert the invalidity of the contract upon which the respondents rest their defense. That question we were from the first impression strongly

inclined to resolve in the negative in view of the allegation that Beemer is now ready and willing to provide for the support of the prisoners; but further reflection has led to a different conclusion, for which our reasons will be briefly stated. This proceeding is not for the enforcement of a mere private right of the relator, but of a duty which the respondents owe to the state, while their defense rests upon the executory agreement of a third party, by which the latter undertakes to pay over money thereby received by him in behalf of the state, not to the treasurer, who alone is authorized to receive and disburse it, but to an officer whose action in that regard is wholly unauthorized and for which he would not, as already shown, be answerable on his official bond. It is elementary law that reciprocal promises as the basis of a valid agreement are equally obligatory upon the parties, so that each may have an action thereon. Otherwise such an agreement is *nudum pactum.* (Pollock, Contracts, p. 176*; Addison, Contracts, sec. 18.) It is not enough that Beemer may at this time express a willingness to account for money received by him under said contract to the commissioner of public lands and buildings, since his obligation to the state could be discharged only by means of payment in full of such funds to the officer authorized by law to receive them. The result of this reasoning is that the contract relied upon is void for want of mutuality and is not a sufficient justification of the action of the respondents, as members of the board of purchase and supplies, in refusing to provide for the maintenance of the penitentiary in the manner prescribed by law. The peremptory writ will accordingly issue as prayed.

WRIT ALLOWED.

CARL KORTH V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 6679.

1. **Affidavits:** BILL OF EXCEPTIONS: REVIEW. Affidavits presented as evidence on a hearing in proceedings in a case in the district court will not be examined in this court unless made a part of the record by being embodied in a bill of exceptions.

2. **Criminal Law:** FAILURE TO TRY ACCUSED: DISCHARGE: REVIEW. When an application for discharge is made by a party charged with the commission of a crime for the reasons stated in section 391, Criminal Code, that three or more terms of court have elapsed since the one at which the information was filed against him, without his being brought to trial, and the delay has not happened on his application, or been occasioned by want of time to try it, the last two stated facts must appear affirmatively in the record by a showing made, if not otherwise. In an examination by this court to determine the propriety of the action of the district court in overruling such application they will not be presumed, but the presumption that the court proceeded regularly and without error will prevail.

3. **Appointment of Prosecuting Attorney:** INFORMATION. The provisions of section 21, chapter 7, Compiled Statutes, as follows: "In the absence, sickness, or disability of the county attorney and his deputies, the court before whom it is his duty to appear, in which there may be business for him, may appoint an attorney to act as county attorney, by an order to be entered upon the minutes of the court, but who shall receive no compensation from the county except as provided for in section six of this act" (Compiled Statutes, sec. 20, ch. 7),—*held*, applicable to the prosecution of offenses by information, established by the act of 1885 (Criminal Code, sec. 579), and to warrant or authorize the trial court to appoint an attorney to perform the duties required of the county attorney in any particular case being prosecuted under the law in regard to prosecutions for offenses by information whenever the conditions exist as stated in section 21, chapter 7, herein quoted, and that the enactment allowing such appointment is not in conflict with the provisions of section 10 of the bill of rights, in the portion wherein it refers to the legislature providing by law for holding persons to answer for criminal offenses on information of a public prosecutor.

4. **Criminal Law:** PLEA IN ABATEMENT: WAIVER. In a criminal case "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar, or the general issue" (see Criminal Code, sec. 444), and if a plea to the general issue has been entered and has not, on leave obtained, been withdrawn, a plea in abatement need not be entertained.

5. **Preliminary Examination:** TRANSCRIPT. Where a transcript of the proceedings at the preliminary examination, and the information upon which such examination was had, were lost or mislaid from the files of the district court, an order for the substitution of another transcript of such record and copy of the information was proper and not erroneous.

6. ———: WAIVER. The record of the proceedings in the examining court disclosed that a complaint was filed which contained a charge of the crime for which plaintiff in error was tried in the district court, and that he was arraigned thereupon and waived examination. *Held*, Sufficient to show fulfillment of the requirements of section 585 of the Criminal Code in regard to preliminary examination.

7. **Information:** SEPARATE FELONIES: ELECTION AS TO COUNTS. A number of separate and distinct felonies, all of which may be tried in the same manner, which are of the same general character, require for their proof evidence of the same kind and the punishment of the same nature, may be charged in separate counts of one information, and the party thus charged may be placed on trial for all of such counts at the same time. The question of whether the state will be required to elect between the several counts, if a motion is made by defendant that it be so required, will rest in the sound discretion of the trial court, and unless it appears that there has been an abuse of such discretion in overruling the motion, it will not be available as error.

8. **Embezzlement:** INFORMATION: ELECTION AS TO COUNTS. In the case at bar the defendant was charged with embezzlement of the funds of a county while he was its treasurer, in an information containing several counts charging several and distinct embezzlements. He made a motion that the state be required to elect upon which of the several counts of the information it would prosecute him. The trial court withheld its ruling upon this motion until the close of the introduction of the state's testimony in chief, at which time the motion was sustained and

the state required to elect under which count of the complaint it would further proceed. *Held*, So far as the record discloses, there was no abuse of discretion in the action of the trial court.

9. **Instructions.** It is not error to refuse to give an instruction when the main purpose sought to be effected by giving the instruction is clearly and fully embraced in and accomplished by other instructions read to the jury, and it appears that no prejudice could have resulted to the rights of the complaining party by reason of such refusal.

10. **Embezzlement:** STATUTES. The act of the legislature of 1891, entitled "An act to provide for the depositing of state and county funds in banks" (Session Laws, 1891, p. 347, ch. 50), did not repeal so much of section 124 of the Criminal Code as is in relation to loaning county funds, and constitutes such loaning by an officer entrusted with their care and disbursement an embezzlement.

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

The opinion contains a statement of the case.

H. C. Brome, Douglas Cones, and *Barnes & Tyler,* for plaintiff in error:

The information was not made or filed by an officer authorized by law to do so. (*Richards v. State,* 22 Neb., 145; *White v. State,* 28 Neb., 341.)

The court erred in overruling the application of plaintiff in error to be discharged for want of prosecution. (*In re McMicken,* 18 Pac. Rep. [Kan.], 473; *People v. Morino,* 24 Pac. Rep. [Cal.], 892; *Ex parte Two Calf,* 11 Neb., 221.)

The court erred in overruling the plea in abatement, and in striking the same from the record. (Maxwell, Criminal Procedure, pp. 524, 525.)

The amount of proof required to establish the offense of embezzlement is similar in kind and quantity to that required to establish any other offense of the same grade. (16 Am. & Eng. Ency. Law, 504.)

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

The order overruling the application of plaintiff in error to be discharged was without error. (*State v. Cox*, 65 Mo., 29; *State v. Huting*, 21 Mo., 464.)

There was no error in the ruling on the motion to require the prosecuting attorney to elect upon which count of the information he would proceed. (1 Bishop, Criminal Procedure, sec. 461; *Bailey v. State*, 4 O. St., 442.)

HARRISON, J.

On December 15, 1891, an information was filed in the district court of Pierce county, charging the plaintiff in error with the crime of embezzlement of public money, the property of such county, during the time he was treasurer thereof. On the 27th day of April, 1893, the application of plaintiff in error for a change of venue was granted, and the case was sent to Antelope county for trial December 23, 1893; as a result of a trial, a verdict of guilty was rendered and entered, and, after motions for new trial and in arrest of judgment were heard and overruled, plaintiff in error was sentenced to a term of three years' imprisonment in the penitentiary. He has presented the cause to this court by petition in error.

A bill of exceptions was filed, which was attacked on the part of the state by a motion to quash, which was sustained; as a consequence of which action, we will be confined in our examination of the points raised for adjudication by the assignments of error to those which can be discussed and determined without reference to the bill of exceptions.

One assignment of error refers to alleged misconduct of the court during the trial. The facts on which this assignment depends for its force were made a part of the record by affidavits in which they were set out. There were also counter-affidavits in relation to the same matter filed for

the state. Affidavits of the character of these, in order that the subjects embraced in them may be available in the presentation of questions in this court, must be preserved in a bill of exceptions; and if it was done in this case, the bill of exceptions has been quashed, consequently the facts with relation to this objection are not properly before this court for examination. It follows that the assignment of error is unsupported and must be overruled.

During the pendency of the cause, and before trial, the plaintiff in error made application by motion to be discharged on the ground that four terms of court, succeeding the one during which the information under which he was prosecuted was filed, had passed without a trial being accorded him, and that the delay or failure to bring the cause to trial was not occasioned by any application or act of his or by lack of time. Affidavits were filed in support of the motion, to show that the trial of the case had not been delayed on application of the plaintiff in error, or for want of time, and on the part of the state mainly directed to an attempt to show the opposite to be true as to both facts; but the affidavits are not presented to this court by a bill of exceptions, and we cannot examine or consider them. The record before us does not disclose that the delay in the trial of the cause was caused in any manner by the plaintiff in error, or for lack of time at any term of the court to try it, nor does the contrary appear. For the purpose of the motion doubtless it devolved upon the plaintiff in error, if not disclosed by the record, to show that there had been no postponement of the trial of the cause on his application, or that the delay was not occasioned by the want of time to try it during the third term of court held subsequent to a term at which the information was filed. In the absence of the appearance of these facts in the record or a showing in regard to them, we think the presumption must prevail that the court proceeded regularly and without error, and properly held and placed the plaintiff in error upon trial

at the time it did; or it will not be presumed that the trial court, in the face of the existence or a showing of the existence of the facts which entitled the plaintiff in error to his discharge under the provisions of section 391 of the Criminal Code, ignored his constitutional right to a speedy trial (see Constitution, art 1, sec. 11), and improperly held and tried him for the crime with which he was charged.

Another contention is that the information filed in the case was not made or filed by any officer or person authorized by law. The information was made and filed by W. W. Quivey, who was not the county attorney of Pierce county at the time, and whose authority, if he possessed any, was derived from an order of the court in this particular case, which was as follows: "Now on this 14th day of December, 1891, the same being a judicial day of the regular December, 1891, term of said court, this cause came on for hearing, and the county attorney failing to appear and prosecute this case, and it appearing to the court that said county attorney is disqualified from prosecuting on behalf of the state of Nebraska, by reason of his having been retained as counsel for the defendant, Carl Korth, prior to his election and qualification as county attorney aforesaid; and it further appearing that said county attorney has no deputy qualified to appear for him in this cause: It is therefore ordered by the court that W. W. Quivey is hereby appointed by said court to act as county attorney in this case, and that John S. Robinson is hereby duly appointed by the court to assist the said W. W. Quivey as county attorney in the prosecution of this cause." Pursuant to this order W. W. Quivey acted in all particulars as county attorney in this case. It is argued that, under the provisions of our constitution (art. 1, sec. 10), that "No person shall be held to answer for a criminal offense * * * unless on a presentment or indictment of a grand jury; *Provided*, That the legislature may by law provide for holding persons to answer for criminal offenses on infor-

mation of a public prosecutor; and may by law abolish, limit, change, amend, or otherwise regulate the grand jury system;" and the act of 1885, establishing prosecution of crimes by information, in one section (Criminal Code, sec. 579,) of which it is stated, "All informations shall be filed during term in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant,"—the county attorney is indicated as the person—and the only one—who can make and file an information in a prosecution by such proceeding without the intervention and finding of a grand jury; that the several district judges or courts of the state possess no right to and cannot appoint any one to file information in the place and stead of the county attorney. The legislature which passed the act authorizing prosecutions by information also passed an act in relation to county attorneys and their duties, etc. In one section (Compiled Statutes, sec. 21, ch. 7) it was provided: "In the absence, sickness, or disability of the county attorney and his deputies, the court before whom it is his duty to appear, in which there may be business for him, may appoint an attorney to act as county attorney, by an order to be entered upon the minutes of the court, but who shall receive no compensation from the county except as provided for in section six (6) of this act [Compiled Statutes, sec. 20, ch. 7]." This, doubtless, gave the trial court power to make the appointment, and the person designated in its order possessed the authority to act in this particular case in all matters or questions arising therein which would properly have fallen within the province of the county attorney to examine and determine had he been present and not disqualified to act, nor do we think, in thus holding, we do any violence to the proper enforcement of the provisions of the constitution and the law of 1885 invoked by the plaintiff in error, when given their true and practical significance. It is urged that the power to thus appoint an attorney to prosecute a cause

against a person accused of crime is liable to be abused, and some one assigned the duty who is incompetent, or who will not fairly conduct the case, but may, in the interest of private parties who desire an exceedingly vigorous prosecution to be made, allow the criminal case to become the means of satisfying personal spite or the gratification of malicious purpose, and the party charged with crime be persecuted, rather than prosecuted as the law contemplates. This contention involves the assumption that the person who has been so fortunate as to be elevated by a majority of the votes of the electors of the judicial district to the high and honorable position of district judge will lend himself, or be hoodwinked into seeming to countenance the scheme depicted in this argument, and the member of the bar appointed will be disreputable and ready to disregard his oath and act in an unprofessional manner. With this view we cannot agree. It must rather be presumed that both judge and attorney will perform their respective duties fairly, impartially, and honorably. It is possible that, in exceptional cases, what is claimed in the argument may happen, but if so, it may always be remedied in the same or a higher court.

A plea in abatement was filed in behalf of plaintiff in error and on motion of the state was stricken from the files, or practically overruled. This action of the court is assigned as error. The plea was founded upon the same matters as presented in the motion to discharge the plaintiff and which we have hereinbefore discussed. Whether it was proper practice for the court to strike the plea from the record, or whether the subjects set forth in the plea were such as may properly be presented by the plea in abatement, we need not stop to consider, for, on December 17, 1891, plaintiff in error had been arraigned and pleaded generally, and on the date the plea in abatement was filed the plea to the general issue was still of record and not withdrawn. This being true, all defects which might have

been excepted to by plea in abatement were waived (see sec. 444 of the Criminal Code); and if it was error, which we do not now decide, for the court to strike the plea from the files, it could not prejudice the rights of plaintiff in error, as, at the time, the plea could not have been of any avail.

Another objection is that, at the time the plaintiff in error was placed on trial, the record did not show that he had ever been accorded a preliminary examination for the crime with which he was charged in the trial court. This objection was made in the district court at the inception of the introduction of testimony and was overruled by the court. This is assigned for error. The prosecution was instituted in the county court of Pierce county and, after it reached the district court, an information was filed. Afterward, during the pendency of the cause in Pierce county, an order was made in which it was recited that the transcript of the record of the hearing before the county judge, and some of the accompanying papers, and particularly the information filed in the examining court, had been lost, and that a new transcript and copy of the information be substituted. A change of venue was applied for and granted and the case was transferred to Antelope county, and the order of substitution was not fulfilled until after the removal of the cause to Antelope county, and the commencement of the trial; but the transcript then filed disclosed that the plaintiff in error waived an examination in the county court. This being true, there was no prejudice to his rights in proceeding with the trial at a time when the transcript of the hearing in the examining court was not in the record by reason of being lost or mislaid, or in allowing another transcript and copy of such information to be substituted.

Another alleged error is that the court erred in refusing to require the state to elect on which count of the information the plaintiff in error should be tried. There were five counts in the information, as to the fourth of which a *nolle*

prosequi was entered before the cause came to trial. A motion was filed at or about the time of trial to require the state to elect upon which count of the information it would proceed. Upon this the court withheld its ruling until such time as the evidence for the state should all be introduced, and when the trial had progressed to the stage indicated, sustained the motion, and an election was accordingly made at that time by the state. It is urged that the court erred in not sustaining it at the time when made. After the fourth count of the complaint was ignored, there still remained four counts in which separate and distinct felonies were charged, but each was a charge of embezzlement of public money, the money of the county of which the plaintiff in error was treasurer. The offenses were all of the same general character, required for their proof the same quality of testimony, the same manner of trial and mode of punishment, and it was proper to try the plaintiff in error upon the several counts at the same time. Whether there should be an election as to the particular count was a question within the discretion of the trial court. This, in the case at bar, was exercised by allowing the prosecution to introduce its testimony and then requiring it to elect, and we cannot discover from the record that in this there was any abuse of discretion. As to the main proposition, see 1 Bishop, Criminal Procedure [3d ed.], secs. 424, 450, 451; Wharton, Criminal Pleading & Practice, sec. 285 *et seq.; Commonwealth v. Jacobs*, 25 N. E. Rep. [Mass.], 463; *Pointer v. United States*, 14 Sup. Ct. Rep., 410; *State v. Hodges*, 26 Pac. Rep. [Kan.], 676; 4 Am. & Eng. Ency. of Law, 754–756; *Roberts v. People*, 17 Pac. Rep. [Colo.], 637.

It is claimed the court erred in refusing to give instruction numbered 2, requested by plaintiff in error. This instruction was as follows: "You are instructed that in law the words '*prima facie*' mean 'at the first blush,' 'on the first appearance of.' Such evidence, in a criminal case, is

not sufficient to warrant a conviction. The rule obtains in all criminal prosecutions that the evidence must be sufficient to convince the jury of the defendant's guilt, and of every element of the transaction going to establish his guilt, beyond all reasonable doubt." Instruction numbered 1, given at the request of plaintiff in error, reads: "You are instructed that the statutes of this state provide that any failure or refusal to pay over public money, or any part thereof, by any officer or other person charged with the collection, receipt, transfer, disbursement, or safe-keeping of the public money, or any part thereof, whether belonging to the state, or to any county, or precinct, or school district, or organized city or incorporated village in this state, or any other public money whatsoever, * * * shall be taken and held as *prima facie* evidence of embezzlement. Nevertheless you are instructed that the state must prove to you beyond all reasonable doubt that the defendant converted the public moneys of Pierce county to his own use, with intent to defraud the said county out of the same; and if you have any reasonable doubt of such fact, you will give the defendant the benefit of such doubt and find him not guilty." The argument is, that inasmuch as the court thought fit to give instruction numbered 1, then, to convey to the jury a proper understanding of its terms, and in particular the words "*prima facie* evidence," No. 2 should have been given. It will be noticed that in the concluding portion of No. 1 the jury is informed that notwithstanding all that may have been stated in the preceding portion of the instruction the proof to be sufficient to convict must be beyond a reasonable doubt, and in an instruction numbered 3, asked by plaintiff in error and given, this feature of the requirement in regard to the proof was stated in strong terms, and in instruction numbered 3, given by the court on its own motion, the above rule was clearly and positively announced, and it also appears in other portions of the instructions. In view of all this, we are satisfied that no

prejudice could have resulted to the rights of plaintiff in error from the refusal of the court to give the instruction indicated in the assignment of error.

The giving of each of the instructions numbered 1 and 2 of the charge to the jury given by the court on its own motion is assigned as error. The main objection raised is claimed to be applicable to both and we will so examine it. No. 1 of these instructions was a copy of the section of the Criminal Code defining the crime of embezzlement of public money, under which this prosecution was instituted, and No. 2 quoted the first count of the information and stated that it contained a charge against the plaintiff in error of a violation of the section set forth in instruction numbered 1. It is alleged that the act of the legislature of 1891, in relation to depositing the county funds in banks, repealed at least so much of the section defining the crime of embezzlement as refers to the loaning of such funds, and that these instructions were erroneous in not noticing the act of 1891, and its claimed effect upon the laws of embezzlement, and in not informing the jury that it should not consider any evidence in relation to loaning the county funds, as bearing upon the issue which was being tried. To the proposition that the act of 1891 repealed the portion of the law of embezzlement in regard to the loaning of funds of a county we do not agree. The act of 1891 was entitled "An act to provide for the depositing of state and county funds in banks," (Session Laws, 1891, p. 347, ch. 50,) and in its text it is confined to providing for the deposit of such funds, for safe-keeping, in banks, under certain requirements as to bonds being furnished for the security of such funds, and other details, and in each and every detail it appears that it is for the county and its benefit that such deposits are to be made, the treasurer acting in each and every instance for and in behalf of the county, and as prescribed by law and not of his own volition. If he refuse to perform any of the statutory requirements, he is liable to pun-

ishment therefor, and if he deposit the money of the county, under the direction of the law, in a bank which has given bond he is not liable for any money so deposited. It is true there is a section of the act referred to which defines as a crime the making of any profit whatever, directly or indirectly, by the county treasurer out of any money belonging to the county, in his charge, by loaning it. It is the fact that a profit is derived from it that subjects him to punishment and not the fact of the loaning. The deposit of the funds which the treasurer is called upon to make by the law in question is, in effect, a deposit by the county. The treasurer has only to place it where directed and draw it when needed for county purposes. In the law defining embezzlement the loaning by the treasurer, either with or without interest, is evidence of a conversion of the funds to his own use and is to be punished as an embezzlement. Clearly, evidence of a deposit of the funds such as is contemplated by the act of 1891 would not be competent and could not be received in a prosecution for embezzlement of county funds by the treasurer, as tending to show a loan; nor does the fact that an attempt has been therein made to provide a punishment of the treasurer for making a profit out of the public money by loaning it, in any manner or degree conflict with or abridge the right or power of the state to punish the act of loaning the funds by the treasurer as an embezzlement. We are clearly of the opinion that the act of 1891 referred to did not work a repeal of the portion of the law in relation to the loaning of county funds by officers entrusted with their care and charged with their disbursement, and which constitutes such loaning a conversion and embezzlement of the funds loaned. The judgment of the district court is

AFFIRMED.

M. J. KAUFMANN V. WILLIAM J. COOPER ET AL.

FILED JANUARY 9, 1896. No. 5899.

1. **Contracts to Erect and Repair State Buildings:** BONDS. It is within the province of the proper officers of the state in entering into an agreement on behalf of the state, with a contractor, for the erection or repair of its buildings, or additions thereto, to require the insertion of a condition in the contract and the bond executed to secure its faithful performance, whereby the contractor agrees to pay for all labor performed or material furnished him in completing such contract, and the right to exact such a condition exists independent of statutory provision conferring it, nor does the absence of statutory provision authorizing it render such a condition in a contract illegal or void.

2. ——: CONSIDERATION. A promise made by one person to another for the benefit of a third person may be enforced by such third person, notwithstanding the consideration did not move directly from him.

3. ——: ——. The granting of a contract by the state for the construction of a building for it, or additions or repairs to buildings, is a sufficient consideration to sustain a promise on the part of the contractor to pay for all labor and material supplied him in the performance of the agreement.

4. ——: BONDS: LIABILITY OF SURETIES. A contract was awarded by the state for furnishing material and performing labor in and upon the industrial home at Milford, by one provision of which the contractor was to be paid eighty-five per cent of monthly estimates made by a superintendent of construction, as the work progressed, and the balance on the full completion and acceptance of the work. *Held*, That the condition in the bond given by the contractor, by which the payment of all accounts for labor and material furnished him for such purpose was secured, was not rendered nugatory, so far as the liabilities of the sureties were concerned to laborers or furnishers of material, by reason of payment to the contractor made in excess of an estimate of the superintendent of construction.

5. ——: ——: ——. The firm of Symonds & Blake was awarded a contract by the state for the performance of certain labor in and about the industrial home at Milford, and gave a bond, to secure, among other things, the full payment of all

claims of laborers, mechanics, or furnishers of material. Plaintiff contracted with such firm to furnish material for use in the performance of its agreement with the state. Soon after the firm of Symonds & Blake contracted with the state, and further contracted with the plaintiff to furnish it material, Symonds withdrew from the firm, and S. C. Blake, the other member of the firm, or S. C. Blake & Co., composed of S. C. Blake and one Godfrey J. Kaufmann, who became a partner of Blake's when Symonds retired from the firm, or it was dissolved, succeeded to the rights of Symonds & Blake in the contract with the state, and the plaintiff furnished material in accordance with the terms and under the agreement made with Symonds & Blake. *Held*, That the sureties in the bond were not released from their obligation to pay claims for labor or material, by the dissolution or change in the firm of Symonds & Blake, and an action on the bond could be maintained against them thereon by plaintiff for any balance due on account of material furnished S. C. Blake, or S. C. Blake & Co., for use in the execution of the contract with the state.

6. **Review.** If the evidence is sufficient to sustain the findings of a jury they will not be disturbed.

7. **Briefs:** ASSIGNMENTS OF ERROR. Assignments of error which are not noticed in the brief of plaintiff in error will be treated as waived.

8. **Assignments of Error.** Alleged errors in regard either to giving or refusing instructions should be separately assigned, and if assigned in a group will, as to either one, be examined no further than is necessary to ascertain that the action as to any one of the instructions of each of the groups was proper.

9. **Instructions:** REVIEW. A verdict will not be set aside for possible errors in giving instructions where it is clear that the error, if any, could not have prejudiced the rights of the complaining party.

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

Guy R. C. Read and *W. A. Williams*, for plaintiff in error.

William Leese and *John M. Stewart*, *contra*.

HARRISON, J.

The petition in this action stated that on the 29th day of June, 1889, Symonds & Blake were awarded and entered into a contract with the state to furnish materials for and perform certain labor upon and about the industrial home at Milford, and executed and delivered to the state a bond for the faithful and full performance of the contract, J. W. Foster and M. J. Kaufmann signing such bond as sureties; that the bond contained the following conditions: "The condition of the above obligation is such that the above bounden Symonds & Blake have been awarded the contract to furnish all the materials and labor and skill necessary to the purpose, and to erect, construct, and fully complete, in a good and workmanlike manner, for the use of the industrial home at Milford, Nebraska, the steam heating, gas fitting, plumbing, ventilation, sewerage, windmill, well, and three cisterns, all to be in strict conformity to the plans, specifications, and detailed drawings now on file in the office of the commissioner of public lands and buildings at Lincoln, Nebraska, and to pay off, in full, all claims that may become due for laborers' and mechanics' wages or for materials furnished in or about said contract. Now if the above bounden Symonds & Blake shall well and truly keep and perform each and every covenant, promise, and agreement contained in said contract at the several times, and in the manner therein stated, and fully pay all claims due for laborers, mechanics, or furnishers of materials, then this obligation to be void; otherwise to be and remain in full force and virtue in law." Copies of the contract, the bond, and an itemized statement of the account for material which the party in whose favor the action was instituted claimed to have furnished, were attached to the pleading. To the action there was but one appearance on the part of the defendants, that of Kaufmann, one of the sureties on the bond. In his answer he denied that the

material was furnished to Symonds & Blake or by virtue of the contract with them, or that the fact that the bond existed was any inducement to the plaintiff in the action to extend the credit to the parties to whom it was given, and alleged affirmatively that if the plaintiff furnished any material it was to S. C. Blake & Co., and upon the credit of such firm, and without reference to the contract with Symonds & Blake; that the provision of the bond hereinbefore quoted was exacted wrongfully and contrary to legal right, and hence was void; that the firm of Symonds & Blake assigned its contract to S. C. Blake & Co., which was known to plaintiff, and such assignment was acquiesced in or ratified by the state; that the contract contained a provision that Symonds & Blake were to receive for furnishing the material and performance of labor as therein stated the sum of $3,039 "at the times and in the manner following: Eighty-five per cent of the monthly estimates made by the superintendent of construction, as the work progresses; and the balance to be paid when the said contract has been fully completed and tested and accepted by the board of public lands and buildings;" and that a payment was made to plaintiff without any estimate being made by the superintendent of construction, and other and further payments were made so that in the aggregate they amounted to more than eighty-five per cent of the estimates made during the progress of the work, of all of which these plaintiffs had knowledge and approved; that of and to the doing of these things, all and singular, the answering defendant was not informed, had no knowledge, gave no consent, and his discharge as surety was thereby effected. The reply was a general denial. There was a trial and a verdict and judgment for plaintiff. The defendant Kaufmann, of the sureties on the bond, presents the case here for review.

We will first notice the portion of the contention on behalf of the surety Kaufmann, in which it is asserted that he

was discharged from any obligations he had assumed as such surety (1) by the payment of $500 to the plaintiff without any estimate of the superintendent of construction as a basis or authority for such payment, and (2) by the payment of more than eighty-five per cent of an estimate made of the amount due plaintiff by the superintendent of construction. It may be said in regard to the second of these points that the aggregate sum of eighty-five per cent of an estimate made by the superintendent during progress of the work, of the amount due plaintiff, and the alleged prior payment of $500, the basis of the first point mentioned, would make the payments just $500 more than the amount of the estimate; or, in other words, it is claimed that $500 were paid to plaintiff prior to any estimate made, and that, combining it with the payment made on a subsequent estimate, the whole amount of the payments was in excess of eighty-five per cent of such estimate. The promise in the bond to pay the laborers and parties furnishing material was for their benefit, and in an action thereupon by either it was enforceable, notwithstanding the act or acts of the state in making the alleged payments, which, in an action by the state against the contractor principal in the bond for a default in any of its conditions, might have precluded a recovery and have constituted a defense for the sureties on the bond, and released them from liability thereon (which we do not decide), and the sureties were not released from their obligations to either laborers or materialmen whose valid claims were unpaid. (*Doll v. Crume*, 41 Neb., 655.) In the case cited the doctrine was applied to a state of facts which disclosed a payment on an estimate, in excess of the per cent which, according to the terms of the contract, was to be paid upon estimates, but is equally forcible where, as in the case at bar, a payment has been made unauthorized by an estimate, the reason which supports the rule being in all respects as pertinent and cogent in reference to the latter phase of the case as to the former

one, or the one as to which it was declared in the case to which we have called attention.

It is urged that the bond, in the particular condition which was made the basis of this action, was illegally required and exacted, was without warrant or authority of law; that inasmuch as the statutes governing the subject involved directed that a bond be taken, and prescribed a number of particulars to be covered by conditions inserted therein, and did not include the subject of payment to laborers or furnishers of material, the provision in the bond which covered this particular, not coming within the direct requirements of the statutory provisions, was illegal, unauthorized, and void, and hence not enforceable. A similar question has been presented to, considered, and determined by this court, and it has been decided that it was within the province of the proper officers of the state, upon whom it devolved to let such contract, to exact a bond containing a condition in relation to the payment of laborers' wages and the accounts of parties who had furnished material, and it was held that such a condition was valid and any liability arising thereunder could be enforced. (*Sample v. Hale*, 34 Neb., 220; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb., 649.)

It is also urged that the plaintiff was not a party to the bond, and that no action could accrue or be based thereon in its behalf. A precisely similar question to this one has been heretofore discussed in and by this court, and it was then held that the promise set forth in the condition of the bond under consideration was for the benefit and an action arose thereon in favor of the laborer to whom wages remained due or to the furnisher of material whose account or any portion thereof was unpaid. (*Doll v. Crume*, 41 Neb., 655; *Lyman v. City of Lincoln*, 38 Neb., 794; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb., 649; *Sample v. Hale*, 34 Neb., 220.)

It is also urged that by the dissolution of the firm of

Symonds & Blake, and the transfer of the contract to furnish the material and perform the labor to S. C. Blake & Co., or by the new firm assuming its performance, the sureties on the bond were not bound to pay the account for material furnished by plaintiff to the latter firm for use in the performance of the contract with the state under the contract it had made to do so with Symonds & Blake. It is disclosed by the evidence that soon after the firm of Symonds & Blake had entered into the contract with the state, and had further contracted with the plaintiff for the furnishing by it of the material, Symonds withdrew from the firm and S. C. Blake, or S. C. Blake & Co., which consisted of S. C. Blake and one Godfrey J. Kaufmann, who became a partner with Blake at the time Symonds retired from the firm of Symonds & Blake and it was dissolved, succeeded to all the rights of the old firm in the contract with the state, and the plaintiff furnished to S. C. Blake & Co. the material for use in the fulfillment of the contract with the state which it had contracted to furnish to Symonds & Blake. Under these circumstances the sureties on the bond were not released and an action on the bond could be maintained against them by plaintiff for the unpaid amount due it on account of material furnished to Blake, or S. C. Blake & Co., for use in the performance of the contract with the state. (17 Am. & Eng. Ency. of Law, p. 1150; *Freeman v. Berkey*, 48 N. W. Rep. [Minn.], 194; *Abbott v. Morrissette*, 48 N. W. Rep. [Minn.], 416; *Sepp v. McCann*, 50 N. W. Rep. [Minn.], 246; *French v. Griffin*, 10 S. E. Rep. [N. Car.], 166.)

It is urged that the testimony does not show that the material stated in the account, upon which this suit was based, was used in the construction of the "industrial home." The evidence was sufficient to sustain the finding of the jury in respect to this branch of the case, and in accordance with a well established rule of this court, it will not be disturbed. Errors were assigned of the action of the

trial court in admission of evidence, but they were not argued in the brief of plaintiff in error, hence will be treated as waived.

It was assigned that the court erred in giving instructions 1 and 2 of the instructions given on its own motion. Of these instructions No. 2 was clearly pertinent and proper, and this being ascertained, no further examination of these instructions need be made, as the alleged errors were not separately assigned.

Complaint was also made that the court erred in refusing to give instructions 1, 2, 3, 4, 5, and 6, asked by the plaintiff in error. These instructions were framed and submitted in support of the views of counsel for plaintiff in error in relation to the questions involved in the case, and, according to our determination of such questions, were, several of them, clearly erroneous and improper, one of which was that numbered 2, and as they were grouped in the assignment which referred to them, having concluded that one was incorrect and properly refused, it disposes of the entire assignment.

The action of the court in giving instructions numbered 1 and 2, requested by the plaintiff in that court, was assigned as error. These instructions do not conflict materially, if at all, with the views herein expressed in regard to the proper disposition to be made of the issues in the case, under the facts as developed in the evidence. There is nothing in them which could prejudice the rights of the complaining party, and their giving was not error. The judgment of the district court is

AFFIRMED.

E. F. MOREARTY V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 7864.

1. **Forgery:** INFORMATION. It is sufficient in an information for forgery to charge the intent to defraud in general terms. It is not necessary to state or prove an intent to defraud any particular person. *Roush v. State*, 34 Neb., 325, reaffirmed and followed.

2. ——: ——. An order to deliver to bearer a specific article of personal property is within the definition of section 145 of our Criminal Code in relation to forgery, as "any order or any warrant or request for * * * the delivery of goods and chattels of any kind."

3. ——: ——. The order or request upon which the charge in this case was founded, to let bearer have a designated article of personal property, *held* to be the subject of forgery, though not addressed to any person by name; and where such an order is set forth by copy in an information charging its forgery, and it is apparent from its face or its terms that there was a possibility, by its use, to deprive some person of property rights, the information is sufficient without averment of any facts extrinsic to the instrument to extend or explain its terms.

4. **Instructions.** The giving of an instruction which submits to the jury the existence or non-existence of a fact material to the issues in the case on trial, when no evidence has been introduced which would support a finding of its existence, is error for which the judgment may be reversed.

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

The facts are stated in the opinion.

John O. Yeiser, *Martin Langdon*, and *Mahoney & Smyth*, for plaintiff in error:

The instrument set out in the information, being of doubtful or uncertain validity, cannot be the subject of forgery except by the allegation of extrinsic matter. (1

Bishop, Criminal Law [5th ed.], sec. 748; *Roode v. State*, 5 Neb., 174; *People v. Harrison*, 8 Barb. [N. Y.], 560; *Barnum v. State*, 15 O., 717; *People v. Galloway*, 17 Wend. [N. Y.], 540; *People v. Tomlinson*, 35 Cal., 503; *Rembert v. State*, 53 Ala., 467; *Dixon v. State*, 81 Ala., 61; *State v. Cook*, 52 Ind., 574; *State v. Wheeler*, 19 Minn., 98; *Shannon v. State*, 109 Ind., 407.)

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

In reply to the objections to the sufficiency of the information, reference was made to the following cases: *Roush v. State*, 34 Neb., 326; *State v. Hart*, 67 Ia., 142; *State v. Baumon*, 52 Ia., 68; *Peete v. State*, 2 Lea [Tenn.], 513; *Dixon v. State*, 26 S. W. Rep. [Tex.], 500; *State v. Gullette*, 26 S. W. Rep. [Mo.], 354; *People v. Krummer*, 4 Park. Crim. Rep. [N. Y.], 217; *Noakes v. People*, 25 N. Y., 380; *Rudicel v. State*, 13 N. E. Rep. [Ind.], 114; *Powers v. State*, 87 Ind., 97; *Arnold v. Cost*, 3 G. & J. [Md.], 231; *Rex v. Ward*, 2 Ld. Ray. [Eng.], 1461; *Crawford v. State*, 19 S. W. Rep. [Tex.], 766; *State v. Wheeler*, 25 Pac. Rep. [Ore.], 394; *People v. Brown*, 72 N. Y., 571; *Commonwealth v. Costello*, 120 Mass., 370; *Commonwealth v. Brown*, 18 N. E. Rep. [Mass.], 587; *Stewart v. State*, 16 N. E. Rep. [Ind.], 186; *Hendricks v. State*, 9 S. W. Rep. [Tex.], 555; *Brewer v. State*, 22 S. W. Rep. [Tex.], 41; *Billings v. State*, 107 Ind., 57.

HARRISON, J.

As a result of a trial during the May, 1895, term of the district court of Douglas county the plaintiff in error was convicted of the crime of forgery and was sentenced to be imprisoned for a term of one year in the penitentiary and to pay a fine of $100. To obtain a review of the proceedings therein the plaintiff in error brings the cause to this court on petition in error.

The information filed contained two counts, the first of which charged as follows:

"That on the 8th day of March, in the year of our Lord 1894, Edward F. Morearty, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being in said county, then and there unlawfully and feloniously did forge and counterfeit a certain order and request for the delivery of goods, in words and figures following, to-wit:

"'MARCH 8, 1894.

"'Please let bearer have the trunk I put in your house at 5:30 this P. M. The bill is all paid and everything O. K. FRANK MCKINZIE, *Constable.*'

with intent to defraud."

The second count charged that the plaintiff uttered and published the order as true and genuine, with intent to defraud.

It is first argued that the information filed is insufficient and did not charge a crime; that there are two defects apparent upon its face, one of which is a failure to allege an intent to defraud "any person or persons, body politic or corporate, or any military body organized under the laws of this state," and the other that the instrument set out in the information by copy as forged was one on which no action could be predicated without an allegation of extraneous matter, and no such facts were pleaded. The first of these objections to the information is untenable. It is sufficient, in an information for forgery, to charge the intent to defraud in general terms. It is not necessary to state or prove an intent to defraud any particular person. (*Roush v. State,* 34 Neb., 325; Criminal Code, sec. 417.)

It is claimed, as we have before stated, that the information was defective for the reasons that the instrument alleged to have been forged, which was set out in the information in full as the basis of the charge of forgery, was so imperfect or incomplete in its terms that it was not on its

face apparently good and valid and that it was necessary, to a good information, that there should have been averments of matters extrinsic to the instrument, explanatory of or extending its signification and that no such matters were pleaded. In our statutes (see Criminal Code, sec. 145) there is stated, in a long and quite comprehensive list, a number of instruments which may be the subject of forgeries, and among them, "any order or any warrant or request for the payment of money, or the delivery of goods and chattels of any kind." The instrument declared upon in the information purported to be an order for the delivery of a trunk, and its false making, if sufficiently perfect in its terms, would be within the provisions of our Code relating to forgery. The only further question is, was it apparently sufficient within itself to effect the purpose for which it was made? The instrument in this case was one which upon its face called for the delivery to the bearer of a specific article, "the trunk I put in your house at 5:30 this P. M." "The bill is all paid and everything is O. K." The signature attached was "Frank McKinzie, Constable." While it is true it was not addressed to any person, yet it is apparent that it could be but for the one party with whom the trunk was left or in whose house it was placed at 5:30 P. M. of the day the instrument was dated, and it seems quite clear that the order, if genuine, would have been explicit and clear enough for presentment to such party and demand for the delivery of the trunk and to warrant him in honoring it. This being true, its making was forgery, and it was not necessary to plead any facts extrinsic to it in the information. If used, it was of a character to deprive some one of property rights. There was a possibility of some person being defrauded by its false making, and this was apparent from its face, and no averments of other and extrinsic matters were necessary in the complaint. Its meaning was sufficiently apparent or could be gathered from the face of the instrument alone, and it was not essential to a

full charge that there should be statements of evidential matters in the pleading. (*Dixon v. State*, 26 S. W. Rep. [Tex.], 500; *State v. Gullette*, 26 S. W. Rep. [Mo.], 354; *Noakes v. People*, 25 N. Y., 380; *Hendricks v. State*, 9 S. W. Rep. [Tex.], 555; *People v. Krummer*, 4 Park. Cr. Rep. [N. Y.], 217.) "But if the meaning of the transaction can be sufficiently extracted from the instrument itself, it will not be necessary to state matters of evidence, so as to make out more fully the charge." (1 Wharton, Criminal Law, sec. 740.)

It was assigned that the court erred in giving instruction numbered 5 to the jury. This instruction reads as follows: "You are further instructed that the intent of a person is necessarily an operation of the mind and is not ordinarily susceptible of direct proof, but may be determined by words spoken or acts done, or by both words and acts. Every human being of sufficient age to understand the nature and consequences of his acts is presumed to intend the natural and probable consequences of his acts; and if you find from the evidence beyond a reasonable doubt that the trunk in question was in the possession of one W. H. McKinzie as constable, that he had deposited said trunk for safe-keeping temporarily with one Robinson, and that defendant, for the purpose of obtaining possession of said trunk from said Robinson, did unlawfully and fraudulently make, forge, and counterfeit the said instrument set out in the first count of the information, and did present said instrument to said Robinson, and did obtain thereby said trunk, you would have a right to infer, in the absence of proof to the contrary, that the defendant did unlawfully and falsely make and counterfeit said instrument with intent to defraud; and, if the other facts necessary to a conviction and these facts have been established by the evidence beyond a reasonable doubt, the defendant would be guilty upon the first count of the information, and you should convict him on said first count of the information; and if the facts necessary

to a conviction, as hereinbefore explained to you, upon the second count of the information, have been established by the evidence beyond a reasonable doubt, and you further find from the evidence, beyond a reasonable doubt, that defendant uttered or passed said instrument described in said second count of the information for the purpose of obtaining the trunk in question from said Robinson, you would be authorized in concluding that he uttered and published said instrument with the intent to defraud some person or persons,"—and the objection urged against it is that it submitted to the jury, in both its first and second paragraphs, whether the trunk was in possession of W. H. McKinzie as constable; that this was error, for the reason that there was no evidence introduced of the fact of such possession. After a careful examination of all the testimony given on the trial, we feel forced to the conclusion that this position is a correct one. The evidence does disclose that one W. H. McKinzie (or Washington McKinzie) was a constable in Douglas county and that he took possession of the trunk in question; that he took it from Birdie Mann, on Ninth street, in the city of Omaha; that he had a writ of replevin at the time he took the trunk; that he left the trunk at the house or store of one Robinson, where Morearty found it when he sought or obtained it by means of the instrument set out in the information; but it nowhere appears, nor do we think it can be fairly inferred from what is shown, that McKinzie assumed possession of the trunk as constable, or by virtue of the writ of replevin, or that he held such possession as such officer or under such writ of replevin or any other writ or process, or that either his taking or holding possession of the trunk was referable in any manner or to any degree to his duties or position officially, or by virtue of any replevin or other writ and its service as an officer. The use of the alleged forged order, judging from the intent and possibility of its defrauding any one, which, in the manner of its pleading, must be derived

from the instrument itself, could but result injuriously, if at all, to prejudice the rights of McKinzie to the possession of the trunk as constable; and there being no right of possession, as such officer, shown in him, no evidence to support a finding of such fact, if made, it was error to submit the question to the jury, and prejudicial, as the intent of the crime charged in the information was to violate the rights of the officer. (*Williams v. State*, 46 Neb., 704.)

There are some other assignments of error argued in the briefs, but we do not deem it necessary to enter into a discussion of them at the present time.

It follows from the views expressed herein that the judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

NORVAL, J. I concur in the result, expressing no opinion upon the sufficiency of the information.

BERNHARDT RAUSCHKOLB ET AL. V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 7602.

1. **Indictment and Information:** INDORSEMENT OF NAMES OF WITNESSES: TIME. In the discretion of the trial court, the names of additional witnesses may be indorsed by the county attorney on the information after the filing thereof and before the trial.

2. ——: ——: POSTPONEMENT OF TRIAL. In such case, however, where a request is made to postpone the trial for twenty-four hours to enable the defendant to meet the testimony expected to be given by the person whose name is so indorsed, it is an abuse of discretion to deny such request, if such witness is examined on the trial and gives material testimony for the state in making out its case in chief.

ERROR to the district court for Nemaha county. Tried below before BUSH, J.

See opinion for statement of the case.

John S. Stull and *C. P. Edwards*, for plaintiffs in error:

The court erred in refusing plaintiffs in error a reasonable time in which to prepare for trial after the name of the witness Levi Shores had been indorsed on the information. (*Johnson v. Dinsmore*, 11 Neb., 394; *Newman v. State*, 22 Neb., 355; *Gandy v. State*, 27 Neb., 707; *People v. Evans*, 72 Mich., 367; *Elliott v. State*, 34 Neb., 48.)

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and *A. J. Burnham, County Attorney*, for the state, cited: *Gandy v. State*, 24 Neb., 723.

NORVAL, J.

This is a prosecution brought under section 20, chapter 50, Compiled Statutes of this state, for keeping and having in possession for sale, without a license, certain intoxicating liquors. The prisoners were found guilty, and the judgment rendered against them upon the verdict is before us for review.

The record discloses that the case was continued from term to term until the 20th day of March, 1894, when, upon a showing made by the county attorney, permission was given, over the objection of defendants, to indorse upon the information the name of Levi Shores. An exception to the ruling was taken, and the defendants thereupon, by reason of said indorsement, asked that they be given twenty-four hours in which to prepare for trial. This the court refused, but arraigned the defendants at once, and forthwith impaneled a jury to try the case, and on the same day a

verdict of guilty was returned. The permitting the county attorney to indorse the name of the witness on the information and refusing defendants' request to postpone the trial are assigned for error.

Section 579 of the Criminal Code provides that the prosecuting attorney shall indorse on the information the names of the witnesses known to him at the time of filing the same, and at such time, before the trial of any case, as the court may by rule or otherwise prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him. In the case under consideration it appears from the affidavit of the county attorney that he was not such officer when the information was filed, and that he had no means of knowing that Levi Shores could give material testimony until the time the application was made to indorse his name. The statute gives authority to indorse upon an information the names of additional witnesses after the filing thereof and before the trial. It is discretionary with the trial court whether such permission shall be given or refused, and its ruling in that regard is no ground for disturbing the verdict, where no abuse of discretion is made to appear. Upon the showing made, we think the discretion of the court was properly exercised in authorizing the name of the witness to be indorsed on the information.

The denial of the defendants' request for a postponement of the trial is fraught with more serious consequences. It was the duty of the trial court, in allowing the indorsement of the name of an additional witness on an information, to protect the rights of the accused; and where a reasonable request is made to delay the hearing in order that the defendant may meet the testimony expected to be given by the person whose name is so indorsed, the court should give the defendant a reasonable time to prepare his defense. It is, doubtless, true, as contended by the attorney general, that an application of the character indicated is addressed

to the sound discretion of the court, and unless prejudice is shown to have resulted from a denial thereof, the ruling will not be disturbed by this court. The bill of exceptions shows that Levi Shores was a most important witness for the state in making out its case in chief. His testimony was to the effect that he bought intoxicating liquors of the defendants at the place where the liquors in question were kept. The purpose of this testimony was to establish the intent of the defendants in keeping the liquors,—one of the essential ingredients of the crime charged. A reasonable postponement of the trial should have been allowed the defendants to meet this testimony, and the twenty-four hours asked by the defendants was not an unreasonable time. There was an abuse of discretion in refusing this request. (*Parks v. State*, 20 Neb., 515; *Stevens v. State*, 19 Neb., 647.)

The conclusion reached in *Gandy v. State*, 24 Neb., 723, cited by the state, does not conflict with the ruling herein. There additional names were indorsed upon the information immediately preceding the trial, and a continuance was thereupon requested by the defendant, which was denied. The testimony of those whose names were thus indorsed was immaterial, and the continuance was asked over the term. In these important respects the case differs from the one at bar.

Other errors are assigned, but the conclusion already reached makes their consideration unnecessary. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ED. E. LEWIS V. MARTIN BARKER ET AL.

FILED JANUARY 9, 1896. No. 5685.

Final Order: REVIEW. An order sustaining a motion to quash a summons is not reviewable until followed by a final judgment of dismissal.

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

H. Wade Gillis, for plaintiff in error.

NORVAL, J.

This suit was instituted in the district court of Burt county by the plaintiff in error against Martin Barker, Frank Dellone, Fred Dellone, and John McCrary. Barker was summoned in Burt county and the other defendants in Douglas county. Subsequently, on motion of the two Dellones and McCrary, the summons was by the court quashed as to them, on the ground that it was issued without the authority of law, and to reverse this order the plaintiff prosecutes a petition in error to this court.

The decision of which complaint is here made is not reviewable, since it is not final in such a sense as to constitute a final judgment. An order sustaining a motion to quash a summons is not reviewable in the appellate court before a final judgment dismissing the cause has been rendered in the court below. This was distinctly held in *Brown v. Rice*, 30 Neb., 236; *Persinger v. Tinkle*, 34 Neb., 5; *Standard Distilling Co. v. Freyhan*, 34 Neb., 434. (See *Smith v. Johnson*, 37 Neb., 675; *Seven Valleys Bank v. Smith*, 43 Neb., 237; *Edgar v. Keller*, 43 Neb., 263, and authorities therein cited.) Since the record fails to show that a final judgment of dismissal has been rendered in the cause in the court below, the petition in error is

DISMISSED.

JOHN LANHAM V. FIRST NATIONAL BANK OF CRETE ET AL.

FILED JANUARY 9, 1896. No. 5820.

Usury: SET-OFF. **Money paid as usurious interest to a national bank cannot be set off in a suit brought by the bank more than two years after such payment to recover the principal sum.**

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

Abbott & Abbott, for plaintiff in error.

F. I. Foss, contra.

NORVAL, J.

On the 4th day of January, 1889, the plaintiff in error executed a chattel mortgage to the First National Bank of Crete, upon certain specific personal property, to secure the payment of his promissory note of $3,000, given on that date to the bank, and payable on April 22, 1889, with ten per cent interest from date. Subsequent to the maturity of the note the defendant in error seized and took into its possession the property described in the mortgage. Thereupon John Lanham brought this action of replevin against the bank to recover the mortgaged chattels. A trial was had to the court, with findings and judgment for the defendant. Plaintiff prosecutes error.

The defendant claims the property under the chattel mortgage already mentioned. The evidence shows that Lanham borrowed of the defendant, at a usurious rate of interest, the sum of $6,000, and gave his note therefor, which note was renewed from time to time by the plaintiff giving new notes, the last renewal being the note secured by said mortgage. It is also disclosed that plaintiff has

paid at various dates usurious interest on said original and renewal notes, and that the sums so paid, together with the payments made generally, equal the original amount borrowed. Most of the usurious payments were made more than two years prior to the bringing of this suit; and the sums so paid within that period, nor double the amount thereof, when added to all payments generally on the indebtedness, are insufficient to cancel the mortgage. If the plaintiff is entitled to be credited with all usurious-interest payments, whenever made, as he contends, then there was nothing due on the mortgage when this suit was instituted, and the judgment should have been against the bank. The question is presented by the record whether the plaintiff can avail himself of the provisions of section 5, chapter 44, of the Compiled Statutes of this state, which provides, *inter alia:* "If in any action on such contract proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid." The identical question was decided in *Norfolk Nat. Bank v. Schwenk,* 46 Neb., 381. It was there held that the foregoing statute did not apply to national banks; that usurious interest paid a national bank on a note cannot be set off in an action upon such note; and that the federal statute alone determines the penalties that shall be visited upon such banking institutions for exacting and receiving illegal interest; that is, if illegal interest has been contracted for and not paid, the bank forfeits all interest; but if illegal interest has been paid to a national bank, the borrower may recover double the amount thereof, provided his action is commenced within two years from the time the usurious transaction occurred; further, that the borrower may not set off in an action on the note either the amount of usurious interest paid thereon, or double the

sum so paid, more than two years before the action was instituted. In addition to the authorities cited in the opinion in that case sustaining the doctrine, see *First Nat. Bank of Peterborough v. Childs*, 133 Mass., 248; *Ellis v. First Nat. Bank of Olney*, 11 Brad. [Ill.], 275; *First Nat. Bank of Clarion v. Gruber*, 8 W. N. C. [Pa.], 119, 91 Pa. St., 377; *Nat. Bank of Fayette County v. Dushane*, 9 W. N. C. [Pa.], 472, 96 Pa. St., 340; *Lebanon Nat. Bank v. Karmany*, 98 Pa. St., 65; *Nat. Bank of Auburn v. Lewis*, 81 N. Y., 15; *Oldham v. First Nat. Bank of Wilmington*, 85 N. Car., 240.

It is argued that the removal acts of congress have given the states control over national banks, and, therefore, such banks are subject to the remedies provided by the laws of the respective states wherein they are situated. We held adversely to this contention in *Norfolk Nat. Bank v. Schwenk*, 46 Neb., 381, *supra*, and that the removal acts did not make such banking institution liable to the penalties imposed by a state for receiving usurious interest, but the purpose of congress in enacting those laws was to prevent the removal of suits to which a national bank is a party from a state to a federal court. With the conclusion then reached we are content.

It was likewise urged that by the proviso clause of section 4 of the act of congress, approved July 12, 1892, entitled "An act to enable national banking associations to extend their corporate existence, and for other purposes," each national bank continuing its existence after the expiration of its original charter is subject to all laws governing state banks where it exists and does business. The proviso reads as follows: "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized

under any law of the United States which do, or might do, banking business where such national banking associations may be doing business when such suits may be begun." (United States Statutes at Large, vol. 22, p. 163, sec. 4.) We cannot adopt the construction placed upon said provision by counsel for plaintiff. It is patent that it was not the intention of congress thereby to repeal section 5198 of the Revised Statutes of the United States prescribing the penalties imposed upon national banks for taking, reserving, receiving, or charging illegal interest. The purpose of the national legislature was not to subject national banks to the penalty imposed by the usury laws of the state, but to confer the same jurisdiction upon state courts for actions brought by or against national banks, with certain specified exceptions, as obtains for suits by or against banks not organized under any law of congress. So far as the forum is concerned, state and national banks were placed upon the same footing by the provision quoted above. It is true that the supreme court of the United States has not, to the knowledge of the writer, in express terms, construed the proviso clause of section 4 of the act of 1882, since most of the adjudications of that court, affirming the doctrine that money paid a national bank as usurious interest cannot be applied by way of payment or set off in an action to recover the principal sum, were rendered prior to the date of said act. The decision in *Stephens v. Monongahela Nat. Bank*, 111 U. S., 197, wherein the same principle was held and applied, after a review of the prior cases in that court upon the subject, was announced March 31, 1884, or nearly two years after the act of 1882 became operative. The fair and reasonable implication from this is that the act did not have the effect to modify or make inapplicable the previous decisions of the court upon the question under consideration.

We have examined the case of the *State v. First Nat. Bank of Clark*, 51 N. W. Rep. [S. Dak.], 587, cited by

plaintiff. The conclusion reached in the case at bar is not in conflict with the opinion therein. In South Dakota there is a statute which makes the receiving of a greater rate of interest than that fixed by law a misdemeanor. Under this statute a criminal prosecution was instituted against the First National Bank of Clark for taking usury, and it was found guilty, and the judgment was affirmed by the supreme court of the state. While it was held that a national bank is amenable to the criminal law of that state prescribing a fine for taking usury, it was distinctly stated that the laws of congress alone determine the results which should follow the taking by national banks of unlawful interest, its effect upon the contract, and the remedies of the parties; and further, that such remedies are purely civil. The court in discussing the question, in the opinion, say: "It may be disciplinary and a punishment, but it is a civil punishment, as distinguished from a criminal punishment. Exemplary damages, recovered in a civil action, are in a sense penal, but they never prevent the criminal law from operating upon the same act in the name of the state. One is civil, the other criminal. One is based upon the violation of private rights, the other upon the violation of the right of the state to have its laws respected." The Dakota case is clearly distinguishable from the one before us. The dissimilarity is so obvious that it need not be pointed out.

We entertain no doubt that the rights and remedies of the parties herein are to be determined by the provisions of section 5198 of the Revised Statutes of the United States. The decision of the court below being in harmony with the conclusion we have reached, the judgment is

AFFIRMED.

JOHN LANHAM V. FIRST NATIONAL BANK OF CRETE ET AL.

FILED JANUARY 9, 1896. No. 6614.

Usury: SET-OFF. *Lanham v. First Nat. Bank of Crete*, 46 Neb., 663, followed.

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

Webster, Rose & Fisherdick and *Abbott & Abbott*, for plaintiff in error.

F. I. Foss, contra.

NORVAL, J.

The facts in this case are in all material respects like those in *Lanham v. First Nat. Bank of Crete*, 46 Neb., 663, and the judgment of the district court herein is affirmed on that authority.

AFFIRMED.

STATE OF NEBRASKA, EX REL. D. T. WELTY, V. H. W. MCFADDEN ET AL.

FILED JANUARY 9, 1896. No. 8117.

1. **Elections:** CANVASSERS OF RETURNS. The duties of canvassers of election returns are ordinarily ministerial, and as a general rule they are not clothed with either discretionary or *quasi*-judicial powers.

2. ———: ———. Where it appears that an unauthorized alteration has been made in the return of the vote after the return has been delivered to the county clerk, the canvassers should disregard the alteration, and make the count according to the original and true return.

3. ———: RETURNS. The returns of an election consist of the whole election proceedings which the statute requires to be entered upon the poll books and tally list, viz., the certificate of the election officers, the list of those voting, and the tally list of the number of votes cast for the different persons, and from these the abstract of the vote is to be made.

4. ———: ———: DUTY OF CANVASSERS. In case of a discrepancy between the certificate and the tally list as regards the number of votes cast for a particular person, the canvassers must determine which is correct, after comparing them with the list of voters returned, and declare the result accordingly.

5. **Mandamus:** CANVASSERS OF ELECTION RETURNS. Where a board of canvassers has made a canvass, declared the result, and adjourned, *mandamus* will lie to compel it to reconvene and make a correct canvass of all the returns before it, if upon the first canvass the board has failed or refused to fully perform its duty.

ORIGINAL application for *mandamus* to compel the respondents to reconvene as a board of canvassers and recanvass the votes cast in Furnas county, at the last general election, for the office of judge of the fourteenth judicial district of Nebraska. *Writ allowed.*

No briefs filed.

W. R. Starr and *A. J. Rittenhouse*, for relator.

J. T. McClure, *contra.*

NORVAL, J.

This is an application for a writ of *mandamus*, brought originally in this court by D. T. Welty against the respondents, to compel them to reconvene as a board of canvassers and recanvass the votes cast in Furnas county, at the last general election, for the office of judge of the fourteenth judicial district. To the petition, answers were filed by the respondents, and thereupon, by the agreement of parties, John F. Cordeal, Esq., was appointed referee to take the testimony and report the same to the court. The cause

was heard upon the pleadings and proof, and as prompt action was required to protect the rights of the parties, a peremptory *mandamus* was issued as prayed at the last term of this court, without waiting for the preparation of an opinion expressing our views upon the questions presented by the record.

It appears that at the election held on the 5th day of November, 1895, the relator was the candidate of the people's independent party for the office of judge of the fourteenth judicial district; that George W. Norris was the candidate of the republican party for said office, and W. W. Barngrover was the candidate of the democrat party. Subsequent to said election, the respondents, as the county canvassing board, canvassed the votes cast at said election in said Furnas county for judge of the district court, and entered an abstract of the votes by precincts upon the book provided by the county clerk for that purpose, which abstract shows the votes cast in said county for said office were counted, canvassed, and declared as follows: For Barngrover, 108 votes; for Norris, 1,376 votes; for Welty, 881 votes. A copy of said abstract was transmitted to the secretary of state. It also appears that in Union precinct, in said county, the respondents found, and so certified, that there were cast for said office 10 votes for Barngrover; 46 votes for Norris, and for the relator 33 votes.

The first contention of the relator is that the returns made by the election board of Union precinct have been falsely and fraudulently tampered with and changed since they were lodged with, and received by, the county clerk and while in his custody, by increasing the number of votes cast for Norris from 40 to 46, and that the respondents should have credited to Norris 40 votes from said precinct instead of 46 votes. It is disclosed by the poll-book of Union precinct, conveyed to the county clerk, that the names of 86 persons, and no more, were returned by the election board as having voted in said precinct at said elec-

tion. The certificate of the judges and clerks of election of said precinct accompanying the returns states the number of votes cast for judge of the district court as follows: "Annie R. Woodby, one; W. W. Barngrover, ten; G. W. Norris, forty; D. T. Welty, thirty-three." The tally sheet returned with the poll-book from Union precinct now shows, *inter alia*, the following:

NAME OF OFFICE.	NAMES OF PERSONS VOTED FOR.	TALLY LIST.	
Judge District Court	W. W. Barngrover	𝍸 𝍸	10
	G. W. Norris	𝍸 𝍸 𝍸 𝍸 𝍸 𝍸 𝍸 𝍸 𝍸 |	46
	D. T. Welty	𝍸 𝍸 𝍸 𝍸 𝍸 𝍸 |||	33

It will be observed that there is a discrepancy on the face of the returns between the certificate of the votes cast for Norris for the office of district judge, and the tally sheet, or list, of the votes received by him. The certificate of the judges and clerks of the election show that Norris received 40 votes, while the tally list of the poll-books, counting the tally marks thereon, credits him with receiving 41 votes, though as now appearing the tallies are footed 46. The evidence discloses that, when the returns were made and delivered to the county clerk, the tallies marked opposite the name of Norris were carried out as either 40 or 41, and that the "0," or the "1," has been since fraudulently changed, but by whom it does not appear, into the figure "6," so as to make the number read "46" votes for Norris; and the respondents, acting as canvassers, have canvassed the same as 46 votes for Norris in said Union precinct. Under the law, it was the duty of the respondents to cast up the votes received by each person according to the returns of such votes transmitted to the county clerk by the judges and clerks of the election from the several voting districts of the county. It

is the settled law of this, and other states, that the duties of canvassing boards are ordinarily ministerial, and that they possess no judicial functions. (*Hagge v. State*, 10 Neb., 51; *State v. Hill*, 10 Neb., 58; *State v. Stearns*, 11 Neb., 106; *State v. Peacock*, 15 Neb., 442; *Long v. State*, 17 Neb., 61; *State v. Kavanagh*, 24 Neb., 506; *State v. Elder*, 31 Neb., 169; *Lewis v. Commissioners of Marshall County*, 16 Kan., 102; *People v. Hilliard*, 29 Ill., 413; *People v. Head*, 25 Ill., 325; *State v. Steers*, 44 Mo., 223; *Phelps v. Schroder*, 26 O. St., 549; *People v. Kilduff*, 15 Ill., 492; McCrary, Elections, sec. 229, and cases cited in note 2.) While generally such boards have no discretion in the discharge of their duties, the rule has its exceptions. Thus, where what purports to be two or more returns from the same election district are received by the county clerk, the canvassing board must necessarily determine from the face of the papers which one shall be regarded as the true and genuine return. (McCrary, Elections, sec. 227; *Long v. State*, 17 Neb., 61.) So, too, where there is a discrepancy between the certificate of votes cast for any person for a particular office and the tallies of the votes cast for him, the canvassers must determine from the entire returns which is correct. There may be other cases where such boards are clothed with some discretion or *quasi*-judicial powers, in performing their legal duties, but whether so or not, for the purposes of this case, it is unnecessary to determine. There can be no doubt, when the returns are regular in form and genuine, the canvass is purely a ministerial act, and the votes must be counted as shown by the returns of the local election boards, and that *mandamus* will lie in such case to compel them to do so. The canvassers must cast up and count the votes as returned by the officers of election, and this is true, even though the returns may have been altered either by fraud or accident after they were delivered to the custody of the county clerk. (*State v. Dalton*, 1 O. C. C. Rep., 161; *State v. Garesche*, 65 Mo., 480; *State v. Kava-*

nagh, 24 Neb., 506; *State v. Matley*, 17 Neb., 564.) In the Ohio case the poll book and tally sheet had been altered after the return had been signed, which was apparent from the face of the papers, by adding 200 tallies to certain candidates and changing the figure "7" into a "9," thereby increasing the vote on the tally sheet 200 votes. The court held that the canvassers should reject and not count such forgery or falsified figures. In *State v. Garesche, supra*, there had been an alteration of the returns after they had been sent in, and it was held, in a proceeding by *mandamus*, that it was the duty of the canvassers to disregard the alteration, and make the count according to the true return. In the case at bar the respondents should have based their canvass upon the original and genuine return from Union precinct, and rejected the forged portion thereof. Norris should not have been credited with 46 votes from said precinct, since it was only from the falsified returns that the inference could be drawn that that number of votes had been cast for him thereat.

As already indicated, there is a discrepancy, between the tallies and the certificate of the election officers accompanying the returns from Union precinct of one vote since the number of votes cast for Norris for district judge, the tallies show 41 votes, while the certificate states he received 40 votes. It is urged by the relator that the tally list constitutes no part of the returns, and that the certificate of the election officers stating the number of the votes cast for a particular person must control. To this doctrine we cannot assent. There is some diversity of judicial opinion in regard to whether the tally list is a part of the returns and should be considered by the canvassers; but the decided preponderance of the decisions, under statutes similar to ours, sustains the doctrine that the tally list may be considered by the canvassing board. The returns consist of the entire election proceedings which the statute requires to be entered upon the poll-books and tally list. In other words,

the returns are composed of the certificates of the election officers entered in the poll-book, together with the names of those voting and the tally list of the number of votes cast for the different persons. The tally sheet is as much a part of the returns as the certificate of the judges and clerks. (*State v. Hill*, 10 Neb., 62, 20 Neb., 119; *State v. Kavanagh*, 24 Neb., 510; *State v. Cavers*, 22 Ia., 343; *Simon v. Durham*, 10 Ore., 52; *People v. Ruyle*, 91 Ill., 525; *Dalton v. State*, 43 O. St., 652.) It, therefore, follows that it is the duty of the canvassing board, in making the abstract of the vote of an election, to consider the entire returns, to-wit, the certificate of the election officers, the list of voters, and the tally list; and where there is a discrepancy or conflict between the certificate of the officers conducting the election and the tally list as regards the number of votes cast for a particular person, the canvassers, after comparing the certificate and tally list with the list of voters returned, must decide which is correct, and make an abstract of the vote accordingly. No arbitrary rule can be laid down. Upon such comparison, the canvassers may be justified in counting the votes as shown by the tally list, rather than the number stated in the certificate, and *vice versa*. The law imposes upon the canvassers the duty of canvassing the returns exactly as filed with the county clerk by the election boards, and, until the canvassers have so compiled the vote, their task is uncompleted. They have no right to adjourn without day until they have finished their work. It has been repeatedly decided that after they have made one canvass, declared the result, and adjourned, they may be compelled by *mandamus* to reassemble and make a correct canvass of all the returns, where it appears that upon the first convass they neglected or refused to fully perform their duty. (*State v. Dinsmore*, 5 Neb., 145; *State v. Hill*, 10 Neb., 63; *State v. Stearns*, 11 Neb., 106; *State v. Peacock*, 15 Neb., 442.) A peremptory writ of *mandamus* will issue as prayed, requiring

the respondents to reconvene and canvass all the votes returned from Furnas county.

