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STATE OF NEBRASKA V. JOHN E. HILL ET AL.

FILED MARCH 5, 1896. No. 6952.

1. **Action on State Treasurer's Bond:** FAILURE TO TURN OVER FUNDS. In an action on a treasurer's bond the breaches especially alleged were, that there had been a failure to turn over to his successor a certain sum which it was alleged the outgoing treasurer had in a certain bank when his term of office expired. By answer it was alleged that the outgoing treasurer had turned over to his successor evidence of indebtedness of the same character as those which had formed the basis of liability of the bank to himself to an amount equal to that for which he was sought to be held. By reply, it was, in effect, admitted that the outgoing treasurer had turned over to his successor all choses in action that he had received as treasurer, in like forms of evidence of indebtedness with those which he had received, but it was averred that such payment was ineffectual to release the outgoing treasurer because, as insisted by the plaintiff, nothing but cash could be treated as payment. *Held*, That, under this condition of the issues, and under proofs consistent with the theory of each contending party, it was a question of fact for the jury to determine how much actual money had been received and paid, and that its verdict, being founded upon sufficient evidence, must stand. Per RYAN, C. IRVINE and RAGAN, CC., concur.

2. **Official Bonds:** DELIVERY: PLEADING. Where the petition alleges the delivery of the official bond declared on, the allegation in the answer of a surety,—following an averment therein that he signed upon condition the principal should also sign,—that "if it [the bond] was ever delivered, it was done in violation of the express condition aforesaid upon which defendant signed said instrument," must be treated as a substantial admission of the delivery of the bond. Per NORVAL, J. All concurring.

3. ———: ———. Whether the sureties in an official bond are liable where the principal therein named has failed to sign it before its acceptance and approval, *quære*. Per NORVAL, J.

4. ———: EXECUTION: SIGNATURE OF PRINCIPAL. When a state officer elect writes his name in the body of a paper prepared by himself as his official bond, and subscribes his oath of office indorsed thereon, which instrument is delivered, accepted, and approved as his official bond, the same is valid and binding upon the principal and his sureties, even though such officer inadvertently omitted to attach his final signature at the bottom of the bond. Per NORVAL, J. All concurring.

5. **Treasurers:** TURNING OVER PUBLIC FUNDS: CERTIFICATES OF DEPOSIT. Prior to the taking effect of the legislative enactment providing for the depositing of state and county funds in bank, the payment of money in the hands of a state or county treasurer, at the termination of his term of office, to his successor, could be effectuated alone by the delivery of that which the law of the land recognized as money. The mere delivery and acceptance of certificates of deposit issued by a bank—upon which no money has been realized—is not such a payment as will release the outgoing officer. *Cedar County v. Jenal*, 14 Neb., 254, adhered to. Per NORVAL, J.

6. ———: ACCEPTANCE OF CERTIFICATES OF DEPOSIT: RATIFICATION BY STATE. Although a state treasurer has no right to receive in payment of the public revenues anything but money, yet if he chooses to do so, the state may ratify the act, in which case he and his sureties are chargeable as for money, and must make good the amount. Per NORVAL, J.

7. ———: ———: ———. The legislature has the power to ratify the act of an outgoing state treasurer in turning over to his successor, as money, certificates of deposit issued by a bank. Per NORVAL, J. HARRISON, J., concurring.

8. ———: ———: ———. *Held*, That the record discloses such a ratification in this case. Per NORVAL, J. HARRISON, J., concurring.

9. **Payment:** APPLICATION. When partial payments have been made on a running account, the debtor has the right to direct their application, but if he fails to do so the creditor may make the application, and where neither of them has made any appropriation before suit is brought, the law will apply such payments according to their priority of time; that is, the first item on the

debit side is discharged or reduced by the first item on the other side of the account. Per NORVAL, J.

10. **New Trial:** INSTRUCTIONS: HARMLESS ERROR. A verdict will not be set aside for error in instructions, when it is manifest that no other verdict should have been returned under the evidence. *Western Union Telegraph Co. v. Lowrey*, 32 Neb., 732, followed. Per NORVAL, J. All concurring.

11. **Embezzlement.** It is essential to the crime of embezzlement that the owner be deprived of the property alleged to have been embezzled, by an adverse use or holding. (*Chaplin v. Lee*, 18 Neb., 440.) Per POST, C. J. All concur.

12. ———: OFFICERS: LOANING PUBLIC MONEY. So much of section 124, Criminal Code, 1873, defining embezzlement of public funds, as provides that if any officer charged with the collection, safe-keeping, or disbursement of public funds "shall loan, with or without interest, * * * any portion of the public money, * * * every such act shall be deemed * * * an embezzlement of so much of the said moneys * * * as shall be thus * * * loaned" (General Statutes, 1873, p. 749, sec. 124), was intended to prevent the unlawful use by officers, and others with their knowledge and consent, of money committed to their custody, and not as an amendment of existing statutes regulating the means of preserving and accounting for of public funds. Per POST, C. J. HARRISON, J., RYAN, RAGAN, and IRVINE, CC., concurring.

13. ———: ———: DEPOSITS OF PUBLIC FUNDS: LOANS. The term "loan" is thus employed in a restricted sense, and includes those transactions only in which the conventional relation of borrower and lender exists, and has no application to the deposit in bank, for safe-keeping, of public funds by the custodian thereof who so far retains his control over them that they may be by him at any time reclaimed. Per POST, C. J. RYAN and RAGAN, CC., concurring.

14. **Commercial Paper:** PUBLIC FUNDS: OFFICERS. In the absence of statutory restriction upon the subject, the method employed in the monetary transactions of the world by which payments are made, and charges and credits adjusted, through the agency of checks, drafts,

and certificates of deposit, is so far applicable to custodians of public funds in this state as to render them liable for remittances by that means made and received, provided such instruments be in good faith tendered and accepted as payment and not for collection and credit at the debtor's risk. Per POST, C. J. RYAN, RAGAN, and IRVINE, CC., concurring.

15. **Definition of "Money."** The word "money" is a generic term, and may include not only legal tender coin and currency, but any other circulating medium, instruments, or tokens in general use in the commercial world as the representative of value. (*State v. McFetridge*, 84 Wis., 473.) Per POST, C. J. RYAN, RAGAN, and IRVINE, CC., concurring.

16. **State Treasurer:** TURNING OVER FUNDS: PAYMENT: ACCEPTANCE OF CHECKS. A state treasurer who on taking charge of the office, instead of demanding the funds due from his predecessor in cash, accepts in payment thereof certificates of deposit issued by a bank in which such funds have been deposited for safe-keeping, is chargeable upon his bond for the amount of such payment and his liability therefor is not affected by the fact that he is unable to realize the money upon such certificates by reason of the subsequent failure of said bank. Per POST, C. J. HARRISON, J., RYAN, RAGAN, and IRVINE, CC., concurring.

17. ———: ———: ———: ———: SETTLEMENT. Such a transaction, if in good faith by both parties, amounts to a settlement within the meaning of the statute, which will, to the extent of the payment so made, relieve the retiring treasurer, since the state is not entitled to concurrent remedies upon the bonds of successive officers to enforce the same liability, and whatever is in such case sufficient in law to charge the incumbent will operate *per se* to discharge his predecessor. Per POST, C. J. RYAN and RAGAN, CC., concurring.

18. **Stare Decisis.** Where a line of decisions, although erroneous, has become a rule of property it should be adhered to until changed by statute; but in the absence of complications resulting from property rights it is the undoubted privilege, if not indeed the duty, of courts to re-examine questions, and modify or overrule previous decisions shown to be fundamentally wrong. Per POST, C. J. All concur.

19. ———: LIABILITY OF TREASURERS. *State v. Keim*, 8 Neb., 63, *First Nat. Bank of South Bend, Ind., v. Gandy*, 11 Neb., 431, and *Cedar County v. Jenal*, 14 Neb., 254, criticised. *State v. Hill*, 38 Neb., 698, distinguished.

20. **Liability of Treasurers:** CERTIFICATES OF DEPOSIT. Whether the doctrine of *Cedar County v. Jenal*, 14 Neb., 254, extends to a case where a treasurer has accepted certificates of deposit from his predecessor, doubted. Per IRVINE, C.

21. ———: DEPOSITORY LAW: NOVATION. The deposit by Hill's successor, under the depository law, of the certificates received by him from Hill, in the same bank which issued them, the cancellation of the certificates and the state's accepting a credit on open account for their amount operated a novation, made the bank the state's debtor, and released Hill from liability. Per IRVINE, C. HARRISON, J., and RYAN and RAGAN, CC., concur.

ORIGINAL action in the supreme court to recover from defendants upon the official bond of John E. Hill for his second term as state treasurer, the sum of $236,364.62. There was a trial to a jury, resulting in a verdict for defendants. Heard on motion of the state for a new trial and on motion of defendants for judgment on the verdict. *New trial denied and judgment entered in favor of defendants.*

Omitting the justifications of the sureties, the bond upon which the action is based and the oath of office attached thereto are as follows, the italicized words in the bond being in the handwriting of John E. Hill, whose signature does not appear at the end of the instrument:

"Know all men by these presents, that we, *John E. Hill*, as principal, and Charles W. Mosher, D. E. Thompson, J. D. Macfarland, Richard C. Outcalt, John Fitzgerald, J. E. Smith, S. C. Smith, John Ellis, C. T. Boggs, N. S. Harwood, Frank

Colpetzer, V. B. Caldwell, Saml. E. Rogers, John F. Coad, as sureties, are held and firmly bound unto the state of Nebraska in the sum of *two million* dollars, for the payment of which, well and truly to be made unto the state of Nebraska, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents; sealed with our seals and dated this —— day of December, A. D. 1890.

"The conditions of this bond are these: Whereas, at the last general election held within and for the state of Nebraska, the above bounden *John E. Hill* was duly elected to the office of *treasurer of the state of Nebraska* for the term of two years from the 8th day of January, A. D. 1891:

"Now, if the said *John E. Hill* shall well and truly, in all things, perform the duties of *treasurer of the state of Nebraska* for the state of Nebraska during the continuance of his term of office, as provided by law, then the above obligation to be void, otherwise to be and remain in full force and effect.

"CHARLES W. MOSHER.....	$300,000 00
"D. E. THOMPSON.....	150,000 00
"J. D. MACFARLAND.....	200,000 00
"RICHD. C. OUTCALT.....	150,000 00
"JOHN FITZGERALD	400,000 00
"J. E. SMITH	100,000 00
"S. C. SMITH.....	100,000 00
"JOHN ELLIS	100,000 00
"C. T. BOGGS	100,000 00
"N. S. HARWOOD.....	100,000 00
"FRANK COLPETZER.....	100,000 00
"V. B. CALDWELL	100,000 00
"SAML. E. ROGERS.....	200,000 00
"JOHN F. COAD.....	200,000 00
"JOHN H. MCCLAY.....	50,000 00
"JOHN B. WRIGHT.....	50,000 00

"STATE OF NEBRASKA, }
COUNTY OF LANCASTER. }

"I do solemnly swear that I will support the constitution of the United States and the constitution of the state of Nebraska, and will faithfully discharge the duties of state treasurer of the state of Nebraska according to law, and the best of my ability; and that at the election at which I was chosen to fill said office I did not improperly influence in any way the vote of any elector, and have not accepted, nor will I accept or receive, directly or indirectly, any money or other valuable thing from any corporation, company, or person, or any promise of office for any official act or influence. JOHN E. HILL.

"Subscribed in my presence and sworn to before me this 8th day of January, A. D. 1891.

"AMASA COBB,
"*Chief Justice.*"

[Indorsed:] "Official Bond. J. E. Hill, State Treasurer. Approved this 8th day of January, A. D., 1891. James E. Boyd, Governor of Nebraska. Approved this 8th day of January, A. D. 1891. John M. Thayer, Governor."

"STATE OF NEBRASKA, }
SECRETARY'S OFFICE. } SS.

"Received and filed for record this 8th day of January, A. D. 1891, and recorded in Book "C," Bond Record Incorporations, at page 283.

"JOHN C. ALLEN,
"*Secretary of State.*"

See opinions by RYAN, C., and NORVAL, J., for statement of the case.

The court instructed the jury as follows:

"1. By this action the state of Nebraska, as plaintiff, seeks to recover from J. E. Hill, as principal, and the other defendants, as sureties, on the official bond of the said Hill as treasurer of Nebraska for the term ending in January, 1893. Several questions have been controverted during the trial, although your inquiry will be confined to those issues to which your attention is especially directed by this charge, all others presenting questions of law for which the court is alone responsible.

"2. By taking the oath of office, procuring his official bond to be approved, holding the office of state treasurer and enjoying the emoluments thereof during the entire term, the defendant Hill is estopped to deny his liability on said bond, and such estoppel applies with equal force to the other defendants—his sureties.

"3. It is undisputed that Hill, at the close of his last term of office, indorsed and turned over to Joseph S. Bartley, his successor, in settlement, three certificates of deposit of the Capital National Bank aggregating $285,357.85, upon which the state has since realized $48,993.23, and no more. This suit is to recover $236,364.62, the difference between said sums, the state claiming that the receiving of said certificates by Bartley did not constitute a payment except for the said amount actually realized thereon. The uncontradicted evidence further discloses that Hill, as state treasurer, at the end of his first term had taken credit with the Capital National Bank upon open account the sum of $177,489.84, and also held certificates of deposit issued by said bank aggre-

gating $90,000. The defendants contend that a part, if not all, of these credits was carried through his second term and merged into the certificates of deposit turned over by Hill to Bartley, claiming they are not liable in this suit for the amount of Hill's credit with said bank at the commencement of his second term, save to the extent that he may have converted the same into money.

"4. You are instructed that the payment of money in the hands of a state or county treasurer at the termination of his office, to his successor, can be effectuated only by the delivery of that which by the law of the land is recognized as money. The mere delivery of certificates of deposit issued by a bank upon which no money is realized is not a payment.

"5. It follows from the foregoing rule that the defendants are not chargeable in this action for the amount of the defendant Hill's credit as state treasurer with the Capital National Bank at the commencement of his second term, whether represented by certificates of deposit or open bank account, except for the money, if any, subsequently realized thereon by Hill.

"6. The burden of proof is upon the state to show affirmatively the amounts with which the defendant Hill is chargeable, and these amounts are dependent upon the aggregate sums of money actually received by him during his second term.

"7. The evidence shows a continuous course of dealing between Hill and the Capital National Bank during the second term of the former as state treasurer, and the contention of the state is that the first withdrawals by him in point of time should be applied in discharge of the amount of his credits at the commencement of said term.

Hill, on the other hand, in effect, contends that his intention was at all times to withdraw the money last deposited, and that the transaction in evidence should be so construed. Should you find that there was an agreement or understanding between Hill and the bank with respect to the application of withdrawals by him, such agreement is binding upon the parties to this action. If, however, no such understanding existed, it is the right of the defendant Hill to direct the application to be made of such withdrawals, and it is not within the power of the state to make another or different application thereof.

"8. If the defendant Hill has fully accounted for and paid over all moneys belonging to the state which came into his hands during the period covered by the bond in suit, your verdict should be for the defendants. If Hill has not so accounted, then your verdict should be for the state for the amount disclosed by the evidence that he has received and not paid over, with seven per cent interest thereon from January 14, 1893, to the first day of the present term, to-wit, September 17, 1895."

In addition to the general verdict for defendants, a special verdict was returned under the directions of the court, the substance of which is set out in the opinion by NORVAL, J.

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, for the state, *E. Wakeley* and *G. M. Lambertson,* of counsel:

The sureties are liable even if Treasurer Hill did not execute the bond. (*United States v. Linn,* 15 Pet. [U. S.], 290; *State v. Bowman,* 10 O., 445;

Trustees v. Sheik, 119 Ill., 579; *Williams v. Marshall*, 42 Barb. [N. Y.], 524; *Parker v. Bradley*, 2 Hill [N. Y.], 584; *Haskins v. Lambard*, 4 Shep. [Me.], 140; *Scott v. Whipple*, 5 Greenl. [Me.], 336; *Keyser v. Keen*, 17 Pa. St., 327; *Johnson v. Weatherwax*, 9 Kan., 75.)

The name John E. Hill, written by him in the body of the bond, is a sufficient execution on his part. (*Taylor v. Dobbins*, 1 Strange [Eng.], 399; *Saunderson v. Jackson*, 2 Bos. & Pul. [Eng.], 238; *Schneider v. Norris*, 2 Maule & Selw. [Eng.], 286; *Morison v. Turnour*, 18 Ves. Ch. [Eng.], 175; *Bleakley v. Smith*, 11 Sim. [Eng.], 150; *Merritt v. Clason*, 12 Johns. [N. Y.], 102; 1 Brandt, Suretyship & Guaranty, p. 151; *Clason v. Bailey*, 14 Johns. [N. Y.], 484; *Davis v. Shields*, 26 Wend. [N. Y.], 341; *Commonwealth v. Ray*, 3 Gray [Mass.], 441; *Penniman v. Hartshorn*, 13 Mass., 87; *Schmidt v. Schmaelter*, 45 Mo., 502; *Wise v. Ray*, 3 Greene [Ia.], 430; *McConnell v. Brillhart*, 17 Ill., 354; *Barry v. Coombe*, 1 Pet. [U. S.], 640; *Palmer v. Grant*, 4 Conn., 389; *Rhode v. Louthain*, 8 Blackf. [Ind.], 413; *Quin v. Sterne*, 26 Ga., 223; *Drury v. Young*, 58 Md., 546; *McLeod v. State*, 13 So. Rep. [Miss.], 268; 1 Brandt, Suretyship & Guaranty, p. 89; *Argenbright v. Campbell*, 3 Hen. & M. [Va.], 144.)

Hill having exercised the duties of the office of state treasurer, under the bond and oath of office is estopped from claiming that he did not execute the bond. (*McNitt v. Turner*, 16 Wall. [U. S.], 363; *Carpenter v. Rannels*, 19 Wall. [U. S.], 146; *Apthorp v. North*, 14 Mass., 167; *Bank of United States v. Dandridge*, 12 Wheat. [U. S.], 64; *Miltenberger v. Schlegel*, 7 Barr. [Pa.], 240; *People v. John*, 22 Mich., 465; *Wright v. Leath*, 24 Tex., 32; *Broome v. United States*, 15 How. [U. S.], 155; *Bartlett v. Board of*

Education, 59 Ill., 367; *Bowman v. Griffith*, 35 Neb., 361.)

The law presumes the delivery of an instrument found in the custody of the officers created by law for its safe-keeping. (1 Devlin, Deeds, sec. 294; *Dedham Bank v. Chickering*, 20 Mass., 335; *McLean v. State*, 8 Heisk. [Tenn.], 23; *Bryan v. City of Des Moines*, 51 Ia., 590; *Boggs v. Olcott*, 40 Ill., 304; *City of Portland v. Besser*, 10 Ore., 243; *Coons v. People*, 76 Ill., 383; *State v. McAlpin*, 4 Ired. Law [N. Car.], 148; *State v. Ingram*, 5 Ired. Law [N. Car.], 442; *Daniels v. Tearney*, 102 U. S., 415; *State v. Mitchell*, 31 O. St., 592; *Pritchett v. People*, 1 Gilm. [Ill.], 525; *Alley v. Adams County*, 76 Ill., 101; *People v. Murray*, 5 Hill [N. Y.], 468; *Ferguson v. Landram*, 5 Bush [Ky.], 230; *United States v. Hodson*, 10 Wall. [U. S.], 395; *Motz v. City of Detroit*, 18 Mich., 526; *McCracken v. Todd*, 1 Kan., 148; *Hyde v. Baldwin*, 17 Pick. [Mass.], 305; *Jacobs v. Miller*, 50 Mich., 119; *Scholey v. Rew*, 23 Wall. [U. S.], 331; *Cowell v. Colorado Springs Co.*, 100 U. S., 55; *McClure v. Commonwealth*, 80 Pa. St., 167; *Perryman v. City of Greenville*, 51 Ala., 507; *Walker v. Mulvean*, 76 Ill., 18; *McCauley v. State*, 21 Md., 556; *Williamson v. Woolf*, 37 Ala., 298; *McClure v. Colclough*, 5 Ala., 65; *Byers v. McClanahan*, 6 Gill & J. [Md.], 250; *Brown v. Murdock*, 16 Md., 201; *Hoffmire v. Holcomb*, 17 Kan., 378; *Smith v. Smith*, 14 Gray [Mass.], 532; *Harbin v. Bell*, 54 Ala., 389; *Bank of St. Marys v. Powers*, 25 Ala., 566; *State v. McDonald*, 40 Pac. Rep. [Idaho], 312; *Iredell v. Barbee*, 9 Ired. Law [N. Car.], 250; Murfree, Official Bonds, 436, 437.)