WRIT ALLOWED.

STATE OF NEBRASKA, EX REL. ALFRED BARTOW, V. O. K. EASTMAN ET AL.

FILED JANUARY 9, 1896. No. 8114.

1. **Elections:** RETURNS: DUTY OF CANVASSERS. The tally list required to be sent to the county clerk is a part of the election returns, and is proper to be considered by the canvassing officers, and where there is a discrepancy between the certificate of the election board and tally list as to the vote cast for any person, it is for the canvassers to determine which correctly states the vote, after making comparisons with the list of those purporting to have voted, and they should make the abstract of the vote and declare the result accordingly.

ORIGINAL application for *mandamus* to compel the respondents to reconvene as a board of canvassers and recanvass the votes cast in Dawes county, at the last general election, for the office of judge of the fifteenth judicial district of Nebraska. *Writ denied.*

No briefs filed.

J. R. Webster, D. B. Jenckes, and *A. W. Crites,* for relator.

J. R. Gilkeson, contra.

NORVAL, J.

This is a proceeding by *mandamus,* commenced in this court, to compel the respondents, the board of canvassers of Dawes county, to reconvene and recanvass the votes

cast at the election held in said county on November 5, 1895, for the office of judge of the fifteenth judicial district. The relator, Alfred Bartow, and W. H. Westover and others were voted for at said election for said office. The returns have been canvassed by the respondents, and it is conceded by the relator that the abstract was correctly made except as to his own vote in one of the two voting districts in Chadron precinct, in said county, from which district the canvassers credited him with 262 votes. In this district a discrepancy appears on the face of the returns between the certificate of votes cast for relator and the tally list. The certificate reads "two hundred and sixty-seven, 227" The tally list, in form "𝍸 𝍸," etc., which counted shows 262 votes for Bartow. It is argued that not only does the certificate govern, but that the number written out in full should prevail over the figures. In *State v. McFadden*, 46 Neb., 668, it was held that the tally list was as much a part of the election returns as the certificate signed by the proper officers, and where a discrepancy exists between them, it is for the canvassing board to determine, after making comparisons with the list of persons purporting to have voted, which part of the returns correctly states the vote cast for a particular person and to count the vote accordingly. That decision is decisive of the case at bar. There is a discrepancy between the written number in the certificate and the figures therein of 40 votes, and the respondents corrected the returns and computed the votes according to the tally list, as they were fully justified by the entire returns in doing. The writ is denied.

WRIT DENIED.

FARMERS LOAN & TRUST COMPANY V. M. M. KILLINGER ET AL., APPELLEES, AND DAVID A. HALE, APPELLANT.

FILED JANUARY 9, 1896. No. 5772.

Judgments: ORDER VACATING: CONTINUANCE OF LIEN. A court, upon setting aside a mere money judgment, has no power to continue in existence the statutory judgment lien of the judgment set aside that it may attach to such judgment as subsequently may be rendered in the same cause.

APPEAL from the district court of Madison county. Heard below before SULLIVAN, J.

Allen, Robinson & Reed, for appellant, cited: *Exley v. Berryhill*, 30 N. W. Rep. [Minn.], 436; *Whereatt v. Ellis*, 30 N. W. Rep. [Wis.], 520; *Nuckolls v. Irwin*, 2 Neb., 60; *Flagg v. Cooper*, 54 N. Y. Sup. Ct., 50; *Loomis v. Second German Building Association*, 37 O. St., 392; *Leonard's Appeal*, 94 Pa. St., 180; *Kittanning Ins. Co. v. Scott*, 101 Pa. St., 449; *Cope's Appeal*, 96 Pa. St., 294; *Holmes v. Bush*, 35 Hun [N. Y.], 637.

S. O. Campbell and *Wigton & Whitham, contra.*

RYAN, C.

This action was for the foreclosure of a mortgage made to the Farmers Loan & Trust Company by M. M. Killinger and his wife. There were made defendants Louis Stein & Co., David Hale, and L. B. Baker. A controversy not settled to the satisfaction of one party was between L. B. Baker, who had filed his claim for a mechanic's lien against the real property of Killinger on August 6, 1889, and D. A. Hale, who had recovered judgment against M. M. Killinger on May 2, 1889. One of the

journal entries introduced in evidence in this case was as follows:

"DAVID A. HALE
v.
M. M. KILLINGER. } Wm. V. Allen's journal entry.

"And now on this 29th day of July, 1889, it being a judicial day of the regular April, 1889, term of this court, this cause came on for hearing to the court on the defendant's motion to set aside the judgment heretofore entered in this case, and to be let in to defend, supported by the affidavit of the defendant. On consideration of said motion the same is granted by the court, the judgment set aside, and the defendant let in to defend, on condition that he pay all the costs of this case; to all of which the plaintiff duly excepted.

"It is further ordered that the plaintiff have forty days from this date to prepare and settle a bill of exceptions. It is further ordered that the attachment and general judgment lien obtained by the plaintiff in this case shall be preserved to him and in no manner be affected by this order."

On May 2, 1890, judgment was rendered in the above entitled cause against the defendant for the sum of $388.45 and costs. The judgment which had been rendered just one year previously was for $620. As has already been stated, the claim of L. B. Baker for a mechanic's lien was filed August 6, 1889. The appellant claims that this lien was subject to the lien of whatever judgment should be recovered ultimately by Mr. Hale, and that, therefore, the final judgment in the sum of $385.45 should have been declared superior to the aforesaid mechanic's lien. The contention of the appellees, that the lien of David A. Hale's judgment dated only from May 2, 1890, was sustained by the district court, and to reverse this postponement of his lien this appeal was taken.

In argument it was urged that the order setting aside

the judgment in Mr. Hale's favor was made upon condition that the judgment lien, previously existing, should be preserved and held to attach to whatever judgment ultimately should be rendered. This construction is not borne out by the language employed, for the order with reference to the preservation of said lien was made after, and independently of, the order setting aside the judgment.

It is further insisted that the language of the final paragraph of the above journal entry brought about one result, and that was that the lien of the judgment opened was, by the court, preserved for the enforcement of whatever final judgment should be rendered. To sustain this appellant's counsel have cited several Pennsylvania cases. The practice in that state does not seem to depend upon an express provision of the statutes. We infer, however, that there is held to exist a material difference between opening a judgment and setting it aside. This inference seems justified by the following language quoted from *Steinbridge's Appeal*, 1 Penr. & W. [Pa.], 481: "A judgment may be opened, or it may be set aside. If the former, it remains a judgment still, and with all the attributes as such, of which the order of the court has not deprived it. Here it was opened to let the party into not even a full defense; consequently it was no further disturbed than to effect that object." In 1 Troubat & Haly's Practice, section 60, a work specially designed for use in Pennsylvania, is found this language: "Our remedy, also, for irregularity or collusion in the rendition of a judgment is to overturn it; but for pretermitted matter of defense it necessarily is to open it, for it is impossible to say what may be found due. Our practice, therefore, is to try collusion by a collateral issue, but matter of defense, by an issue in the cause which gives the defendant all proper advantage of matter of original defense without loosening the plaintiff's hold on the security gained by the judgment." The Pennsylvania cases cited in the brief for appellant were where the judgment

had been opened and the defendant let in to defend. They, therefore, afford no justification of the claim that in that state a judgment may be set aside and yet that the lien of such judgment may continue to exist.

In the case of *Flagg v. Cooper*, 54 N. Y. Sup. Ct., 50, the judgment was not vacated, but leave to defend was granted upon the express condition that the judgment already in existence should stand as security, but that no execution thereon should issue. The fact that the defendant had availed himself of this condition influenced the court somewhat in the direction of holding the defendant bound by this provision.

The case of *Loomis v. Building Association*, 37 O. St., 392, also cited by the appellant, rather tends to deny than recognize the claim that a lien may survive a judgment after it has been set aside, for in that state it had been deemed necessary to effect that result that this statutory provision quoted in the opinion should be adopted, to-wit: "In all cases where the party against whom the judgment is rendered obtains a second trial under the act to which this is amendatory and supplementary, the lien of the opposite party so obtaining such second trial, created by said judgment, shall not be by the obtaining of such second trial removed or vacated, but the real estate of said party so obtaining such second trial shall be bound in the same manner as if said second trial had not been demanded until the final determination of the case."

From this review of all the cases cited by the appellant upon this point it is very clear that an order made, as was the one which we now have under consideration, has not been shown to have had the effect claimed to have been generally recognized as resulting from such an order.

In *Loomis v. Building Association, supra*, it was said: "A judgment lien is a creature of the statute, and does not exist except by its authority. The correctness of this proposition will not be questioned. The provision of our stat-

ute, found in section 477 of the Code of Civil Procedure, by virtue of which appellant's judgment created a lien of any kind, is in this language: "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." There is found in the statutes of this state no provision which makes this lien dependent upon any other consideration than the rendition of a judgment. It would be deemed an extraordinary and unwarranted proceeding if a court, contemporaneously with the entry of a mere money judgment, should order that by virtue thereof its lien should date from some time named before the first day of the current term. If such an order could not be made at the time of the rendition of the judgment, it could scarcely be possible for the court, upon the entry of an order setting aside such judgment, to provide that if thereafter, no matter if a year subsequently, there should be another judgment, its lien, instead of arising as provided by statute, should be deemed to have been in existence from the date at which the first judgment had its origin. We are not considering what order might properly be made by a court in the exercise of its equity powers continuing a lien as between the parties to such an action.

In the case wherein judgment was rendered, M. M. Killinger was the sole defendant, the party whose lien is sought to be postponed therefore could not be bound by an order or judgment on the theory that as to him it was *res judicata*. We are of the opinion that, under the circumstances, the court had no power upon opening a mere money judgment to order that the lien thereof should remain in existence and attach to a subsequent judgment of like character whenever such judgment might be rendered. The judgment of the district court is

AFFIRMED.

L. B. BAKER v. M. M. KILLINGER ET AL., APPELLEES, AND LOUIS STEIN & CO. ET AL., APPELLANTS.

FILED JANUARY 9, 1896. No. 5773.

Judgments: ORDER VACATING: CONTINUANCE OF LIEN.

APPEAL from the district court of Madison county. Heard below before SULLIVAN, J.

Allen, Robinson & Reed, for appellants.

Wigton & Whitham, contra.

RYAN, C.

The questions involved in this case are the same as those involved in *Farmers Loan & Trust Co. v. Killinger*, 46 Neb., 677. It follows that the judgment in this case rendered by the district court should be, and, therefore, it is,

AFFIRMED.

STATE OF NEBRASKA, EX REL. BOARD OF TRANSPORTATION, V. SIOUX CITY, O'NEILL & WESTERN RAILROAD COMPANY, F. C. HILL, ITS RECEIVER, AND FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY.

FILED JANUARY 9, 1896. No. 7526.

1. **Constitutional Law:** FEDERAL DECISIONS: STARE DECISIS. The construction placed upon provisions of the federal constitution by the supreme court of the United States must be followed by state courts in all matters to which such provisions are applicable. Following *Franklin v. Kelly*, 2 Neb., 79; *Bressler v. Wayne County*, 25 Neb., 468.

2. ———: STATUTES: RAILROAD COMPANIES: TRANSFER SWITCHES. The provisions of chapter 11, Laws, 1893, which require railroad companies, as an absolute finality, and without the right of judicial investigation by due process of law, to carry freights over longer lines for the same rates as required by any railroad company for hauling the same freight between the same points by a shorter line, no matter how great the disparity in the length of such hauls may be, is in conflict with the provisions of the fourteenth amendment of the constitution of the United States, that no state shall "deprive any person of life, liberty, or property without due process of law." Following *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S., 418, 458, and *Reagan v. Farmers Loan & Trust Co.*, 154 U. S., 362.

3. ———: ———: ———: COURTS. It is not within the power of a court to make such an arrangement for the business intercourse of common carriers as in the opinion of such court they ought to make for themselves, for such function is legislative, rather than judicial. Following *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S., 667; *Pullman Palace Car Co. v. Missouri P. R. Co.*, 115 U. S., 587; *Express Cases*, 117 U. S., 1.

4. ———: ———: ———. The power of the legislature to require railroad lines to build and maintain transfer switches between themselves, being but an incidental consideration, is not discussed or decided in this case. The main purpose of chapter 11, Laws, 1893, being the regulation of business intercourse of connecting railroad companies, said act is held invalid, as not being susceptible of enforcement as an entirety, for the reasons given in the second and third paragraphs of this syllabus.

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

The opinion contains a statement of the case.

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and *W. A. Dilworth*, for plaintiff in error:

In an argument against the contentions that chapter 11, Session Laws of 1893, is void for uncertainty, and that the act creates no tribunal, in case of a disagreement of the companies, to determine their respective rights, reference

was made to the following authorities: *Texas Express Co. v. Texas & P. R. Co.*, 6 Fed. Rep., 437; *Southern Express Co. v. Iron M. & S. R. Co.*, 10 Fed. Rep., 210; *McCoy v. Cincinnati, I., St. L. & C. R. Co.*, 13 Fed. Rep., 3; *State v. Republican V. R. Co.*, 17 Neb., 647.

The transfer switch is a facility for conducting the business of a railroad. The act does not, therefore, deprive the carriers of their property without due process of law. It does not deny them the equal protection of law, nor provide for taking their property without compensation. Its effect is not to impair the obligations of contracts. (*Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. Rep., 854; *Burlington, C. R. & N. R. Co. v. Dey*, 48 N. W. Rep. [Ia.], 98; *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.*, 109 Ill., 135; *Louisville & N. R. Co. v. Boland*, 18 L. R. A. [Ala.], 260; *Reagan v. Mercantile Trust Co.*, 154 U. S., 418; *San Antonio & A. P. R. Co. v. State*, 79 Tex., 264; *State v. Wabash, St. L. & P. R. Co.*, 83 Mo., 144; *State v. Kansas City, Ft. S. & G. R. Co.*, 32 Fed. Rep., 722; *Smith v. Chicago, M. & St. P. R. Co.*, 53 N. W. Rep. [Ia.], 128; *Vincent v. Chicago & A. R. Co.*, 49 Ill., 33; *People v. Chicago & A. R. Co.*, 55 Ill., 95; *Chicago & A. R. Co. v. Suffern*, 129 Ill., 274; *Hoyt v. Chicago, B. & Q. R. Co.*, 93 Ill., 609; *People v. New York, L. E. & W. R. Co.*, 28 Hun [N. Y.], 549; *Abbott v. Johnstown, G. & K. H. R. Co.*, 80 N. Y., 27; *State v. Hartford & N. H. R. Co.*, 29 Conn., 538; *Covington Stock Yards Co. v. Keith*, 139 U. S., 128; *Wight v. Missouri P. R. Co.*, 20 Mo. App., 481; *Budd v. State of New York*, 143 U. S., 517; *Brass v. State of North Dakota*, 153 U. S., 391; *Thorpe v. Rutland & B. R. Co.*, 27 Vt., 140; *State v. Chicago, B. & Q. R. Co.*, 2 Am. R. & C. Rep. [Neb.], 664; *American Rapid Telegraph Co. v. Hess*, 4 Am. R. & C. Rep. [N. Y.], 199; *Maine v. Grand T. R. Co. of Canada*, 5 Am. R. & C. Rep. [U. S.], 248; *Galena & C. U. R. Co. v. Rae*, 68 Am. Dec. [Ill.], 374.)

William B. Sterling and *Lloyd W. Bowers, contra:*

By the act, a railroad is required to engage in the business of transporting freight beyond its own line of road, and so is forced into an occupation which it has never bound itself to enter. Such legislation is a deprivation of liberty and property without due process of law, abridges the immunities guarantied to railroads as to others, and denies them the equal protection of the laws, all in contravention of section 1 of the fourteenth amendment to the constitution of the United States. (*Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq., 178; *Ames v. Lake Superior & M. R. Co.*, 21 Minn., 255; 2 Morawetz, Private Corporations [2d ed.], secs. 1047, 1059; Hutchinson, Carriers [2d ed.], sec. 145; *Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep., 567; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S., 668.)

The rates fixed by the act for any transportation of freight in the course of which a transfer switch is traversed are unreasonable, and have the effect of taking property without due process of law, in disregard of both the federal and state constitutions. (*Reagan v. Farmers Loan & Trust Co.*, 154 U. S., 362; Black, Constitutional Law, pp. 318, 324, 325; *In re Jacobs*, 98 N. Y., 98; *Toledo, W. & W. R. Co. v. City of Jacksonville*, 67 Ill., 37.)

The right of railroads, under their charters from congress and the state of Nebraska, to charge reasonable rates, is a contract right, and is subject to regulation only by the legislative power of the state in the proper exercise of the police power, and for the purpose and to the extent of preventing unreasonable charges; but the act in question subjects the rates of one railroad to control by other railroads, and places the rates under arbitrary and unreasonable restrictions, thereby impairing the obligation of the contract growing out of the company's charter, and so violating article 1, section 10, of the federal constitution. (3 Am. &

Eng. Ency. Law, 741; Black, Constitutional Law, p. 536; Cooley, Constitutional Limitations [5th ed.], p. 712; *Pingry v. Washburn*, 1 Aik. [Vt.], 264; *New Orleans Gas Light Co. v. Lousiana Light & Heat Producing & Mfg. Co.*, 115 U. S., 650.)

The rates fixed by the statute for the transportation of freight in the course of which a transfer switch is traversed are absolute and are conclusively imposed, whether actually reasonable or not. The rates are established finally, instead of being merely declared presumptively reasonable; and under the terms of the statute, judicial inquiry into the actual reasonableness of the rates is immaterial and improper; for this reason, the act takes property without due process of law, and also denies the equal protection of the laws, contrary to the federal and state constitutions. (*Chicago, M. & St. P. R. Co. v. State of Minnesota*, 134 U. S., 418.)

Wright, Hubbard & Bevington, John B. Hawley, and *B. T. White*, also for defendants in error.

RYAN, C.

This action was begun in the district court of Holt county, as shown by the prayer of the application for a writ of *mandamus* to compel the defendants to build, forthwith, a transfer or connecting switch at O'Neill, in said county, whereby the lines of the respondent railroad companies might be connected one with the other, and upon completion of said transfer switch to henceforth maintain the same in good condition and to receive and forward freight in car load lots offered by one road to the other offered on or over said transfer switch, and to place in force a joint schedule of rates between stations on the lines of each of said roads whereby freight in car load lots might be carried from a station on one road to a station on the other, which said rates should be for the rate for the shortest mile-

age by any railroad between the point of shipment and the point of destination; or, to show cause, by a day fixed, why said order should not be complied with, and, upon final hearing, that said order be made final, and for such other and further order as might be required and which a full and complete carrying out of the statute set forth in the application aforesaid should demand. It is not necessary to more fully state the nature of this action further than to say that by the application it was shown that the lines of railroad owned and operated by the defendant companies touched each other at O'Neill and at that point each received and delivered freight; that the board of transportation of the state of Nebraska, before the commencement of this action, had found a necessity for a transfer switch between said lines and had duly ordered the same to be constructed, and that the respondents, and each of them, had failed and refused to build and maintain such switch. The right to the relief above prayed was based upon the provisions of chapter 11, Laws, 1893. It is not possible to determine whether or not the connection by transfer switch could have been compelled, under the provisions of section 113, chapter 16, Compiled Statutes, for there are contained in the application no averments showing the existence of prerequisites indispensable under this section. A general demurrer to the petition by each defendant was sustained, and from the judgment of dismissal, thereupon following, plaintiff has prosecuted error proceedings to this court.

The first and second sections of chapter 11, pages 142, 143, Laws, 1893, contain the provisions concerning which most of the arguments in this case have been made. The enacting clause and these sections are in the following language:

"*Be it enacted by the legislature of Nebraska:*

"Section 1. That all railroads touching the same point in this state, at which point such railroads receive and deliver freight, or at some near point, shall build and maintain transfer switches for common use in transferring freight

in car load lots from one such railroad to another, and receive and forward such freight according to the provisions of this act; *Provided,* That the railroad interested may apply to the state board of transportation to be relieved of this duty in any case where its performance is unusually burdensome, and if, upon a personal examination of the locality where the transfer switches are to be put in, and taking testimony of the persons residing in the locality, by the secretaries of such board, they find it unjust and unreasonable to require the building of such transfer switches, then such board may relieve such roads of such duty, and that evidence from any locality along the lines of roads interested shall be considered by said board, and be competent testimony in such case.

"Sec. 2. That whenever a shipper of freight from any point in this state to any other point in this state over two or more lines of railroads to reach such point of destination, it shall be the duty of all such railroads as come under the provisions of this act to receive and deliver all such freight in car lots, on board cars upon such transfer switch. The railroad company at point of shipment shall make a through way bill to point of destination, and the rate to be charged for such shipment shall not be the sum of two or more locals, but shall be apportioned between the different roads according to the mileage of each necessarily used in such shipment, and shall be the rate for the shortest mileage distance by any railroad between point of shipment and point of destination."

The mandatory requirement of the first section is that railroad companies, situated as are the defendants, shall build and maintain transfer switches for transferring car load lots from one road to the other and receive and forward the same according to the provisions of said act. The case has been presented on both sides upon the theory that the clause, "according to the provisions of this act," relates to and qualifies each antecedent requirement; that is, of

putting in and maintaining the transfer switch as well as of receiving and forwarding freight. In this we think counsel correctly construed these provisions. In view of the fact that at the date of the passage of this act there was already in existence a section of the Compiled Statutes which required the construction of transfer switches, it is very clear that the main purpose of the act under consideration is to be found in its second section.. The validity of this act will, therefore, be considered with reference to its chief object as defined in the said second section, rather than with reference to the duty to construct transfer switches,—a matter of minor importance.

In Iowa a transfer switch law was enacted by the legislature, of which some provisions resemble those found in the above act. It is not necessary that these should be copied or described at length, for the argument of the attorney general was based upon analogies sufficiently indicated by an opinion of the supreme court of that state filed in a cited case, to which we shall now refer. In *Smith v. Chicago, M. & St. P. R. Co.*, 53 N. W. Rep. [Ia.], 128, thus confidently relied upon by the plaintiff in error, there were considered but two questions. Of these, the first was whether the state was the proper party plaintiff. The other proposition decided is found correctly stated in the fourth paragraph of the syllabus thus: "Code, section 1292, provides that a railroad corporation whose road intersects or crosses any other line of railway of the same gauge shall connect its road with such other railway so intersected. Act 1878, section 3, provides that the railroad commissioners shall have general supervision of all the railroads in the state and inquire into any neglect or violation of the laws of the state. Acts 20 General Assembly, chapter 24, section 1 provides that corporations having intersecting roads shall, 'whenever ordered by the railroad commissioners,' unite and connect their tracks. Held, that the commissioners should order the connection of such tracks

only when they deem it best and need not do so regardless of its advisability." In this case the railroad commissioners had, in effect, found that there was no necessity for the connection sought to be required, but ordered it on the theory that the statute compelled them so to do whether the connection was necessary or not. How the supreme court of Iowa viewed the construction followed by the railroad commissioners is clearly indicated by the language above quoted. In the case just considered, however, there was involved no such question as that which chiefly concerns us in this case. Since we have had brought to our notice the holding of the supreme court of Iowa in one case, it may subserve a useful purpose to note that in *Smith v. Chicago, M. & St. P. R. Co.*, 55 N. W. Rep., [Ia.], 331 another ruling of that court has been made, which is correctly reflected in the following language of the syllabus: "An order of the railroad commissioners that the defendant railroad company transfer cars delivered to it by another company from its station to another point, as a switching service and at switching rates, will not be enforced where such point is beyond the yard limits and the service rendered is on the main line and is done under orders as in case of trains and not under the direction of the yardmaster." The court, in its opinion, said that if the order of the railroad commissioners was to be enforced by a decree, as prayed, such enforcement involved a change in the management of the company as to the classification and operation of its trains, and for this reason a demurrer to the petition containing the prayer above indicated was held to have been properly sustained. Indirectly there was thus considered one of the minor questions to which the law under discussion might naturally give rise; but as this question is not necessarily involved, we shall proceed to consider other questions which cannot be ignored.

It is insisted by the plaintiff in error that section 2 of

the act under consideration is not within the inhibition of the following language of section 1 of the fourteenth amendment of the constitution of the United States, to-wit: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law." In the construction of the federal constitution and statutes, state courts must follow the supreme court of the United States. (*Franklin v. Kelly*, 2 Neb., 79; *Bressler v. Wayne County*, 25 Neb., 468.) In delivering the opinion of the court in *Reagan v. Farmers Loan & Trust Co.*, 154 U. S., 362, Mr. Justice Brewer briefly reviewed the history of the adjudications of the United States supreme court respecting legislative control over railroads. As such a review is not inappropriate in the consideration of this case, and as no one is more likely to correctly summarize such history than Judge Brewer, his language is quoted, as follows: "In *Chicago, Burlington & Quincy Railroad v. Iowa*, 94 U. S., 155, and *Peik v. Chicago & Northwestern Railway*, 94 U. S., 164, the question of legislative control over railroads was presented, and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers but was subject to legislative control. As stated by Mr. Justice Miller in *Wabash, etc., Railway v. Illinois*, 118 U. S., 557, 569, in respect to those cases: 'The great question to be decided and which was decided, and which was argued in all those cases, was, the right of the state, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges.' There was in these cases no decision as to the extent of control, but only as to the right of control. This question came again before this court in *Railroad Commission Cases*, 116 U. S., 307, 331, and while the right of control was reaffirmed, a limitation on that right was plainly intimated in the following words of the chief justice: 'From what

has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law.' This language was quoted in the subsequent case of *Dow v. Beidelman*, 125 U. S., 680, 689. Again, in *Chicago, Milwaukee & St. Paul Railway v. Minnesota*, 134 U. S., 418, 458, it was said by Mr. Justice Blatchford, speaking for the majority of the court: 'The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination.' And in *Chicago & Grand Trunk Railway v. Wellman*, 143 U. S., 339, 344, is this declaration of law: 'The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates.' *Budd v. New York*, 143 U. S., 517, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business, that of elevating grain, was within legislative control as to the matter of rates. It was said in the opinion: 'In the cases before us the records do not show that the charges fixed by the statute are unreasonable.' Hence, there was no occasion for saying anything as to the power or duty of the courts in case the rates as established had been found to be unreasonable. It was enough that upon examination it appeared that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground."

Commenting upon the principles involved in the cases

which he had just reviewed Mr. Justice Brewer said: "It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limits and guaranties, the forms of the law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In *Chicago, M. & St. P. R. Co. v. Minnesota*, referred to in the above review of cases by Judge Brewer, the restrictions just referred to were applied to such facts and in such a manner as to illustrate their inhibitory force. In that case there was under consideration a law of Minnesota which empowered a commission to prescribe rates for the transportation of freight upon the several railroad lines in that state. Upon a failure of any railroad company to comply, within a fixed time, with the rate established by such commission, the commission was empowered by law to post such rate, which, thereupon, became as binding upon the railroad company concerned as though adopted and promulgated by its authority. Under the provisions of this law the supreme court of Minnesota had held that the rates thus published were the only ones that were law-

ful, and that therefore, in contemplation of law, the only ones that were equal and reasonable, and hence that, in a proceeding by *mandamus* to compel a railroad company to comply with this rate, there was no fact to traverse, except the alleged violation of the law in refusing compliance with the recommendations of the commission. In delivering the opinion of the majority of the supreme court of the United States, Mr. Justice Blatchford said: "This being the construction of the statute by which we are bound in considering the present case, we are of the opinion that, so construed, it conflicts with the constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." That the rates referred to in the foregoing quotation were fixed by a commission to which that power had been delegated by the legislature of Minnesota, in principle, was the same as though the legislature itself had exercised that power, for the latter could not delegate to the former a power not possessed by itself. Considered independently of the entirely fortuitous circumstance that the commission had fixed the rates, the majority of the supreme court of the United States, in effect, held in *Chicago, M. & St. P. R. Co. v. Minnesota*, that it was not within the power of the legislature to provide, as an absolute finality, that only certain fixed rates could be charged by railroad companies for the transportation of freight. In the subsequently decided case of *Reagan v. Farmers Loan & Trust Co., supra*, the entire court seems to have assented to the correctness of the following

proposition therein quoted from the majority opinion in *Chicago, M. & St. P. R. Co. v. Minnesota*, to-wit: "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." As this seems unquestionably to be the conclusion established by the able review of the cases which has been hereinbefore quoted from *Reagan v. Farmers Loan & Trust Co.*, it should be accepted as such an authoritative construction of the part of the fourteenth amendment which is involved in this case that it must bind this court, whatever its views independently of this construction might have been.

In view of this construction by the supreme court of the United States placed upon the part of the fourteenth amendment with which we are now concerned, let us consider some of the provisions of the second section of the act entitled "An act to regulate railroads and to compel them to put in transfer switches," the same being chapter 11, Laws, 1893. The first sentence of this section is imperfect, but its evident meaning is that where freight shall be shipped over two or more lines of railroad, between points in this state, it shall be the duty of all such railroads to receive and deliver such freight in car lots, on board cars upon such transfer switch as connects their lines. By this section it is furthermore required that the railroad company at the point of shipment shall make a through way bill to the point of destination, the rate for the shipment not to be the sum of two or more locals, but for the shortest mileage distance by any railroad between the point of shipment and the point of destination. For the sake of illustration, let us suppose that a triangle is formed by three distinct lines of railroad within this state; that of each of two of these lines the length is one hundred miles and that the length

of the line on the third side is twenty-five miles. A shipper of a ton of hard coal, we will suppose, directs that his coal be sent from the intersection of the short line with one of the longer lines over both of the longer lines to the point at which such coal shall reach the extremity of the short line furthest from the initial point of shipment. It will thus be required to travel two hundred miles to reach its destination. It might have done so by traveling twenty-five miles. Chapter 24, Laws, 1893, has been held in *Ames v. Union P. R. Co.*, 64 Fed. Rep., 165, to have fixed inadequate rates, and the enforcement of this statute is now suspended by injunction; nevertheless we shall assume, for the mere purposes of illustration, that these rates afford as fair a basis between themselves for comparisons as any other that could be found. For hauling 2,000 pounds of hard coal a railroad company, under this maximum rate law, was permitted to charge for a distance of twenty-five miles the sum of seventy-six cents; for hauling the same ton of coal two hundred miles there might be required as compensation the sum of two dollars. It may be objected that this case is merely hypothetical, and that, practically, this supposed condition is impossible. Let us, therefore, suppose that a dealer finds it necessary to send a car load of hard coal from Omaha to Plattsmouth. For some reason, perhaps to avoid the payment of drayage charges, he elects to send the coal by way of Columbus, and, as he has the right under this law, he requires it billed over the Union Pacific railway to Columbus and thence over the Burlington & Missouri railway to Plattsmouth. There is by this route required to be traveled ninety-one miles over the line of the first named railway and one hundred and thirty miles over the other—in all two hundred and twenty-one miles. The same shipment might be made by the Missouri Pacific railway, in which case the haul would be but twenty-six miles. Referring again to the maximum rate law for what may be assumed to be relatively fair rates, at

least in the judgment of the legislature which passed the act under consideration, we find that the rate for twenty-five miles, the rate nearest approximating that for the distance between Omaha and Plattsmouth by a direct line (as stated in the first illustration) is seventy-six cents per ton, while by the lines in fact traveled, had they been in fact exactly two hundred and twenty miles, the rate would be two dollars and twenty cents per ton, that is one dollar and forty-four cents in excess of what could have been charged over the shortest available route, and these are but fair illustrations of the practical results brought about by chapter 11, Laws of 1893, and apparently, that there may be no means of avoiding this result, this law forbids any charges to be made for transfer switching. Even the reasonableness of the charge for transporting over the short line the supreme court of the United States, as we have already seen, has held is a question for judicial investigation, requiring the process of law for its determination. If, as was held in *Chicago, M. & St. P. R. Co. v. Minnesota*, the establishment of an arbitrary rate which deprived the railroad company of its right to a judicial investigation by due process of law under the forms and with the machinery provided for the investigation judicially of the truth of the matter in controversy, and the substitution therefor as an absolute finality of the action of a commission not clothed with judicial functions or possessed of the machinery of a court of justice, was in conflict with the constitution of the United States, there is no escape from the conclusion that a law which, as a finality, establishes a rate dependent, not upon the length of a haul by the route chosen by the shipper of freight, but by the length of a much shorter route of which he refuses to avail himself, is open to the same objection. No argument can be made to sustain this law, which equally would not tend to sustain those under which the supreme court of the United States held invalid the rates established by commissioners in Min-

nesota, and other rates fixed in a similar manner in Texas. This law, in addition to the objections held sufficient as against the statutory regulations of rates in Minnesota and Texas, is subject to the criticism that no railroad company can know, in advance, for what compensation it may be required to haul freights over its line. There is, therefore, no way by which we can escape the logical result of these conditions authoritatively declared by the supreme court of the United States sufficient to vitiate other legislative enactments in which but a portion of the objectionable features of the statute under consideration was embodied. The attempt to establish rates of compensation, as was done in chapter 11, Laws, 1893, must therefore be held to be in violation of the provisions of the fourteenth amendment and therefore to be nugatory.

It is, however, insisted by the plaintiff in error that, independently of legislative establishment of rates, it lies within the power of courts to define what rate over connecting lines is reasonable, and to enforce its observance. This question, too, has received the attention of courts and always, we believe, with the result reached in the cases we shall now review.

In *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation Canal & Land Co.*, 45 Neb., 884, Judge POST, for this court, said: "It was at the consultation suggested that it is within the power of a court of equity to prescribe the conditions upon which one irrigating company may connect with the ditch of another; but that assertion rests, to say the least, upon doubtful grounds. Conceding irrigating companies as *quasi*-public corporations, to be subject to the strict obligations of common carriers, it does not follow that they may, by the courts, be compelled to enter into particular agreements or assume particular relations, however just and equitable, towards each other. That subject has recently engaged the attention of the supreme court of the United States, by

which the power to prescribe terms for the interchange of business by connecting carriers is declared to be rather legislative than judicial in character, notwithstanding the provisions of the interstate commerce act. (*Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S., 667; *Pullman Palace Car Co. v. Missouri P. R. Co.*, 115 U. S., 587; *Express Cases*, 117 U. S., 1; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.*, 41 Fed. Rep., 559. See, also, Beach, Private Corporations, 839; *Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep., 567.) Such of these citations as refer to cases determined by the supreme court of the United States we shall now consider at such length as shall be profitable.

In *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., supra*, Waite, C. J., delivering the opinion of the court, said: "A connection of roads may make a connection in business convenient and desirable, but the one does not necessarily carry with it the other." Later in this opinion he said that it was not the law that every railroad company which forces a connection of its road with that of another company has a right under the constitution of Colorado, or at the common law, to require the company with which it connected to do a connecting business at the junction, if it does a similar business with any other company under any other circumstances. This, he said, might be made the law by the legislative department of the government, but it did not follow as a necessary consequence from the constitutional right of a mechanical union of tracks, or from the said constitutional prohibition against undue or unreasonable discrimination in facilities.

In *Pullman Palace Car Co. v. Missouri P. R. Co., supra*, it was sought to compel the use of the cars of plaintiff over the line of the St. Louis, Iron Mountain & Southern Railway Company, though that company had been consolidated with the Missouri Pacific Railway Company. Waite, C. J., in the opinion delivered by him for the court in this case,

said: "The business [of the sleeping car company] is always done under special written contracts. These contracts must necessarily vary according to the special circumstances of each particular case. Certainly, it cannot be claimed that a court of chancery is competent to require these companies to enter into such a contract for the furnishing and hauling of the Pullman cars, as the court may deem reasonable. A mere statement of the proposition is sufficient to show that it is untenable."

In the *Express Cases, supra,* the circuit court had required by its decree that the railroad companies which were defendants should, as common carriers, afford each express company certain facilities for the transaction of its business as a common carrier, the character of such facilities to be the same as by virtue of a contract formerly in existence it had been the duty of each railroad company to provide. By this decree the rate of compensation to be paid had been fixed at not exceeding fifty per cent more than the railroad company's prescribed rate for the transportation of ordinary freight, and not greater than the railroad company would charge for the transportation of express matter on its own account, or for any other express or other corporation, or for private individuals, and a bond was required to secure such payment. The right of each party to apply for a modification of this decree under the rules in equity proceedings had been reserved by the decree itself as to the measure of compensation prescribed. In the opinion of a majority of the court, delivered by Waite, C. J., the following language was used: "The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts which established the duty of the railroad company upon the one side, and fixed the liability of the express company on the other, the court, in decreeing the carriage, was substantially compelled to make for the parties such a contract for the business as, in its

opinion, they ought to have made for themselves. Having found that the railroad company should furnish the express company with facilities for business, it had to define what these facilities must be, and it did so by declaring that they should be furnished to the same extent, and upon the same trains, that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. In this way, as it seems to us, 'the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves,' and that, we said in *Atchison, Topeka & Sante Fe Railroad Co. v. Denver & New Orleans Railroad Co.*, 110 U. S., 667, followed at this term in *Pullman Palace Car Co. v. Missouri Pacific Railway Co.*, 115 U. S., 587, could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but unless a duty has been created either by usage, or by contract, or by statute, the courts cannot be called on to give it effect."

The other citations in *Paxton & Hershey Irrigating Canal*

& Land Co. v. Farmers & Merchants Irrigation & Land Co., supra, need not be considered at length, for while inferior in authority, they follow the same line as do the cases above reviewed. The same doctrine was recognized in *Reagan v. Farmers Loan & Trust Co.,* 154 U. S., 362.

Among the cases cited by the plaintiff in error is *Texas Express Co. v. Texas & P. R. Co.,* 6 Fed. Rep., 437, determined in the circuit court of the United States for the northern district of Texas, in which case it was said: "If it is practicable to define express matter with reasonable certainty, and to fix by law maximum rates for its carriage, it is most clearly not within the province of the judicial department of the government to do this. When and how far it may become necessary or expedient to do so must be left to the legislature to determine and declare, and until the legislature does so provide, the parties hereto, and all others similarly circumstanced, must be remitted to their right and power to contract in reference to the compensation for such service, subject to the limitations placed upon defendants by their duties as exclusive public carriers on public highways, that their terms for carrying shall be reasonable and such as involve no unjust discrimination, to be determined in each particular case by the agreement of the parties in interest, and, in case of their failing to agree, to be determined by the proper court on full statement and proof of the particular case." The language of the latter part of the above quotation is relied upon by the attorney general to sustain the proposition that if the provisions of the statute cannot be upheld, this court may supply the deficiency, and, separated from its context, this part of the quotation, doubtless, tends strongly in that direction. This part of the quotation, however, is greatly qualified when we take into account that immediately preceding this portion favorable to the contention of the plaintiff in error it was said: "If it is practicable to define express matter with reasonable certainty, and to fix by law maximum rates for

its carriage, it is most clearly not within the province of the judicial department of the government to do this."

From this review of the federal decisions with reference to this subject-matter it is clear that it does not lie within the power of courts to formulate contracts whereby shall be regulated the rights and duties of parties concerned, even though each of such parties is a common carrier. The practical difficulties which in the *Express Cases* surrounded, and in the judgment of the supreme court of the United States rendered futile, the attempt of the circuit court to define the duties of the express companies on the one hand, and the railroad companies on the other, apply with still greater force to the case at bar. In the *Express Cases* there were on either side the proposed parties to a contract relation which was to exist for a considerable space of time in the future and all these parties were in court. Between themselves, they had formerly been able, without difficulty, to make a contract which the circuit court believed sufficiently furnished analogies for all the points to be adjusted. In the case at bar the only criterion furnished for the adjustment of rates is that no more shall be charged for such haul as, by the election of the shipper, shall be made necessary, than that it must not exceed the cost of shipment by the shortest route possible. In this case there was before the district court no party interested in shipments other than the carrier, the parties who it was assumed propose to ship were unnamed and unknown, and there was no attempt to suggest the points between which shipment should be made or the compensation therefor which should be established. If it was impossible for the circuit court in the *Express Cases* practically to solve the problem with which it was confronted, there can be no question as to the futility of every effort of this or any other court to formulate rules or rates in compliance with the uncertain requirements of section 2 of chapter 11 of the Laws of 1893. The district court, therefore, very properly declined attempting the per-

formance of this hopeless task. There has been suggested no method by which the act under consideration can be put into effect which has not already been considered, and in justice to the attorney general it is but fair to say that, to sustain the provisions of this act, he has advanced every available argument and consideration which in our opinion is even plausible. The judgment of the district court is

AFFIRMED.

GEORGE S. WILLIAMS V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 7929.

1. **Instructions:** EVIDENCE. An instruction which recites material evidence that is not before the jury in such a way as to imply that the judge trying the case understands that such evidence is in the record, is erroneous.

2. **Evidence:** INSTRUCTIONS. The effect of the evidence and the inferences deducible therefrom are for the jury; and for the court to instruct the jury that the evidence establishes a certain controverted fact in issue, is an unwarranted assumption of the functions of the jury.

3. **Homicide:** INSANITY: EVIDENCE: INSTRUCTIONS. Where, on the trial of a murder case in which the defense is temporary insanity, the court undertakes to detail in an instruction what evidence the jury may consider in determining whether the prisoner knew the killing was wrong, the court must impartially recite the material evidence offered both by the state and the prisoner to sustain their respective theories of the homicide.

4. ——: ——: ——: ——. It is prejudicial error for the court in such a case to group together in an instruction the important material facts put in evidence by the state as to the prisoner's sanity and omit all mention of the evidence produced by the prisoner tending to traverse that of the state.

ERROR to the district court for Jefferson county. Tried below before BUSH, J.

John Heasty and *W. H. Barnes*, for plaintiff in error:

The practice of giving instructions detailing the evidence and calling the attention of the jury to particular portions of the testimony, thus giving such testimony undue prominence, has been disapproved. (*City of Lincoln v. Beckman*, 23 Neb., 677; *Marion v. State*, 20 Neb., 233; *Long v. State*, 23 Neb., 33; *Markel v. Moudy*, 11 Neb., 213; *Burley v. Marsh*, 11 Neb., 291; *Kersenbrock v. Martin*, 12 Neb., 376.)

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and *E. H. Hinshaw, County Attorney*, for the state.

RAGAN, C.

In the district court of Jefferson county, George Williams was convicted of the crime of murder in the second degree for the killing of one Charles A. Smiley and sentenced to imprisonment in the penitentiary for thirteen years. Williams brings the judgment of the district court here for review.

Of the errors assigned and argued we shall notice only one. Williams' defense was in substance that at the time he committed the homicide he was temporarily insane, being then and there deeply intoxicated and in a state of frenzied excitement resulting from such intoxication, and a vile and opprobrious remark made concerning his wife by Smiley, and an assault and battery inflicted upon him by Smiley. The district court charged the jury as follows: "The court instructs the jury that if they believe from the evidence in this case beyond a reasonable doubt that the defendant did, upon the 20th day of August, 1894, have a quarrel with the deceased, and that deceased struck defendant and knocked him down; that defendant afterwards said that he would kill the deceased, and that he would get a gun and 'do him' before 12 o'clock; and that defendant did get

a loaded revolver, and follow and hunt up the deceased, and shoot and kill him; and thereafter stated that he had come down to kill the son-of-a-bitch, and hoped he had killed him; and when asked why he had killed the deceased pointed to a bruise or wound on his face where the deceased had struck him, and said, 'See what he done to me;' and when asked what he had killed deceased with, said, 'A brand-new 38, and a dam'd good one;' and that he had gone down to kill him, and hoped he had; and told his wife that he had got the revolver when she was at supper,—then the jury have a right to consider all these facts in determining whether the defendant had knowledge that the act of shooting and killing Charles A. Smiley was wrong." This instruction was prejudicially erroneous for several reasons:

1. The court told the jury that if they found from the evidence that Williams said that he would "get a gun and do him before 12 o'clock," etc. The record contains no evidence of any such remark made by the prisoner. The jury could not find a fact outside the evidence, and the injustice to the prisoner in this part of the instruction was that the jury, without inquiry or reflection, were likely to take it for granted that the prisoner had made the threat because the court in its instruction assumed that he had. An instruction which recites material evidence that is not before the jury in such a way as to imply that the judge trying the case understands that such evidence is in the record, is erroneous. (*Frame v. Badger*, 79 Ill., 441.) If by an instruction a question material to the issue, and without any evidence to support it, be submitted to the jury, it is error. (*Dunbier v. Day*, 12 Neb., 596. See, also, for the same principle, *McCready v. Phillips*, 44 Neb., 790.)

2. Again, in the instruction the court said to the jury: "If you believe from the evidence that the defendant did get a loaded revolver and follow and hunt up the deceased," etc. No such fact was testified to in such language. We assume, for the purposes of this case, that such a fact was

inferable from the evidence, but who was to draw such an inference? The effect of the evidence and the inferences deducible therefrom were for the jury, not for the judge. By this statement the court assumed that the evidence warranted a certain inference, and in doing so he invaded the province of the jury. (*Prairie State Loan & Trust Co. v. Doig*, 70 Ill., 52; 2 Thompson, Trials, sec. 2290; *Omaha Fair & Exposition Association v. Missouri P. R. Co.*, 42 Neb., 105; *Terry v. Beatrice Starch Co.*, 43 Neb., 866.)

3. But the most serious defect in the instruction consists in this: In the instruction the court grouped together the important material facts put in evidence by the state to sustain its theory of the homicide and utterly ignored the evidence produced by the prisoner which tended to traverse the theory of the state. The evidence on behalf of the prisoner tended to show that at the time of the homicide he was suffering from a disease of the heart which rendered him easily excited; that he was deeply intoxicated; that the deceased had made a remark to him concerning his wife of the vilest and most opprobrious character; that he had assaulted and knocked the prisoner down, and that all these things had conduced and contributed to put him into an excited and frenzied state of mind to such an extent that he had lost control of himself and consciousness of his actions. We do not say that the evidence established this theory of the prisoner, but we do say that it tended in that direction, and whether this evidence warranted the conclusion which the prisoner claimed for it, was for the jury. It is to be observed that when the court comes to submit to the jury the question as to whether the prisoner at the time he shot Smiley knew that the killing was wrong, ignores all the evidence of the prisoner on the subject and picks out and holds up for the consideration of the jury only the claims of the state. After reciting the material facts proved by the state, the court said to the jury: "You have a right to consider all these facts in de-

termining whether the defendant had knowledge that the act of shooting and killing Charles A. Smiley was wrong." The jury not only had the right to consider all the facts in evidence detailed by the court, but it had the right, and it was its sworn duty, to weigh and consider all the facts testified to by the defense in support of the theory of the prisoner. By this instruction the district judge practically said to the jury: "You consider the evidence that I have detailed to you and omit all consideration of evidence not detailed." When the court undertook to detail in an instruction what evidence the jury might consider in determining whether the prisoner knew at the time that the killing of Smiley was wrong, it was its duty to hold the scales of justice equally balanced, to give impartially to the jury the material evidence offered by the state to sustain its theory and the material evidence offered by the prisoner to sustain his theory. (*Markel v. Moudy*, 11 Neb., 213; *Burley v. Marsh*, 11 Neb., 291; *Kersenbrock v. Martin*, 12 Neb., 374; *Marion v. State*, 20 Neb., 233; *Long v. State*, 23 Neb., 33; *City of Lincoln v. Beckman*, 23 Neb., 677; *Carruth v. Harris*, 41 Neb., 789; *People v. Clarke*, 62 N. W. Rep. [Mich.], 1117.) In this last case it was said that an instruction in which the strong points of the evidence for the state were brought out while the evidence for the defendant was not so emphasized, and certain testimony which tended to negative material statements of the state's witness was not even referred to, was prejudicial to the defendant.

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

REVERSED AND REMANDED.

EBENEZER HARDS V. PLATTE VALLEY IMPROVEMENT COMPANY.

FILED JANUARY 9, 1896. No. 7835.

1. **Corporations:** SUBSCRIPTIONS FOR STOCK The mere mismanagement of the affairs of a corporation will not release a stockholder from his obligation to pay for the stock subscribed by him.

2. **Trial:** DIRECTING VERDICT. It is the duty of a trial court to direct a verdict for the plaintiff if the evidence would not support a finding for the defendant.

3. ———: ———: EVIDENCE. The evidence examined, and *held* to justify an instruction of the district court to the jury to return a verdict for the plaintiff.

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

W. R. Watson and *John Patterson*, for plaintiff in error.

J. W. Sparks and *A. Ewing*, *contra*.

RAGAN, C.

Ebenezer Hards subscribed for $100 of the capital stock of the Platte Valley Improvement Company, a corporation organized under the laws of the state of Nebraska for the purpose of erecting and operating a hall for the use of societies, organized meetings, etc. The domicile of the corporation was Central City, in Merrick county. Of the amount subscribed by him, Hards paid $15, and this suit was brought by the corporation against him to recover the balance. At the close of the evidence the jury, in obedience to an instruction of the district court, returned a verdict for the corporation, and to reverse the judgment rendered thereon Hards has prosecuted to this court a petition in error.

The assignments of error argued may all be included under one head, viz.: That the verdict and judgment are not supported by sufficient evidence. One of the defenses interposed by Hards to the action in the court below was that the promoters of the corporation represented to him that if he would subscribe for $100 of the capital stock of the corporation, that its entire authorized capital stock of $4,000 would then have been subscribed for by good, lawful, solvent, and good-faith subscribers; that, relying upon these representations, he subscribed for the $100 of capital stock, and that such representations were false when made, and that the full amount of the authorized capital stock of the corporation, including his subscription, was not then taken and had never been taken. We find in the briefs of counsel a copy of a written opinion filed in the case by the district judge who tried the case. In this opinion the district court, speaking to this defense of the plaintiff in error, said: "I assume that the pleading is faultless, and proceed to inquire whether the defendant has made a case on the evidence. The burden of proof is on him. He must produce evidence tending in some degree to sustain the allegations of his answer or else fail in his defense. He says Stitzer, a promoter of the corporation who procured Hards' subscription, told him there were forty shares taken by good, responsible, *bona fide* subscribers. This is the important representation. If it was made and proved to be false as to the number of subscribers, their responsibility or good faith, there can be no recovery in this action. Whether the subscribers were good or not is immaterial, unless the word is used as synonymous with responsible, about which there may be doubt. It is conclusively shown that there were fifty-three shares of the stock of this corporation actually subscribed, and there is no evidence tending to show there was not at least forty shares taken by solvent *bona fide* subscribers." With this disposition of the defense under consideration made by the district court

we entirely agree, after an examination of the evidence in the record. Another defense interposed to the action by Hards was that he was induced to make the subscription sued upon because of representations made to him by the promoters of the corporation that it had obtained a lease of certain real estate in Central City from one Brinninger & Hostetter for ninety-nine years, and that this representation was false. We have been unable to find any evidence in the record which tends to sustain this defense, and upon looking into the opinion filed in the case by the district court we find his views as to this defense expressed as follows: "The representations, with reference to the lease from Brinninger & Hostetter, are, I am satisfied, well pleaded. But they are not, as it seems to me, sustained by a scintilla of proof." Another defense interposed by Hards was that some of the subscribers to the capital stock of the corporation had been induced to make such subscriptions upon representations made to them by the promoters that the capital stock of the corporation was to be $6,000.

Recurring again to the opinion of the district court filed in the case we quote with approval what he says as to this defense: "But the defendant insists that some of these shares were taken in view of an increased capitalization and therefore should not be counted. It is perfectly clear there was no change in the capital stock. One was in contemplation by some of the members, and it is true that some of the shareholders may have become such upon the supposition that the capital stock was $6,000. But they make no complaint; they have not repudiated their connection with the company. Besides the defendant is not their chosen champion. He cannot strengthen his defense by exploiting their grievances. The fact remains that this corporation has outstanding fifty-three shares of its stock, and the defendant has not produced evidence tending to show that there are less than forty of such shares in the

hands of *bona fide* and responsible subscribers." Still another defense interposed by Hards was that the corporation or its managing officers had permitted the persons, of whom the corporation leased the real estate on which was, or was to be, erected the corporation's building, to incumber such real estate with a mortgage of $2,000. This averment, if true, constituted no defense to the action, as the mismanagement of the affairs of a corporation will not release a stockholder from his obligation to pay for the stock subscribed by him. (*Chetlain v. Republic Life Ins. Co.*, 86 Ill., 220.) And once more we quote with approval that part of the opinion of the district court directed to this defense: "The defendant complains of the mismanagement of the affairs of the corporation, but that has not been held to release the stockholder from his contract to pay for his stock. When the defendant became a stockholder in the plaintiff corporation he became entitled to all the benefits, and subject to all the burdens incident to that relation. Had there been gains, he would have shared in them; and since there have been losses, he should, in common justice, help to bear them. If officers of a corporation act *ultra vires* to the prejudice of the stockholders, the latter, as the owners of the corporate property and franchises, may by a prompt intervention annul their acts and they may effectively invoke the restraining powers of the court to keep them within the scope of their delegated authority. Mismanagement of corporate officers, whether known or unknown to stockholders, will not operate to cancel the obligations of the latter to the corporation. The stockholders bear the same relation substantially to the corporate officers that the *cestui que trust* bears to the trustee, and has for the protection of his interest in the corporation the same remedies that are provided for the beneficiary in a trust estate. To these remedies he must resort, or bear the consequences of his omission so to do." If the jury had returned a verdict in favor of the plaintiff in error, it would have lacked evidence to support

it. It would have been the duty of the district court to have set it aside, and therefore the court did not err in directing a verdict for the corporation, and its judgment is

AFFIRMED.

WILLIAM BARTRAM ET AL., APPELLANTS, V. A. J. SHERMAN, APPELLEE.

FILED JANUARY 9, 1896. No. 5866.

1. **Final Order:** REVIEW. An order to be final and reviewable on error or appeal must dispose of the merits of the case and leave nothing for the further judicial determination of the court.
2. **Order Dissolving Temporary Injunction:** REVIEW. No provision of the Code makes an order dissolving or modifying a temporary injunction reviewable except in connection with the final judgment rendered in the action of which the temporary injunction is an incident.

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

Griggs, Rinaker & Bibb, for appellants.

Alfred Hazlett and *Fulton Jack, contra.*

RAGAN, C.

William Bartram and Abbie Smith brought this suit in equity against A. J. Sherman, a road overseer, in the district court of Gage county. The object of the action was to enjoin the road overseer from tearing down certain fences and hedges which the plaintiffs alleged stood upon their land, and which they alleged the road overseer was threatening and about to tear down claiming they obstructed a public highway. The prayer of the petition of

the plaintiffs below was for a temporary order of injunction against the road overseer restraining him from interfering with the hedges and fences pending the hearing of the case, and that on a final hearing such injunction might be made perpetual. An answer and reply were filed and the case heard on oral evidence. It would seem from the record, though such fact does not affirmatively appear, that a temporary order of injunction was granted on the filing of the petition. After hearing the case the district court entered a decree as follows: "It is therefore considered by the court that the injunction heretofore granted in this cause be and the same is hereby dismissed." The plaintiffs below have appealed. This decree of the district court is not such a final order or judgment as disposes of the merits of the case and invests this court with jurisdiction to review it. By the decree of the district court the action brought by the appellants was not dismissed, but only the temporary order of injunction granted on the filing of the petition was dissolved.

By sections 679, 680, and 681 of the Code of Civil Procedure it is provided, in effect, that if a temporary order of injunction be dissolved or modified, it may still be kept in force by the party applying therefor on his giving a supersedeas bond for that purpose until the case is heard and finally determined. But no provision of the Code makes the order of a district court dissolving or modifying a temporary order of injunction reviewable except in connection with the final judgment rendered in the action of which the temporary injunction is an incident. In *Scofield v. State Nat. Bank of Lincoln*, 8 Neb., 16, it was held: "An order of a judge of a district court dissolving a temporary injunction is not final, but interlocutory merely, and insufficient to support a petition in error before final judgment in the action." In *Smith v. Sahler*, 1 Neb., 310, it was held: "An order to be final and subject to review in an appellate court upon appeal or petition in error must dispose of the

whole merits of the case and leave nothing for the further judicial determination of the court." In *Browne v. Edwards & McCullough Lumber Co.*, 44 Neb., 361, the decree was as follows: "The court, being fully advised in the premises, does sustain said motion, and said injunction is hereby vacated and dismissed." HARRISON, J., said: "There is nothing contained in the entry which can in the least be construed as alluding to the main case, or as an attempt to dispose of it in any manner or to any degree, * * * and we conclude, so far as the record discloses, there was and has been no final disposition of the case in which the temporary injunction was granted." We cannot entertain this appeal, because no final decree has been entered by the district court disposing of the main case on its merits, and because the decree of the district court dissolving or modifying the temporary order of injunction is not reviewable. The appeal, therefore, must be, and is, dismissed.

APPEAL DISMISSED.

ALBERT T. NICHOLS V. STATE OF NEBRASKA.

FILED JANUARY 9, 1896. No. 7914.

1. **Banks and Banking:** EVIDENCE. The law presumes that the relation existing between a bank and its customer is that of ordinary debtor and creditor.

2. ———: DEPOSITS: EVIDENCE. Whether a deposit made in a bank by its customer is a general or special one, is a question of fact to be determined from the intention of the parties; but in the absence of evidence the law presumes such a deposit a general one.

3. ———: ———: OVERDRAFTS. Where a customer of a bank, who has overdrawn and thus stands indebted in open account to the bank, makes a general deposit therein, the presumption of law is that such deposit was made and received toward the payment of such overdraft.

4. ———: INSOLVENCY: PENALTY FOR RECEIVING DEPOSITS. The object of the enactment of sections 22 and 23, chapter 8, Compiled Statutes, was to prevent an insolvent banking association from borrowing money,—that is, receiving money on deposit and becoming debtor therefor; but said sections should not be so construed as to render an officer of a banking association guilty of a felony for permitting a debtor of the association to pay his debts thereto, even though the association is at the time, to the officer's knowledge, insolvent.

5. **Unlawfully Receiving Deposits:** BANKS AND BANKING. EVIDENCE. N. was indicted for receiving a deposit in a bank of which he was cashier, knowing at the time that the bank was insolvent. The state, to sustain the indictment, offered evidence which tended to show the existence of the bank; that N. was its cashier; that it was insolvent to his knowledge on the 18th of February, 1895, and that on said date one M. deposited in said bank $11. N. then offered to prove that when M. made such deposit he was overdrawn at the bank $15.30. The court excluded the offer. *Held*, That the evidence offered tended to show that the deposit made by M. and accepted by N. was intended by the parties to apply towards the payment of M.'s debt to the bank, and that so long as N. remained lawfully in charge of the bank as its cashier, he had the right to accept money in payment of any debt owing by any person to the bank; and that, therefore, the court erred in excluding the evidence offered.

ERROR to the district court for Sherman county. Tried below before SINCLAIR, J.

Wall & Burrows and *H. M. Sullivan*, for plaintiff in error.

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

RAGAN, C.

In the district court of Sherman county Albert T. Nichols was convicted of the crime of receiving a deposit in a bank of which he was cashier, the bank then and there being to his knowledge insolvent, and sentenced to a term in

the penitentiary. He brings the judgment of the district court here for review. There are numerous errors assigned and argued here for the reversal of this judgment, of which we shall notice only one. Section 22, chapter 8, Compiled Statutes, provides: "No bank, corporation, partnership, firm, or individual transacting a banking business in this state shall accept or receive on deposit for any purpose any money, bank bills, United States treasury notes, or currency, or other notes, bills, checks, drafts, credits, or currency, when such bank, corporation, partnership, firm, or individual is insolvent." Section 23 provides: "If any bank, corporation, partnership, firm, or individual transacting a banking business in this state shall receive or accept on deposit any such deposits as are named and set forth in section twenty-two (22), when said bank, corporation, partnership, firm or individual is insolvent, any officer, director, cashier, manager, member of the partnership or firm, individual or managing party thereof, who shall knowingly receive or accept, be accessory to, or permit or connive at the receiving or accepting on deposit therein or thereby any such deposits as aforesaid, shall be guilty of a felony," etc. The information charged that Nichols, being the cashier of the People's State Bank of Litchfield, a banking corporation organized under the laws of the state and doing business in said Sherman county, on the 18th day of February, 1895, received a money deposit of $11 from one Henry Miller, the said People's State Bank of Litchfield being then and there, to the knowledge of said Nichols, insolvent. On the trial the state produced evidence showing the existence of the banking corporation; that Nichols was cashier thereof; and that on the 18th of February, 1895, one Henry Miller made a general deposit in said bank of the sum of $11. And the state also offered evidence which tended to show that the said bank was on that date, to the knowledge of the said Nichols, insolvent. The record contains the following:

"JULY 13, 1895, 8 o'clock A. M.

"Argument to jury about to be commenced by County Attorney J. W. Long for the prosecution. Defendant here asks leave to withdraw his rest and to put on the witness stand O. S. McCurrie, by whom he can show that on the 16th day of February, 1895, the account of Henry Miller, the prosecuting witness herein, in the People's State Bank of Litchfield, Nebraska, was overdrawn $15.30, and that no deposit was made by him on the 17th; and that the first deposit made or money brought in to the bank by him after the 16th was the $11 charged in the information in this case; and at the time it was brought in, the said Henry Miller was overdrawn in his account with said bank in the sum of $15.30."

"The counsel for the state object, as immaterial, irrelevant, incompetent, and too late at this time."

"The court: The request is denied for the reason that the fact sought to be shown is immaterial, irrelevant, incompetent, and not because it is too late. Defendant excepts."

The evidence shows that Miller was a customer of the bank, and this being so, the relation which the law presumes existed between them was that of debtor and creditor. (*Marine Bank v. Fulton Bank*, 2 Wall. [U. S.], 252; *Thompson v. Riggs*, 5 Wall. [U. S.], 663; *Bank of the Republic v. Millard*, 10 Wall. [U. S.], 152.) The evidence tends to show that the deposit made by Miller on the 18th was a general one. Whether the deposit was a general or special one was of course a question of fact to be determined from the intention of the parties, but a deposit is presumed to be a general one in the absence of evidence to the contrary. (*Brahm v. Adkins*, 77 Ill., 263; *In re Franklin Bank*, 1 Paige Ch. [N. Y.], 249; 1 Morse, Banks & Banking, sec. 186.) Since the relation existing between Miller and the bank was that of debtor and creditor, and since the offer was to show that Miller was overdrawn at

the bank—that is, that he was indebted to the bank in open account—in the sum of $15.30 when he made the deposit of $11 on the 18th of February, the presumption of law is, in the absence of evidence to the contrary, that he made this deposit in payment, so far as it would reach, of his debt or overdraft to the bank. (*Hansen v. Kirtley*, 11 Ia., 565; *Poucher v. Scott*, 98 N. Y., 422.) If the bank on the date that Miller made his deposit was insolvent, and if Nichols knew that fact, yet so long as he remained lawfully in charge of the bank, he had the right as its cashier to accept money in payment of any debt owing by any person to the bank; at least by so doing he did not violate the statute just quoted. The deposit made by Miller in the bank on the 18th was in the nature of a loan to the bank. (*State v. Keim*, 8 Neb., 63; *First Nat. Bank of South Bend, Indiana, v. Gandy*, 11 Neb., 431; *State v. Bartley*, 39 Neb., 353.) And had Miller not been indebted to the bank in a sum equal to the deposit he made, then Nichols, knowing the insolvent condition of the bank and taking the deposit, would doubtless have violated the statute; for the very object of this enactment was to prevent an insolvent banking association from borrowing money, that is, receiving money on deposit and becoming a debtor to a depositor therefor; but we do not think that the act should be so construed as to make an officer of a banking association guilty of a felony for permitting a debtor of the association to pay his debt thereto, even though the association is at the time, to the officer's knowledge, insolvent. To give it this construction is to obey the letter of the law and to violate its spirit. Under the evidence in the record and that offered by Nichols and excluded by the court, the $11 received by Nichols from Miller on the 18th of February, and put to Miller's credit on the books of the bank, was not an acceptance by Nichols as cashier of that amount of money to be held on deposit for Miller within the meaning of the statute quoted, but was an acceptance of that amount

of money by Nichols from Miller in payment of the latter's debt in open account to the bank. The district court erred in excluding the evidence offered. Its judgment is reversed and the cause remanded with instructions to grant Nichols a new trial.

REVERSED AND REMANDED.

WILLIAM DEERING & COMPANY v. JOHN A. WISHERD.

FILED JANUARY 9, 1896. No. 5833.

1. **Sheriffs and Constables:** POSSESSION OF ATTACHED PROPERTY: DAMAGES. It is the duty of an officer who seizes personal property on a writ of attachment to take such property into his actual possession, and to keep it under his control and have it forthcoming to answer the judgment of the court; and for a neglect of this duty such officer and his sureties are liable to the party injured thereby.

2. ———: ———: COSTS. Where an officer seizes the property of a defendant on a writ of attachment he may lawfully return as costs in the attachment proceeding all the actual, necessary, and reasonable charges and expenses which he has incurred in the taking possession, removal, and preservation of the attached property.

3. **Attachment:** COSTS. On the discharge of an attachment the costs and expenses incident thereto should ordinarily be taxed to the party suing out the attachment.

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

Thomas D. Crane, for plaintiff in error:

The authority to tax costs is strictly statutory. Every item entered against a party must find its warrant in some statutory provision. There is no statutory authority permitting an officer to return as fees, or a court to tax as costs, anything for the care or custody of attached property upon

dissolution of the attachment. (*Reed v. Smith*, 25 Neb., 64; *Genesee County Savings Bank v. Ottawa Circuit Judge*, 54 Mich., 305; *Stanton County v. Madison County*, 10 Neb., 308; *Cramer v. Oppenstein*, 27 Pac. Rep. [Colo.], 713.)

Allen, Reed & Ellis, contra.

RAGAN, C.

William Deering & Co. sued John A. Wisherd, at law, in the district court of Madison county and at the same time caused an attachment to be issued for the seizure of Wisherd's property. On the 26th day of September, 1890, the sheriff, by virtue of the writ of attachment, seized and took into his possession the following property belonging to Wisherd: Two stacks of hay, twenty-nine head of hogs, shoats, and pigs, three colts, one team of bay mares, five head of horses and ponies, eight head of cows, heifers, and calves, one bull, two hundred acres of corn—standing in the field—three listers, one tricycle plow, two wagons, one hay rack, one set of harness. This property the sheriff retained in his possession until the 22d day of April, 1891, on which date he returned it to Wisherd, the court having on said date dissolved the attachment. The sheriff, on his return to the writ of attachment, charged in the attachment suit the following bill of costs:

Service and return	$0 50
Copy	25
Mileage	1 50
Making levy	1 00
Calling appraisers	50
Swearing the same	50
Fees of the same	4 00
Making appraisement	1 00
Taking care of and feeding horses and cattle from Sep. 26, 1890, to April 22, '91, 209 days at $2.00 per day	418 00

Husking 200 acres of corn, estimated at 2,000 bushels, at .05 per bushel	$100 00
7 trips to Wisherd's ranch, 28 miles	2 80
Expenses to Omaha and return	20 00
Total	$550 05
Rec'd of plaintiff's attorney	2 00
Balance	$548 05

The district court, on motion of Wisherd, made an order taxing these costs to Deering & Co., and to reverse this order the latter have prosecuted to this court a petition in error.

1. It is first argued that the finding and judgment of the district court are not supported by sufficient evidence. This contention is especially directed to the items of $418 and $100, charged by the sheriff for taking care of the live stock and husking the standing corn. The evidence is undisputed that the sheriff caused the standing corn to be husked, and that he employed a man and put him in charge of all the property levied upon the day it was seized and kept him in charge of the same until the attachment was discharged. Whether the expenses incurred by the sheriff in feeding and taking care of the live stock and the prices paid by him for husking the corn were reasonable charges and expenditures was a question submitted to the court on conflicting evidence; but such evidence supports the finding of the court.

2. Counsel for plaintiff in error next says that "there is no statutory authority permitting an officer to return as fees or a court to tax as costs anything for the care or custody of attached property; but counsel have overlooked the statute. Section 26, chapter 28, Compiled Statutes, is as follows: "That in all cases where writs of attachment against property are issued the officers to whom such writ is directed for service shall be empowered to demand in

advance and receive before said service the regular fees for service of papers and in addition thereto a sum of money sufficient to defray the expenses incurred for work and labor in the taking possession of or removal of the property ordered attached and for the safe keeping thereof, said sum to be taxed in the costs." If the sheriff might lawfully demand of Deering & Co., in advance, a sum of money sufficient to defray the expense of taking possession of and preserving the property attached, it logically follows that he might lawfully return as costs in the attachment suit all actual necessary and reasonable charges and expenses which he had incurred in the taking possession, removal, and preservation of the attached property. In the case at bar, as already stated, a part of the attached property was 200 acres of standing corn. The district court was of opinion, and we agree with him, that the sheriff kept within the line of his duty when he caused this corn to be husked and thus preserved. The sheriff hired a man to husk this corn, and the preponderance of the evidence is with the finding of the court that the price paid was a fair, reasonable, and usual price for husking such a crop as this was. The sheriff kept the attached stock on the ranch where it was when attached, and hired a man at the rate of $2 per day to look after this stock, preserve it, keep it together and feed it, and the court found, and the evidence supports his finding, that this was a necessary and reasonable precaution on the part of the sheriff, and that the price he paid the man hired was a reasonable and fair compensation. It is the duty of an officer who seizes personal property under an execution or a writ of attachment to take such property into his actual possession, and to keep it under his control and have it forthcoming to answer the judgment of the court, and for a neglect of this duty such officer and his sureties would be liable to the party injured thereby. It would be an intolerable hardship for the law to require of an officer, when he should seize personal property in obedi-

ence to a writ of attachment, to preserve it at his peril and at the same time deny to him a reimbursement of the actual necessary and reasonable expenses incurred in performing his duties. It was to prevent just such an injustice that the legislature enacted the statute quoted above. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. GEORGE HOCKNELL, V. GEORGE W. ROPER ET AL.

FILED JANUARY 16, 1895.* No. 7387.

1. **Relocation of County Seat:** CONSTRUCTION OF STATUTE. Section 1, article 3, chapter 17, Compiled Statutes, 1893, construed, and *held*, (1) that within the meaning of this statute a county seat shall not be relocated in any place unless three-fifths of all the electors of the county shall express their will to that effect by their votes at an election held for that purpose; (2) that the law presumes when such an election is held all the electors of the county vote at such election.

2. ———: ELECTIONS: MANDAMUS. In a *mandamus* proceeding to compel the officers of Red Willow county to remove their offices to, and perform the duties of their office at, the city of McCook the application alleged: "That on the 1st of August, 1892, a special election was held in said county for the relocation of the county seat thereof; that the county seat at that time and for more than five years prior thereto had been located at the city of Indianola; that neither previous to nor since said date had any election been held in said county for the relocation of the county seat thereof; that the canvass of the votes cast at such election showed the following results: Votes in favor of Indianola, 867; votes in favor of McCook, 1,339; rejected ballots, 1; blank ballots, 3; ballots written for McCook and not counted, 2; ballots not accounted for, 25; total number of names of electors on poll-books, 2,237." *Held*, (1) That the twenty-five ballots "not accounted for" constituted a part of the "vote cast" at

* Publication withheld pending rehearing. See 46 Neb., 730.

the election, within the meaning of the statute; (2) that the law presumes that every elector whose name appears upon the poll-books was present and voted at the election; (3) that in order for the result of the election to locate the county seat at McCook three-fifths of 2,237 votes must have been cast in favor of that city; (4) that as the application failed to show such fact it did not state a cause of action.

3. **Elections:** RESULT. *State v. Bechel*, 22 Neb., 158, reaffirmed.

ORIGINAL application for *mandamus* to compel the county officers of Red Willow county to remove their offices from Indianola to McCook. *Writ denied.*

Marquett, Deweese & Hall, A. J. Rittenhouse, and *W. S. Morlan,* for relator.

S. R. Smith, W. R. Starr, H. W. Keyes, Reese & Gilkeson, and *Sidney Dodge, contra.*

RAGAN, C.

This is an application for a peremptory writ of *mandamus* to compel the respondents, who are officers of Red Willow county, to forthwith remove their offices from the city of Indianola to the city of McCook, in said county, and to hold their offices and perform their respective duties as such officers at said city of McCook. It is alleged in the petition or application that on the 1st of August, 1892, a special election was held in said county for the relocation of the county seat thereof; that the only places voted for at said election were the city of McCook and the city of Indianola; that the county seat of Red Willow county was at the time of holding said election, and for more than five years prior to that time had been, located in the city of Indianola; and that neither previous to nor since August 1, 1892, had any election been held in said Red Willow county for the relocation of the county seat thereof. The application further alleges that at said special election there were cast for the relocation of the county seat of said

county 1,341 votes in favor of relocating the county seat at the city of McCook, and 867 votes in favor of relocating said county seat at said city of Indianola. The application further alleges: "At said election more than three-fifths of all the votes cast were for the relocation of the county seat of said county at said city of McCook. On the 4th and 5th days of August, 1892, said votes were duly canvassed. A true copy of the canvass of said votes which was duly published or declared and the return of the canvassing board of the votes cast at said election is as follows: For the relocation of the county seat—At Indianola, 867 votes; at McCook, 1,339 votes; ballots not reported or accounted for, 25; ballots rejected, 1; blank ballots, 3; ballots written for McCook and not counted, 2; total vote, 2,237."

Does this petition or application state facts sufficient to constitute a cause of action? It will be observed from the quotations made above from the application that at the special election for the purpose of relocating the county seat there were cast at said election 2,237 votes. Section 1, article 3, chapter 17, Compiled Statutes, 1893, provides that where an election is held for the purpose of relocating the county seat of a county, "Any place receiving three-fifths of all the votes cast shall become and remain * * the county seat of said county." The theory of the relator seems to be that as Indianola and McCook together received 2,206 votes, and that more than three-fifths of these were cast in favor of McCook, therefore the result of the election was to relocate the county seat at the latter city. Is this the correct construction of the statute just quoted; or, does the statute mean that the county seat shall be declared relocated at that place which receives three-fifths of all the votes cast at the election held for the purpose of relocating the county seat?

Section 5, article 10, of the constitution provides: "The legislature shall provide by general law for township or-

ganization, under which any county may organize whenever a majority of the legal voters of such county voting at any general election shall so determine." A proposition to adopt township organization was submitted to the voters of Lancaster county at the November, 1877, election. At the election held at that time there were cast 2,451 votes; 952 were cast in favor of, and 601 votes were cast against, the proposition. The county commissioners refused to complete township organization as provided by the law, and application was made to this court for a peremptory writ of *mandamus* to compel the county commissioners of Lancaster county to complete township organization in said county by dividing the county into towns and appointing town officers, etc.; and this court, construing the constitutional provision quoted above, held that in order to adopt township organization a majority of all the legal voters of the county voting at the election must be recorded in favor of township organization. (See *State v. County Commissioners of Lancaster County*, 6 Neb., 474.)

Section 2 of article 11 of the constitution of the state, entitled "Miscellaneous Corporations," provides: "No such general law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town or incorporated village without first requiring the consent of a majority of the electors thereof." Section 4, article 7, chapter 72, Compiled Statutes, provides that the question of the consent of a majority of the electors of any municipality to the construction and operation of a street railroad in its limits should be determined by submitting the question to the electors of such municipality; and by section 5 of said article it was also provided that such election should be held in the same manner and at the same places as the general city elections, and the returns should be canvassed by the council of said city and the result declared; "and if a majority of the votes cast at such election shall be in favor of the constructing

and operating such proposed street railroad, the council shall cause the city clerk to make out a certificate of the result, stating that the consent of a majority of the electors of such city has been given to the constructing and operating of such railroad." (Session Laws, 1877, p. 136, sec. 5.) The Omaha & South Omaha Street Railroad Company applied to the electors of the city of Omaha for consent to construct and operate a street railroad in the streets of said city. The question as to whether the electors of said city would consent to such request of the street railroad company was submitted to and voted upon by the electors of said city at the general election held therein on the 3d of May, 1887. There were 8,146 votes cast at such general election. On the question of consent to the street railroad company to build and operate its road in the streets there were cast 1,650 votes, of which 1,470 were in the affirmative and 180 in the negative. The result of the election having been certified to the city council, that body refused to cause the clerk of the city to certify to the street railroad company the necessary consent for it to operate and build its street railway in the streets thereof, but on the contrary declared that the consent of the electors of the city that the street railroad company might build and operate its road had not been given. The street railroad company then made application to this court for a peremptory writ of *mandamus* to compel the city council and city clerk of the city of Omaha to make out a certificate of the result of the election, stating that the consent of the majority of the electors of said city had been given to the street railroad company to construct and operate its street railway in the streets of said city; and this court, construing said section 5 quoted above, held that as the majority of all the votes cast at the election, or more than one-half of 8,146 votes, were not cast in favor of the street railway company, the result of the election did not confer the consent of the electors of the city of Omaha upon the street railway company to construct and operate its

road in the streets of said city. (See *State v. Bechel*, 22 Neb., 158.) This case is decisive of the question at bar. Here the application shows that at the election held for the purpose of relocating the county seat of Red Willow county there were cast at such election 2,237 votes, and in order for the result of this election to relocate the county seat at McCook three-fifths of all the votes cast at the election, or three-fifths of 2,237 votes, must have been cast in favor of McCook. The meaning of the law is that a county seat of a county shall not be relocated at any place unless three-fifths of all the electors of the county shall express their will to that effect by their votes at an election held for that purpose; and the law presumes that when such an election is held that all the electors of the county vote at such election. The votes cast for Indianola and for McCook, the three blank ballots cast, the one ballot rejected, and the two ballots written for McCook and not counted do not constitute the entire vote cast. There were on the poll-books of the various voting places recorded as voting the names of 2,237 electors. The votes of all these electors are accounted for except twenty-five; but as the twenty-five electors registered as voting, we must presume they voted either blank ballots or for some place other than either McCook or Indianola. Those ballots, though unaccounted for, constitute a part of the whole vote cast, within the meaning of the statute; in other words, a name registered on the poll-book is a vote cast. The law requires the clerks of an election to enter on the poll-books the name of each elector at the time he votes. We cannot presume that the clerks of this election entered upon the poll-books the names of twenty-five electors who in fact were not present and did not vote. On the contrary, we must presume that every elector whose name appears upon the poll-books was present and voted at the election. (*Slingerland v. Norton*, 61 N. W. Rep. [Minn.], 322.) The writ is denied and the application dismissed.

WRIT DENIED.

STATE OF NEBRASKA, EX REL. GEORGE HOCKNELL, V. GEORGE W. ROPER ET AL.

FILED JANUARY 9, 1896. No. 7387.

1. **Relocation of County Seat:** ELECTIONS: FRAUD: MANDAMUS. On an application for a *mandamus* to compel the removal of a county seat in pursuance of the declared result of a canvass of the vote on the question of relocation, the court cannot go behind the returns and investigate issues of fraud and illegality in the manner of conducting the election.

2. ———: ———: ———: PLEADING. An answer in such a case tendering such issues presents no defense.

3. ———: ———: MANDAMUS. In an appropriate case the court will by *mandamus* enforce the *prima facie* right established by the canvass, but it will not determine the ultimate right.

REHEARING of original application for *mandamus* to compel the county officers of Red Willow county to remove their offices from Indianola to McCook. For former opinion, see 46 Neb., 724. Heard on motion of relator to strike out portions of the answers. The issues are stated by the commissioner. *Motion sustained.*

J. W. Deweese, A. J. Rittenhouse, and *W. S. Morlan,* for relator:

The material matters set forth in the answers which the relator has moved to strike out involve the decision of a political question, and may not be tried in a court upon which jurisdiction has not been conferred by the legislature. (*Wright v. Fawcett,* 42 Tex., 203; *Parmeter v. Bourne,* 35 Pac. Rep. [Wash.], 586; *State v. Dortch,* 41 La. Ann., 846; *State v. Police Jury,* 43 La. Ann., 1009; *Reynolds & Henry Construction Co. v. Police Jury,* 44 La. Ann., 863; *Dickey v. Reed,* 78 Ill., 261.)

The supreme court has no original jurisdiction in election cases. (*Miller v. Wheeler* and *Crawford v. Norris*, 33 Neb., 765; *Bell v. Templin*, 26 Neb., 249; *Scott v. McGuire*, 15 Neb., 305.)

An election cannot be contested in a *mandamus* proceeding, and in such a case the court will not go behind the returns and inquire into the legality of the votes cast. (*Cameron v. Parker*, 38 Pac. Rep. [Okla.], 14; *State v. Dodson*, 21 Neb., 218; *State v. Jaynes*, 19 Neb., 161; *Houston v. Steele*, 28 S. W. Rep. [Ky.], 662; *State v. Nemaha County*, 10 Neb., 32; *State v. Powell*, 10 Neb., 48; *McGee v. State*, 32 Neb., 149; *State v. Palmer*, 10 Neb., 203; *Anderson v. Colson*, 1 Neb., 172; *State v. Plambeck*, 36 Neb., 404; *Hagge v. State*, 10 Neb., 51; *State v. Stearns*, 11 Neb., 106; *State v. Peacock*, 15 Neb., 442; *State v. Wilson*, 24 Neb., 139; *State v. Elder*, 31 Neb., 169.)

The intervenors had another adequate remedy at law, and therefore cannot try in this action the material matters moved to be stricken out of their answers, in *mandamus* proceedings. (*Anderson v. Colson*, 1 Neb., 172; *State v. McCrillus*, 4 Kan., 250; *Eyke v. Lange*, 63 N. W. Rep. [Mich.], 535; *Ex parte Heath*, 3 Hill [N. Y.], 42; *Commissioners of Yorktown v. People*, 66 Ill., 339; *Excelsior Mutual Aid Association v. Riddle*, 91 Ind., 84.)

The district court had original jurisdiction to try the contest of the county seat election. (*Scott v. McGuire*, 15 Neb., 305; *Burke v. Perry*, 26 Neb., 414; *Ayers v. Moan*, 34 Neb., 210; *Crews v. Coffman*, 36 Neb., 824; *Gibson v. Trinity County*, 22 Pac. Rep. [Cal.], 225; *Albert v. Twohig*, 35 Neb., 568; *Biggs v. McBride*, 21 Pac. Rep. [Ore.], 878; *Packard v. Richardson*, 17 Mass., 143; *Curtis v. Leavitt*, 15 N. Y., 217; *People v. Fitch*, 1 Cal., 523.)

Where the statute prescribes a specific and adequate remedy, this must be pursued to the exclusion of all other remedies. (*State v. Stewart*, 26 O. St., 216.)

S. R. Smith, W. R. Starr, H. W. Keyes, and *Reese & Gilkeson, contra:*

In answering to the merits the relator waived his right to be heard upon the motion. (Code of Civil Procedure, sec. 92; *Bell v. Sherer*, 12 Neb., 411; *Moore v. Glover*, 16 N. E. Rep. [Ind.], 163; *Ludlow v. Ludlow*, 9 N. E. Rep. [Ind.], 769.)

Statutes providing for contests of election, unless clearly exclusive, are only cumulative remedies. (High, Extraordinary Remedies, sec. 624; McCrary, Elections, sec. 334.)

Before a writ of *mandamus* will issue the court has a right to inquire into every fact necessary to determine whether or not the relator is entitled to the relief prayed for, and to that end may go behind the certificate and returns. (*State v. Barber*, 32 Pac. Rep. [Wyo.], 14; *People v. Rice*, 129 N. Y., 390.)

The election of a person to an office who does not possess the requisite qualifications, gives him no right to hold the office or to claim a certificate of election, and the court will go behind the returns and hear evidence upon issue joined. (*State v. Albin*, 44 Mo., 346; *State v. Stevens*, 23 Kan., 456; *State v. Newman*, 91 Mo., 445; *State v. Williams*, 99 Mo., 291; *State v. McGregor*, 44 O. St., 628; *State v. Lesueur*, 103 Mo., 253; *Sherburne v. Horn*, 45 Mich., 160)

The legality of the election of relator may be tested in *mandamus* proceedings. (*Kimball v. Lamprey*, 19 N. H., 215; *Walter v. Belding*, 24 Vt., 658; *Burr v. Norton*, 25 Conn., 103.)

On a petition for *mandamus* to compel a county clerk to remove his records to a place claimed to have been designated as the permanent county seat, the facts stated in the petition are traversable, and a peremptory writ should not issue. Where fraud and corruption are set up and alleged in the answers of the respondents, the court should permit the same to be proved. (*State v. Avery*, 14 Wis., 133; *State*

v. Grace, 25 Pac. Rep. [Ore.], 382; *State v. Thatch*, 5 Neb., 94; *State v. Marston*, 6 Kan., 524; *State v. Stevens*, 23 Kan., 456; *People v. Jones*, 20 Cal., 50; *Keough v. Board of Aldermen of Holyoke*, 31 N. E. Rep. [Mass.], 387; *Hunter v. State*, 14 Neb., 506; *Boren v. Smith*, 47 Ill., 482; *State v. Hamilton County*, 35 Kan., 640; *McWhirter v. Brainard*, 5 Ore., 426; *Calaveras County v. Brockway*, 30 Cal., 326; *State v. Saxton*, 11 Wis., 25; *State v. Larrabee*, 1 Wis., 178; *Attorney General v. Fitzpatrick*, 2 Wis., 397; *State v. Lean*, 9 Wis., 254; *State v. Fetter*, 12 Wis., 632.)

Where the record shows an honest dispute as to a material fact, the writ should not issue. (*People v. Board of Police of City of New York*, 13 N. E. Rep. [N. Y.], 920; *State v. Washington County*, 2 Chand. [Wis.], 250; *Free Press Association v. Nichols*, 45 Vt., 7; *People v. Salomon*, 46 Ill., 419; *People v. Mayor of Chicago*, 51 Ill., 28; *Commissioners of Yorktown v. People*, 66 Ill., 339; *Springfield & I. S. R. Co. v. Wayne County*, 74 Ill., 27; *People v. Trustees of Schools*, 86 Ill., 613; *People v. Town of Oldtown*, 88 Ill., 202; *State v. New Haven & North Hampton Co.*, 45 Conn., 331; *State Board of Education v. City of West Point*, 50 Miss., 638; *Sabine v. Rounds*, 50 Vt., 74; *Cook v. Town of Peacham*, 50 Vt., 231; *Tyler v. Taylor*, 29 Gratt. [Va.], 765; *Townes v. Nichols*, 73 Me., 515; *People v. Auditor General*, 36 Mich., 271.)

Where an officer has been illegally elected, *mandamus* will not issue to aid him in getting possession of the office. (*Collins v. State*, 8 Ind., 344; *Gulick v. New*, 14 Ind., 93.)

Sidney Dodge, also for respondents.

IRVINE, C.

This is the same case which was before the court some months ago and in which an opinion was filed denying the writ prayed for. (*State v. Roper*, 46 Neb., 724.) The decision was based upon the ground that the application did

not show that the relator was entitled to the relief sought. A rehearing was allowed on relator's motion. Certain petitions of intervention, accompanied by answers, were filed, and the case is now presented on the motion of the relator to strike out portions of these answers. The former opinion discloses the material allegations of the application. The intervenors are certain county officers not named as respondents in the application, and certain citizens, electors and taxpayers of Red Willow county, who allege that as such they are interested in the retention of the county seat at Indianola. The answers are substantially alike. They admit the calling of the election and the facts rendering the call legal; admit that the only places voted for were McCook and Indianola; admit the institution in the district court of a contest of the election and an appeal to the supreme court, and allege that the supreme court dismissed the whole case for want of jurisdiction in either court, and admit the official capacity of the original respondents. The other allegations are denied. The intervenors further allege that the total number of votes, legal and illegal, was 2,237, of which there were but 1,339 for McCook, being less than three-fifths of the whole number of votes cast. So far the answers are not attacked. The motion goes, however, to all the rest of the answers, the allegations of which are, in brief, as follows: That the county owns land and a commodious court house and jail in Indianola, and no buildings or other property at McCook; that Indianola has a more convenient geographical location, and that a majority of the citizens and electors do not desire the removal of the county seat. These allegations must clearly be stricken out. If the requisite number of voters at a valid election expressed themselves in favor of removal, it is clear that a removal cannot be defeated in subsequent judicial proceedings on the ground last stated. The question before the court cannot go farther than the ascertainment of the legal expression of the electors' desires when the election was held. It can-

not extend to matters of convenience and present wish of the electors. Further, the intervenors charge that McCook was a city of more than 2,500 inhabitants, and that there was no registration of the voters therein; that a large number of illegal votes for McCook were cast in certain precincts; that the relators and others offered rewards and bribes for votes for McCook in the way of pledges of money and land for a court house; that certain voters were bribed to vote for McCook; that void ballots were counted for McCook, and that challengers were wrongfully kept from the polls. The motion to strike out these allegations presents the question whether in an application for a *mandamus* of this character the court may go behind the returns and inquire into the legality of the election.

In an early case in this court (*Anderson v. Colson*, 1 Neb., 172) there was an application to compel a county treasurer to pay over to the relator, who claimed to have been elected school district treasurer, moneys to which the school board was entitled. The answer alleged facts in contravention of the legality of the relator's election. The case was heard on these pleadings. This court held that the pleadings disclosed that there was a dispute as to the right to the office; that such a question could not be tried on an application for a *mandamus*, and, therefore, dismissed the petition. *State v. Thatch*, 5 Neb., 94, was an application similar to this. The answer alleged in general terms and upon information and belief that the election was fraudulent and illegal. The court held that the answer, by failing to state the facts on which the charge of fraud was based, was insufficient, and therefore awarded the writ, adding *obiter*, that if it were made to appear clearly that a sufficient number of illegal votes had been cast in favor of the successful town to give it a majority, this would be sufficient cause for the court to refuse its aid. In view of the decision in *Anderson v. Colson, supra*, we take it that what was in the mind of the court was that if a sufficient an-

swer of such a character was filed, the court would not try the issues in the *mandamus* case but would pursue the course adopted in *Anderson v. Colson*, dismiss the case, and leave the parties to appropriate proceedings to determine the validity of the election.

In *People v. Hamilton County*, 3 Neb., 244, the application was similar to that before us, and the writ was denied because no sufficient notice had been given of the election. The effect of the decision is that the requirement of a notice of elections of this character is mandatory, and without such a notice the election is absolutely void. The question then being not whether the election had been fairly and legally conducted, but whether there had been any election. This case is not in point. *Hunter v. State*, 14 Neb., 506, was a similar application. It does not appear what the answer was. The court reaffirmed *State v. Thatch*, *supra*, as to the requirements of such an answer, and then decided that the introduction in evidence of a petition for an injunction to restrain the officers from removing the county seat proved only the fact of the pendency of such an action, and did not prove the facts alleged in the petition for the injunction. Beyond this, expressions in the opinion are entirely *obiter*. *Scott v. McGuire*, 15 Neb., 303, was the injunction case referred to in *Hunter v. State*. The court held that an injunction would not be granted to restrain the removal of a county seat on allegations attacking the legality of the conduct of the election.

It has a number of times been held that a canvassing board has no authority to go behind the returns; that its duty is to canvass the vote as returned to it, and that, therefore, *mandamus* will lie to compel a canvass in accordance with the face of the returns. (*Hagge v. State*, 10 Neb., 51; *State v. Stearns*, 11 Neb., 104; *State v. Peacock*, 15 Neb., 442; *State v. Wilson*, 24 Neb., 139; *State v. McFadden*, 46 Neb., 668.) *State v. Jaynes*, 19 Neb., 161, was an application for a *mandamus* to compel the respond-

ent to turn over to the relator, books and papers belonging to the office of justice of the peace to which relator claimed he was elected. The respondent denied that the relator had been elected, although he had received a certificate of election, and alleged that illegal and fraudulent votes had been counted, by which the relator had been declared elected. The court held that in an application for a *mandamus* it would not go behind the certificate of election and try the relator's title, but would issue the writ in accordance with the certificate. This doctrine was reaffirmed in *State v. Dodson*, 21 Neb., 218, and though the nature of the cases was somewhat different in *State v. Van Camp*, 36 Neb., 91, and in *State v. Plambeck*, 36 Neb., 401.

From a review of the cases we therefore find that the court has steadfastly refused on application for a *mandamus* to inquire into the regularity of an election and into the correctness of the action of the election officers. It has never tried, but has always refused to try, issues of fraud and illegal voting. In the earlier cases it held that presenting such an issue was a sufficient reason for refusing the writ, without trying the issues, until the validity of the election should be determined in a proper action. Later, the ground was taken that a canvassing board must canvass the returns and declare the result according to the face of the returns; and this led logically to the conclusion reached in all cases since 1886, that an answer alleging fraud and illegality in the manner of conducting the election sets up no defense, thus in effect overruling the earlier cases, not so far as they held that such issues would not be tried in the *mandamus* case, but in so far as they held that presenting such issues was a defense to the action. We conceive that the later, and undoubtedly the correct position is that a canvassing board must proceed according to the face of the returns, and that the court will give its aid through a writ of *mandamus* to the person entitled under such a canvass, either to secure his certificate or to

secure the office in pursuance thereof, not as a final determination of the right, but to give effect to the result of the canvass as establishing a *prima facie* right. This must hold true as well in regard to the choice of a county seat as to the choice of an officer.

It is argued that in *Thomas v. Franklin*, 42 Neb., 310, this court held that no jurisdiction was obtained of contest proceedings in regard to this very election; that no contest being permissible, the respondents are without a remedy unless they can obtain it in this action, and that the usual remedy not being applicable, the merits of the election can be inquired into in this case. Assuming the premises to be correct, we would not at this time commit ourselves to the correctness of the conclusion. Some courts of very high authority have held that in such a case inquiry may be made into the issues presented by these answers. On the contrary, there are many cases emanating from courts to whose decisions we owe equal deference, to the effect that a proceeding which is in its nature, whatever may be its form, the contest of an election, is one political or administrative in its character, and not the subject of judicial cognizance unless made so by express statute; that, therefore, where there is no statute authorizing a judicial inquiry into the validity of an election, no such inquiry can be made in any proceeding, and this view is not without some inferential support from this court. (*Miller v. Wheeler*, 33 Neb., 765; *State v. Oleson*, 15 Neb., 247; *State v. Saline County*, 18 Neb., 422.) But the question thus presented it is not necessary to here decide. The statutes expressly provide (Compiled Statutes, ch. 26, sec. 64) that an election for the location or relocation of a county seat may be contested, and we did not in *Thomas v. Franklin* decide either that this statute was unconstitutional or that it was inoperative for failure to provide a method of contest. What we there decided was that an elector, as such, in his own individual name and behalf could not maintain

such a proceeding. The court did not undertake to decide how such a proceeding should be brought, because that question was not presented. The court held that Thomas, as an elector, by himself and in his own behalf, could not maintain it; but it does not follow from that holding that no contest could have been had by proper proceedings. Therefore, assuming that the question is a judicial one, and that fraud and illegality in an election present a case where the courts must in some manner of action afford a remedy, it does not follow that it may be by *mandamus*, and every adjudication is against such a view.

The motion to strike was filed July 19, 1895. On July 22 the relator filed what is styled an answer to the petition of the intervenors. It is now claimed that having answered, the motion cannot be considered. On June 22 the court had made an order requiring the relator to answer the petition of the intervenors within thirty days. The court, after making this order, almost immediately adjourned *sine die*. The answer, protesting that the petitions are irrelevant, is expressly made because of the court's order. Ordinarily, filing an answer to a petition waives any defect which can be raised only by motion, but in view of the fact that the court here in terms required such an answer, of the further fact that a consideration of the motion avoids the unnecessary delay and expense which would be caused by taking a large volume of testimony on the irrelevant issues, and still further, because the pleading filed by the relator was an answer to the petition of intervention, and not a reply to the answers of the intervenors which the motion attacks, we have deemed a decision upon the merits of the motion proper. It follows from what has been said that the motion is sustained.

MOTION SUSTAINED.

SUMNER DARNELL V. L. B. MACK.

FILED JANUARY 9, 1896. No. 4911.

1. **Fraudulent Conveyances:** POSSESSION OF MORTGAGED CHATTELS: BURDEN OF PROOF. In a contest between a chattel mortgagee and one representing a creditor of the mortgagor, the burden of proof is upon the mortgagee to establish the *bona fides* of the mortgage when he has not taken possession of the mortgaged property.

2. ———: ———: ———. This burden is not satisfied merely by showing that there were notes in existence, such as those described in the mortgage as secured thereby, without proof of the consideration of the notes or *bona fides* of the debt represented thereby.

3. **Attachment:** LEVY: JURISDICTION. Where property has been seized under a writ of attachment regularly issued and levied the court acquires jurisdiction over the property, so far at least as to render the custody of its officers lawful, and jurisdiction to that extent is not lost, so long as the action remains pending, by failure to serve process in the main action upon the defendant. Following *Crowell v. Johnson*, 2 Neb., 146; again overruling *Wescott v. Archer*, 12 Neb., 345.

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

Evans & Hale and *Steele Brothers*, for plaintiff in error, cited: *Marsh v. Burley*, 13 Neb., 261; *Pyle v. Warren*, 2 Neb., 252; *Severance v. Leavitt*, 16 Neb., 439; *Bullis v. Drake*, 20 Neb., 171; *South Omaha Nat. Bank v. Chase*, 30 Neb., 444; *Norton v. Pilger*, 30 Neb., 860; *Gillilan v. Kendall*, 26 Neb., 82; *Edminster v. Higgins*, 6 Neb., 265; *Rhea v. Reynolds*, 12 Neb., 132.

I. T. McCaskey and *George P. Sheesley*, *contra*, cited: *Wescott v. Archer*, 12 Neb., 349; *Ruser v. Union Distillery Co.*, 24 N. Y. Sup., 101; *Rhode Island Hospital Trust Co. v. Keeney*, 48 N. W. Rep. [N. Dak.], 341.

IRVINE, C.

December 17, 1889, Thomas Wolfe commenced an action against Joseph Blahak and another, in the county court of Butler county, to recover the sum of $282.60 on a promissory note. He caused an attachment to be issued against Joseph Blahak on the ground of a fraudulent removal and sale of the latter's property. The attachment was levied on certain corn as the property of Blahak. The summons in the case was January 5, 1890, returned "Not found," and down to the trial of the present action no further steps had been taken in the attachment case. February 15, 1890, Mack, the defendant in error, commenced the present action in replevin against Darnell, the sheriff, who held the corn under the writ of attachment. The case was tried in 1891 to the court without the intervention of a jury, and there was a finding and judgment for the plaintiff, from which the sheriff prosecutes error.

The plaintiff claimed the property by virtue of a chattel mortgage from Blahak. The defendant undertook to justify under the writ of attachment. The argument of the plaintiff in error is addressed largely to an attack upon the admission in evidence of the chattel mortgage relied upon by Mack. Under that assignment we can hardly consider the question presented, for the reason that in trials to the court without a jury errors in the admission of evidence are not, as such, open to review; but as Mack's claim was founded entirely upon the mortgage, the same questions are presented under the assignment that the finding is not sustained by the evidence. The evidence discloses that the corn in question was upon a farm recently in the possession of Blahak. About the time the attachment was issued, Blahak absconded. Mack testifies that he was proceeding to take possesion of the corn when the attachment was levied; but nothing is shown to indicate that this proceeding had gone further than an instruction to Mack's agent to

take possession. There is evidence conclusively showing that Blahak had himself left the farm, probably with the intention of not returning, but had left the corn there and servants of his were in charge. Therefore, Mack was not in possession of the mortgaged property when the writ of attachment was levied, and as against a creditor the burden of proof was upon him to show that his mortgage was taken in good faith. (*Pyle v. Warren*, 2 Neb., 241; *Marsh v. Burley*, 13 Neb., 261; *Paxton v. Smith*, 41 Neb., 56, and many other cases.) This burden he failed to satisfy by any evidence. There is testimony to show that the mortgage was given to secure two promissory notes from Blahak to Mack. But this much appears from the face of the mortgage itself. Mack himself testified by deposition, and it is nowhere shown what was the consideration of the notes, that there was any consideration, or that they represented any indebtedness. Surely the good faith of the mortgage is not established merely by showing without other evidence that notes are in existence similar to those described in the mortgage, without proof of the genuineness of the debt which the notes purport to represent, or other proof of good faith. It is, however, contended that in the absence of such proof the mortgage, which was due when the replevin suit was brought, was sufficient as between the parties thereto to give Mack the right of possession, and that proof of the mortgage made out his case, unless the sheriff established that he represented a creditor under valid process; and further, that there having been no service of process, either actual or constructive, upon the defendant in the attachment case the attachment was void, and the officer therefore showed no right against the plaintiff. We presume that the finding of the district court was based on this theory, and such a finding was warranted by the cases of *Wescott v. Archer*, 12 Neb., 345, and *Grebe v. Jones*, 15 Neb., 312. The course of decisions in this state has been somewhat peculiar, and calls for attention.

Crowell v. Johnson, 2 Neb., 146, was an action of ejectment, in which the plaintiff claimed by deed from one Dawley and the defendant by virtue of a sale made under a judgment in an action wherein the land had been attached as the property of Dawley. The court held that jurisdiction had been acquired by the levy of the order of attachment, and that a failure to publish notice, the defendant being a non-resident, while it rendered the proceeding voidable, did not render it void. The title under the judicial sale was, therefore, sustained. In *Wescott v. Archer*, *supra*, the facts were the same, and the form of action the same. The majority of the court, without referring in any way to *Crowell v. Johnson*, held directly to the contrary—that is, that the judgment was void because the published notice was defective. The chief defect in the notice was that it did not describe the property attached. Judge LAKE dissented. In *Grebe v. Jones*, *supra*, the court had rendered judgment in an action in which land had been attached, the defendants being non-residents, the published notice not properly describing the lands attached. The district court, on motion, set aside the judgment. From that order proceedings in error were prosecuted. The majority of the court, although that was a direct proceeding to vacate the judgment and not a collateral attack, held that the notice was sufficient, and overruled *Wescott v. Archer*, in so far as it held a specific description necessary, but took occasion to express its continued belief that notice was necessary to the jurisdiction of the court. Judge LAKE, while concurring in the result, again dissented from the reasoning of the court, and lamented "the struggle of the writer of that opinion to hold fast to a remnant of the pernicious rule announced in *Wescott v. Archer*." A rehearing was at a subsequent term denied, Judge LAKE having then retired, the decision of the court being unanimous; but inasmuch as the same result would follow either from the views expressed in the majority opinion, or from the doc-

trine of *Crowell v. Johnson*, and the views of Judge LAKE, overruling the motion for rehearing was not significant on the present question.

Under this state of decisions the first question which arises is as to whether the necessity of publication, in order to confer jurisdiction over attached property where the defendant has not been personally served, is a question still open for inquiry? We think it is. *Crowell v. Johnson* was decided by a united court evidently after a careful consideration of the authorities. *Wescott v. Archer* was decided chiefly upon a review of the case of *Paine v. Mooreland*, 15 O., 435, the court discussing and disapproving only one of the reasons given by the Ohio court for its judgment, and upon a citation of *Millar v. Babcock*, 29 Mich., 526, *Anderson v. Coburn*, 27 Wis., 558, and *King v. Harrington*, 14 Mich., 532. Of these cases *King v. Harrington* is the only one which lends any support to the conclusion of the court, the other two cases merely construing statutes quite different from ours. The fact that Judge LAKE dissented and cited *Crowell v. Johnson*, weakened the authority of *Wescott v. Archer* at the start; and the fact that in *Grebe v. Jones* the court retired from its position in *Wescott v. Archer*, and expressly overruled it in a material point, still further discredited the case. We therefore think that the doctrine of *Wescott v. Archer* has not been definitively established, and that in view of the conflicting decisions of the court, an inquiry into the merits of the question is demanded at this time.

The precise question under consideration in *Crowell v. Johnson* and in *Wescott v. Archer* was not the legality of the original levy of attachment, but the validity of a sale made in pursuance of a judgment following such levy. For reasons hereafter stated we regard the two questions as inseparably connected, and think that we cannot decide the first without a consideration of the second. There has been much discussion of the second question, but we are

satisfied that the doubts arising thereupon have been created more by the theoretical views of text-writers than by the adjudicated cases. Judge Drake expressed himself without qualification in favor of the doctrine that so far as the attached property is concerned, jurisdiction attaches by virtue of the levy of a lawfully issued writ, but that a judgment without service of process upon or notice to the defendant is erroneous, although not void. (Drake, Attachment, secs. 436 *et seq.*) In a later work (Waples, Proceedings in Rem, secs. 593 *et seq.*) the position seems to be taken that by the levy of the writ the court obtains lawful custody of the attached property, but is without jurisdiction to proceed to judgment. In 1 Wade, Attachment, secs. 6, 44, 45, the distinction between jurisdiction so far as acquiring the lawful custody of the *res*, and jurisdiction for the purpose of rendering final judgment disposing of the *res*, is denied. The argument is largely in the form of a criticism of *Cooper v. Reynolds*, 10 Wall. [U. S.], 308. At the outset of that criticism Mr. Wade attributes to Mr. Justice Miller, as a part of the opinion in *Cooper v. Reynolds*, the following language: "When notice to the defendant by publication is required, it is not an element of the jurisdiction of the court, but is necessary to authorize the court to exercise its jurisdiction by giving judgment in the cause." No such language was used by Mr. Justice Miller in *Cooper v. Reynolds*, but such language is found in Drake, Attachment, sec. 437, not as a quotation but as Judge Drake's summary of the result of the cases cited by him, of which *Cooper v. Reynolds* is not one. Again, in a foot-note to section 6 Mr. Wade says: "See Waples on Proceedings in Rem, secs. 594–596, where this distinction is freely criticised. Also dissenting opinion of Field, J., in *Cooper v. Reynolds*." But Judge Field wrote no dissenting opinion in *Cooper v. Reynolds*. He merely expressed his dissent without an opinion. Criticisms by text-writers upon a doctrine established by adjudicated cases

serve little purpose, when, as here, they are so evidently made without even reading the cases criticised. In these days when voluminous text-books appear with such rapidity that care in their preparation can hardly be expected, opinions expressed in such works are hardly worth serious attention, except where, as in the present instance, they have introduced a serious doubt upon a point where the real authorities are in practical accord. In the two works cited, while the authors express opinions opposed to the authority of the court to proceed, they practically admit that the weight of authority is against their opinions, but hold that certain well considered cases support their views. Of the cases cited by them we find none which support the view that a judgment rendered in such proceeding is without jurisdiction so far as it affects the attached property, except *Haywood v. Collins*, 60 Ill., 328, and *King v. Harrington*, 14 Mich., 532. To these may be added *Wescott v. Archer, supra.* We will not burden the opinion by reviewing the other cases cited by them to show their inapplicability. Some of them were direct proceedings to reverse such a judgment, where the question was one not of jurisdiction but of error in the proceedings. Others were where such a judgment had been rendered in one state, the attached property exhausted, and action brought in another state on the judgment as if it were one *in personam.* Still others were under statutes which fixed a definite time within which, after the issuance or levy of the attachment, process must be served upon the defendant, with a provision for vacating the attachment if this were not done. A valuable case of this class, although not cited by the text-writers, is *Rhode Island Hospital Trust Co. v. Keeney*, 1 N. Dak., 411. On the other hand, we have in the first place *Cooper v. Reynolds, supra*, in which the supreme court of the United States, in an opinion by Mr. Justice Miller, clearly elucidated the peculiar character of actions accompanied by attachments, saying: "If the

defendant appears, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff." The court then proceeds to hold that jurisdiction depends upon the lawful seizure of the property and that subsequent defects may render the judgment erroneous but not void. To the same effect is *Paine v. Mooreland*, 15 O., 435; *In re Clark*, 3 Denio [N. Y.], 167; *Beech v. Abbott*, 6 Vt., 586; *Williams v. Stewart*, 3 Wis., 678; *Feild v. Dortch*, 34 Ark., 399; *Hardin v. Lee*, 51 Mo., 241. It is true, as stated by Mr. Wade in his criticism of *Cooper v. Reynolds*, that that case was based upon an attachment under the statutes of Tennessee, and that in a later case the supreme court of Tennessee expressed its opinion to the effect that the supreme court of the United States had wrongly construed its statutes (*Walker v. Cottrell*, 6 Bax. [Tenn.], 257); but the criticism of the Tennessee court is chiefly directed against another point of the decision in *Cooper v. Reynolds*, and, in any event, the question before us is not whether the supreme court of the United States construed the Tennessee statutes properly in view of the decisions of the Tennessee courts, but whether its construction was a proper one to be given in the first instance to such a statute.

Attachment is, it is true, in this state, a remedy merely ancillary to the personal action, where the defendant is within the jurisdiction of the court and lawfully summoned. At the same time, even in such cases, there is a distinction between personal jurisdiction so as to permit an adjudication of the principal action, and jurisdiction of

the attached property for the purpose of placing it in the lawful custody of the court pending the main action. For the purpose of the attachment an action is commenced when a petition is filed and a summons issued with the *bona fide* intention that it shall be served (*Coffman v. Brandhoeffer*, 33 Neb., 279), although jurisdiction of the person of the defendant had not been then obtained. In the case of a defendant beyond the jurisdiction of the court, the action is analogous to a proceeding *in rem*. Substituted service cannot confer personal jurisdiction, and although the requisites for such service be strictly pursued, jurisdiction attaches no further than to permit the court to subject the attached property to the satisfaction of any claim found due. If a judgment rendered in such a case, without substituted service upon the defendant, is erroneous merely, as we now hold, and not void, then it follows that the property is throughout in the lawful custody of the court, and that the sheriff's possession under the levy of the attachment remains lawful so long as the proceedings are pending. If, on the contrary, we should follow the doctrine of *Wescott v. Archer*, one of two courses must be taken. We must hold either that because of the failure of the plaintiff to take proper steps to obtain substituted service, all the proceedings became void, and that the sheriff was, as was charged of the Six Carpenters, a trespasser *ab initio*, or else that jurisdiction attached on the levy of the writ and his custody was then lawful, and that it was lost at some point pending the proceedings. The first course would be as unreasonable as it would be unjust and impracticable. The sheriff, when he receives a valid writ of attachment, is bound to levy it. We cannot permit him to inquire then for his own protection whether the plaintiff will properly proceed with the subsequent stages of the case. We cannot subject him to liability for performing his clear duty; because the plaintiff, entirely independent of his control, neglects such subsequent steps. Nor do we think that the

second course is open. If the writ levied before process served is valid, and if a judgment rendered in pursuance of such levy without process is absolutely void, there must be some point between levy and judgment at which jurisdiction is lost, and where it becomes the duty of the sheriff without an order of the court to surrender the attached property. Our statutes provide for no such procedure, and we know no possible way in which the court can determine the point down to which jurisdiction over the attached property extends and after which it is lost, unless we say that jurisdiction attaches for a reasonable time to permit the plaintiff to publish notice. How is such reasonable time to be determined? An attachment is allowed (Code, sec. 198), not only when the defendant is a non-resident of the state, or has absconded or left the county to avoid service of summons, but also where he conceals himself so that a summons cannot be served upon him, and in such cases (Code, sec. 77), service may be had by publication. There may be many actions aided by attachment where the plaintiff is not only justified, but required, if he have a due regard for his oath, to make investigations after the commencement of the action to ascertain the whereabouts of the defendant, and in such cases the law never contemplated that the continuance of the court's jurisdiction should depend upon the hour or the day when the plaintiff elected between actual and constructive service and proceeded to have process executed. There is in such case a plain remedy always open where property is unreasonably detained in custody without taking steps to authorize a final adjudication. The court in such case may, on the motion of an interested party, or on its own motion, dismiss the case for want of prosecution, and with the dismissal of the case there is no doubt that the attachment would fall with it, and further jurisdiction over the attached property cease. In the case before us no defect is pointed out in the institution of the suit, or the issuance or levy of the writ of attachment. While it had

not proceeded to judgment, there was uncontradicted proof of an indebtedness to the attachment plaintiff on the cause of action alleged. We hold, therefore, that the sheriff was lawfully entitled to possession as against the plaintiff, unless the plaintiff established the *bona fides* of his mortgage.

REVERSED AND REMANDED.

POST, C. J., not sitting.

UNION PACIFIC RAILWAY COMPANY V. LAWRENCE RAY.

FILED JANUARY 9, 1896. No. 5856.

1. **Railroad Companies:** NEGLIGENCE IN SETTING OUT FIRE: DAMAGES. In an action against a railroad company for negligently setting out a fire, destroying plaintiff's property, the evidence, without contradiction, showed that a certain engine of the railroad company which passed the place where the fire originated, at such a time that it might have set out the fire, was equipped with the most approved appliances, and was in good condition, but there was no direct evidence that this engine did set out the fire, and there was evidence that it was set out by a different engine. *Held*, That the issue of negligence in the construction and maintenance of the engine setting out the fire was properly submitted to the jury.

2. ———: ———: ———: INSTRUCTIONS. Certain instructions, presenting no new question of law, construed, and *held* applicable to the evidence.

3. ———: ———: DUTY OF LAND-OWNER TO PROTECT HIS PROPERTY. The construction of a railroad near one's premises does not require one to forbear the ordinary use of his land, nor to take unusual precautions to guard against the consequences of probable negligence on the part of the railroad company. One is only required to take such precautions as a person of reasonable prudence would take to protect his property. (*Omaha Fair & Exposition Association v. Missouri P. R. Co.*, 42 Neb., 105.)

4. **Damages:** INTEREST: NEGLIGENCE. Where property is de-

stroyed by the negligence of another, the owner will be entitled to interest on the value of the property from the time of its destruction. (*Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138.)

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

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

John C. Martin, contra.

IRVINE, C.

Ray recovered a judgment against the railway company for damages caused by the destruction by fire of certain hay lying in winrows on the land of Ray, it being claimed that the fire originated on the right of way of the railway and then spread to the plaintiff's land. The plaintiff alleged as negligence, first, that the railway company negligently failed to keep its right of way free from combustible materials, and suffered large quantities of dry grass and weeds to accumulate thereon; and second, that the railway company negligently permitted its engines to cast out sparks and coals of fire into said combustible materials. The court submitted to the jury both issues of negligence.

It is first contended by the railway company that there was no evidence upon which to submit to the jury the issue as to whether sparks and coals had been negligently permitted to escape from the engine. This contention is based upon the argument that the uncontradicted evidence shows that the engine which set out the fire had the most approved appliances to prevent such results; that it had been recently inspected and found to be in good condition, and that it was inspected when it reached the roundhouse after the run during which the fire was caused and was again found to be in perfect condition. We need not consider

whether under such a state of evidence this issue should have been withdrawn from the jury, because while the uncontradicted evidence does establish such a state of facts with regard to a certain engine which passed the place where the fire broke out about the time when the fire was discovered, there is no evidence to show that this was in fact the engine which set out the fire. On the contrary, the proof is that this engine was hauling a freight train, while the plaintiff's evidence is to the effect that the fire was set out by an engine hauling a passenger train. Of course, the witness who testified to this may have been mistaken as to this fact, but there is not a particle of evidence to show that he was, or that the engine described by defendants' witnesses was in fact the one which set out the fire. There is proof that the fire was set out by one of the defendant's engines, and under the long established rule, this being proved, the burden was upon the defendant to show due care in the construction, maintenance, and operation of that engine. (*Burlington & M. R. R. Co. v. Westover*, 4 Neb., 268; *Union P. R. Co. v. Keller*, 36 Neb., 189.)

It is next argued that the court erred in giving the following instruction: "If you find from the evidence that the defendant negligently and carelessly permitted dry grass, weeds, and other combustible materials to accumulate on its right of way adjoining the plaintiff's premises so as to unnecessarily increase the hazard from fire, and that by reason of such accumulation of combustible materials fire escaping from defendant's engine was kindled therein and thence communicated to plaintiff's property which was thereby destroyed, without the negligence of the plaintiff in any manner contributing thereto, you should find for the plaintiff, even though the escape of the fire from such engine was without any fault on defendant's part." The correctness of the general principle stated in this instruction is established by *Burlington & M. R. R. Co. v. Westover, supra,* and was again recognized in *Omaha Fair &*

Exposition Association v. Missouri P. R. Co., 42 Neb., 105. No objection is made to the instruction in its general scope, but it is argued that the instruction was inaccurate in referring to the right of way as adjoining plaintiff's premises, the proof showing that there was a strip of land forty or fifty feet wide between the right of way and plaintiff's land. It is contended that the effect of using this term was to lead the jury to believe that it was the duty of the railway company to keep this strip, as well as its own right of way, free from combustible materials. If this were the effect of the instruction, it would, no doubt, be erroneous; but we do not think that it is possibly susceptible of that interpretation. It plainly refers to the right of way alone, and not to any other land. A further argument is interwoven with the last, to the effect that the instruction required the railway company absolutely to keep the whole of its right of way clear and free from combustible materials, while the law requires only that so much of it should be kept clear as is reasonably necessary to avoid danger from fire. This construction is also untenable. Under the instruction as given, the railway company was only chargeable if it negligently and carelessly permitted the accumulation of combustible materials in such a way as to unnecessarily increase the hazard from fire. Therefore, if the right of way was so wide that a failure to keep clear its outside border was not negligence, then the instruction would not render the company liable. The duty of the railway company in this behalf was further defined and explained by another instruction. Incidentally to the criticism of this instruction, it is also argued that the evidence showed without contradiction that proper precautions had been taken in this respect, and that this state of the evidence did not justify a submission of the question to the jury. This argument involves no question of law, and it would, therefore, be useless to state the evidence. We think there was sufficient to require a submission of the issue to the jury.

Objection is also made to the following instruction: "If at the time the property in question was destroyed, the defendant's right of way at the place where the fire started, if it started on the right of way, was free and clear from dry grass, weeds, and other combustible materials, or, if the defendant, its agents and servants exercised due and reasonable diligence, care, and precaution to keep and have its said right of way free and clear from such dry grass, weeds, and other combustible materials, then, in that case, the defendant would not be liable in this action on the second ground above mentioned." The principal objection to this instruction is the same urged against that already discussed, and it is as free from objection on that ground as the former instruction. But it is also argued that inasmuch as the court told the jury that the defendant would not be liable if the right of way was clear, or if reasonable diligence had been exercised to keep it clear, it was a necessary inference that the defendant would be liable if either fact did not exist. The effect of the instruction was directly contrary. It stated rules discharging the company, and stated them in the alternative. The inference would, therefore, be that in order to charge the company, the jury must find that the right of way was not clear, and, further, that the company had not exercised due diligence to keep it clear.

It is contended that the plaintiff was guilty of contributory negligence, and was, therefore, not entitled to recover. By the instruction first quoted, the jury was broadly told that the plaintiff must not have been guilty of negligence contributing to injury. The issue of contributory negligence was, therefore, submitted to the jury. We think that under the evidence it would not have been erroneous to have charged the jury that there was no contributory negligence. Certainly none was shown, unless it was negligent for the plaintiff to permit his hay to lie on the land. In *Omaha Fair & Exposition Association v. Missouri P. R.*

Co., supra, it was said that the construction of a railroad near one's premises does not require one to forbear the ordinary use of his land; nor does it require him to take unusual precautions to guard against the consequences of probable negligence on the part of the railroad; that he is required to take only such precautions as a person of reasonable prudence under similar circumstances would take to prevent the destruction of his property. The land was hay land, and for hay to lie upon it in winrows was only to use it in the ordinary manner. It is not shown that there was anything negligent in the manner of using the land or storing the hay. It is argued that while the evidence shows that a fire-break had been plowed around the land, it was insufficient. But in this respect again the case is closely analogous to the *Burlington & M. R. R. Co. v. Westover, supra,* where the court held that it was not *per se* contributory negligence to fail to provide such fire-break.

Finally, it is contended that the court erred in directing the jury, if it found for the plaintiff, to allow interest on the value of the hay from the time of its destruction; but this rule of damages was precisely that stated in *Fremont, E. & M. V. R. Co. v. Marley,* 25 Neb., 138, to-wit: "Where property is destroyed by the negligence of another, the owner will be entitled to interest on the value of such property from the time of its destruction."

There is no error in the record.

JUDGMENT AFFIRMED.

ADDISON E. CADY, APPELLANT, V. SOUTH OMAHA NATIONAL BANK, APPELLEE.

FILED JANUARY 21, 1896. No. 6173.

1. **Trust Funds:** BANK DEPOSITS. Trust funds do not lose their character as such by being deposited in bank by the trustee to his own account.

2. ———: ———. So long as such funds can be traced and distinguished in the hands of the trustee or his assigns, they remain subject to the trust.

3. **Commission Merchants:** BANK DEPOSITS: ACCOUNTING: LIABILITY OF BANK. F., a commission merchant, deposited in bank money realized from the sale of live stock consigned to him by C., his account with the bank being at the time largely overdrawn. *Held*, Regardless of the question of notice, that the bank is accountable to C., and that it cannot apply the money so deposited in satisfaction of F.'s indebtedness.

4. ———: ———: EVIDENCE: PLEADING. In an action against a bank for money deposited by the plaintiff's agent to his own account, evidence of payment by the defendant on checks subsequently drawn by such agent, in good faith, relying upon his apparent title to said fund, is inadmissible under a general denial. Such fact to be available as a defense must be specially pleaded.

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

See opinion for statement of the case.

John C. Watson and *Frank T. Ransom*, for appellant, cited: *Gillespie v. Union Stock Yards Nat. Bank*, 41 Fed. Rep., 231, 137 U. S., 411.

Charles Offutt, contra:

The bank did all that could be required of it in reference to the drafts. Had the bank paid the drafts con-

trary to the orders of Fitch, it would have been liable to him. (*Marzetti v. Williams*, 1 B. & Ad. [Eng.], 415; *Patterson v. Marine Nat. Bank*, 18 Atl. Rep. [Pa.], 632; *First Nat. Bank v. Mason*, 95 Pa. St., 113; *Fonner v. Smith*, 31 Neb., 107; *Martin v. Rocke*, 53 L. T. n. s. [Eng.], 946; *Levy v. Cavanagh*, 2 Bosw. [N. Y.], 100; *Wood v. Boylston Nat. Bank*, 129 Mass., 358; *Justh v. Nat. Bank of the Commonwealth*, 56 N. Y., 478; *Southwick v. First Nat. Bank of Memphis*, 84 N. Y., 434; *Thomson v. Clydesdale Bank*, 48 Albany L. J. [Eng.], 324.)

POST, C. J.

This is an equitable proceeding instituted by the appellant, Addison E. Cady, in the district court for Douglas county, against the appellee, the South Omaha National Bank, to enforce an accounting by the latter for the proceeds of a car load of hogs, by the plaintiff consigned to William Fitch at South Omaha under the name and style of William Fitch & Co. The facts essential to an understanding of the questions involved are as follows:

On the 20th day of June, 1888, the First National Bank of St. Paul, Nebraska, of which the appellant was president, addressed to the appellee the following communication:

"ST. PAUL, NEB., June 20, 1888.

"*H. C. Bostwick, Cash., So. Omaha*—SIR: Will you give me, in confidence, what information you may have regarding financial standing and responsibility of Wm. Fitch & Co., commission firm. We are sending you a good many drafts on them and would like to know something of them, and would consider it a special favor if at any time you consider them at all shaky, you would notify us, and we will be glad to reciprocate at any time.

"Yours truly, GEO. E. LEAN,

"*Cashier.*"

To the above, appellee replied, under date of June 21, as follows:

"DEAR SIR: Replying to yours of 6/20, Wm. Fitch is doing a small commission business under name of Wm. Fitch & Co. We have been doing business with him a long time and think him reliable and conservative. I think he has about $2,000 in his business, which is as much cash capital as larger firms use. We do not think him in any way shaky, and will inform you if we have reason to change our opinion. H. C. BOSTWICK,

"*Cashier.*"

Fitch was, as may be inferred, at the date mentioned, engaged in the live stock commission business at South Omaha, and in which he continued up to and subsequent to the transactions out of which this controversy arose. On the 24th day of September, 1888, appellant, at Dannebrog, in this state, shipped a car load of hogs to South Omaha, consigned to Fitch in the name of Wm. Fitch & Co. Said hogs were in due time received by the consignee named, who, on the 26th day of September, sold them to the Armour-Cudahy Packing Company for the sum of $1,021.80. In accordance with the established practice, weight tickets were issued bearing the indorsement of the purchaser, directing payment of the amount of such purchase, which were by Fitch turned over to and collected by the appellee bank, the proceeds thereof being placed to the credit of the former on an open account, and which was, as will presently appear, then largely overdrawn. The plaintiff on September 25 drew upon Fitch & Co. for $1,000, the estimated net proceeds of the shipment above mentioned, but which draft the appellee, by whom it was presented for payment, on September 27, returned unpaid, bearing the indorsement "amount not correct." It is conceded that the proceeds of the hogs sold, less necessary charges, including commission, amounted to the sum of $976.01, and for which the appellant on the 28th day of September drew

upon Fitch & Co. The draft last mentioned was sent for collection to the appellee, and upon presentation payment thereof was refused. Fitch, according to the representative of the appellee bank, assigned as a reason for his refusal that the hogs in question had been purchased with money advanced by him for that purpose to one Stuart, and shipped in appellant's name in order to defraud him of the amount of his advancement, although that contention has no support whatever in the record.

Fitch's account with the bank shows a general balance in his favor until about August 10, 1888. Beginning with August 13, his account was overdrawn in various amounts, until the close of business September 25, when his indebtedness to the bank on his open account was $976.44. During the month of August he was, according to the record, overdrawn fourteen days, in the average sum of $591.01, the highest amount thereof being $747.23 on the 4th and the lowest $355.22 on the 22d. From September 1st to 25th, inclusive of both days he was overdrawn twenty days, in the average sum of $1,276.69, the highest being $1,757.94 on the 10th and the lowest $585.54 on the 18th. The transactions on the 26th were the payment of two checks for $5 each, drawn by Fitch, making a total on the debit side of $986.44 and a credit for $1,021.80, the proceeds of plaintiff's hogs, leaving a balance in his favor at the close of business on that day of $35.36. Fitch was, it seems within the knowledge of the appellee, in the habit of making advancements to shippers and reimbursing himself from the proceeds of stock subsequently consigned to him, although it was aware that most, if not all, of his deposits represented the proceeds of stock sold on commission and for which he was accountable to consignors. It is also a reasonable inference from the admitted facts that appellee was advised not later than September 27, on which day the first mentioned draft was presented by it, that Fitch's credit of the preceding day was the pro-

ceeds of stock sold for the appellant, and it is shown to have been fully informed of his rights in the premises on the 2d day of October following. As one of the questions presented involves an examination of Fitch's account with the bank from September 26 to October 2, inclusive, a summary thereof is here given:

WM. FITCH & CO.		Dr.	Cr.
Sept. 26.	Balance		$35 36
" 27.	Deposit		958 75
" 28.	Check	$917 20	$994 11
" "	"	40 00	
" "	"	5 00	
" 29.	Int. on Sept. overdraft	10 50	
Oct. 1.	Check	5 00	
		$977 70	
Oct. 2.	Balance		$16 41

The questions suggested by the foregoing statement will be examined in the following order, viz.: (1.) To what extent, if at all, did the deposit of the appellant's money and its application in discharge of Fitch's indebtedness to the bank affect the rights of the former? (2.) Are the rights of the parties affected by the transactions between Fitch and the bank subsequent to September 26 and prior to the receipt of formal notice of the appellant's rights on the 2d day of October?

Preliminary to the first inquiry it should be remarked that the record presents no question of the authority of a factor or broker to deposit, in his own name, money, the proceeds of goods consigned for sale on account of his principal. We assume, therefore, that the act of Fitch, in depositing to his own credit the money realized from the sale of appellant's hogs, was authorized by the course of dealing between the parties named or by the recognized usage of trade,—in short, that such transaction did not in

law amount to conversion by Fitch of the funds in question. It is a recognized rule in equity jurisprudence that trust funds may be followed through any number of transmutations and reclaimed by the owner so long as they can be distinguished in the hands of the trustee or his assigns.

In the leading case of *Pennell v. Deffell*, 4 De G., M. & G. [Eng.], 372, the controversy was between an official assignee in bankruptcy and the executors of a prior deceased assignee who had kept a bank account in which he had mingled his own funds with those of the trust, the credits being all entered in his own name. It was said: "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent* * * * as between the trustee and his executors and the general creditors after his death."

In *Van Alen v. American Nat. Bank*, 52 N. Y., 1, it was held that where an agent deposits in bank to his own account the money of his principal under the direction of the latter, such fund is impressed with a trust in favor of the owner which is not affected by the fact that the agent at the same time deposited to the same account funds of his own. Referring to the question of notice by the bank of the plaintiff's rights, the chief justice says: "It was suggested on the argument that notice to the bank by the depositor was necessary to protect the rights of the plaintiff, but this is not so. The title of the plaintiff does not depend upon whether the bank knew he had title or not. That rests upon other facts. A notice to the bank might have prevented any transfer, or the creation of a lien by the de-

positor, or prevented the bank from taking or acquiring such lien in good faith, but could not otherwise be necessary or important."

In *Burtnett v. First Nat. Bank of Corunna*, 38 Mich., 630, one Raynale deposited with the defendant bank to his own account the sum of $1,015, the proceeds of certain securities belonging to the plaintiff's intestate. Of the amount so deposited, he subsequently checked out $229.29 and soon thereafter died insolvent, being indebted to the bank in a sum exceeding the balance shown by the books thereof in his favor. Thereupon the bank, claiming the right to apply said balance upon Raynale's indebtedness, made upon its books the entries necessary to effectuate that result. In the opinion of the court, reversing the judgment below for the defendant, Graves, J., says: "But we are not aware of any principle which will enable a depositary, who has received from a trustee or agent a fund belonging in fact to the principal or beneficiary, to appropriate it by his sole act to his own debt held against the trustee or agent, and thereupon to insist that his want of knowledge of the true ownership is sufficient to guard such inequitable appropriation and bar the real owner from pursuing the fund."

In the recent case of *Davis v. Panhandle Nat. Bank*, 29 S. W. Rep. [Tex.], 926, the facts were quite similar to those involved in this controversy. There one Hancock, having in his possession a sum of money, the proceeds of certain live stock sold for the plaintiff, deposited it to his own credit with the defendant bank, with which his account was then overdrawn. In holding that the plaintiff was entitled to recover for so much of the deposit as was applied to balance Hancock's account the court say: "There is neither allegation nor evidence that the bank lost its debt upon Hancock by reason of this transaction, * * * and in the absence of such evidence we do not see upon what principle it should be allowed to retain this money."

The court in the case last cited say further: "As to whether or not it [the bank] should be protected in the amount it allowed Hancock to check out after its receipt, will depend upon the question of notice. If it had notice of the real ownership of the funds, and that Hancock was not authorized to use them at the time it honored his checks, it should be required to pay appellant notwithstanding such payments. If, however, it did not have notice of these facts, the money having been remitted to it in the name of Hancock, Davis should bear the loss."

In Boone, Law of Banking, sec. 285, the subject is considered in all of its phases, and concludes as follows: "It may be stated as a general principle, that if money deposited in a bank was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account." And the same principle is recognized in the following cases: *Third Nat. Bank of St. Paul v. Stillwater Gas Co.*, 36 Minn., 75; *Peak v. Ellicott*, 30 Kan., 156; *Baker v. New York Nat. Exchange Bank*, 100 N. Y., 31; *Whitley v. Foy*, 6 Jones Eq. [N. Car.], 34; *Central Nat. Bank v. Connecticut Mutual Life Ins. Co.*, 104 U. S., 54; *Union Stock Yards Bank v. Gillespie*, 137 U. S., 411.

Analogous in principle, also, is the doctrine, abundantly supported by authority, that a partner cannot, without the consent of his copartners, apply the firm property in satisfaction of his individual liabilities, and that upon one so receiving partnership property is cast the burden of proving either consent by the other partners, or facts which amount to an equitable estoppel as against them. (*Kendal v. Wood*, 6 L. R., Ex. [Eng.], 243; *Heilbut v. Nevill*, 4 L. R., C. P. [Eng.], 354; *Rogers v. Batchelor*, 12 Pet. [U. S.], 221; *Davis v. Smith*, 27 Minn., 390; *Farwell v. St. Paul Trust Co.*, 45 Minn., 495; *Johnson v. McClary*, 131 Ind., 105. See, also, Parsons, Partnership, sec. 90, and note; Bates, Partnership, sec. 1046; *Dob v. Halsey*,

16 Johns. [N. Y.], 34; *Mutual Nat. Bank v. Richardson*, 33 La. Ann., 1312.)

A consideration of the authorities cited leads irresistibly to the conclusion that appellant's right to the money in controversy was not affected by the deposit thereof in Fitch's name, and that he is entitled to reclaim it notwithstanding that fact, unless there exists in favor of the bank an equitable defense arising out of the subsequent transactions, which should prevail as against his title, a question we will now proceed to examine.