A public officer and his bondsmen are absolutely liable for all public moneys received, and for which he is accountable, regardless of the fail-

ure of banks in which the funds are deposited, of worthless paper received as money, of theft, robbery, or unavoidable loss. (*State v. Keim*, 8 Neb., 63; *First Nat. Bank of South Bend, Ind., v. Gandy*, 11 Neb., 431; *Cedar County v. Jenal*, 14 Neb., 254; *Wayne County v. Bressler*, 32 Neb., 818; *State v. Hill*, 38 Neb., 698; *United States v. Prescott*, 3 How. [U. S.], 587; *United States v. Morgan*, 11 How. [U. S.], 160; *United States v. Dashiel*, 4 Wall. [U. S.], 185; *Muzzy v. Shattuck*, 1 Den. [N. Y.], 233; *Commonwealth v. Comly*, 3 Pa. St., 372; *State v. Harper*, 6 O. St., 607; *State v. Bartley*, 39 Neb., 353; *Inhabitants of Town of Hancock v. Hazzard*, 12 Cush. [Mass.], 112; *Halbert v. State*, 22 Ind., 125.)

The appointment of the Capital National Bank as a state depository after the expiration of Treasurer Hill's term of office did not release him and his sureties from the liability that had already accrued on the bond.

There has been no ratification by the state of the deposits made by Hill in the Capital National Bank.

The sureties on the bond are bound by the admissions of Hill and by entries in the book made by him in the line of his official duties. Such admissions are part of the *res gestæ*. (*Barry v. Screwmen's Benevolent Association*, 67 Tex., 250; *Northumberland v. Cobleigh*, 59 N. H., 250; *Bank of Brighton v. Smith*, 12 Allen [Mass.], 243; *Placer County v. Dickerson*, 45 Cal., 12; *Atlas Bank v. Brownell*, 9 R. I., 168; *Blair v. Perpetual Ins. Co.*, 10 Mo., 567; *Drummond v. Prestman*, 12 Wheat. [U. S.], 515; *Wilson v. Green*, 25 Vt., 450; *Middleton v. Melton*, 10 B. & C. [Eng.], 317; *Pendleton v. Bank of Kentucky*, 1 T. B. Monroe [Ky.], 171; *Morley v. Town of Metamora*, 78 Ill., 394; *Dobbs v. Justices*, 17 Ga., 624; *Casky v. Haviland*, 13 Ala., 314.)

A debtor paying money has the right to direct its application. If he omits to do so, the creditor may make the application at any time before a controversy arises. (*Robinson v. Doolittle*, 12 Vt., 246; *Pierce v. Knight*, 31 Vt., 701; *Taylor v. Coleman*, 20 Tex., 772; *Poulson v. Collier*, 18 Mo. App., 583; *Callahan v. Boazman*, 21 Ala., 246; *Whetmore v. Murdock*, 3 W. & M. [U. S. C. C.], 390.)

After controversy arises neither debtor nor creditor has the right to make an appropriation of payments. (*Lazarus v. Friedheim*, 11 S. W. Rep. [Ark.], 518; *Milliken v. Tufts*, 31 Me., 497; *United States v. Kirkpatrick*, 9 Wheat. [U. S.], 720; *Applegate v. Koons*, 74 Ind., 247; *Wendt v. Ross*, 33 Cal., 650; *Thurlow v. Gilmore*, 40 Me., 378; *Jones v. United States*, 7 How. [U. S.], 684; *Harrison v. Johnston*, 27 Ala., 445; *Longan v. Taylor*, 130 Ill., 412; *Dall v. People*, 34 N. E. Rep. [Ill.], 413; *McCune v. Belt*, 45 Mo., 174; *Hersey v. Bennett*, 9 N. W. Rep. [Minn.], 500.)

J. H. Broady, for defendant Hill:

The early Nebraska cases should not be followed, but are distinguishable from the case at bar.

The case of *Cedar County v. Jenal*, 14 Neb., 254, is not analogous. In that case the certificate offered in payment as money never went beyond the control of the payor, never was accepted, indorsed, and delivered by the payee to the bank, nor did the payee ever receive credit at the bank subject to check, nor check any part of it out. A striking feature of the decision in that case is that there is no authority whatever cited except section 124 of the Criminal Code, nor is there any

discussion of the principles of law of embezzlement.

State v. Sheldon, 10 Neb., 452, is quite peculiar. It was an action of *quo warranto* to determine who was treasurer of Greeley county. The second paragraph of the syllabus is in these words: "The fact that the public funds have been stolen from the treasury is no legal justification for the failure of the treasurer to account for them;" and yet the opinion truly states all there was in the case in this language: "Two questions are to be determined in this case: First—The right of the board of county commissioners to summarily remove the treasurer from office without giving him an opportunity to make a defense. Second—Must a judgment of ouster be entered?" So it appears that paragraph 2 of the syllabus was a matter not in the case nor necessary to its decision. It is therefore only a *dictum* of the court outside the case and not an authority as such. The same peculiarity applies to this case as to the other, that it neither cites any authority nor discusses principles of law upon which to base the second paragraph of the syllabus.

In *State v. Keim*, 8 Neb., 63, counsel for plaintiff contended that the ownership of state funds was in the state, saying in their brief that the statutes stamped the ownership of public funds in the state. Counsel for defendant in error contended: "The money which he [treasurer] receives becomes his own money and he is liable absolutely for it to the state, on his official bond." The decision of affirmance, based upon section 124 of the Criminal Code, says: "It is true that although such loaning or depositing of the public money was unauthorized and contrary to

the spirit and policy of our government, yet after it was done in point of fact, it could be ratified by the state." The same peculiarity runs through this case, and on the question of whether the treasurer or the state is the owner of the public funds, and on the question of embezzlement, it cites no authority except the statute, nor does it discuss legal principles; but this decision, as well as all of them, is based upon section 124 of the Criminal Code. Their logic is that putting in the bank to the credit of the state, without any actual conversion on the part of the treasurer or any want of good faith, was an embezzlement; that actual conversion, bad intent, or want of diligence are all immaterial. No wonder there were no citations nor discussions of legal principles to sustain such a theory! But the turning point of the case being embezzlement, shows that the court intended to hold in this case as well as in the others that the treasurer was not the owner of the funds, but that the state is the owner; that the treasurer was not a debtor, but a bailee of the funds; and yet, by a process of reasoning we fail to understand, or principles of law to us entirely new, they hold that the owner cannot recover the property. They hold that it is a bailment, but they deprive the owner of the rights he has in other sorts of bailments, or the rights the beneficiary has in other sorts of trusts. The same criticism applies to *First Nat. Bank of South Bend, Ind., v. Gandy*, 11 Neb., 431.

In support of an argument on the proposition that the depositing of the money in the Capital National Bank by defendant Hill did not make him liable for the loss, reference is made to the following authorities: *Gray v. Havemeyer*, 3 C. C.

A., 497; *Estate of Law*, 144 Pa. St., 499; *State v. Gates*, 67 Mo., 139.

Hill's term, by law, ceased January 5, 1893. At that time the state depository law took effect. Because of the delay of the legislature in canvassing the election returns, Bartley could not qualify until January 14. For this reason Hill continued, at least *de facto*, in office and held things *in statu quo* from January 5 to January 14. In the meantime the new statute was in force recognizing the banks of the state as a better place to keep state funds, and recognizing and making the treasurer the agent of the state to so deal with the banks and with the public funds accordingly. From January 5, 1893, until January 14, Hill was, at least *de facto*, treasurer, and was such agent of the state; and after January 14, 1893, Bartley was such agent. The actions of both as to the deposits in the Capital National Bank were the actions of the state, and moreover the making of that bank a state depository by the state according to law, and putting the funds therein and taking the credit for that money in the Capital National Bank as a state depository, again ratified the same, which ratification related back to the beginning of the transaction that led to and culminated in such credit to the state under the state depository law. It was a waiver of wrongs or irregularities, if any, in the prior stages of the proceedings, and was therefore an estoppel against urging them in this cause. (*State v. Gates*, 67 Mo., 139; *People v. Stephens*, 71 N. Y., 527; *Clark v. Stanley*, 66 N. Car., 59; Throop, Public Officers, secs. 3, 21, 551.)

Charles O. Whedon, for the sureties:

It is alleged in the answer that the defendants who are sued as sureties signed the instrument sued on upon the express condition that it should not be delivered to the obligee until it had been signed by the principal therein named,—the defendant Hill, whose name appears in the body of the bond as principal. It is further alleged that said Hill never signed said instrument, and that it was never delivered with the knowledge or consent of the defendants sought to be held as sureties, and if it was ever delivered it was against the consent of said defendants and in violation of said condition. These alleged facts constitute a defense. (*Board of Education v. Sweeney*, 48 N. W. Rep. [S. Dak.], 302; *Johnston v. Kimball Township*, 39 Mich., 187; *Hall v. Parker*, 39 Mich., 287; *Green v. Kindy*, 43 Mich., 279; *Wells v. Dill*, 6 Martin [La.], 665; *State v. Austin*, 35 Minn., 51; *Duncan v. United States*, 7 Pet. [U. S.], 448; *Bunn v. Jetmore*, 70 Mo., 228; *Bean v. Parker*, 17 Mass., 591; *Wood v. Washburn*, 2 Pick. [Mass.], 24; *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass., 460; *State Bank v. Evans*, 15 N. J. Law, 155; *Hall v. Parker*, 37 Mich., 590; *Fletcher v. Austin*, 11 Vt., 447; *Hessell v. Johnson*, 63 Mich., 623; *Russell v. Annable*, 109 Mass., 72; *Bibb v. Reid*, 3 Ala., 88; *Pepper v. State*, 22 Ind., 399; *Allen v. Marney*, 65 Ind., 398; *Wild-Cat Branch v. Ball*, 45 Ind., 213.)

The fact that the name of Hill appeared in the instrument as principal, and that at the time it came into the possession of the governor of the state his name was not signed thereto as principal, shows that the instrument was incomplete, and that was sufficient notice to the obligee therein

named, and the best notice that could have been given, that the principal named was to sign the instrument before delivery. (*Hall v. Smith*, 14 Bush [Ky.], 606; *Sharp v. United States*, 4 Watts [Pa.], 21; *Fletcher v. Austin*, 11 Vt., 447; *Dair v. United States*, 16 Wall. [U. S.], 1.)

If there is anything on the face of the bond to apprise the obligee that the bond has been delivered by the sureties upon a condition not complied with, the sureties may plead the failure as a defense to the action. (*Cutler v. Roberts*, 7 Neb., 4; *Gray v. School District*, 35 Neb., 446.)

These defendants were under no legal or moral obligation to see that the principal had signed the instrument. They had a right to rely upon the legal discharge of official duty by those whose duty it was to see that a proper bond was executed, and to dismiss all oversight of it. (*Fletcher v. Leight*, 4 Bush [Ky.], 303.)

A statute of Wisconsin required the treasurer to keep his office at the capitol, to receive and have charge of all money paid into the state treasury, and pay the same out as provided by law. The governor and attorney general of that state were required at least once each quarter year to examine and see that all the money appearing on the books of the treasurer and secretary of state as belonging to the state was in the vaults of the treasury. The statute also made it *prima facie* evidence of embezzlement of the public funds if the treasurer should loan or deposit the same for his own gain or advantage without special authority. The statute contained this provision: "Every public officer shall promptly pay over, as required by law, the same moneys received and held by him by virtue of his office." Construing

these provisions of the statute, the supreme court of Wisconsin held (1) that the deposit of public moneys in banks by the state treasurer in the name of his office, payable at any time, but only upon his official draft, was not unlawful; nor was it unlawful for him to stipulate for and receive interest on such deposits; (2) that such deposits, having been made in accordance with long-continued usage and for convenience in the transaction of the business of his department, were not made for gain, profit, or advantage to the treasurer within the meaning of the statute making such deposit by a public officer for his own gain, profit, or advantage *prima facie* evidence of embezzlement; (3) that the treasurer was not, by the statute, required to pay the identical moneys by him received as such officer, but money having the same value and essential qualities as that paid into the treasury; (4) that the certificates of deposit or other vouchers for money deposited in solvent banks, payable on demand, were money within the meaning of the statute requiring the governor and attorney general from time to time to see that all money belonging to the several funds was in the vaults of the treasury; (5) that a deposit of public funds in banks subject to draft at any time was not an investment for such funds prohibited by statute. (*State v. McFetridge*, 84 Wis., 473.)

It is a fact admitted by the pleadings that the custom and usage of receiving, depositing, and paying out the public funds as stated in the answer had obtained in this state since its organization and that such custom and usage were known of all men, the courts, and the legislature. It would be practically impossible to transact public

business in any other way. The state has provided no place in which the large amount of money which comes into the hands of the treasurer can be safely kept. It is not the policy of the state that money which is paid as taxes shall be locked up in a vault and withdrawn from circulation. The state holds a large amount of bonds which belong to the permanent school fund. These securities have been kept in the vault in the office of the state treasurer, where they were insecure. Because of the danger of their being stolen, the legislature in 1887 passed an act requiring that all such bonds should be stamped with the words, "This bond belongs to the permanent school fund of the state of Nebraska, and is not negotiable," which statement the state treasurer is required to sign. (Session Laws, 1887, ch. 79, p. 614.) The title of the act expresses the fear that said securities might be lost by theft or otherwise, and to prevent their negotiability the act was passed. No precaution has been taken by the state to prevent the stealing of money of the state from the vault of the treasury, because it was known that the money was not kept in the vault. It has never been supposed that the treasurer would keep the money which he received in his office. It is impossible that a treasurer who followed the custom of depositing public funds in a bank for safe-keeping,—a custom which had been followed for thirty years,—should be convicted of embezzlement for making such deposit, especially in view of the fact that the state had furnished no safe place for keeping such funds. As to the question of custom and usage reference is made to the case of *Slidell v. Grandjean*, 111 U. S., 413.

By the giving of the depository bond, its approval by the proper officers, and the filing thereof with the auditor, a contract was entered into between the state and the bank, and the depositing of the certificates in the bank was in part performance of that contract. By the terms of this contract the bank became entitled to receive on deposit current funds of the state to an amount not exceeding one-half the amount of the bond, which funds should be subject to the check of the treasurer, and the amount on deposit might be increased or diminished as the treasurer might determine. On its part the bank became liable to pay to the state interest on the funds deposited at the rate of three per cent per annum on daily balances, interest payable quarterly. The terms of this contract are not only found in the act of 1891, but they are embodied in the bond given by the bank. There is no contention that the requirements of the act of 1891 were not complied with in the giving of the bond, its form, approval, or filing. It is admitted that the deposit was not made until after the bond had been approved and filed. The state is bound by this contract. (*People v. Stephens*, 71 N. Y., 527; *Sholes v. State*, 2 Chand. [Wis.], 182; *Metzel v. State*, 16 Wis., 370; *State v. Dennis*, 39 Kan., 509; *Danolds v. State*, 89 N. Y., 36; *United States v. Bank of Metropolis*, 15 Pet. [U. S.], 377; *Carr v. State*, 11 L. R. A., 370; *Georgia Penitentiary Cos. v. Nelms*, 71 Ga., 301; *Fletcher v. Peck*, 6 Cranch [U. S.], 88; *Hall v. Wisconsin*, 103 U. S., 5; *Davis v. Gray*, 16 Wall. [U. S.], 232; *Curran v. Arkansas*, 15 How. [U. S.], 308; *Abeel v. Culberson*, 56 Fed. Rep., 329; *State v. Flint & P. M. R. Co.*, 89 Mich., 481; *Houston v. Cook*, 153

Pa. St., 43; *Sheets v. Selden's Lessee*, 2 Wall. [U. S.], 177; *Hodgson v. Dexter*, 1 Cranch [U. S.], 345.)

John H. Ames, also for sureties:

The statutes of this state (Compiled Statutes, sec. 12, ch. 10) enact: "All official bonds shall be obligatory upon the principal and sureties for the faithful discharge of all the duties required by law of such principal." The condition of the bond in suit is that "the said John E. Hill shall well and truly in all things perform the duties of treasurer of the state of Nebraska" during his term of office. These are the usual terms of the ordinary common law bond, such as is customarily given by trustees, receivers, executors, and administrators, and the language of the statute is conclusive of the legislative intent that the liability of the treasurer and his sureties shall be the common law liability of such trustees and officers. It is in effect the same as though the legislature had said: "The bond shall be obligatory upon the principal and sureties as in cases of trustees at common law."

The state treasurer is not responsible as an insurer of the funds and moneys coming into his hands by virtue of his office. His liability is that of a bailee for hire, and he is held to the exercise of good faith and honesty and of that degree of care and skill which a reasonably prudent man would exercise in the conduct of like business of his own. Beyond this his responsibility does not extend. The contrary doctrine resting upon the authority of *United States v. Prescott*, 3 How. [U. S.], 578, has been abandoned. (*United States v. Thomas*, 15 Wall. [U. S.], 337; *Cumberland County v. Pennell*, 69 Me., 357; *State v. McFetridge*, 84 Wis.,

473; *State v. Walsen*, 17 Colo., 170; *Commonwealth v. Godshaw*, 17 S. W. Rep. [Ky.], 737; *Renfroe v. Colquitt*, 74 Ga., 618; *Rock v. Stinger*, 36 Ind., 346; *Bevans v. United States*, 80 U. S., 56; *United States v. Dashiel*, 4 Wall. [U. S.], 182; *Walker v. British Guaranty Association*, 18 Ad. & E., n. s. [Eng.], 276; *Wilson v. People*, 34 Pac. Rep. [Colo.], 944; *Rose v. Hatch*, 5 Ia., 149; *Whitfield v. Le Despencer*, Cowper [Eng.], 765; *York County v. Watson*, 15 S. Car., 1; *Board of Supervisors v. Dorr*, 25 Wend. [N. Y.], 440; *Muzzy v. Shattuck*, 1 Den. [N. Y.], 233; *People v. Faulkner*, 107 N. Y., 477.)

A deposit by a custodian of public or trust funds of the moneys in his possession, in a bank of reputed solvency, is such a prudent and careful disposition of the funds as will relieve him from responsibility though the bank subsequently fails and the funds are lost. There is a plain and well defined distinction between the loaning of such funds and the depositing of them in a bank, unmixed with the depositor's private or personal moneys, and expressly in his official character. (*People v. Faulkner*, 107 N. Y., 477; *State v. McFetridge*, 84 Wis., 473; *Comstock v. Gage*, 91 Ill., 328; *Millard v. Lawrence*, 16 How. [U. S.], 256; *Moulton v. McLean*, 5 Colo. App., 454; *Payne v. Gardiner*, 29 N. Y., 146; *Estate of Law*, 144 Pa. St., 499, 14 L. R. A., 103.)

Griggs, Rinaker & Bibb, Cowin & McHugh, George E. Pritchett, J. W. Deweese, F. M. Hall, W. Q. Bell, and *Abbott, Selleck & Lane,* also for the sureties.

RYAN, C.

This action was brought in this court upon the bond of J. E. Hill, formerly treasurer of this state,

as it was held in *Re Petition of Attorney General*, 40 Neb., 402, might properly be done. The general verdict of the jury was in favor of the defendants, and upon plaintiff's motion for a new trial, and upon defendants' motion for judgment upon a special verdict also found by the jury, the questions hereinafter considered have been presented in argument. In the consideration of these questions it may be of some use to refer to the case of *State v. Hill*, 38 Neb., 698, in which an attempt was made to acquire jurisdiction of such defendants as were non-residents of Douglas county, by reason of averments in the petition that the defendant Hill had been guilty of breaches of his bond in making deposits of public moneys in certain banks in the city of Omaha. From the petition in this case were omitted this averment, and perhaps such others that it might be unsafe to merely refer to the statements of facts, as therein given, as furnishing a complete summary of those now to be reviewed.