The allegations of the petition are indicated by the foregoing statement of facts, while the answer is, in effect, a general denial. It may, for the purpose of the present inquiry, be conceded that payment by the bank of the money in controversy upon Fitch's checks, in good faith, relying upon his apparent title thereto, without notice of appellant's rights in the premises, would be a complete justification,—in short, that appellant, having clothed Fitch with the apparent ownership of said fund, is now estopped as against the bank to question his authority to check it out. But is that fact available as a defense under the issues presented? "The answer shall contain (1) a general or specific denial of each material allegation of the petition controverted by the defendant; (2) a statement of any new matter constituting a defense, counter-claim, or set-off, in ordinary and concise language." (Civil Code, sec. 99.) It has, in construing the section quoted, been repeatedly held that new matter of any kind, constituting a complete or partial defense, must be specially pleaded. (*Atchison & N. R. Co. v. Washburn*, 5 Neb., 117; *Burlington & M. R. R. Co. v. Harris*, 8 Neb., 140; *Clark v. Mullen*, 16 Neb., 481; *Mordhorst v. Nebraska Telephone Co.*, 28 Neb., 610; *Bishop v. Stevens*, 31 Neb., 786; *Prall v. Peters*, 32 Neb., 832.) New matter, according to the most approved interpretation of the term, is any fact extrinsic to the matter alleged as the cause of action, and includes all defenses, whether legal or equi-

table, not included in a denial of the allegations of the petition. (Bliss, Code Pleading, sec. 352.) And the rule thus stated is applicable to the case at bar, however the transaction in question may be characterized, whether as an estoppel *in pais*, or simply as a repayment of the appellant's money upon the checks of his authorized agent. It follows from these views that decree for the defendant must be reversed and the district court advised to enter a decree in accordance with the prayer of the petition.

REVERSED.

IRVINE, C., not sitting.

JOHN THOMAS, TRUSTEE, v. PETER N. CARSON ET AL.

FILED JANUARY 21, 1896. No. 6260.

1. **Pleading:** NAMES OF PARTIES. Where the petition or complaint states a cause of action in favor of the plaintiff personally, superadded words, such as "agent," "executor," or "trustee," will be regarded as *descriptio personæ* merely.

2. **Abstracts of Title:** STATUTORY BOND. The bond required by section 1, chapter 64, Laws, 1887 (Compiled Statutes, sec. 65, ch. 73), is designed as security for those who may be damaged through the negligence or inefficiency, and possibly the fraud, of persons engaged in the business of compiling abstracts of title.

3. ——: ERRORS: LIABILITY OF ABSTRACTER. T., the plaintiff, purchased a real estate mortgage relying upon the certificate accompanying an abstract of title, in which it was recited that C., the abstracter, had carefully examined the records of the office of the county clerk, the clerk of the district court, and county treasurer; and that there were of record in said offices no liens upon the property described except as in said abstract mentioned. *Held*, That C. is not liable on his bond on account of the omission from said abstract of a prior mortgage upon the property conveyed, then of record in the office of the *register of deeds*.

4. ———: ———: CERTIFICATE OF ABSTRACTER: LIABILITY ASSUMED. The fact that the omission of the prior mortgage was the result of a conspiracy between C., the abstracter, E., the mortgagor, and P., to whom the subsequent mortgage was given, *held*, not material, since the certificate relied upon by the plaintiff imparted notice of C.'s engagement and the extent of the liability assumed by him.

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

Capps & Stevens, for plaintiff in error.

John M. Ragan, *J. B. Cessna*, and *M. A. Hartigan*, *contra*.

POST, C. J.

This was an action in the district court for Adams county by the plaintiff in error Joseph Thomas, trustee, who sued to recover from the defendants Carson, Doyen, Spicknell, and Brunningsen, on the undertaking of the first named defendant as a bonded abstracter. The bond set out in the petition below is in substantial compliance with chapter 64, Laws, 1887 (Compiled Statutes, ch. 73, sec. 65 *et seq.*). The breach alleged as the cause of action is the making and certifying by Carson, the principal in said bond, of an abstract of the title to a certain quarter-section of land in Adams county, from which were omitted two mortgages shown by the records of said county, and which were valid and subsisting liens upon the property therein described. It is alleged that the plaintiff, relying upon said abstract and accompanying certificate, purchased a certain mortgage thereby appearing to be a first lien upon said property but which was filed for record subsequent to the recording of the two mortgages first described. That the mortgage so purchased by the plaintiff was not as shown by said abstract and certificate a first lien upon said property, but was, on the contrary, the third lien and no se-

curity whatever for the money paid therefor. Carson, the principal, appears to be in default of answer, but the sureties join in an answer, of which the only allegation requiring notice is that the omission from the abstract of the two prior mortgages was the result of a conspiracy between Carson, their principal, the mortgagee therein named, the Western Loan & Investment Company, Elsmore, who, at the date of the several transactions involved, held the legal title to the property in question, and Charles H. Paul, the mortgagee named in the subsequent mortgage, and was done without the knowledge or consent of the answering defendants, or any of them. The reply is a general denial of the allegations of the answer.

The foregoing statement omits many allegations of the pleadings, but is, it is believed, sufficient to illustrate the principles by which this controversy is governed. On the trial below the plaintiff having introduced his evidence in chief, the defendants requested the court to direct a verdict in their favor on the following grounds: 1. The plaintiff is without authority to bring or maintain the action. 2. The plaintiff is not the real party in interest. 3. The abstract and certificate mentioned in the pleadings are shown to be in all respects true. Said motion having been sustained, a verdict for the defendants was returned in accordance with the direction of the court, upon which judgment was subsequently entered, and which has been removed into this court for review by the plaintiff below.

The record contains no suggestion of the capacity in which the plaintiff sues, aside from his designation in the pleadings as "Trustee." The allegation with respect to the payment by him for the securities mentioned is as follows: "And in consideration of the delivery to this plaintiff of the $10,500 notes secured by the mortgage hereinbefore referred to, this plaintiff purchased said notes, paying therefor the sum of $10,500." Mr. Ratzell, who represented the plaintiff in the purchase of said securities,

testified that the funds used for that purpose were advanced by Joseph Thomas, "Trustee," whose residence is in the state of Pennsylvania, but on his cross-examination stated that he had no information whatever as to whether said investment was made by Mr. Thomas on his own account or as the representative of another. We must, in view of these facts, regard the assumption that the action is prosecuted by the plaintiff in a representative capacity as unwarranted. On the contrary, assuming the petition to state a cause of action, it is in favor of the plaintiff individually, hence the word "trustee" accompanying his name in the pleadings is merely *descriptio personæ*. Where the petition or complaint discloses a cause of action in favor of the plaintiff personally, superadded words, such as "agent," "executor," or "trustee," may be treated as superfluous and wholly rejected by the court. (*Henshall v. Roberts*, 5 East [Eng.], 150; *Merritt v. Seaman*, 6 N. Y., 168; *Bennett v. Whitney*, 94 N. Y., 302; *Litchfield v. Flint*, 104 N. Y., 543; *Stilwell v. Carpenter*, 2 Abb. N. C. [N. Y.], 238, 62 N. Y., 639; *Holton v. Parker*, 13 Minn., 355; *Magee v. Board of Supervisors*, 38 Wis., 247; *Bragdon v. Harmon*, 69 Me., 29; *Sutton v. Mansfield*, 47 Conn., 388; 2 Boone, Code Pleading, p. 13.)

The conclusion thus stated renders necessary an examination of the third ground of the motion above mentioned, which is in effect that the veracity of the abstract and certificate introduced in evidence is not directly or indirectly assailed. However, as preliminary to an examination of that subject, it should be remarked that the act to which reference has been made requires each person engaged in the business of compiling abstracts of title to execute to the state of Nebraska a bond in the penal sum of $10,000, with not less than three sureties, conditioned for the payment by such abstracter "of any and all damages that may accrue to any party or parties by reason of any error, deficiency, or mistake in any abstract or certificate of title

made and issued by such person or persons." (Session Laws, 1887, p. 565, ch. 64, sec. 1.) On the back of the abstract in question we find printed a blank certificate in the usual form, in which it is recited that it is a full and complete abstract of all conveyances upon record affecting the property therein described. Carson, for reasons not disclosed by the record, instead of using the blank above mentioned, which included all conveyances affecting said property, executed and attached to the abstract a certificate in the following form:

"STATE OF NEBRASKA, }
ADAMS COUNTY. }

"I, P. N. Carson, an abstracter, duly qualified and having given the bond and had it approved as required by law, do hereby certify that I have carefully examined the records and files of the county clerk's office, office of the clerk of the district court, and treasurer's office, all of the county of Adams and state of Nebraska, and that the foregoing abstract is true in all respects.

"And I further certify that there are no other deeds, mortgages, or trust deeds, other conveyances or contracts of any kind, or any other mechanics' liens, judgments, attachments, actions in equity, or other liens or proceedings, or any taxes upon, or any tax proceedings, or liens for taxes upon the premises described in the heading of this abstract, or any part thereof, upon or in the records of either of the said three offices, to-wit, county clerk's office, office of the clerk of the district court, and treasurer's office, all of the county of Adams, except as hereinbefore set out.

"N. P. CARSON,

"Dated May 8, 1889. *Abstracter.*"

There are two facts conclusively established by the evidence in the record, viz.: (1) That the entries upon the abstract in question are in all respects true; (2) that at the date of said abstract, and for more than a year prior thereto, there was a register of deeds for Adams county, who is by

law made the custodian of all records of deeds, mortgages, and other instruments affecting the title to real estate in said county, and that the two prior mortgages above mentioned were not of record in either of the offices named in the foregoing certificate. It is also reasonably certain from the evidence that the omission from the abstract of the prior mortgages was, as alleged by defendant, the result of a conspiracy between Carson, Elsmore, Paul, the Western Loan & Investment Company, and others. It is possible that the terms "abstract" and "certificate of title" are used interchangeably in the statute, and that an abstracter would be chargeable upon his bond for damage resulting from the omission of a prior conveyance in the absence of any additional certificate; but it is unnecessary at this time to determine that question, since it is expressly charged by the plaintiff that he relied upon the certificate of Carson that there were no liens upon the mortgaged property except those shown by the abstract. Turning again to the certificate, it is apparent that by no reasonable or natural construction can it be held to include or apply to liens or conveyances of record in the office of the register of deeds. The evident purpose of the bond required by the statute is to provide security for persons who may be damaged through the negligence or inefficiency, and possibly the fraud, of abstracters. It is unnecessary to consider the question so ably argued by counsel for plaintiff, viz., whether Carson was, in contemplation of law, an officer, and his undertaking an official bond, or whether the requirement in that respect is a mere exercise of the power to regulate the business to which it applied. It is sufficient that the relation between an abstracter and his employer remains as it was before the statute, purely contractual, the only difference being, as already observed, that the bond of the former is a guaranty of his skill and faithfulness, and perhaps his fidelity. He may be, and frequently is, employed to search the record for liens only, or for deeds only, but in all cases his liability is

measured by his employment; and where, as in this case, his engagement applies to particular records, his liability will not, by implication, be so extended as to embrace liens or conveyances not disclosed by a search of the designated office or offices. In other words, in order to maintain an action upon the statutory undertaking of an abstracter, it is necessary to show that the act of omission or commission alleged as the cause thereof is a breach of the conditions, express or implied, of the particular engagement to which it relates. The omission to which the plaintiff's loss is attributed not being, according to the record, a violation of the terms or conditions of Carson's employment as an abstracter, is not a breach of the bond upon which this action is found, and the district court did not, therefore, err in the direction complained of. We must not from these views be understood as intimating that the plaintiff is without remedy for the wrong alleged. It may be, and probably is, true that the purpose of Carson and his confederates above named was, by means of the certificate employed, to defraud purchasers of the subsequent mortgage through assignment from Paul, the mortgagee; but, as has been shown, the prior mortgages were omitted from the abstract, with the knowledge and consent, if not by the procurement, of Paul, and the certificate was evidently satisfactory to him. The plaintiff may, therefore, as the victim of such fraud, in addition to the remedy against the parties antecedently liable on the notes and mortgage, pursue the several conspirators by an action for fraud; but being a stranger to the agreement under which the abstract was furnished, and having purchased the notes and mortgage, relying upon the certificate, which of itself imparts notice of the limitation upon Carson's liability, he must look elsewhere for relief than to the bond declared upon in this action.

Defendants also rely upon a want of privity between the plaintiff and Carson, and argue that the abstract being sat-

isfactory to Paul, at whose instance it was prepared, and to whom the subsequent mortgage was given, cannot be made the basis of recovery in favor of a stranger to the transaction. The cases cited by counsel appear to sustain the proposition contended for as a rule of the common law, although their application to a statute like ours under which the bonds of abstracters are conditioned for the payment of "all damage that may accrue to any party or parties by reason," etc., may well be doubted. It is, however, unnecessary to pursue that subject, since, for reasons stated, the judgment must be

AFFIRMED.

RAGAN, C., not sitting.

LEROY MARTIN, APPELLEE, V. WILLIAM P. MILES, APPELLANT.

FILED JANUARY 21, 1896. No. 7776.

Elections: MANNER OF MARKING BALLOTS. The provision of section 20, act of 1891 ("Australian Ballot Law"), for the expressing of the voter's intention by a mark opposite the name of the candidate of his choice, is mandatory, and the manner thus prescribed is exclusive of all others; and such is the rule whether the names of candidates be printed on the ballot or written thereon by the voter.

APPEAL from the district court of Cheyenne county. Heard below before NEVILLE, J.

The opinion contains a statement of the case.

William P. Miles, *George W. Heist*, and *Henry St. Rayner*, for appellant:

The fifty-three ballots having no mark opposite the name

of appellee should not have been counted for him. (*State v. Stein*, 35 Neb., 859; *Spurgin v. Thompson*, 37 Neb., 39; *Grant v. McCallum*, 12 Can. L. J., 113; *Woodward v. Sarsons*, 32 L. T. R., n. s. [Eng.], 867; *Cameron v. Maclennan*, 11 Can. L. J., 163; *Dionne v. Gagnon*, 9 Queb. L. R., 20; *Haswell v. Stewart*, 1 C. S., 4th series [Scot.], 925; *Robertson v. Adamson*, 3 C. S., 4th series [Scot.], 978; *Parvin v. Wimberg*, 30 N. E. Rep. [Ind.], 790; Wigmore, Australian Ballot System, 191-193; *Hawkins v. Smith*, 8 Can. Sup. Ct., 676; *Sherwood v. State Board of Canvassers*, 129 N. Y., 409.)

Coffin & Stone, also for appellant.

H. D. Rhea, contra, cited: *State v. Russell*, 34 Neb., 116; *Kreitz v. Behrensmeyer*, 17 N. E. Rep. [Ill.], 232; *Daggett v. Hudson*, 54 Am. Rep. [O.], 832; *Kellogg v. Hickman*, 21 Pac. Rep. [Colo.], 325; *State v. Nicholson*, 102 N. Car., 465; *Brown v. McCollum*, 76 Ia., 479; *Fenton v. Scott*, 17 Ore., 189.

POST, C. J.

This case was before us on a former appeal, resulting in a reversal of the judgment of the district court for Cheyenne county, in favor of Martin, the contestant, for the office of county attorney for said county. (*Martin v. Miles*, 40 Neb., 135.) It will be observed from the opinion cited that the judgment of this court was based upon the ruling of the district court in receiving in evidence over the objection of the contestee, Miles, the original ballots cast at election in question, to-wit, the general election for the year 1892. It was there said, following *Albert v. Twohig*, 35 Neb., 563, that the ballots having been so placed that they might without difficulty have been tampered with by interested parties, were inadmissible in the absence of proof that they were in the same condition as when sealed up by

the several election boards. Since the remanding of the cause to the district court a trial has been had therein, resulting also in a judgment for the contestant, and from which the contestee has appealed to this court.

It is on this appeal strenuously insisted by counsel for Miles, the unsuccessful party below, that the proof is insufficient to overcome the presumption against the ballots and that the district court a second time erred in receiving them in evidence. We will not, however, examine that subject, but assume the objection to have been rightly overruled, since there is another question prominently mentioned in the briefs of the respective parties, which is necessarily decisive of the controversy.

According to the finding of the district court there were cast for Martin, the contestant, 503 votes, and for Miles, the contestee, 474 votes, or a majority of 29 in favor of the former. Counsel agree that the foregoing statement includes 53 ballots counted for the contestant, on which his name appeared written under the appropriate head, but containing no mark opposite his name, or any means of indicating the choice of the respective votes other than the writing of contestant's name, which, for reasons foreign to the question under discussion, was not printed on the official ballots. We think the ballots thus described should have been rejected. True, section 13 (Session Laws, 1891, p. 245, ch. 24) of the Australian ballot law, among other things, provides that "Nothing in this act contained shall prevent any voter from writing on his ballot the name of any person for whom he desires to vote for any office, and such vote shall be counted the same as if printed upon the ballot and marked by the voter." (Compiled Statutes, sec. 138, ch. 26.) The section from which the foregoing is quoted is apparently intended to define and provide for the furnishing of official ballots, and must be construed in connection with the other provisions of the act. Turning to section 20 (Session Laws, 1891, p. 251, ch. 24), which

prescribes the manner of voting, we observe the following language: "The elector shall then forthwith proceed alone into a compartment, if one be then unoccupied, and shall prepare his ballot by marking in the appropriate margin or place a cross (x) with ink opposite the name of the candidate of his choice for each office to be filled, or by filling in with ink the name of the candidate of his choice in the blank space provided therefor, and marking a cross (x) with ink opposite thereto." (Compiled Statutes, sec. 145, ch. 26.) Paragraph 7 of schedule B, entitled "Forms of Cards of Instruction for the Guidance of Voters," which is a part of said act, and required to be posted in all booths or compartments provided for marking ballots, reads as follows: "If you wish to vote for any person whose name does not appear upon the ballot, write or insert his full name in the blank space on the ballot under the proper office you wish him to hold, and make a cross mark in the proper margin opposite the same." (Session Laws, 1891, p. 260, ch. 24.)

We are referred to the case of *State v. Russell*, 34 Neb., 116, in support of the contention that the provision for expressing the choice of the voter by a mark opposite the name of candidates is not essential to a fair election, and should therefore be regarded as directory only. But that case does not, we think, sustain the claim of counsel. It is, on the contrary, there said that "Courts have uniformly held that when the statute expressly, or by fair implication, declares an act to be essential to a fair election, or that an act shall be performed in a given manner and no other, such provisions are mandatory and exclusive." It cannot be doubted from a reading of the several provisions of the Australian ballot law that the manner of voting therein prescribed, by a cross (x) or its equivalent, is exclusive of all others. Such appears to have been one of the principal inducements for the abolition of the former system in order to promote the express purpose of the act,

viz., the independence of the voter. Adjudications directly in point are not numerous, but the views here expressed harmonize with the decided weight of judicial expression, if indeed there exists any diversity of opinion on the subject. (*State v. Stein*, 35 Neb., 848; *Sego v. Stoddard*, 36 N. E. Rep. [Ind.], 204; *Parvin v. Wimberg*, 30 N. E. Rep. [Ind.], 790; *Sanner v. Patton*, 40 N. E. Rep. [Ill.], 290; *In re the Vote Marks*, 17 R. I., 812; *Curran v. Clayton*, 86 Me., 42; *Vallier v. Brakke*, 64 N. W. Rep. [S. Dak.], 180, 64 N. W. Rep., 1119.)

Rejecting the 53 votes erroneously counted, the result is 450 votes for Martin and 477 for Miles, or a majority of 27 votes in favor of the latter. It follows that the judgment of the district court must be reversed and the cause remanded for trial *de novo*.

REVERSED.

HARRY MCCORMAL ET AL. V. STEPHEN A. REDDEN.

FILED JANUARY 21, 1896. No. 5958.

1. **Negotiable Instruments:** CONSIDERATION: PRINCIPAL AND SURETY. The maker of a promissory note died before its maturity, and gave by will to his two sons the major portion of his estate, both real and personal, subject to the payment of his debts. *Held*, The cancellation of the note, and the extension of time for payment of the indebtedness evidenced thereby, constituted a sufficient consideration for the execution and delivery by the sons of a note for the amount of such debt. The new note was a binding obligation upon them, and a party signing the first note as surety for the father and the second in the same capacity for the sons was entitled, upon being obliged to pay the same by their failure to meet it, to recover from the principal makers the sum paid, with legal interest.

2. ———: ACTION BY SURETY AGAINST PRINCIPAL: JUDGMENT FOR PLAINTIFF. The evidence examined, and *held* sufficient to sustain a verdict in favor of the plaintiff in the action.

3. **Instructions:** REVIEW: ASSIGNMENTS OF ERROR. "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." (*Murphy v. Gould*, 40 Neb., 728.)

4. **Rulings on Evidence:** REVIEW. The objections to the admission of certain testimony considered and the ruling of the trial court thereon approved.

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

The facts are stated in the opinion.

James McNeny, for plaintiffs in error:

The note sued upon was without consideration and void as to plaintiffs in error. A surety, in order to recover, must show that the principal at the time of payment was under legal obligation to pay. (*Kimble v. Cummins*, 3 Met. [Ky.], 327; *Davis v. Board of Commissioners of Stokes County*, 72 N. Car., 441; *Davis v. Board of Commissioners of Stokes County*, 74 N. Car., 374; *Pitt v. Purssord*, 8 M. & W. [Eng.], 538; *Hollinsbee v. Ritchey*, 49 Ind., 261; *Bancroft v. Abbott*, 3 Allen [Mass.], 524; *Noble v. Blount*, 77 Mo., 235.)

The court should have set aside the verdict as being against the weight of the evidence. (*Cummins v. Winters*, 19 Neb., 719.)

The last will and testament of Henry McCormal, deceased, was erroneously admitted in evidence. (*Brown v. Swineford*, 44 Wis., 292; *Webber v. Hanke*, 4 Mich., 198; *Marshall v. Haney*, 59 Am. Dec. [Md.], 92; *Cleveland Paper Co. v. Banks*, 15 Neb., 22.)

In any view of the case the plaintiff below was entitled to recover only the sum actually paid by him, with interest at seven per cent per annum from the date of payment, after giving defendants below credit with thirty-two dollars paid by them. The judgment exceeds the amount paid by

plaintiff below, and interest, and to the extent of the excess is not sustained by the evidence. (*Bell v. Ardis*, 38 Mich., 609; *Beardsley v. Horton*, 3 Mich., 565.)

J. S. Gilham, contra.

HARRISON, J.

The defendant in error instituted this action in the district court of Webster county to recover the amount of a promissory note which he alleged, in his petition filed in the cause, was executed by the plaintiffs in error as principal makers and he as their surety, and which he further stated the plaintiffs in error failed and refused to pay at its maturity, and he as surety then paid. He was successful in the district court in a trial to the judge and a jury, and the defeated parties have presented the case to this court for review of the proceedings therein.

It is urged on behalf of plaintiffs in error that the note was, as to them, without consideration and hence of no effect, also that the verdict was not sustained by the evidence. These two contentions we will notice together, as, from the nature of the case, as disclosed by the evidence, they are so closely connected that it seems proper to do so. It appears, as we gather the history of the transactions involved in the cause from the testimony introduced at the trial, that at some time (the exact date is not material to the issue) in the spring of 1888, Henry McCormal, father of plaintiffs in error, borrowed of the bank of Guide Rock, Nebraska, the sum of $325, as evidence of which he executed and delivered to the bank a promissory note, also signed by the defendant in error as surety. Before the maturity of this note Henry McCormal, the principal maker, died, and at the time the note became due demand was made of the defendant in error, the surety thereon, for its payment. Henry McCormal was, at the time of his death, the owner of a considerable estate, consisting of real and personal property, sub-

ject to some debts, which he by will devised and gave to his two sons, the plaintiffs in error, and which they received. The defendant in error, when the payment of the note signed by Henry McCormal and himself was demanded of him, went to the two sons, and, whatever the agreement or conversation between them at the time may have been, if any, they all of them, plaintiffs and defendant in error, subsequently signed the note in suit. The evidence was conflicting as to whether the three went to the bank together and signed the note while there, or went separately and signed. This is only material as it may be considered as bearing with more or less weight upon the question of the relation which existed between the signers of the note, whether defendant in error was surety or not. We are satisfied from a careful examination of the testimony that it will sustain findings that the plaintiffs in error realized, or knew at the time of the execution of the note in controversy, that the amount of the note given by their father and defendant in error to the bank was a valid claim against the estate of the deceased father, of which they were the recipients, and must be paid by them or deducted from the property, which would amount to the same. It was testified by defendant in error that when he asked one of the sons about arranging in regard to the note at the bank, the son said, "yes, they would have to pay it anyway in the end, and they would give their notes in its place;" that this was the reason which moved them to sign the note in suit; also that the three were at the bank together at the time they signed the note, and that the old note signed by the father and defendant in error was canceled and given to one of the sons at that time; that the new note was signed by defendant in error as surety, it being given to secure an extension of time for the payment of the indebtedness evidenced by the one which was canceled, the extension being to furnish time to plaintiffs in error to obtain a loan for which they were then negotiating, or in some manner raise

the money with which to pay the debt. These findings, being warranted by the testimony, coupled with admitted facts, and such as were fully proven, were sufficient to sustain the verdict, and disclosed sufficient consideration for the execution of the note.

It is argued that the trial court erred in giving instruction numbered 2 of the instructions given by the court on its own motion. The assignments in the motion for new trial and petition in error, in reference to the alleged error, were as follows: "The court erred in giving instructions numbered 1 and 2 on its own motion." It has been repeatedly held by this court that alleged errors in giving instructions should be separately assigned, or, if grouped, as in this case, and, by examination, any instruction of the group should be determined to be without error, the assignment would not be given further consideration. No. 1 of the instructions attacked by the assignment was entirely proper, and applying the rule above referred to, this contention will not be further noticed.

The last will and testament of Henry McCormal, deceased, father of plaintiffs in error, was offered and admitted in evidence over the objection of their counsel, and this is assigned for error. The instrument admitted disclosed that the greater portion of his property, both lands and personal property, subject to the payment of his debts, was given to these two sons, and was material as tending to show the interest plaintiffs in error would have in the payment of this note held by the bank, which would be a claim against the estate they were to receive, and be deducted from it, and thus tended to establish the consideration which moved them to sign the note in suit. Agreeably with this view of the will as evidence, there was no error in its admission. It is also claimed that counsel for defendant in error, during the argument of the case, made use of some expressions in reference to plaintiffs in error which were uncalled for, not warranted by the testimony, and prejudicial to the

rights of plaintiffs in error. Counsel for defendant in error, in the argument, if he is quoted correctly in the record, did use some language in the connection stated which probably might as well have been left unsaid, in so far as it may have been intended to bear upon any phase or issue of the case, but under the conclusion to which we have arrived as to the proper disposition of the rights of the parties in view of all the testimony adduced during the trial, the fact that this language was used by counsel was immaterial and in no degree prejudicial to the rights of plaintiffs in error.

The jury returned into court with a verdict, in which the amount allowed defendant in error was $347.50, "with ten per cent interest per annum, less $32 already paid by the defendant." This verdict was not accepted by the court, and the jury were directed to retire to the jury room and "bring in another verdict." These are the words used in the portion of the direction to the jury in relation to the verdict, as appears from the record. We presume the jury were told to reform the verdict by computing any interest to be allowed and add it to the principal, for this is what was done, as is apparent from the verdict which was delivered when the jury again came into the room, the amount assessed in favor of defendant in error, as then stated, being $456. The only error which we can discover in this portion of the proceedings is in the amount allowed the defendant in error. The jury did not deduct the payment of $32 and calculated the interest on the sum paid by the defendant in error at ten per cent per annum, instead of seven per cent, the proper per centum of interest. Treating the $32 paid after the time of payment of the note by defendant in error as a payment on the interest properly allowable, the defendant in error was given a verdict for the sum of $42.03 in excess of the amount to which he was entitled. Defendant in error will have leave to file a remittitur for the sum indicated, $42.03, within forty days, and if he does

so the judgment of the trial court will stand affirmed, and if not, reversed and remanded.

JUDGMENT ACCORDINGLY.

PATRICK MCEVOY V. NEBRASKA & IOWA INSURANCE COMPANY.

FILED JANUARY 21, 1896. No. 5979.

1. **Insurance:** PREMIUM NOTES: WAIVER OF DEFAULT. A clause providing that an insurance policy shall be suspended during the time the premium note shall remain unpaid after maturity, is for the benefit of the company and may be waived by the insurer.

2. ——: ——: ACTION ON NOTES: MEASURE OF RECOVERY. A promissory note of date May 11, 1889, and due June 1, 1889, was executed and delivered by the party insured to an insurance company for the entire amount of the premium for a policy of fire insurance insuring his property for a stated term. The contract of insurance and the note each contained a statement by which it was agreed that, if the assured failed to pay the note at maturity, the liability of the company under the policy for any loss or damage to the property insured happening thereafter, and during the continuance of such default, should be suspended. Default was made in the payment of the note when due. In a suit on the note a recovery may be had for the full amount of it or any unpaid balance thereof.

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

W. S. Poppleton, for plaintiff in error.

Montgomery & Hall, contra.

HARRISON, J.

This is an action for the balance due upon a promissory note of date May 11, 1889, and due June 1, 1889, in the

sum of $225, given for the amount of the premiums for fire insurance issued and procured for the plaintiff in error by the Nebraska & Iowa Insurance Company, payee of the note. There had been payments made aggregating in amount $97.50. The insurance company recovered judgment in the district court, and the case is presented to this court for review by error proceedings on behalf of the losing party there. It was a part of the insurance contract, and also stated in the note in suit, that if default was made in payment of the note when due, the company was absolved from liability during the continuance of such default, and the contract of insurance to be null and void during such time.

It is urged that the judgment was contrary to the evidence and to law, on the ground that there was no real consideration for the note because of the clause which we have hereinbefore indicated. A like contention was made in the case of *Phenix Ins. Co. of Brooklyn v. Rollins,* decision reported in 44 Neb., 745, with which, in the effect of the facts and circumstances involved, the case at bar is identical, and, after a full discussion the rule was determined and announced as follows: "A clause providing that an insurance policy shall be suspended during the time the premium note shall remain unpaid after maturity, is for the benefit of the company and may be waived by the insurer. A fire insurance policy for the term of five years, at a gross premium for the entire time, the insured giving his note for such premium due in one year from date, contained a stipulation to the effect that the failure by the insured to pay the premium note when due suspended the policy during such default, but that a subsequent payment of the premium in full revived the policy for the remainder of the term. The defendant made default in the payment of such note, and in an action thereon it was held that the company was entitled to recover the full amount of the note." The case at bar is within the rule just

stated, and it follows that the plaintiff in error is liable for the full amount of the note or for any balance due upon it.

As a part of his answer to the petition or cause of action the plaintiff in error pleaded certain payments made upon the note after its maturity, and sought the recovery of the payments from the insurance company on the ground that the amounts were paid after the maturity of the note, and at a time when the plaintiff in error was not further liable for its payment either in whole or in part. The non-liability as to these partial payments is based upon the same reasons as were urged as to non-liability for the whole amount, and having determined it to be unavailing in regard to the whole sum evidenced by the note, it is certainly so as to a part or parts of it, and there existed no right in the plaintiff in error to a recovery of the partial payments of the note made after its maturity. The judgment of the district court is

AFFIRMED.

ANNA C. HUBERMANN ET AL. V. MARY B. EVANS ET AL.

FILED JANUARY 21, 1896. No. 5731.

1. **Guardians' Sales:** REGULARITY OF PROCEEDINGS: TITLE OF PURCHASER. Defects and irregularities in the proceedings by a guardian for the sale of the real property of his ward will not affect the title of a good-faith purchaser, where so much as section 64, chapter 23, Compiled Statutes, makes essential to the validity of the sale has been complied with.

2. ———: ———: JURISDICTION: DISTRICT COURT. By "a district court of competent jurisdiction," in subdivision 1 of said section, is meant the district court of the county in which the guardian was appointed.

3. **Guardian and Ward:** PETITION TO SELL LAND: DESCRIPTION OF PROPERTY. A petition by a guardian for a license to sell the ward's real estate should describe all the land that the

ward owns, and especially that which is sought to be sold; but any description therein will be sufficient, when collaterally assailed, if it provides the means of identifying the property.

4. ——: ——: ——. In proceedings to sell the real estate of a ward, the description of the land need not necessarily be more specific, definite, and certain than is required in a conveyance of real property. Hence a general description of the premises in such petition, as all the real estate of the ward situate in this state, or in any particular county or city therein, is not void for indefiniteness and uncertainty.

5. ——: SALE OF LAND: REGULARITY OF PROCEEDINGS. The proceedings of a guardian to obtain authority to sell the land of his ward will not be invalidated by reason of a manifestly false statement in the description of the property in the application and license, when the remainder of the description, after rejecting that which is erroneous, is sufficiently certain to enable the land to be located.

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

Winfield S. Strawn, for plaintiffs in error.

Wharton & Baird and *B. G. Burbank, contra.*

NORVAL, J.

This is an action by plaintiffs in error to recover lot 4, in block U, in Lowe's Addition to the city of Omaha. Two other actions were brought in the court below by the plaintiffs against other defendants, to recover lots 5 and 6, in the same block. By consent, the three cases were tried together, and by stipulation of the respective parties it was agreed that the decision in one should control the others, since the facts in each case were the same. Upon a trial to the court judgment was entered herein against the plaintiffs. There is no controversy as to the facts. The parties claim title to the real estate in controversy through August Hubermann, deceased, as a common source. On the 15th day of December, 1878, August Hubermann died in Douglas

county, this state, intestate, seized in fee-simple of lots 7 and 11 in block S, lots 4, 5, and 6 in block U, and lots 1, 2, 3, 4, 5, and 6 in block V, all in Lowe's Addition to the city of Omaha. Hubermann left surviving him three minor children, the plaintiffs herein, and a widow. The latter was subsequently appointed, by the county court of said county, guardian of said minors, and qualified as such. The premises last above described were all the real estate situate in Douglas county which plaintiffs owned at the time the proceedings hereinafter mentioned for license to sell the lands of the wards were instituted. On March 20, 1884, the guardian filed in the district court of Douglas county the following duly verified petition for an order to sell the real estate of her wards:

"In the District Court of Douglas County, State of Nebraska.

"IN THE MATTER OF GUARDIANSHIP OF ANNA C. HUBERMANN ET AL., MINORS.

"Now comes Ellenor Hubermann, guardian herein of Anna C. Hubermann, Emma Hubermann, and Henry Hubermann, and shows to the court that said minors have no personal estate whatever or of any kind, and your petitioner is the mother of said minors, and she is a widow and without any means of support, except what she can earn by her own labor.

"Your petitioner further shows to the court that said minors are possessed of real estate situated in the county of Douglas, and state of Nebraska, and described as follows, to-wit: Lot seven (7) in block S, lot eleven (11) in block S, lots four (4), five (5), and six (6) in block W, and lots one (1), two (2), three (3), four (4), five (5), and six (6) in block V, all in Lowe's Addition to the city of Omaha.

"Your petitioner further states that the above is all the real estate belonging to said minors. She also states that there is a mortgage amounting with interest upon said real

estate to about the sum of $1,500, and that said real estate is now worth about the sum of $2,000.

"Your petitioner further alleges that said minors are in need of the proceeds of the sale of their said real estate for their support, maintenance, and schooling.

"Wherefore your petitioner prays that she be licensed to sell all the above described real estate, and that an order be made to her for that purpose by this honorable court, and for such other and further relief as in equity she is entitled to."

Notice of the presentation of the foregoing application was published for the period and in the manner provided by law, which notice contained no specific description of the property, but stated in general terms the object and prayer of the petition to be to secure a license to sell the real estate of the minors situated in Douglas county, Nebraska. Pursuant to said notice the district court entered an order or decree authorizing a sale of all the real estate described in the petition. The guardian, after taking and subscribing the oath required by law, and filing the statutory bond, which was approved, gave due and legal notice that she would, in obedience to said license, on the 28th day of November, 1885, at 10 o'clock in the forenoon of said day, sell the real estate of her wards, which notice stated the time, place and terms of sale, and described the real estate thus: "The following described real estate being and situated in Douglas county and state of Nebraska, to-wit: Lots 7 and 11 in block S, lots 4, 5, and 6 in block U, lots 1, 2, 3, 4, 5, and 6 in block V, all in Lowe's Addition to the city of Omaha." On the date last aforesaid, and pursuant to the terms of said notice, the guardian sold at public sale all the real estate last above described, including the lot in controversy herein, to Dexter L. Thomas, who was the highest bidder thereof, and who purchased in good faith and for a valuable consideration. Subsequently said sale was reported to, and con-

firmed by, the district court, and a deed was executed, acknowledged, and delivered by said guardian to said Thomas, covering the property so purchased by him, including said lot 4 in block U. The lots in block U were erroneously described as in block W in the petition of the guardian for license and in the license to sell. There is not now, and never has been, any block in Lowe's Addition to the city of Omaha known or designated as "block W." The defendant claims title to, and holds possession of, said lot 4 in block U under and through a series of valid conveyances from said Dexter L. Thomas. It is obvious that the plaintiffs are entitled to recover the premises in dispute, unless their title or interest therein was divested by the guardian's deed already mentioned. Whether it had that effect is the pivotal point in the case.

The legislature has, by sections 42 *et seq.* of chapter 23, Compiled Statutes, enumerated the purposes for which a guardian may sell the real estate of his ward, and prescribed the steps to be taken by the guardian in order to effect such sale, one of these being that the contemplated sale must be first licensed either by the district court of the county in which the guardian obtained his appointment, or by a judge of such court, and this, though the premises are located in another county. (*Stack v. Royce*, 34 Neb., 833.) There is no room to doubt that a sale by a guardian without such order is of no force whatever. It is not merely irregular, but is absolutely void. (*Ludlow v. Culbertson Park*, 4 O., 5; *Newcomb v. Smith*, 5 O., 448; *Goforth v. Longworth*, 4 O., 129; *Bell's Appeal*, 66 Pa. St., 498; *Evans v. Snyder*, 64 Mo., 516; *Walbridge v. Day*, 31 Ill., 379; *Tippett v. Mize*, 30 Tex., 361.) In the case before us a license was issued by the court of the proper county; but it is argued by counsel for plaintiffs that it and the application therefor were so defective as to render the guardian's deed nugatory. The objections to the proceedings instituted by the guardian to obtain the license which resulted

in the sale and conveyance of the property present the questions which have been discussed by counsel in the briefs and to be decided by the court. As this action is based upon the ground that no title to the premises in dispute passed to Thomas by the sale and conveyance made by the guardian, we look alone for defects of such a character as will render the proceedings void.

It is contended that the district court had no jurisdiction to license the sale of the lot, because it was not described in the petition presented by the guardian asking for authority to make the sale. It is strenuously argued by defendant's counsel that it is not essential that such a petition should contain any description of the real estate. We will proceed to the consideration of the point.

Sections 42, 43, 47, 48, and 53 of chapter 23, Compiled Statutes, are as follows:

"Sec. 42. When the income of the estate of any person under guardianship, whether as a minor, insane person, or spendthrift, shall not be sufficient to maintain the ward and his family, or to educate the ward when a minor, or the children of such insane person or spendthrift, his guardian may sell his real estate for that purpose, upon obtaining a license therefor, and proceeding therein as provided in this chapter.

"Sec. 43. When it shall satisfactorily appear to the court, upon the petition of any such guardian, that it would be for the benefit of his ward that his real estate, or any part thereof, should be sold, and the proceeds thereof put out at interest or invested in some productive stock, his guardian may sell the same for that purpose, upon obtaining a license therefor, and proceeding therein as hereinafter provided."

"Sec. 47. In order to obtain a license for such sale, the guardian shall present to the district court of the county in which he was appointed guardian a petition therefor, setting forth the condition of the estate of his ward, and

the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale, which petition shall be verified by the oath of the petitioner.

"Sec. 48. If it shall appear to the court from such petition that it is necessary or would be beneficial to the ward that such real estate or some part of it should be sold, the court shall thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before such court at a time and place therein to be specified, not less than four nor more than eight weeks from the time of making such order, to show cause why a license should not be granted for the sale of such estate."

"Sec. 53. If, after full examination, it shall appear to the court either that it is necessary or that it would be for the benefit of the ward that the real estate, or any part of it, should be sold, such court may grant a license therefor, specifying therein whether the sale is to be made for the maintenance of the ward and his family, or for the education of the ward or his children, or in order that the proceeds may be put out or invested as aforesaid."

Provisions are made in other sections of the chapter for notifying the next of kin of the ward and all parties interested in the estate of the time fixed for the hearing, that they may, if so advised, resist the application; also, for the guardian giving a bond and taking and subscribing an oath before the sale shall be made, and for the giving of a notice of the sale; but the sections relating to these matters need not be copied here, as they shed no light upon the question under consideration. The statute is explicit that a petition for a license to sell must be presented by the guardian, and clearly such petition is to be in writing. The statute likewise enumerates certain matters which the petition shall disclose, one of which being a statement of the facts relied upon to show the necessity and expediency of the sale of the ward's lands. In an action at law the petition should set forth the facts entitling the plaintiff to

recover; and so in a petition by a guardian for authority to sell real estate, the matters necessary to justify the granting of the license, and the sale thereunder, should be averred. The application must show that the ground upon which the sale is asked is one of the purposes specified by the legislature for which a sale may be licensed. The authorities do not agree as to the necessity of describing in the application the property sought to be sold. Some hold that it is essential, and that where a license is based upon a petition with the description omitted, the order and sale thereunder are void (*Leary v. Fletcher*, 1 Ired. [N. Car.], 259; *Ducket v. Skinner*, 11 Ired. [N. Car.], 431; *Spruill v. Davenport*, 3 Jones Law [N. Car.], 42; *Verry v. McClellan*, 6 Gray [Mass.], 535; *Weed v. Edmonds*, 4 Ind., 468; *Trent v. Trent*, 24 Mo., 307; *Wilson v. Hastings*, 66 Cal., 243; *Gilchrist v. Shackelford*, 72 Ala., 7); and others say it is not essential that the property be particularly described in a petition for its sale (*Wells v. Mills*, 22 Tex., 302; *Wells v. Polk*, 36 Tex., 121; *Davis v. Touchstone*, 45 Tex., 491; *Bryan v. Bauder*, 23 Kan., 95); and there is another line of cases which holds that the omission of the description from the application for an order of sale, or that the petition is otherwise defective, is an error or irregularity merely, available alone in a direct proceeding to review the decision, but that the order allowed on such a petition is not void when assailed collaterally. Among the numerous decisions sustaining this doctrine are: *Burke v. Wheat*, 22 Kan., 722: *Hodgin v. Barton*, 23 Kan., 740; *Watts v. Cook*, 24 Kan., 278; *Arrowsmith v. Harmoning*, 42 O. St., 254; *Rumrill v. First Nat. Bank of St. Albans*, 28 Minn., 202; *Montour v. Purdy*, 11 Minn., 278; *Howard v. Moore*, 2 Mich., 226. Although our statute does not in express language say that the petition of a guardian for a license to sell the real estate of his ward must describe or set forth the property, we are constrained to hold that the manifest intention of the legislature was that the application should designate

the property belonging to the ward. This is obvious from the fact that by section 53, already quoted, the order or license must specify whether the whole or only a part of the property shall be sold, and further, that section 47 requires the petition to state the condition of the estate of the ward. Again, proceedings for the sale of real property by a guardian are necessarily *in rem*, and the application should show that the *res* is in the jurisdiction of the court granting the order. The authority of a guardian is confined to the state in which he was appointed, and, therefore, he cannot be empowered in this state to sell property situate in another state. The petition should, therefore, disclose that the real estate for which sale is prayed is within this state.

It will be observed that the petition or application for a license in the case under consideration does not specifically state that any of the real estate belonging to the wards was located in block U, in the particular block in which the lot in question is situate, and consequently it is argued that the court had no power to license the sale thereof. The defendant urges that the confirmation of the sale made by the guardian cured any and all defects, errors, and irregularities previously accruing in the proceedings, and that they are not available in this collateral action. Section 64, chapter 23, Compiled Statutes, is relied upon in support of the latter contention. It provides: "In case of an action relating to any estate sold by a guardian, under the provisions of this subdivision, in which the ward, or any person claiming under him, shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear: First—That the guardian was licensed to make the sale by a district court of competent jurisdiction. Second—That he gave a bond, which was approved by the judge of the district court, in case any bond was required by the court upon granting the license. Third—That he

took the oath prescribed in this subdivision. Fourth—That he gave notice of the time and place of sale, as prescribed by law. Fifth—That the premises were sold accordingly, at public auction, and are held by one who purchased in good faith."

Errors and irregularities in the proceedings instituted by a guardian for the sale of real estate, owned by his ward, are reviewable in an appropriate proceeding, but it by no means follows that the sale is void on account thereof. The section last quoted provides when a ward, or a person claiming a title under and through him, may contest the validity of a guardian's sale, and what shall be conclusively taken to be a valid sale, when attacked in a collateral action, like the one before us. It is not every defect, irregularity, or omission preceding the sale that will defeat the title of a good-faith purchaser; but only those enumerated in the statute. This is self-evident, since if every step laid down in the statute relating to the sale of real estate of those under guardianship must be strictly followed, to constitute a valid sale, then there never can be irregularities or defects to cure; and the enacting of section 64 was a useless piece of legislation. The legislature contemplated that mistakes and omissions would likely occur in such proceedings by the failure of the guardian to strictly follow each requirement of the statute; and the purpose of the lawgivers in adopting the aforesaid section was to prevent a defeat of the sale on account of such defects and errors in the proceedings, when collaterally assailed, where it appears that the five requirements of said section have been complied with. In other words, the sale must stand as valid unless some one of the five grounds for which a sale may be avoided is made to appear; but if any one of the requisites prescribed in section 64 is lacking, the sale must fall; otherwise the purchaser acquires by the sale and deed a perfect title, whatever else is wanting. This is the plain import of the statute. Neither the failure to give notice

of the application for a license to sell, nor defects in a petition, will render the proceedings void under this curative section. The legislature could have dispensed with the giving of such notice, or with the presentation of any petition, and this being true, it could provide by statute, as it in effect has done, that sales shall be valid when made, where the petition is defective or entirely wanting, or where the notice of the application for the order is defective or entirely lacking, in case the matters specified in section 64 appear. (*McKeever v. Ball*, 71 Ind., 398.)

In the case before us, it is established beyond controversy that the guardian of these plaintiffs gave a bond as prescribed in the license, which was duly approved; that she took and subscribed the oath required by statute; that the lot in question was duly advertised and sold at public sale; and that the defendant is a good-faith purchaser of the premises. Therefore, the second, third, fourth, and fifth requirements of section 64 have been fully complied with.

It remains to be determined whether "the guardian was licensed to make the sale by a district court of competent jurisdiction," as required by the first subdivision of the section under consideration. The sale was authorized by an order entered by the district court of Douglas county, the county in which the guardian received her letters of guardianship. Was the license issued by a court of competent jurisdiction? We entertain no doubt of it. The words "competent jurisdiction," as used in the section, mean the court which has the power or authority conferred upon it by the law to hear and determine the particular application, and whose jurisdiction it was proper to invoke in that instance. The statute has expressly conferred the power upon the district court of the county where the guardian was appointed, or a judge of such court, to license the sale of real estate of the ward for certain specified purposes. Where a guardian of minors is appointed by the county court of Douglas county, the district court of no other

county in the state could lawfully order the sale of the real estate belonging to such minors, and should it do so, the order and sale thereunder would be absolutely void, and their invalidity could be asserted in a collateral proceeding. What the legislature intended was that the sale must have been authorized by the proper forum; *i. e.*, the district court of the county, wherein letters of guardianship were granted, or by the judge of such court. Orders of sale made or rendered by such court, or judge, upon applications for license to sell real estate by a guardian, cannot be impeached collaterally; because, however erroneous they may be, they are not void. A *bona fide* purchaser at a guardian's sale, under a license issued by a court of competent jurisdiction, is not bound to look beyond the license, but takes a good title which cannot be impeached collaterally, and is not affected by any irregularities in the proceedings except for the matters enumerated in said section 64. The construction we have placed upon said section is not without precedents to sustain it, but is abundantly supported by the following decisions pronounced under statutory provisions the same as ours: *Montour v. Purdy*, 11 Minn., 278; *Rumrill v. First Nat. Bank of St. Albans*, 28 Minn., 202; *Howard v. Moore*, 2 Mich., 226; *Coon v. Fry*, 6 Mich., 506; *Marvin v. Schilling*, 12 Mich., 356; *Woods v. Monroe*, 17 Mich., 238; *Cooper v. Robinson*, 2 Cush. [Mass.], 184; *Harris v. Lester*, 80 Ill., 307; *Reynolds v. Schmidt*, 20 Wis., 394; *Mohr v. Porter*, 8 N. W. Rep. [Wis.], 364; *Ackerson v. Orchard*, 7 Wash., 377; *Overton v. Cranford*, 7 Jones Law [N. Car.], 415.

But it is said the court never authorized the sale of the lot in suit. In the license granted, as well as in the petition therefor, this lot is not particularly mentioned or described. In the decretal order the court finds "that it is for the best interest of said minors that said real estate in said petition described should be sold, * * * and that the interest derived from the sale of said real estate should

be used for the maintenance and education of said minors," etc., and then orders that the "guardian proceed to sell at public auction to the highest bidder the real estate of said minors as in said petition described," following which, for the first time therein, is a specific description of the property, the same as contained in the application for license. It is obvious that, for the purpose of ascertaining what property was ordered sold, the petition and license must be construed together. As mentioned in our statement of the facts in the fore part of the opinion, the petition for an order of sale describes certain of the property for which sale was asked as located in block "W" in Lowe's addition to the city of Omaha, when there is no such block in that addition, instead of describing it as in block "U" in said addition, in which last block the lot in controversy is situate. It must be conceded, if there were nothing aside from the specific description of the property contained in the application or license to indicate the land asked and directed to be sold, that the sale of the lot in suit was never authorized, and the guardian's deed did not convey this lot. But there is inserted in the petition for license to sell, other descriptions or identifications of the lots which the court was requested to order sold. It was all the real estate belonging to the wards that was asked to be sold, and the same is described as being in Lowe's Addition to the city of Omaha. We then have a case where the petition for a license contains two inconsistent descriptions of the property,—the one general, and the other specific; the former true and the latter, in part, false and incapable of being applied to any tract of land. Two questions arise: First—Which description shall give way to the other? Second—If the false one shall be rejected, is the general description of the property sufficient to authorize the sale of the lot in dispute? We will take up the propositions in their inverse order.

The office of a description in a deed is not to identify

the lands conveyed, but to provide the means of identification; and it is sufficient when this is done. (*Works v. State*, 22 N. E. Rep. [Ind.], 127.) It must be conceded, we think,—for such is undoubtedly the law,—that the description of the property in the proceedings by a guardian for the sale of the lands of the ward, need not necessarily be more specific, definite and certain than is demanded in deeds or other conveyances of real property. A conveyance is not void for want of description, where an uncertainty as to the identity of the land conveyed can be explained by extrinsic proofs. (*Henry v. Whitaker*, 17 S. W. Rep. [Tex.], 509; *Mc Whirter v. Allen*, 20 S. W. Rep. [Tex.], 1007; *Perry v. Scott*, 109 N. Car., 374.) A deed simply describing in the granting clause all the grantor's lands in the state, or within a certain county or city, is not void for indefiniteness, but is a sufficient description, since it can be made certain by evidence *aliunde* of what lands the grantor at the time owned. (1 Dembitz, Land Titles, sec. 6; *Witt v. Harlan*, 66 Tex., 660; *Hervey v. Edens*, 6 S. W. Rep. [Tex.], 306; *Cox v. Hart*, 145 U. S., 376; *Frey v. Clifford*, 44 Cal., 335; *Brown v. Warren*, 16 Nev., 228; *Harris v. Broiles*, 22 S. W. Rep. [Tex.], 421; *Minor v. Lumpkin*, 29 S. W. Rep. [Tex.], 799; *Crowley v. Goll*, 27 S. W. Rep. [Tex.], 879.)

In the fifth subdivision of the syllabus in *Stanley v. Green*, 12 Cal., 148, it is said: "It is undoubtedly essential to the validity of a conveyance, that the thing conveyed must be described so as to be capable of identification; but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence." (See *Redd v. Murry*, 30 Pac. Rep. [Cal.], 132.)

It has been held that extrinsic evidence is admissible to locate lands conveyed by a sheriff's deed containing an accurate, but general, description of the premises. (*Smith v. Crosby*, 86 Tex., 15; *Brown v. Warren*, 16 Nev., 228.)

Ward v. Saunders, 6 Ired. [N. Car.], 382, was an action

of ejectment to recover lands purchased at an execution sale. The return of the officer on the writ described the premises thus: "Levied on the lands and tenements of Isham Doby, adjoining the land of Allen Newsom, Claiborne Newsom and others, and containing 190 acres." It was ruled that this was sufficient to distinguish and identify the lands, and complied with the statute which requires that the officer making the levy shall make return setting forth "what lands and tenements he has levied on, on what water-course, and whose land it is adjoining." To the same purport are the cases of *Smith v. Low*, 2 Ired. [N. Car.], 457; *Blanchard v. Blanchard*, 3 Ired. [N. Car.], 105.

In *Starling v. Blair*, 4 Bibb [Ky.], 288, Wilkinson gave to one M'Ilvain a mortgage upon "all the lots that he then owned in the town of Frankfort, whether he had a legal or equitable title thereto." The mortgage was foreclosed, and an order of sale was issued, under which lot 82, the one involved in that suit, was sold to Starling. In an action by Blair to specifically enforce a contract alleged to have been made by Wilkinson for the sale of the lot, it was contended the mortgage was invalid, on the ground that the description of the premises was too general and uncertain. The court held the description good for all the lots which could be identified as belonging to the mortgagors at the date of the mortgage; and in passing upon the question, in the opinion, say: "This objection is certainly novel in its nature. As far as we are aware it is unsupported by any authority, nor can we perceive any reason to justify it. The expression used, though general, is not uncertain. It clearly and explicitly manifests the intention of the parties, and there is nothing unlawful in that intention. There may indeed be more difficulty in ascertaining the lots intended to be conveyed, where the language used in describing them is thus general, than if the lots had been designated by their numbers. But it is in the degree and not in the nature of the difficulty that the two cases differ. It

results in neither case from no ambiguity on the face of the deed, but from extrinsic circumstances, and in both cases resort must be had to evidence *aliunde* for the purpose of identifying the lots which are the subject of the conveyance."

In *Davis v. Touchstone*, 45 Tex., 490, lands belonging to an estate were sold, on the petition of the administrator, by order of the probate court. In a suit in ejectment against the heirs, they set up that the premises were not sufficiently described in the order of sale or administrator's deed, the description being "a part of the headright league of land granted to Leander Harle, containing three hundred and twenty acres, being the tract on which the said James Touchstone lived at the time of his death, adjoining the lands of A. H. Davis, James Aikins, and William C. Easterwood." The description was held sufficient.

Robertson v. Johnson, 57 Tex., 62, was a suit by minors to recover certain real estate which had been sold by their guardian under an order by the probate court, the defendants claiming title to the land through such sale. The plaintiffs insisted that the order of sale was void, because of the insufficient description of the lands. The court in overruling the contention said: "An order of sale has been sustained in which no description was attempted to be given of the land ordered to be sold, or any mention by name, designation, or description of any particular tract of land. (*Wells v. Polk*, 36 Tex., 126.) In this case the order of sale empowered the guardian to sell at the court house door in the town of Paris, Lamar county, 'three hundred and twenty acres of land known as the headright of William H. Merrill,' etc. As was said by the present chief justice in *Davis v. Touchstone, supra*, 'the description in these orders is not such as should have been given, but it cannot be said to give no data for identification.' Here if, as recited in the order, the three hundred and twenty acres of land was known as the headright of William H. Merrill, it appears

that this would furnish affirmative matter by which the land might be identified. We do not think the order of the sale is void for a want of description of the property directed to be sold."

In *De Bardelaben v. Stoudenmire*, 48 Ala., 643, lands of a decedent were sold by order of the probate court on the application of the administrator of the deceased. The sale was attacked upon the ground of the insufficiency of the description of the property in the petition. There were two tracts mentioned in the petition, but the county and state where located were not given. One was described as a quarter section, but the number was not given, but was bounded on its four sides by lands of three persons named. The court held the description sufficient. We quote the fourth paragraph of the syllabus: "If the petition omits, in words, to state that the lands are in the county, or within the jurisdiction of the court in which the application is made, yet, if such a description is given as to leave no real difficulty in identifying the lands intended, it will be sufficient, especially if no objection is interposed before the final order of the sale is made."

Pendleton v. Trueblood, 3 Jones Law [N. Car.], 96, was an action of ejectment to recover lands of a ward, sold by his guardian, under an order of court. The order authorized the guardian "to sell the land of the ward named in the petition, adjoining the lands of John Bailey and others, containing about one hundred and ten acres." It was urged that this description was insufficient to divest the title of the ward. The court overruled the objection, saying: "It does not appear, and it is not suggested, that she had any other land in that locality, nor indeed anywhere else. Such a description would be sufficient to distinguish and identify lands levied on by a constable under a justice's execution; and we think it must be so in a case like the present."

In *Clements v. Henderson*, 4 Ga., 148, a description of

land in an order authorizing the administrator to sell "all the real estate" of the decedent was held sufficient.

In *Bloom v. Burdick*, 1 Hill [N. Y.], 130, a description in a license issued to an administrator to sell the property of his intestate, as "ninety-one acres of the southwest corner of lot number eleven" was held not to be fatally defective. The court, in passing upon the point, said: "The description would be best answered by laying out ninety-one acres in a square form on the southwest corner of the lot, which would not include more than forty acres of the land of the intestate, and would include about fifty acres of land belonging to some other person. But there is, I think, enough in the case to help the purchaser out of this difficulty. It was an order for the sale of the real estate of which Henry Bloom died seized, and there were to be ninety-one acres in a specified lot. The intestate owned precisely that quantity of land, and no more, in the designated lot, and his land touched the southwest corner of the lot, though it did not lie in a square form. The surrogate evidently had in view the particular parcel of land which the intestate owned in lot number eleven. The matter must have been well understood by all the parties in interest, and I think the whole of the land in controversy might well pass by the deed."

We have already stated that a description of the lands should be given in the application of a guardian for an order of sale. As in a conveyance of real estate, so in the proceedings by a guardian to obtain authority to sell the lands owned by his ward, it is far better that the property be specifically and accurately described, since it would obviate a resort to extrinsic evidence to determine the property affected by the court's order. But upon principle, as well as authority, if the description given, though general in its terms, is such as to leave no difficulty in identifying the premises intended, by the use of such means as would be admissible in a court of justice for that purpose, it will

be sufficient after confirmation of the sale. In this case, after eliminating from the application for license and order of sale the specific, yet uncertain and impossible, description of the property, we have remaining an application for license, and an order to sell all of the real estate of the plaintiffs. Under the authorities heretofore mentioned such general description is not void for uncertainty, but is ample to sustain the guardian's deed for the lot involved in this litigation.

We now pass to a consideration of the remaining proposition, namely: Can any portion of the specific description of the property contained in the application and license be rejected, or must the general description therein contained yield to the specific? It is a well established rule, in the construction of deeds or other instruments containing two descriptions of property, which are not consistent with each other, one false and the other true, that extrinsic evidence may be resorted to for the purpose of ascertaining which one is correct, and that the instrument or deed must be interpreted accordingly. This is but an application of the familiar maxim *falsa demonstratio non nocet*, sanctioned by all the authorities. In 2 Devlin, Deeds, sec. 1016, it is said: "If the deed contains two descriptions, one correct and the other false in fact, the latter should be rejected as surplusage. Where one of two different descriptions applies to land to which the grantor had title, and the other to land which he did not own, the former will be taken as the true description and the latter will be rejected as false. If sufficient remains, after rejecting a part of the description which is false, the deed will take effect." The rule deducible from the authorities may be summarized thus: A deed will not be defeated by a manifest erroneous description therein of the property intended to be conveyed, when the remaining part of the description is sufficiently certain by the aid of proof *aliunde* to locate the land. (*Parks v. Loomis*, 6 Gray [Mass.], 467; *Bosworth v. Sturtevant*, 2 Cush.

[Mass.], 392; *Mason v. White*, 11 Barb. [N. Y.], 173; *Masten v. Olcott*, 101 N. Y., 152; *Roman Catholic Orphan Asylum v. Emmons*, 3 Brad. [N. Y.], 144; *Vose v. Handy*, 2 Greenl. [Me.], 322; *Harvey v. Mitchell*, 31 N. H., 575; *Thompson v. Ela*, 60 N. H., 562; *Benton v. McIntire*, 15 Atl. Rep. [N. H.], 413; *Wilt v. Cutler*, 38 Mich., 189.)

Although this opinion has already reached an unusual length, we feel that the importance of the question involved will justify our referring to, and making quotations from, a few of the leading cases where the identical principle here contended for by defendants has been judicially determined.

Moreland v. Brady, 8 Ore., 303, was an action to quiet title to lot 2, in block 187, in the city of Portland. The parties claimed title under one Bernard Brady, late of Multnomah county, deceased, as the common source; the plaintiff under and through mesne conveyances from Esther Brady, one of the devisees of the last will of Bernard Brady. The defendants urged that the will was void because of a misdescription and that parol evidence was inadmissible in aid of its construction. The fourth clause of the will contained the following: "As also a certain parcel of ground or lots in the city of Portland, and numbered as follows, to-wit: No. block (187) one hundred and eighty-seven, lot No. (2) two, I bequeath to Margaret McGill." The sixth clause of the will reads: "I also bequeath to my sister, Esther Brady, that lot, or parcel of ground, in the city of Portland, as here described, lot No. (1) one, in block (187) one hundred and eighty-seven." It was disclosed that Bernard Brady never owned either lots 1 and 2 in block 187, but did, at the date of his will, and when he died, own lots 3 and 4 in said block. The court sustained the will, holding that by rejecting the erroneous part of the description the remainder was sufficient to identify the property with reasonable certainty. Boise, J., in delivering the opinion of the court, said: "The de-

vise is the same as if the numbers of the lots had not been mentioned at all or had been named and the numbers left blank. We are then compelled to fall back upon the remaining portion of the description, to-wit: 'A certain parcel of ground or lots in the city of Portland, in block No. 187; also, that lot or parcel of ground in the city of Portland in block 187.' And by thus placing ourselves in the position of the testator, by oral evidence at the time of the execution of his will, we find that there were two lots or parcels of ground in the city of Portland, and in block 187, belonging to the testator at that time and also at the time of his death. This renders the devise entirely certain from the language of the will as to the intention of the testator. The description would have been sufficient by merely naming the block and city in which the lots or land lay without specifying the numbers of them."

Riggs v. Myers, 20 Mo., 239, was an interpretation of a will, which described the land devised as the "southeast and southwest quarters of section 4 in township 60, range 38, in Holt county, Missouri," with the privilege of using the water of the Big spring, having free access to and from it as he may wish. It being shown by parol evidence that the testator owned the corresponding section of township 59 of the same town, range and county, and that the Big spring was upon the southeast quarter of section 4, in township 59, and did not own any land in section 4 of township 60, it was held the false description should be rejected, and that the will passed the lands in section 4 of township 59. (See, also, *Lessee of Allen v. Lyons*, 2 Wash. C. C. [U. S.], 475; *Winkley v. Kaime*, 32 N. H., 268.)

In *Melvin v. Proprietors of Locks and Canals*, 5 Met. [Mass.], 15, the land was described in the deeds from the heirs of Kittridge to Moses Cheever as follows: "A certain share of 'about one hundred acres of land, be the same more or less, with the buildings thereon standing, situate in the town of Chelmsford, in the county of Mid-

dlesex, being the same estate on which the said Moses Cheever now lives, and which was conveyed by Benjamin Melvin and Joanna Melvin to Dr. Kittridge by deed dated the 25th day of April, 1782.'" The two descriptions did not agree, and the question before the court was which should be considered the true description. It was held that the conveyances passed the title of the heirs to the whole farm, notwithstanding the deed from the Melvins to Kittridge, which was referred to in the conveyances, did not include the whole premises. The court say: "It is another well-known rule in the construction of deeds and other instruments that if some of the particulars of the description of the estate conveyed do not agree, those which are uncertain and liable to errors and mistakes must be governed by those which are more certain. Thus the boundaries of lands by known monuments are always to control the description by courses and distances, and so courses and distances will control the quantity of land expressed. Another rule of construction is that if the description be sufficient to ascertain the estate intended to be conveyed it will pass, although some particular circumstance be added inconsistent with the description." The same court in the case of *Sawyer v. Kendall*, 10 Cush. [Mass.], 241, said: "The remaining objection to the demandant's right to recover is that he shows no title to the land claimed, because the description in the deed from Nancy Brown to the demandant, by metes and bounds, does not include the demanded premises, and that the particular description is not to be controlled by the reference in the deed to the partition of the estate by the commissioners and the bounds therein given which do comprehend the premises in dispute. The principle on which this objection rests is well founded, and were it applicable, would be decisive of this case. But upon comparing the metes and bounds given by the deed with the plan referred to upon which they were laid down, and which is also made a part of the

particular description, it will be found that they do not correspond, and that it is impossible to trace out and mark the granted premises with intelligible certainty by following the description contained in the deed. By reason of some unexplained error, the metes and bounds in that part of the description which applied to the demanded premises are wholly uncertain, and it is impossible to ascertain by them the precise land granted by the deed. It is not a case, therefore, of two inconsistent descriptions in which the general must yield to the particular, but of an uncertain and impossible description, which must be controlled by an intelligible though general description given by a reference to the grantor's title by partition. (*Melvin v. Proprietors of Locks and Canals*, 5 Met. [Mass.], 15-28.)"

In the case of *Worthington v. Hylyer*, 4 Mass., 196, the mortgage described the property as "all that my farm of land in said Washington, on which I now dwell, being lot No. 17 in the first division of lands there, containing 100 acres with my dwelling house and barn thereon standing, bounding west on land of Joseph Chaple, northerly by a pond, easterly by lot No. 18, and southerly by lot No. 19, having a highway through it." The land claimed under the mortgage was not included in lot 17, nevertheless the court, by Parsons, C. J., decided that it passed under the first description, and that the additional description being inconsistent therewith, was to be rejected. In the opinion it is said: "If the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance that the intent of the parties may be effected." The same doctrine has been held and applied in *Brookman v. Kurzman*, 94 N. Y., 272; *Zink v. McManus*, 49 Hun [N. Y.], 583; *Schoenewald v. Rosenstein*, 5 N. Y. Sup., 766; *Peterson v. Ward*, 23 S. W. Rep. [Tex.], 637.

Boardman v. Reed, 31 U. S., 328, was a suit in eject-

ment to recover 8,000 acres of land. The property was described in the patent as lying and being in Monongalia county, while it appeared from parol proof that at the date of the patent it was not situated in said county but in the county of Harrison. The other calls of the patent placed the land in the last named county. The court, by Justice McLean, held the grant was not void for uncertainty, and said: "The contradiction supposed was in the admission of proof that the land covered by the patent is in the county of Harrison, when the patent calls for it to lie in the county of Monongalia. That certain calls in a patent may be explained or controlled by other calls, was settled, and in reference to this very point, by this court, in the case of *Stringer's Lessee v. Young*, before referred to. If the point had not been so adjudged, it would be too clear, on general principles, to admit of serious doubt. The entire description in the patent must be taken, and the identity of the land ascertained, by a reasonable construction of the language used. If there be a repugnant call, which, by the other calls in the patent, clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void. This, however, was not the case of the patent under consideration. Its calls are specific, and, taking them all together, no doubt can exist as to the land appropriated by it. The call for the county may be explained, either by showing that it was made through mistake, or that, under the circumstances which existed at the time of the survey, it was not inconsistent with the other calls of the patent. This would not be going behind the patent to establish it, for its calls fully identify the land granted; but to explain an ambiguity or doubt which arises from a certain call in the patent. This principle applies, under some circumstances, to the construction of all written instruments."

An administrator's deed described the granted premises as "lot 2, in block 6, or the west half of block 6, in the town of Lamar." It was held that the description of the premises as "lot 2" should be rejected as false, and the description as the west half of the block should be taken as the true one, it being shown that lot 2 constituted the east half of the block, and that the administrator's intestate owned only the west half. (*Bray v. Adams*, 114 Mo., 486.)

The doctrine recognized in the foregoing authorities is not confined alone to cases involving the construction of deed and will, but is equally applicable to cases like the one before us. Authorities in harmony with this view are not wanting.

Schnell v. City of Chicago, 38 Ill., 383, was a suit by the city to enjoin the defendants from prosecuting an action of ejectment brought to recover certain lots in Canal Trustees' subdivision of section 33, held and claimed by the city, it having purchased the same at an administrator's sale made in pursuance of an order granted by the county court. It appears that the petition of the administrator for a license to sell the lands of the intestate, for the purpose of paying the debts of the deceased, described the premises correctly as certain lots lying in section 33. They were, however, described in the abstract from the county court attached to the petition, and in the inventory from which the abstract is, by law, to be taken, and also in the order of sale, as being in section 23. The notice of the sale, and the deed made by the administrator to the purchaser, gave the true location of the premises. It was held that the misdescription of the section mentioned was a mere clerical error, not affecting the validity of the sale, and not available in a collateral proceeding involving the title. The identical question was raised and decided the same way in *Berry v. Young*, 15 Tex., 369.

The case of *Mauarr v. Parrish*, 26 O. St., 636, is quite analogous to that now before us. It was an action by

Laura Parrish against Elizabeth Mauarr, to recover lot 174 in the town of East Ironton. The defendant claimed title under the sale of the lot by plaintiff's guardian, under an order of the probate court. In her answer she set forth a copy of the proceedings relating to said sale, by which it appeared that in the petition of the guardian for an order to sell the real estate of the ward, the premises were described as lots 73, 74, and 75, in East Ironton, while in the order of sale in the case the lots were designated as 173, 174, and 175, in said town, the latter being the true description of the lots owned by the ward, which had descended to her from an ancestor, and which were actually sold by the guardian under said license. It did not appear whether Laura owned in East Ironton any lots numbered 73, 74, and 75, and whether she owned other real estate than the three lots sold. A demurrer to the answer on the ground that it showed no legal sale of the lots by the guardian was sustained by the trial court, which judgment was, on a review of the case, reversed. The supreme court, speaking through Welch, C. J., uses the following language: "The question presented by the first objection is, whether the order of sale made by the probate court is not void on the ground that the lots so ordered to be sold are not described in the guardian's petition, and that, therefore, the court acquired no jurisdiction over the lots sold. Had the pleader set forth in the answer all the material facts relating to the ward's property, there would probably have been but little difficulty in deciding the question. If it be the fact that the ward really owned six lots in East Ironton, numbered 73, 74, 75, 173, 174, and 175, and that they all 'descended to her from an ancestor,' the question presented would have been whether, upon application by the guardian to sell only a part of the ward's estate, without any description of the ward's other property, or any disclosure of the fact that the ward had other property, the court acquired jurisdiction over her entire estate. This question, however, we

think does not arise in the present case. It seems to us that there is upon the face of this record of proceedings in the probate court, taken in connection with the answer setting it forth, sufficient to satisfy anyone that the number of the lots in the petition of the guardian as 73, 74, and 75, instead of 173, 174, and 175, was a mere clerical mistake of the draughtsman. We come to this conclusion for several reasons: (1) The mistake is one easily fallen into; (2) the extreme improbability that the same person should own six lots happening thus to vary exactly 100 in their numbers; (3) the statute requires the guardian to set forth in his petition a description of all the ward's real estate, and until the contrary is shown we must presume that in this respect the petition conformed to this requirement. The petition, therefore, should be viewed as asking for the sale of three lots situate in East Ironton, being lots which descended to the ward, and being all the real estate owned by her, and numbered 73, 74, and 75. Here is simply a case of a description, repugnant with itself, but containing sufficient within itself to enable the court to make the proper correction, by eliminating from it what was false, and supplying what was true, so as to make it conform to the real intention of the parties. This we must presume the court did, and that it was done upon a proper showing, or proper knowledge of the subject-matter. We are satisfied that the lots really sought to be sold, and the lots so sold are identical, and that this mistake in the petition does not affect the jurisdiction of the court, or render the order of sale absolutely void."

Myers v. McGavock, 39 Neb., 843, was an action in ejectment to recover real estate in the city of Omaha, sold by a guardian under a license issued out of the district court of Douglas county. The premises were described in the proceedings instituted by the guardian, and in the guardian's deed, as "the N. E. two-thirds ($\frac{2}{3}$) of lot eight (8), in block two hundred and three (203), in the city of Omaha,

being all that portion of said lot eight (8), not belonging to the Union Pacific Railway Company." It was ruled that the proceedings were not void for indefiniteness and uncertainty of description, but that the description was sufficient to enable the property to be identified, and to divest the title of the wards to all of that portion of the lot not owned by said railway company. In the case just mentioned there were two conflicting descriptions, and the false one was required to yield to the one which was true.

In the brief of plaintiffs it is said "the expression of one thing is always to the exclusion of others, and the particular description given in the application limited the license and the request therefor to what was properly described therein." The principle sought to be invoked is a familiar one, but we are unable to see its application to this case. Ordinarily a general description of property must yield to a specific description in the same instrument. But this rule does not obtain where such specific description is impossible or false, as the authorities herein cited abundantly show. If the particular description given in the proceedings by the guardian had designated the lot in this case as being in a block having an existence in fact and the plaintiff owned that numbered lot in such block, then there would be ground for argument that the description of the ward's real estate in general terms, as all the real estate, would confer no authority to sell lot 4 in block U. But that is not the case with which we have to deal. The distinction between the supposed and real case is manifest. Here the particular designation of the lots for which application was made to sell, as to some of them, is false and fits no property. It being manifest that authority was requested to sell lands other than these which were correctly described in the proceedings the erroneous description must give way to the general description, and by the latter the identity of the land requested and ordered sold can be ascertained by the aid of extraneous evidence.

Applying the principle already announced to the case in hand, there can be no question as to the validity of the guardian's sale and deed. In the petition of the guardian and the order of sale, the lot in dispute, and others, were described as being in block W, in Lowe's Addition to Omaha, whereas there is no such block in said addition; hence this portion of the attempted specific description of the property in the proceedings for license is in fact no description, and should be regarded as surplusage. Doing this we but apply the maxim *falsa demonstratio*, etc., for, after such rejection, enough is left to enable the property ordered sold to be identified. The inaccuracy or mistake in designating the block in which the lot was located did not make the description of the property void for uncertainty. The real estate of the ward was specifically and accurately given in the guardian's advertisement or notice of sale. That the lot was described in the petition and order of sale as being in block W instead of block U was clearly a clerical mistake, and the court granting the license must have so regarded it, for it confirmed the report of the sale which was accompanied by the notice of the sale and the proof of its publication, and ordered the guardian to execute a deed to the purchaser for the lands so sold. It is clear that the guardian's deed passed whatever title the plaintiffs may have had to the lot in controversy. The judgment is

AFFIRMED.

FOX, CANFIELD & COMPANY V. GEORGE GRAVES.

FILED JANUARY 21, 1896. No. 5854.

1. **Pleading.** Although the prayer for relief is a part of the petition, it is no portion of the statement of facts required to constitute a cause of action. The entire omission of any demand for judgment would not subject the petition to general demurrer.

2. **Verdict:** PRACTICE. A verdict must not exceed the sum prayed for in the petition. If it does, objection on that ground should be raised in the motion for a new trial, or it will be deemed waived.

3. **Pleading:** COUNTS: PRACTICE. Where a petition contains inconsistent counts, the proper motion is to strike out all but one, or require the plaintiff to elect upon which cause of action he will proceed to trial.

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

Brome, Burnett & Jones, for plaintiffs in error:

Where an uncertain and indefinite demand is based upon allegations of the petition, from which the amount of recovery sought cannot be definitely computed, the petition does not tender an issue, a cause of action is not stated, and such a pleading will not support a judgment. (*Carter v. Shotwell,* 42 Mo. App., 663; *Hinchley v. Pfister,* 53 N. W. Rep. [Wis.], 21; Bliss, Code Pleading [2d ed.], sec. 165.)

As to arbitration and award the following cases were cited: *Groat v. Pracht,* 31 Kan., 656; *Miller v. Brumbaugh,* 7 Kan., 352; *Bentley v. Davis,* 21 Neb., 685.

Allen, Reed & Ellis, contra.

NORVAL, J.

Defendant in error filed his petition in the district court alleging: "That Fox, Canfield & Co., on the 1st day of May, 1882, and at the times of the purchases and transactions hereinafter stated, was a partnership firm doing business in the state of Nebraska, in Stanton county and adjoining counties; that the sole individual members of said partnership were and are the defendants George Fox, S. S. Canfield, and H. C. Brome; that the defendants, as such partners, in the partnership name, on or about the months of

May, June, August, September, October, November, and December, of the year 1882, and about the month of November, 1883, bought of plaintiff, and had delivered to them by plaintiff, at their request, lumber, bridge and building material of the reasonable value of $1,501.38 which defendants agreed to pay on delivery, and on or about the 27th day of September, 1884, plaintiff paid freight for defendants, at their request, the sum of $132.50, no part of which has been paid except the sum of $1,026.92; that there is due plaintiff, and remaining unpaid upon said account, the sum of $606.92, principal, and $125.95, interest; that a copy of the account for said material sold and freight paid, with all credits thereon, are hereto attached, marked Exhibit A, and made part of this petition. Wherefore plaintiff demands judgment against defendants for the sum of $734.52, and with interest thereon from July 20, 1885, less amount of certain freight bills with costs.

"Count 2. Plaintiff, for further cause of action against the defendants, states that Fox, Canfield & Co. are a partnership firm carrying on business in Stanton county and adjoining counties in the state of Nebraska, composed of George Fox, S. S. Canfield, and H. C. Brome; that on or about the 1st day of July, 1885, the matters in controversy between plaintiff and defendants, being the amount set forth in Exhibit A, hereto attached, were, by agreement by plaintiff and defendants, referred to Knox Tipple and J. B. Walker as arbitrators, with authority in said arbitrators to consider, ascertain, and settle all matters of account between plaintiff and defendants, and to find the balance due upon such settlement; that on or about the 20th day of July, 1885, the said Knox Tipple and J. B. Walker, after full and thorough examination of matters referred to them as said arbitrators, found that there was due and owing from defendants to plaintiff the sum of $734.52, except the amount of certain freight bills not promised, which is now due and wholly unpaid; that the balance so found

due by said arbitrators was upon the account set forth in the first count hereof, and it was agreed between the plaintiff and defendants, at the time of the submission of said matters to said arbitrators, that their findings and award should be a final adjustment and complete settlement between the parties in that regard. Wherefore plaintiff demands judgment against the defendants for the sum of $734.52, and interest thereon from July 20, 1885, less amount of certain freight bills, with cost of suit."

A motion was filed to strike from the petition all of the first count as irrelevant and redundant, immaterial and prejudicial, which motion was denied by the court and an exception was taken to the ruling. Thereupon an answer was filed consisting of a general denial. There was a trial to a jury, with a verdict and judgment for the plaintiff below in the sum of $169.57. No bill of exceptions having been preserved in the case, but two assignments of error are relied upon for reversal, namely:

"1. The verdict and judgment are contrary to law.

"2. The court erred in overruling the motion to strike out the first count of the petition."

Under the first assignment it is argued that the petition fails to state a cause of action. The record fails to disclose the count under which the recovery was had, or whether under both or but one. Therefore, if either count contains sufficient facts to support the verdict and judgment, the first assignment is not well taken. It will be observed that the plaintiff below, for his first cause of action, alleges, in effect, that he sold and delivered to the defendants timber, bridge and building materials of the reasonable value of $1,501.38, payable on delivery; that plaintiff paid freight for defendants, at their request, the sum of $132.50, no part of which has been paid except $1,026.92, and that there remains due the plaintiff $606.92 debt, and $125.95 interest. These averments are sufficient to constitute a cause of action and to authorize a judgment in plaintiff's favor for

$732.91, which sum is several hundred dollars more than the amount of the verdict and judgment. The objection urged is not that the facts alleged in the petition, aside from the prayer for judgment, are not well pleaded. The contention is that the prayer for relief is so defective as to render the petition insufficient as stating a cause of action. It will be observed that judgment is asked "for the sum of $734.52, with interest thereon from July 20, 1885, *less amount of certain freight bills.*" It is insisted that this prayer is insufficient to support the verdict, for the reason no certain sum is demanded, or facts alleged from which it can be computed. This contention is predicated upon the italicized words above quoted. Probably if Exhibit A, which was attached to and made a part of the original petition, was not omitted from the transcript, what was meant by the words referred to could be easily ascertained. However that may be, the expression, "less amount of certain freight bills," is not a material statement, and may be disregarded as surplusage. If plaintiff was indebted for freight paid by the defendants, they should have pleaded it as a defense in their answer. The plaintiff was not required to do so for them. While the prayer for relief is a part of the petition, it is no portion of the statement of facts required to constitute a cause of action. The entire omission of any demand for judgment would not subject the petition to a demurrer upon the ground that no cause of action is set forth. (1 Kinkead, Code Pleading, sec. 66; *Culver v. Rodgers*, 33 O. St., 546; *Hiatt v. Parker*, 29 Kan., 765.) The cases cited by plaintiffs in error, at least those we have been able to examine, do not conflict with the rule just stated. The prayer, in the absence of a motion to strike out the words italicized above, or to make more specific, was, we think, sufficient to support the judgment.

Doubtless, a verdict must not exceed the sum prayed for in the petition. If it does, the objection should be raised in the motion for a new trial, as that the verdict exceeds

the amount demanded in the prayer. The defendants having failed to object to the verdict on that ground in the trial court, they must be considered to have waived the same.

By reference to the petition it will be noticed that the items constituting plaintiff's first cause of action were submitted to arbitrators chosen by the parties, and the arbitrators made an award, and the second count is predicated thereon. It is claimed that the first count of the petition should have been stricken out for the reason the original claim is merged in the award, and is thereby extinguished. This court has held that an award of arbitrators, unless impeached for fraud or mistake, is a bar to an action on the original claim. (*Bentley v. Davis*, 21 Neb., 685.) To the same effect see *Groat v. Pracht*, 31 Kan., 658, and cases there cited. But it does not follow that there was error in denying the motion to strike. The plaintiff had a right to elect upon which count of the petition he would rely. The motion should have been in the alternative to strike from the petition the first count, or require him to elect as to the one upon which he would proceed to trial. (*Keens v. Gaslin*, 24 Neb., 310.) A motion may properly be overruled which cannot be allowed in substantially the same terms as requested. (*McDuffie v. Bentley*, 27 Neb., 380.) The judgment is

AFFIRMED.

ANSON E. JOHNSON V. WILLIAM D. GULICK ET AL.

FILED JANUARY 21, 1896. No. 5903.

1. **Review:** ARGUMENTS. **Errors assigned, but not argued, are deemed waived.**

2. **False Representations:** ALLEGATIONS AND PROOF. **In actions for false representations it is not necessary to aver or prove that the party making them at the time knew they were untrue.**

3. ———: NEGOTIABLE INSTRUMENTS: EVIDENCE. In a suit upon a promissory note given as part payment for corporation stock, the defense being that the defendants were induced to make such purchase by certain false representations of the plaintiff, testimony showing that prior to such sale he made to other persons similar misstatements in the sale to them of a portion of the same series of stock is irrelevant and immaterial.

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

Ricketts & Wilson, for plaintiff in error.

NORVAL, J.

Plaintiff in error brought suit in the court below upon a promissory note for $1,296, purporting to be made by the defendants in error, bearing date January 1, 1891, and payable April 1 thereafter, with interest at eight per cent. The defendants, for answer, admit the execution and delivery of the note, but aver that it was given in renewal of a note of $1,200 executed by the defendants as part consideration of three-fifths of the corporate stock in the Commercial Publishing Company, of Ogden, Utah; that plaintiff, in order to induce the defendants to make said purchase, knowingly and falsely represented to them that said corporation was the owner of a franchise in the Western Associated Press of the value of $4,000; that the defendants relied upon said representations; that the same were false and untrue; and that the defendants have been thereby damaged in the sum of $2,000. The reply was a general denial of each averment of new matter contained in the answer. There was a jury trial, resulting in a finding that there was due the plaintiff from the defendants upon the note declared upon the sum of $1,425.60, and that there was due the defendants upon the counter-claim the sum of $1,389, and the amount of the plaintiff's recovery was assessed at the difference between said amounts, to-wit, $36.60.

Judgment was rendered in accordance with the verdict, and plaintiff brings error.

Thirty-six errors have been assigned, while but one has been argued in the brief of plaintiff. It relates to the rulings of the trial court upon the admission of testimony. All other errors assigned are regarded as waived and will not be considered by the reviewing court. (*Gulick v. Webb*, 41 Neb., 706.)

Upon the trial evidence was introduced tending to establish the allegations of the counter-claim set up in the answer. The defendants, in making out their case, produced and read the deposition of one J. S. Painter, who, after testifying that he and one Murphy, the last of November or the first of December, 1889, which was prior to the sale of the stock to the defendants, purchased of the plaintiff Johnson six-tenths interest in the Ogden *Daily Commercial*, deposed in answer to questions as follows:

Q. State whether or not at the time, while negotiations were pending between yourself and Murphy, as parties of one part, and the plaintiff Johnson, as party of another part, for the purchase and sale of this stock, any statements or representations were made to you by the plaintiff Johnson concerning the Western Associated Press franchise possessed or owned by the Ogden *Daily Commercial*.

A. Yes, sir; there were such representations made. I had a number of conversations with Mr. Johnson in regard to the purchase of the paper. I do not remember just exactly when the first one was had. The second one was had about November 20, 1889. I went into the office and looked it over. Mr. Johnson was not in. I returned to the local editorial room. We went into the editor-in-chief's room, and had a talk about the paper.

Q. What I want to get at is any conversation between yourself and Mr. Johnson about the franchise.

A. I told him I thought I could duplicate good material in the office for $2,000, and he says the franchise was ex-

clusive and was worth $10,000, and that if he was circumstanced differently than he was at that time, he would not take less than $25,000; that it would be worth that in two years.

Q. What exclusive franchise did he refer to?

A. Associated Press franchise.

Q. As being owned and possessed by the Ogden *Daily Commercial?*

A. He said so.

Q. Was the representation as to the paper owning and possessing this Associated Press franchise made to you more than once by Mr. Johnson?

A. It was made to me on two or three occasions. Every time we talked about the matter it was discussed, because I looked upon it, from what he said, as being the most valuable part of the paper.

Each question was objected to at the time the same was propounded as being incompetent, irrelevant, and immaterial, and an exception was duly taken to the overruling of the objection. The assignment argued by plaintiff is based upon the admission of the testimony quoted above. He now insists that the objection to receiving the evidence should have been sustained, because proof of representations made by the plaintiff to persons other than the defendants does not tend to establish that the representations charged in the answer were made as therein stated. We think this position sound. The evidence was clearly inadmissible, and had the effect to mislead the jury. From the fact that the plaintiff made the representations to Painter testified to by him, the inference cannot be properly drawn that the same or similar representations were made by plaintiff to the defendants. As is stated in 1 Phillips, Evidence, p. 748*: "It is considered, in general, that no reasonable presumption can be formed as the making or executing of a contract by a party with one person, in consequence of the mode in which he has made or executed similar contracts

with other persons. Still less can a party be affected by the declarations, conduct, or dealings of strangers. Transactions which fall within either of these classes are termed in law *res inter alios acta*, and evidence of this description is uniformly rejected. Where the question between a landlord and his tenant is whether the rent was payable quarterly or half-yearly, it has been held irrelevant to consider what agreements subsisted between the landlord and other tenants, or at what time their rents would become due." (1 Greenleaf, Evidence, sec. 53; 1 Wharton, Evidence, sec. 29.) In *Somes v. Skinner*, 16 Mass., 360, it is said: "It is not competent to a party, imputing fraud to another, to offer evidence to prove that the other has dealt fraudulently at other times, and in transactions wholly disconnected with that which is on trial." Evidence of other transactions than those under investigation is admissible, but only for the purpose of proving the *scienter* or intent, when that is in issue in the case. The defendants have failed to furnish us either with a brief or oral argument in this case; hence we are not advised of the theory upon which they introduced the evidence. Possibly it was offered and admitted upon the ground that it was essential for the defendants to establish the *scienter;* that is, that the plaintiff, at the time of making the representations, knew them to be false. Whether in an action for damages for false representations it is necessary either to aver or prove the *scienter*, the authorities do not agree. The better rule, and the one adopted by this court, is that the intent or good faith of the person making false statements is not in issue in such a case (*Philips v. Jones*, 12 Neb., 213; *Foley v. Holtry*, 43 Neb., 133; *Carter v. Glass*, 44 Mich., 154; *Shippen v. Bowen*, 122 U. S., 575); and the trial court so instructed the jury in the case at bar. It is true the answer sets up that the plaintiff knowingly made false representations, but as it was unnecessary to aver the fraudulent intent, the defendants were not called upon to prove

it. It follows that the evidence introduced to show that the plaintiff made similar misstatements to persons other than the defendants in the sale to them of a portion of the same series of stock in the Commercial Publishing Company as that sold to defendants, was incompetent and immaterial. For the error pointed out, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN W. ARGABRIGHT V. STATE OF NEBRASKA.

FILED JANUARY 21, 1896. No. 8148.

Bill of Exceptions: ORDER FOR TRANSCRIPT OF EVIDENCE: PRACTICE. An order will not be made in this court requiring a reporter of the district court to prepare a transcript of evidence preliminary to the settlement of a bill of exceptions, when the record discloses that a like order had been made by the proper district judge upon the precedent condition that the reporter's legal fees should first be paid, there being shown neither a compliance with such order, nor an attempt to review it.

ERROR to the district court for Nemaha county. Tried below before BABCOCK, J.

HEARD on a motion by plaintiff in error to compel the court stenographer of the first judicial district to furnish a transcript of the evidence upon which the case was tried. *Motion overruled.*

W. H. Kelligar and *John S. Stull*, for the motion.

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

RYAN, C.

The plaintiff in error has applied to this court for an order to compel the reporter of the first judicial district of this state to furnish a transcript of the evidence upon which this cause was tried. We find in the record that, upon an application to Hon. A. H. Babcock, the district judge who presided at said trial, for an order requiring that said evidence be extended without payment, on account of the poverty of the plaintiff in error, said order was refused, but that in that connection it was found that the said reporter, as a condition precedent to making the transcript required of him, had demanded from one of the attorneys of plaintiff in error his fees for making such transcript, but that such payment had been refused. It was ordered, however, that said reporter furnish the required bill of exceptions upon the tender to him of his legal fees for such services. As there has been no attempt to review or comply with the order, plaintiff in error is not entitled to the order asked in this court. Accordingly it is denied.

MOTION OVERRULED.

PETER WENDELL V. STATE OF NEBRASKA.

FILED JANUARY 21, 1896. No. 7745.

Arson: ACCESSORIES: INFORMATION. Under section 54 of the Criminal Code it was erroneous, over proper objections, to try a defendant upon the charge of burning a schoolhouse, joined with one for causing such burning to be done by another person.

ERROR to the district court for Kearney county. Tried below before BEALL, J.

J. L. McPheely and *C. J. Dilworth*, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General,* for the state, cited: Bishop, New Criminal Procedure, sec. 422; *Candy v. State,* 8 Neb., 483; *Aiken v. State,* 41 Neb., 264.

RYAN, C.

Plaintiff in error was tried in the district court of Kearney county upon an information containing three counts and found guilty upon the second count. Omitting such matters as are not essential to the understanding of the questions presented, these counts were as follows:

First count—"That on the second day of April in the year of our Lord one thousand eight hundred and ninety-five, one Peter Wendell then and there being * * * did then and there unlawfully, willfully, and maliciously, and feloniously procure, incite, and cause one Ben Pearson then and there being unlawfully, willfully, maliciously, and feloniously to set fire to and burn one schoolhouse," etc.

Second count— * * * "That on the second day of April, A. D. 1895, one Ben Pearson * * * did, then and there, unlawfully, willfully, maliciously, and feloniously set fire to and burn one schoolhouse * * * and that Peter Wendell, then and there being, did, before and at the time of said burning, unlawfully, willfully, maliciously, and feloniously * * * procure, incite, aid, abet, and cause the said Ben Pearson to set fire to and burn said schoolhouse," etc.

Third count— * * * "That on the second day of April, in the year of our Lord one thousand eight hundred and ninety-five, Ben Pearson * * * did, then and there, unlawfully, willfully, maliciously, and feloniously, set fire to and burn one schoolhouse there situated * * * and that one Peter Wendell, then and there being in said county and state aforesaid, then and there did hire and

cause said Ben Pearson to set fire to and burn said schoolhouse in the manner and form aforesaid," etc.

In the second count there is charged that Ben Pearson was guilty of the crime of arson, and that he was feloniously thereto instigated by the plaintiff in error. In this respect the three counts are alike. In the second count, which was that on which Wendell was found guilty, and which therefore is specially essential in this case, there was contained the charge that Wendell not only procured, incited, abetted, and caused Pearson to do the burning, but it was as well charged that Wendell aided Pearson in the act. The conviction was under section 54 of the Criminal Code, in which it is provided that "If any person shall willfully and maliciously burn or cause to be burned any dwelling house, etc. * * * every person so offending shall be deemed guilty of arson and shall be imprisoned in the penitentiary not more than twenty years, nor less than one year."

The instructions given by the court were evidently framed upon the theory that in the second count of the information there was charged but one offense, for in the second instruction given by the court was contained this language: "In this case the substantive offense charged is the willful, unlawful, and felonious setting fire to said schoolhouse in said county of Kearney and state of Nebraska, on or about the time alleged in the information, and, as hereinbefore stated, the defendant might have committed the same, if such offense was committed, by personally setting fire to and burning said schoolhouse, or by causing or procuring another unlawfully to do it, or by aiding, assisting, or abetting such other person in such unlawful burning. The state has seen fit to charge the defendant in this case with such burning, in each of the ways above set out. This it may lawfully do." The fourth instruction was in the same line as the second, while in the sixth occurs this language: "The court instructs the jury that if you believe

from the evidence in this case, beyond a reasonable doubt, that the defendant either personally, unlawfully, and willfully, burned the schoolhouse by setting fire thereto, or that he caused or procured another to unlawfully and willfully set fire to said schoolhouse, or knowing that another intended to unlawfully and feloniously set fire to said schoolhouse and burn the same aided, abetted, or assisted such person in the commission of said offense in said county and state, * * * then in either case said person would be guilty and liable as a principal of the unlawful and felonious burning of said schoolhouse." By these instructions there is presented the question whether or not two distinct offenses were charged in the count of the information upon which the plaintiff in error was found guilty. The court assumed that there was charged but one offense. Counsel for the plaintiff in error insists that there were two, each distinct from the other, and there has been no failure properly to preserve that question upon the record.

No case has been called to our attention in which is considered the language of a statute similar to that above quoted. It seems to us, however, that this differs from a case wherein is charged burglary and larceny in conjunction, for in such case the larceny is but the consummation of the intent with which the burglary is committed. Again, it is said, in section 449, 1 Bishop, Criminal Procedure [3d ed.]: "If the pleader is uncertain whether the transaction will appear in the proofs to be embezzlement or larceny, and both are felonies, he may have a count or counts for each. Under like circumstances counts may be joined for embezzlement and false pretenses." It does not seem to us that any of these considerations justify the joinder of the offense of aiding in burning a house with that of hiring, causing, or procuring another to commit such arson. The proof that Pearson set fire to the schoolhouse described, in no way tended to connect Wendell with the offense of causing Pearson to commit this crime. Proof that Wendell aided Pear-

son is direct evidence of his participation in the offense of Pearson. Proof that Wendell instigated Pearson is evidence only that he in some measure was responsible for the formation of a felonious intent by Pearson, but this intent, if never carried into effect, constituted no crime. If, however, the fruition of this intent was the consummation of the crime urged upon Pearson by Wendell, then Wendell became liable for the part which he had taken in the origination of Pearson's felonious intent and must answer accordingly. It is possible, that by statute the promoter of the arson might be made liable for its commission, but in our view section 54 of the Criminal Code is not so framed as to express such an intention on the part of the legislature. The judgment of the district court is

REVERSED.

CALVIN A. KREAMER V. ALFRED IRWIN.

FILED JANUARY 21, 1896. No. 5961.

1. **Breach of Contract:** DAMAGES. In a suit by a contractor against his contractee for damages for the latter's failure to permit him to perform the work contracted to be done, the contractor's measure of damages is the profit he would have made on the contract had he performed it.

2. **Trial:** ABSENCE OF WITNESSES: PRACTICE. A litigant whose witnesses are absent when his case is called for trial, and who makes no objection then to the trial proceeding on that account, cannot be heard to complain in his motion for a new trial that he was prejudiced by the trial taking place when his witnesses were absent.

3. **Damages:** EVIDENCE. The evidence examined and *held* to sustain the verdict of the jury.

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

Pound & Burr, for plaintiff in error.

Davis & Hibner, *contra*.

RAGAN, C.

In the district court of Lancaster county, Calvin A. Kreamer sued Alfred Irwin, alleging in his petition that in April, 1889, a contract was entered into between the parties in and by which Kreamer agreed to furnish the labor, materials, and tools, and raise and level the floor of a store building belonging to Irwin, for all of which labor and material the latter was to pay Kreamer the sum of $100; that in pursuance of this contract he made preparations to do the work at great expense, hired help, and moved his materials and tools on the ground, and refused other work in order to perform his contract; that Irwin refused to permit him to carry out his contract, to his damage in the sum of $65. The answer was a general denial. There was a trial to a jury and a verdict for Irwin, upon which judgment was rendered, dismissing Kreamer's action, to reverse which he prosecutes to this court a petition in error.

1. It is first insisted that the verdict of the jury is not supported by sufficient evidence. On the contrary we think it is. Assuming that the contract was made between Kreamer and Irwin as the former contends; that Kreamer was at all times ready and willing to perform the contract; made preparations at an expense to himself, and that Irwin refused to permit him to perform his contract, the measure of Kreamer's damages would be the difference between the contract price of the work and what it was reasonably worth to perform it in accordance with the contract. In other words, the measure of Kreamer's damages would have been his profits on the contract had he performed it. Now if there is any evidence in the bill of exceptions in this case which shows or tends to show what it would have cost

Kreamer to do the work as agreed, what it was reasonably worth to do the work according to the contract, what his profits would have been had he performed the contract, we have failed to find it. If Kreamer had established the making of the contract, pleaded his readiness, willingness, and ability to perform it, and that Irwin refused to permit him to carry it out, then, notwithstanding he failed to show that he had suffered any damages, doubtless he would have been entitled to recover nominal damages. But the jury has also found by its verdict that the contract pleaded by Kreamer was never made, and while this evidence is conflicting it supports the finding of the jury. The evidence tends to show that Kreamer made a proposition to Irwin to do the work for one hundred dollars, but it also tends to show that Irwin did not accept this proposition, and the jury may have concluded that the proposition made by Kreamer to Irwin was never accepted by the latter. If it did so, its conclusion is supported by the evidence.

2. It is next assigned as error that the court erred in compelling Kreamer to go to trial in the absence of material witnesses. If Kreamer made any application for the postponement of the trial in this case or its continuance at any time on account of the absence of witnesses, the record does not disclose it. Kreamer's complaint that he was compelled to go to trial in the absence of material witnesses appears in the record for the first time when he filed his motion for a new trial. When his case was called for trial, if he was not ready on account of the absence of witnesses whose testimony was material for him, he should have applied to the court then and there for the postponement of the trial on that account. A litigant whose witnesses are absent when his case is called for trial, and who makes no objection then to the trial proceeding on that account, cannot afterwards be heard to complain in his motion for a new trial that he was prejudiced by the trial taking place when his witnesses were absent.

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

AFFIRMED.

CAMPBELL PRINTING PRESS & MANUFACTURING COMPANY V. ELLA M. DYER ET AL.

FILED JANUARY 21, 1896. No. 5980.

1. **Sales:** ESTOPPEL. A purchaser cannot successfully assert a greater interest in personal property than his vendor had, unless the real owner of the property, by his conduct, has estopped himself from asserting his title to the chattel.

2. **Conditional Sales.** A contract for the sale of personal property upon condition that the title is to remain in the vendor until the purchase price is paid is valid as between the parties, and valid as against third parties dealing with the property without notice, unless such third parties are purchasers, judgment or attaching creditors of the conditional vendee.

3. **Chattel Mortgages:** SALES. A mortgagee of a conditional vendee in possession of chattels is not a purchaser within the meaning of section 26, chapter 32, Compiled Statutes.

4. **Conditional Sales:** CHATTEL MORTGAGES: REPLEVIN. A contract between a manufacturing company and a printing company provided: "The manufacturing company hereby agrees to sell at the sum of $—— to the printing company [a printing press, described] to be delivered, boxed, on cars at its factory * * * warranted free from defects of material and manufacture. * * * The printing company hereby agrees to buy such presses * * * and to pay therefor, on receipt of bill of lading of same, cash $——, and the balance in payments, evidenced by purchaser's notes. * * * The title to the said property shall remain in the seller until the purchase price with interest has been fully paid, and in case of any default in any of the terms of this contract the seller shall have the right to take immediate possession of said property." The presses were received by the printing company, put up, and used in its business, but it did not make the cash payment nor execute the notes as agreed. The printing company subsequently pledged

these presses by a chattel mortgage to a bank to which it was indebted. The bank duly filed its mortgage and took actual possession of the presses. In an action of replevin by the manufacturing company against the bank, *held*, (1) that the printing company never acquired any title to the presses, and by its default had forfeited its right to their possession as against the manufacturing company; (2) that the manufacturing company was entitled to the possession of the presses as against the bank.

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

Breckenridge, Breckenridge & Crofoot, for plaintiff in error, cited: *Davis v. Giddings*, 30 Neb., 209; *Dows v. Kidder*, 84 N. Y., 121; *Tyler v. Freeman*, 3 Cush. [Mass.], 261; *Whitney v. Eaton*, 15 Gray [Mass.], 225; *Adams v. O'Connor*, 100 Mass., 515; *Hirschorn v. Canney*, 98 Mass., 149; *Stone v. Perry*, 60 Me., 48; *Seed v. Lord*, 66 Me., 580; *Hodgson v. Barrett*, 33 O. St., 63; *Paul v. Reed*, 52 N. H., 136; *Pond Machine Tool Co. v. Robinson*, 37 N. W. Rep. [Minn.], 99; *Briggs v. Ewen*, 42 N. W. Rep. [Ia.], 303; *Empire State Type Foundry Co. v. Grant*, 21 N. E. Rep. [N. Y.], 49; *Ballantyne v. Appleton*, 20 Atl. Rep. [Me.], 235; *Thorpe v. Fowler*, 57 Ia., 541; *Mathewson v. Belmont Flouring Mills Co.*, 76 Ga., 359.

Hall, McCulloch & Clarkson, contra, cited: Morse, Banks & Banking, sec. 111; Wade, Notice, sec. 683; *Pringle v. Dunn*, 37 Wis., 451.

Clinton N. Powell and *Howard B. Smith*, also for defendants in error.

RAGAN, C.

In February and May respectively, 1890, the Campbell Printing Press & Manufacturing Company, a corporation domiciled in the state of Massachusetts, and hereinafter called the "Manufacturing Company," and the Western

Printing Company, a corporation domiciled in the city of Omaha, and hereinafter called the "Printing Company," entered into two contracts in writing, substantially alike, and the terms of which, so far as material here, were as follows:

"The Manufacturing Company hereby agrees to sell at the sum of $—— to the Printing Company [here follows in each contract a description of a printing press], to be delivered, boxed, on cars at its factory in Massachusetts, * * * warranted free from defects of material and manufacture. * * * The Printing Company hereby agrees to buy said press as within specified, and to pay therefor, on receipt of bill of lading of same, cash $——, and the balance in payments, evidenced by purchaser's notes of even date with said bill of lading and bearing six per cent interest, as follows: [here follows the amount of each note, the time it is to run and by whom the notes are to be indorsed], the purchaser to deliver the said notes with the cash; the seller to send erector to superintend erection of press, paying for erector's time, hotel bills, and all traveling expenses.

"It is further agreed that the title to the said property shall remain in the seller until the purchase price with interest has been fully paid, and in case of any default in any of the terms of this contract the seller shall have the right to take immediate possession of said property."

Soon after the making of said contracts, the printing presses mentioned in said contracts were shipped to the Printing Company at Omaha, and it received them and put them up in its printing house and used them in its printing business. The Printing Company did not make the cash payments, nor execute the notes as agreed. No copy of either of these agreements was filed in the office of the county clerk of Douglas county. In August, 1890, the Printing Company executed to the Omaha National Bank and Ella M. Dyer two chattel mortgages upon the

printing presses to secure debts amounting to about $20,000 owing by the Printing Company to the bank and Dyer. The mortgagees filed their mortgages in the office of the county clerk of Douglas county and immediately took possession of the mortgaged property. Some weeks after this the Manufacturing Company instituted this suit—an action in replevin—in the district court of Douglas county against the bank and Dyer for the printing presses. The Manufacturing Company based its action on the contracts quoted above, claiming that inasmuch as the Printing Company had never paid the purchase price of the presses that the title to them had never passed to the Printing Company, and that by reason of its failure to execute the notes and make the cash payments agreed, it, the Manufacturing Company, was entitled to possession of the presses. The bank and Dyer claimed to be innocent mortgagees of the property from the Printing Company without actual notice of the contract existing between the Manufacturing Company and the Printing Company. At the close of the evidence the jury, in obedience to an instruction of the district court, returned a verdict in favor of the bank and Dyer, upon which the court rendered a judgment that the Manufacturing Company return the presses to them or pay them $1,500 in money, the stipulated value of the presses. To reverse this judgment the Manufacturing Company prosecutes to this court a petition in error.

For the purposes of this opinion we assume that neither the bank nor Dyer had any actual notice of the existence of the terms of the contract between the Manufacturing Company and the Printing Company, and there is no claim made that any copy of either of these contracts was ever filed in the office of the county clerk of Douglas county. Section 26, chapter 32, Compiled Statutes, provides: "That no sale, contract, or lease wherein the transfer of title or ownership of personal property is made to depend upon any condition shall be valid against any

purchaser or judgment creditor of the vendee or lessee in actual possession obtained in pursuance of such sale, contract, or lease without notice, unless the same be in writing signed by the vendee or lessee, and a copy thereof filed in the office of the clerk of the county within which such vendee or lessee resides," etc. The contract between the Manufacturing Company and the Printing Company was and is one wherein the transfer of title of personal property is made to depend upon a condition, namely, the payment by the Printing Company of the purchase price of the presses. The bank and Dyer obtained their mortgages upon these presses from the Printing Company, the conditional vendee, while it was in the actual possession of the presses. If the bank and Dyer had purchased from the Printing Company while it was in possession, or if the bank and Dyer claimed a title to or lien upon these presses by reason of their being judgment creditors of the Printing Company, then it is clear that they would be protected by the statute just quoted; but is a mortgage of personal property made by a conditional vendee in possession thereof within the statute? It will aid us in answering this question to ascertain what the rights of the parties to this contract were between themselves, and what the rights were of third persons dealing with this property without notice, prior to the enactment of the statute just quoted.

In *Aultman, Miller & Co. v. Mallory*, 5 Neb., 178, Aultman, Miller & Co. had sold to one Johnson a mower, taking from him in payment thereof a note which provided that the title to the mower should remain in Aultman & Co. until the note was paid. A judgment creditor of Johnson's levied an execution upon the mower and Aultman & Co. replevied it. The court said: "A sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee until the condition is performed,"—and accordingly held that the title to the mower remained in

Aultman & Co. This decision is based upon the correct principle that one cannot successfully assert a greater interest in personal property than his vendor had, unless the real owner of the property by his conduct has estopped himself from asserting his title to the chattel. Applying the doctrine of this case to the contract under consideration it is evident, in the absence of statute, that as between the Manufacturing Company and the Printing Company the title to these presses could only pass to the Printing Company upon the full payment of their purchase price. The case just cited is an adjudication in this state that the rule of *caveat emptor* applies to sales of personal property; that though one may purchase personal property from another in the actual possession thereof,—purchase it in good faith for a valuable consideration and with the honest belief that the property belongs to the vendor,—yet he will make such purchase at his peril and take only such title as his vendor has.

The doctrine of *Aultman, Miller & Co. v. Mallory, supra,* was before this court in *McCormick v. Stevenson,* 13 Neb., 70, *Norton v. Pilger,* 30 Neb., 860, *Peterson v. Tufts,* 34 Neb., 8, and *McClelland v. Scroggin,* 35 Neb., 536; and in all of these cases the rule, announced in the Aultman-Miller case, that a contract for the sale and delivery of personal property, upon condition that the title should remain in the vendor until the purchase price was paid, was a valid contract as between the parties and binding upon third parties dealing with the property with notice of the agreement between the conditional vendor and vendee, was approved. The Aultman case was decided at the July, 1876, term, and on January 1, 1877, the legislature convened and passed the statute (sec. 26, ch. 32) quoted above. This statute was in effect a legislative command that the decision in the Aultman case should no longer be the law of this state so far as judgment and attaching creditors and purchasers without notice were concerned; but did the legislature intend that

this provision of the statute should extend to the protection of a mortgagee of a conditional vendee? If it did, it has not said so either expressly or by implication. We must presume that the members of the legislature of 1877 were familiar with the fact that bankers and others were constantly lending money on chattel security; and yet with the decision of the Aultman case before it the legislature in effect said that a contract for the sale of personal property upon condition that the title is to remain in the vendor until the purchase price is paid shall remain valid in this state, as declared by the supreme court, except where third parties dealing with the property without notice are purchasers or judgment or attaching creditors. The temptation is very strong to read into this statute the word "mortgagee," but in this instance our duty does not coincide with our inclination. We are forced to the conclusion that had it been the intention of the legislature that said statute should afford protection to a mortgagee of a conditional vendee or lessee, it would have said so in express terms. (*Steele v. Spencer*, 1 Pet. [U. S.], 550.) We are strengthened in this conclusion by an examination of section 14, chapter 32, Compiled Statutes, which provides that a conveyance of chattels intended to operate as a mortgage shall be void as against creditors, subsequent purchasers, and mortgagees in good faith. This thought seems also to have been present in the mind of COBB, C. J., when writing the opinion in *Norton v. Pilger, supra.* It follows that the judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

F. G. KEENS v. F. Y. ROBERTSON.

FILED JANUARY 21, 1896. No. 5982.

1. **Agreements of Counsel:** POWER OF COURT TO VACATE. Agreements of counsel in regard to the trial of a cause are not absolute although in writing; and are not to be treated as contracts to be enforced under all circumstances. They may be set aside by the court in the exercise of a sound discretion when their enforcement would result in serious injury to one of the parties and the other party would not be prejudiced by its being set aside. *McClure v. Heirs of Sheek*, 4 S. W. Rep. [Tex.], 552, followed.

2. **Continuance:** REVIEW. The ruling of a district court on a motion for a continuance will not be disturbed unless it is manifest the court abused its discretion and the litigant—himself guiltless of negligence or laches—was thereby deprived of an opportunity to make his case or defense. *Home Fire Ins. Co. of Omaha v. Johnson*, 43 Neb., 71, and *Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb., 121, reaffirmed.

3. **Instructions:** OBJECTIONS: REVIEW. A litigant cannot for the first time object in this court that the district court erred in giving or refusing to give a certain instruction. He must make his complaint of the action of the court in his motion for a new trial in order to have it reviewed here.

4. **Trial:** EVIDENCE: OFFER OF PROOF. It is not error for a district court to refuse to permit a witness to answer a question, where no offer of proof is made, if the question is of such a nature as to require an offer of proof, in order to advise the court of the competency and relevancy of the question under issue.

5. **Pleading and Proof.** Evidence to prove a defense in the nature of a confession and avoidance is incompetent under a general denial.

6. **Witnesses:** OFFER OF PROOF. Where a question is asked and excluded and an offer of proof made thereunder, the offer, to be competent, must correspond to the question.

7. **Depositions.** Depositions taken in a case pending before a justice and by stipulation used in said case and another pending before said justice, may be used on the trial of both cases in the appellate court, the stipulation in the meantime not having been set aside.

8. ———: REVIEW. Where depositions are erroneously read to the jury, but not preserved in the bill of exceptions, this court cannot say that such error was prejudicial.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

The facts are stated by the commissioner.

R. A. Moore, for plaintiff in error:

The agreement is binding. (*State Bank of Nebraska v. Green*, 8 Neb., 307; *McCann v. McLennan*, 3 Neb., 29; *Palmer v. People*, 4 Neb., 76; *Rich v. State Nat. Bank of Lincoln*, 7 Neb., 201.)

Dryden & Main, contra:

The court had power to set aside the stipulation, and that power was properly exercised. (*Porter v. Holt*, 11 S. W. Rep. [Tex.], 494; *McClure v. Heirs of Sheek*, 4 S. W. Rep. [Tex.], 552; *Ward v. Clay*, 23 Pac. Rep. [Cal.], 50; *Richardson v. Musser*, 54 Cal., 196.)

RAGAN, C.

In the district court of Buffalo county, G. M. Johnston, F. M. Waterhouse, and J. A. Waterhouse sued F. G. Keens to recover $50 which they alleged in their petition that Keens had agreed to pay them when they should commence the erection of a paper-mill within three miles of the Midway Hotel in the city of Kearney and have on the ground, ready for placing in position, $20,000 worth of machinery for said paper-mill. F. Y. Robertson was substituted as plaintiff, had a verdict and judgment, and Keens prosecutes to this court a petition in error.

1. On the 23d day of January, 1892, a stipulation was entered into between the parties to the suit, or their counsel, and made a matter of record, that the decision in this case should be the same as that which might be rendered

in the case of Johnson v. Buffalo County National Bank, then pending for trial in said court. On the 26th of January, 1892, counsel for Robertson made application to the court, supported by affidavit, to vacate the agreement just referred to. The grounds upon which he asked to have the agreement vacated were that at the time he became a party thereto he supposed that the case of Johnson against the Buffalo County National Bank would be tried upon the issues on which it was tried before the justice of the peace from whom it had been appealed, and that since making said stipulation counsel for the defendant in the case of Johnson v. Buffalo County National Bank had filed an answer in that case, setting up the defense of *ultra vires*. The court sustained the application to vacate the agreement, and this action of the court is the first error assigned here.

We do not think the court abused its discretion in setting aside this agreement. It is true the agreement was not procured by fraud or sharp practice, and counsel for the defendant in error here may have been somewhat negligent in not providing in the stipulation that the Buffalo County National Bank case should be tried upon the same issues that it was tried in the justice court, but that action, like the one here, was on a subscription to this Kearney paper-mill. Like this one, it had been tried in a justice court, where the answer was perhaps a general denial, if indeed there was any answer at all, and with these facts in his mind, counsel may have been very willing to save the labor, expense, and trouble of trying two cases, the facts and issues being the same. But of course the defense of *ultra vires* was not one which the defendant in this action could interpose, and if the plaintiff should be bound to submit in this case to the same judgment that might be rendered in the bank case, it might work an injustice to him, while the setting aside of the stipulation could not possibly prejudice the defendant in this action. In *McClure v. Heirs*

of Sheek, 4 S. W. Rep. [Tex.], 552, before the term of court at which the case was tried, the respective counsel stipulated for the continuance of the case over the term of court about to be held. When the court convened one of the parties employed other counsel and notified opposite counsel that he would not be bound by the agreement and moved the court to vacate the stipulation for continuance on the ground that by a continuance of the case he would likely lose the subject-matter of the action—some cattle. The party making the application also showed the court that he had not consented to the condition since being advised that his counsel had made it, and that he had never authorized his counsel to consent to a continuance. The court set aside the continuance, holding that "Agreements of counsel in regard to the trial of a cause are not absolute, although in writing; and are not to be treated as contracts to be enforced under all circumstances. They may be set aside by the court in the exercise of a sound discretion when their enforcement would result in serious injury to one of the parties and the other [party] would not be prejudiced by its being set aside. To the same effect see *Porter v. Holt*, 11 S. W. Rep. [Tex.], 494. In this case the supreme court of Texas held not only that the setting aside of agreements of counsel was generally in the discretion of the district court, but went further, and held that where the agreement affected the substance of the cause of action or the character of the defense and appears to have been made by counsel without a knowledge of all the facts, and that its vacation would not prejudice either party, that the motion to set aside ceased to be a matter of mere discretion, and refusal to set it aside would be error. (See, also, *Ward v. Clay*, 23 Pac. Rep. [Cal.], 50, and cases there cited.)

2. As already stated, this action was originally brought before a justice of the peace. Robertson filed his petition in the district court on the 18th of December, 1889. On the 16th of April, 1892, the court ruled Keens to answer *in-*

stanter. He did not answer, however, until the 18th of April, and on that date his counsel filed an application for a continuance, which the court overruled. This action of the court is the second error assigned here. The grounds upon which counsel sought to have the court continue this action were that his client was absent in the city of New York; that he had gone to that place with his family on the 8th of April previous. We are of opinion that the district court did not abuse its discretion in refusing this application. The showing made for the continuance did not disclose that Keens ever intended returning to Nebraska. He knew the case was pending when he left, and yet he made no effort to have his deposition taken to be used on the trial. The absence of Keens was not unexpected. He had not been unexpectedly called away because of some emergency. In other words, his application for a continuance not only discloses that he had not used due diligence to be ready for trial, but that he had been grossly negligent. The ruling of a district court on a motion for a continuance will not be disturbed unless it is manifest the court abused its discretion and the litigant, himself guiltless of negligence or laches, was thereby deprived of an opportunity to make his case or defense. (*Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb., 121; *Home Fire Ins. Co. of Omaha v. Johnson*, 43 Neb., 71.)

3. The third assignment of error argued in the brief is that the court erred in refusing to give instruction No. 5 requested by the plaintiff in error. But the plaintiff in error made no objection to this action of the court in his motion for a new trial. He there alleges that the court erred because of its refusal to give instructions Nos. 1, 2, 3, and 4 asked by him, but no mention is made of instruction No. 5. A litigant cannot for the first time object in this court that the district court erred in giving or refusing to give a certain instruction. He must make his complaint of the action of the court in his motion for a new trial in order to have it reviewed here.

4. The fourth assignment of error relates to the action of the district court in refusing to permit a witness called by the plaintiff in error to answer certain questions. All these questions were of such a nature as to require an offer of proof in order that the district court might be advised of their competency and relevancy under the issues. No offers of proof were made by the plaintiff in error on the refusal of the court to permit the witness to answer some of the questions and they need no further notice. One of the questions propounded to the witness was as follows: "State if you made any statement to the subscribers that their money would not be called upon until the full $8,000 would be raised." This question was objected to, as incompetent and irrelevant. The objection was sustained, and thereupon the plaintiff in error made the following offer: "Defendant offers to prove by this witness that * * * the committee was canvassing this city with a subscription list, agreed with the subscriber, and it was one of the inducements held out to the parties solicited to subscribe that no part of it should be paid until the $8,000 had been subscribed according to the terms of the agreement. That it was understood and agreed and was represented by said committee * * * that the building was to be a paper-mill, and that it was to be properly constructed; that the machinery was to be placed there in such a position that it would make paper, and be ready for operation, before the money which they subscribed should be called for, and that that was the inducement that caused the subscribers to subscribe." This offer of proof was denied and the plaintiff in error excepted. The answer of the plaintiff in error was, in effect, a general denial, and the evidence offered was incompetent under the pleadings. Another question asked the witness was this: "State in what manner the building differed from the one represented on the plans." Objection having been made and sustained to the witness answering this question, the plaintiff in error

made the following offer: "Defendant offers to show by this witness that a part of the machinery put in this building, claimed as a part of the $20,000, consisted of engines that were running upon the same shaft, and that one had one-half foot longer stroke than the other and were otherwise inferior and of no use." This offer was denied and the plaintiff in error excepted. The court did not err in excluding this offer, for the reason that the offer did not correspond with the question propounded. The interrogatory refers to the building, the offer of proof was to show that the machinery put in the building was defective.

5. When the above mentioned case of Johnson against the Buffalo County National Bank was pending before the justice of the peace the depositions of certain parties were taken for use in that case; and the counsel in that and this case being the same, it was agreed between them that the depositions in the bank case should be used in this case, and they were so used on the trial before the justice of the peace. The next error assigned is that the district court erred in permitting these depositions to be read in evidence on the trial in this case. The record shows that the depositions were offered in evidence; that they were objected to and the objection overruled, and it is only fair to presume that the depositions were read in evidence to the jury; but if they were, they are not in the bill of exceptions of this record. We cannot say, if the court erred in permitting these depositions to be read, that such error was prejudicial to the plaintiff in error, as we have no means of knowing what the witnesses testified to in their depositions. Furthermore, we are of opinion that these depositions, having been used by consent in the trial of this case before the justice of the peace, it was proper to use them again in the case in the district court if the evidence they contained was material and relevant. (See Code of Civil Procedure, sec. 383.)

The judgment of the district court is

AFFIRMED.

JACOB D. ZITTLE V. SAMUEL SCHLESINGER.

FILED JANUARY 21, 1896. No. 5919.

1. **Trial:** NONSUIT: PRACTICE. Under our code a trial court has no authority to enter an involuntary nonsuit and judgment of dismissal, because the plaintiff fails by his evidence to establish his cause of action. In such case the proper practice is to instruct the jury to return a verdict for the defendant.

2. ———: ———: HARMLESS ERROR. But a judgment so entered will not be reversed by this court where, on the evidence, the defendant was entitled to have a verdict directed. In that case the error is without prejudice.

3. **Real Estate Agents:** COMMISSIONS: FRAUD. While a real estate broker is usually entitled to his commissions when he has produced one ready, willing, and able to purchase on the terms proposed by the principal, or when he has produced one with whom a contract of sale is actually made, still, if the person produced is able to purchase only by resort to an unlawful device, the broker has not earned his commission.

4. ———: ———: VENDOR AND VENDEE: FRAUD. Where, under such circumstances, an executory contract of sale has been entered into between the principal and the proposed purchaser, the principal being aware that its execution involves the perpetration of a fraud upon a third person and refusing to consummate the contract, the broker is not entitled to his commission.

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

The opinion contains a statement of the case.

Slabaugh & Rush, for plaintiff in error:

After the introduction of the evidence by plaintiff, the court has no authority to dismiss the case and discharge the jury without a verdict. (*Dolby v. Tingley,* 9 Neb., 417; *Smith v. Sioux City & P. R. Co.,* 15 Neb., 583; *Chicago, B. & Q. R. Co. v. Richardson,* 28 Neb., 118; *Byrd v. Blessing,* 11 O. St., 362.)

Plaintiff cannot be nonsuited after testimony has been introduced by defendant. (*Lyon v. Sibley*, 32 Me., 576; *Emerson v. Joy*, 34 Me., 347; *Rose v. Learned*, 14 Mass., 154.)

If fraud appears, it is on part of defendant and he cannot take advantage of his own wrong. (*Phelps v. Prusch*, 83 Cal., 626; *Blaydes v. Adams*, 35 Mo. App., 526; *Hannan v. Moran*, 71 Mich., 261.)

If parties to a sale attempt to do wrong it does not affect the agent who is innocent. (*Roundtree v. Smith*, 108 U. S., 269; *Patrick v. Littell*, 36 O. St., 79; *Tracy v. Talmage*, 14 N. Y., 162; *Ormes v. Dauchy*, 45 N. Y. Sup. Ct., 85.)

If parties, having been brought together by the agent, choose to execute a lawful transaction in an unlawful manner, that is a matter which rests wholly with them. (*Michael v. Bacon*, 49 Mo., 474; *Tracy v. Talmage*, 14 N. Y., 162; *Hubbard v. Moore*, 24 La. Ann., 591; *Mahood v. Tealza*, 26 La. Ann., 108.)

An agreement for an exchange was entered into in writing. The sale and purchase were agreed upon and the agent is entitled to his commission. (*Keys v. Johnson*, 68 Pa. St., 42; *Love v. Miller*, 53 Ind., 294; *Francis v. Baker*, 45 Minn., 83; *Love v. Owens*, 31 Mo. App., 501; *Rice v. Mayo*, 107 Mass., 550; *Hamlin v. Schulte*, 34 Minn., 534.)

A broker is not an insurer of title and may recover his commission though the title is defective. (*Birmingham Land & Loan Co. v. Thompson*, 86 Ala., 146; *Doty v. Miller*, 43 Barb. [N. Y.], 529.)

IRVINE, C.

This was an action by the plaintiff in error against the defendant in error to recover commissions which the plaintiff claimed he had earned as a real estate broker. When the plaintiff rested, the defendant moved for a nonsuit. This

motion was sustained by the court, and a judgment of dismissal entered, against the plaintiff's exception, without taking a verdict from the jury. It is contended that under our code this was improper practice, and we shall examine that question before inquiring into the merits of the case.

It is broadly contended that the court has no power to subject the plaintiff to an involuntary nonsuit or to enter a judgment of dismissal on the ground that the plaintiff's evidence is insufficient to establish a cause of action. Were we without guide from the statutes, the question would upon authority be difficult of solution. The supreme court of the United States (*Elmore v. Grymes*, 1 Pet., 469) has determined that the federal courts have no power to subject the plaintiff to an involuntary nonsuit. Many of the state courts take the same view. On the other hand, in many states such a practice has been sustained as avoiding an unnecessarily circuitous procedure. (See authorities collated, 16 Am. & Eng. Ency. of Law, 733.) But the provisions of our Code of Civil Procedure, to our minds, afford a ready solution of the question. Section 430 provides: "An action may be dismissed without prejudice to a future action. First—By the plaintiff, before the final submission of the case to the jury, or to the court, where the trial is by the court. Second—By the court, where the plaintiff fails to appear on the trial. Third—By the court, for want of necessary parties. Fourth—By the court, on the application of some of the defendants where there are others whom the plaintiff fails to prosecute with diligence. Fifth—By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases, upon the trial of the action, the decision must be upon the merits." By virtue of this section, in the five cases stated, a judgment of dismissal without prejudice may be entered by the court; and by the last sentence of the section such a judgment cannot be entered in other cases. At common law a nonsuit was not a bar to a future action, and the evi-

dent purpose of the framers of the code was to change the law in order to lead every case to a final judgment which should be a bar except where, for sufficient reasons, other provision has been made. This is the view taken elsewhere under similar statutes. (*Byrd v. Blessing*, 11 O. St., 362; *Case v. Hannahs*, 2 Kan., 490; *Mulhern v. Union P. R. Co.*, 2 Wyo., 465.) Where the evidence is insufficient to warrant a verdict for the plaintiff the court may, and should, instruct the jury to return a verdict for the defendant; but it has no authority without a verdict to enter a nonsuit and judgment of dismissal. It does not follow, however, that this judgment should be reversed because of this error. Section 145 of the Code provides: "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." It follows that if the state of the evidence was such that the court should have directed a verdict for the defendant and entered judgment upon that verdict, the error is without prejudice and must be disregarded. (*Byrd v. Blessing* and *Case v. Hannahs, supra.*)

The evidence tends to show that the plaintiff, a real estate broker, had entered into a contract with one Mills to procure for him a purchaser, either by way of sale or exchange, for certain property in the city of Omaha. In the language of real estate brokers, Mills had "listed" his property with the plaintiffs for sale or exchange. Some time thereafter the defendant approached plaintiff to ascertain what property plaintiff had for exchange. He was informed of Mills' property, and the defendant then listed his property with the plaintiff, knowing, it was alleged, that plaintiff was to receive a commission from Mills, and agreeing with that knowledge to himself pay to plaintiff one-half the usual commission. This arrangement having been made, the plaintiff and defendant went to examine

Mills' property. They were met by Mrs. Mills, who refused to permit them to enter. Returning, they met Mills, who was introduced to defendant by plaintiff, plaintiff informing Mills where they had been, their object, and how it had been defeated. They were then informed by Mills that Mrs. Mills was unwilling to dispose of the property, but that she had joined in a conveyance to one Miller, and that a reconveyance from Miller to Mills was then held in escrow. Mills proposed to obviate the difficulty arising from Mrs. Mills' unwillingness to convey, by destroying the reconveyance and causing Miller to convey directly to the defendant. Subsequently a memorandum of agreement was signed by Mills and the defendant, but defendant refused to perform it, giving as a reason that he had taken counsel and learned the title would not be good, and that he did not wish the property. The record does not disclose the actual condition of the title, except that there had been a conveyance from Mills and wife to Miller, which it would seem from some of the evidence was for the purpose of securing a debt; that Miller had executed a reconveyance, and that that reconveyance had not been delivered, but was in possession of one Wakefield, and held by him as security for the payment of other moneys. Under this evidence, had plaintiff produced a purchaser willing and able to take defendant's property? We think not. In the first place, assuming the title to have been in Mills, Mills did not offer a valid conveyance to defendant. It is true that the defendant was aware of this when he entered into the written memorandum. But the method proposed for making title was plainly a device to defraud Mrs. Mills of her dower if not also of homestead rights. The plaintiff was cognizant of this device and of its purpose. Had the transaction been completed, Mrs. Mills would have had her remedy against the defendant who was also a party to the fraud; and while the defendant can claim no relief because of his participation in such an unlawful transaction, he was not bound to

consummate it. He had a right, which he exercised, to refuse to consummate the fraud, and Mills being unable to confer upon him even the apparent title, except through such fraudulent device, he was not a purchaser able to take the property in a lawful way. He was merely one willing to purchase by unlawful means. A production of such a purchaser does not entitle the agent to his commission. The greater part of the argument on behalf of plaintiff is addressed to propositions which assume that a person willing and able to take the property had been procured. We are cited to certain cases holding that a broker may recover his commission although the title proves defective, and that the refusal of a wife to join in a conveyance is no bar to the recovery of commissions; but the defects and refusal referred to in those cases relate to the title to the principals' land, and not to such features with relation to land offered in exchange therefor. In the case of an exchange a defect in title to the land offered in exchange is as good a defense as would be proof that the purchaser produced had no means of buying except with counterfeit money. But we have taken a view very favorable to the plaintiff in assuming that title had been shown in Mills. This court has held that where a deed absolute in form is executed to secure a debt, the case is different from an ordinary mortgage, and title passes to the grantee. (*Gallagher v. Giddings*, 33 Neb., 222.) Such a conveyance had been made to Miller, and while a reconveyance had been executed, it had not been delivered, but had been placed in escrow as security for a further debt. The details of these transactions very meagerly appeared in evidence. It is unnecessary to consider where the legal title was reposed. It is sufficient that if the legal title were not outstanding there were substantial outstanding equities which Mills did not propose to divest in a regular or legal manner. The evidence was, therefore, of such a character that a verdict should have been directed

for the defendant, and the error in the former proceedings was not prejudicial.

JUDGMENT AFFIRMED.

SCHOOL DISTRICT NUMBER ONE OF HARLAN COUNTY v. HARRY O. BISHOP ET AL.

FILED JANUARY 21, 1896. No. 5975.

1. **Findings of Referee:** REVIEW. Findings of fact reported by a referee stand in the same position as the verdict of a jury; and in reviewing the action of a district court in setting aside such a report, the same rules will be observed as in reviewing an order setting aside a verdict.
2. **Ruling on Motion for New Trial:** REVIEW. The granting of a new trial is largely within the discretion of the trial court. A stronger showing is required to reverse an order allowing a new trial than to reverse one denying it.
3. **Reference:** FINDINGS: ORDER SETTING ASIDE REPORT: REVIEW. Where an action at law has been referred, this court will not reverse an order of the trial court setting aside the referee's report and allowing a new trial, when the referee failed to report any finding on material issues presented by the pleadings.
4. **Court Records:** CORRECTIONS. A court of record has the inherent authority to amend its records so as to make them conform to the facts. This power extends as well to supplying omissions as to correcting mistakes, and in the exercise of the power the court is not confined to an examination of the judge's minutes or other written evidence; it may proceed upon any satisfactory evidence.
5. **Continuance:** DISMISSAL: REVIEW: BILL OF EXCEPTIONS. A record disclosing a stipulation for the continuance of a cause and a peremptory order of the court dismissing it at the same term, the judgment of dismissal cannot be reviewed in the absence of a bill of exceptions or matter of record disclosing the grounds of the court's action.

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

James McNeny, for plaintiff in error.

C. C. Flansburg, *contra*.

IRVINE, C.