In the case at bar it was alleged that, at the general election held in 1890, John E. Hill was elected treasurer of this state for the two-years term which began on the first Thursday after the first Tuesday in January, 1891. This term, it was alleged, he served as treasurer, the sureties on his bond being his co-defendants in this action, and that, upon the 14th day of January, 1893, he surrendered said office to his successor, Joseph S. Bartley. It was further averred that when John E. Hill entered upon his duties on January 8, 1891, he had in his possession, as incumbent of the same office for the term immediately preceding, the sum of one million five hundred and twenty-four thousand five hundred and fifty-four dollars and sev-

enty-four cents ($1,524,554.74); that upon entering upon his duties under the bond sued on he received from county treasurers of the state the additional sum of four million two hundred thousand eight hundred and thirty-four dollars and fifty cents ($4,200,834.50). The total sum with which it was claimed that the defendant Hill should be chargeable upon his bond sued upon was the aggregate of the above two sums, to-wit, the sum of five million seven hundred and twenty-five thousand three hundred and eighty-nine dollars and twenty-four cents ($5,725,389.24). Although in general terms the liability of the treasurer was charged as to the immense amounts above set out, the breaches alleged were within the range of comparatively familiar figures. These breaches, two in number, were described in such language as indicated the intention of the pleader to avail himself of the technical rule justified, to some extent, by the case of *Cedar County v. Jenal*, 14 Neb., 254. It might happen that an attempt to abbreviate would result in obscuring the theory upon which the petition was drawn, as well as the line of defense adopted by the defendants in their answer, and the emphasis of the theory of the petition found in the reply. At the risk of tediousness an attempt will therefore be made to illustrate the material issues joined and tried with quotations made with great freedom from the pleadings, beginning with the petition, in which were the following averments:

"And the plaintiff, for assigning and setting forth a breach and violation of the conditions of the said bond, alleges that the said John E. Hill, in the county of Lancaster, in the state of Nebraska, during his last term of office did from time

to time unlawfully deposit in and loan to the Capital National Bank of Lincoln, a corporation located and doing business in the county and state last aforesaid, divers large sums and portions of the moneys so as aforesaid held by him and belonging to the state of Nebraska, amounting in all to the sum of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents ($285,357.85) and more, the particular sums so deposited and the particular times when they were so deposited the plaintiff is unable more definitely to state. A part of the said moneys so unlawfully loaned and deposited were, from time to time, during his said last term of office, collected and received from said bank, and paid out and accounted for by the said Hill as treasurer as aforesaid for the use and benefit of the state of Nebraska. But, on the 14th of January, 1893, and when he surrendered his said office to his said successor, there remained of the said moneys so unlawfully loaned and deposited the sum of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents ($285,357.85) or more, which the said Hill, as such treasurer, had not in any manner used or paid out for the use and benefit of the state of Nebraska or in any manner accounted for, and which he refused and failed to pay over to his said successor, by reason of which the said John E. Hill converted to his own use the said sum of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents ($285,357.85).

"Second Breach.—And the plaintiff, for assigning and setting forth another and second breach and violation of the conditions of said bond, al-

leges that of the moneys so as aforesaid received and held by said John E. Hill as such state treasurer and belonging to the state of Nebraska there still remained at the end of his said last term of office the sum of one million four hundred and forty-four thousand five hundred and fifty-six dollars and forty-two cents ($1,444,556.42) which he had not, at any time, disbursed upon any warrant or warrants drawn upon the state treasury, according to law, or at any time paid out, disbursed, or disposed of lawfully, or in any authorized manner, or for any lawful, proper, or authorized purpose, or for the use or benefit of the state of Nebraska, and which sum it was his duty to pay over and deliver, at the end of his last term of office, to-wit, on the 14th day of January, A. D. 1893, to his said successor in office; but he failed and refused, except as hereinafter mentioned, to so pay over and deliver to him the said sum or any part thereof, or at any time, or in any manner whatever to account for the same, or any part thereof, to his said successor in office, or otherwise, save that, as the plaintiff is informed and alleges, the said John E. Hill did then pay and turn over to his successor certain small sums of money, the exact amount of which is unknown to the plaintiff, and did assign, transfer, and deliver to his said successor divers and sundry certificates of deposit of certain banks and banking institutions located in the state of Nebraska and other choses in action, the precise nature of which is not fully known to the plaintiff, and which the said John E. Hill in some manner induced his said successor to receive and accept in the place of, and instead of money, among which were, as plaintiff is informed and alleges, certain certifi-

cates of deposit issued by the Capital National Bank of Lincoln, payable to the state treasurer of Nebraska, for certain sums of money therein respectively specified, amounting in the aggregate to the sum of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents ($285,357.85), of which amount, as the plaintiff is informed and believes to be true, the said Joseph S. Bartley, successor in the office of the said John E. Hill, subsequently, and on or before the 21st day of January, A. D. 1893, received from the said bank, through or by means of said certificates of deposit, for the use and benefit of the state of Nebraska, divers and sundry sums of money, amounting in the aggregate to the sum of forty-eight thousand nine hunderd and ninety-three dollars and twenty-three cents ($48,993.23), but has never, at any time, received any further or other sums of money upon, through, or by means of the said last mentioned certificates of deposit. And, as the plaintiff alleges upon information and belief, the said Capital National Bank was at the time when said John E. Hill, treasurer, so transferred and delivered the said certificates of deposit to his said successor, and ever since has been, wholly insolvent, and from and after the said 21st day of January, A. D. 1893, has, at all times, failed and refused to pay any sums of money whatsoever upon or toward the amounts payable, according to the tenor of the said certificates of deposit. And his said successor has since that time, as plaintiff is informed and believes, received upon or from, or by means of others of said certificates of deposit or choses in action, and applied for the use and benefit of the state, certain sums of money, the exact amount of which is not

known to the plaintiff. But the said John E. Hill failed and refused, and has ever since failed and refused, to lawfully pay over, disburse, or account for, or pay over to his successor in office, or otherwise or in any manner whatever to apply for the use or benefit of the state of Nebraska, the sum of two hundred and thirty-six thousand three hundred and sixty-four dollars and sixty-two cents ($236,364.62), and more, of the moneys so received by him as such state treasurer and belonging to the state of Nebraska remaining in his hands at the end of his said last term of office, and in some way converted the same to his own use, and which has not been received by or in any manner applied for the use and benefit of the plaintiff. And by reason of the premises aforesaid the said defendants became and still are indebted to the plaintiff, the state of Nebraska, and the plaintiff has sustained damages in the sum of two hundred and thirty-six thousand three hundred and sixty-four dollars and sixty-two cents ($236,364.62), for which sum, with interest thereon from the 14th day of January, 1893, the plaintiff demands judgment, and that it may have such further relief in the premises as it may be entitled to."

In the answer filed by John E. Hill it was alleged that his successor's term should have commenced on January 5, 1893, but that, owing to the fact that the legislature had failed seasonably to canvass the vote of such successor, he did not enter upon the duties of his office until January 14, 1893; that the condition of business in the state treasurer's office remained unchanged, and that, when said office, its funds, and property were turned over to John E. Hill's successor on January 14, 1893, they were exactly in the same condi-

tion as they had been on the 5th day of the same month, when said Hill had submitted to the state auditor his accounts and conduct as such treasurer, and when the same had been by said auditor examined and passed upon, approved, and found correct. In this answer it was also alleged that, upon the installation of Joseph S. Bartley as treasurer he examined and passed upon the accounts, papers, certificates of deposit, and other evidences of the funds of the state; that there was so turned over to Joseph S. Bartley, as treasurer, no cash, except, perhaps, five hundred dollars ($500) in amount; that among the things turned over to Hill's successor there was a certificate of deposit of the Capital National Bank made to the order of the treasurer of the state of Nebraska for the said sum of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents ($285,357.85), which represented the same amount mentioned in the petition, and that this certificate had been received by Treasurer Bartley and accepted on the same day that the Capital National Bank was designated and became a state depository according to law, and in lieu thereof said Bartley received an open account at said bank subject to check and surrendered to said bank its certificate of deposit; that thereafter, on January 16, 1893, the said Joseph S. Bartley, as treasurer, checked out of said bank and received as such over thirty-five thousand dollars ($35,000) of the said money for which he had been given an open account subject to check; that between the 16th and 20th of January, 1893, said Bartley could have checked out and received from the bank the whole amount of his open account as aforesaid, but refrained from checking out more

than fifty thousand dollars ($50,000) between said two last named dates. It was alleged in the answer, in effect, that by the Capital National Bank having been designated as a depository bank, and having given bond and duly qualified as such, the opening of an account with it operated to create a credit in favor of the state to the amount of such account, although such credit was based solely upon a deposit of the bank's own evidence of indebtedness, and that from thenceforth John E. Hill was not in any way a party to or in privity with any party to such open account. Upon information and belief it was alleged in this answer that said bank had closed, and at the time such answer was filed was in the hands of a receiver, and that at such closing there was still a portion of said open account which had not been withdrawn from said bank, and that for this balance unpaid Joseph S. Bartley, as treasurer, had filed his claim therefor against said bank and that said demand had been allowed in favor of the plaintiff.

In reply it was admitted that defendant Hill undertook and purported to turn over to his successor all, or what he claimed to be all, the money, excepting an amount not exceeding five hundred dollars ($500) in the form of certificate deposits of or from various banks in the state of Nebraska, or some similar choses in action, but the plaintiff alleged "that all such transactions excepting the turning over of such sum of actual money were illegal, unauthorized, and in nowise binding upon the state of Nebraska." There were contained in the reply the following averments of the plaintiff: "It admits, upon information and belief, that the defendant's successor, J. S. Bartley, did receive and purport and pretend to accept as money, and

did accept in lieu and instead of money, certain certificates of deposit and other papers purporting to be evidences of the funds of the state, and among them, "three certificates of deposits of the Capital National Bank aforesaid, made to the order of the treasurer of the state of Nebraska, for the aggregate sum of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents ($285,357.85),—but not in one certificate for said sum as alleged in the answer,—one of the said certificates being for the sum of one hundred and fifty thousand dollars ($150,000), one for the sum of one hundred thousand dollars ($100,000), and the other for the sum of thirty-five thousand three hundred and fifty-seven dollars and eighty-five cents ($35,357.85), and was induced and prevailed upon by the said defendant to receive and accept the said certificates of deposit in lieu and instead of money to the amount thereof, all of which transactions, the plaintiff alleges and submits to the court, were unauthorized, void, and in nowise binding upon the state of Nebraska." In general terms it may be said that in this reply it was admitted that Joseph S. Bartley indorsed the above described certificates of deposit, and, upon surrender of the same, received credit in open account with said bank for the aggregate amount of two hundred and eighty-five thousand three hundred and fifty-seven dollars and eighty-five cents ($285,357.85); that between January 16 and January 21, 1893, said Bartley did check out portions of said money aggregating $48,993.23. Following these admissions was the following language: "But the plaintiff specially denies that thereby the amount represented by the said certificates of deposit, or

any amount, became the money of the state of Nebraska in the said bank, and alleges and submits to the court that the said transactions were illegal, and unauthorized, and in nowise binding upon the state of Nebraska." It was furthermore admitted that the Capital National Bank had been designated as a depository as alleged in the answer, and that it afterwards closed and is in the hands of the comptroller of the currency of the United States and in process of liquidation, and that there purports to remain due from said bank to J. S. Bartley, as treasurer, a balance of the said account, and that, as state treasurer, he has filed a claim against said bank, but specially denied that plaintiff was responsible for or bound by the filing thereof.

From the above description of the averments of the several pleadings relative to the nature of plaintiff's cause of action, and of the defenses thereto presented, it is clear, beyond question, that this suit was brought to recover the exact amount evidenced by the certificates of deposit turned over by Hill to his successor, less such aggregate amounts as had been thereon realized in money; that is, the sum of $236,364.62, being the difference between $285,357.85 and $48,993.23. It is insisted by the defendants that this, in the form of certificates of deposit, was actually turned over to and received by Joseph S. Bartley; also, that he, as treasurer, opened an account with the Capital National Bank as a state depository duly designated and approved as such by the proper officers of the state, and that thereafter defendant Hill was in nowise accountable to the state for this sum. On the other hand, the state insists

that, under the decisions of this court, nothing but cash can operate or be recognized as payment; and that, therefore, as to whatever sums the defendant became liable for as treasurer he could claim an acquittance only by showing payment of actual cash. In line with this theory the defendants upon the trial urged that if only cash could be recognized for one purpose it was equally unavailable for any other purpose, and that, therefore, the defendants could be held liable only for such cash as actually was proven to have come into the hands of State Treasurer Hill. In respect to this branch of the case the evidence was solely that of Mr. Bartlett, Mr. Hill's deputy, who testified as follows:

Q. Can you tell me how much money Mr. Hill had in the treasury on the day, how much in cash he had, when he entered upon his second term, and how much he received from himself as his own successor in actual money?

A. I think it was $523. * * *

Q. Mr. Bartlett, are you now able to state how much actual money Treasurer Hill deposited in the Capital National Bank during his second term of office?

A. Well, I find during Mr. Hill's second term he deposited in actual cash in the Capital National Bank, $10,300.

Q. How much actual cash did he draw out of that bank during that same period?

A. He drew for the use of the office from that bank $17,785.

Q. For the use of the office? Just explain what you mean by that. Tell how it was drawn out.

A. Paid warrants with it.

Q. To whom would the check be drawn?

A. Drawn payable to currency. We would take the check down to the bank and draw currency, bring it up to the office and use that to pay warrants.

Upon the theory of the plaintiff the sum for which Mr. Hill was accountable was the amount evidenced by the three certificates of deposits above referred to. There was no conflict in the evidence in regard to these three certificates being made up of other certificates running back through the entire term for which the bond sued upon was given. Whatever of cash was put into the Capital National Bank, and even more, was by the above quoted evidence shown to have been paid out upon warrants, so that the language used in the petition in a general way, outside of that referring to the above three certificates, found nothing in the proofs to justify a recovery.

The theory upon which this action was begun, and, indeed, was tried, had its origin in *Cedar County v. Jenal*, 14 Neb., 254. That case was originally brought on behalf of Cedar county to recover from Peter Jenal, who had been treasurer of said county, and the sureties on his official bond, a sum of money which it was claimed he had failed and refused to pay over to L. M. Howard, his successor, at the expiration of his term of office. The defendants, by their answer, admitted that at the expiration of Jenal's term the sum of money demanded was in his hands belonging to the county, but they alleged in defense full payment "in the manner required by law." The judgment in favor of the defendants was reversed because of the mistaken view of the law embodied in the following instruction, to-wit: "Mr. Jenal

testifies that he had the amount due from him to the county on deposit in a bank at Yankton; that he requested Mr. Howard, 'his successor,' to go with him to that place and receive the money; that Mr. Howard refused so to do, but instructed Mr. Jenal to bring him a small portion thereof and deposit the rest to his credit in the same bank. Now if you find that these instructions were given and in pursuance thereof Mr. Jenal did bring so much of the money as directed, and left the rest on deposit in the bank to the credit of Mr. Howard, changing the deposit from his name to that of Mr. Howard, and that this was agreed upon by both Howard and Jenal as a payment, and if you further find that the bank at that time had sufficient funds and was able to pay the amount of such deposit, then such transaction would be a payment of such amount of $3,500 to Mr. Howard, and you would be obliged to find for the defendant." Commenting upon this instruction, LAKE, J., who delivered the opinion of this court, said: "Very clearly to our minds the transaction referred to in this instruction was not a payment of the public money by Jenal to his successor, nor did it relieve the defendants from liability on their bond." There can be no question that the decision of this case was as it should have been, upon the record presented. The bank in which the funds were deposited was in the territory of Dakota. The payment claimed was assumed to be binding upon the county solely because the incoming treasurer had agreed to accept, instead of money, a credit in such bank in favor of himself as treasurer of the county. The first paragraph of the syllabus was sweeping in its enunciation of the general principle involved, and was as fol-

lows: "The payment of money in the hands of a county treasurer, at the termination of his office, to his successor, can be effectuated only by the delivery of that which by the law of the land is recognized as money." As applied to the facts involved in the case then under consideration the above principle was just; and yet it is conceivable that here might be facts to which this principle would equally apply, and yet that thereby a grave injustice would be sanctioned. For instance, under the provisions of our present depository law it might admit of grave doubt whether or not the state, having selected a depository and required deposits of public moneys to be made in depositories only, should not be required to recognize such deposits as the equivalent of actual cash in the hands of the outgoing treasurer, and that, when such credit in a bank had been transferred to his successor, the state should be held bound as though actual cash to the same amount had passed between the two treasurers in making a transfer of the office from one to the other. On the other hand, it might admit of serious question whether or not the incoming treasurer or his sureties should be held as for cash with respect to such amounts as had been credited in his favor by the depository bank, no matter how such credit may have been obtained. These questions are mentioned merely to illustrate the danger of stating a very general proposition as a rule of universal application.

Since the unsuccessful party by its pleadings, as well as throughout the entire trial, and upon presentation of its motion for a new trial, has insisted that the depository law which went into effect at the beginning of Treasurer Bartley's

term has no applicability to the facts of this case, it is not necessary to determine the queries above suggested, in determining plaintiff's motion for a new trial. The special verdict of the jury was consistent with its general verdict. It is not deemed necessary to set out this special verdict at length in the already extended description of the issues and evidence involved in this case. The facts therein found were, that on January 14, 1893, the officers by law required to approve depository bonds, to-wit, the governor, secretary of state, and the attorney general, did approve the depository bond of the Capital National Bank in the penal sum of $700,000, upon which Charles W. Mosher and R. C. Outcalt were sureties; that the three certificates of deposits described in plaintiff's reply were indorsed by J. E. Hill as treasurer to his successor and by him on January 16, 1893, were surrendered to said bank, being indorsed to its president, C. W. Mosher, and in place of these certificates Treasurer Bartley with the amount thereof opened a current account with said bank and before January 21, 1893, had withdrawn therefrom $48,993.23, but that on the date last named said bank was not open for business and then was, and thenceforward has been, insolvent, and has dishonored certain checks drawn against said account after January 17, 1893, and that on January 22, 1893, said bank and its effects were taken possession of by a bank examiner and afterwards were, by such examiner, turned over to a receiver. It was further found by said special verdict that on May 11, 1893, J. S. Bartley, purporting to act as treasurer of the state of Nebraska, filed a claim with the said receiver for the unpaid balance of the above account, but that

said claim was afterwards returned to him without an allowance thereof being made, and that on September 4, 1895, Treasurer Bartley, by the attorney general of this state, brought suit in the circuit court of the United States for the district of Nebraska, against said receiver, to recover the amount of said balance. The defendants have moved for judgment upon this special verdict. To grant this motion would be to justify the verdict of the jury upon grounds radically different from those chosen by the state, consistently with which grounds the jury were instructed. As we are of the opinion that the motion for a new trial must be overruled, for the reason that there has been suggested or discovered in the record no error prejudicial to plaintiff, it results that, upon the general verdict judgment must be rendered for the defendants. It is therefore deemed advisable to make no order upon the motion for judgment on the special verdict, lest hereafter it might be assumed that the questions thereby presented had been passed upon by this court, in advance of an existing necessity for such action. The motion for a new trial is overruled and it is ordered that judgment be rendered in favor of the defendants upon the general verdict.

NORVAL, J.

This is an original action brought in this court by the state upon the official bond of John E. Hill as state treasurer for his second term of office. There have been two trials. At the first one the jury failed to agree. The second trial resulted in a general verdict for the defendants, and a special verdict was also returned under the directions of the court. A motion for a new trial has

been filed by the state, and a motion by the defendants for judgment upon the special verdict. These motions have been argued and submitted for our consideration.

Before taking up the questions presented by the foregoing motions I deem it proper to express an opinion upon several important propositions which were controverted, and ably argued by counsel during the trial.

Several defenses were interposed by the sureties in their answers, among others, that the bond sued on was never signed by Hill, the principal named therein; that the sureties signed the same upon the express condition that it should not be delivered until it had been signed by said Hill, and that if said instrument was ever delivered to, or filed with, the secretary of state, it was against the defendants' consent and in violation of the condition aforesaid. At both trials one of the objections to the introduction of the bond in evidence urged by the sureties was that the state had failed to show it was ever delivered by Hill to the secretary of state as and for the former's official bond, which objection was overruled. Considerable testimony was adduced for the purpose of establishing the delivery of the instrument, which I do not now deem important to review, or to express an opinion upon its sufficiency, inasmuch as the question of delivery was not an issuable fact in the case. The petition expressly alleges the delivery of the instrument to the proper officer of the state. In the third subdivision of each of the answers of the sureties I find the following language: "This defendant admits that he did sign the instrument in writing mentioned, and by copy attached to the petition,

and in the petition designated as the bond of office of the defendant Hill as treasurer of the plaintiff, but this defendant alleges the fact to be that at the time he signed said instrument it was expressly understood and agreed by and between this defendant and the said defendant Hill, and between defendant and others who had signed and who were to sign said instrument, that said Hill should and would, before said instrument should be delivered or be presented to the governor of the state of Nebraska for approval, and before it should be filed or recorded, be signed by said defendant Hill; and this defendant signed said instrument upon the express condition that it should not be delivered until after it had been signed by said defendant Hill. Defendant further says that said Hill never at any time signed said instrument, and if it was ever delivered it was done in violation of the express condition aforesaid, upon which defendant signed said instrument." It is obvious, that, under the rules governing pleadings in the Code states, the foregoing was insufficient to put in issue the averment in the petition of the delivery of the bond in question. The answer states that "if it [the bond] was ever delivered, it was done in violation of the express conditions" under which it was signed. This averment constituted a substantial admission of the delivery of the bond to the proper officer, and the state was, therefore, not required to prove that fact. (*Dinsmore v. Stimbert*, 12 Neb., 433; *Miller v. Hurford*, 13 Neb., 22; *School District v. Holmes*, 16 Neb., 488; *Dwelling House Ins. Co. of Boston v. Brewster*, 43 Neb., 528.)