The history of this case has been somewhat eventful, and its result is to present to us now for review questions of practice rather than questions of substantive law. The action was begun by the school district to recover damages upon a bond alleged to have been executed by Henry O. Bishop as principal and the other defendants as sureties, conditioned for the faithful performance of a contract whereby Bishop undertook to construct for the school district a certain schoolhouse, it being alleged that the contract provided that Bishop should assume all risk of losses by fire, water, or accident during the progress of the work, and deliver to the school district the building complete at a time specified. The breach alleged was that while the work was in progress a violent wind-storm occurred, destroying the building, and that Bishop had failed and refused to replace it, to the plaintiff's damage. An answer and a reply were filed presenting a number of issues for trial. In June, 1888, an order was made referring the case to a referee to hear and determine the facts and report his findings on the first day of the following term of court. It does not appear whether or not this order of reference was made by consent of the parties, but no exception was taken thereto, so the question is immaterial so far as the validity of the order is concerned. Subsequently an order was made extending the time for report. This order was made October 16, 1888, and directed the referee to report on the first day of the next term of court. The record presents some question as to whether the report was filed within time. It was filed December 27, 1888, and the record being silent as to the dates when the different terms were held, it must be presumed that the report was filed

within time. The result of the report so filed was to find due to the plaintiff from all the defendants except Henrietta Bishop the sum of $4,160.49, and to discharge the defendant Henrietta Bishop. A motion was filed to confirm this report on the part of the plaintiff, while the defendants filed exceptions thereto, and a motion to set it aside and for a new trial. The latter motion was sustained February 16, 1889, the plaintiff excepting to the court's ruling. The case was then continued from term to term for different reasons until October, 1891. In that month there was filed a stipulation of counsel agreeing to a continuance of the cause over the November, 1891, term; but an order appears at that term reciting that the cause came on to be heard and that it was dismissed at plaintiff's costs over an exception by the plaintiff to that ruling. Six days later a motion was filed by the plaintiff to reinstate the cause; but no entry was made at that term of any order on the motion to reinstate. In February, 1892, another judge presiding, the motion to reinstate was called up, whereupon the court on motion of two of the defendants entered a *nunc pro tunc* order, finding that on the 5th day of December, 1891, the motion to reinstate had by the former judge been overruled and that the plaintiff had then excepted to that ruling, and directing the clerk to reform the record accordingly. Bills of exceptions were settled preserving the evidence on the hearing of February, 1892; but there is no bill of exceptions disclosing the evidence or proceedings of the November term, 1891. On this record the plaintiff prosecutes proceedings in error, his petition containing a number of assignments of error, which may, however, be reduced to three general assignments: First, the setting aside of the referee's report; second, the dismissal of the case in December, 1891; third, the making of the order of February, 1892, *nunc pro tunc*, showing the overruling of the motion to reinstate in December, 1891.

An examination of the Code of Civil Procedure, and of

the decisions of this court thereunder, shows that where a case is referred, the findings of fact by the referee stand in the same position as the verdict of a jury, and may be confirmed and judgment entered thereon, or may be set aside on a motion for a new trial in conformity with the practice in other cases. (Code of Civil Procedure, art. 4 and art. 6; *Simpson v. Gregg*, 5 Neb., 237; *Light v. Kennard*, 11 Neb., 129; *Brown v. O'Brien*, 4 Neb., 195.) Therefore, in considering whether or not there was error in the action of the district court in setting aside the referee's report, we should proceed in the same manner as if there had been a trial by jury and verdict similar to the report of the referee, and a motion for a new trial sustained. While the limitations upon the power of this court to review the action of a district court in granting a new trial have not yet been very distinctly defined, the adjudications have gone far enough to establish these rules: That in granting a new trial a district court has a large discretionary power; it is not confined to a strict consideration of the specific grounds urged in the motion, but may, for manifest error in the proceedings, of its own motion, in the interest of a proper administration of justice, set aside a verdict and allow a new trial; and, therefore, where a new trial has been allowed, a much stronger showing must be made against the ruling of the court to procure a reversal, than where a new trial has been denied. The action of the court will not be reviewed except for abuse of discretion. (*Missouri P. R. Co. v. Hays*, 15 Neb., 224; *Bigler v. Baker*, 40 Neb., 325; *Weber v. Kirkendall*, 44 Neb., 766.) Examining this record with a view to the rule so established, and not merely upon a technical consideration of the reasons assigned in the motion for a new trial, we find that the sureties on the building bond averred in their answer that after the building had been blown down the plaintiff had permitted strangers to remove and convert to their own use building material to the value of $2,500; that they had signed the bond upon condition that

before its delivery one Mullalley should sign the same, and that this condition was known to the plaintiff, and that after the execution of the bond material changes had been made in the building contract, the performance of which it had been given to secure, without the consent of the sureties. The last defense is averred in general language, but is probably sufficiently pleaded unless attacked by motion, which was not done. On none of these issues did the referee make any finding, and there was no general finding. It has been said that where the referee fails to find certain issues the proper practice is to refer the case back with directions to make a finding. (*State v. Graham*, 23 Neb., 68.) But this was said in an original action in the nature of *quo warranto* in this court, and not in a case like this—an ordinary action at law. It has also, we believe, been the practice, where an equity case has been referred and the findings of the referee vacated, for the court itself to make findings on the evidence reported by the referee; and this practice we do not wish to be understood as disapproving. The case before us is, however, an action at law where a jury trial is demandable of right. It could not be referred except by consent of the parties (Code of Civil Procedure, secs. 298, 299), and the record showing no objection, consent is presumed. (*Hosford v. Stone*, 6 Neb., 378.) But the case being one not referable except by consent, if the court did not find the report such as to warrant the entry of judgment thereon, we do not think it was any abuse of discretion to set it aside absolutely and award a new trial, although we would not say that that was the only proper practice. It is stated in one of the briefs that the report was in fact set aside because the bill of exceptions was not complete. This statement is not, however, borne out by the record, which shows that it was set aside "for the reasons stated" in the motion, which included most of the causes authorized for a motion for a new trial. We cannot, therefore, from the record, tell upon which one the

court proceeded, and having found one reason justifying its action it will not be disturbed.

We are thus brought to the proceedings of 1891 and 1892. It is strenuously argued that the *nunc pro tunc* order was erroneous, not because it was not entered in accordance with the facts, but because it was made on oral testimony alone, without any support from the judge's minutes, the files, or other entries of record; and cases are cited which hold that a *nunc pro tunc* order for the purpose of supplying the record must be based on some entry and cannot be made to depend upon oral testimony. We think that the weight of authority is now contrary to this view; and that the action of the court was fully warranted by our own decisions. In *Garrison v. People*, 6 Neb., 274, a criminal case, the record failed to show the finding of the indictment, and at a subsequent term of the court a *nunc pro tunc* order was entered supplying this defect. This action was sustained, the court holding that a court of record has authority to make an entry as of the date when it should have been made, to conform to the facts; and that "this may be done upon the judge's notes or any other satisfactory evidence." In *Sullivan Savings Institution v. Clark*, 12 Neb., 578, it was held that the judge's minutes are *prima facie* evidence of the proceedings, but may be shown to differ from the judgment actually rendered. *Brownlee v. Davidson*, 28 Neb., 785, and *Hoagland v. Way*, 35 Neb., 387, also assert the full power of the court to amend its record to conform to the facts. Of the propriety of this rule we have not the slightest doubt. The record when made up imports absolute verity. In collateral proceedings and for purposes of review in this court, it is unimpeachable. This is an elementary rule which we have had frequent occasion to enforce. Its existence is of itself a sufficient reason for sustaining the power of the court making the record to see that it becomes in fact what it is in law—an absolutely truthful record of what in fact oc-

curred; and while a court should on application to correct the record proceed with caution for the purpose of insuring verity, it is not confined to any one class of evidence, but, in the language of the first case cited, may proceed upon any satisfactory evidence. There was, therefore, no error in making the *nunc pro tunc* order. Nor can we say that there was error in the judgment of dismissal or in refusing to reinstate the case thereafter. We do not know from the record why the court took this course. It is true there was a stipulation for a continuance, but this stipulation may have been waived. It may have been vacated for good cause. (*McClure v. Heirs of Sheek*, 4 S. W. Rep. [Tex.], 552.) We have no bill of exceptions showing either the existence or absence of such cause. It is true that there is in the record a bill of exceptions embodying the evidence on the motion to reinstate when called up in February, 1892; but this motion was then properly overruled by the judge on ascertaining that the same motion had been passed upon at a former term—in other words, that it was no longer pending. We are not even prepared to say that the rights of other litigants may not justify a court in summarily dismissing a case for want of prosecution, in spite of such a stipulation, where it has stood term after term upon the docket without progressive action and an impediment to other business of the court. But we do not hold that this was such a case. We sustain the judgment of dismissal upon the ground that the record does not disclose the evidence upon which it was based, and error does not appear.

JUDGMENT AFFIRMED.

RAGAN, C., not sitting.

WILLIAM D. FARRIS ET AL. V. STATE OF NEBRASKA, EX REL. JOHN MURPHY.

FILED JANUARY 21, 1896. No. 7368.

1. **Review:** SUFFICIENCY OF PLEADINGS. In error proceedings this court will, on proper assignments of error, review a record to ascertain whether the pleadings support the judgment rendered by the district court, although there was in that court no motion for a new trial.

2. **Mandamus.** A writ of *mandamus* will not issue where it is not within the power of the respondents lawfully to perform the act sought to be enforced, or where the writ would otherwise be unavailing.

3. ———. Accordingly where an administrative board is charged with the duty of performing several acts involving expenditures, and there are no funds available sufficient to permit the performance of all, courts will not ordinarily by *mandamus* direct the board which act to perform and which to leave unperformed.

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

E. F. Gray, for plaintiffs in error.

John H. Barry and *H. Gilkeson*, *contra*.

IRVINE, C.

Murphy, a resident taxpayer and parent of children of school age in school district No. 34 of Saunders county, applied to the district court for a writ of *mandamus* against the members of the district board to require them to purchase and lend to the pupils of the school the necessary text-books for the pursuance of a course of study therein. A peremptory writ of *mandamus* was allowed by the district court, and the respondents bring the case here for review by petition in error.

The relator claimed a right to the writ under chapter 46, Session Laws of 1891, entitled "An act to provide cheaper text-books and for district ownership of the same." (Session Laws, 1891, p. 334, ch. 46.) By the terms of this act, district school boards are empowered, and it is made their duty, to purchase all text-books necessary for the schools of such district, and they are authorized to enter into contracts with publishers for the purchase of such books. The details of the act are not essential to a decision of this case.

A question of practice must be disposed of before the merits of the case are reached. The case was tried in the district court on the application for the writ, and an answer and a reply thereto, and was determined upon the pleadings and upon evidence adduced. There is no bill of exceptions, nor was there filed any motion for a new trial. On this state of the record the relator contends that this court can only inquire into the case for the purpose of ascertaining whether the application stated a cause of action, while the respondents contend that all the pleadings can be examined for the purpose of ascertaining whether the judgment rendered could properly be rendered on such pleadings. We concur in the latter view. In numerous cases it has been held that rulings made on the trial of a case cannot be reviewed on error unless the record discloses that a motion for a new trial was made in the district court and a ruling obtained thereon. But it has likewise been held that where a case tried before a justice of the peace has been taken to the district court by proceedings in error, a motion for a new trial in that court is not necessary to obtain a review of its judgment here. (*Newlove v. Woodward*, 9 Neb., 502; *Leach v. Sutphen*, 11 Neb., 527; *Dreyfus v. Moline, Milburn & Stoddard Co.*, 43 Neb., 233.) In *Newlove v. Woodward* the reason is given that the matters presented to the district court were purely questions of law; and in *Leach v. Sutphen* it is said that a motion for a new trial is only

necessary where questions of fact are tried and determined. In *O'Donohue v. Hendrix*, 13 Neb., 255, it was held that a motion for a new trial is only necessary where a trial has been had, and that if the court has merely construed the pleadings, or some of them, no motion for a new trial is necessary. The logic of this case would apply as well to a case where there was in fact a trial, but where the assignments of error relate only to matters involving a construction of the pleadings. We think the rule deducible from all the cases is that a motion for a new trial is necessary in all cases in order to obtain a review of any rulings made in the course of, or in connection with, the trial of the case. But as such a motion only calls to the attention of the court the proceedings on the trial, it is not necessary for the purpose of obtaining a review of questions not connected with the trial, but arising independently thereof. If, as has been held, the question of the sufficiency of a petition to state a cause of action may be raised at any time (*Thomas v. Franklin*, 42 Neb., 310), and if a motion for a new trial is not necessary to raise that question (*Schmid v. Schmid*, 37 Neb., 629), it is clear that such a motion is not necessary to raise the question as to whether the pleadings support the judgment rendered. We therefore deem this question open for review.

The relator argues, among other things, that the act of 1891, above referred to, is unconstitutional; but this question we do not decide, for the reason that, assuming its constitutionality, we think that under the pleadings the writ should have been denied. In the application there is a general averment that "the school district has at the present time money levied and on hand whereby said books and supplies may be purchased and paid for." The answer denies this averment, but it will be observed that the averment is not broad enough to show that there were moneys available for such purpose in excess of prior obligations of the district. The application was made Sep-

tember 17, 1894, and the answer avers specifically that of the taxes for 1893 there remained unpaid only $6.56; that at the annual school meeting held in June, 1894, there was voted a tax of one mill to pay interest on bonds, all of which would be necessary for that purpose, and also a tax of six mills, nominally for a building fund, but intended to be used to pay teachers, fuel bills, and incidental expenses, and that no other tax had been voted or levied; that the assessed valuation of the district was $28,860, whereunder the six-mill tax would yield only $173.16; that the state apportionment made in June, 1894, was $70.62, all of which had been paid out; that the money in the hands of the county treasurer to the credit of the district was $14.95; that the money in the hands of the district treasurer was $47.40, $30 of which had been drawn against, but not yet paid, and that the state apportionment to be made in June, 1895, would be $67.76; that these items constituted the entire resources of the district, and that against such resources the district had contracted to pay a teacher the sum of $280; that the expense for fuel would be $68, and for cleaning and repairs not less than $10; that no tax had been voted or appropriation made to buy text-books, but on the contrary a proposition to make a levy for such purpose had at the annual meeting been defeated; that there were in the district attending school fifty-five pupils, and that to supply them with text-books would cost $2 each. The reply denies that there were fifty-five pupils, and alleges that there were but thirty-two, and that it would cost only $1 per pupil to furnish books. It also denies that fuel would cost $68, but does not allege what it would cost. The reply contains no other denial. It is unnecessary to consider whether any part of the six-mill levy for building purposes could be devoted to text-books. It is very clear that no portion of the state apportionment could be appropriated to any other purpose than the payment of teachers' wages. (Compiled Statutes, sec. 8, ch. 79, sub. 5.) In any

view of the resources of the district as disclosed by the pleadings, it is perfectly clear that there were no funds available after paying salary of teacher, fuel bills, and necessary incidentals wherewith to buy text-books. If the act of 1891 be in all respects valid, and if it be mandatory in requiring the purchase of text-books, still no writ should issue in this case. A writ of *mandamus* will not issue where it is not within the power of the respondents lawfully to comply therewith, or where it would otherwise be unavailing. Where an administrative board is confronted with the duty of performing several acts involving expenditures, and there are no funds available sufficient to permit the performance of all, some duty must be left unperformed, and ordinarily the courts will not by *mandamus* direct the board which one it shall perform and which leave unperformed. (See *Young v. Lane*, 43 Neb., 812.)

REVERSED AND REMANDED.

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

FILED JANUARY 21, 1896. No. 8050.

1. **Bill of Exceptions.** When a bill of exceptions has been quashed it cannot be afterwards considered for any purpose in the case. *Jones v. Wolfe*, 42 Neb., 272, followed.

2. **Review Without Bill of Exceptions:** INSTRUCTIONS. In reviewing a judgment on petition in error without a bill of exceptions this court is necessarily confined in an examination of instructions to an inquiry whether the instructions given could under any circumstances be properly given under the pleadings. The refusal of instructions cannot be reviewed.

3. **Instructions:** HARMLESS ERROR. The repetition of a proposition of law in the court's charge is not reversible error unless

it be made to appear that the defeated party was prejudiced thereby.

4. **Estoppel:** PLEADING. A party entitled to an estoppel need not in all cases formally plead the estoppel. If the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom.

5. **Negotiable Instruments:** POSSESSION: EVIDENCE. Possession of instruments negotiable by delivery is *prima facie* evidence of ownership.

6. **Banks and Banking:** GUARANTY BY PRESIDENT: NEGOTIABLE INSTRUMENTS. A person purchasing negotiable paper from the president of a bank, with a guaranty of payment executed by the president, is justified in relying on the president's representation that the paper belonged to the bank, and the bank is bound by his representation to that effect, at least where the transaction occurred in the banking house, and while the president was apparently engaged in performing his duties as such officer.

7. **Instructions:** REVIEW. Certain instructions examined, and *held* not erroneous as applied to the case under consideration.

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

M. A. Hartigan, for plaintiff in error.

Capps & Stevens, contra.

IRVINE, C.

This case was before the court in 1894 and the judgment of the district court therein was reversed. (*Thomas v. City Nat. Bank of Hastings*, 40 Neb., 501.) On a new trial in the district court there was a verdict followed by judgment for the plaintiff. This judgment the bank seeks to reverse. The former report of the case contains a sufficient statement of the facts, except, perhaps, as to some minor features which will be mentioned in the course of the opinion.

The report contains what purports to be a bill of exceptions; but this was, on motion of Thomas, quashed at the

last term of court. The bank contends that, notwithstanding this order, on the authority of *Scott v. Waldeck*, 11 Neb., 525, and *City of Seward v. Klenk*, 27 Neb., 615, and 30 Neb., 775, we may still look into this bill of exceptions for the purpose of ascertaining whether the verdict is supported by the evidence. Such a practice is, however, contrary to reason, and has for a long time been rejected by this court. The case of *Jones v. Wolfe*, 42 Neb., 272, distinctly disapproves of the rule stated in the cases cited, and must be taken as definitively establishing the doctrine that when a bill of exceptions has been quashed it can be no further considered for any purpose. There being now no bill of exceptions, none of the assignments of error is open for consideration, which, for examination, requires the existence of such a bill. The petition in error contains no assignments other than these, except those relating to the instructions. Of these it is obvious that we cannot consider those relating to the refusal of instructions, because no matter how clearly correct such instructions may be as abstract statements of law, their refusal was proper unless they were applicable to the evidence adduced; and whether or not they were so applicable we cannot determine without a bill of exceptions. Furthermore, in examining the instructions given, in the absence of a bill of exceptions we must presume that they were applicable to the evidence, and could only reverse the judgment for error in giving instructions, if such instructions could not, under any circumstances under the pleadings, be otherwise than prejudicially erroneous. We therefore confine our examination of the case to the limits stated.

The charge of the district court was very long. The instructions were evidently prepared and requested by counsel. It followed that several instructions, stating in substance the same proposition of law, but in varying language, having been submitted, the court in several instances gave the whole group of such instructions, so that the

charge is open to the criticism of unnecessarily reiterating the same general proposition, and it is attacked for that reason. It has, however, been established that the repetition of a proposition of law in several instructions is not reversible error unless it be made to appear that the fact of such repetition was prejudicial to the defeated party. (*Hill v. State*, 42 Neb., 503; *Carleton v. State*, 43 Neb., 373; *Gran v. Houston*, 45 Neb., 813.) We think this case falls within the rule stated. It will be unnecessary to quote at length each of the instructions which the bank attacks. Attack is not made upon the form of language employed, but upon the proposition of law submitted; and we shall, for the most part, consider those propositions without reference to the specific instruction or instructions in which they were embodied.

One of the defenses was that the notes sued on were secured by mortgage and that another action was pending to foreclose the mortgage. By one of the instructions the jury was told that both remedies might be pursued at the same time. This as a general abstract statement of law would be incorrect (*Meehan v. First Nat. Bank of Fairfield*, 44 Neb., 213); but we cannot learn without a bill of exceptions whether the proof showed a state of affairs within the rule announced in the case cited, or even whether there was any proof in support of the plea. Error, therefore, much less prejudicial error, does not appear.

In several of the instructions the jury was told that if certain other facts, not necessary to here mention, should be found, then the plaintiff might recover, although Bostwick, the president of the bank, had converted the proceeds of the sale of the notes to his own use, and had thereby defrauded the bank. These instructions are attacked on the ground that the bank had pleaded no such matter in defense, and that the instructions were, therefore, not within the issues. But many things may develop on the trial not directly pertinent to the issues, and which a jury

might consider pertinent in the absence of an instruction that they should be disregarded. In such cases it is proper for the trial court to direct the jury to disregard such matters. For all that appears from the record these instructions were of this character.

The fourth instruction was to the effect that if on or about May 10, 1889, the bank purchased from Paul the notes in action and placed to Paul's credit the sum of $9,525 in payment for said notes, and if, on or about May 18, the bank sold said notes to the plaintiff for $10,300, paid by plaintiff to the bank, and the bank retained for its own use $775 of said money, then the verdict should be for the plaintiff. The objection urged to this instruction is that it held the bank liable for the whole amount of the notes, provided the jury found that it received the benefit of $775 only; but in view of the issues the instruction was correct. The plaintiff alleged a sale of the notes by Paul to the bank and a resale with contract of guaranty by the bank to the plaintiff. One of the defenses was that the bank never owned the notes; that they were not sold by the bank, but by Bostwick, for the benefit of himself and others, and that Bostwick had no authority to execute the guaranty. When we read this instruction we find it told the jury that if the bank bought the notes and paid Paul $9,525 therefor, or rather by credit on his account became his debtor for that sum, and if it then sold the notes for $10,300, and retained for its own use $775, which was the difference between the purchase and selling price, it was liable. We must assume that the evidence warranted an instruction restricting the inquiry to this class of facts; and if so, such a transaction would, under the former opinion in this case, be a ratification of Bostwick's act and charge the bank upon the guaranty. The amount of profit realized by the transaction would not affect the liability. Closely allied to the question just considered is the contention that some of the instructions are erroneous in sub-

mitting a question of estoppel to the jury when none was pleaded. What counsel conceive to present a case of estoppel grows out of the facts referred to in the instruction last criticised, and also out of the fact that the bank had made Bostwick its president and clothed him with apparent authority to make the contract sued on. It is not true that in all cases to be available an estoppel must be strictly pleaded as such. The rule is that where the pleadings present the opportunity the particular facts relied on as constituting an estoppel must be pleaded. All these facts are pleaded, and we think the plaintiff is entitled to the benefit of the law arising therefrom, although he did not by reply collate them anew and replead them avowedly by way of estoppel.

In two instructions the jury was told that the authority of Bostwick to execute the guaranty was conclusively presumed, and this statement is attacked. It was held on the former hearing that the authority of the president to execute the guaranty would be conclusively presumed in favor of a purchaser without notice to the contrary. This rule was laid down with reference to the facts of the case, and was derived from *People's Bank of Belleville v. Manufacturers Nat. Bank*, 101 U. S., 181. In both of the instructions given the general statement attacked was coupled with other elements confining the rule within the limit stated in the former opinion, and it was therefore not erroneous.

The jury was instructed that possession of negotiable instruments is *prima facie* evidence of ownership. In another instruction this was qualified with the further requirement that such instruments should be in form negotiable by delivery. These statements were made in connection with instructions in regard to plaintiff's right to presume that the bank was the owner of the paper. It is settled that in an action upon an instrument negotiable by delivery, possession is *prima facie* evidence of ownership

(*McDonald v. Aufdengarten*, 41 Neb., 40), and the purchaser of paper is certainly warranted in acting upon evidence which is sufficient in a court of justice.

Another statement in the instructions, two or three times repeated, calls for closer examination. It is, in effect, that although the notes were not the property of the bank, plaintiff may recover, provided Bostwick, the president of the bank, represented that the bank owned the notes, if the plaintiff bought them relying on that representation and remitted the purchase money to the bank. The bank had no authority to guaranty the payment of the paper except in course of its banking business. It had no authority to execute such a guaranty for the accommodation merely of others. It had authority to buy commercial paper and sell it; and in connection with the sale to guaranty its payment. (*Thomas v. City National Bank of Hastings, supra.*) The argument is that while Bostwick might bind the bank, although without special authority so to do, in dealing with the bank's property, he could not bind the bank by contracts made in its name on matters not connected with its business; and that his representation and declarations were not sufficient in a particular transaction to establish the fact that that transaction was on behalf of the bank, and that its subject-matter was the bank's property, nor were they sufficient to justify the plaintiff in believing so. This question is by no means new, and has not met an entirely uniform solution by the courts; but we take it that the better doctrine is that in such a case, where one of two innocent persons must suffer through the misfeasance of the agent of one, that one who has placed the agent in a position to perpetrate the fraud must suffer. This general rule will hardly be controverted. (*Hern v. Nichols*, 1 Salk. [Eng.], 289, and many other cases.) It has been applied to cases like the present. Thus, in *Houghton v. First Nat. Bank of Elkhorn*, 26 Wis., 663, the case was very much like that before us, and the court held the bank bound by the repre-

sentation of the cashier indorsing the paper, that it belonged to the bank. *North River Bank v. Aymar*, 3 Hill [N. Y.], 262, and *Bank of Genesee v. Patchin Bank*, 19 N. Y., 312, are equally in point, while the same principle is recognized, but under more different facts, in *Farmers & Mechanics Bank v. Butchers & Drovers Bank*, 14 N. Y., 623, 16 N. Y., 125; *City Bank of New Haven v. Perkin*, 29 N. Y., 554; *Bank of State of New York v. Bank of the State of Ohio*, 29 N. Y., 619. The principle is also impliedly recognized in *West St. Louis Savings Bank v. Parmelee*, 3 Dill. [U. S.], 403, 95 U. S., 557, although in the last case the bank was held not liable, because from the form of the note and from facts within plaintiff's knowledge he was charged with notice that the paper was that of the cashier and not that of the bank. It may be that the representations of the president at all times and at all places would not bind the bank upon this question; but again we must indulge the presumption in favor of the correctness of the instruction. If the representations were made in the banking house while the president was apparently engaged in performing his duties as such officer, we have no doubt that the plaintiff was justified in relying on his representation so made that the bank owned the note.

No other arguments are advanced calling for special notice here.

JUDGMENT AFFIRMED.

EDWARD HAUBROCK ET AL. V. ABRAHAM LOEB.

FILED JANUARY 22, 1896. No. 5991.

Conflicting Evidence: REVIEW. When the record presents questions of fact only, as to which the evidence is conflicting, and apparently evenly balanced, a verdict or finding based thereon will not be disturbed by this court.

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

A. H. Bowen, for plaintiffs in error.

Capps & Stevens, contra.

POST, C. J.

This action originated before a justice of the peace for Adams county, where the defendant in error sued to recover upon a note alleged to have been executed by the defendants below, plaintiffs in error, to one George S. Clute. It was from thence taken by appeal to the district court for said county, where a trial was had, resulting in a verdict and judgment for the plaintiff therein, and which it sought to reverse by means of this proceeding. In the petition below is alleged the execution of the note and the purchase thereof by the plaintiff, for value, before maturity in the usual course of business. The answer is a general denial. The judgment is assailed in this court upon the sole ground that the evidence fails to establish the execution of the note sued on.

Two witnesses, Clute, the payee above named, and one Bickford, testified positively to the signing and delivering of the note in their presence, and were to some extent corroborated by the witnesses Hamen and Slaker, who identified the disputed signatures as genuine from personal acquaintance with the writing of the defendants, and also from comparison with their acknowledged signatures. The defendants on the other hand denied the execution of the note, but admitted the signing of some paper at the time to which reference was made by the plaintiff's witnesses. The finding of the jury, based upon the conflicting evidence above stated, must, in this proceeding, be regarded as conclusive. The rule which governs in like controversies has been

many times asserted by this court and is fittingly illustrated by the case at bar. We discover no error in the record and the judgment is accordingly

AFFIRMED.

OMAHA LOAN & TRUST COMPANY, APPELLANT, V. LARS HANSON ET AL., APPELLEES.

FILED JANUARY 22, 1896. No. 6941.

1. **Usury.** Where by the terms of a promissory note it is provided that it shall bear interest until maturity at a given rate, and thereafter at a higher lawful rate, such contract is not usurious, nor is the agreement for the higher rate of interest after maturity a mere penalty.
2. **Interest.** It is the duty of the court in computing the amount due on such an instrument to allow interest until maturity at the lower rate and thereafter at the higher rate.

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

Francis A. Brogan, for appellant.

J. W. Rogers, contra.

POST, C. J.

This is an appeal from a decree of the district court for Douglas county, the only question presented by the record being the validity of a provision of a promissory note for the payment of interest at six per cent per annum until maturity, and at a rate of ten per cent thereafter. The identical question was considered in *Havemeyer v. Paul*, 45 Neb., 373, in which, overruling *Richardson v. Campbell*, 34 Neb., 181, the validity of the foregoing provision was sustained. The decree of the district court will accordingly

be reversed and the cause remanded, with directions to compute interest in accordance with the rule herein approved.

REVERSED.

ALBERT E. MCKINNEY ET AL. V. E. L. HOPWOOD.

FILED JANUARY 22, 1896. No. 5987.

Directing Verdict: NEGOTIABLE INSTRUMENTS: CONSIDERATION: SURETYSHIP: LIABILITY OF MARRIED WOMAN. Where the evidence in a case is such that had a finding been made thereon by the jury for plaintiff, it would have been sufficiently sustained, it is error for the court to direct a verdict for defendant.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

R. A. Moore, for plaintiffs in error:

In the argument reference was made to the following cases: *Eckman v. Scott*, 34 Neb., 817; *Bowen v. Foss*, 28 Neb., 373; *State Savings Bank of St. Joseph v. Scott*, 10 Neb., 86; *Webb v. Hoselton*, 4 Neb., 308; *Davis v. First Nat. Bank of Cheyenne*, 5 Neb., 245; *Gregory v. Hartley*, 6 Neb., 356; *Grant v. Cropsey*, 8 Neb., 205.

Thompson & Oldham, contra.

HARRISON, J.

Plaintiffs commenced this action in the district court of Buffalo county to recover the amount alleged in the petition filed to be due them on a promissory note executed and delivered to them by the defendants. E. L. Hopwood, of defendants, answered and admitted the execution and de-

livery of the note to plaintiffs, and alleged further that she so executed it as surety for her husband, and that personally she did not receive any benefit from signing it, nor was her separate property benefited thereby; that the note was made for the amount of a judgment in favor of plaintiffs against her husband upon an indebtedness incurred by him in the purchase of certain goods and merchandise of plaintiffs, and that the transaction out of which the indebtedness arose and the obtaining of judgment thereon occurred at a time prior to her marriage to her co-defendant. A reply was filed by plaintiff and a trial of the issues had to the court and a jury. At the close of the introduction of the testimony, the trial judge, on motion of counsel for E. L. Hopwood, instructed the jury that "Under the law and the evidence introduced in the action the plaintiff cannot recover against the defendant E. L. Hopwood, and your verdict will therefore be in her favor," etc. The jury followed the direction of the court and returned a verdict in favor of Mrs. Hopwood, in accordance with which judgment was rendered in her favor. The plaintiffs have prosecuted error proceedings to this court.

The main contention of counsel for plaintiffs is that there was evidence in relation to Mrs. Hopwood's signing the note in suit and a consideration for her so doing which should have been submitted to the jury for its deliberation, consequently the action of the trial court in directing a verdict for her was erroneous. It will be remembered that the answer of Mrs. Hopwood, as we have hereinbefore mentioned it, contained an allegation that the consideration for the note, upon which suit was brought, was the release of a judgment against her husband which had been recovered before she became his wife. There was testimony introduced which tended to prove that Mrs. Hopwood, at the time of the execution of the note in suit, held title to certain real estate which had formerly belonged to her husband, and belonged to him at the date the judgment alluded

to was rendered, and the judgment created at least an apparent lien on the property; that Mrs. Hopwood desired and was negotiating with parties for the purpose of obtaining a loan to be secured by mortgage on the real estate, and that such parties requested that a release of the judgment be secured before completing the loan, and that it was not finally closed until after the release of the judgment, which was procured by the execution and delivery of the note which is the subject of this action. If it became necessary, in order to secure the loan, that the judgment be released, and Mrs. Hopwood attached her signature to a note, the amount of which was made up of the substance of the judgment, and delivered the same to parties owning the judgment, and thereby procured the release and was thus enabled to make the loan, it was a sufficient consideration moving to her to bind her for the payment of the note. The testimony introduced in the effort to establish the connection between the giving of the note and the release of the judgment, and the necessity of the latter in effecting the loan, was somewhat inconclusive and unsatisfactory, but we think was sufficient to have sustained a finding in favor of plaintiffs had the evidence been submitted to the jury, and from its consideration it had so determined. This being true, it was error not to allow the jury to deliberate upon it, and to direct a verdict, as was done by the trial judge. It follows that the judgment must be reversed and the case remanded.

REVERSED AND REMANDED.

CHRISTIAN SPECHT V. R. STEVENS & SON ET AL., APPELLEES, IMPLEADED WITH FIRST METHODIST EPISCOPAL CHURCH OF OMAHA, APPELLANT.

FILED JANUARY 22, 1896. No. 5849.

1. **Mechanics' Liens:** CONTRACTS. The contract under which the subcontractor furnished material and performed labor, on account of which he filed the lien sought to be foreclosed in this case, *held* not such a written contract as is contemplated by the provisions of section 3, chapter 54, Compiled Statutes, in regard to mechanics' liens, wherein it states: "When any labor has been done or materials furnished as provided on a written contract, the same, or a copy thereof, shall be filed with the account herein required."

2. ———: ———: EVIDENCE. The evidence examined, and *held* to sustain the decree of the district court except as to one item, in which particular it is modified, and, as modified, affirmed.

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

Breckenridge, Breckenridge & Crofoot, for appellant.

Schomp & Corson, Blair & Goss, and *Tunnicliff & Page, contra.*

HARRISON, J.

This action was instituted by Christian Specht to foreclose a mechanic's lien upon lots 3 and 4, in block 80, in the city of Omaha, and the church building standing thereon, all owned by the First Methodist Episcopal Church of Omaha. R. Stevens & Son, of defendants, were the contractors who built the church. Mickel, Riley & Co., also of defendants, were subcontractors of R. Stevens & Son, the contract of Mickel, Riley & Co. being for the material and labor for the erection of the brick portion of the building, and for a balance alleged to be due the firm on

account of such labor and material, it filed a statement and claim of lien upon the property of the church society and assigned, of the amounts which it was claimed was the firm's due, $2,281.22 to the First National Bank of Omaha, and any further sum due it on the account and lien, to the Chicago Lumber Company. During the progress of the suit a settlement was made with the plaintiff and the case dismissed, but it was afterwards reinstated in so far as it involved the cross-bill of the First National Bank. After this occurred, and before the trial, the Chicago Lumber Company re-assigned the lien, to the extent it had received an assignment of it, to Mickel, Riley & Co., who were allowed to enter an appearance and file a cross-petition praying for a foreclosure in favor of the firm of this part of the lien. The Kennard Glass & Paint Company did not appear in the cause. The controversy in the case was in respect to the validity of, and the amount due upon the one lien,—that filed by Mickel, Riley & Co. Its enforcement was sought by the party in whose name it was originally filed, and the First National Bank, and was contested by the church organization and R. Stevens & Son, the principal contractors. A trial of the issues resulted in a decree in favor of the First National Bank, establishing the lien and fixing the amount due at the sum of $2,363.08 and granting its foreclosure. From this decree the church organization has prosecuted this appeal.

When the papers filed by Mickel, Riley & Co. to perfect a lien were offered in evidence, the attorneys who appeared on behalf of the church society objected to them, as immaterial, irrelevant, and incompetent, for the reason that the affidavit shows that it is based upon a written contract, and no copy of the contract was attached to the paper. It is argued that in section 3 of chapter 54 of the Compiled Statutes, in relation to mechanics' liens, it is provided: "When any labor has been done or material furnished as provided on a written contract, the same, or a copy thereof,

shall be filed with the account herein required," and that this is mandatory, and if the labor is performed or materials furnished pursuant to the terms of a contract reduced to writing, and no copy of the contract attached to the papers filed to establish the lien of record, it is not perfected by such filing, and the account and accompanying affidavit were not competent as evidence of a perfected statutory lien. We do not think that the facts in regard to the contract between R. Stevens & Son, the contractors, and Mickel, Riley & Co., subcontractors, being a written one, within the meaning of the portion of the statutes in reference to such contracts, and the necessity of a copy being filed as a part of the mechanic's lien, are such as necessitate a discussion or decision of the question of the mandatory nature of the statutory provision in this particular. It was stated in the affidavit attached to the Mickel-Riley account that the materials were furnished and the labor performed "under a written and verbal contract," but the evidence disclosed that Mickel, Riley & Co. made R. Stevens & Son a proposition in writing, or submitted a written bid to furnish the materials and perform the labor, and that there was subsequently an acceptance of the bid, not in writing, but by word of mouth, and no other or further writing embodying the contract between the parties was ever made or signed, and the agreement, in so far as it was binding upon R. Stevens & Son, was never in any of its terms or conditions reduced to writing. There was clearly no such written contract as is contemplated in the portion of the section of the statutes to which reference has been made.

The further contention of appellant is confined to an attempt to make it appear that of the items of credit which it was claimed by Stevens & Son and the church should be applied to reduce the account filed with the lien in suit, some particular ones were disallowed by the trial court, in respect to which an opposite course should have been adopted. Of these was one in reference to extra brick work

in lieu of stone, one for hauling terra-cotta, and another in relation to staging or scaffolding. It is conceded by counsel for appellant, and is true, that the testimony in regard to each of these items was conflicting; and it is also true that there was ample evidence to sustain the finding of the trial court as to each of them, and it was not clearly contrary to any preponderance of the testimony. This being determined, following a well established rule of this court, the decision of the trial court as to each of these items will not be changed. L. H. Mickel, one member of the firm of Mickel, Riley & Co., subscribed $500 toward a fund being raised to pay for building the church, and it is claimed that he authorized the trustees of the church society to deduct one-half of this amount from the account of Mickel, Riley & Co. against the contractor, and that the amount so authorized, $250, should have been allowed as a credit upon the lien, which was not done by the trial court. The evidence discloses that the subscription was made in the amount claimed, and further, that there was something said between L. H. Mickel, the member of the firm who individually subscribed the sum, that its one-half should be applied as a credit on the account of the firm against the contractors, R. Stevens & Son, which might and did ripen into a lien upon the property of the church organization; but such an agreement, if made (which is somewhat doubtful from the evidence), being the agreement of an individual partner acting for himself alone in regard to his personal liability or debt, and not for the partnership, and the agreement not being within the knowledge of the firm or its members, or in any degree concurred in by the firm or the parties comprising it, did not and could not become or be binding upon the firm, or make the amount involved a credit upon the account due such firm.

It appears from the evidence that on July 2, 1889, a note was executed and delivered by R. Stevens & Son to Mickel, Riley & Co. in the sum of $1,000, that there were

several renewals of this note, and that it was finally paid January or February, 1890. It is claimed on behalf of the appellant that this was a payment upon the account of Mickel, Riley & Co. for material furnished for and labor performed on the church, and it should have been so applied, which was not done in the trial court, it having not been allowed there as an item of credit. At or about the time Mickel, Riley & Co. were working on the church they were also working upon another building or buildings for R. Stevens & Son, and it is asserted for appellees that this $1,000, evidenced by the note of July 2, 1889, and the renewals thereof, was a payment on an account other than that accruing to the appellee firm on the church contract. A careful examination and consideration of all the testimony relating to this particular item—and we need not discuss it at length—convinces us that the trial court was right in its finding in regard to this point and in not allowing its application as a credit on the account and lien in suit.

There remains but one further point of contention to be noticed. It was shown that Mickel, Riley & Co. executed and delivered to R. Stevens & Son an accommodation note, which the latter firm indorsed and obtained the money thereon at the Omaha National Bank, which was done, R. Stevens testifies, at the solicitation of Mickel, Riley & Co., or one member thereof acting for it, and the money thus obtained was given or paid to the firm, and it was agreed at the time of the transaction that if R. Stevens & Son paid this note, its amount was to be credited as a payment on what was known as "the church account" of appellee firm. At the maturity of this note a similar one was made, and the money obtained by its discount with another and different bank, and with the amount thus procured the first note was paid. The second note was not paid by R. Stevens & Son when it matured and was finally paid by Mickel, Riley & Co., but subsequently R. Stevens & Son reimbursed them

therefor by delivering to them a note, known in the case and the account as the "Hopper note," in the sum of $300, and paying in cash, or by check, $125, which overpaid the amount due the firm on account of the payment by it of the $400 note, but the balance was, Stevens states, to be credited on the account. It is claimed for Mickel, Riley & Co. that the first of these $400 notes, and, indeed, the whole transaction, was for the accommodation of R. Stevens & Son, and that they, Mickel, Riley & Co., did not receive the money, the proceeds of the first of these notes, and the $400 should not be deducted from the amount of their account. The finding of the trial court was, as to this contention, favorable to the appellee firm and the First National Bank, successors by assignment to a portion of the firm's rights under the lien, and the $400 item was not deducted from or credited upon the sum claimed in the lien. After reading and considering all the testimony which has a bearing upon this point of the issues in the case, we are forced to the conclusion that the finding of the trial court thereupon was wrong and against the evidence in relation thereto, and it follows that such determination must be reversed and a finding entered in this court in favor of appellant for the amount involved in the controversy in this branch of the case. The decree of the district court will be modified by the conclusion last announced, which involves a deduction from the amount of the decree rendered herein, of the sum of $403.63, such deduction to be made as of the date of the original decree, and, as thus modified, such decree is affirmed.

DECREE ACCORDINGLY.

IRVINE, C., took no part in the decision.

THOMAS F. HALL v. DAVID ECCLES.

FILED JANUARY 22, 1896. No. 5953.

1. **Contracts:** ABANDONMENT. An abandonment of a contract may be effected by acts of one of the parties thereto, which are inconsistent with its existence and acquiesced in by the other party.

2. **Sale:** EVIDENCE OF ABANDONMENT OF CONTRACT. The evidence examined, and *held* sufficient to sustain findings and judgment in favor of defendant.

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

Cowin & McHugh, for plaintiff in error.

H. W. Smith and *C. L. Richards*, *contra*, cited: *Paul v. Meservey*, 58 Me., 419; *Jewell v. Reddington*, 57 Ia., 92; *Harris v. Bradley*, 9 Ind., 166; 2 Addison, Contracts, p. 854.

Bartlett, Crane & Baldrige, also for defendant in error.

HARRISON, J.

Plaintiff in error Thomas F. Hall, with O. N. Ramsey and M. M. Marshall, were, in the year 1886, partners; and the firm thus constituted owned and operated a saw mill, made and sold various kinds of lumber, railroad ties, etc., and also operated several small stores selling general merchandise, and some other industries in and near the village of North Powder, Oregon. Of the partners, Hall owned a one-half interest in the firm and Ramsey and Marshall one-fourth each. At the time stated, and prior thereto, defendant in error was and had been a wholesale and retail dealer in lumber at Ogden, Utah, and owned and operated several saw mills for the supply of his trade. During the month

of October, 1886, plaintiff and defendant in error met, probably at the suggestion or appointment of the latter, in North Powder, and after some negotiations entered into a contract or signed a statement which set forth the sale by Hall to Eccles of the one-half of Hall's interest or a one-fourth interest in the business of the firm, the consideration therefor, as expressed in the instrument, being $9,062.50 of which no part was paid except possibly $1. There was a statement in the contract of sale acknowledging the receipt of a payment of $1. To recover the amount of the consideration expressed in the contract or memorandum of sale referred to was the object of this suit, and from a finding and judgment of the trial court favorable to the defendant the plaintiff has prosecuted error proceedings to this court.

The judgment rendered by the district court was apparently based upon a finding that whatever agreement of sale was entered into between the parties to this action, by the terms of the paper signed by them at North Powder, was afterwards abandoned, and that such abandonment was evidenced by the acts of plaintiff herein inconsistent with or diametrically opposed to the further existence of the agreement, which were acquiesced in by defendant, and that, if it ever possessed any force or validity, it was thus annulled. By the testimony introduced the plaintiff sought to establish that there was an actual, executed, completed sale by him to defendant of a one-fourth interest in the business, as was indicated by the terms of the instrument to which we have alluded, and that nothing remained to be done except payment of the consideration by the defendant, and in furtherance of this purpose it was proved, and not controverted, that immediately after the signatures of the parties were attached to the alleged contract, he accompanied the defendant on a tour of inspection of the various properties and enterprises of the firm and exhibited to him its books and papers, and told him some of the secrets of its

business, or caused the latter to be made known to him. The defendant strove to make it appear that at the time he and plaintiff signed the paper which purported to be a contract of sale and purchase plaintiff was very anxious for him to become a partner, or interested in the firm and its operations, as it needed financial aid, and plaintiff thought defendant would be able to furnish it, and, if interested, would do so, and it was understood that defendant was to make an effort to purchase all, or a portion, of the interest owned by Ramsey and Marshall, or of Ramsey, who, it appears, owned or so controlled Marshall's former interest as to be in a position to make a binding sale of it, and if defendant succeeded in purchasing of Ramsey, the contract between plaintiff and defendant was to be abandoned, but if he did not or could not effect a purchase of Ramsey, then such agreement was to be further pursued. Defendant finally did purchase of Ramsey a one-third interest in the business and properties of the firm. It appears that subsequent to the execution of the instrument which is the foundation of this suit, and before plaintiff was aware that defendant had perfected the purchase of Ramsey, which was consummated in Ogden and could not be known to plaintiff, then at North Powder, plaintiff wrote to defendant that there had arisen a present and pressing need for money to use in the business, and plaintiff had made a draft on Ramsey, as he did not know whether defendant had concluded a deal with Ramsey sufficiently to permit drafts to be drawn upon him (defendant). It is insisted that this letter was inconsistent with the claim of plaintiff that the defendant had purchased of him and was interested in the firm to the extent of a one-fourth interest, and thus had become a member of the firm and in the same position, so far as honoring the draft was concerned, as if any bargain had been closed with Ramsey. It further appears that after the time of the execution of the instrument by plaintiff and defendant which is relied upon in this action, the plaintiff stated, at different times and

places, to various persons that he was the owner of a one-half interest in the business, etc., of the firm; that he wrote to an agent of the Union Pacific Railway Company regarding some money due or to become due the firm from that company, and stated in the letter that he was one-half owner in the business and was then the manager, and strongly urged that the vouchers for claims should be sent to and paid to him (plaintiff). At another time, when $2,500 was to be divided between the members of the firm, plaintiff received one-half, defendant one-third, and Ramsey one-sixth, and plaintiff executed and delivered to defendant his promissory note for $833.33⅓, defendant's share of the $2,500, at a time when he insists defendant was owing him the amount in suit. An agreement was signed by all the members of the firm, including plaintiff, wherein the liability which should attach to defendant as a member of the firm for any indebtedness incurred by it should be limited to the one-third or to the same extent as was his paid-up interest in the properties and business of the firm. Plaintiff testified and produced other witnesses to show that in the last mentioned transaction particularly, and indeed at all times and under all circumstances, he insisted that he still relied upon the contract of purchase and sale now in suit, and its validity, and that nothing he did and no act of his should be taken in any manner or to any degree as weakening the force of his position or rights under such contract; that before he signed the agreement by which the liability of defendant for the debts of the firm was limited to a one-third and no more, he asked for time to see counsel and was granted it, and it was only after feeling fully assured and satisfied that such action would not and could not interfere with the proper enforcement of his contract of sale to defendant, that he consented to sign the other agreement in relation to defendant's liability. There was evidence of other and further facts and circumstances produced by either party to the suit which tended in a greater or lesser

degree to corroborate or support the position assumed under the issues by each, but we do not deem it necessary to further notice them here. After fully and carefully examining all the testimony, we have reached the conclusion that the evidence sustained the finding of an abandonment of the contract of sale, if any was ever in effect, and it follows that the judgment of the district court will be

AFFIRMED.

C. A. CLAFLIN V. AMERICAN NATIONAL BANK OF OMAHA ET AL.

FILED JANUARY 22, 1896. No. 5884.

1. **Review:** OBJECTION TO JUDGMENT. To obtain a review of a judgment of the district court dismissing an appeal taken from an inferior court no exception is necessary.

2. **Dismissal:** REVIEW: MOTION FOR NEW TRIAL. A ruling of the district court dismissing an appeal may be reviewed without a motion for a new trial.

3. **Appeal:** APPEARANCE IN APPELLATE COURT. When an appeal from a justice of the peace to the district court is taken in the time prescribed by law, and both parties appear in the appellate court and without objection file pleadings, and the cause is noticed for trial, it is then too late for the appellee to object to the validity of the appeal.

4. ———: PARTIES. One of several defendants, having separate and distinct defenses, may prosecute an appeal from a justice of the peace to the district court without joining his co-defendants. *Polk v. Covell*, 43 Neb., 884, followed.

5. ———: ———. When the interests of several defendants are inseparably connected, an appeal by one defendant brings up the entire case. (*Polk v. Covell, supra.*)

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

A. C. Troup, for plaintiff in error.

Will H. Thompson, contra:

A motion for a new trial is necessary to obtain a review of a case on error to the supreme court. (*Harrington v. Latta*, 23 Neb., 98; *Yates v. Kinney*, 25 Neb., 122; *Miller v. Antelope County*, 35 Neb., 237; *Ecklund v. Willis*, 42 Neb., 737.)

NORVAL, J.

This suit was instituted before a justice of the peace by the American National Bank of Omaha, one of the defendants in error, against the Omaha Coffin Manufacturing Company, C. A. Claflin, and S. L. Andrews, to recover the sum of $150 and interest upon a promissory note, of which the following is a copy:

"$150. OMAHA, NEB., July 13, 1891.

"Ninety days after date we promise to pay to the American National Bank, or order, one hundred and fifty $\frac{00}{100}$ dollars, for value received, payable at Union National Bank, Omaha, Nebraska, with interest at the rate of ten per cent per annum from maturity until paid. Payable

OMAHA COFFIN MFG. CO.
"C. A. CLAFLIN, *Pres.*
"S. L. ANDREWS, *Sec'y.*"

Personal service of the summons was had upon the defendants, except Andrews, who was not found in the county, and did not appear in the action. Upon the trial a judgment for the face of the note and interest was rendered in favor of the bank, and against both the Omaha Coffin Manufacturing Company and Claflin. Within ten days thereafter, Claflin, for the purpose of prosecuting an appeal from said judgment, filed with the justice an appeal undertaking in the sum of $320, which was more than double the amount of the judgment and costs, and said

bond and surety thereon were duly approved. Subsequently, and within the time prescribed by statute, a transcript of the proceedings and judgment was filed in the district court, and the appeal was docketed therein. Several months thereafter, and after pleadings had been filed by both parties and issues had been joined, the plaintiff filed a motion to dismiss the appeal, alleging as grounds therefor:

"1. There is a defect of parties on said appeal.

"2. In the court below a joint judgment was rendered against the Omaha Coffin Manufacturing Company and C. A. Claflin, and that said C. A. Claflin only signed the appeal bond herein, and that said C. A. Claflin only is a party to said appeal."

This motion was sustained by the court, and the appeal dismissed. Thereafter, and during the same term, a motion to reinstate the appeal was overruled. Claflin has prosecuted a petition in error to this court, making all the other parties to the action defendants in error, and alleging that there was error in said proceedings: "(1) In sustaining the motion to dismiss the appeal, and (2) in refusing to reinstate said appeal."

It is argued by counsel for the bank that the order dismissing the appeal cannot here be reviewed, since no motion for a new trial was presented to the court below, and no exception was taken to the decision at the time it was made. No exception is necessary to a final judgment, in order to lay the foundation for its reversal. The order of dismissal being a final judgment, an exception was unnecessary. (*Morrow v. Sullender*, 4 Neb., 374; *Black v. Winterstein*, 6 Neb., 224; *Parrat v. Neligh*, 7 Neb., 459; *Jones v. Null*, 9 Neb., 254; *Welton v. Beltezore*, 17 Neb., 399; *Cheney v. Wagner*, 30 Neb., 262.)

Several decisions of this court are cited to the point that a motion for a new trial is indispensable to a review of a cause in this court on error. It is undoubtedly true that

rulings which properly form the basis, grounds, or causes for a new trial are not available as error in the appellate tribunal unless assigned in a motion for a new trial; and this is as far as the cases cited by counsel for defendants in error go. Rulings which do not pertain to the trial in such a sense as to make them assignable as causes for a new trial, such as rulings upon demurrers, motions addressed to pleadings, and motions to dismiss, need not be called to the attention of the trial court by motion for a new trial, to make them available in error proceedings. This is the well settled doctrine of this court. (*Newlove v. Woodward*, 9 Neb., 502; *Leach v. Sutphen*, 11 Neb., 527; *Hays v. Mercier*, 22 Neb., 656; *O'Donohue v. Hendrix*, 13 Neb., 255; *Graves v. Scoville*, 17 Neb., 593; *Bohanan v. State*, 15 Neb., 209.)

The appellee's motion to dismiss was made too late to raise objection that the appeal was not properly taken. It appears from the record that after the transcript was filed in the court below appellee filed its petition alleging a cause of action against all of the defendants; that Claflin presented a motion to make the petition more definite and certain, which was overruled; that he then demurred to the petition, and on its being overruled, he filed an answer, which plaintiff moved to strike from the files, and that afterwards plaintiff noticed the cause for trial. It was several months subsequent to the docketing of the appeal, and after all the foregoing proceedings were had in the district court, that the motion to dismiss was filed. It was then too late to object to the validity of the appeal, or to defects or irregularities therein. (*Minneapolis Harvester Works v. Hedges*, 11 Neb., 46; *Goodrich v. City of Omaha*, 11 Neb., 204; *Asch v. Wiley*, 16 Neb., 41; *Steven v. Nebraska & Iowa Ins. Co.*, 29 Neb., 189.) Moreover, the appeal was properly taken. There was no defect of parties. The filing of the appeal bond by Claflin alone was sufficient to bring up for review the entire case. The precise point

was passed upon, and that too adversely to the contention of the bank, in the opinion of the present chief justice, after a review of the authorities bearing upon the question, in *Polk v. Covell*, 43 Neb., 884. For the reasons stated, the judgment of the district court must be reversed, the appeal reinstated, and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

FRED W. HASKINS V. STATE OF NEBRASKA.

FILED JANUARY 22, 1896. No. 7949.

1. **Criminal Law:** INSTRUCTIONS. It is error to give an instruction infringing on the province of the jury.
2. ———: ———: BURDEN OF PROOF. An instruction in a criminal case is erroneous which has the effect to shift the burden of proof from the state to the accused.

ERROR to the district court for Furnas county. Tried below before WELTY, J.

J. G. Thompson and *McClure & Anderson*, for plaintiff in error.

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

NORVAL, J.

The plaintiff in error, Fred W. Haskins, was tried in the court below upon an information filed by the county attorney, containing two counts, the first charging him with horse stealing, and the second charging him with grand larceny by stealing a certain buggy, harness, and other personal property of the prosecuting witness. The

accused, on being convicted of both offenses, was sentenced to imprisonment in the penitentiary for the term of two years, and to reverse such judgment and sentence is the purpose of these proceedings.

The crimes charged, if committed at all, occurred at the same time and as a part of the same transaction. The testimony embodied in the bill of exceptions, which was introduced on behalf of the state, tends to show that the plaintiff in error hired, for the period of three weeks, a team of horses, harness, and buggy,—being a portion of the property he was charged with stealing,—from the prosecuting witness for the alleged purpose of going from Oxford, this state, to Gretna to bale some hay; that the property was not returned to the owner within that time, and a search was instituted therefor; that plaintiff in error, instead of taking the outfit to Gretna, went to Lincoln with it, where he attempted to dispose of the same, and did sell the harness to one J. H. Philpot for the sum of $6. The horses and buggy were found at a livery stable in the capital city. The defendant below introduced evidence tending to prove that the prosecuting witness, at the time of the hiring, authorized the accused to sell or trade the property if he found an opportunity so to do. A further statement of the testimony is unnecessary to an understanding of the questions we shall consider. Forty-nine errors are assigned upon this record, but we shall only notice two, which are predicated upon the fifth and sixth instructions given by the court upon its own motion. These instructions are as follows:

"5. If you find from the evidence that, after the taking of the property by the defendant from the complaining witness, Henry Glahn, that he sold such property, or any part of it, or attempted to sell the same or any part of it, with the intention of appropriating the proceeds thereof to his own individual use and benefit, this is presumptive evidence that the original taking of the goods was

felonious, and unless such sales or attempted sales are satisfactorily explained, you should find the defendant guilty.

"6. The court instructs the jury that, if they find that Henry Glahn, the prosecuting witness, parted with the possession of the property described in the information under the belief on his part that he was loaning such property to the defendant for a certain length of time, it is not necessary that such time should elapse before taking steps to regain possession of the same, and it is immaterial, as far as the crime charged in the information is concerned, what the length of said time was; but if at any time after the taking of said property by the defendant, either before or after the expiration of the time understood by the said Henry Glahn in which said property was to be returned, the defendant sold, or attempted to sell, said property or any part of the same with the intention of appropriating the proceeds thereof to his own individual use and benefit, then the crime charged in the information is sufficiently proven, and unless the defendant satisfactorily explains such sales, or attempted sales, you should find the defendant guilty."

Obviously both of these instructions are bad. The fifth is so conceded by the attorney general, and for that reason he has properly declined to file a brief. By these paragraphs of the charge, the jury are told that if the accused sold, or attempted to sell, the property, or any portion thereof, with the intent to appropriate the proceeds, they should infer therefrom that the original taking was felonious, and should convict, unless the sales, or attempted sales, are satisfactorily explained by the defendant. This is not the law, for two reasons. The effect to be given to the sale or attempted disposition of the property was for the jury alone to determine when considered in connection with all the other evidence adduced on the trial; hence the instructions invaded the province of the jury. Moreover, during the entire progress of the trial, the law surrounds

the defendant with the presumption of innocence, and required the prosecution to establish his guilt beyond a reasonable doubt. Yet these two instructions shifted the burden of proof from the state to the accused by requiring him to overcome the presumption of guilt which the trial court told the jury arose from the sale or attempted disposal of the property. In a criminal trial the burden of proof does not shift, but is on the state at all stages of the trial. The instructions were, therefore, erroneous and prejudicial to the prisoner. (*Burger v. State*, 34 Neb., 397; *Robb v. State*, 35 Neb., 285; *Dobson v. State*, 46 Neb., 250; *Metz v. State*, 46 Neb., 547.) For the errors indicated in these instructions the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FREDERICK E. GOBLE V. AMERICAN NATIONAL BANK OF KANSAS CITY, MISSOURI.

FILED JANUARY 22, 1896. No. 5918.

Pleading: ACCORD AND SATISFACTION. To a petition upon a cause of action not controverted, where there is attempted to be pleaded an accord and satisfaction, the plea is bad when the performance necessary to constitute the satisfaction is not alleged.

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

James McNeny, for plaintiff in error.

References: *Evans v. Powis*, 1 Exch. [Eng.], 601*; *Good v. Cheesman*, 2 B. & Ad. [Eng.], 328; *Sard v. Rhodes*, 1 M. & W. [Eng.], 153; *Billings v. Vanderbeck*, 23 Barb.

[N. Y.], 546; *Goodrich v. Stanley*, 24 Conn., 613; *Bigelow v. Baldwin*, 1 Gray [Mass.], 245; *Hall v. Smith*, 15 Ia., 584; *Merry v. Allen*, 39 Ia., 235; *Babcock v. Hawkins*, 23 Vt., 561.

George R. Chaney, contra.

RYAN, C.

The American National Bank of Kansas City, Missouri, as indorsee, brought an action in the district court of Webster county, upon a promissory note executed by the defendant, of date May 8, 1891, payable thirty days after date to the First National Bank of Red Cloud. The answer of the defendant was to the effect that while plaintiff was the owner of the note sued upon, the defendant agreed with plaintiff to turn over to plaintiff a sufficient number of cattle owned by defendant at a price to be fixed by one Samuel Temple, to pay off and discharge the said note, and, in consideration of the promise and agreement aforesaid made by defendant to plaintiff, the plaintiff on its part agreed to turn over, deliver, cancel, discharge, and surrender to this defendant the note sued upon, and in consideration of the mutual agreement then entered into by defendant and plaintiff, the said plaintiff agreed to cancel and deliver up to defendant the note sued on; and the defendant alleged that he, at all times from the making of said agreement, had been ready and willing to perform and fulfill said agreement in all things on his part to be performed, and to take and accept the said note sued on, and to turn over to plaintiff the cattle so agreed to be turned over. A demurrer was sustained to this defense, and judgment was thereupon rendered against the defendant, who prosecutes error proceedings to this court.

We have not been favored with a brief by the defendant in error, but in the brief of the plaintiff in error we find quoted from 2 Parsons, Contracts [6th ed.], p. 836, this

language: "If he [the defendant] sets forth the agreement in such a manner that it appears upon the face of the plea that performance, and not the promise to perform, was to be received in satisfaction, and does not aver performance, the pleading will, of course, be bad." Referring to the averments in the answer we find that, as alleged, "the defendant agreed to and with plaintiff to convey and turn over to plaintiff a sufficient number of cattle which the defendant then owned * * * to pay off and discharge the said note," etc. From this statement no other conclusion can be reached than that there was a promise to accept payment of the note in cattle. From the other averments of the answer it is also clear that neither the cattle were selected nor yet was there a price fixed. There was, therefore, no averment of performance, and the pleading, within the above rule, was properly held bad. The judgment of the district court is

AFFIRMED.

NEBRASKA EXPOSITION ASSOCIATION V. RICHARD H. TOWNLEY.

FILED JANUARY 22, 1896. No. 5965.

1. **Subscriptions:** PAROL EVIDENCE. In an action upon a written subscription parol evidence is not admissible to add conditions to those expressed in the writing sued upon.

2. **Corporations:** SUBSCRIPTIONS: COUNTER-CLAIMS: PLEADING. Where a defendant, by way of counter-claim, alleges that he was induced to make a subscription for the benefit of a corporation upon the faith of a promise contemporaneously made by an agent of such corporation that an amount of capital stock of such corporation equal to such subscription would be issued to him, such subscriber should aver the payment, or, at least, a legal tender, of the amount of such subscription before he is entitled to claim anything by reason of a failure to issue the stock.

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

A. G. Greenlee, for plaintiff in error, cited: *Aultman v. Brown*, 40 N. W. Rep. [Minn.], 159; *McClure v. People's Freight R. Co.*, 90 Pa. St., 271; *Roche v. Roanoke Classical Seminary*, 56 Ind., 188; *Gibbs v. Holcomb*, 1 Wis., 33; *Howe Machine Co. v. Clark*, 15 Kan., 492; *Streeter v. Poor*, 4 Kan., 412.

Roscoe Pound and *Burr & Burr*, *contra*, cited: *Luce v. Foster*, 42 Neb., 818; *Walker v. Haggerty*, 30 Neb., 120; *De Camp v. Scofield*, 75 Mich., 449; *Dicken v. Morgan*, 54 Ia., 684; *Gulf, C., & S. F. R. Co. v. Jones*, 82 Tex., 156; *Louisville, St. L. & T. R. Co. v. Neafus*, 93 Ky., 53; *Board of Trustees of Seventh Day Baptist Memorial Fund v. Saunders*, 84 Wis., 570; *Lake Manawa R. Co. v. Squire*, 57 N. W. Rep. [Ia.], 307; *Reynolds v. Burlington & M. R. R. Co.*, 11 Neb., 186; *Esterly Harvesting Machine Co. v. Frolkey*, 34 Neb., 110.

RYAN, C.

Plaintiff in error sued the defendant in error for the recovery of the sum of $50. The averments of the petition as to plaintiff's cause of action were as follows: "During the month of January, 1890, the defendant entered into a written contract with the plaintiff whereby he agreed to pay for the purpose of assisting the plaintiff to erect certain accommodations for the Nebraska Agricultural Society, on the grounds of the plaintiff, the sum of fifty dollars ($50), on condition that the state fair should be located upon the said grounds at the said city of Lincoln for the five years beginning 1890, and that the said sum was to be paid upon the location of the state fair at said place." Full performance of the condition upon which this subscription was to be paid, as well as defendant's refusal upon demand to pay

the amount subscribed by him, were further alleged by the plaintiff. In his answer the defendant admitted "that he signed a written subscription whereby he agreed to pay the sum of $50 to plaintiff as alleged; that the said sum has not been paid, and admits that the state fair was located upon the grounds of said corporation [the plaintiff] in the city of Lincoln as alleged."

Before noticing the affirmative matter pleaded in the answer it is proper to say that the defendant in error cannot now insist that the terms of the contract of subscription, by reason of not being set out in the record, cannot be known to this court, for, having admitted that defendant was to pay as alleged in the petition, we must assume that the terms had been therein fully as well as accurately stated. So, too, of the performance. It was admitted in the answer that the state fair had been located as alleged, and this is the only condition precedent to be found in the contract as it was described in the petition. There were, therefore, admissions in the answer which described the conditions upon which the defendant in error was to become liable, which disclosed the full performance of those conditions necessary to fix the liability of the defendant, and the failure of the defendant to make payment in accordance with his said agreement. By way of the affirmative defense it was averred, however, that "the plaintiff, through one John Sheedy, who was then and there its duly authorized agent, promised and agreed to and with the defendant to issue and execute to the defendant $50 of stock of the said corporation [plaintiff], and that defendant, in consideration thereof, signed said subscription, and that said promise to issue and deliver said stock to the defendant was the sole and only consideration of said subscription; and the defendant further alleges that, although often requested, the defendant has failed and refused to execute or deliver said stock to the defendant, and that the consideration of said subscription has wholly failed." In another paragraph

of his answer the defendant pleaded the same facts as above pleaded with reference to the agreement to issue stock to him, and, having alleged the value of such stock and the refusal upon demand to issue it, he asked that the value of such stock be allowed in his favor by way of counterclaim. The dual manner in which these affirmative matters have been stated does not involve a separate consideration of the rules of pleading or evidence governing each, for these rules in one case are the same as in the other. If by the language quoted from the answer it was intended to allege that upon payment of the subscription the stock would be issued to defendant, such tender of payment was a necessary condition precedent to the defendant's right to have stock issued to him, and the non-issue of such stock therefore constituted no matter of defense. This defense was wanting in necessary averment and was bad. If, however, upon this affirmative language it is claimed that the issue of stock was a necessary condition precedent to entitle plaintiff to payment of the defendant's subscription, it is a complete answer to this claim to call attention to the fact that in the written contract, admitted to be correctly reflected in the petition, no such condition existed. The engrafting of another condition by the proffered testimony would be in violation of the rule that all previous and contemporaneous negotiations and conversations leading to the contract are merged in it and cannot therefore be established by oral testimony. (*Mills v. Miller*, 4 Neb., 441; *Hamilton v. Thrall*, 7 Neb., 210; *Dodge v. Kiene*, 28 Neb., 216.) This defense was, therefore, unavailing, and should have been so held upon the evidence tendered in support of it. The judgment of the district court is

REVERSED.

A. H. GOULD v. D. B. ARMAGOST ET AL.

FILED JANUARY 22, 1896. No. 5916.

1. **Chattel Mortgages:** TITLE TO CHATTELS. The legal title to property pledged by a chattel mortgage remains in the mortgagor and creates merely a lien. *Musser v. King*, 40 Neb., 892, and *Camp v. Pollock*, 45 Neb., 771, followed.

2. **Execution:** SALE OF MORTGAGED CHATTELS. The title and interest of a mortgagor of chattels therein may be levied upon and sold under execution against him, the mortgagor being in possession.

3. ——: ——: TITLE OF PURCHASER. A purchaser at such sale is thereby subrogated to all the rights, but only the rights, such mortgagor had to such property at the time of the levy of the execution thereon.

4. ——: ——: ——. A purchaser at such sale takes the property subject to all valid liens and the rights of the holders thereof existing thereon at the time of the levy of the execution under which the sale was made.

5. **Chattel Mortgages:** EXECUTION SALES: TENDER OF PAYMENT OF DEBT BY PURCHASER. An unconditional tender by such a purchaser of the entire debt secured by a chattel mortgage existing against said property, the debt being at the time of the tender due and the tender being kept good, divests the lien of the mortgage and entitles the purchaser to the possession of the property. *Tompkins v. Batie*, 11 Neb., 147, and *Knox v. Williams*, 24 Neb., 630, followed.

6. ——: ——: ——: COSTS. Such a tender, to be good and divest the lien of the mortgage, in addition to the amount of the mortgage debt, must include all reasonable and necessary expenses which have been incurred by the holder of the mortgage in taking possession of the mortgaged property and in enforcing his lien thereon.

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

A. J. Evans and *S. H. Steele*, for plaintiff in error.

Matt Miller, *contra*.

RAGAN, C.

One Zwicker owned a kiln of brick which he pledged by a chattel mortgage to one Zellar to secure a debt of $100 and interest. After the note evidencing the mortgage had matured, Zellar sold and indorsed it to one Carpenter. On the 14th of December, 1889, in a justice court of Butler county, one Scott recovered a judgment against said Zwicker. May 3, 1890, an execution was issued on this judgment and delivered to a constable for execution, who levied the same on the kiln of brick belonging to Zwicker; and on the 17th of May, 1890, the constable sold the kiln of brick to one Gould. The levy and sale were made subject to the lien of the Zellar mortgage. Carpenter, on the day of or the day before the execution sale, took possession of the kiln of brick, was present at the sale, and objected thereto, advising the constable that he, Carpenter, owned the Zellar mortgage. After Gould had purchased the kiln of brick at the constable's sale, he tendered to Carpenter, the owner and holder of the Zellar mortgage and the debt which it secured, the full amount of said debt, principal and interest, and demanded possession of the kiln of brick, and kept this tender good by depositing the amount thereof with the clerk of the district court, which being refused, he brought this suit in replevin in the district court of Butler county. The jury returned a verdict in favor of Carpenter, upon which judgment was rendered, and Gould prosecutes to this court a petition in error.

The judgment is contrary to law, the instructions of the district court, and wholly unsupported by the evidence. The fact that Zwicker had mortgaged the brick to Zellar did not invest the latter with the legal title to the brick, and of course Zellar's assignee, Carpenter, did not become possessed of the legal title by taking an assignment of the mortgage debt. Notwithstanding this mortgage the legal title to the brick remained in Zwicker until divested by

foreclosure, either in a proceeding in equity or a proceeding under the statute, and the mortgagee acquired by the mortgage only a lien upon the mortgaged property. (*Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Camp v. Pollock*, 45 Neb., 771; *Sharp v. Johnson*, 44 Neb., 165.) The constable in levying upon these brick levied only upon the interest of Zwicker, the execution debtor therein. In this case he did not attempt to levy upon anything else than Zwicker's interest, and it would have made no difference if he had. The constable, in selling these brick under the execution, sold only the interest therein of Zwicker. In this case the constable did not pretend or attempt to do more, and the attempt would have been unavailing if he had. Gould, by purchasing these brick at the constable's sale, purchased only the interest which Zwicker, the execution debtor, had in them, and took the brick subject to the liens existing against them at the time of the levy. In other words, the effect of the levy and sale was to transfer to Gould, the purchaser, the same title to the property sold that the execution debtor had when the levy was made, but when Gould purchased these brick Carpenter was entitled to possession and in possession of the brick by virtue of his chattel mortgage, and at that time Gould was not entitled to possession of the brick as against Carpenter. Though Carpenter's mortgage was a lien upon this property, the debt which it secured was past due, and Gould tendered him the full amount of money due on the mortgage debt and demanded possession of the mortgaged property. Gould having unconditionally tendered the full amount of the debt secured by the mortgage, the latter ceased from that moment to be a lien upon the property, and Gould, as owner of the legal title, became then entitled to the possession of the property (*Tompkins v. Batie*, 11 Neb., 147; *Knox v. Williams*, 24 Neb., 630); and having kept said tender good by depositing it in court when he instituted this action, he was entitled at that time also to the possession of the property.

On the trial to the jury Carpenter sought to parry the force and effect of the tender of the mortgage debt made to him by Gould by claiming that Gould in this tender did not include the expense which he, Carpenter, incurred in taking possession of the mortgaged property. There are two answers to this contention: First, at the time the tender was made by Gould, Carpenter did not set up or claim or pretend that he had incurred any expense in and about taking possession of the mortgaged property nor refuse the tender on that ground; second, the evidence, without conflict, shows that Carpenter's claim that he had incurred any expense in the taking possession of this property has no foundation in fact.

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

REVERSED AND REMANDED.

POST, C. J., not sitting.

BEATRICE PAPER COMPANY V. BELOIT IRON WORKS.

FILED JANUARY 22, 1896. No. 5946.

1. **Error and Appeal:** ELECTION OF REMEDIES. If the judgment which the litigant seeks to have reviewed is appealable, he may have it reviewed on appeal or error, at his election; and he may make such election at any time before the final submission of the case in this court. He may dismiss his appeal and stand on his petition in error, or *vice versa;* but if he makes no such election, this court will review the judgment of the district court on error when there is filed with the transcript a petition in error. *Woodard v. Baird*, 43 Neb., 310, and *Monroe v. Reid*, 46 Neb., 316, followed and reaffirmed.

2. **Judicial Sales:** ORDER OF CONFIRMATION: REVIEW. In a proceeding in error from a decree of the district court confirming a judicial sale this court will not review a question involving the

merits of the original decree. *State Nat. Bank of Lincoln v. Scofield*, 9 Neb., 499; *Stratton v. Reisdorph*, 35 Neb., 314; *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281, followed and reaffirmed.

3. **Orders Recalling Executions:** POWER OF COURTS. The district courts of this state have authority to control their process, and for sufficient reason may recall an execution or order of sale and set aside an appraisement of property made thereunder.

4. **Order of Sale:** DESCRIPTION OF PROPERTY: RECALLING EXECUTION. The fact that all the property made liable by a decree is not described in the execution or order of sale issued is sufficient reason to authorize the district court to recall the order of sale and set aside the appraisement made thereunder.

5. **Decrees:** PROCEDURE: NOTICE. In a suit in equity, where the decree has been entered and the case is still on the docket pending proceedings to sell the property, all of the parties to the case, in the absence of a rule on the subject, are bound to take notice of all the orders entered and steps taken by the court in the case in term time which do not affect the original decree.

6. **Judicial Sales:** CONFIRMATION AT CHAMBERS: CONSTITUTIONAL LAW. The constitutionality of the act passed and approved February 25, 1875 (Session Laws, 1875, p. 38), by which section 498 of the Code of Civil Procedure was so amended as to confer authority upon the district judges sitting in chambers to confirm judicial sales, is no longer an open question in this court. *McMurtry v. Tuttle*, 13 Neb., 232, reaffirmed.

7. **Statutes:** REPEAL: CONSTRUCTION. The act passed and approved March 2, 1881 (Session Laws, 1881, p. 226, ch. 46) does not repeal any part of section 498 of the Code of Civil Procedure, nor repeal section 39 of the act passed and approved February 27, 1879 (Session Laws, 1879, p. 90), but said laws should all be construed together.

8. ——: ——: ——. A statute will not be construed as repealing by implication another statute unless the repugnancy between the two is plain and unavoidable. (*Lawson v. Gibson*, 18 Neb., 137.)

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

J. E. Cobbey and *G. M. Johnston*, for plaintiff in error.

S. L. Geisthardt and *S. D. Killen, contra.*

RAGAN, C.

This is a suit in equity in the district court of Gage county brought by the Beloit Iron Works against the Beatrice Paper Company and others. In its petition the Iron Works claimed that the Paper Company was indebted to it in a large sum of money for labor and material furnished by it to the Paper Company towards the erection of a paper mill on its property, and claimed a lien upon the property of the Paper Company under the mechanics' lien law of the state to secure the payment of the Paper Company's indebtedness to it. The Iron Works had a decree as prayed in its petition, under which the property of the Paper Company was sold to the Iron Works, the sale confirmed, and the Paper Company prosecutes to this court proceedings in error.

1. The Paper Company has filed in this court what it denominates a "petition in error and on appeal," and thus seeks to have this court review the judgment of the district court both on appeal and error. In *Woodard v. Baird*, 43 Neb., 310, it was held that "when a case is in its nature appealable, and the party seeking a review files, in connection with the transcript, a petition in error, he will be deemed to have elected to proceed in error, and not by appeal;" and in *Monroe v. Reid*, 46 Neb., 316, it was held that "a case will not be considered in this court as both an appeal and a proceeding in error. A party must elect which remedy he will pursue, and having filed a petition in error, must be presumed to have selected that remedy." It must, therefore, be considered as settled that a litigant cannot have reviewed in this court a judgment of a district court both on appeal and in error. If the judgment which the litigant seeks to have reviewed is appealable he may have it reviewed on appeal or error, at his election; and

he may make such election at any time before the final submission of the case in this court. He may dismiss his appeal and stand on his petition in error, or he may dismiss his petition in error and stand on his appeal; but if he makes no such election, this court will review the judgment of the district court on error when there is filed with the transcript a petition in error.

2. The first assignment of error argued here by counsel for the Paper Company is that the main decree rendered by the district court in the action is erroneous, in that it makes the debt found due to the Iron Works from the Paper Company a lien under the statute upon certain property owned by the Paper Company, and on which property the material and labor furnished by the Iron Works were not used in constructing the improvements for the Paper Company; and that, therefore, the court erred in issuing an order for the sale of the property of the Paper Company made liable by the decree for the debt. But the petition in error filed here by the Paper Company does not assail in any respect the correctness of the decree of the district court. The petition in error challenges only the correctness of the proceedings of the district court subsequent to the rendition of such decree and prays that the order confirming the sale made under the decree may be reversed. In *State Nat. Bank of Lincoln v. Scofield*, 9 Neb., 499, it was held: "On an appeal from an order of the district court confirming a sale of mortgaged premises, held that this court would not consider a question involving the merits of the original case." In *Stratton v. Reisdorph*, 35 Neb., 314, it was held: "Where parties have been personally served with summons and make an appearance in a suit to foreclose a mortgage, they cannot afterwards to defeat confirmation assail the decree for mere irregularity." (See, also, *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281.) The court had jurisdiction of the subject-matter of the action and of the parties

thereto, the petition stated a cause of action, the decree rendered is supported by the pleadings, and no appeal has ever been taken from this decree, nor has any proceeding in error been had or commenced which challenges its correctness. We cannot, therefore, look into the record for the purpose of ascertaining whether the decree is erroneous. It is not void. It is not directly attacked in this proceeding, and it must therefore be conclusively presumed to be valid.

3. An order for the sale of a part of the property described in the main decree was issued, such property appraised, advertised, and offered for sale and not sold for want of bidders. The sheriff returned such order of sale into court, reciting his proceedings under it, and thereupon counsel for the Iron Works moved the court to vacate and set aside the appraisement made of the property and for the issuance of an *alias* order of sale upon the ground that all of the property described in the main decree was not mentioned in the order of sale issued. This motion the court sustained, vacating the first appraisement and ordering an *alias* order of sale to issue. The action of the court in thus vacating the first appraisement is the second error assigned and argued. It is first insisted that the court was without authority to vacate the first appraisement until the property had been twice offered for sale under the appraisement and not sold for want of bidders; and that the language of this court in *Hubbard v. Draper*, 14 Neb., 500, holding that an appraisement of real estate might be vacated by the court for any sufficient reason, is a mere "*dictum.*" Whether the language used by the court in the case cited is a "*dictum*" or not, we do not think it necessary to cite authority to the proposition that a court has authority to control its process, and for sufficient reason to recall an execution or an order of sale and to set aside an appraisement made of property under execution and this statement is not to be considered *obiter*. On looking into the record we find that some of the prop-

erty described in the decree was not described in the first order of sale. This, of itself, was sufficient to authorize the district court to recall the order of sale and set aside everything that had been done under it. The Iron Works had the right to insist that the order of sale should be as broad as the decree, and that the sale of the property should be made in accordance with the decree of the court. (*Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281.)

A second argument made to sustain this assignment of error is that the court made the order vacating the first appraisement without any notice to the Paper Company or its counsel. We assume for the purposes of this opinion that the Paper Company had no actual notice of the application of the Iron Works to the court to vacate the appraisement and did not know that the same had been vacated until long afterwards. But this application to vacate the appraisement was made in open court. The order vacating the appraisement was made on one of the days of a regular term of the court and while it was in session transacting business. The case was on the docket. Proceedings were pending for the sale of the property under the decree in the action. The officer had made his return of what he had done under the order of sale. It was on file, and the Paper Company and all other parties to the suit, in the absence of some rule of the court on the subject, were bound to take notice of every step taken in the case by the court which did not affect the original decree.

4. The order confirming the sale was made by the judge of the district court at chambers upon due notice to all parties. The final assignment of error is that the district judge had no jurisdiction to make this order. The argument advanced to sustain this contention is as follows: Section 498 of the Code of Civil Procedure in express terms confers authority upon the district judges to confirm sales of real estate in vacation. The legislature on the 27th day of February, 1879 (see Session Laws, 1879, p. 82),

passed an act entitled "An act to amend chapter 13 of the Revised Statutes of 1866, entitled 'Courts.'" By section 39 of this act it was provided that a judge of the district court might sit in chambers anywhere within his district for the purpose of confirming judicial sales and for other enumerated purposes; and on the 2d day of March, 1881, the legislature passed another act entitled "An act to give to the several judges of the judicial districts of Nebraska certain powers when sitting in chambers anywhere within their respective judicial districts." (See Session Laws, 1881, p. 226, ch. 46.) By this act certain powers were conferred upon the district judges when sitting in chambers, but the power to confirm judicial sales was not one of the powers mentioned in the latter act. Counsel for the Paper Company correctly say that so much of said section 498 of the Code of Civil Procedure as authorizes a judge of a district court to confirm a judicial sale at chambers owes its origin to the act of the legislature passed and approved February 25, 1875 (see Session Laws, 1875, p. 38); and the argument is that this last act, by which said section 498 of the Code of Civil Procedure was amended, is unconstitutional and void. The constitutionality of this act of 1875 amending said section 498 of the Code of Civil Procedure was considered by this court in *McMurtry v. Tuttle*, 13 Neb., 232, and it was there held that the act was not repugnant to the constitution. The validity, then, of said section 498 of the Code of Civil Procedure, as it now stands, is no longer an open question. It is also argued that section 39 of the act of 1879, quoted above, is also unconstitutional, but since section 498 of the Code of Civil Procedure is valid and confers authority upon judges of the district court sitting in chambers to confirm judicial sales, we need not stop to inquire whether the act of 1879 be valid or not. Again, it is insisted that the act of 1881, quoted above, is a valid act in all respects, and that by that act the act of 1879 and so much of section 498 of the

Code of Civil Procedure as authorizes a judge at chambers to confirm a judicial sale were repealed. If the act of 1881 repeals section 498 of the Code of Civil Procedure and section 39 of the act of 1879, quoted above, it must be by implication, as the act does not assume, either in its title or body, to repeal any previous law, and there is no repugnancy between the act of 1881 and section 498 of the Code of Civil Procedure and the act of 1879 quoted above. All these statutes, then, should be construed together. A statute will not be construed as repealing by implication another statute unless the repugnancy between the two statutes is plain and unavoidable. (*Lawson v. Gibson*, 18 Neb., 137, and case there cited.) The assignments of error, then, and each of them, are therefore overruled and the judgment of the district court is in all things

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. GIDEON ARCHER.

FILED JANUARY 22, 1896. No. 5752.

1. **Expert Witnesses:** HYPOTHETICAL QUESTIONS: OBJECTIONS. An objection to a hypothetical question put to an expert witness, that it is "incompetent, immaterial, and irrelevant," is too general to raise the point that the question involves erroneous statements of evidence.

2. ———: ———. A hypothetical question, after stating a number of hypotheses, concluded, "[suppose] he has been unable to work by reason of such injury for a period of seven months, * * * to what would you attribute his inability to work, and for what period would he be partially or wholly incapacitated for labor, and until what time would it require for a total disappearance of the pains and other results of such injuries and leave no trace thereof?" *Held*, That the first two inquiries relating to facts expressly assumed were not prejudicial, and that

the last was an inquiry as to the probable future duration of the injury, and a proper question to ask an expert.

3. ———: ———: RULINGS ON OBJECTIONS. The court, in overruling an objection to a hypothetical question, remarked: "I think that is a fair epitome of the evidence already given in the case." *Held*, Not error.

4. **Damages**: PERSONAL INJURIES: INSTRUCTIONS. In an action for personal injuries it is error to submit to the jury a consideration of the question, in assessing damages, as to whether the injuries were permanent, in the absence of evidence tending to establish such permanency of injuries with reasonable certainty.

5. ———: ———: ———: HARMLESS ERROR. Even where the damages are unliquidated, where the trial court has, by an instruction, submitted to the consideration of the jury an element of damages not sustained by the evidence, the error will be treated as harmless where, from an examination of the evidence and the verdict, it is reasonably certain that the jury was not misled, and that it allowed nothing on account of the element improperly submitted.

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

The facts are stated by the commissioner.

W. F. Evans and *C. S. Montgomery*, for plaintiff in error:

The objection to the hypothetical questions assuming that plaintiff had been unable to work by reason of his injury should have been sustained. The questions assumed a conclusion or ultimate fact, which was for the jury alone to determine. (*Haish v. Payson*, 107 Ill., 370; *Bishop v. Spining*, 38 Ind., 144; *Muldowney v. Illinois C. R. Co.*, 39 Ia., 616.)

The hypothetical questions assume that the wagon in falling upon the plaintiff struck him "in the small of the back" at the "base of the spinal column." This assumption is without support in the evidence. Hypothetical questions must present facts which the evidence tends to prove. If the facts embraced in them are not proved or

attempted to be proved, objections to such questions should be sustained. (1 Thompson, Trials, sec. 606; *State v. Anderson*, 10 Ore., 448; *Williams v. Brown*, 28 O. St., 547; *Hurst v. Chicago, R. I. & P. R. Co.*, 49 Ia., 76; *Bomgardner v. Andrews*, 55 Ia., 638; *Haish v. Payson*, 107 Ill., 365; *Guetig v. State*, 66 Ind., 95; *Hathaway v. Nat. Life Ins. Co.*, 48 Vt., 336.)

Hypothetical questions must not embrace matters within the range of ordinary human experience, because as to such matters the opinions of the jurors are better in the eye of the law than those of the experts. (1 Wharton, Evidence, secs. 434, 436; 1 Thompson, Trials, sec. 605; *New England Glass Co. v. Lovell*, 7 Cush. [Mass.], 319; *State v. Anderson*, 10 Ore., 448; *Hill v. Portland & R. R. Co.*, 55 Me., 439; *State v. Watson*, 65 Me., 74; *Linn v. Sigsbee*, 67 Ill., 76.)

The instruction relating to the elements of damage was erroneous. (2 Shearman & Redfield, Negligence, sec. 743; *Curtis v. Rochester & S. R. Co.*, 20 Barb. [N. Y.], 292; *Strohm v. New York, L. E. & W. R. Co.*, 96 N. Y., 306; *Tozer v. New York, C. & H. R. R. Co.*, 105 N. Y., 617; *Feeny v. Long I. R. Co.*, 116 N. Y., 381; *Clark v. Nevada Land & Mining Co.*, 6 Nev., 205; *Spicer v. Chicago & N. W. R. Co.*, 29 Wis., 580; *Ohio & M. R. Co. v. Cosby*, 27 Am. & Eng. R. Cases [Ind.], 339; *Cleveland, C., C. & I. R. Co. v. Newell*, 104 Ind., 264; *White v. Milwaukee C. R. Co.*, 21 N. W. Rep. [Wis.], 524; *Missouri P. R. Co. v. Mitchell*, 41 Am. & Eng. R. Cases [Tex.], 226; *Fry v. Dubuque & S. W. R. Co.*, 45 Ia., 416; *Walrath v. State*, 8 Neb., 80; *Union P. R. Co. Ogilvy*, 18 Neb., 643; *Chicago, B. & Q. R. Co. v. Sykes*, 96 Ill., 163; *McGowan v. St. Louis Ore & Steel Co.*, 16 S. W. Rep. [Mo.], 236.)

Matthew Gering, contra:

The objections to the hypothetical questions were insufficient to raise the questions argued by plaintiff in error.

(*Powers v. Mitchell*, 77 Me., 361; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind., 409; *McCooey v. Forty-Second Street & Grand Street Ferry R. Co.*, 29 N. Y. Sup., 369.)

The objections to the hypothetical questions were properly overruled. (*Gottlieb v. Hartman*, 3 Colo., 53; *Williams v. State*, 64 Md., 384; *Kerr v. Lunsford*, 31 W. Va., 660; *Cowley v. People*, 83 N. Y., 464; *Dilleber v. Home Life Ins. Co.*, 87 N. Y., 79; *Turnbull v. Richardson*, 69 Mich., 400; *Quinn v. Higgins*, 63 Wis., 664; *Filer v. New York C. R. Co.*, 49 N. Y., 46; *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 44; *Stearns v. Field*, 90 N. Y., 641; *Lincoln Vitrified Paving & Pressed Brick Co. v. Buckner*, 39 Neb., 86; *Peterson v. Chicago, M. & St. P. R. Co.*, 38 Minn., 511; *McDonald v. Illinois C. R. Co.*, 55 N. W. Rep. [Ia.], 102; *Van Hoesen v. Cameron*, 54 Mich., 609; *Eiseley v. Malchow*, 9 Neb., 174.)

In support of an argument in favor of the instruction complained of, reference was made to the following cases: *Illinois C. R. Co. v. Read*, 37 Ill., 484; *Morris v. Chicago, B. & Q. R. Co.*, 45 Ia., 29; *Baker v. Kansas City, C. & S. R. Co.*, 52 Mo. App., 602; *Fremont, E. & M. V. R. Co. v. Leslie*, 41 Neb., 164; *Spicer v. Chicago & N. W. R. Co.*, 29 Wis., 583; *Kerr v. Forgue*, 54 Ill., 482.

IRVINE, C.

Archer recovered a judgment of $1,500 against the railway company in the district court of Sarpy county for personal injuries alleged to have been sustained by Archer in consequence of falling into a cut made by the railway company along the public highway, and left without guards to protect passengers on the highway from falling therein. Three assignments of error relate to the overruling of objections to a hypothetical question asked on behalf of Archer on the examination of as many expert witnesses. The question asked each witness was as follows: "Suppose a young man, aged about twenty-six years, in good, sound

physical health, is thrown or falls down an embankment a distance of between sixteen and eighteen feet while driving along the public highway in a lumber wagon, the young man falling on his face, the wagon falling on him, striking him in the small of the back at the base of the spinal column, one of the horses which he was driving was killed and another injured; that by reason of such fall, which resulted in the breaking of the bone of the leg and dislocating the ankle joint,—supposing this to have occurred in November, 1890,—necessitating the young man's confinement to a bed for a period of about eight weeks, and during which period he was incapable of moving in his bed because of severe pains in his back and injury to his leg; and that he constantly complained of severe pains and injuries to his spine and back, and thereafter, for a period of nearly three months, was unable to walk without the aid of crutches; that from the time of the injury up to the present time he had constantly complained of pains in his back, and has been unable to work by reason of such injury for a period of seven months, except at light labor for about forty days,—these conditions all existing, to what would you attribute his inability to work, and for what period would he be partially or wholly incapacitated for labor, and until what time would it require for a total disappearance of the pains and other results of such injuries, and leave no trace thereof?"

It is argued that these objections should have been sustained, because, in the first place, the injection of the phrase "by reason of such injury" introduced into the question not a hypothesis of fact, but an inference for the jury to draw, and one improper to submit to an expert as a basis for a further opinion; and second, that in certain respects there was no evidence tending to establish hypotheses of fact involved in the question. When the question was propounded to one of the witnesses the objection was made that it was "incompetent, irrelevant, and immaterial,"

When put to the other witnesses the objection was: "Objected to by defendant, as incompetent and immaterial, and for the reason that no foundation has been laid for the question, and the question is not single, but multiform in character and not properly framed." The defendant in error contends that these objections are insufficient to present for review the questions now argued; and after careful consideration we are convinced that his contention is correct. In this state the strict rule prevailing in many jurisdictions requiring that all objections shall be specific has not prevailed. An objection that a question is "incompetent, irrelevant, and immaterial" has been here held sufficient generally to apprise the court of any ground of complaint falling within the meaning of those terms (*First Nat. Bank of Madison v. Carson*, 30 Neb., 104); but, on the other hand, this court has held that where a deed is offered in evidence, such an objection is too general to reach defects in the form, execution, or acknowledgment of such deed (*Gregory v. Langdon*, 11 Neb., 166), or the fact that the deed has no witness (*Rupert v. Penner*, 35 Neb., 587). In such cases the objection must be specific, and call the attention of the trial court to the precise defect complained of. The same reasons which controlled the court in the two cases last cited are peculiarly applicable to a hypothetical question asked an expert witness. The general objection directs attention only to the general scope and character of the question. There is much reason in the language of Mr. Justice Daniel (*Camden v. Doremus*, 3 How. [U. S.], 515): "Upon the offer of testimony, oral or written, extended and complicated as it may often prove, it could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence, nor point to some definite or specific defect in its character, that the court should explore the entire mass for the ascertainment of defects, which the objector himself either would not or could not point to their view. It would

be more extraordinary still if, under the mask of such an objection, or mere hint at objection, a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on, and which, if they had been openly and specifically alleged, might have been easily cured." The precise question has been passed upon by the circuit court of appeals for this circuit, Judge Thayer saying: "We would not be understood as deciding that an objection on the ground of 'incompetency, irrelevancy, and immateriality' is always too general, but we think that, when counsel intend to rely on the ground that a hypothetical question propounded to an expert witness is based upon an erroneous statement of the evidence, that fact, at least, should be called to the attention of the trial court." (*Missouri P. R. Co. v. Hall*, 66 Fed. Rep., 868. See, also, *Powers v. Mitchell*, 77 Me., 361; *Currier v. Henderson*, 85 Hun [N. Y.], 300.) The objections here argued relate to only a small portion of the question propounded. If the objection had specifically called attention to this portion at the time of the trial, and the objection were well taken, the question might have been readily reframed in order to meet it. We do not think that the objections that no foundation had been laid for the question, and that the question was not properly framed, are sufficient to suggest the defects complained of, and the objection that the question was not single certainly does not go to the point.

A further objection is made that the question relates to a matter within the range of ordinary human experience, and not to one within the range of expert testimony. This objection probably goes to the competency of the whole question, but we do not think it is well taken. The question asks three things: First, to what would you attribute his inability to work? Second, for what period would he be partially or wholly incapacitated for labor? And third, what time would it require for a total disappearance of the

pains and other results of such injuries? The first two elements are merely a repetition of assumptions already made in the question, and for that reason are certainly not prejudicial. The third was an inquiry as to the ultimate period of suffering from injuries which had so far produced the effect stated in the body of the question. This was certainly a subject peculiarly within the domain of expert testimony.

The court, in overruling the objection to the question when first propounded, remarked: "I think that is a fair epitome of the evidence already given in the case." An exception was taken to this remark. Counsel construe this remark as indicating to the jury that the trial judge deemed the facts assumed in the question established by the evidence. We do not think so. It was but an indication that the court considered that the question epitomized the evidence up to that time introduced, but without any opinion as to the weight of such evidence. If the objection had been properly made that the question in particulars stated was not supported by any evidence yet introduced, the court by the act of overruling the objection would have in effect made the same statement. It is not every remark made orally by the trial judge during the progress of a case which falls within the inhibition against oral instructions. It has been held that the trial judge may state at length his reasons for ruling on a question of law and it is not error to do so in the presence of the jury. (*Hall v. Aitkin*, 25 Neb., 360.) Such a remark as was here made is not prejudicial if it be not of such a character as to influence the minds of the jurors in determining facts presented to them. At the close of the plaintiff's evidence the defendant moved for the direction of a verdict, and this motion was overruled. Counsel for plaintiff now aptly suggests that if the remark referred to was erroneous, the very act of overruling this motion must have been erroneous for the same reason, because it implied that the court consid-

ered the evidence sufficient to warrant a verdict for the plaintiff.

Among the instructions given was the following: "If you find for the plaintiff, then, in estimating his damages, you are instructed that he is entitled to recover any pecuniary loss he has sustained on account of being unable to work, either wholly or in part. If he has suffered permanent injury that will prevent him from pursuing his ordinary business or labor in future to the same extent that he did prior to the injury, that should be taken into account. He is also entitled to recover on account of bodily pain and suffering, and for expenses of his treatment, including physicians' charges. You should take all these elements into consideration and allow him such sum as will be fair and just compensation for the injuries sustained; but you cannot allow him exemplary damages; that is, damages by way of punishment of the defendant." We agree with counsel for the railway company that to recover prospective damages it must be made to appear from the evidence with reasonable certainty that future evils will result; and we also agree with them in their contention that the record discloses no evidence of a permanent disability affecting plaintiff's ability to pursue his ordinary business in the future. It follows that the instruction just quoted, in so far as it submitted to the jury a consideration of a permanent disability affecting plaintiff's future business, was technically erroneous. The most difficult question in the case is whether the error was prejudicial. The verdict was for $1,500. Prior to the injury the plaintiff was a man of sound health, able to perform manual labor at remunerative wages. For four weeks at least he was confined to his bed. For several months thereafter he could only move with the aid of crutches. Down to the time of trial he experienced pain, and while for some time prior to the trial he had been working, he had been compelled to resort to a different class of work and procure assistance to re-

lieve him of the severer tasks. At the time of the trial these conditions continued, and there was evidence tending to show that they might continue for two years. In *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 27, the jury found a verdict of $7,000. This court held that there was no sufficient evidence of a permanent disability resulting from the injuries complained of; but permitted a judgment of $2,000 to stand on plaintiff's remitting the remainder. The propriety in such cases, even where damages are unliquidated, of permitting the defendant in error to elect between a remittitur and a judgment of reversal, has not, so far as we know, ever been questioned in this state. If this verdict were for so large a sum that it was evident or even probable that a portion of the damages had been allowed on account of supposed permanent injuries, there would, therefore, be no doubt that the judgment should be of this character, the court estimating as the amount of the remittitur as great a sum as it was probable that the jury might have allowed on account of the element improperly submitted. But here we cannot pursue this course. In the Brady case a judgment $500 greater than that here allowed was permitted to stand for temporary injuries, apparently no more serious than those disclosed in this case, and we would not feel warranted in requiring as a condition of affirmance a remittitur beyond a nominal sum. On the other hand, had the verdict been for $5 or $100, or even any sum not beyond what might be equal to what may be called the liquidated elements of damages proved, to-wit, expenses occasioned by the injury and actual loss of earnings already sustained, we would unhesitatingly affirm the judgment unconditionally as beyond all question not including anything for permanent disability. We think the true rule is that where the damages are unliquidated and the jury has been by the instructions permitted to consider an element not sustained by the evidence, the error should be treated as harmless where, from an inspection of

the evidence and the verdict, it is reasonably certain that the jury was not misled, and that it allowed nothing on account of the elements improperly submitted to it. We think this case discloses a state of affairs within the rule.

JUDGMENT AFFIRMED.

L. E. SPATZ V. J. A. MARTIN.

FILED JANUARY 22, 1896. No. 5988.

Negotiable Instruments: SURETYSHIP: LIABILITY OF MARRIED WOMEN. Evidence in an action against a married woman upon a note executed by her as surety examined, and *held* sufficient to sustain a verdict against her.

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

J. L. McPheely and *H. M. Pope*, for plaintiff in error.

In argument reference was made to the following cases: *State Savings Bank of St. Joseph v. Scott*, 10 Neb., 84; *Davis v. First Nat. Bank of Cheyenne*, 5 Neb., 242; *Hale v. Christy*, 8 Neb., 264; *Webb v. Hoselton*, 4 Neb., 308; *Barnum v. Young*, 10 Neb., 309; *Gillespie v. Smith*, 20 Neb., 455.

A. H. Burnett, contra.

IRVINE, C.

J. E. Spatz and L. E. Spatz, his wife, gave to J. P. Adams their promissory note for $254. This note was indorsed by Adams to Martin, and the makers and indorser were sued by Martin. A judgment by him was recovered. Mrs. Spatz brings the judgment here for review

by petition in error. Her defense was coverture. The case was submitted to the jury on an instruction to the effect that if Mrs. Spatz signed the note as surety, without reference to her separate estate, and was a married woman, then she was not liable. There is no assignment of error relating to the instruction, and the sole question presented for review is whether the verdict was, under this instruction, sustained by the evidence.

It is settled that a married woman may in this state obligate herself as surety for her husband's debt. (*Stevenson v. Craig*, 12 Neb., 464; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb., 123; *Smith v. Spaulding*, 40 Neb., 339; *Briggs v. First Nat. Bank*, 41 Neb., 17; *Watts v. Gantt*, 42 Neb., 869.) The effect of other decisions is that under our married woman's act a married woman is liable upon her contracts when made with reference to and upon the faith and credit of her separate property. (*Davis v. First Nat. Bank of Cheyenne*, 5 Neb., 242; *Barnum v. Young*, 10 Neb., 309.) In some cases this rule is stated in the alternative, to-wit, that she is bound upon contracts made with reference to her separate estate or upon the faith or credit thereof. (*State Savings Bank of St. Joseph, Mo., v. Scott*, 10 Neb., 83; *Eckman v. Scott*, 34 Neb., 817.) In such cases it has been held that she is liable upon her general obligations, not in their nature connected with her separate estate, when she intended to bind it for their performance. It is not necessary in this case to consider the distinction suggested by the use of the conjunctive term in some cases and the disjunctive in others, because, as already stated, no complaint is made of the instruction, and we need only consider the sufficiency of the evidence, in connection with the instruction and the general statements of the law afforded by the cases cited.

The evidence tends to show that J. E. Spatz was a physician who had performed professional services for the wife of Adams. He had been charged with negligence in his

treatment of her, and in settlement of this controversy had given the note sued upon, his wife joining him in its execution. She testified in answer to direct questions that she did not sign the note with reference to her separate estate, and did not intend to bind it; but, on the other hand, there is evidence, both from her and her husband, to the effect that while the husband enjoyed a good practice, all the property was in her name; that she had previously signed notes as surety; that she knew the object of giving this note, and that it was necessary for him to give security for it. She testified that she presumed she was asked to sign the note because she owned the property. She believed that that was the reason why her signature was desired. It further appeared that her owning the property was the reason urged upon Adams for accepting her as surety, although this conversation was not in her presence. We think this was sufficient evidence to sustain the verdict. The jury was not bound by her direct denial of the fact that she did intend to bind her separate property. It had a right to believe from the evidence that when she had signed the note, owning all the property of the family, and knowing that her signature was desired because of that fact, her intention was to charge that property.

JUDGMENT AFFIRMED.

MORTIMER C. SWEENEY V. FRANK J. RAMGE.

FILED FEBRUARY 4, 1896. No. 6158.

Affirmance Where the Record Fails to Present a Question for Review.

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

C. A. Baldwin and *Weaver & Giller*, for plaintiff in error.

Parke Godwin, contra.

PER CURIAM.

The bill of exceptions in this case having been quashed at a former term of this court, and the petition in error presenting no question which can be considered without a bill of exceptions, the judgment is

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Subscriptions.

11. The mismanagement of the affairs of a corporation will not release a stockholder from his obligation to pay for the stock subscribed. *Hards v. Platte Valley Improvement Co*... 709
12. Where a defendant in a suit on a subscription files a counter-claim alleging that he was induced to subscribe through a promise that capital stock to the amount subscribed would be issued to him, he must aver payment or tender before he can claim anything by reason of plaintiff's failure to issue the stock. *Nebraska Exposition Association v. Townley* 893

Costs.

An officer under a writ of attachment may lawfully return as costs the actual, necessary, and reasonable charges and expenses incurred in taking, removing, and preserving the attached property. *Deering v. Wisherd* 720

Counter-Claim. See SET-OFF AND COUNTER-CLAIM.

Counties. See EMBEZZLEMENT, 11.

Officers' Fees. County Boards.

1. The county board, under the laws in force in 1883, exercised ministerial functions in examining the reports of fees received by the county clerk and in adjusting the account between him and the county. *Heald v. Polk County* 28
Ragoss v. Cuming County 36
2. The examination and adjustment by the county board of reports of fees received by the county clerk and the subsequent allowance of the clerk's claim for making the county tax list are independent transactions. *Id.*
3. After settlement with the county clerk and the retention by him, from fees collected, of the full amount of his salary, the county board, in allowing him a further sum for making the county tax list, acted judicially and within its jurisdiction; and its decision, unless appealed from, is final. *Id.*
4. A county board is vested with exclusive, original jurisdiction to hear and determine all claims filed against the county. *Id.*
5. Under the statute in force in 1883 county clerks of counties having less than twenty-five thousand inhabitants were not entitled to extra compensation for making county tax lists. *Id.*
6. Construction of sec. 42, ch. 28, Comp. Stats., in relation to compensation of certain county officers and their deputies. *Wolfe v Kyd* 292

Supervisors.

7. Ch. 28, Session Laws, 1895, provides for seven supervisors in all counties under township organization. *Van Horn v. State* 63

Bridges.

8. Prior to the enactment of ch. 72, Session Laws, 1887, a county under township organization was not invested with power, nor charged with the duty, of building or repairing bridges in the county. *Tullock v. Webster County* 211
9. It was not intended by ch. 72, Session Laws, 1887, to make counties under township organization liable for the payment of bridges already constructed, nor for the payment of repairs made before the act went into effect. *Id.*
10. A petition to recover more than one hundred dollars from a county for labor and material furnished for a bridge built in 1887 was *held* insufficient, where it failed to allege that

Counties—*concluded.*

the bridge was in the county; that when the contract was made there was money on hand to pay for the improvement; and that the county advertised for bids. *Id.*

11. The contract referred to in the preceding paragraph was *held* to be *ultra vires* and incapable of ratification by the county. *Id.*

Bonds.

12. The antedating of county bonds under the circumstances referred to in the opinion was not a substantial defect. *State v. Moore* 590

Relocation of County Seat.

13. A county seat can only be relocated by a three-fifths vote of all the electors of the county at an election held for that purpose. *State v. Roper* 724

14. The law presumes that all the electors of the county vote at an election to relocate a county seat. *Id.*

15. On application for *mandamus* to compel the removal of a county seat pursuant to the declared result of an election, an answer tendering only issues as to fraud in the election presents no defense. *Id.* 730

County Attorneys. See CRIMINAL LAW, 35, 36.

The provision of sec. 21, ch. 7, Comp. Stats., for the appointment of a county attorney to act during the absence, sickness, or disability of the public prosecutor and his deputies is applicable to informations under sec. 579, Criminal Code. *Korth v. State* 631

County Boards. See COUNTIES. RES ADJUDICATA.

County Bonds. See COUNTIES, 12.

County Clerks. See CHATTEL MORTGAGES, 2. COUNTIES.

County Courts.

A county court has power to open the settlement of a former account of an executor to correct any mistake therein, except as to disputed items previously heard and determined. *Merrick v. Kennedy* 264

County Judge.

Where a vacancy occurs in the office of county judge, and the unexpired term exceeds one year, it should be filled by election. *State v. Lansing* 515

County Seat. See COUNTIES, 13–15.

Court Records. See RECORDS.

Courts. See CARRIERS, 1. CONTEMPT, 7. COUNTIES, 4. COUNTY COURTS. JURISDICTION. JUSTICE OF THE PEACE. STARE DECISIS. SUPREME COURT.

Covenants. See MUNICIPAL CORPORATIONS, 1.

Creditors' Bill.

1. As a condition precedent to recover, plaintiff in a creditors' bill must plead and prove that he is the owner of a valid and unsatisfied judgment. *Johnson v. Parrotte*..... 52
2. The right to bring an equitable action in the nature of a creditors' bill was not superseded by the statute providing for proceedings in aid of execution. *Monroe v. Reid*..... 317

Crimes.

A crime is a wrong of which the law takes cognizance as injurious to the public, and punishes in a proceeding in the name of the state. *Bohner v. Bohner*..... 204

Criminal Law. See BANKS AND BANKING, 4, 5. CONSTITUTIONAL LAW, 12. CONTEMPT. COUNTY ATTORNEYS. EMBEZZLEMENT. FORGERY. HOMICIDE. INSTRUCTIONS, 15–32. REVIEW, 30. ROBBERY. SHERIFFS AND CONSTABLES, 3, 4.

Judgments.

1. Where the record for review is without error, except an irregularity in entering judgment, the cause may be remanded with instructions to the lower court to enter a proper judgment on the verdict. *Griffen v. State*..... 282

Accessories.

2. One who is present when a crime is committed, aiding and assisting therein, is a principal, though his hand was not the instrument through which the crime was perpetrated. *Dixon v. State*..... 299

Sentence.

3. Before sentencing a convict the court is not limited to the single inquiry, "Have you anything to say why judgment should not be pronounced against you?" *Tracey v. State*... 362
4. In pronouncing judgment upon a convict the court has no authority to coerce from him answers to inquiries. *Id.*

Harmless Error.

5. A judgment should not be reversed for error not prejudicial. *Id.*

Motion for New Trial.

6. Alleged errors in overruling challenges to jurors for cause will not be reviewed by the appellate court unless presented below by the motion for a new trial. *Ford v. State*..... 390

Criminal Law—*continued.*

Charge.

7. A charge of the court that every sane person is presumed to intend the natural and probable consequences of his voluntary acts, *held* correct. *Id.*

Imprisonment.

8. The confinement of a convict from the date of conviction until the date fixed for his execution is not a part of the penalty for a capital offense. *McGinn v. State* 427

Former Jeopardy.

9. Where one convicted of a felony procures a reversal of the judgment on account of error in the proceedings, he waives his right to object to further prosecution on the ground of former jeopardy. *Id.*

Pleading.

10. Where a plea to the general issue has been entered and has not been withdrawn, a plea in abatement need not be entertained. *Korth v. State*..... 632

Continuance.

11. It is error for the court to refuse to postpone trial for a reasonable time to enable defendant to meet testimony of a witness whose name was indorsed on the information after it was filed, where the latter gave material testimony for the state during the examination in chief. *Rauschkolb v. State*..... 658

Evidence.

12. In reviewing the rulings of the trial court in admitting and rejecting evidence the supreme court will confine its examination to the objections made below. *Collins v. State*..... 37

13. A verdict of guilty is supported by the evidence when the circumstances proved lead beyond a reasonable doubt to inferences of facts essential to establish defendant's guilt. *Dixon v. State*..... 298

14. An objection relating to the materiality or relevancy of testimony should be made when the testimony is offered. *Ford v. State*..... 390

15. An order excluding an answer during the examination in chief will not be reviewed where the record fails to show an offer to prove the fact the answer would elicit. *Id.*

16. It is not reversible error to exclude testimony offered to prove a fact established by uncontradicted evidence. *Id.*

17. The effect of the evidence and the inferences deducible therefrom are for the jury. *Williams v. State*..... 704

Criminal Law—*continued.*

18. The omission of the trial court to instruct the jury that the failure of defendant to testify creates no presumption against him, is not a ground for reversal, where defendant did not request such an instruction. *Metz v. State*..... 547

Preliminary Proceedings. Variance.

19. An objection that the offense charged in the indictment differs from that in the complaint should be made by plea in abatement and not by motion to quash. *Whitner v. State*, 144

20. Testimony on the trial should not be rejected on the ground that the witness testified differently during the preliminary examination. *Dixon v. State*..... 299

21. Where the transcript of the preliminary proceedings has been lost from the files of the district court another transcript may be substituted by order of the court. *Korth v. State*..... 632

22. The record of the proceedings in the examining court *held* sufficient to show a compliance with sec. 585 of the Criminal Code relating to preliminary examinations. *Id.*

Penalties.

23. It was not error to submit to the jury the question of defendant's guilt of a higher grade of offense than that for which conviction is had, where there is evidence to sustain the higher grade. *Whitner v. State*..... 144

24. A refusal to instruct as to the statutory penalty, or to permit that question to be argued, is not error, where the jury is not required to fix the punishment. *Ford v. State*, 390
Lawhead v. State..... 607

Review.

25. A ruling below on motion to compel an election as to whether the case in which it was filed or another case involving the same offense should be dismissed cannot be reviewed in the supreme court in absence of a showing that two such cases were in fact pending. *Lindsay v. State*..... 177

Verdict.

26. A verdict of guilty, responsive separately to each of two counts of an information, both counts charging one crime, should be treated, in entering judgment, as though both elements of the crime had been embraced in a single count. *Griffen v. State*..... 282

Separate Trials.

27. On motion of the state or a defendant, persons jointly indicted for a felony may be separately tried. *Metz v. State*... 547

Criminal Law—*continued.*

28. Where defendants were jointly indicted, it is too late to object to a severance after the jury has been selected. *Id.*

Election as to Counts.

29. Under an information charging several distinct embezzlements, the action of the trial court, in withholding its ruling upon defendant's motion to require an election as to counts until the state introduced its evidence in chief, was *held* not an abuse of discretion, where the motion was sustained. *Korth v. State*..... 632

Conflicting Evidence.

30. Facts determined by the district court upon contradictory affidavits will be presumed by the supreme court to have been established by the proofs. *Grossman v. State*..... 21

31. Where the evidence as to the alleged misconduct of jurors is conflicting, the finding of the trial court thereon will not be disturbed. *McMahon v. State*..... 166

32. A ruling in the district court upon a question of fact presented by a motion supported by affidavits will not be disturbed in the supreme court, unless it is without support of sufficient evidence. *Lindsay v. State*..... 177

33. In considering a motion for a new trial the court is not obliged to accept as true an uncontradicted statement in an affidavit impeaching the conduct of the jury, but may weigh against the statement the presumption that the jurors obeyed their oaths. *Tracey v. State*..... 361

34. Mere statements of counsel in argument, though contained in a bill of exceptions, cannot be considered as evidence. *Grossman v. State*..... 21

Misconduct of County Attorney.

35. Alleged misconduct of the county attorney in using improper language during his argument to the jury *held* not prejudicial to the rights of defendant. *McMahon v. State*... 166

36. Case where the prosecuting attorney in a trial for murder conversed with a juror in violation of an order of the court, and the overruling of a motion for a new trial, based on that ground, was not reversible error. *Lindsay v. State*.... 177

Arguments.

37. It is within the discretion of the trial court to limit the time for arguments before the jury. *Dixon v. State*..... 299

Discharge of Prisoner.

38. The term at which a person was indicted should be excluded in construing sec. 391, Criminal Code, providing for his discharge, where he has been admitted to bail and

Criminal Law—*concluded.*

not brought to trial before the end of the third term of court. *Whitner v. State* 144

39. An application for a discharge under sec. 391 of the Criminal Code should be overruled where it fails to show that three terms of court elapsed after the information against accused was filed, without his being brought to trial, and that the delay was not occasioned by want of time to try the case or upon his request. *Korth v. State* 631

40. In reviewing an order denying an application for a discharge under sec. 391 of the Criminal Code the presumption that the proceedings below were regular will prevail, where the contrary is not shown. *Id.*

Custom and Usage. See PRINCIPAL AND AGENT, 3, 4.

Damages. See ABSTRACTS OF TITLE, 2. DEATH BY WRONGFUL ACT. INTOXICATING LIQUORS. RAILROAD COMPANIES, 1, 2. REVIEW, 35. SET-OFF AND COUNTER-CLAIM, 2.

1. Where property is destroyed by the negligence of a railroad company in setting out fire, the owner is entitled to interest on its value from the time of its destruction. *Union P. R. Co. v. Ray* 750

2. In a suit against a party for wrongfully terminating work under a contract, plaintiff's measure of damages is the profit he would have made by completing it. *Kreamer v. Irwin* 827

3. In an action for personal injuries it is error to submit to the jury the question as to whether the injuries were permanent, in absence of evidence tending to establish the permanency with reasonable certainty. *Chicago, R. I. & P. R. Co. v. Archer* 908

4. The submission of an element of damage not sustained by the evidence was treated as harmless error where it did not mislead the jury or affect the amount of the verdict. *Id.*

Dangerous Premises. See NEGLIGENCE.

Death by Wrongful Act. See NEGLIGENCE.

A petition in an action for death by wrongful act under ch. 21, Comp. Stats., is fatally defective, where it fails to show that plaintiff sustained pecuniary injury. *Orgall v. Chicago, B. & Q. R. Co.* 4

Deceit. See EVIDENCE, 3. FALSE REPRESENTATIONS.

Declarations. See HOMICIDE, 3-6.

Deeds. See MUNICIPAL CORPORATIONS, 1. RAILROAD COMPANIES, 1, 2.

1. Title passes to the grantee in a deed neither acknowledged nor recorded and afterward lost, and a sheriff's deed under a sale to satisfy a judgment against such grantee conveys the legal title. *Connell v. Galligher*..... 372
2. Description of land. *Hubermann v. Evans*..... 784

Deficiency Judgments. See MORTGAGES.

De Lunatico Inquirendo. See HOMICIDE, 13, 14.

Deposits. See BANKS AND BANKING, 4, 5.

Deputy Sheriffs. See SHERIFFS AND CONSTABLES, 7.

Description. See EXECUTIONS, 17.

Sufficiency of description of realty in proceedings relating to guardians' sales. *Hubermann v. Evans*..... 784

Directing Verdict. See TRIAL, 7, 8.

Discrimination. See WATER COMPANIES, 4.

Dismissal. See REVIEW, 17, 41.

Distribution. See EXECUTORS AND ADMINISTRATORS, 1. VOLUNTARY ASSIGNMENTS.

District Attorneys. See COUNTY ATTORNEYS.

District Irrigation. See IRRIGATION.

Easements. See RAILROAD COMPANIES, 1, 2.

Election of Remedies. See CRIMINAL LAW, 25.

A creditor who knowingly ignores a voluntary assignment and elects to enforce his claim by attachment, cannot, after an adverse judgment, share in the distribution of the estate of the assignor, where he willfully refused to file his claim within the time allowed by law. *Commercial Nat. Bank of Omaha v. Lipp*..... 599

Elections.

Publication.

1. The validity of an election does not depend upon the publication of the election notice. *State v. Lansing*..... 515
2. Where a particular office is to be filled, an election for that office is not invalid because the filling thereof was not included in the published notice of election. *Id.*

Returns.

3. As a general rule canvassers of election returns are not clothed with either discretionary or *quasi*-judicial powers. *State v. McFadden*..... 668

Elections—*concluded.*

4. Election returns consist of the certificate of election officers, the list of those voting, and the tally list of the number of votes cast for the different persons. *Id.* 669
5. The abstract of the vote should be made from the entire election returns. *Id.*

Canvass.

6. Canvassers should disregard an unauthorized alteration made in the return after it has been delivered to the county clerk, and make the count according to the original and true return. *Id.* 668
7. Where there is a discrepancy between the certificate of the election board and the tally list as to the number of votes cast for a candidate, the canvassers should determine which is correct, after comparing them with the list of voters returned, and declare the result accordingly. *Id.* 669
State v Eastman 675
8. Result of county seat election. *State v. Roper* 724, 730

Ballots.

9. Under sec. 145, ch. 26, Comp. Stats., the method of expressing the intention of the voter by a mark on the ballot opposite the name of the candidate of the voter's choice is exclusive. *Martin v. Miles* 772

Embezzlement.

1. The corporate character of the employer is an essential element of the offense, where employment by a corporation is charged in the information. *McAleer v. State* 116
2. In construing sec. 121, Criminal Code, the court *held* that the exception as to persons within the act relating to apprentices and those within the age of eighteen does not apply to officers, agents, attorneys, clerks, or servants of incorporated companies. *Id.*
3. Under an information charging embezzlement, proof of secreting money with intent to embezzle it is sufficient. *Id.*, 117
4. To constitute embezzlement under sec. 121, Criminal Code, it is essential that the money or thing embezzled should have come into the possession or care of defendant by virtue of his employment. *Id.*
5. A sheriff who converts to his own use money collected by virtue of his office is liable to a prosecution for embezzlement under sec. 121, Criminal Code. *Conley v. State* 187
6. In an information against a sheriff who sold land under foreclosure and converted to his own use, before the court made an order of distribution, the amount of the bid col-

Embezzlement—*concluded.*

lected, it is unnecessary to allege to whom the money belonged. *Id.*

7. Embezzlement is the fraudulent appropriation by an agent of the property of another. *Hamilton v. State*..... 285

8. The evidence will not sustain the conviction of an agent for embezzlement of his principal's property unless the facts warrant the conclusion that the property was converted with a felonious or fraudulent intent. *Id.*

9. Evidence that the relation of debtor and creditor existed between principal and agent, and that the latter was indebted to his employer when their account was balanced, is not alone sufficient to sustain a verdict finding the agent guilty of embezzlement. *Id*..... 284

10. A number of different felonies of the same general character may be charged in separate counts of an information. *Korth v. State* 632

11. The act to provide for depositing state and county funds in banks (Session Laws, 1891, p. 347, ch. 50) did not repeal sec. 124, Criminal Code, making an officer liable for embezzlement where he loans county funds. *Id*..... 633

Eminent Domain. See RAILROAD COMPANIES, 1, 2.

Equity. See ABATEMENT. ELECTION OF REMEDIES. JURY, 3.

Error Proceedings. See REVIEW.

Estoppel. See EVIDENCE, 2. PRINCIPAL AND AGENT, 3.

1. A party who signs in a trial court a stipulation providing that an interlocutory order may be reviewed on error, and that a judgment on the merits of the case may be entered in the error proceeding, is not thereby estopped from attacking the judgment of the appellate court for want of jurisdiction. *Johnson v. Parrotte*..... 52

2. A land-owner who states to an intending purchaser of a judgment that it is a lien on the former's land is, as against the latter, estopped from asserting the contrary. *Viergutz v. Aultman*..... 141

3. A failure to examine the books of a corporation does not estop a creditor from attacking, as fraudulent, the valuation fixed upon property exchanged for corporate stock. *Gilkie & Anson Co. v. Dawson Town & Gas Co*..... 334

4. A party entitled to an estoppel need not in all cases formally plead it. *City Nat. Bank of Hastings v. Thomas*..... 861

Evidence. See ADVERSE POSSESSION. BANKS AND BANKING, 5, 6. BURGLARY, 5, 6. CHATTEL MORTGAGES, 5. CONTEMPT, 7, 8. CONTRACTS, 3. CRIMINAL LAW, 13, 17, 20, 33. EMBEZZLEMENT, 3, 8, 9. FALSE IMPRISONMENT, 2. FALSE REPRESENTATIONS, 2. HOMICIDE, 3–7, 13–18. LARCENY, 1. MECHANICS' LIENS, 1. NEGLIGENCE. NEGOTIABLE INSTRUMENTS, 5. NOTICE. PRINCIPAL AND AGENT, 2–5, 8. QUIETING TITLE. RAPE, 1–4. REVIEW, 15. ROBBERY, 1. WITNESSES.

Ratification.

1. Ratification by a corporation of an unauthorized act of an agent or officer may be proved by a direct recognition of the act or by an inference from facts and circumstances. *Reed v. First Nat. Bank of Weeping Water* 168

Documents.

2. A party who asks his adversary to offer in evidence a written instrument cannot urge in the appellate court that it should have been excluded as incompetent. *Smith v. Brown* 230

Parol Evidence.

3. A representation or promise by which a party was induced to sign a written order for the purchase of goods may be proved by parol. *Bryant v. Thesing* 245
4. In an action upon a written subscription parol evidence is not admissible to add conditions to those expressed in the contract. *Goble v. American Nat. Bank of Kansas City* ... 891

Liquors.

5. Evidence as to intoxication and character of liquors purchased, in a suit on a saloon-keeper's bond. *Dolan v. McLaughlin* 449

Depositions.

6. A deposition may be used in the district court upon appeal from a justice where it was used below in the same case under a stipulation of the parties. *Keens v. Robertson*, 837

Hypothetical Questions.

7. In the trial of an action for personal injuries a hypothetical question containing inquiries relating to facts expressly assumed was *held* not prejudicial to defendant. *Chicago, R. I. & P. R. Co. v. Archer* 907
8. In the trial of an action for personal injuries a hypothetical question containing an inquiry as to the probable future duration of the injury was *held* a proper question to ask an expert. *Id.*

Exceptions. See BILL OF EXCEPTIONS. INSTRUCTIONS, 6. REVIEW, 41.

Executions. See CREDITORS' BILL, 2. ESTOPPEL, 2.

1. Duties of an officer holding an execution for the sale of real estate. *Burkett v. Clark* 466
2. The terms "execution" and "order of sale" are used interchangeably in the statutes relating to judicial sales of real estate. *Id.*
3. An order of sale should contain, or have attached thereto, a copy of the decree. *Id.* 467
4. Sec. 490 of the Code is a legislative sanction and adoption of the writ of *venditioni exponas*. *Id.* 468
5. By sec. 504 of the Code the legislature made the writ of *venditioni exponas* applicable to sales of real estate. *Id.*

Levy.

6. To levy an execution is to do the acts by which an officer sets apart and appropriates, for the purpose of satisfying the writ, a part or the whole of a defendant's property. *Id.*, 467
7. An actual levy need not be made by an officer holding an execution by which he is commanded to sell land under a decree in equity. *Id.*

Appraisement.

8. The copy of appraisement and application for, and certificates of, liens mentioned in sec. 491*d* of the Code must be deposited in the office of the clerk who issued the writ, before the sale is advertised. *Id.*
9. Objections that the property is appraised too high, or too low, should be made and filed, with a motion to vacate the appraisement, before the sale. *Id.*
10. An officer is required to make but one appraisement of real estate until it has been twice advertised and twice offered for sale, whether under an original or an *alias* writ. *Id.* 469
11. An officer has no authority to cause real estate to be reappraised until it has been twice advertised and twice offered for sale. *Id.*

Return.

12. The life of an execution from a court of record is limited by sec. 510 of the Code to sixty days from its date, and must be returned within that time, whether it be the original or an *alias* writ. *Id.* 468

Mortgaged Chattels.

13. A mortgagor's interest in chattels may be levied upon and sold under execution. *Gould v. Armagost* 897

Executions—*concluded.*

14. A purchaser of mortgaged chattels at an execution sale takes the property subject to all valid liens and rights of lienors at the time of the levy. *Id.*

Confirmation of Sales.

15. A district judge at chambers may, upon proper notice, confirm a judicial sale. *Beatrice Paper Co. v. Beloit Iron Works* 900

Recall.

16. For a sufficient reason a district court may recall an execution or order of sale and set aside an appraisement of property made thereunder. *Id.*
17. An omission in an execution or order of sale to describe all the property covered by the decree is a sufficient reason for recalling the writ and setting aside the appraisement. *Id* 901

Executors and Administrators. See WILLS.

1. An executor, as such, cannot appeal from a county court's final order of distribution where he is not pecuniarily affected by the order. *Merrick v. Kennedy* 264
2. An executor may appeal from a county court's adverse decision upon his petition to correct a mistake in the settlement of his former account. *Id.*
3. A county court may order distribution of personalty in the hands of an executor after payment of debts and charges of administration, though a suit, in which the executor has no interest, brought against him by a devisee for the construction of a devise of realty, is pending in the district court. *Id.*

Expert Witnesses. See EVIDENCE, 7, 8.

Factors and Brokers. See BANKS AND BANKING, 7. REAL ESTATE AGENTS.

False Imprisonment.

1. In a suit for false imprisonment, evidence to establish the previous good character of plaintiff is inadmissible where his character has not been assailed. *Diers v. Mallon* 122
2. The reasonableness of the prisoner's detention is a question for the court, where there is no conflict in the evidence as to the length of time and the circumstances under which the prisoner was held. *Id.*
3. Where the facts are in dispute, it is for the jury to determine the question as to the reasonableness of the detention. *Id.*

False Imprisonment—*concluded.*

4. The question as to whether the officer had reasonable ground to believe the person arrested had committed a felony is for the jury under proper instructions, where the evidence is conflicting. *Id.*
5. Where the facts are conceded or undisputed, probable cause is a question of law for the court to determine. *Id.*
6. Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing the accused guilty. *Id.*
7. Evidence *held* sufficient to justify a verdict for defendants. *Id.*

False Representations.

1. In an action for false representations it is not necessary to aver or prove that the party making them at the time knew they were untrue. *Johnson v. Gulick* 817
2. Under an allegation by defendant that the note sued on was procured by false representations, evidence that plaintiff previously made false statements to others in similar transactions is inadmissible. *Id.* 818

Fees. See SHERIFFS AND CONSTABLES, 7.

The legislature may, in the absence of a constitutional restriction, express or implied, increase or diminish the emoluments pertaining to any office of its own creation. *State v. Vincent* 408

Final Order. See JUDGMENTS, 4–7.

Forgery.

1. An information charging the forgery of an instrument and the fraudulent uttering of the same instrument by the same person charges one crime, and in case of conviction but one penalty can be inflicted. *Griffen v. State* 283
2. It is sufficient in an information for forgery to charge in general terms the intent to defraud. *Morearty v. State* 652
3. In a prosecution for forgery it is not necessary to state or prove an intent to defraud any particular person. *Id.*
4. An order to deliver to bearer a specific article of personal property may be the subject of forgery. *Id.*
5. Sufficiency of information without an averment as to extrinsic matter, where the subject of forgery is an order to deliver to bearer a specific article of personal property. *Id.*

Former Jeopardy. See CRIMINAL LAW, 9.

Fraud. See ABSTRACTS OF TITLE, 2. MANDAMUS, 11. REAL ESTATE AGENTS.

Fraudulent Conveyances. See ATTACHMENT, 1. CHATTEL MORTGAGES, 4, 5. CORPORATIONS, 7.

1. The failure of a purchaser of chattels to take possession does not render the sale conclusively void as against creditors, but casts upon him the burden of proving good faith. *Powell v. Yeazel*..... 225
2. In a contest between a purchaser of chattels and creditors of one under whom he claims title it is error to give instructions in which the sale is characterized as a "pretended sale," where the evidence tends to show a purchase in good faith for value. *Id.*
3. A finding for plaintiff in an action to cancel certain alleged fraudulent conveyances was held to be sustained by the evidence. *Monroe v. Reid*..... 317

Guardian and Ward.

1. By "a district court of competent jurisdiction," referred to in sec. 64, ch. 23, Comp. Stats., is meant the district court of the county in which the guardian was appointed. *Hubermann v. Evans*..... 784
2. A guardian's petition for a license to sell realty of the ward should describe all the land he owns, and especially the portion for sale; but a description which provides the means of identifying the property will be held sufficient when collaterally attacked. *Id.*
3. A general description of the premises in a petition to sell a ward's property, as all the real estate of the ward situate in this state, or in any particular county or city therein, is not void for indefiniteness or uncertainty. *Id*... 785
4. In proceedings to sell a ward's land the description need not be more specific, definite, and certain than that required in a conveyance of realty. *Id.*
5. The proceedings for authority for a guardian's sale will not be invalidated by reason of a manifestly false statement in the description of the land in the application and license, where the remainder of the description is sufficiently certain to enable the land to be located. *Id.*
6. Where a guardian's sale complies with all the requirements essential to its validity under sec. 64, ch. 23, Comp. Stats., defects and irregularities in the proceedings will not affect the title of a good-faith purchaser. *Id*..... 784

Guardians' Sales. See GUARDIAN AND WARD.

Harmless Error. See DAMAGES, 4. REVIEW, 50.

Homestead. See ESTOPPEL, 2.

Homicide. See STATUTES, 15.

1. The jury cannot fix the penalty where the murder was committed before ch. 44, Session Laws, 1895, went into effect. *Walker v. State* 25
2. Propriety of certain instructions stating the law as to a reasonable doubt. *Collins v. State* 38

Dying Declarations.

3. Under the circumstances stated in the opinion, a declaration by one fatally injured, that he had been accidentally shot by a person named, was *held* inadmissible, as neither a dying declaration nor part of the *res gestæ*. *Id.*
4. Whether the declaration of a person fatally injured is competent evidence, as being part of the *res gestæ*, must be determined from the facts and circumstances surrounding the case. *Id.*
5. To make dying declarations admissible, a statement by the injured person that he expects to die is unnecessary, where that state of the mind is shown by other testimony. *Id* 37
6. The declaration of a fatally injured person as to the cause of the injury, though not made in presence of the assailant and inadmissible as a dying declaration, may be competent evidence as part of the *res gestæ*, where it was made under such circumstances as to raise the presumption that it was an unpremeditated explanation. *Id* 38

Confessions.

7. Statements in the nature of confessions by the accused *held* voluntary and properly admitted in evidence. *Pflueger v. State* 493

Trial. Misconduct of Bystander.

8. In a trial for murder the mother of deceased exclaimed, in presence and hearing of the jury, that accused killed her son, and the record was *held* to be without reversible error where it showed that the prosecution was not responsible for her conduct; that the court, with consent of the county attorney, promptly removed her from the court room; and that she did not return. *Lindsay v. State* 177

Murder in Second Degree.

9. Sufficiency of evidence to sustain a conviction for murder in the second degree. *Collins v. State* 51

Homicide—*concluded.*

Manslaughter.