Another objection urged to the admission of the bond in evidence was that it was never signed

or executed by Treasurer Hill. This contention is based upon the fact that Hill did not subscribe his name to the bond at the usual place for signing below the body of the instrument, and preceding the signatures of the sureties. The question was ably discussed at the bar and in the briefs filed as to whether the sureties upon an official bond are bound where the instrument has not been executed by the principal named therein. There is a sharp conflict in the authorities upon this point. The following decisions lend support to the doctrine that the sureties are liable, even though the principal did not execute the bond: *State v. Bowman*, 10 O., 445; *Trustees of Schools v. Sheik*, 119 Ill., 579; *Loew's Administrator v. Stocker*, 68 Pa. St., 226; *Williams v. Marshall*, 42 Barb. [N. Y.], 524; *Parker v. Bradley*, 2 Hill [N. Y.], 584; *Scott v. Whipple*, 5 Greenl. [Me.], 336; *Keyser v. Keen*, 17 Pa. St., 327; *Johnson v. Weatherwax*, 9 Kan., 75; *State v. Peck*, 53 Me., 284; *Tillson v. State*, 29 Kan., 452; *State v. Peyton*, 32 Mo. App., 522. There are other cases which hold that such a bond is imperfect and no action can be maintained thereon against the sureties. (*Bean v. Parker*, 17 Mass., 603; *Russell v. Annable*, 109 Mass., 72; *Wood v. Washburn*, 2 Pick. [Mass.], 24; *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass., 460; *People v. Hartley*, 21 Cal., 585; *Bunn v. Jetmore*, 70 Mo., 228; *Wells v. Dill*, 6 Martin [La.], 665; *Johnston v. Township of Kimball*, 39 Mich., 187; *Hall v. Parker*, 39 Mich., 287; *Sievers v. Woodburn Sarven Wheel Co.*, 43 Mich., 279; *Board of Education of Rapid City v. Sweeney*, 48 N. W. Rep. [S. Dak.], 302; *City and County of Sacramento v. Dunlap*, 14 Cal., 421; *Fletcher v. Austin*, 11 Vt., 447; *State v. Austin*, 35 Minn., 51.) Our court, in *Gregory v. Cameron*, 7

Neb., 414, has held that a bond given to secure a stay of execution signed by the sureties alone is invalid, and in *Bollman v. Pasewalk*, 22 Neb., 761, an indemnifying bond signed by the sureties and not executed by the principal therein named, was sustained. Thus it will be seen that not only are the adjudications in other states hopelessly irreconcilable upon the point, but this court is apparently upon record on both sides of the question. As I view the case at bar, it is unnecessary that at this time we should determine which line of decisions lays down the true rule, inasmuch as the proofs adduced on the last trial show beyond controversy that Treasurer Hill did in fact execute the instrument declared upon as and for his official bond. In preparing the bond a printed form was used, the most of the blank spaces therein being filled in the handwriting of Mr. Hill. He wrote his own name three times in the body of the bond, besides inserting the amount of the penalty of the bond and the name of the office to which he had been elected, with the intention of making it his bond, and for the purpose of enabling him to qualify as state treasurer. Following the justification of the several sureties attached to the bond, is the following oath of office:

"STATE OF NEBRASKA, }
LANCASTER COUNTY. } SS.

"I do solemnly swear that I will support the constitution of the United States, and the constitution of the state of Nebraska, and will *faithfully discharge the duties of state treasurer* of the state of Nebraska according to law, to the best of my ability; and that at the election at which I was chosen to fill said office I did not improperly influ-

ence in any way the vote of any elector, nor have I accepted, nor will I accept or receive, directly or indirectly, any money or other valuable thing from any corporation, company, or person, or any promise of office for any official act or influence.

"JOHN E. HILL.

"Subscribed in my presence and sworn to before me this 8th day of January, A. D. 1891.

"AMASA COBB,
"*Chief Justice.*"

It was shown that the signature "John E. Hill" appended to the oath and the words "faithfully discharge the duties of state treasurer," set out in the body thereof, were in Mr. Hill's handwriting; that he obtained the signatures of most of the sureties thereon; that the bond was presented to both Governors Thayer and Boyd, and was approved by each of them; that subsequently it was filed and recorded in the office of the secretary of state—the proper custodian thereof; that the failure of Mr. Hill to subscribe the bond at the usual place was a mere unintentional omission on his part; that he did not know of it until about the time this action was instituted, and that he entered upon and discharged the duties of his office for the full term in the belief that he had qualified as required by law. These facts, under the authorities, constitute a signing and execution of the bond by Hill, and the sureties are as firmly bound as though their principal had signed his name at the usual place at the bottom of the instrument. (*Gage County v. Fulton*, 16 Neb., 5; *Taylor v. Dobbins*, 1 Strange [Eng.], 399; *Schneider v. Norris*, 2 M. & S. [Eng.], 286; *Morison v. Turnour*, 18 Ves. Ch. [Eng.], 175; *Bleakley v. Smith*, 34 Eng. Ch., 150;

Clason v. Bailey, 14 Johns. [N. Y.], 484; *Penniman v. Hartshorn*, 13 Mass., 87; *Schmidt v. Schmaelter*, 45 Mo., 502; *Fulshear v. Randon*, 18 Tex., 275; *Wise v. Ray*, 3 Greene [Ia.], 430; *McConnell v. Brillhart*, 17 Ill., 359; *Barry v. Coombe*, 1 Pet. [U. S.], 640; *Palmer v. Grant*, 4 Conn., 389; *Quin v. Sterne*, 26 Ga., 223; *Drury v. Young*, 58 Md., 546; *Hall v. Lafayette County*, 69 Miss., 529; *McLeod v. State*, 69 Miss., 221.) The last two cases are directly in point. The last one was an action on the official bond of McLeod as sheriff and tax collector. The instrument was prepared by McLeod, he inserting his name in two places in the body thereof, and in that condition it was presented to, and signed by, the sureties, they leaving the first line at the end of the bond for McLeod's signature. Through inadvertence he failed to attach his signature there, and the bond was approved. McLeod took and subscribed the oath required, and thereafter entered upon the duties of his office. In an action upon the bond, the sureties attempted to show that they signed the instrument on the condition that the principal was also to sign it, but the trial court refused to allow such evidence to be given, and gave a peremptory instruction to find for the plaintiff, and a verdict was returned in accordance therewith. The judgment entered against McLeod and his sureties was affirmed by the supreme court. Cooper, J., in delivering the opinion of the court observes: "McLeod made the bond, and his name twice appeared in the body thereof, written by him. True, he says that he did not intend his name, as written, to be his final signature or subscription thereto; but he testifies that the bond, as it now appears, was delivered by him as his official bond, and accepted as such by the approv-

ing authorities. He intended the bond, as written by him, to be operative; and when this appears, and the name appears in the instrument, written by the party, such signature, adopted by the final delivery, intended as such, is such an authenticating signature as discloses the purpose of the obligor." The usual place for signatures to a bond is at the bottom of the instrument, but its validity does not necessarily depend on its being signed there, as the authorities last above cited show. The statute (sec. 8, ch. 10, Compiled Statutes) relating to bonds of state officers does not require such a bond to be subscribed by the principal therein, but provides that it shall be executed by him, with at least three sureties. It is therefore of no consequence on what part of the bond Hill wrote his name,—whether at the top, in the body, or at the bottom,—so he placed his name thereon with the intention of binding himself. This we think he did, and therefore he duly signed and executed the bond, as fully and completely as if he had attached his signature at the bottom of the instrument. The liability of the defendant sureties is conditional to that of their principal. He being bound, they are also bound. We so held and instructed the jury upon the last trial.

Another defense interposed by the sureties was, as already indicated, that they executed the bond upon the condition that the principal should likewise sign it, and that they did not consent to its delivery without it. Numerous authorities were called to our attention which lay down the rule that an official bond, signed by sureties alone, whose signatures were secured upon the promise of the officer that he would also execute the same before delivery, and without their knowledge and

consent it was accepted and approved without the signature of the principal, is invalid and of no binding force whatever. Had it been established that Treasurer Hill never signed the bond under consideration, the decisions relied upon by the sureties would be in point. It is not alleged in the answers that Hill promised to subscribe the bond by writing his name at the usual place for signatures, but that he agreed to sign the instrument. Inasmuch as Hill did execute the bond, although he failed to sign it at the bottom, the defense interposed that the bond was delivered in violation of the condition pleaded has fallen to the ground.

The motion for a new trial contains several assignments, but they need not be stated, nor shall I discuss each assignment separately. I shall direct my attention alone to such questions as were argued upon the presentation of said motion and the motion of defendants for judgment upon the special verdict.

The petition alleges two breaches of the bond, the first being that the defendant Hill, during his second or last term of office, deposited of the moneys held by him and belonging to the state the sum of $285,357.85 in the Capital National Bank of Lincoln; that said sum had not been disbursed or paid out for the use and benefit of the state or in any manner accounted for, but so remained on deposit in said bank when he surrendered his office to his successor, and that he has failed and refused to pay over the amount thereof to such successor. For a second breach it is averred, in effect, that at the end of Hill's last term of office, in making settlement with Joseph S. Bartley, his successor in office, for the money

received and held by him as such state treasurer and which then remained in his hands undisbursed, said Hill turned over to said Bartley, who received and accepted in lieu of money certain certificates of deposit issued by said Capital National Bank amounting in the aggregate to the sum of $285,357.85, of which amount said Bartley has subsequently received upon said certificates from said bank certain sums of money, aggregating the sum of $48,993.23 and no more, and that said bank was, at the time said certificates were turned over by Hill, and ever since has been, wholly insolvent, and it has failed and refused to pay any other sums of money upon said certificates of deposit, and that by reason of the premises aforesaid the conditions of said bond are broken and the defendants became indebted to the state in the difference between the amounts of said certificates of deposit and the sums received thereon by said Bartley, to-wit, $236,364.62, for which amount, with interest thereon, judgment is prayed. Although two breaches of the bond are alleged, the action is to recover but a single sum, namely, the amount last above stated.

It is conceded by the state that the defendant Hill has fully accounted for all moneys which came into his hands as state treasurer, save and except the sum last aforesaid. It was also established beyond controversy that only a small portion of the revenues of the state was paid to Hill in actual cash, but that almost the entire bulk thereof was received by him in bank drafts, checks, and certificates of deposit as for and instead of money; that Hill, in settling with his successor, delivered to the latter certificates of deposit and other choses in action of the same

character as those which Hill had accepted as treasurer; and that Hill has properly paid out and disbursed, or accounted to his successor in office for all sums received by him in his official capacity in actual cash, as well as for all drafts, checks, certificates of deposit, or other evidences of indebtedness received by him for the use of the state, which the proofs disclose he converted into money during his second term.

The following facts were established upon the trial by uncontradicted testimony, and the jury by their special verdict substantially so found: That J. S. Bartley, after his induction into office as state treasurer, received from the defendant Hill, as money, three certificates of deposit aggregating $285,357.85, issued by the Capital National Bank, each payable to the order of "State Treasurer of Nebraska," each of said certificates being indorsed "J. E. Hill, State Treasurer;" that subsequently on January 14, 1893, the Capital National Bank was duly made a state depository; that two days later said Bartley as state treasurer indorsed said certificates of deposit and delivered the same to said bank, and took credit for the aggregate amount of said certificates on open account with said bank in the name of "J. S. Bartley, Treasurer," which certificates were thereafter retained by said bank; that there were drawn by said Bartley, and paid by said bank, checks to the aggregate amount of $48,993.23, there being no deposit other than already stated; that on January 14, 1893, and thenceforth said bank was insolvent; that on the 21st of said month it ceased to do business, and a receiver was appointed; that nothing further, either by the state or said Bartley, has been realized from said deposit or account;

that on September 4, 1895, said Bartley, as state treasurer, by the attorney general as his attorney, brought suit in the circuit court of the United States for the district of Nebraska against the receiver of said bank for the recovery of said unpaid balance. The state insists that the acceptance by Bartley from Hill, his predecessor in office, of the said certificates of deposit issued by the Capital National Bank, aggregating the sum of $285,357.85, did not constitute a payment so as to release the outgoing treasurer; in other words, that an outgoing officer can make payment to his successor in nothing but money. This view was adopted by the court upon the trial of the case, and the jury were so instructed in the following language:

"4. You are instructed that the payment of money in the hands of a state or county treasurer, at the termination of his office, to his successor, can be effectuated only by the delivery of that which by the law of the land is recognized as money. The mere delivery of certificates of deposit issued by a bank, upon which no money is realized, is not a payment."

The soundness of this rule is doubted by some of my associates, but it is the doctrine expressly held and applied in *Cedar County v. Jenal*, 14 Neb., 254. That was an action upon the official bond of Peter Jenal, late county treasurer, to recover moneys which it was claimed he had failed to pay at the expiration of his term to one Howard, his successor. The amount sued for was by the answer of the defendants admitted to have been in Jenal's hands at the close of his term, the defense being that he had paid the same to said Howard by depositing the amount, under the express direc-

tions of said Howard, in the latter's name with one Parmer, a banker, receiving therefor certificates of deposit, which Jenal delivered to and which were accepted by said Howard as payment of the amount found chargeable against the outgoing treasurer on settlement. There was judgment in the district court for Jenal and his sureties, which was reversed by this court on the ground alone that the facts above stated did not constitute a payment. In the opinion, which was written by LAKE, C. J., it is said: "Is the matter pleaded as payment a defense? We think not. The bond given by the defendant, on which the action was brought, required Jenal to 'promptly pay over to the person or officer entitled thereto, all money' which might 'come into his hands by virtue of his said office,' and to 'faithfully account for all balances of money remaining in his hands at the termination of his office.' Section 94 of the revenue act, General Statutes, 930, provides that the 'treasurer, on going out of office, shall deliver to his successor in office all public moneys,' etc., 'in his possession.' And the next section declares that if he 'shall fail * * * to pay over all moneys with which he may stand charged at the time, and in the manner prescribed by law, it shall be the duty of the county clerk, on receiving instructions, * * * to cause suit to be instituted against such treasurer and his sureties, or any of them, in the district court of his county.' Thus we see that, it being money that was in Jenal's hands, belonging to the county, both the law and his official bond united in requiring him to hand that over to his successor. The delivery of Parmer's certificates was not payment, for they were mere promises of a stranger to the county

to pay money. The payment of money can be effectuated only by the delivery of that which by the law of the land is recognized as money. Even if Howard, the successor in office, did agree to accept these certificates in payment, which, however, he denies, no money having been realized from them, it could avail the defendants nothing as against the county. In the collection, care, and disbursement of the revenues in this state, such certificates are not recognized at all by the law, and no officer has any right whatever to deal in them on behalf of the public. If a treasurer invest the public funds in them, he is guilty of a highly penal offense. (Criminal Code, sec. 124.) It would indeed be a strange system of laws that would permit an act, denounced as a felony, to be pleaded in bar of an action brought to recover money lost by that act. But such is not the law. The only way in which it was possible for Jenal to have satisfied the law and his bond, and relieved himself and his sureties from responsibility as to this money, was to have handed it over to his successor in office. It being money which he held on the public account, it was money that the law and his bond required him to produce and hand over. Nothing else could suffice." The foregoing is clear cut. The language has no doubtful meaning, nor was this utterance of the court mere *obiter*. The question was squarely involved whether an outgoing treasurer can make payment to his successor in anything except money, and the court said, and rightly so, in my judgment, that he could not. To be sure, in that case it appears that Howard, who was Jenal's successor, denied that he agreed to accept the certificates as payment, but the verdict being for Jenal, we must

assume that the evidence was sufficient to establish, and the jury must have found, that Howard received the certificates in lieu of cash. This decision has never been overruled, but was cited with approval in *Wayne County v. Bressler*, 32 Neb., 818; and was also cited in *State v. Hill*, 38 Neb., 698. In the opinion in the last case, IRVINE, C., uses this language: "From the statutes already quoted and from the decisions of this court (*State v. Keim*, 8 Neb., 63; *First Nat. Bank of South Bend, Ind., v. Gandy*, 11 Neb., 431; *Cedar County v. Jenal*, 14 Neb., 254; *Wayne County v. Bressler*, 32 Neb., 818) it is clear that it is the duty of both state and county treasurers to keep the money coming into their official custody in specie, except where by recent statutes they are permitted to invest or deposit it, and then such investment or deposit must be made only in the manner provided by law. Hill's duty was to keep the money in the treasury at Lincoln. He had no right to invest it in any manner, or to deposit it. * * * When Hill removed the money from the treasurer's office with the intent of depositing it contrary to law, he was guilty of a conversion and a cause of action accrued." If Hill could not lawfully, and without violating the conditions of his bond, deposit in bank the moneys belonging to the state, I do not understand by what process of reasoning it can be held where he has made such deposit of public funds and received a certificate of deposit as evidence thereof, and turned the same over to his successor in making settlement with him at the expiration of his term, that it would release the outgoing treasurer and his sureties to the extent of the amount of such certificate.

The decision of the *Jenal Case* was placed upon

two grounds: First—That the bond and the statutes of the state alike required the treasurer to make payment to his successor in money. Second—That under the Criminal Code it is a crime for a treasurer to loan the public funds or to deposit the same in bank. It may be that the last ground is untenable, yet, nevertheless, the other course of reasoning adopted by the author of the opinion is not only sound, but unanswerable. The doctrine of the *Jenal Case* is neither new nor startling. It merely recognized and applied a familiar principle of the law of agency to a public officer. An agent cannot bind his principal by receiving anything but money in discharge of a debt due the principal, unless authorized by the latter so to do. An attorney cannot discharge a judgment in favor of his client except by the payment of the full amount thereof in money, unless empowered to do otherwise, or there has been a subsequent ratification. Should he accept, in payment of a judgment, a promissory note, the plaintiff would not be bound. In *Smith v. Jones*, 47 Neb., 110, this court said: "The ordinary powers of an attorney do not authorize him to execute any discharge of a debtor but upon the actual payment of the full amount of the debt, and that in money only;" citing *Hamrick v. Combs*, 14 Neb., 381; *Stoll v. Sheldon*, 13 Neb., 207; *State Bank of Nebraska v. Green*, 8 Neb., 297; *Luce v. Foster*, 42 Neb., 818.

As Bartley was merely the agent of the state, he could not bind the public by accepting from his predecessor, Hill, anything which by the law of the land is not regarded as money. Undoubtedly, as between individuals, payment of a debt may be made in any mode which the parties agree shall be treated as the equivalent of a money payment.

In such a case it may be by anything of value which is delivered and accepted for the purpose of extinguishing the indebtedness. It may be made in property or in services, or by a certificate of deposit, if the parties so agree. This is, in effect, the holding in *Hughes v. Kellogg*, 3 Neb., 186; but that decision does not justify the conclusion that a public officer can make payment to his successor by delivery of certificates of deposit or anything else than money, so as to bind the public. If these certificates of deposit had been delivered by Hill to Bartley in satisfaction of an individual indebtedness of the former to the latter, then I agree this would have constituted a valid payment, and the case of *Hughes v. Kellogg, supra*, would be analogous. I suppose it will not be questioned by any one that had Bartley accepted as payment from Hill promissory notes of responsible third persons, or other choses in action, that such payment would have been ineffectual to release these defendants. If such be the law, and there can be no doubt of it, then logically it follows that the acceptance by Bartley of the certificates of deposit upon an insolvent bank did not bind the state,—at least no further than the same may have been by him converted into money,—since certificates of deposit, in form like those under consideration, are in substance and legal effect promissory notes. They are but the mere promises of the Capital National Bank to pay money. (*Bailey v. Bailey*, 25 Mich., 190; *Tripp v. Curtenius*, 36 Mich., 495; *Citizens Nat. Bank v. Brown*, 45 O. St., 39; *Howe v. Hartness*, 11 O. St., 449; *Welton v. Adams*, 4 Cal., 37; *Brummagim v. Tallant*, 29 Cal., 503; *Payne v. Gardiner*, 29 N. Y., 146; *Renfro Bros. v. Merchants & Mechanics Bank*,

83 Ala., 425; *Klauber v. Biggerstaff*, 47 Wis., 551; *Curran v. Witter*, 68 Wis., 16.)

In *Bank of Orange County v. Wakeman*, 1 Cow. [N. Y.], 46, it was held that an officer cannot lawfully receive a promissory note as payment.

In *Elliott v. Miller*, 8 Mich., 132, it was decided that a township treasurer has no right to receive in payment of taxes a draft or anything which the law has not authorized to be so received. To the same effect is *Jones v. Wright*, 34 Mich., 371.

It was ruled in *People v. McKinney*, 10 Mich., 54, that the reception by the state treasurer of drafts drawn by a railroad company on a New York bank in payment of taxes, did not amount to a payment any further than the money had been received by the treasurer upon such drafts.

Campbell, J., in his separate opinion in *City of Lansing v. Wood*, 57 Mich., 201, which was an action on the bond of Wood, the treasurer of the city of Lansing, for failure to pay over moneys received by him during his official term, in discussing whether the receipting for certificates of deposit as cash by the incoming treasurer from the outgoing one operated to bind the city, says: "Such a certificate is no payment unless received as such by one who has power to accept payment in that way. The question is not, perhaps, of any great importance, except in the one point of view urged on the argument that Wood had lawfully deposited his official moneys in Angell's bank, and by this process merely shifted the deposit to his successor, who thereby made the same bank his own place of deposit. No authority is found in our reports, and, so far as we have discovered, none exists anywhere, which favors the idea that a public treasurer may accept from a public

debtor payment in anything but money. If he takes anything else, he may make himself liable for any harm that may come from his doing so, but until the money is actually realized, the debtor has made no payment which will bind the creditor. If the money is realized the payment then becomes complete, but not otherwise."

We have carefully examined the opinion in *State v. McFetridge*, 84 Wis., 473. The sole question there before the court was whether a state treasurer and his sureties on his official bond were liable to the state for interest received by such officer for state funds deposited by him in bank. Such liability was held to exist. Whether an outgoing treasurer could bind the state by the delivery to his successor of certificates of deposit as and for money held by him by virtue of his office was neither involved nor decided in that case. In our investigation of the subject we have been unable to find a single authority, and none has been cited, which holds that the mere delivery and acceptance of certificates of deposit, upon which no money has been obtained, is such a payment as will discharge the outgoing officer.

The statute (sec. 2, art. 4, ch. 83, Compiled Statutes) provides that "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. * * * Eighth—He shall account for and pay over all moneys received by him as such treasurer to his successor in

office." The foregoing statute defining the duties of the state treasurer requires him to account for and pay over, on the expiration of his term, to his successor all moneys received by him belonging to the state. This he can alone do by delivering the amount in actual cash. In no other way can he satisfy the conditions of his bond to well and truly perform the duties of his office required by law. It is money that he is required to pay over. It is idle to say that a certificate of deposit is money. We know it is not. It is the mere promise of the person or bank issuing it to pay money either on demand or at a fixed time. It is absurd to say that a promise to pay money is money. No person is required to accept such paper in discharge of a debt, and yet it is insisted that the liability of an outgoing officer and his sureties is released by the delivery to and acceptance by his successor of certificates of deposit in settlement, and that the state, whether it will or not, is bound. To such doctrine I cannot yield assent. Both upon principle and authority, I am fully satisfied that prior to the taking effect of the legislative enactment providing for the depositing of state and county funds in banks, which law was not in force when Hill settled with Bartley, a turning over by a state treasurer to his successor as moneys received by him during his official term certificates of deposit issued by a bank, would not alone exonerate such outgoing officer and his sureties from liability.

It is argued that the rule in the *Jenal Case* cuts both ways; that is, if Hill is not entitled to credit for the certificates of deposit turned over at the end of his term to his successor, then he is only chargeable with the amount received in cash at

the commencement of, and the sums paid in money during such term, and is not liable as for money for the amounts of any drafts, checks, or certificates of deposits accepted by Hill as so much money due the state. This view was presented to the jury by the sixth instruction. But upon reflection and considerable examination of the subject, I am now convinced that while Hill had no right to receive anything but money in payment of a demand due to the state, yet having done so, it does not necessarily follow that he is not liable to the state. Although Hill could not bind the state by accepting certificates of deposit or other choses in action in satisfaction of demands due the state, yet such payment could be subsequently ratified. In case of such ratification the state is bound, and Hill and his sureties are likewise bound. The state, by instituting this suit and charging Hill with the amounts received from all sources, whether payments were made in cash, or by certificates of deposit, or other evidences of indebtedness, ratified Hill's action, and by treating the acceptance by Hill of such certificates of deposit or other evidences of indebtedness as a payment, the state thereby lost its remedy against the party whose indebtedness was extinguished by the delivery to Hill of such certificates of deposit or other choses in action as payment, and Hill and his bondsmen are liable the same as if the actual cash had been received. (*Modisett v. Governor*, 2 Blackf. [Ind.], 135; *Armstrong v. Garrow*, 6 Cow. [N. Y.], 465; *Heald v. Bennett*, 1 Doug. [Mich.], 513; *Welch v. Frost*, 1 Mich., 30; *Jones v. Wright*, 34 Mich., 371.) The last case was a proceeding by *mandamus* to compel the respondent to pay certain school moneys which, as

township treasurer, he had collected and failed to pay over. One of the defenses was that the respondent had accepted various local orders instead of money in payment of the taxes levied for school purposes. The court held this defense unavailing. The second subdivision of the syllabus reads thus: "A township treasurer has no right to receive for school moneys anything which the law has not authorized to be so received, and if he chooses to do so and to receipt for the taxes, he must make good the amount." Although the state had the power to repudiate any payment made to Hill in anything other than money, it was not bound so to do, and there is no claim that it has repudiated any payment so made. It is equally clear that Hill and his sureties are estopped to repudiate any such payment.

The record discloses that of the moneys of the state in Treasurer Hill's hands at the beginning of his last term, the sum of $177,489.84 was to his credit upon open account in the Capital National Bank, and the further sum of $90,000 was represented by outstanding certificates of deposit issued by said bank and held by said Hill as state treasurer; that he deposited divers sums of money in said bank during his last term and took credit therefor on his open account, and checks for various sums were likewise drawn from time to time by Hill against said account, which were paid by the bank; that a portion of these credits was carried through Hill's second term and was merged into the certificates of deposit which were turned over by him to Bartley. The case was submitted to the jury upon the theory that defendants were only liable for the amount of money Hill received upon said certificates and open account during his

second term. Upon this branch of the case the jury were directed by the seventh instruction as follows: "Should you find that there was any agreement between Hill and the bank with respect to the application of withdrawals by him, such agreement is binding upon the parties to the action. If, however, no such understanding existed, it is the right of the defendant Hill to direct the application to be made of such withdrawals, and it is not within the power of the state to make another or different application thereof." The rule deducible from the authorities in regard to the application of payments may be summarized as follows: A debtor paying money has the right to direct its application, but if he fails to do so, the creditor may make the application at any time before suit is brought. (*Robinson v. Doolittle*, 12 Vt., 246; *Wendt v. Ross*, 33 Cal., 650; *McCune v. Belt*, 45 Mo., 174; *United States v. Kirkpatrick*, 9 Wheat. [U. S.], 720.) It is equally well settled that where payments are made on an open account, and no appropriation thereof has been made by either party before a controversy has arisen concerning them, the law will apply them in discharge of the earliest items. (*Lazarus v. Friedheim*, 11 S. W. Rep. [Ark.], 518; *Pierce v. Knight*, 31 Vt., 701; *Milliken v. Tufts*, 31 Me., 497; *Wendt v. Ross*, 33 Cal., 650; *Thurlow v. Gilmore*, 40 Me., 378; *Harrison v. Johnston*, 27 Ala., 445; *Hersey v. Bennett*, 9 N. W. Rep. [Minn.], 590; *United States v. Kirkpatrick*, 9 Wheat. [U. S.], 720; *Jones v. United States*, 7 How. [U. S.], 684.) In the last case the rule was applied to a running account between the United States and a postmaster. In *United States v. Kirkpatrick, supra*, Judge Story in delivering the opinion of the court said: "The

general doctrine is that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and *a fortiori* at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjudged than for the mere purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time; so that the credits are to be deemed payments *pro tanto* of the debts antecedently due." The rule respecting the appropriation of payments which was given in the case at bar I am constrained to hold was erroneous; but the verdict should not be set aside for error in this or any other instruction given to the jury, inasmuch as the verdict is the only one which should have been returned under the evidence, as I shall hereafter show. (*Converse v. Meyer*, 14 Neb., 190; *Knowlton v. Mandeville*, 20 Neb., 59; *Western Union Telegraph Co. v. Lowrey*, 32 Neb., 732.)

It remains to be determined whether the facts found by the special verdict, standing alone, or when taken in connection with the other facts, established by uncontradicted proofs, constitute a defense to the action. It is strenuously insisted that the surrender by Bartley of the certificates of deposit which he received from Hill to the Capital National Bank—the institution which had issued them—after it had become a state depository, and taking credit therefor on open ac-

count as state treasurer, amounted to a novation and operated as a release of the defendants from liability on their bond. I shall not at this time stop to discuss this line of defense. I am convinced that upon another ground the action must fail. While Bartley had no power to bind the state by accepting these certificates of deposit as payment, yet his action in that regard was subsequently ratified by the state. It is disclosed by this record that after the deposit of said certificates of deposit in the Capital National Bank to the credit of Bartley, as state treasurer, he drew checks against said account aggregating $48,993.23, which were paid by said bank before its doors were closed. The state in its petition herein gave Hill credit for the same. Furthermore, the legislature, at its last session, in the act making appropriation for the current expenses of the state government for the ensuing years, and to pay the miscellaneous items of indebtedness of the state, made the following appropriation: "For state sinking fund, one hundred eighty thousand and one hundred and one and seventy-five one hundredths ($180,101.75) dollars, to reimburse said fund for the same amount *tied up in Capital National Bank.*" (Session Laws, 1895, p. 404, ch. 88.) Subsequently, Bartley, as state treasurer, by the attorney general as his attorney, brought suit against the receiver of said bank to recover the unpaid balance of said account. I am convinced upon full consideration of these matters that the state has ratified the act of Bartley in accepting said certificates of deposit from Hill as money, and thereby exonerated him from liability upon his bond. The only funds in the Capital National Bank which the state had, or could claim to have,

any interest in, it was shown were those arising from the deposit of the certificates received from Hill. The legislature must have regarded this claim against the bank as belonging to the state, else it would not, in making the appropriation aforesaid to reimburse the sinking fund, which had become impaired by the failure of the bank, have used the words, "amount tied up in the Capital National Bank." Had the law-makers desired to repudiate the act of Hill in delivering to his successor said certificates as money, in making said appropriation, it is reasonable to suppose they would have stated in the act the impairment of the sinking fund was occasioned by the money belonging thereto being "tied up in Hill's hands," or used some other appropriate designation. There is no room to doubt that the legislature was clothed with ample power to ratify the act of Bartley in receiving the certificates of deposit in settlement with Hill. (See *City of Lansing v. Wood*, 57 Mich., 201; *Board of Education v. McLandsborough*, 36 O. St., 227; *Mount v. State*, 90 Ind., 29; *Jewell Nursery Co. v. State*, 56 N. W. Rep. [S. Dak.], 113.) In the last case it was decided that there was a ratification, notwithstanding the governor vetoed the act passed by the legislature relied upon to show such ratification; and in the Michigan case it was held competent to show, in an action upon the bond of a city treasurer, that the city council had ratified and approved the act of the treasurer in turning over to his successor, in lieu of money, certain certificates of deposit issued by a bank that afterward failed. For the reason given, the motion for a new trial should be overruled and judgment rendered for the defendants.

POST, C. J.

I quite agree with my Brother RYAN that the motion for a new trial should be denied, but without dissenting from the views expressed by him, I prefer to rest my conclusions upon other and, as appears to me, more substantial grounds. I was at the inception of this controversy, in common with my associates, firmly committed to the doctrine that Hill could discharge the obligations of his bond, as state treasurer, only by the actual payment to his successor, in cash, of the full amount with which he was in law chargeable at the close of his second term. However, the investigation incident to two trials of the cause has led to the conviction that that doctrine is wholly indefensible.

There are certain facts clearly established by the proofs, and as to which there is no controversy, viz., that Hill, at the close of his second term, tendered to his successor, Bartley, as representing the funds with which he was chargeable, certain certificates of deposit, including three certificates issued by the Capital National Bank of Lincoln amounting in the aggregate to $285,357.85; that Bartley, not being satisfied regarding value of the certificates so tendered, a committee of bankers was mutually chosen to pass upon the solvency of the several banks by which they were payable; that upon the recommendation of said committee certain certificates were rejected and the others, including those of the Capital National Bank above mentioned, were by Bartley accepted as payment of the full amount of their face value. The result of that transaction was, I conceive, to render Bartley liable abso-

lutely upon his bond for the amount of money represented by the certificates of deposit so accepted by him, as effectually for all purposes as if he instead thereof had demanded and received from his predecessor legal tender currency or gold coin of the United States. It follows, as the result of that conclusion, that the receipt by Bartley of said certificates operated as a discharge *pro tanto* of the liability of Hill, which is in nowise affected by the subsequent failure of the Capital National Bank after being charged with the amount of such certificates as a state depository in accordance with the act of 1891. We can imagine cases in which the state, or other public body, may, by the proper action, pursue two successive treasurers individually in order to enforce a common liability, although it does not follow that it may have concurrent remedies upon the bonds of successive officers for the same cause of action. Indeed, the converse of that proposition appears to be too clear for argument, for whatever is by law recognized as a sufficient payment of public funds, by an officer to his successor, so as to charge the latter upon his official bond, will *per se* operate to discharge the former. I must not, however, be understood as holding that the power of an officer to bind his sureties or the public, in receipting for public moneys, is without limitation.

It is conceded, by way of illustration, that by no mere barter between Hill and Bartley could the latter have charged his sureties as for money received, or the former have relieved himself from liability upon his bond. Such a transaction is confessedly *ultra vires* and ineffectual for the purpose of concluding either the state or the sureties of an incoming treasurer; but in the absence of

statutory restrictions upon the subject, the system employed in the monetary transactions of the world, by which payments are made, and charges and credits adjusted through the agency of checks, drafts, and certificates of deposit, is so far applicable to custodians of public money as to render them liable for remittances thus in good faith made and received, provided such instruments be, as in this instance, accepted in payment, and not for collection and credit at the debtor's risk; and it can, on principle, make no difference in the application of that rule whether such payment be made by the owner of property for taxes assessed against him, or by a treasurer to his successor of the balance on hand at the close of his term of office. Lest my position may possibly be misunderstood, I repeat that Bartley, having accepted as money the certificates of deposit, is chargeable therewith as money. And the payment thus made being in accordance with the means generally, if not, indeed, necessarily, employed for the transfer of large balances, is within the scope of the authority of Hill and Bartley in their capacities as retiring and incoming treasurers, and therefore conclusive upon the state to the extent that its remedy is upon the bond of the latter for the funds so transferred. These views are not, I am aware, in accordance with certain expressions of opinion by this court, and for that reason an examination of the cases bearing upon the subject is appropriate in this connection.

State v. Keim, 8 Neb., 63, was an action below to recover the sum of $2,000 deposited by the state treasurer for safe-keeping with the defendants, who were doing business as private bankers. It was held on demurrer to the petition, and also on

review by this court, that the depositing in bank of state funds is in contemplation of law a loan thereof within the meaning of section 124 of the Criminal Code, that such a transaction is wholly unauthorized by statute and contrary to the spirit and policy of our laws, and cannot be made the basis of an action by the state in the absence of an express ratification by the legislature. The statutory provision above referred to, so far as material to the present inquiry, is as follows: "If any officer or other person charged with the collection, receipt, safe-keeping, transfer, or disbursement of the public money, or any part thereof, belonging to the state or to any county, or precinct, organized city or village, or school district in this state, shall convert to his own use, or to the use of any other person or persons, body corporate, association, or party whatever, in any way whatever, or shall use by way of investment in any kind of security, stock, loan, property, land, or merchandise, or in any other manner or form whatever, or shall loan, with or without interest, to any company, corporation, association, or individual, any portion of the public money, or any other funds, property, bonds, securities, assets, or effects of any kind, received, controlled, or held by him for safe-keeping, transfer, or disbursement, or in any other way or manner, or for any other purpose; or, if any person shall advise, aid, or in any manner participate in such act, every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property, as aforesaid, and shall thus be converted, used, invested, loaned, or paid out as aforesaid; which is hereby declared to be a high crime, and such officer or person or persons shall

be imprisoned in the penitentiary, not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and, also, pay a fine equal to double the amount of money or other property so embezzled as aforesaid, which fine shall operate as a judgment at law on all of the estate of the party so convicted and sentenced, and shall be enforced to collection by execution or other process, for the use only of the party or parties whose money or other funds, property, bonds or securities, assets, or effects of any kind as aforesaid, has been so embezzled." (Criminal Code, sec. 124.)

First Nat. Bank of South Bend, Ind., v. Gandy, 11 Neb., 431, is an exaggerated statement of the same proposition, since it is there held, following *State v. Keim*, that funds of the county deposited in bank for safe-keeping by the defendant to his account, as treasurer, could by means of garnishee process be appropriated in satisfaction of a judgment against him individually. The following extract from the opinion in that case serves to illustrate the process of reasoning which led to the conclusion stated: "It does not lie in the mouth of Mr. Gandy or any of his privies, of which the Farmers & Merchants Bank is one, in respect to these funds, to deny that they are the private money of Mr. Gandy, which alone he had a right to deposit in bank, and the bank had a right to receive from him on deposit."

Cedar County v. Jenal, 14 Neb., 254, was an action on the bond of a county treasurer, the defense relied upon being the transfer by the defendant to the account of Howard, his successor, of certain funds of the county, then on deposit in bank, and the delivery to the latter of certificates of deposit

therefor. It is noticeable that *State v. Keim* and *First Nat. Bank of South Bend, Ind., v. Gandy,* although not mentioned by the court, are cited as authority by counsel for the county, and appear to have had a controlling influence in the decision, judging from the following language of LAKE, C. J.: "In the collection, care, and disbursement of the revenues in this state, such certificates are not recognized at all by the law, and no officer has any right whatever to deal in them on behalf of the public. If a treasurer invest the public funds in them, he is guilty of a highly penal offense. (Criminal Code, sec. 124.) It would indeed be a strange system of laws that would permit an act denounced as a felony, to be pleaded in bar of an action brought to recover money lost by that act. But such is not the law. The only way in which it was possible for Jenal to have satisfied the law and his bond, and relieved himself and his sureties from responsibility as to this money, was to have handed it over to his successor in office. It being money which he held on the public account, it was money that the law and his bond required him to produce and hand over. Nothing else could suffice."

Wayne County v. Bressler, 32 Neb., 818, was an action against a treasurer individually, and not upon his bond, for the recovery of profits realized from the use by him in his private business of the funds of the county. It was held on the authority of the prior cases above cited that the action would not lie.

In *State v. Hill,* 38 Neb., 698, which was an action upon the bond involved in this cause, it was said: "It is the duty of both state and county treasurers to keep the money coming into their

official custody in specie, except where by recent statutes they are permitted to invest or deposit it. * * * Hill's duty was to keep the money in the treasury at Lincoln. * * * When he, Hill, removed the money from the treasurer's office with the intention of depositing it contrary to law, he was guilty of a conversion and a cause of action accrued."

It does not require a critical examination to perceive that subsequent cases, so far as they sustain the contention of the plaintiff in the present controversy, all depend for their authority upon *State v. Keim;* but that case, although in this state accepted as an authoritative statement of the law, appears, from a more careful analysis, to rest upon premises wholly false, while the doctrine therein asserted has been, by a verdict practically unanimous, rejected in other jurisdictions. Reduced to the form of a syllogism, the reasoning there employed may be thus stated: Public money unlawfully loaned by an officer charged with its collection or safe-keeping cannot, in the absence of an express ratification, be followed and recovered by the state, county, or other public body. The deposit in bank for safe-keeping, by an officer, of public money in his official custody, is a loan thereof within the meaning of the Criminal Code. Therefore public money cannot be recovered in an action against the bank in which it is deposited for safe-keeping without an express ratification of such unlawful loan. The subject might in view of the obvious fallacy of that argument be dismissed without further comment, but in view of the importance of the controversy and the gravity of the question involved, a reference to a few of the many authorities in conflict with the utter-

ances of this court will be here indulged. Mr. Mechem, in a note to section 922 of his valuable work on Public Officers, after a careful review of the authorities, intimates that *State v. Keim* stands alone in denying to the state the right to recover upon the facts reported, and adds that it "is not consistent with reason or authority if it was intended to hold that the state could not recover the money at all." And in *Wolffe v. State*, 79 Ala., 201, Chief Justice Stone, in criticising that case, declares that it ignores "the principle that an outsider, by aiding in the misapplication of trust funds, knowing them to be such, constitutes himself a trustee and must account as a trustee."