10. Where a felon can be arrested or his escape prevented without killing him, and he is slain by a sheriff, the latter is at least guilty of manslaughter. *Lamma v. State*..... 236

11. Evidence *held* sufficient to sustain a conviction of manslaughter. *Id.*

Insanity.

12. Where insanity did not originate after the commission of the offense, there is no requirement that its existence should be determined by a jury impaneled to determine whether or not the accused is of sound mind. *Walker v. State*..... 25

13. Insanity of accused at the time he committed the homicide will not be conclusively presumed from a previous order of the commissioners of insanity finding that he is a fit subject for treatment in an insane asylum. *Pflueger v. State*..... 493

14. Where insanity is the ground of defense in a prosecution for murder, a previous order of the commissioners of insanity finding that accused is a fit subject for treatment in an insane asylum, is, at most, evidence of the defense. *Id.*

15. Instructions defining insanity as a defense in a prosecution for murder examined and approved. *Id.*

16. The opinions of non-expert witnesses who knew accused for fifteen years and observed him almost daily for six weeks before he committed the homicide may be admitted as evidence upon the question of his sanity. *Id.*

17. In a prosecution for murder a non-expert witness, where the proper foundation has been laid, may state his opinion as to the sanity of accused and as to whether the latter was able to distinguish between right and wrong with respect to the crime charged. *Id.*

18. In a trial for murder, the defense being insanity, the court must impartially recite the material evidence offered by both parties, where it undertakes to detail in an instruction what evidence the jury may consider in determining whether accused knew the killing was wrong. *Williams v. State*..... 704

Husband and Wife.

1. Except in a suit for a divorce and in a proceeding for a crime committed by a husband against a wife, the latter cannot testify against the former. *Bohner v. Bohner*..... 204

2. Right of wife to sue her husband for slander is not decided. *Id.*..... 205

Husband and Wife—*concluded.*

3. Liability of wife who signed a note as surety for her husband. *McKinney v. Hopwood*..... 871
4. Evidence in an action against a married woman upon a note executed by her as surety for her husband *held* sufficient to sustain a verdict against her. *Spatz v. Martin*... 917

Imprisonment. See CRIMINAL LAW, 8.

Indictment and Information. See ARSON. CONTEMPT, 13. CRIMINAL LAW, 19, 26, 28. EMBEZZLEMENT, 6. FORGERY. ROBBERY.

1. Sufficiency of information for contempt for violating a temporary injunction. *O'Chander v. State*..... 10
2. Formal defect in an information will be deemed waived unless objected to before trial. *Zimmerman v. State*..... 14
3. Sufficiency of information set out in the opinion to charge defendant with practicing medicine without a license. *O'Connor v. State*..... 158
4. In an information it is necessary to state specifically the essential facts constituting the crime charged. *Id.*
5. Different criminal acts constituting parts of the same transaction, such as burglary with intent to steal particular property, and the stealing of such property, may be charged in the same indictment or count thereof. *Lawhead v. State*..... 607
6. A number of different felonies of the same general character may be charged in separate counts of an information, and it is within the discretion of the court to require the state to elect as to counts. *Korth v. State*..... 632
7. It is within the discretion of the trial court to permit the county attorney to indorse the names of additional witnesses on the information after the filing thereof and before trial. *Rauschkolb v. State*..... 658

Information. See INDICTMENT AND INFORMATION.

Injunction.

1. Where a bond for an appeal from an order dissolving an injunction omits a material, statutory condition, it does not operate as a supersedeas. *O'Chander v. State*..... 10
2. Where a bond for an appeal from an order dissolving an injunction does not on account of defects operate as a supersedeas, a party is not punishable for contempt for violating the injunction after it was dissolved. *Id.*
3. A judge of the district court who granted an injunction has jurisdiction, under sec. 260 of the Code, upon proper

Injunction—*concluded.*

information, to try and to sentence for contempt one who violated the injunction. *Zimmerman v. State* 14

4. Where one conveys a strip of land to a city for a street around a park upon condition that the grantee shall, at its own expense, improve the street and forever keep it in repair, injunction will lie to restrain a sale of the abutting property under an assessment for improving the street. *City of Omaha v. Megeath* 502

5. An order dissolving or modifying a temporary injunction is not reviewable until the final judgment has been entered in the case. *Bartram v. Sherman* 713

Insanity. See HOMICIDE, 12–18. WITNESSES, 4.

Insolvency. See PARTNERSHIP, 1.

Institution for Blind. See OFFICE AND OFFICERS, 2.

Instructions. See ATTORNEY AND CLIENT. DAMAGES, 3. HOMICIDE, 15. INTOXICATING LIQUORS. LARCENY, 2, 4, 8, 9. RAPE, 6. REVIEW, 18, 19.

Civil Cases. Practice.

1. Where the assignments of the motion for a new trial and petition in error are insufficient to challenge the correctness of the instructions, the charge of the court will not be considered on review. *Diers v. Mallon* 122

2. Discussion of instructions relating to measurement of hay sold by the cubic foot. *Smith v. Brown* 230

3. Where plaintiff fails to recover on his cause of action, his objections to instructions relating to the measure of damages will not be considered in the supreme court. *Olsen v. Meyer* 241

4. Instructions as to rights of defendant in a suit for the price of nursery stock where part of the stock tendered was not the kind ordered. *Bryant v. Thesing* 249

Original Instructions.

5. Case where the appellate court ordered the clerk of the district court to send up the original instructions. *Shafer v. Briggs* 446

Exceptions.

6. A general exception to the charge to a jury is unavailing unless the entire charge is erroneous. *Redman v. Voss* 512

Negligence.

7. Discussion of instructions in an action against a railway company for negligently setting out fire. *Union P. R. Co. v. Ray* 750

Instructions—*continued.*

Objections.

8. An objection that the court erred in giving or refusing instructions cannot be raised for the first time in the appellate court. *Keens v. Robertson* 837

Prejudice.

9. Where there is evidence tending to establish the *bona fides* of a conveyance, the validity of which is in issue, it is error to give instructions characterizing the transaction as a "pretended sale." *Powell v. Yeazel* 225

Application.

10. It is not reversible error to refuse to give an instruction not applicable to the evidence. *Brumback v. German Nat. Bank of Beatrice* 540

Assignments of Error.

11. An assignment that a group of instructions is erroneous will not be considered further than to ascertain that one of them was properly given. *Diers v. Mallon* 132
Kaufmann v. Cooper 644
McCormal v. Redden 777

12. On review an assignment of error as to refusing a group of instructions will be considered no further than to ascertain that one of them was properly refused. *Kaufmann v. Cooper* 644

Repetitions.

13. The court may refuse to give an instruction as to points already submitted. *Brumback v. German Nat. Bank of Beatrice* 543

14. The repetition of a proposition is not reversible error, unless it appears that the defeated party was prejudiced. *City Nat. Bank of Hastings v. Thomas* 861

Criminal Law. Repetitions.

15. In a criminal case the repetition of a proposition is not reversible error where it does not prejudice the rights of the accused. *Dixon v. State* 299

16. In criminal cases instructions requested by defendant may be refused where the propositions contained therein have already been given in proper language. *Ford v. State* 391
Lawhead v. State 608
Korth v. State 633

17. The giving of an erroneous instruction is reversible error, though a correct exposition of the law on the same subject has been given. *Metz v. State* 548

Construction.

18. Instructions should be construed together. *Ford v. State*, 391

Instructions—*continued.*

19. Where instructions, considered as a whole, properly state the law, they are sufficient. *Id.*

Reasonable Doubt.

20. Instruction relating to reasonable doubt. *Collins v. State*, 38 *Lawhead v. State* 607

Intoxication.

21. Instruction relating to defense of intoxication *held* correct. *Ford v. State* 391

Insanity.

22. Where the defense is insanity in a trial for murder, it is error for the court to group together in an instruction the important facts put in evidence by the state as to sanity of accused and omit all mention of that produced on behalf of the latter. *Williams v. State* 704

Requests.

23. In a criminal case the county attorney has the same right as counsel in a civil suit to request instructions. *Dixon v. State* 299

24. Instructions given at the request of counsel are entitled to the same weight as those given by the court of its own motion. *Id.*

Evidence.

25. An instruction by which it is sought to cover the whole case should include all the elements necessarily involved within the evidence. *McAleer v. State* 116

Language.

26. In a criminal case defendant cannot complain if the court charges the jury in the language of the information that all the allegations thereof are material, no technical or ambiguous language being used. *Dixon v. State* 299

Erasures.

27. It is error to modify by erasure or interlineation an instruction requested and give it to the jury as thus corrected. *Tracey v. State* 362

Burden of Proof.

28. An instruction in a criminal case is erroneous where it has the effect to shift the burden of proof from the state to the accused. *Haskins v. State* 888

Assumptions of Fact.

29. It is error to give an instruction which assumes a controverted material fact upon which the testimony is conflicting. *Metz v. State* 548

30. It is reversible error to give an instruction assuming the

Instructions—*concluded.*

existence of material facts which are unsupported by evidence. *Morearty v. State* 652
Williams v. State 704

31. It is an unwarranted assumption of the functions of the jury to instruct that the evidence establishes a controverted fact in issue. *Williams v. State* 704

32. It is error to give an instruction infringing on the province of the jury. *Haskins v. State* 888

Insurance.

1. A clause in a policy providing that the insurance shall be suspended during the non-payment of a premium note after maturity may be waived by the insurer. *McEvoy v. Nebraska & Iowa Ins. Co.* 782

2. The company may recover the full amount of a premium note upon default in payment thereof, though the note and policy contain a provision that the insurance shall be suspended during the non-payment of the note after maturity. *Id.*

Interest.

1. Where property is destroyed by the negligence of another, the owner is entitled to interest on its value from the time of its destruction. *Union P. R. Co. v. Ray* 750

2. In computing interest, the rate fixed by the contract should govern, where it provides for six per cent per annum until maturity and ten per cent thereafter. *Omaha Loan & Trust Co. v. Hanson* 870

Intoxicating Liquors. See CONTRACTS, 8.

1. Discussion of instructions relating to the liability of several saloon-keepers in an action on their bonds by a widow and her children for loss of support, where it was alleged that the death of the head of the family resulted from intoxication produced by the use of liquors purchased at different saloons. *Dolan v. McLaughlin* 449

2. In an action on a saloon-keeper's bond an instruction stating that liquor sold at a saloon is presumed to be intoxicating was held erroneous where it was shown that part of the liquor furnished was not intoxicating. *Id.* 450

Intoxication. See LARCENY, 4.

Irrigation.

1. Irrigation districts are public, rather than municipal, corporations, and their officers are public agents of the state. *Board of Directors of Alfalfa Irrigation District v. Collins* ... 411

Irrigation—*concluded.*

2. The district irrigation law (Session Laws, 1895, p. 269, ch. 70) is not unconstitutional on the ground that it authorizes the taking of property for private use; nor on the ground that the power conferred upon districts to levy taxes is without limitation; nor on the ground that it confers legislative power upon county boards. *Id.*

Jeopardy. See CRIMINAL LAW, 9.

Judges. See CONSTITUTIONAL LAW, 14. CONTEMPT, 7.

Judgments. See COUNTY COURTS. CRIMINAL LAW, 1, 3, 4, 8. ESTOPPEL, 2. EXECUTIONS, 3. MORTGAGES. PLEADING, 1. RES ADJUDICATA.

1. A judgment on the merits of a case is void where it was rendered by the supreme court in a proceeding in error from an order not final. *Johnson v. Parrotte* 52
2. A void judgment may be impeached in a direct or collateral action. *Id.* 53
3. A judgment cannot be attacked collaterally for irregularities where the court had jurisdiction. *Hough v. Stover* 588
4. An order setting aside a verdict and granting a new trial during the term at which the verdict was rendered, and before judgment, is not a final order. *Johnson v. Parrotte,* 52
5. An order continuing in force during the pleasure of the court a temporary injunction is not a final order. *Einspuhr v. Smith* 138
6. An order dissolving or modifying a temporary injunction is not a final order. *Bartram v. Sherman* 713
7. An order quashing a summons is not a final order. *Lewis v. Barker* 662
8. In an action for the price of beer, the admission of defendant that he obtained the goods and owes the sum claimed, and a verdict accordingly, do not amount to a confession of judgment, where there has been no ruling or finding upon his counter-claim for payment for a liquor license which plaintiff agreed to furnish. *Storz v. Finklestein* 577
9. In setting aside a money judgment the court cannot preserve the lien so as to make it attach to a subsequent judgment in the same case. *Farmers Loan & Trust Co. v. Killinger* 677
   Baker v. Killinger 682

Judicial Comity. See STARE DECISIS.

Judicial Sales. See EXECUTIONS. GUARDIAN AND WARD.

Jurisdiction. See ATTACHMENT, 4. CONTEMPT, 2. COUNTIES, 3, 4, 10, 11. REPLEVIN, 2. REVIEW, 10, 11.

Where the trial court is without jurisdiction it cannot be acquired in the appellate court by appeal. *Keeshan v. State*... 155

Jury. See CRIMINAL LAW, 31, 33.

1. Error cannot be predicated upon the overruling of a challenge for cause where the record fails to disclose that the complaining party exhausted his peremptory challenges. *Brumback v. German Nat. Bank of Beatrice*..... 540
2. Case where the *voir dire* examination showed the qualification of a juror, and he was permitted to serve, though he previously stated, through a desire to be excused, that he would send the defendant up for life. *Conley v. State*... ... 193
3. An action to set aside a fraudulent transfer of property and subject it to the payment of a judgment against the transferrer is equitable in its nature and may be tried to the court without a jury. *Monroe v. Reid*..... 316
4. It is not error for the trial court in a prosecution for a felony to order the sheriff to summon persons qualified to serve as jurors in anticipation of a demand for talesmen. *Pflueger v. State*..... 493

Justice of the Peace. See REPLEVIN, 2.

1. The only authority of a justice of the peace under sec. 17, Criminal Code, previous to the amendment thereof in 1893, was that of an examining magistrate. *Keeshan v. State*... 155
2. The jurisdiction of a justice of the peace extends only to offenses for which the penalty does not exceed three months' imprisonment or a fine not exceeding one hundred dollars. (Constitution, sec. 18, art. 6.) *Id.*

Laborers' Liens. See MECHANICS' LIENS.

Landlord and Tenant.

1. Generally, the relation of landlord and tenant is founded upon express contract, but such relation may be presumed from the conduct of the parties. *Steen v. Scheel*..... 252
2. Construction of a lease providing that the tenant should hold the property two years with the refusal of leasing it two years more on the same terms, and sufficiency of evidence to show that the relation of landlord and tenant terminated in two years from date of the contract. *Id.*
3. A promise by a landlord to pay for moving the goods of the tenant upon condition of the latter's yielding possession of the premises is not without consideration where the tenant performs his part of the contract. *Creighton v. Finlayson*..... 457

Larceny.

1. The effect to be given to the fact of defendant's possession, recently after the larceny, of the stolen property is a question for the jury to determine. *Dobson v. State*..... 250
2. In a prosecution for larceny as bailee an instruction which fails to charge that the original taking of the property must be felonious is not for that reason erroneous. *Ford v. State*..... 390
3. In a prosecution for larceny as bailee the gist of the offense is the conversion of the property without the knowledge and consent of the owner, with intent to steal it. *Id.*
4. Approval of instruction stating the rule relating to the defense of intoxication in a prosecution for larceny as bailee. *Id*..... 391
5. Evidence *held* sufficient to sustain a conviction of larceny as bailee. *Id.*
6. Evidence *held* sufficient to sustain a conviction. *Lawhead v. State*..... 608
7. Instruction relating to reasonable doubt *held* not erroneous. *Id.*
8. Where the jury has been instructed as to the distinction between grand and petit larceny, it is not error for the court to add that the jury has nothing to do with the question of the penalty. *Id.*
9. An instruction is erroneous where it infringes the province of the jury or has the effect to shift the burden of proof from the state to the accused. *Haskins v. State*..... 888

Lease. See LANDLORD AND TENANT. PENITENTIARY, 2.

Legislature. See OFFICE AND OFFICERS, 2.

Levy. See EXECUTIONS.

Libel and Slander.

Verbal slander is not a crime punishable in a prosecution by the state. *Bohner v. Bohner*..... 205

License. See GUARDIAN AND WARD, 2.

Liens. See ESTOPPEL, 2. JUDGMENTS.

Limitation of Actions. See MECHANICS' LIENS, 1. VOLUNTARY ASSIGNMENTS.

A suit against a national bank to recover the penalty, under sec. 5198, Rev. Stats., U. S., for taking usury must be brought in two years from the date of the usurious transaction. *Norfolk Nat. Bank v. Schwenk*..... 381

Malicious Prosecution.

As a rule, an action for malicious prosecution will not lie until the proceeding complained of has terminated in favor of the defendant therein. *Murphy v. Ernst* 1

Mandamus.

Validity of Statute.

1. The performance of a duty imposed by statute may be resisted upon application for *mandamus* on the ground that the statute is unconstitutional. *Van Horn v. State* 62

Parties.

2. Members of a board may join as relators in *mandamus* against the board. *Cooperrider v. State* 84
3. In *mandamus* against a board, where all the members are either relators or respondents, there is no defect of parties. *Id.*
4. In *mandamus* it is proper to name as respondent, and direct the writ against, the individual holding the office, in his official capacity. *Id.*

Supersedeas.

5. Where a peremptory writ has been awarded, allowance of a supersedeas rests within the discretion of the trial court. *Id.*

Water Companies.

6. *Mandamus* may issue to compel a water company to supply water to a customer who paid his rent, though he is insolvent and refuses to comply with a rule of the company requiring those in default to pay one dollar in addition to the rent. *American Water-Works Co. v. State* 195

State Auditor.

7. The writ may issue to compel the auditor of public accounts to register county bonds, where he bases his refusal upon an immaterial defect relating to antedates. *State v. Moore*, 590

Board of Purchase and Supplies.

8. *Mandamus* may be maintained on relation of the warden to require the board of purchase and supplies to provide the necessaries for the support of the state penitentiary. *State v. Holcomb* 612

Canvassing Boards.

9. *Mandamus* will lie to compel a canvassing board to reconvene and make a correct canvass of the election returns, where it adjourned without fully performing its duty. *State v. McFadden* 669

Relocation of County Seat.

10. An application for a *mandamus* to compel county officers to

Mandamus—*concluded.*

remove their offices from Indianola to McCook was *held* insufficient to state a cause of action where it failed to show that three-fifths of all the electors of the county voted to relocate the county seat. *State v. Roper* 724

11. On application for *mandamus* to compel the removal of a county seat pursuant to the declared result of a canvass of the vote on the question of relocation the court cannot go behind the returns. *Id.* 730

Elections.

12. A *prima facie* right established by a canvass of the vote at an election may be enforced by *mandamus*, but the court will not determine the ultimate right in such a proceeding. *Id.*

Power to Obey.

13. A writ should not issue where it is not within the power of respondents to perform the act sought to be enforced, or where the writ would otherwise be unavailing. *Farris v. State* 857

Manslaughter. See HOMICIDE, 10, 11.

Married Women. See HUSBAND AND WIFE, 4.

Master and Servant.

1. A person who contracted to perform labor or services for another is presumed to have done so in view of the risks ordinarily incident to the employment. *Dehning v. Detroit Bridge & Iron Works* 556
2. A servant who incurs the risk of appliances which, though dangerous, he may safely use by the exercise of reasonable skill and caution, does not, as a matter of law, assume the risk of injury from an accident resulting from the master's negligence. *Id.*

Maxims.

Where one of two innocent persons must suffer, it should be that one who misled the other into the contract. *Johnston v. Milwaukee & Wyoming Investment Co.* 490
City Nat. Bank of Hastings v. Thomas 867

Mechanics' Liens.

1. Where more than sixty days intervened between two dates when labor was performed for a contractor, the presumption is that it was performed under separate contracts; and the laborer, to secure a lien under the first contract, must file his statement within sixty days from the last day he labored under it. *Hansen v. Kinney* 208

Mechanics' Liens—*concluded.*

2. A laborer for a contractor should not be allowed to tack one contract to another and procure a lien for all the labor performed under both by filing his statement within sixty days from the last day he labored under the second contract. *Id.*

3. The contract for labor and material under which a subcontractor claimed a lien *held* not such a contract as is contemplated by sec. 3, ch. 54, Comp. Stats. *Specht v. Stevens*, 874

Misconduct of Attorney. See CRIMINAL LAW, 35, 36.

Mistake. See CHATTEL MORTGAGES, 3. RECORDS.

Money Had and Received. See ATTORNEY AND CLIENT, 2.

Month. See CONSTITUTIONAL LAW, 9, 10.

Mortgages. See ABSTRACTS OF TITLE, 2. EMBEZZLEMENT, 6.

Where land was deeded to one of several purchasers, and the former alone executed a mortgage and signed as trustee purchase-money notes, though he did not disclose the nature of the trust, a deficiency judgment may, upon foreclosure, be entered against the trustee but not against the other purchasers. *Farrell v. Reed* 258

Municipal Bonds. See MUNICIPAL CORPORATIONS, 2.

Municipal Corporations. See CORPORATIONS, 10. WATER COMPANIES.

1. Where one conveys a strip of land to a city for a street around a park upon the condition that the grantee shall, at its own expense, improve the street and forever keep it in repair, the abutting property of the grantor, or of subsequent purchasers, cannot be assessed for improvements of the street. *City of Omaha v. Megeath* 502

2. The validity of municipal bonds is not affected by an apparent irregularity which does not operate as an evasion of any provision of law, or a departure from the proposition ratified by the voters. *State v. Moore* 590

Murder. See HOMICIDE. STATUTES, 15.

National Banks. See LIMITATION OF ACTIONS.

Negligence. See MASTER AND SERVANT, 2. RAILROAD COMPANIES, 4, 5.

In a suit for negligently permitting a wall to remain unsupported, evidence by defendant may be admitted to show that during more than two years after it fell there was no storm equal in severity to that which caused the fall resulting in the death of plaintiff's intestate. *Olsen v. Meyer*, 240

Negotiable Instruments. See FALSE REPRESENTATIONS, 2. HUSBAND AND WIFE, 4. INSURANCE. USURY.

1. It was *held* that a surety on a note signed a renewal note in such a manner as to limit his liability and prevent a co-surety who signed both notes from enforcing contribution after payment of the renewal note. *Chapman v. Garber* 16
2. A note signed by one who adds "trustee" to his name without disclosing the nature of the trust is the personal obligation of the signer and not that of the *cestui que trust. Farrell v. Reed* 258
3. Verdict for plaintiff *held* to be sustained by the evidence in a suit on a note, where the sureties alleged that the principal delivered it without complying with an agreement to procure the signature of another surety. *Brumback v. German Nat. Bank of Beatrice* 540
4. An unkept agreement between a maker and several sureties, that their note shall not be delivered until signed by another surety, is no defense in a suit on the note, where the payee had no knowledge of the agreement. *Id.*
5. Where a note executed by a devisor was canceled after his death and a new one given by the devisees, a will showing that the devise was subject to the payment of debts and that the property was bequeathed to them, may, in an action on the note, be admitted in evidence under an issue as to consideration. *McCormal v. Redden* 776
6. Where one made a devise subject to his debts and signed a note which remained unpaid at the time of his death, the cancellation of the note and an extension of time to pay the sum due thereon are sufficient as a consideration for a note for that amount executed by the devisees. *Id.*
7. Possession of instruments negotiable by delivery is *prima facie* evidence of ownership. *City Nat. Bank of Hastings v. Thomas* 862
8. One purchasing negotiable paper at a bank from its president, payment being guarantied by him, is justified in relying on his representation that the paper belonged to the bank, and the latter is bound by such representation. *Id.*

New Trial. See CONTEMPT, 4. CRIMINAL LAW, 33. REVIEW, 36–41.

1. An objection that the verdict is for a sum greater than that prayed for should be raised by motion for a new trial. *Fox v. Graves* 813
2. It is too late to raise for the first time in a motion for a

New Trial—*concluded.*
new trial an objection that a litigant was forced to trial in absence of his witnesses. *Kreamer v. Irwin* 827

3. The granting of a new trial is largely within the discretion of the trial court. *School District v. Bishop* 850

Nonsuit. See PRACTICE, 2.

Notice. See NEGOTIABLE INSTRUMENTS, 4.

1. Before granting credit to a corporation, strangers are not chargeable with notice of the contents of the former's books. *Gilkie & Anson Co. v. Dawson Town & Gas Co* 334
2. Where a decree in equity has been entered, and the case remains on the docket pending proceedings to sell property, the parties, in the absence of a rule on the subject, are bound to take notice of all the orders entered in term time, which do not affect the original decree. *Beatrice Paper Co. v. Beloit Iron Works* 901

Oath of Office. See OFFICE AND OFFICERS, 5.

Objections. See CRIMINAL LAW, 12, 18. EXECUTIONS, 9. REVIEW, 4, 39. TRIAL, 5, 10, 12.

Office and Officers. See COUNTY ATTORNEYS. ELECTIONS. EMBEZZLEMENT, 11. MANDAMUS. PENITENTIARY. SHERIFFS AND CONSTABLES. TOWNSHIPS, 5.

1. Where the law prescribes the duties of a public officer and fixes his compensation, he must perform all the duties required by law for such compensation. *Heald v. Polk County* 28
   Ragoss v. Cuming County 36
2. Sec. 2, p. 149, Session Laws, 1875, providing for the election by the legislature of trustees for the institution for the blind, is repugnant to sec. 10, art. 5, of the constitution, and was thereby repealed. *State v. Holcomb* 88
3. The right to fees or salary earned by a public officer under existing laws is property which the legislature is powerless to destroy by a subsequent act altering the emoluments of such office. *State v. Vincent* 408
4. District irrigation officers are public agents of the state. *Board of Directors of Alfalfa Irrigation District v. Collins* ... 411
5. Secs. 7, 15, 17, ch. 10, Comp. Stats., require one who has been re-elected or re-appointed to an office to qualify by taking the oath and filing the bond in the same manner and within the same time as one for the first time elected. *State v. Lansing* 514
6. Sec. 15, ch. 10, Comp. Stats., providing that if any person

Office and Officers—*concluded.*

elected or appointed to an office shall neglect to have his bond executed, approved, and filed within the time limited by the act, his office shall become vacant, creates a condition precedent to the right of a person so elected or appointed to be inducted into office. *Id.*

7. Sec. 15, ch. 10, Comp. Stats., relating to official bonds, is self-executing, and unless a bond is filed within the time provided by law, the person elected loses all right to the office, and the vacancy may be filled without any previous judicial determination of the fact. *Id.*

8. A distinction exists between the ousting from office of one already inducted and the exclusion of one not yet inducted because of his failure to perform a condition precedent. *State v. Lansing* 515

9. Sec. 20, art. 3, of the constitution stating certain conditions under which offices become vacant does not prohibit the legislature from providing that vacancies in office may arise from other events. *Id.*

10. Officers may, without statutory authority, insert in a contract for erecting a public building and in the builder's bond a provision to secure payment of the claims of laborers and material-men. *Kaufmann v. Cooper* 644

Opinion Evidence. See HOMICIDE, 16, 17.

Orders of Sale. See EXECUTIONS.

Overdrafts. See BANKS AND BANKING, 4, 5.

Overruled Cases. See TABLE, *ante*, p. lvii.

Parol Evidence. See EVIDENCE, 3.

Parties. See MANDAMUS, 2–4. PLEADING, 10. REVIEW, 51.

Partnership. See CORPORATIONS, 1. PRINCIPAL AND SURETY, 3. REPLEVIN, 4.

1. On dissolution of an insolvent partnership, its assets will be treated as a trust fund for payment of partnership debts, and the creditors of one partner will not be permitted to divert the assets to the prejudice of the partnership creditors. *Perkins v. Butler County* 314

2. A partner cannot, without the consent of his copartners, apply firm property in satisfaction of his individual liabilities. *Cady v. South Omaha Nat. Bank* 763

Payment. See CORPORATIONS, 4–6.

Penalty. See LARCENY, 8.

Penitentiary.

1. In absence of statutory restriction it is within the power of the board of public lands and buildings to appoint an agent to lease or manage the convict labor and the shops and machinery within the penitentiary. *State v. Holcomb*, 614
2. The board of public lands and buildings may lease the convict labor, penitentiary grounds, shops, and machinery. *Id.*
3. It is within the power of the board of public lands and buildings to provide by contract for the feeding and clothing of convicts in the penitentiary as one of the considerations for the leasing of their labor. *Id.*
4. One who leases the convict labor and penitentiary grounds cannot, even with the assent of the board of public lands and buildings, usurp any of the functions of the warden as the keeper of the prison. *Id.*
5. The power conferred upon the board of public lands and buildings by sec. 17, Session Laws, 1877, p. 194, to lease the convict labor of the state for a period not exceeding ten years is not a continuing power, but was exhausted by a single user. *Id.* 613
6. The warden of the state penitentiary is the keeper of the prison, subject to the management and control of the board of public lands and buildings. *Id.*
7. Except when furnished by the contractor pursuant to an agreement with the state, the statutory method for procuring supplies for the penitentiary is exclusive, and the board of public lands and buildings cannot delegate to an agent of its own selection the disbursement of money appropriated for that purpose. *Id.* 614

Personal Injuries. See DAMAGES, 3.

Petition in Error. See REVIEW, 10.

Physicians and Surgeons.

1. Definition of practicing medicine. *O'Connor v. State*..... 158
2. It is unlawful for any person to practice medicine, surgery, or obstetrics, or any of the branches thereof, without first having obtained and registered a certificate from the state board of health. *Id.* 157
3. Sufficiency of information charging a person with practicing medicine without first having obtained and registered a certificate from the state board of health. *Id.* 158

Plea in Abatement. See CRIMINAL LAW, 19.

Pleading. See ACCORD AND SATISFACTION. BANKS AND BANKING, 6. CONTRACTS, 2. CORPORATIONS, 8, 12. CREDITORS' BILL, 1. CRIMINAL LAW, 10. GUARDIAN AND WARD, 2. MANDAMUS, 10. REPLEVIN, 2-4. REVIEW, 37. TRIAL, 9.

Damages.

1. A petition in an action for death by wrongful act will not support a judgment for damages where it fails to show that plaintiff sustained pecuniary injury. *Orgall v. Chicago, B. & Q. R. Co.* 4

Creditors' Bill.

2. An amended petition to set aside a fraudulent transfer of property and subject it to the payment of a judgment against the transferrer *held* not to state a different cause of action from that originally pleaded. *Monroe v. Reid*... 317

Demurrer.

3. A demurrer to a pleading does not admit the correctness of the conclusions of law drawn by the pleader. *American Water-Works Co. v. State* 194

Money Had and Received.

4. One who sues an attorney for money and alleges that it was, without a contract, paid by a judgment debtor to the attorney for the use of plaintiff and wrongfully retained, should recover the amount claimed or nothing, where defendant answers that he retained only the sum due him under a contract with plaintiff. *Wigton v. Smith* 461

Petition.

5. A plaintiff must recover, if at all, on the cause of action stated in his petition. *Id.* 465

Reply.

6. It is not the province of a reply to introduce a new cause of action. *Id.*

Confession and Avoidance.

7. Evidence to prove a defense in the nature of a confession and avoidance is incompetent under a general denial. *Keens v. Robertson* 837

New Matter.

8. New matter constituting a defense is not available under a general denial, but should be specially pleaded. *Home Fire Ins. Co. v. Berg* 600

Practice.

9. Case where a motion to strike out portions of a pleading was sustained after an answer to the merits had been filed. *State v. Roper* 739

Pleading—*concluded.*

Names of Parties.

10. The word "agent" following the name of plaintiff in a petition is *descriptio personæ.* *Thomas v. Carson* 765

Prayer.

11. The prayer is not a part of the statement of facts required to constitute a cause of action, and the omission of a demand for judgment does not subject the petition to general demurrer. *Fox v. Graves* 812

Inconsistent Counts.

12. Where a petition contains two inconsistent counts, one of them, on motion of defendant, may be stricken out or plaintiff required to elect as to the cause of action upon which he will proceed. *Id* 813

Motions.

13. A motion may properly be overruled where it cannot be allowed in substantially the same terms as requested. *Id.*, 817

Estoppel.

14. If the facts constituting an estoppel are in any way sufficiently pleaded, the pleader is entitled to the benefit of the law arising therefrom. *City Nat. Bank of Hastings v. Thomas* 862

Policemen. See SHERIFFS AND CONSTABLES, 3-6.

Possession. See FRAUDULENT CONVEYANCES, 1.

Practice. See BILL OF EXCEPTIONS, 3. CONTEMPT, 5. CRIMINAL LAW, 19, 29. EXECUTIONS, 9. JUDGMENTS, 9. MANDAMUS, 4. NOTICE, 2. PLEADING, 9, 12. REVIEW, 37. TIME. TRIAL, 7.

1. Agreements of counsel in regard to the trial of a cause may be set aside by the court. *Keens v. Robertson* 837
2. Under the Code a court has no authority to enter an involuntary nonsuit. *Zittle v. Schlesinger* 844

Preliminary Examination. See CRIMINAL LAW, 22.

Principal and Agent. See BANKS AND BANKING, 7. EMBEZZLEMENT. PENITENTIARY, 1.

1. The unauthorized acts of an agent or officer of a corporation may be ratified by it indirectly or by express action. *Reed v. First Nat. Bank of Weeping Water* 168
2. One dealing with the agent of a business corporation, in a matter relating to its business operations and not involving its corporate functions, is not charged with notice of its by-laws. *Johnston v. Milwaukee & Wyoming Investment Co* 480

Principal and Agent—*concluded.*

3. Where a principal placed an agent in such a situation that a person conversant with business usages is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority. *Id.*
4. Whether or not an act is within the scope of an agent's apparent authority is to be determined as a question of fact from all the circumstances of the transaction and the business. *Id.*
5. Evidence to be considered in determining an agent's apparent authority. *Id.*
6. The apparent authority of an agent which will bind his principal is such authority as the former appears to have by reason of his actual authority. *Creighton v. Finlayson*, 457
7. Sufficiency of evidence to sustain a finding that the agent of a landlord had authority to bind his principal by an agreement to pay the expense of moving the goods of a tenant from leased premises, upon consideration of the latter's yielding possession. *Id.* 458
8. From the fact that one brought suit for the price of beer agreed upon between himself and defendant, it was *held* that the latter was not a mere agent for the sale of plaintiff's beer. *Storz v. Finklestein* 579
9. Where one of two innocent persons must suffer through the misfeasance of the agent of one, that one who has placed the agent in a position to perpetrate the fraud must suffer. *City Nat. Bank of Hastings v. Thomas* 867

Principal and Surety. See ABSTRACTS OF TITLE, 2. HUSBAND AND WIFE, 4. NEGOTIABLE INSTRUMENTS, 4.

1. A surety who paid a renewal note executed only by himself and principal to discharge the original note signed by several co-sureties cannot enforce contribution against the latter. *Chapman v. Garber* 16
2. The sureties on a builder's bond were not released from liability for the payment of claims of laborers and material-men because the contractor was paid, on estimates as the work progressed, a greater percentage than that fixed by the contract. *Kaufmann v. Cooper* 644
3. The sureties on a builder's bond were not released from liability for the payment of claims of laborers and material-men because of the dissolution or change in the membership of the contracting firm. *Id.*

Principal and Surety—*concluded.*

4. Sufficiency of evidence to sustain a verdict for plaintiff who was surety on a note, who paid the debt and sued the principal makers, the defense being that the note was executed without consideration. *McCormal v. Redden*..... 776

Privileged Communications. See WITNESSES, 5.

Prize Fighting.

Lindsay v. State..... 180

Property. See OFFICE AND OFFICERS, 3.

Prosecuting Attorneys. See COUNTY ATTORNEYS.

Public Corporations. See WATER COMPANIES.

Public Policy. See CONTRACTS, 7.

Quantum Meruit. See ATTORNEY AND CLIENT, 2. CONTRACTS, 2.

Quieting Title. See ADVERSE POSSESSION.

A decree in equity establishing the execution and loss of a deed, neither acknowledged nor recorded, is competent evidence in an action to quiet title, where plaintiff purchased the land at sheriff's sale under a judgment against the grantee who subsequently executed a deed to defendant. *Connell v. Galligher*..... 372

Quo Warranto. See OFFICE AND OFFICERS, 8.

Railroad Companies. See CARRIERS.

1. A grant of a strip of land to a railroad company for right of way and for operating its railway only is a mere easement. *Blakely v. Chicago, K. & N. B. R. Co*..... 272
2. A land-owner who grants to a company an easement limited to a right of way for its road may recover compensation from another independent company, where the latter occupies a portion of such right of way and operates its road thereon solely under a conveyance from the former company. *Id.*
3. The transfer switch law (Session Laws, 1893, p. 142, ch. 11) is invalid, as violating the fourteenth amendment of the federal constitution providing that no state shall "deprive any person of life, liberty, or property without due process of law." *State v. Sioux City, O'N. & W. R. Co*..... 683
4. In an action against a railway company for negligently setting out fire, it was *held*, under the evidence referred to in the opinion, that the issue of negligence in the construction and maintenance of the engine causing the fire

Railroad Companies—*concluded.*

was properly submitted to the jury. *Union P. R. Co. v. Ray* 750

5. The owner of land near a railroad is not required to forbear the ordinary use of such land, nor to take unusual precautions to guard against the consequences of probable negligence of the railway company. *Id.*

Rape.

1. Where the prosecutrix is under the statutory age of consent, evidence of resistance or consent is immaterial. *Wood v. State* 58
2. During cross-examination of prosecutrix defendant may inquire as to the particular facts stated by her in complaining of the injury. *Id.*
3. Complaints of the injured person are admissible only as corroborative of her testimony, and are not, except when made *in extremis*, admissible as independent evidence of the offense. *State v. Meyers* 152
4. Where the injured person does not testify as a witness, her declarations relating to the alleged assault are not admissible in evidence, and the fact that she is incompetent to testify on account of imbecility is immaterial. *Id.*
5. The word "abuse," in the sense in which it is used in sec. 12, Criminal Code, is synonymous with the word "ravish." *Chambers v. State* 447
6. An instruction that "carnal abuse" does not necessarily mean abuse by sexual intercourse *held* erroneous. *Id.* 448

Ratification. See COUNTIES, 10, 11. PRINCIPAL AND AGENT, 1.

Real Estate Agents. See CONTRACTS, 2.

A broker does not earn his commission by producing one able to purchase only by a resort to an unlawful device, though a contract of sale is entered into which the principal refuses to consummate because it involves a fraud upon a third person. *Zittle v. Schlesinger* 844

Records.

A court has power to amend its records to conform to the facts, and may proceed upon any satisfactory evidence. *School District v. Bishop* 850

Reference.

1. Confirmation of referee's report. *Warren v. Raben* 115
2. Findings of fact reported by a referee stand in the same position as the verdict of a jury. *School District v. Bishop*, 850

Reference—*concluded.*

3. The supreme court will not reverse an order of the trial court setting aside the report of a referee in an action at law, where he failed to report any finding on material issues. *Id.*

Release. See CHATTEL MORTGAGES, 1-3.

Remedies. See ELECTION OF REMEDIES.

Remittitur.

Where the amount of excess of a verdict appears from the record for review, permission may be given to file a remittitur as a condition of affirming the judgment. *Creighton v. Finlayson*..... 460
McCormal v. Redden..... 776

Repeal. See STATUTES, 17, 18.

Replevin. See CHATTEL MORTGAGES, 8. SALES, 7.

1. It is error to instruct the jury that a purchaser who did not take possession cannot recover the property from an officer attaching it as that of the seller if the purchaser did not obtain possession before levy of the writ, though he had no notice of the seller's fraudulent intent. *Powell v. Yeazel*..... 225
2. In replevin before a justice of the peace the statutory affidavit is the basis of the action, is jurisdictional, and must be filed before issuance of the writ. *Commercial State Bank of Crawford v. Ketcham*..... 568
3. Defective statements in an affidavit for replevin may be amended so as to make clear or certain that which was indefinite or uncertain. *Id.*
4. Where a writ of replevin is issued in favor of a corporation or partnership upon the affidavit of an agent or officer whose allegations refer to the property rights involved as those of affiant, the affidavit cannot be amended so as to make it refer to such rights as those of plaintiff. *Id.*

Res Adjudicata. See BILL OF EXCEPTIONS, 3.

An order of a county board in allowing or rejecting claims against the county has the force of a judgment and is binding on the parties thereto unless vacated or reversed on appeal. *Heald v. Polk County*..... 29
Ragoss v. Cuming County..... 36
State v. Vincent..... 408

Res Gestæ.

Definition of term "*res gestæ.*" *Collins v. State*..... 38

Return. See EXECUTIONS, 12.

Review. See APPEAL BONDS. BILL OF EXCEPTIONS. CONTEMPT, 3–6. CONTINUANCE. CRIMINAL LAW. DAMAGES, 4. INJUNCTION, 1, 2. INSTRUCTIONS. JURY, 1. REMITTITUR. TRIAL, 1.

1. The supreme court will not review a judgment of the district court upon allegations of error where the successful party is entitled to judgment on the pleadings. *Orgall v. Chicago, B. & Q. R. Co* 4
2. Where the trial court is without jurisdiction it cannot be acquired in the appellate court by appeal. *Keeshan v. State* 155
3. A party who asks his adversary to offer in evidence a written instrument cannot urge in the appellate court that it should have been excluded as incompetent. *Smith v. Brown* 230
4. One who knows of irregularities in reviewing a verdict, and does not at the time object, cannot, for the first time, complain of such irregularities in the appellate court. *Jones v. Driscoll* 575
5. Where an appeal to the district court is taken in time, and both parties appear and without objection file pleadings, it is then too late for the appellee to object to the validity of the appeal. *Claflin v. American Nat. Bank of Omaha* 884
6. The rules for reviewing an order setting aside a verdict will be observed in reviewing the action of the district court in setting aside a referee's report. *School District v. Bishop* 850
7. In an error proceeding from the confirmation of a judicial sale the supreme court will not review a question involving the merits of the original decree. *Beatrice Paper Co. v. Beloit Iron Works* 900

Transcripts.

8. The transcript for review imports verity and if erroneous must be corrected below. *Ford v. State* 390
9. In an error proceeding in the district court recitals in the transcript from the inferior court should prevail over a contradictory statement in an affidavit. *Jones v. Driscoll*, 575
10. The supreme court does not acquire jurisdiction of an appeal unless the transcript filed therein has been properly authenticated by the clerk of the district court. *McDonald v. Grabow* 406
    Otis v. Butters 492

Review—*continued.*

11. A stipulation by the parties that a transcript for review contains all the proceedings below cannot be substituted for a certificate of the clerk of the district court. *McDonald v. Grabow* 406

12. Reference to an order of the supreme court directing the clerk of the district court to send up the original instructions, and examination of the instructions in the appellate court. *Shafer v. Briggs* 445

Bill of Exceptions.

13. A stipulation of facts filed below, after judgment, cannot be considered upon review of the judgment. *Bowen v. State* 23

14. Allegations of error based on the existence of facts will not be considered in absence of a showing that evidence was introduced below. *Id.*

15. Affidavits used as evidence below will not be examined on review unless preserved by a bill of exceptions. *Korth v. State* 631

16. Error in reading a deposition to the jury will not be *held* prejudicial where it was not preserved by a bill of exceptions. *Keens v. Robertson* 837

17. Where there was a stipulation for a continuance, and a dismissal at the same term, the order of dismissal cannot be reviewed in absence of a record showing the grounds of the court's ruling. *School District v. Bishop* 850

18. The action of the court in refusing instructions cannot be reviewed in absence of a bill of exceptions. *City Nat. Bank of Hastings v. Thomas* 861

19. In reviewing the charge to the jury, where there is no bill of exceptions, the court can only inquire as to whether the instructions could properly be given under the pleadings. *Id.*

20. Where the bill of exceptions has been quashed and the petition in error fails to present a question for review, the judgment below may be affirmed. *Sweeney v. Ramge* 919

Final Orders.

21. An appeal cannot be prosecuted from the district court to the supreme court until a final order has been entered below. *Einspahr v. Smith* 138

22. An order continuing in force during the pleasure of the court a temporary injunction is not a final order. *Id.*

23. An order setting aside a verdict and granting a new trial during the term at which the verdict was rendered cannot

Review—*continued.*

be made the basis of an error proceeding. *Johnson v. Parrotte* 52

24. An order sustaining a motion to quash a summons is not reviewable until followed by a final judgment of dismissal. *Lewis v. Barker* 662

25. A party not injuriously affected by a county court's final order of distribution in the settlement of an estate cannot appeal. *Merrick v Kennedy* 264

26. An order to be reviewable on error or appeal must dispose of the merits of the case. *Bartram v. Sherman* 713

Briefs.

27. Where a statute is attacked as unconstitutional, the section of the constitution infringed by the law should be pointed out in the brief. *Boyes v. Summers* 308

28. Errors assigned but not argued are deemed waived. *Johnson v. Gulick* 817

29. Assignments of error not noticed in plaintiff in error's brief are waived. *Kaufmann v. Cooper* 645

Assignments of Error.

30. Counsel should not present in the supreme court unfounded assignments of error. *Wood v. State* 61

31. Errors as to giving and refusing instructions should be separately assigned. *Kaufmann v. Cooper* 644

32. Allegations of error relating to rulings on evidence will be disregarded where the testimony involved is not pointed out in the petition in error. *Redman v. Voss* 512
Brumback v. German Nat. Bank of Beatrice 546

Instructions.

33. An allegation of error as to giving or refusing a group of instructions is insufficient. *Grossman v. State* 22

34. Counsel should not indulge in captious or unjust criticism of the instructions of the trial court. *Shafer v. Briggs* 445

35. Where plaintiff fails to recover on his cause of action, his objections to instructions relating to the measure of damages will not be considered. *Olsen v. Meyer* 241

Motion for New Trial.

36. An objection as to admission of incompetent testimony will not be considered where the point is not raised by motion for a new trial or petition in error. *Viergutz v. Aultman* 143

37. A record may be reviewed to ascertain whether the pleadings support the judgment below, though there was no

Review—*continued.*

motion for a new trial. *Hansen v. Kinney* 207
Farris v. State 857

38. Where plaintiff in error did not file a motion for a new trial the court will not go back of the verdict of the jury or findings of the court to review the proceedings below. *Hansen v. Kinney* 207

39. An objection that the verdict is for a sum greater than that prayed for will be deemed waived unless raised by motion for a new trial. *Fox v. Graves* 813

40. A stronger showing is required to reverse an order allowing a new trial than to reverse one denying it. *School District v. Bishop* 850

41. A judgment of the district court dismissing an appeal may be reviewed without a motion for a new trial or an exception to the ruling. *Claflin v. American Nat. Bank of Omaha* 884

Sufficiency of Evidence.

42. Where there is no error in the proceedings, and the verdict is sustained by sufficient evidence, the judgment may be affirmed. *Shafer v. Briggs* 445

43. Findings of a jury sustained by sufficient evidence will not be disturbed on review. *Kaufmann v. Cooper* 644

Conflicting Evidence.

44. Questions of fact determined upon conflicting evidence will not be reviewed in the supreme court. *Hough v. Stover* 588
Haubrock v. Loeb 868

Appeal and Error.

45. Where the judgment below is appealable, the party aggrieved may have it reviewed by petition in error or appeal, but cannot pursue both remedies. *Beatrice Paper Co. v. Beloit Iron Works* 900

46. A party abandons his right to prosecute an appeal where he files a petition in error. *Monroe v. Reid* 316
Beatrice Paper Co. v. Beloit Iron Works 900

47. A party must elect as to whether he will prosecute a proceeding in error or an appeal. *Monroe v. Reid* 316

Harmless Error.

48. Admission of incompetent testimony is not ground of reversal in a case tried to the court without a jury. *Viergutz v. Aultman* 143

49. A judgment should not be reversed for error not prejudicial. *Tracey v. State* 362

Review—*concluded.*

50. A nonsuit and judgment of dismissal, though erroneous, will not be reversed where defendant was entitled to have a verdict directed. *Zittle v. Schlesinger*..... 844

Parties to Appeal.

51. One of several defendants having separate and distinct defenses may prosecute an appeal to the district court without joining his co-defendants. *Claflin v. American Nat. Bank of Omaha*..... 884

52. Where the interests of several defendants are inseparably connected, an appeal by one defendant brings up the entire case. *Id.*

Robbery.

1. In a prosecution for robbery everything said and done by the prosecuting witness and accused at the time of the assault is competent evidence. *Tracey v. State*..... 362
2. An averment of the information as to the character of the money taken is surplusage and need not be proved. *Id.*
3. In pronouncing judgment upon one convicted of robbery the court may consider all the circumstances in evidence under which the crime was committed. *Id.*

Sales. See ATTACHMENT, 1. CONTRACTS, 8. FRAUDULENT CONVEYANCES.

1. On a contract for the delivery of goods the vendee is not entitled to recover when delivery was tendered at the time for performance and the tender kept good. *Mayer v. Ver Bryck*..... 221
2. Instructions and evidence as to measurement of hay sold by the cubic foot. *Smith v. Brown*..... 230
3. The weight of hay is immaterial where it is sold by the cubic foot. *Id.*
4. An order for nursery stock stating the price in a lump sum is not severable, and the orderer is not obliged to receive the stock where a material portion of it is not of the kind or quality ordered. *Bryant v. Thesing*..... 244
5. In a suit to recover the price of nursery stock defendant may show that the stock was not the kind and quality ordered, though he did not refuse it on that ground when delivery was tendered, but based his refusal upon a cancellation of the order. *Id.*
6. A purchaser cannot assert a greater interest in personalty than the seller had, unless the real owner is estopped from asserting title. *Campbell Printing Press & Mfg. Co. v. Dyer*, 830

Sales—*concluded.*

7. Under a contract that a buyer is not to acquire title until he pays the purchase price, it was *held* that one to whom the buyer mortgaged the property was not entitled to possession as against the conditional seller. *Id.*

8. An abandonment of a contract of sale may be effected by acts of one of the parties inconsistent with its existence and acquiesced in by the other party. *Hall v. Eccles*, 880

Satisfaction. See CHATTEL MORTGAGES, 1.

School Lands.

Where a lease authorized by statute allows the lessee to select one of the arbitrators to reappraise the land at the end of five years, the legislature cannot take away that right by a subsequent act. *State v. Thayer*..... 137

Schools and School Districts.

A district school board should not ordinarily be mandamused to purchase text-books, where it may lawfully apply the available funds to other purposes. *Farris v. State*..... 857

Seals. See CORPORATIONS, 10.

Sentence. See CRIMINAL LAW, 1, 3, 4.

Set-Off. See USURY, 1.

Set-Off and Counter-Claim. See CORPORATIONS, 12. TRIAL, 9.

1. In a suit for rent a finding for the tenant was sustained, where he pleaded a counter-claim based on an agreement by the landlord to pay the expense of moving the property of the tenant upon condition of the latter's yielding possession of the leased premises. *Creighton v. Finlayson*... 457

2. A cause of action arising upon contract may properly be pleaded by way of set-off in an action for damages. *Jones v. Driscoll*..... 575

Sheriffs and Constables. See ATTACHMENT, 4. EXECUTIONS.

1. A sheriff is an officer elected to an office of public trust. *Conley v. State*..... 187

2. A sheriff who converts to his own use money collected by virtue of his office may be prosecuted for embezzlement under sec. 121, Criminal Code. *Id.*

3. In absence of statutory authority an officer may arrest without a warrant, and detain for a reasonable time, one he has reason to believe guilty of a felony. *Diers v. Mallon*... 121

4. An officer without a warrant may be justified in making

Sheriffs and Constables—*concluded.*

an arrest where he acts in good faith and has reason to rely upon information that accused is guilty of a felony, though the officer has no personal knowledge of the facts, and the prisoner's innocence should subsequently be established. *Id.*

5. An officer, in arresting or preventing the escape of a felon, may use such force as is reasonably necessary, even to taking life. *Lamma v. State* 236
6. Where a felon can be arrested, or his escape prevented without killing him, and he is slain by a sheriff, the latter is at least guilty of manslaughter. *Id.*
7. In construing sec. 42, ch. 28, Comp Stats., it was *held* that sheriffs are not liable absolutely for the payment of the salaries of their deputies, and that such salaries are to be paid out of the fees earned and collected. *Wolfe v. Kyd*... 292
8. It is the duty of an officer under a writ of attachment to take possession of personal property, keep it under his control, and have it forthcoming to answer the judgment of the court; and he may lawfully return as costs the reasonable and necessary expenses incurred. *Deering v. Wisherd*... 720

Slander. See LIBEL AND SLANDER.

Stare Decisis.

1. Duty of state courts to follow decisions of the supreme court of the United States where the latter is the final arbiter. *Norfolk Nat. Bank v. Schwenk*..... 389
2. The construction of provisions of the federal constitution by the supreme court of the United States should be followed by state courts in matters where such provisions are applicable. *State v. Sioux City, O'N. & W. R. Co*..... 682

State and State Officers. See OFFICE AND OFFICERS. PENITENTIARY.

State Treasurer.

The state treasurer, not the chairman of the board of public lands and buildings, is charged with the duty of receiving and disbursing public funds, and the latter is not chargeable upon his bond with money of which the former is the lawful custodian. *State v. Holcomb*..... 615

State University.

Ch. 65, Session Laws, 1895, providing for a uniform system of vouchers, applies to claims against the state university. *State v. Moore*..... 373

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See CONSTITUTIONAL LAW. COUNTIES, 8-10. EMBEZZLEMENT, 11. FEES. OFFICE AND OFFICERS, 2, 9. TABLE, *ante*, p. lxiii.

Conflict.

1. Where different parts of the same statute are conflicting, the last words stand, and those in conflict therewith are disregarded. *Van Horn v. State* 63

Amendments.

2. Sec. 11, art. 3, of the constitution, relating to amendments, has no application to acts complete in themselves, and not in their effect amendatory. *Id.*

Titles of Bills.

3. Whether or not a bill contains more than one subject is to be determined by examining the substance of the bill. *Id.*, 62

4. Ch. 28, Session Laws, 1895, providing for township organization, has but one subject, which is clearly expressed in its title. *Id.* 63
Cooperrider v. State 85

5. Sec. 5, ch. 66, Session Laws, 1895, providing for the leasing of convict labor, is not within the title of the act, and is, therefore, in conflict with the provision of sec. 11, art. 3, of the constitution, requiring the subjects of acts to be clearly expressed in their titles. *State v. Holcomb* 613

Uniformity.

6. Where a law is general and uniform throughout the state, acting alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, it is not objectionable as wanting in uniformity of operation. *Van Horn v. State* 63

Special Provisions.

7. Special provisions of a statute in regard to a particular subject control general provisions. *Merrick v. Kennedy* ... 264

Construction.

8. Construction of sec. 42, ch. 28, Comp. Stats., in relation to compensation of certain county officers and their deputies. *Wolfe v. Kyd* 292

9. Where, by any reasonable construction, the subject-matter of legislation can be held to be for the welfare of the public, the will of the legislature should prevail over any mere doubt of the court. *Board of Directors of Alfalfa Irrigation District v. Collins* 411

District Irrigation.

10. The district irrigation law (Session Laws, 1895, p. 269,

Statutes—*concluded.*

ch. 70) does not conflict with the constitution by authorizing the taking of property for private use. *Id.* 412

11. The district irrigation law is not unconstitutional on the ground that it confers power upon districts to levy taxes without limitation. *Id.*

12. The district irrigation law does not conflict with the constitution on the ground that it confers legislative power upon county boards. *Id.*

Time of Going Into Effect.

13. The term "calendar month," as used in sec. 24, art. 3, of the constitution, denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. *McGinn v. State* 427

14. The provision of sec. 895 of the Code, for the exclusion of the first day in computing the time within which an act is to be done, applies to the construction of statutes. *Id.*

15. The act approved April 8, 1893 (Session Laws, p. 385, ch. 44), amending sec. 3 of the Criminal Code so as to fix the penalty for murder in the first degree at death or imprisonment for life, in the discretion of the jury, took effect July 9, 1893. *Id.*

Penitentiary.

16. The provision of sec. 32, Session Laws, 1870, p. 31, that all transactions and dealings of the state penitentiary shall be conducted in the name of the warden, conflicts with the act defining the duties of the board of public lands and buildings and was thereby repealed. (Session Laws, 1877, p. 188, sec. 19.) *State v. Holcomb* 612

Repeal.

17. A statute will not be construed as repealing by implication another statute, unless the repugnancy between the two is plain and unavoidable. *Beatrice Paper Co. v. Beloit Iron Works* 901

18. Ch. 46, p. 226, Session Laws, 1881, granting certain powers to district judges at chambers, did not repeal sec. 498 of the Code, nor sec. 39, p. 90, Session Laws, 1879, relating to the confirmation of judicial sales. *Id.*

Stenographers. See BILL OF EXCEPTIONS, 3.

Stockholders. See CORPORATIONS.

Subrogation.

A purchaser of mortgaged chattels at execution sale is subrogated to the mortgagor's rights in the property at the time of the levy. *Gould v. Armagost* 897

Subscriptions. See CORPORATIONS, 3, 5, 11, 12. EVIDENCE, 4.

Summons. See ATTACHMENT, 4.

Supersedeas. See APPEAL BONDS. INJUNCTION, 1, 2.

Supervisors. See TOWNSHIPS.

Supreme Court.

The supreme court is one of limited original and appellate jurisdiction. *Johnson v. Parrotte*..... 51

Tacking. See MECHANICS' LIENS.

Talesmen. See JURY.

Taxation. See CONSTITUTIONAL LAW, 7, 8. INJUNCTION.

1. The power of taxation has been committed by the people to the discretion of the legislature, and for an abuse of that trust the remedy is by appeal to the people in the manner prescribed by law. *Board of Directors of Alfalfa Irrigation District v. Collins*..... 412
2. The provision of sec. 1, art. 9, of the constitution, for uniform taxation, relates to the revenue required for general purposes of state and municipal government, and has no application to assessments for local improvements. *Id.*

Time. See EXECUTIONS, 12. VOLUNTARY ASSIGNMENTS.

The provisions of sec. 895 of the Code, for the exclusion of the first day in computing the time within which an act is to be done, applies alike to the construction of statutes and to matters of practice. *McGinn v. State*..... 427

Townships.

1. Township organization. *Van Horn v. State*..... 62
2. Sec. 5, art. 10, of the constitution confers upon the people by vote the power of adopting and discontinuing township organization, but leaves to the legislature the power of providing the details of such organization. *Id.*
3. Where supervisors are local officers, their number and the manner of their election are subjects connected with township organization, and not solely related to county government. *Id.*
4. The legislature may amend the law in regard to township organization without referring the change to a vote of the people. *Id.*
5. The legislature, when it reduces the number of officers, may provide that those already elected shall cast lots to determine whose terms shall be discontinued, and may provide for filling vacancies provisionally by appointment. *Id.*

Transcripts. See CRIMINAL LAW, 21. REVIEW, 8-12.

Transfer Switches. See RAILROAD COMPANIES, 3.

Trial. See CONTINUANCE, 1. CRIMINAL LAW. EVIDENCE, 2. FALSE IMPRISONMENT, 4, 5. HOMICIDE, 8, 12. INSTRUCTIONS. JURY. NEW TRIAL. RAPE, 2. REVIEW, 48, 50.

1. In a trial to the court without a jury the admission of incompetent evidence is not reversible error. *Monroe v. Reid*, 317

Offer of Proof.

2. Where a question is excluded the offer of proof must correspond to the question. *Keens v. Robertson*..... 837
3. An order sustaining an objection to a question will not be held erroneous in absence of a statement, or proof, as to the fact in issue. *Gilkie & Anson Co. v. Dawson Town & Gas Co*..... 351
   Keens v. Robertson..... 837

Verdict.

4. Irregularities in receiving a verdict should be objected to at the time they occur. *Jones v. Driscoll*..... 575
5. Objections to the form of verdict should be made at the time it is rendered. *Brumback v. German Nat. Bank of Beatrice*..... 540
6. It is not error to refuse to submit a form of verdict not responsive to all the issues in the case. *Id.*

Directing Verdict.

7. It is the duty of the trial court to direct a verdict for the plaintiff where the evidence will not support a finding for the defendant. *Dehning v. Detroit Bridge & Iron Works*... 556
   Hards v. Platte Valley Improvement Co..... 709
   Zittle v. Schlesinger..... 844
8. Where the evidence is sufficient to sustain a finding for plaintiff it is error to direct a verdict for defendant. *McKinney v. Hopwood*..... 871

Question Reserved.

9. The question whether or not a recovery should be had by one of the parties to an unlawful contract may remain open for determination upon the pleadings, in a suit to recover the price of beer, after the jury finds for plaintiff pursuant to an admission that defendant obtained the goods and owes the sum claimed, where there has been no ruling or finding upon the latter's counter-claim for payment for a license which plaintiff agreed to furnish. *Storz v. Finklestein*..... 580

Trial—*concluded.*

Absence of Witnesses.

10. An objection to proceeding with a trial on account of the absence of witnesses should be made when the case is called. *Kreamer v. Irwin* 827

Stipulations of Counsel.

11. The court may set aside stipulations of counsel in regard to the trial of a cause. *Keens v. Robertson* 837

Hypothetical Questions.

12. An objection that a hypothetical question put to an expert witness is incompetent, immaterial, and irrelevant, is too general to raise the point that the question involves erroneous statements of evidence. *Chicago, R. I. & P. R. Co. v. Archer* 907

13. It was *held* not error for the court, in overruling an objection to a hypothetical question, to remark, "I think that is a fair epitome of the evidence already given in the case." *Id.*

Trover and Conversion. See EMBEZZLEMENT.

Trusts. See CORPORATIONS, 3, 7. MORTGAGES. PARTNERSHIP, 1.

1. Trust funds do not lose their character as such by being deposited in bank by the trustee to his own account. *Cady v. South Omaha Nat. Bank* 756

2. So long as trust funds can be traced and distinguished in the hands of the trustee or his assigns, they remain subject to the trust. *Id.*

Ultra Vires. See COUNTIES, 10, 11.

University of Nebraska. See VOUCHERS.

Usury.

1. Usury paid to a national bank cannot be set off in a suit by it, commenced more than two years after such payment, to recover the principal debt. *Norfolk Nat. Bank v. Schwenk* 381
   Lanham v. First Nat. Bank of Crete 663, 668

2. Where a national bank charges for a loan usurious interest which is included in the note, in an action to enforce the contract the entire interest is forfeited. *Norfolk Nat. Bank v. Schwenk* 381

3. Where illegal interest has been received by a national bank, the borrower may recover double the amount of interest actually paid. *Id.*

Usury—*concluded.*

4. A contract providing for interest at a certain rate until maturity and for a higher lawful rate thereafter is not usurious. *Omaha Loan & Trust Co. v. Hanson* 870

Vacancies. See OFFICE AND OFFICERS, 6-9.

Variance. See CRIMINAL LAW, 19.

Venditioni Exponas. See EXECUTIONS, 4, 5.

Vendor and Vendee. See ESTOPPEL, 2. GUARDIAN AND WARD, 6. MORTGAGES. REAL ESTATE AGENTS.

Venue.

Correctness of ruling where a change of venue was demanded and refused in a trial for murder. *Lindsay v. State*..... 177

Verdict. See TRIAL, 4-8.

Voluntary Assignments.

One who, through his own fault and neglect, fails to present his claim for allowance within the time fixed by law, in conformity with the order of the county court, is forever barred. *Commercial Nat. Bank of Omaha v. Lipp*..... 595

Vouchers.

Chapter 65, Session Laws, 1895, providing for a uniform system of vouchers, applies to claims against the state university. *State v. Moore* 373

Waiver. See CONTEMPT, 5. CRIMINAL LAW, 9. INSURANCE, 1. PLEADING, 9. REVIEW, 4, 28, 29, 39.

Warden. See PENITENTIARY.

Wards. See GUARDIAN AND WARD.

Water Companies.

1. A water company with a franchise from a city must supply water to all the inhabitants at a reasonable and uniform price. *American Water-Works Co. v. State*..... 194
2. A water company may adopt reasonable and just rules for its convenience and security, and may refuse to furnish water to one who fails to comply with such rules. *Id.*
3. Rules of a water company, to be enforceable, must be lawful and just and not discriminatory. *Id*..... 195
4. The provision of a rule applying to a customer in default, which requires him to pay, as a condition to his right to be supplied with water, the sum of one dollar in excess of the rent, is unreasonable, discriminatory, and void. *Id.*

Weights and Measures. See CONTRACTS, 3.

Wills. See NEGOTIABLE INSTRUMENTS, 5, 6.

A suit by an heir and devisee against an executor for the construction of a clause in a will devising real estate may be dismissed, where it appears that the latter has no interest in the adjudication and that an interpretation will not assist him in administering the estate. *Kennedy v. Merrick* 260

Witnesses. See CONTEMPT, 9-12. CRIMINAL LAW, 18, 20. EVIDENCE, 7, 8. HOMICIDE, 16, 17. HUSBAND AND WIFE, 1. INDICTMENT AND INFORMATION, 7.

1. Whether the rule limiting the re-examination of a witness to the points arising on cross-examination should be enforced rests with the trial judge. *Collins v. State* 37
2. A witness on redirect examination may make clear matters left obscure or incomplete by his answers on cross-examination. *Id.*
3. Where defendant in a prosecution for abortion testifies in chief that his acquaintance with the woman was not intimate, it may be shown by him, on cross-examination, that he had been criminally intimate with her. *Dixon v. State*, 299
4. One who by reason of insanity or imbecility is unable to comprehend the obligation of an oath, or to understand and answer questions, is incompetent to testify as a witness. *State v. Meyers* 152
5. Information voluntarily entrusted to an attorney at law, where the relation of attorney and client does not exist, is not a privileged communication. *Home Fire Ins. Co. v. Berg* 600

Words and Phrases.

1. "Abuse." *Chambers v. State* 447
2. "Calendar month." *McGinn v. State* 427
3. "Corn-crib." *Metz v. State* 550
4. "Crimes." *Bohner v. Bohner* 205
5. "District court of competent jurisdiction." *Hub rmann v. Evans* 784
6. "Due process of law." *Board of Directors of Alfalfa Irrigation District v. Collins* 411
7. "Executions." *Burkett v. Clark* 466
8. "Forthwith." *Id.* 467
9. "Practicing medicine." *O'Connor v. State* 158
10. "Probable cause." *Diers v. Mallon* 122
11. "*Res gestæ*." *Collins v. State* 38
12. "Storehouse." *Metz v. State* 550
13. "Warehouse." *Id.*

Writs. See MANDAMUS, 4.