San Diego County v. California Nat. Bank, 52 Fed. Rep., 59, arose out of a state of facts quite similar to *First Nat. Bank of South Bend, Ind., v. Gandy, supra.* There one D. made a deposit of money to his account as county treasurer, there being no agreement that the identical money should be returned, and it was in fact mingled with the funds of the bank. It was held, in an elaborate opinion by Judge Ross, that the county could recover on the ground that the bank was a mere trustee and was liable as such; and the principle there stated was distinctly recognized by this court in the recent case of *Cady v. South Omaha Nat. Bank*, 46 Neb., 756, holding that trust funds do not lose their character as such by being deposited in bank to the trustee's own account, but may be followed through any number of transformations and reclaimed by the owner so long as they can be distinguished in the hands of the trustee or his assignees.

So much for the major premise of that argument. Let us now determine whether there ex-

ists for the minor premise a more substantial foundation; or, in other words, was the deposit by Hill of the state's funds for safe-keeping in the Capital National Bank a loan thereof within the denunciation of the Criminal Code? By section 18, chapter 4, Revised Statutes, 1866, the duties of the territorial treasurer were defined as follows: "First—To receive and keep all moneys of the territory not expressly required to be received and kept by some other person. Second—To disburse the public money upon warrants drawn upon the territorial treasury according to law, and not otherwise. Third—To keep a just, true, and comprehensive account of all moneys received and disbursed. * * * Sixth—To render a full statement to the auditor of all moneys received by him, from whatever source; if on account of revenue, for what years; of all penalties and interest on delinquent taxes reported to or accounted for to him, and of all disbursements of public funds; with a list in numerical order of all warrants redeemed, the name of the payee, amount, interest, and total amount allowed thereon; with the amount of the balance of the several funds unexpended; which statement shall be made on the first day of December, March, June, and September, and oftener if required. * * * Ninth—He shall account for, and pay over, all moneys received by him as such treasurer, to his successor in office, and deliver all books, vouchers, and effects of office to him, and such successor shall receipt therefor." (Revised Statutes, 1866, p. 24, ch. 4, sec. 18.) These provisions, amended by the insertion of the word "state" instead of "territory," have been continued in force to this date (see sec. 2, art. 4, ch. 83,

Compiled Statutes) and were, previous to the act of 1891, the only express provisions governing the keeping and accounting for of state funds aside from that contained in section 21, chapter 10, Compiled Statutes, viz.: "Any officer or other person who is intrusted with funds belonging to the state or any county thereof, which may come into his possession by any appropriation or otherwise, shall be responsible for the same upon his bond," etc. It is not claimed that these provisions even impliedly prohibit the depositing for safe-keeping of the state's money, and it was not claimed at the trial, and could not have been under the issues, that the deposit was made for any other purpose; and it is for that purpose wholly immaterial whether Hill in the transaction in question acted in the capacity of a trustee so that the legal title to the money deposited remained in the state, or whether his relation to the state was that of a debtor only, since in either case his liability is measured by the conditions of his bond.

This conclusion leads naturally to the next and most important subject of inquiry, viz., the extent to which, if at all, the discretion of public officers in the preservation of money entrusted to them for safe-keeping is restricted or controlled by the prohibition of the Criminal Code above set out. That provision is found in chapter 16 of the act which took effect September 1, 1873, entitled "An act to establish a Criminal Code." (General Statutes, 1873, p. 719, ch. 58.) The power of the legislature under a title like the above, to create new and distinct offenses, is not doubted. It is also true, as claimed, that where the law denounces as criminal an act,—particularly one which is contrary to public policy, or, as said in *State v. Keim*,

against the spirit and policy of our government,—it will be regarded as if expressly prohibited and cannot be made the basis of an action at law or in equity; but the application of such a provision, like other acts of the legislature, is always a subject for judicial construction. The evident design of the section under consideration was to prevent the use by the class of officers therein mentioned of the public funds for the purpose of speculation, and not as an amendment of existing laws pertaining to the manner in which such funds were required to be kept and accounted for. It is true that the general deposit of money in bank is, for some purposes, regarded as a loan, since the relation thereby created is that of debtor and creditor; but that the word "loan" has any such comprehensive meaning in the connection in which it is employed in the Criminal Code, I cannot admit. In my judgment the expression "or shall loan, with or without interest, to any company, corporation, association, or individual, any portion of the public money" (Criminal Code, sec. 124), applies to and includes those cases only in which the conventional relation of borrower and lender exists, and can have no reference whatever to a deposit made solely for the purpose of preserving such funds. Before examining that subject in the light of authority, let us see what are the facts disclosed by this record. Practically the only evidence of Hill's purpose, or of the conditions upon which the money was deposited in this instance, is found in the certificates of deposit issued by the bank, which are identical in form except as to amounts, and of which one is here set out:

"CAPITAL NATIONAL BANK. $35,357.85.
LINCOLN, NEB., Jany. 6, 1893.

"State Treasurer of Nebraska has deposited in this bank thirty-five thousand three hundred fifty-seven 85-100 dollars, payable to the order of himself on return of this certificate, properly indorsed. Not subject to check.

"C. W. MOSHER, *President.*"

Law's Estate, 144 Pa. St., 499, was a proceeding to surcharge the account of a guardian to the amount of certain funds of the ward lost by reason of the failure of a bank, and turned upon the question whether the deposit thereof by the guardian amounted to a loan or investment of such funds. In the opinion of the court, which contains a review of the cases in that state, we observe the following language: "Was this transaction with the Bank of America a deposit of the money, or was it a loan or investment of it? A deposit is where a sum of money is left with a bank for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or may not bear interest, according to the agreement. Whilst the relation between the depositor and his banker is that of debtor or creditor simply, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period at interest, in which case the transaction assumes all the characteristics of a loan. * * * In the present case the money was placed in the bank, not as an investment for any fixed period, but merely for safe-keeping, and at a small rate of interest until a suitable investment could be found. * * * It is true that two weeks' notice was to be given of the

withdrawal of the deposit, but this was a reasonable provision and not inconsistent with a bank deposit. * * * A deposit, as we have said, is a temporary disposition of money for safe-keeping, and it is upon this ground alone that the trustee is justified in depositing trust funds in bank, and it is upon the same ground that a deposit is distinguishable from an investment." And the right to deposit trust money, as such, in bank while awaiting an opportunity for investment, or when from the necessities of the case such deposit is required in order to preserve it, is generally, if not universally, recognized. (*Churchill v. Hobson*, 1 P. Wms. [Eng.], 241; *Adams v. Claxton*, 6 Ves., Jr. [Eng.], 226; *Fenwick v. Clarke*, 31 L. J. Ch., n. s. [Eng.], 728; *Wilks v. Groom*, 3 Drew [Eng.], 584; *Norwood v. Harness*, 98 Ind., 134; *McCabe v. Fowler*, 84 N. Y., 314; *In re Hunt*, 141 Mass., 515; 1 Lewin, Trusts, *295, 296; note to *Brice v. Stokes*, 2 White & T. L. Cas. [Eng.], 987.)

The question here involved was presented in *State v. McFetridge*, 84 Wis., 473, in the construction of a statute authorizing the investment by the treasurer of certain public funds with the consent of the governor, and of other funds by the commissioner of public lands, and expressly prohibiting the investment of any state funds except as therein provided. It was contended that the deposit by the treasurer of state funds in bank, without the consent of either of the officers above named, was an investment thereof within the meaning of the statute and accordingly unlawful; but the court, by Lyon, C. J., in disposing of that contention, say: "The distinction between a general deposit of money in a bank payable at any time on demand, and an invest-

ment of such money, is plain and substantial. By such deposit the depositor does not lose control of the money, but may reclaim it at any time. True, he loses control of the specific coin or currency deposited, but not of an equal amount of coin or currency having the same qualities and value," and after remarking that the treasurer by an investment under the statute loses control over the funds the learned judge continues: "The retention by the treasurer of substantial control over the funds in the one case, and his loss of such control in the other, mark the leading distinction between a mere deposit of the funds and an investment thereof, as those terms are used in the statutes."

By reference to the foregoing certificate of deposit it will be perceived that the transaction here involved differs from an ordinary general deposit in one respect only, viz., that the money of the state in the Capital National Bank was payable upon the return of the certificates, and not subject to check. It is therefore directly within the reasoning of the cases cited. But the legislature could not, by the adoption of the Criminal Code, have intended to require the impounding of public funds in specie in the vaults of the treasury for another and sufficient reason, viz., that the state had then, as it has now, no sufficient vault in which to securely keep them. We take notice, too, for it is a matter of common notoriety that treasurers have never kept the funds of the state in actual cash in the vaults of the treasury, and we may safely assume that they will never be so kept, since no treasurer could give the required bond who was suspected of an intention to entrust the millions for which

he is accountable to the utterly insufficient security provided therefor by the state. A change so radical as to amount almost to a revolution of the financial policy of the state and which must result in multiplied embarrassments, owing to the inadequate provisions for investment of our rapidly increasing school fund, should not be sanctioned upon any such doubtful ground as an amendment of the Criminal Code, designed to prevent the embezzlement, by officers, of public funds entrusted to them for safe-keeping.

It was said by this court in *Chaplin v. Lee*, 18 Neb., 440, that to constitute embezzlement (in that case of public funds), it is essential that the owner be deprived of the property mentioned, by an adverse use or holding. According to the settled rule of construction, like terms in penal statutes are presumed to have been used according to their ascertained sense and meaning. (Endlich, Interpretation of Statutes, sec. 75.) And the doctrine that an act of a public officer, not expressly prohibited or contrary to public policy done in good faith to enable him to execute his trust, by preserving the funds committed to his custody, is punishable as an embezzlement in this state is, it would seem, the *reductio ad absurdum* of the rule heretofore asserted.

Although this opinion has been protracted much beyond the limit intended, I cannot dismiss the subject without a further reference to *State v. McFetridge, supra.* It was by statute of Wisconsin in one section made the duty of the state treasurer, under a severe penalty, to pay out, or deliver to persons entitled thereto, the same identical coin and currency paid into the treasury, and by another section, to keep such coin and

currency in the vaults of the treasury until lawfully paid out. By a third section it was made the duty of the governor and attorney general, at least once in each quarter, to examine and see that all money shown by the treasurer's books to belong to the state was in the vaults of the treasury, and in case of deficiency, to require the treasurer to immediately supply the amount thereof. The chief justice, after holding that the section first above mentioned was designed, when adopted in 1858, to prevent the payment of state debts in depreciated money, concludes as follows: "The better view is, we think, that if the public creditors receive directly from the hands of the treasurer or from banks, on the treasurer's draft, money having the same value and essential qualities as that paid into the treasury, the treasurer does pay out 'the same moneys received and held by him by virtue of his office,' within the meaning and intention of the statutes." And referring to the second section the same judge says: "It is argued that the term * * * 'money,' as employed in the statute, means the actual coin and currency of the country. This construction is, we think, too narrow, for it ignores the customary and necessary processes universally employed in the conduct of business affairs, and the methods by which the business of the treasurer's office has been conducted from its first organization. * * * The construction of section 159 contended for would require the treasurer to demand that the revenues of the state should be paid to him in lawful money, that is, legal tender funds, or else would compel him to collect such checks, drafts, or certificates of deposit in lawful money, and place the proceeds and other money thus

received by him in the vault in his office in order to be prepared for the official inspection of the governor and attorney general. It is impossible to impute any such absurd intention to the legislature. It may be conceded for the purposes of the case that such restricted construction of the statute in respect to what is meant by the vaults of the treasury is the correct one, * * * but we cannot agree that the word 'money' as there employed means only the actual coin and currency in circulation as money. Such a construction would be extremely technical, and is, we think, uncalled for. 'Money' is a generic term and may mean not only legal tender coin and currency, but also any other circulating medium or any instrument or token in general use in the commercial world as the representatives of value. It includes whatever is lawfully and actually current in commercial transactions, as the equivalent of legal tender coin and currency. * * * Certificates of deposit or other vouchers for money deposited in solvent banks, payable on demand, are a most convenient medium of exchange and are extensively used in commercial and financial transactions to represent the money thus deposited. * * * Hence the same are 'money' within the meaning of section 159, and its requirements in that behalf were complied with by the treasurer if * * * [there is] found in the 'vaults of the treasury' the amounts called for by the books of the secretary of state and treasurer, although portions thereof were in such certificates or vouchers." Cooley, C. J., in discussing the precise question here presented in *City of Lansing v. Wood*, 57 Mich., 201, uses this language: "If Wood had first drawn the money from the

bank, and Edmunds [his successor] had taken and immediately deposited it, the latter unquestionably, if he had a right to the moneys, would have taken upon himself all risks. What difference it can make that the parties did not count out the money and then count it in again, I do not perceive. It is manifest that all parties at the time understood that the fund had been transferred to Edmunds, and it is certain that he had all the evidences of right, and the complete and absolute control."

The foregoing comprehensive definition of the term "money" as there employed accords with the views of other writers and appears to be altogether reasonable. (*Vide* Webster's Dictionary; Century Dictionary; *Paul v. Ball*, 31 Tex., 10; *Kennedy v. Briere*, 45 Tex., 305; *Taylor v. Robinson*, 34 Fed. Rep., 678.)

It is necessary to here again briefly refer to some of the cases of which mention has been made from this court. In *Cedar County v. Jenal* the decision was apparently right upon the facts, there being evidence tending to prove that the certificates of deposit there involved were accepted, not as in this case, in payment, but for collection as credit only, by Howard, the defendant's successor in office. In *State v. Hill* the controlling question was whether the alleged breach of his official bond, by the principal defendant, occurred in Douglas county or Lancaster county, jurisdiction being claimed in behalf of the district court for the first named county, by reason of the deposit by Hill as treasurer of state funds, in certain banks in the city of Omaha. The petition distinctly charged a loan of the money so deposited, and which allegation was for the purpose of

the objection to the jurisdiction of the court taken as true; and what was in fact decided is that Hill, in withdrawing state funds from the vaults of the treasury for the purpose of unlawfully loaning the same as alleged, in the city of Omaha, was thereby, *eo instanti*, guilty of conversion, whether in the consummation of his purpose such funds were subsequently loaned in Douglas county or elsewhere. The question here presented was not involved in that case, the language quoted therefrom in apparent conflict with the views here expressed being responsive to the arguments of counsel for the respective parties, and should, as evidently intended, be regarded as *obiter* only.

I fully appreciate the importance of the doctrine *stare decisis*, and with what reluctance courts consent to the reversal of rules established by repeated decisions, although confessedly erroneous, particularly such as have become rules of property. In such cases, according to the dictates of common justice, they should be adhered to until changed by statute. There are, it is true, to be found cases holding that the same principle is applicable to all statutory constructions, whether involving rules of property or mere questions of practice; but such a consecration of the doctrine of *stare decisis* is opposed to reason and the overwhelming weight of authority. That rule, like all others, is not without its exceptions, and, in the absence of complications resulting from property rights, it is the undoubted privilege, if not indeed the duty, of courts to re-examine their decisions whenever satisfied that they are fundamentally wrong. Such decisions ought, in the language of Chan-

cellor Kent, "to be examined without fear and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error." (1 Kent, Commentaries, *477; Black, Interpretation of Laws, 403, 404; Endlich, Interpretation of Statutes, sec. 363.) It is certainly not discrediting the wisdom of our predecessors to hold, as must eventually be done, that the doctrine running through the cases cited is unsound in principle and unjust alike to the state, to its servants, and to the public at large, for time and experience are, after all, the logic by which to judge rules of law as well as morals, and our fondest hope is that our work may, when tried by that infallible test, be found equal in point of merit to theirs.

To repeat, the motion for a new trial should be denied and the cases mentioned, so far as they conflict with the rules herein stated, should be overruled.

IRVINE, C.

In my opinion the verdict rendered is the only one which could properly be rendered under the evidence; and it is therefore unnecessary to consider whether or not the instructions given were in all respects technically correct. Brevity, in so far as the importance of the questions presented permits, is imperative, and I shall therefore, in stating my views, omit references to the numerous authorities which have been consulted upon the consideration of interlocutory applications, and during the two trials of the case; nor do I feel that I would be warranted in any very extended presentation of the reasons for my own conclusions.

The case of the state rests entirely on the generally accepted construction of the case of *Cedar County v. Jenal*, 14 Neb., 254. That doctrine is that it is the duty of treasurers to keep all funds committed to their custody in specie; and that their obligations can only be satisfied by the payment to their successors of all undisbursed funds by the delivery "of that which by the law of the land is recognized as money." The phrase quoted is certainly somewhat vague; but according to the state's construction thereof,—and this construction is warranted by the *Jenal Case*,—checks, certificates of deposit, and instruments of like character do not come within the requirement of the law, although the commercial world may regard them as so far partaking of the characteristics of money that their acceptance in lieu thereof may bind individuals in private transactions. It is to my mind somewhat doubtful whether the present case presents a state of facts similar to those before the court in the *Jenal Case*. In this case there is no doubt that Hill not only tendered to his successor certificates of deposit in lieu of money, but his successor actually accepted those representing the deposit in the Capital National Bank. Two certificates of other banks he refused to accept, whereupon Hill delivered money in lieu of them. In the *Jenal Case* the plea was that instead of delivering the money to his successor, Jenal paid it to a foreign banker at his successor's direction, and delivered certificates evidencing such payment to the successor; and that the successor had accepted such acts as payment to him. The report of the case discloses that the successor denied having agreed to accept the certificates. What the evidence was otherwise on this question

does not appear. I would have no doubt that nothing short of the actual acceptance of the certificates by the successor would operate as a discharge. Conceding, however, that this case does fall within the principle of the *Jenal Case*, or rather that the facts of the *Jenal Case* were broad enough to render the doctrine there announced direct authority as applied to this case, still I think the state has entirely failed to prove the breach of the bond alleged in its petition. If a treasurer is entitled to credit for disbursements or the delivery to his successor only when "that which by the law of the land is recognized as money" has been disbursed or delivered, it would seem to follow necessarily that he is chargeable as for money only when he has received "that which by the law of the land is recognized as money." If Hill is not entitled to credit for the certificates which Bartley accepted from him, how can it be said that Bartley is chargeable with those certificates as money, and how can it be said that Hill is chargeable as for money received with any paper or credits received at the commencement of or during his term of office? The evidence shows that but a very small portion of the deposits made in the Capital National Bank were of money, and there was drawn from the bank in money and lawfully disbursed by Hill more than the money deposits. The balance remaining in the bank at the close of his term was created solely by the deposit of instruments which under the rule in the *Jenal Case* were not money in Hill's hands. If the *Jenal Case* should be followed at all, it must be followed to its full extent and be applied on one side of the account as well as on the other; and this must be

true of the receipts and deposits made during Hill's term of office, as well as of the balance received by him from his predecessor. If the rule is to be so applied, not a dollar with which Hill is chargeable as for money was traced into the account, except as it was traced out again under circumstances entitling Hill to credit therefor. The question of the application of the payments by the bank is therefore entirely immaterial. So that I concur with Commissioner RYAN in his opinion that upon the state's own theory of the case it cannot complain of the verdict. On that theory it may be that a treasurer commits a breach of duty when he does not insist on having all payments made to him in money, and that it was a breach of the bond for Hill to receive from his predecessor and from debtors of the state during his term things other than money; but the state did not frame its petition on that theory. It charges no such breach. On the contrary, it charges Hill in express language with the receipt of all sums in money. But for my own part I would not be prepared to let the decision rest on so technical a view, especially as I entertain the doubt alluded to as to the real extent of the doctrine of the *Jenal Case;* and as I entertain a great deal more than a doubt as to the correctness of that doctrine if it goes to the extent which the state must claim for it in order to support its action. In other words, I believe that the incoming treasurer represented the state in accounting with his predecessor; and if he received, as the evidence shows he did, these certificates in satisfaction of so much of the state's claim against Hill, the state was bound by his action. If such action was improper and the state suffered a loss

thereby, the remedy would not be against Mr. Hill. Hill parted with the certificates on the faith of his successor's accepting them. He lost their possession. He lost their legal title. In the week or more which elapsed between the delivery of the certificates to Mr. Bartley and the failure of the bank, Hill had no control over the deposit, and was utterly powerless by any act of his to obtain payment from the bank and defeat the loss. The state had provided no means whereby the treasurer could safely keep in specie the moneys of the state. Indeed, it has become impossible for the state to conduct its business transactions by barbarous or mediæval methods. Its business is too vast and too much interwoven with the private business of its citizens to permit it to entirely ignore the universal usages of commerce. Whether it will or not, it is forced to more or less adapt itself to these usages. I think our statutes relating to the business operations of the state should be construed as having been adopted with reference to the prevailing commercial customs; and the proposition that Hill and his bondsmen should be held liable for the loss in this case, under all its circumstances, must appear to any man at all versed in commercial or financial transactions as harsh, unreasonable, and unjust.

I think there is another reason why this verdict should not be set aside, which is perfectly conclusive. What is known as the depository law went into effect at the expiration of Hill's term,—that is, not later than January 14, 1893. Under this statute, banks may present their bonds to the state for the security of state moneys deposited. These bonds are submitted to a board consisting

of the governor, secretary of state, and attorney general for approval. Upon the approval of such a bond the bank becomes a recognized state depository. The treasurer is not only permitted, but he is required, to keep all the current funds in his hands on deposit in these designated banks, and he is subject to indictment and punishment if he willfully fails to do so. He is expressly by the statute relieved from liability on account of loss of money while so deposited. This was the law when Mr. Bartley's term of office began; and on that day, January 14, 1893, the governor, secretary of state, and attorney general approved such a bond tendered by the Capital National Bank in the sum of $700,000. This must have been one of the first, if not the very first, bonds approved; and the treasurer was thereby authorized to deposit in the Capital National Bank $350,000. It is fair to presume that at that time the condition of the treasury was such as technically to require a deposit of that full amount. On the 16th of January Mr. Bartley indorsed the certificates of deposit received from Hill and caused them to be delivered to the bank, and opened a general account with the bank under the depository law, receiving on behalf of the state credit thereon for the amount of these certificates, which were retained by the bank and canceled. Between the 16th and the 21st of January about $49,000 was withdrawn by check from this account. There can be no doubt that at that time Mr. Bartley was authorized to deposit that amount of money in the bank. There can be little doubt that the law required him to do so. Whether he was authorized to receive credit in the bank by transfer from Hill or not, he was authorized to receive a credit by

deposit thereafter. The state by this act became the creditor of the bank to the amount of the certificates, and there can be no doubt that from the moment that deposit was made all remedies upon the certificates were lost. Neither Hill nor Bartley had any longer any right thereto or interest therein. There was a complete novation. The bank discharged its liability to the holder of the certificates by assuming with the consent of the state an equivalent liability to the state. To this position the state makes two answers. In the first place it says that the depository law is unconstitutional. In the second place it says that the bank was at the time of the deposit insolvent; that the certificates were worthless and therefore did not operate as a valid deposit.

In answer to the first contention it may be said that in *Hopkins v. Scott*, 38 Neb., 661, a number of constitutional objections to the act were considered, and it was held that it was not bad for any of the reasons then suggested. The state now presents an additional objection arising out of section 22, article 3, of the constitution, providing, among other things, that "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon." It is argued that this law contemplates the withdrawal of money without an appropriation and without a warrant. The provision quoted, however, manifestly applies to the ultimate disbursement of moneys in payment of claims against the state, and has no reference to any provisions which the legislature might see fit to make in regard to the custody or investment of money while in the treasury awaiting disbursement.

The second argument is not, in my opinion, sound. No question is presented of fraud on the part either of Mr. Hill or Mr. Bartley. It is not pretended that either knew the bank was insolvent. The state was willing that its money should be lent to the bank, and the state's officers had approved security offered by the bank as satisfactory. It must be admitted that had Bartley deposited money to the amount for which he obtained credit at the bank, such a deposit would have been lawful. If he had presented the certificates to the paying teller, had received payment thereof in money, and had immediately redeposited that money with the receiving teller, there could be no doubt of the validity of the deposit. I cannot see that the situation is changed because that process was not adopted. If A gives to B his check on a bank in payment of a debt, and B deposits the check in the bank on which it is drawn and receives credit on his own account for the amount of the check, the amount being at the same time charged to A by the bank, is not the debt from A to B satisfied, there being no fraud in the transaction, both men believing the bank good, even though it does afterwards develop that the bank was insolvent? In that case it was B who gave credit to the bank and who took the risk of its insolvency. He was willing to accept the bank as his debtor. The case is very different from that suggested in argument, of the deposit in one bank of a check drawn on another which fails before the check is collected. In the latter case the payee of the check has not accepted the bank on which it was drawn as his general debtor. The payment is in such case conditional at best. This case is precisely analogous to that first supposed;

and I think that whatever may have been the law before the depository act took effect, the state is now in the banking business and in its banking transactions acquires the same rights and subjects itself to the same liabilities as an individual. There is no possible doubt that the state for this money has a remedy upon the depository bond given by the bank. If the sureties on that bond were insufficient, the responsibility certainly does not rest upon Mr. Hill or his sureties.

On this aspect of the case I think the decision of the court and the reasoning of Judge LAKE in *Hughes v. Kellogg*, 3 Neb., 186, is directly in point and conclusive.

HARRISON, J.

I concur in the doctrine announced in paragraphs 11, 12, 16, and 18 of the syllabus to the opinion in this case written by Chief Justice POST, also in what is stated in paragraphs 2, 4, 7, 8, and 10 of the syllabus of the opinion written by NORVAL, J., of which I call attention to Nos. 7 and 8, stating:

"7. The legislature has the power to ratify the act of an outgoing state treasurer in turning over to his successor, as money, certificates of deposit issued by a bank.

"8. Held, that the record discloses such a ratification in this case."

I also agree with Commissioner IRVINE in the statement that "The deposit by Bartley, under the depository law, of the certificates received by him from Hill in the same bank which issued them, the cancellation of the certificates, and the state's accepting a credit on open account, operated a novation, made the bank the state's debtor, and

released Hill from liability;" and also agree with the conclusion of Commissioner RYAN, that under the issues presented in the cause there was sufficient evidence to sustain the verdict rendered, and it must therefore stand.

RAGAN, C.

I agree with the conclusion of RYAN, C., that the motion for a new trial must be overruled and judgment entered for the defendants. I also concur in the views expressed by the chief justice, and entirely agree with IRVINE, C., that "The deposit by Bartley, under the depository law, of the certificates received by him from Hill, in the same bank which issued them, the cancellation of the certificates, and the state's accepting a credit on open account for their amount, operated a novation, made the bank the state's debtor, and released Hill from liability." I also concur in points 2, 4, and 10 of the syllabus of the opinion by NORVAL, J.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. STATE OF NEBRASKA, EX REL. CITY OF OMAHA.

FILED MARCH 18, 1896. No. 7805.

1. **Police Power.** The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large.

2. ———. The legislature cannot, under the guise of police regulations, arbitrarily invade personal rights or private property. There must be some obvious and real connec-

tion between the actual provisions of such measures and their assumed purpose.

3. **Constitutional Law:** PROPERTY RIGHTS: PUBLIC USE: DUE PROCESS OF LAW. "Due process of law," as the term is used in the state and federal constitutions, does not necessarily imply a hearing, by one whose property is taken or damaged for public use, according to the established practice in courts of common law or equity, but is satisfied whenever an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained.

4. **Legislature:** PUBLIC WELFARE: CONTRACTS. The power of the legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety, is inherent in the sovereignty of the state and cannot be bartered away by contract or otherwise.

5. **Municipal Corporations:** POLICE POWER. Such power may be asserted directly by the legislature, or may, in the absence of constitutional restrictions upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise.

6. **Statutes:** PROPERTY RIGHTS: COURTS. The power of the legislature over private property is not absolute. But while it cannot at will impose upon property burdens so excessive and unreasonable as to work a practical confiscation thereof, the courts will never interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the law-making power of the government respecting the wisdom or necessity of particular measures.

7. **Municipal Corporations:** RAILROAD COMPANIES: VIADUCTS: REPAIR. The provision of the charter of the city of Omaha (Compiled Statutes, ch. 12*a*, sec. 48), authorizing said city, by ordinance, to require railroad companies to construct and keep in repair viaducts over streets therein, crossed by their tracks, is a valid exercise of the police power of the state.

8. **City Ordinances:** RAILROAD COMPANIES: VIADUCTS: CONTRACTS. Ordinance requiring the reconstruction by two railroad companies of specific portions of a viaduct previously erected by them jointly with the city, *held*, not to violate prior contract obligations.

9. ——: ——: ——: REPAIRS: PARTIES. Nor is such ordinance void as against the railroad companies therein named as the owners of said roads for the failure of the city to proceed against other companies engaged in operating one or more of said tracks as lessees of the owners, the charter obligation being imposed upon railroad companies owning or operating separate lines of track.

10. Mandamus: RAILROAD COMPANIES. The duty of railroad companies to construct or repair viaducts within the city of Omaha may be enforced by writ of *mandamus*.

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

The opinion contains a statement of the case.

C. J. Greene, for plaintiff in error:

The provisions of section 48 of the city charter do not apply to viaducts existing at the time they went into operation, but to those only to be thereafter constructed. (*Chew Heong v. United States*, 112 U. S., 559; *State v. Stein*, 13 Neb., 530; *Bartruff v. Remey*, 15 Ia., 257; *McIntosh v. Kilbourne*, 37 Ia., 420; 2 Dillon, Municipal Corporations, sec. 1018; *City of Lincoln v. Walker*, 18 Neb., 244; *City of Plattsmouth v. Mitchell*, 20 Neb., 228; *Foxworthy v. City of Hastings*, 25 Neb., 133; *City of Lincoln v. Smith*, 28 Neb., 762; *Kinney v. City of Tekamah*, 30 Neb., 605; *City of Omaha v. Randolph*, 30 Neb., 699; *Watson v. Tripp*, 11 R. I., 98.)

The provisions of the ordinance authorize the taking of respondent's property without due process of law and also impair the obligations of the contracts under which the respondent's track was located and the viaduct constructed. (*Edwards v. Kearzey*, 96 U. S., 595; *New Orleans Gas Light Co. v. Louisiana Light Co.*, 115 U. S., 650; *Slaughter*

House Cases, 16 Wall. [U. S.], 62; *Stone v. Mississippi*, 101 U. S., 814; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. [U. S.], 116; *The Binghampton Bridge*, 3 Wall. [U. S.], 51; *West River Bridge Co. v. Dix*, 6 How. [U. S.], 531; *Pontchartrain R. Co. v. Orleans Navigation Co.*, 15 La., 413; *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann., 147; *St. Anna's Asylum v. City of New Orleans*, 105 U. S., 368; *Home of the Friendless v. Rouse*, 8 Wall. [U. S.], 430; *New Jersey v. Wilson*, 7 Cranch [U. S.], 166; *State Bank of Ohio v. Knoop*, 16 How. [U. S.], 376; *Gordon v. Appeal Tax Court*, 3 How. [U. S.], 133; *Wilmington & R. R. Co. v. Reid*, 13 Wall. [U. S.], 266; *Humphrey v. Pegues*, 16 Wall. [U. S.], 248; *Farrington v. Tennessee*, 95 U. S., 689; *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. [U. S.], 428; *Ward v. Farwell*, 97 Ill., 593; *Coast Line R. Co. v. City of Savannah*, 30 Fed. Rep., 646; *State v. Corrigan Consolidated Street R. Co.*, 85 Mo., 263; *Illinois C. R. Co. v. City of Bloomington*, 76 Ill., 447; *Sioux City Street R. Co. v. Sioux City*, 138 U. S., 98; *Peck v. Chicago & N. W. R. Co.*, 94 U. S., 164; *Boston Beer Co. v. Massachusetts*, 97 U. S., 25; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S., 663; *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U. S., 746.)

The respondent is under no legal duty to make the repairs in question, for the reason that in the proceedings of its council to impose such duty or obligation the relator has failed to observe the requirements of section 48 of the city charter.

If the act under consideration can be justified, it must be as an exercise of that power which abides with the state to be used when necessary to secure the public safety. (*County of Santa Clara*

v. Southern P. R. Co., 18 Fed. Rep., 392; *Newland v. Marsh*, 19 Ill., 376; *Bigelow v. West Wisconsin R. Co.*, 27 Wis., 478; *Dow v. Norris*, 4 N. H., 16; *City of Dubuque v. Illinois C. R. Co.*, 39 Ia., 56; *People v. Supervisors of Orange County*, 17 N. Y., 235; *Boisdere v. Citizens Bank*, 29 Am. Dec. [La.], 453.)

A hearing, or an opportunity for one, is essential to the validity of the act and the proceedings under it. (*Hagar v. Reclamation District*, 111 U. S., 701; *Barhyte v. Shepherd*, 35 N. Y., 238; *Hassan v. City of Rochester*, 67 N. Y., 528; *Stuart v. Palmer*, 74 N. Y., 183; *Williams v. Weaver*, 75 N. Y., 30; *Jordon v. Hyatt*, 3 Barb. [N. Y.], 275; *Ireland v. City of Rochester*, 51 Barb. [N. Y.], 416; *State v. City of Jersey City*, 24 N. J. Law, 662; *State v. Town of Morristown*, 34 N. J. Law, 445; *Griffin v. Mixon*, 38 Miss., 434; *Overing v. Foote*, 65 N. Y., 269; *Thomas v. Gain*, 35 Mich., 155; *State v. City of Plainfield*, 38 N. J. Law, 97; *Patten v. Green*, 13 Cal., 325; *San Mateo County v. Southern P. R. Co.*, 8 Sawy. [U. S. C. C.], 238; *Darling v. Gunn*, 50 Ill., 424; *Gatch v. City of Des Moines*, 63 Ia., 718; *Trustees v. City of Davenport*, 65 Ia., 633; *Ulman v. Mayor of City of Baltimore*, 21 Atl. Rep. [Md.], 711; *Boorman v. City of Santa Barbara*, 4 Pac. Rep., [Cal.], 31; *Campbell v. Dwiggins*, 83 Ind., 473; *State v. Mayor of City of Newark*, 25 N. J. Law, 399; *City of St. Louis v. Hill*, 22 S. W. Rep. [Mo.], 861; *Bradley v. Fallbrook Irrigation District*, 68 Fed. Rep., 948; *McMillen v. Anderson*, 95 U. S., 37; *Davidson v. Board of Administrators of New Orleans*, 96 U. S., 97.)

Notice must be given to persons interested. (*Hess v. Cole*, 3 Zab. [N. J.], 116; *Coster v. New Jersey Railroad & Transportation Co.*, 3 Zab. [N. J.], 227; *Vail v. Morris & E. R. Co.*, 1 Zab. [N. J.], 191;

In re Flatbush Avenue, 1 Barb. [N. Y.], 286; *Owners of Ground v. Mayor of City of Albany*, 15 Wend. [N. Y.], 374; *Vantilburgh v. Shann*, 4 Zab. [N. J.], 740; *Kirby v. Shaw*, 19 Pa. St., 258; *Schenley v. Commonwealth*, 36 Pa. St., 29; *McGonigle v. Alleghany City*, 44 Pa. St., 118; *In re Washington Avenue*, 69 Pa. St., 360; *City of Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. Law, 385; *Tide-water Co. v. Coster*, 18 N. J. Eq., 519; *In re Drainage of Lands*, 35 N. J. Law, 497; *St. John v. City of East St. Louis*, 50 Ill., 92; *In re Albany Street*, 11 Wend. [N. Y.], 149; *Litchfield v. Vernon*, 41 N. Y., 123; *Brady v. King*, 53 Cal., 45; *Taylor v. Palmer*, 31 Cal., 240.)

Conceding that the respondent is under a legal duty or obligation to make the repairs, there is no statute, either special or general, conferring upon the courts authority to compel the discharge of such duty or obligation by writ of *mandamus*. (*State v. Grand Island & W. C. R. Co.*, 27 Neb., 694; *State v. Chicago, B. & Q. R. Co.*, 29 Neb., 412; *State v. St. Paul, M. & M. R. Co.*, 35 Minn., 131, 38 Minn., 246; *State v. Minneapolis & St. L. R. Co.*, 39 Minn., 219; *Trumble v. Trumble*, 37 Neb., 346; *State v. Smith*, 35 Minn., 257; *Gaal v. Townsend*, 77 Tex., 464; *Lyon v. Rice*, 41 Conn., 245; *State v. Jones*, 1 Ired. Law [N. Car.], 129; *Knight v. Ferris*, 6 Houst. [Del.], 283.)

J. W. Deweese, also for plaintiff in error.

W. J. Connell, contra:

The remedy by *mandamus* is given by section 645 of the Code "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station."

Railroad companies hold "trust or station" within the meaning of the Code. (*State v. Chicago, B. & Q. R. Co.*, 29 Neb., 412; *State v. Grand Island & W. C. R. Co.*, 27 Neb., 694, 31 Neb., 213; *State v. Missouri P. R. Co.*, 5 Pac. Rep. [Kan.], 772; 14 Am. & Eng. Ency. of Law, 158.)

The remedy was especially conferred in this class of cases by charter provision, and the act is valid. (*Dogge v. State*, 17 Neb., 140; *State v. Babcock*, 23 Neb., 130; *State v. Berka*, 20 Neb., 375; *In re White*, 33 Neb., 813; *Smails v. White*, 4 Neb., 353; *State v. Arnold*, 31 Neb., 75; *Smith v. State*, 34 Neb., 691.)

The relator has a clear legal right to be enforced. (*State v. Missouri P. R. Co.*, 5 Pac. Rep. [Kan.], 772; *Hagar v. Reclamation District*, 111 U. S., 701; *State v. Stearns*, 11 Neb., 104; *Indianapolis & C. R. Co. v. State*, 37 Ind., 489; *Habersham v. Savannah & Ogechee Canal Co.*, 26 Ga., 665.)

POST, C. J.

This was a proceeding on the relation of the city of Omaha to require the Chicago, Burlington & Quincy Railroad Company, hereafter referred to as the "respondents," to repair the south one-third of the so-called Eleventh street viaduct, in said city. There was a trial upon issues joined in the district court for Douglas county, resulting in a finding and judgment in accordance with the prayer of the relator, and which has, by appropriate proceedings, been removed into this court for review.

It is essential to a perfect understanding of the questions discussed to refer in detail to the legislation of the state and the city so far as it relates to the subject of the controversy, and in so doing

we will follow the order in which they are presented in the valuable brief submitted in behalf of the respondent.

In the year 1869 the Omaha & Southwestern Railroad Company was organized under the general statutes of this state, and immediately thereafter constructed a line of road from the city of Omaha, in a southwesterly direction, to a point on the Platte river in Sarpy county, and which it continued to operate until the year 1871, when it transferred all of its property and franchises to the Burlington & Missouri River Railroad Company, also a Nebraska corporation, by lease for 999 years. Said road was by the last named company operated until 1880, in which year it was, together with all the property and franchises of the original corporation, transferred to the respondent company, a corporation of the state of Illinois. Section 83, chapter 25, Revised Statutes, 1866, under which the Omaha & Southwestern Compnay was organized, contained among other provisions the following:

"Sec. 83. If it shall be necessary in the location of any part of any railroad to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authority owning or having charge thereof and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied."

In the year 1884 application was by the last named company made to the city for permission to lay its tracks over and across certain streets therein, including Eleventh street; and in response to that request an ordinance, No. 729,

was enacted and approved in the following language:

"Said Omaha & Southwestern Railroad Company shall have the right to construct, maintain, and operate a line of railroad along, upon, through, and across said portion of said streets and alleys as a part of its line; *Provided*, That said railroad track and tracks are constructed so as to conform to the grade of said streets as near as may be, and so as to interfere as little as possible with the travel along and upon said streets; *And provided*, That nothing herein contained shall be construed as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company, now laid and operated by said Union Pacific Railway Company, in any portion of the streets and alleys herein named and enumerated."

Pursuant to said ordinance the respondent soon thereafter constructed a track from Tenth street across Eleventh street, and thence in a southwesterly direction to the city limits. Long previous to the last mentioned date the Union Pacific Railway Company had, with the consent of the city, constructed twenty-one or more tracks across Eleventh street, which have ever since been in continual operation for general traffic and for switching purposes, so that the additional tracks therein of the respondent did not materially increase the inconvenience or danger of the public in the use of said street.

By sections 1, 2, and 4 of an act entitled "An act to provide for viaducts, bridges, and tunnels, in

certain cases, in cities of the first class," approved March 4, 1885 (Session Laws, 1885, p. 109, ch. 12), it was declared:

"Section 1. That the mayor and city council in any city of the first class shall have power, whenever they deem any improvement, herein provided for, necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct or bridge over, or tunnel under any railroad track or tracks, switch or switches in such cities, when such track or switches cross or occupy any street, alley, or highway thereof, in the manner and to the extent hereinafter provided.

"Sec. 2. Whenever any such viaduct, bridge, or tunnel shall be deemed necessary, as provided in the preceding section, the mayor and city council shall have the power to secure and adopt plans and specifications therefor, together with the estimated cost of the work, and thereupon, if the railroad company or companies across whose tracks or switches the work is proposed to be built, will assume three-fifths (3-5) of the entire cost thereof, and three-fifths (3-5) of all damages to abutting property on account of construction of said viaduct, bridge, or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require, and when the payment of the further sum of one-fifth (1-5) of the money required for said improvement is arranged for in manner satisfactory to said mayor and council, either by private donation or by execution of good and sufficient bond as will protect said city from the payment of said one-fifth (1-5), then the said mayor and council may proceed to contract with the neces-

sary party or parties for the construction of such viaduct, bridge, or tunnel, under the supervision of the board of public works of such city, and to provide for the payment of one-fifth (1-5) of the cost thereof by the city, by special tax on all taxable property in such city, and one-fifth (1-5) by special tax to property benefitted, as provided in the following section, if not otherwise provided for.

"Sec. 4. The city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge, or tunnel as herein provided, may permit any street railway company to build its street railway track and operate its railway upon or through the same, upon such terms and conditions and for such compensation as shall be agreed upon between the city and the street railway company. And the compensation paid for such use shall be set apart and used towards the maintenance of such viaduct, bridge, or tunnel."

In virtue of the foregoing provisions the city, the Union Pacific Company, and the respondent, in the year 1886, entered into an agreement in writing, the essential part of which is as follows:

* * * "Witnesseth, that the said parties of the second part, in pursuance of the provisions of an act of the legislature of the state of Nebraska, entitled 'An act to provide for viaducts, bridges, and tunnels in certain cases in cities of the first class,' do hereby assume and agree to pay, as may be required by the mayor and city council of said city, three-fifths of the entire cost of constructing a viaduct along Eleventh street in said city over the railroad tracks of said parties of the second part, and three-fifths of the damages to abutting

property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars ($90,000), the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company and one-fourth thereof to be paid by said Omaha & Southwestern Railroad Company. * * *

"The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of such increased cost and damages, in the same manner and according to the same division as hereinbefore agreed." * * *

Pursuant to that agreement the viaduct in question was constructed and dedicated to the use of the public early in the year 1887. In the year last named a new charter was provided for the city by an act entitled "An act incorporating metropolitan cities and defining and prescribing their duties, powers, and government" (Session Laws, 1887, p. 105, ch. 10), section 48 of which, as amended in 1893, reads as follows:

"Sec. 48. The mayor and council shall have power to require any railway company or com-

panies owning or operating any railway tracks upon or across any public street or streets of the city to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. * * * When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. It shall be the duty of any railroad company or companies upon being required as herein provided to erect, construct, reconstruct, or repair any viaduct, to proceed, within the time and in the manner required by the mayor and council, to erect, construct, reconstruct, or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect, or refuse to perform such duty, and upon conviction such company or companies shall be fined one hundred dollars ($100), and each day any such company or companies shall fail, neglect, or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled by *mandamus* or other appropriate proceedings to erect, construct, reconstruct, or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power, whenever any railroad company or companies shall fail, neglect, or

refuse to erect, construct, reconstruct, or repair any viaduct or viaducts after having been required so to do as herein provided, to proceed with the erection, construction, reconstruction, or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the costs of the erection, construction, reconstruction, or repair of such viaduct or viaducts against the property of the railroad company or companies required to erect, construct, reconstruct, or repair the same, and such cost shall be a valid and subsisting lien against such property and shall also be a legal indebtedness of said company or companies in favor of such city, and may be enforced and collected by suit in the proper court." (Session Laws, 1893, p. 70, ch. 3, sec. 7.)

In the month of January, 1894, the relator, having determined from the report of the city engineer, the board of public works, and other competent evidence that extensive repairs were required upon said viaduct by reason of structural weakness thereof and other causes, enacted an ordinance approving the plans and specifications therefor previously submitted by the city engineer, sections 2 and 3 of which read as follows:

"Sec. 2. That the Union Pacific Railway Company be and is hereby, ordered, directed, and required to repair that portion of said Eleventh street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct, and the Chicago, Burlington & Quincy Railroad Company, grantee and successor to the Burlington & Missouri River Railroad Company in Nebraska and the Omaha & Southwestern Railroad Company, be and is

hereby ordered, directed, and required to repair that portion of said Eleventh street viaduct commencing at the south end thereof and extending northward a distance of one-third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications and to be done under the supervision of the city engineer; the said repairs to be commenced without unnecessary delay and fully completed as herein required within ninety days from the passage and approval of this ordinance.

"Sec. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago, Burlington & Quincy Railroad Company, owning or operating railroad tracks upon and across said Eleventh street under said Eleventh street viaduct, a duly certified copy of this ordinance without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs."

Notice of the foregoing order was in due form served upon the respondent as well as upon the Union Pacific Railway Company, and upon the refusal of the former to comply with the terms of the ordinance this proceeding was instituted, with the result stated.

The first proposition asserted by the respondent is that section 48, above set out, has a prospective operation only, and does not in terms or by implication apply to viaducts in existence at the time it took effect. We are, however, unable to accept counsel's definition of a retrospective law. A statute does not operate retroactively from the mere fact that it relates to antecedent events. A

retrospective law has been defined as one intended to affect transactions which occurred, or rights which accrued, before it became operative as such, and which ascribes to them effects not inherent in their nature in view of the law in force at the time of their occurrence. (Bishop, Written Laws, sec. 83; Black, Interpretation of Laws, p. 247.) The language employed in the statute is "any viaduct or viaducts," and must, when read in the light of the authorities cited, be held to include such as were then in existence as well as those subsequently constructed.

The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public. It is one of the powers which has been reserved by the people of the state, and which cannot be surrendered, to require persons and corporations to so exercise and enjoy their rights as not unnecessarily to injure others. That the principle stated is especially applicable to existing rights, without regard to the time of their acquirement or to the source from whence they are derived, appears to us a self-evident proposition not requiring argument, and the subject will not therefore be further pursued in this connection.

The next and most important subject of inquiry is presented by respondent's contention that the ordinance under which the city proceeded in ordering the repairs in question contemplates the taking of its property without due process of law, within the meaning of the state and federal constitutions, and also impairs the obligation of the contract under which its track was laid and under which said viaduct was constructed. The diffi-

culty attending a solution of the questions presented by this assignment is augmented from the fact that courts have not always observed the distinction between the different reserved powers of the state, and have cited indiscriminately cases involving the police power, the taxing power, and the power of eminent domain; nor is the confusion on that account at all strange when we remember that those powers all depend for their vitality upon a common principle, viz., the subordination of private rights to the public welfare—of the individual to the community. Of the cases frequently cited to illustrate that principle many involve an application of two or more of the powers enumerated, while in others the line of distinction is by no means clearly apparent. Many attempts at defining the police power have been made, but in none has the limit of its exercise been defined with precision. It is, in the language of Chief Justice Shaw in *Commonwealth v. Alger*, 7 Cush. [Mass.], 53, "much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise." Doubtless the safe course to pursue in attaining the desired result is that which is characterized by Mr. Justice Miller in *Davidson v. City of New Orleans*, 96 U. S., 97, as "the gradual process of judicial inclusion and exclusion." We held in *Smiley v. McDonald*, 42 Neb., 5, that the legislature cannot, under the guise of a police regulation, arbitrarily invade private property or personal rights, but that the court must be able to perceive some clear and real connection between the assumed purpose of the law and its actual provisions. The obvious purpose of the legislation in this case, both state and

municipal, is to promote the convenience and safety of the public at a grade crossing which is judicially recognized as a place of danger. It is, in short, the exercise of the governmental power and duty to secure a safe and necessary highway, and must be upheld, if at all, as a legitimate exercise of the police power of the state. The authorities which fully sustain this proposition will be noticed in the course of our further examination of this case and need not be here cited. The questions presented by this assignment are in principle nearly allied, covering substantially the same field of inquiry, and will, for convenience, be considered together.

The proceeding by the mayor and council is, it it claimed, essentially judicial in character, and, to use the language of the respondent, "Such a proceeding, without notice to those concerned, and without giving them an opportunity to be heard, violates every maxim and principle of constitutional government." The term "due process of law" is, like the police power of the state, not susceptible of a precise definition. However, that of Judge Cooley appears to have proved the most acceptable to the courts of this country, viz., "Due process of law in each particular case means an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs." In *Board of Directors v. Collins*, 46 Neb., 411, we held, in effect, that the constitutional requirement with respect to that subject does not imply a hearing according to the established practice in courts of common law or equity, but that it

is satisfied whenever the citizen, whose property is taken or damaged for public use, is afforded an adequate remedy therefor in a court of competent jurisdiction; and the doctrine is now firmly established, although after some diversity of opinion, that previous notice and an opportunity to be heard by persons thereby affected is not indispensable to a valid exercise of the police power, or the power to levy and collect taxes, whether *ad valorem*, by the ordinary means, or such as are denominated special assessments and chargeable against particular property. In *McMillen v. Anderson*, 95 U. S., 37, Mr. Justice Miller, in holding that the courts of the United States could not be invoked to prevent the collection of an alleged illegal license tax levied by the state of Louisiana, on the ground that the effect thereof was to take the petitioner's property without due process of law, said: "It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present in some tribunal when it was assessed. But this is not, and never has been, considered necessary to the validity of a tax; * * * nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that state, as in others, if compelled to pay the tax by a levy upon his property he can sue the proper party and recover back the money as paid under duress if the tax was illegal." True, it was said in *Barker v. City of Omaha*, 16 Neb., 269, that "notice in some form must be given a property owner before a special assessment upon his property becomes fixed and irrevocable;" but the learned author of that opinion did not say, or imply, that the means

of redress afforded in other cases against illegal assessment fail to satisfy the constitutional inhibition against the taking of property without due process of law. What is meant, and what is the doctrine of the authorities there cited, is, that a property owner shall, before being required to pay, have an opportunity to be heard in the courts, in a proceeding instituted by himself or by the municipality to which the taxing power of the state has been by law entrusted. Although there are many cases in the state and federal courts in harmony with the opinion of Justice Miller, from which the foregoing is quoted, and fully sustaining the proposition here asserted, we prefer to confine our examination of such as involve an exercise of the police power rather than the power of taxation. In *Woodruff v. Catlin*, 54 Conn., 295, it is said: "The legislature having determined that the intersection of two railways with a highway in the city of Hartford, at grade, is a nuisance, dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land, and in such manner as will separate the grade of the railways from that of the highway at intersections; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone, or in part by both; * * * that the legislature of this state has the power to do all this for the specified purpose, and to do it through the instrumentality of a commission." *Appeal of New York & N. E. R. Co.*, 58 Conn., 532, involved the constitutionality of an act of the leg-

islature limiting the amount chargeable to a town or village, on the separation of the grade of a highway from that of a railway track situated therein, to one-fourth of whole cost of such improvement. Such a limitation, it was argued, authorized the taking of the appellant's property without due process of law, inasmuch as it prevented the commissioner to whom the discretion was entrusted from apportioning to the city a just and equitable share of the burden imposed by the act; but the court held otherwise. Carpenter, J., speaking for the court, after remarking that the policy of the law was to abolish grade crossings, said: "Legislation on this subject assumes that each party, in the discharge of its duty, is concerned in creating the danger, and that each may justly be required to contribute to the expense of its removal, or that either may be required to pay the whole, and if each contributes, that the proportion which each shall pay may be determined by the legislature in each case as it arises, or by general rule by itself, or by a delegation of its power to the railroad commissioners. This exercise of power is justifiable on the ground that government itself in the discharge of its governmental duties undertakes to remove the danger, and does it in the same manner and through the same instrumentalities that it provides and maintains highways through, and at the expense of, the towns and other corporations. So far as towns are concerned, it is a duty that has ever devolved upon them to keep the highways reasonably safe. They are compelled to act without compensation or pecuniary profit. Their sole motive is the public welfare. Railroad companies, in some sense, are but the agents of the government in affording to the pub-

lic a more expeditious and vastly improved method of travel. * * * Unlike towns, they do not act upon compulsion, but by choice. Their motive is private gain. Public benefit is incidental. * * * They contribute largely to the danger, and the state may well require them to contribute largely to its removal. * * * Requiring the railroad company to pay three-fourths of the expense, however just it might be to require the town to pay more than one-fourth, is not a matter of which the railroad company can legally complain." That doctrine was reasserted by the same court in *Appeal of New York & N. E. R. Co.*, 62 Conn., 527, which was upon proceedings in error to the supreme court of the United States affirmed and the validity of the act in question expressly upheld. (See *New York & N. E. R. Co. v. Bristol*, 151 U. S., 556.) In the opinion last referred to this language was used by Chief Justice Fuller: "Nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them [railroad companies] in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that in such particulars a law enacted in the exercise of the police power of the state is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States;" and substantially similar views are expressed by

that court in *Missouri P. R. Co. v. Humes*, 115 U. S., 512, and *Eldridge v. Trezerant*, 16 Sup. Ct. Rep., 345. In *Train v. Boston Disinfecting Co.*, 144 Mass., 529, a regulation of the board of health for the disinfecting of certain vessels, and goods imported therein, at the owner's expense, was assailed on the ground that no provision was by law made for a hearing, or for review by appeal or otherwise; but the court pronounced the regulation a reasonable one, and defensible as an exercise of the police power of the state. In *Commonwealth v. Roberts*, 155 Mass., 281, an act required all buildings used for a designated purpose to be supplied with sufficient water closet connections. It was held, although there was no provision for notice or hearing, that said act was a valid exercise of the police power and applicable to buildings erected before its enactment as well as to those subsequently constructed. In *People v. Boston & A. R. Co.*, 70 N. Y., 569, the appellant company was required to construct a bridge over a turnpike road, on the ground that the state may, under the powers reserved to the legislature, impose upon railroad corporations such additional burdens as are essential to the public welfare. In *State v. Missouri P. R. Co.*, 33 Kan., 176, the power of the city of Atchison to compel the respondents to construct viaducts was sustained under legislation substantially like that here involved. Referring to the subject of notice, the court, by Valentine, J., observed: "We might, however, say that we do not think it is necessary that the city should have given the railroad company notice before passing the ordinance requiring them [respondents] to construct the viaduct. Notice afterward, with an opportunity on the part of the railroad companies

to contest the validity of the ordinance, and the right of the city to compel them to construct the viaduct, is sufficient." But the clearest and most satisfactory exposition of the subject is found in *Health Department v. Rector of Trinity Church*, 145 N. Y., 32, which was an action to recover a penalty under a statute requiring all tenement houses to be supplied with water on each floor occupied, or intended to be occupied, by one or more families, whenever so directed by the board of health. The statute requiring all tenement houses to be supplied with water on each floor occupied, or intended to be occupied, by one or more families whenever so directed by the board of health. The statute made no provision for notice to property owners, and none was in fact given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the board. In the opinion of Peckham, J., it is said: "The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. * * * The fact that the legislature has chosen to delegate a certain portion of its power to the board of health * * * would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order." And in answer to the argument that the effect of the act was to impair contract obligations, the same learned judge said: "Laws and regulations of a police nature, though they may disturb the

enjoyment of individual rights, are not unconstitutional though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it, by sharing in the general benefits which the regulations are intended and calculated to secure. (See, also, *People v. Union P. R. Co.*, 20 Colo., 186; 37 Pac. Rep., 610; 1 Dillon, Municipal Corporations [4th ed.], sec. 141, and note; *Commonwealth v. Alger*, 7 Cush. [Mass.], 83; *Baker v. City of Boston*, 12 Pick. [Mass.], 183; *Thorpe v. Rutland & B. R. Co.*, 27 Vt., 140; Tiedeman, Limitations of Police Power, sec. 124; Prentice, Police Power, pp. 57, 58.) And the principle which underlies all of the cases cited was distinctly recognized by this court in *State v. Chicago, B. & Q. R. Co.*, 29 Neb., 412. It will not, of course, be contended that the power of the legislature is, in that respect, absolute, or that it may at will impose upon property burdens so unreasonable as to work a practical confiscation. There is, as all admit, a limit beyond which it cannot go and within which it will be confined by the judicial power of the state. (Prentice, Police Power, p. 31; *Minnesota v. Barber*, 136 U. S., 313.) But it is unnecessary, if it were possible, to point out the boundary line between reasonable and unreasonable exactions. It is enough that the courts will not interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the law-making branch of the government respecting the wisdom or necessity of particular measures. To summarize briefly, we conclude,

from the foregoing authorities and many others examined, that the legislation assailed in this cause is a valid exercise of the police power of the state over the subject to which it applies; that it does not authorize the appropriation of the respondent's property without due process of law in a constitutional sense, since the latter is enabled to invoke the equal protection of the law by any appropriate proceeding, and because it did in fact put in issue by the answer both the validity of the ordinance and the reasonableness of the amount apportioned to it for the repair of the viaduct in question. Nor is such legislation violative of any contract obligation, since the power to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety cannot be bartered away by contract or otherwise. Such power is inherent in the sovereignty of the state, and may be asserted directly by the legislature, or may, in the absence of constitutional restriction upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise. The single purpose of the legislation, whether contemplating the erection or reconstruction of the viaduct, is to reduce to a minimum the danger to life and limb for which the railroad companies are chiefly responsible, and it is not unreasonable to require the parties to maintain the street in a condition of safety, for whose benefit and convenience it was originally rendered unsafe.

The argument assailing the ordinance on the ground that it requires the respondent to repair the south one-third of the viaduct, instead of contributing a designated part of the entire cost, is, we think, without merit. Section 48, above set

out, confers upon the mayor and council of the city plenary powers with respect to the subject. They may by ordinance determine the proportion of the viaduct and approaches to be constructed by two or more railroad companies owning or operating separate lines of track to be crossed thereby, or may determine the cost thereof to be borne by each. The ordinance, if not within the letter of the city's charter, is clearly within its declared scope and purpose. But in the absence of any statute regulating the manner of apportioning the cost of such repairs, it cannot be said that the plan adopted is either so inequitable or unreasonable as to amount to an abuse of the discretion conferred upon the officers of the city. Equally groundless is the contention that the city was required to proceed against the Chicago, Rock Island & Pacific and the Chicago, Milwaukee & St. Paul Railroad Companies, then engaged in operating, jointly with the Union Pacific Company, certain tracks belonging to the latter across Eleventh street and under said viaduct. The statute, as we have seen, authorizes the city to require two or more railroad companies owning or operating separate lines of track to erect, construct, reconstruct, or repair viaducts. If we admit the companies named, as lessees of the Union Pacific Company, to be within the terms of the act, it does not follow that they are in any sense necessary parties to the proceeding, since the city might still have proceeded against the owners of the tracks operated by them. Such is the plain and necessary inference from the language of the statute.

Lastly, it is argued that, conceding the respondent's duty to repair the viaduct as commanded by

the ordinance, such duty is not one which will be enforced by means of the writ of *mandamus*. By reference to section 48 of the city's charter it will be observed that authority to proceed by *mandamus* or other appropriate proceedings is therein expressly conferred; but independent of that provision, *mandamus* has long been recognized as an appropriate remedy, if not the only adequate remedy, in cases of like character. Indeed, so firmly is that rule established by the decisions of this court as not to admit of a doubt at this time. (See *State v. Republican V. R. Co.*, 17 Neb., 647, 18 Neb., 512; *State v. Grand Island & W. C. R. Co.*, 27 Neb., 694; *State v. Chicago, B. & Q. R. Co.*, 29 Neb., 412.)

We discover no error in the record and the judgment of the district court is

AFFIRMED.

HANOVER FIRE INSURANCE COMPANY ET AL. V. MARCUS L. PARROTTE.

FILED MARCH 18, 1896. No. 6300.

Insurance: PROOF OF LOSS: UNOCCUPIED PREMISES. The proof of loss submitted by the plaintiff, in an action upon a policy of insurance, contained this clause, partly written and partly printed: "The building described by said policy, or containing said property, was occupied in its several parts by the parties hereafter named and for the following purposes: Used as a residence by Hill Adair up to 3:30 P. M., September 20, 1890, and for no other purpose whatever." *Held*, Not an admission that the insured property remained unoccupied for ten days thereafter, within the terms of the policy providing that it should be null and void in case the premises insured were at any time unoccupied for more than ten consecutive days.

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

Thomas D. Crane, for plaintiff in error.

Francis A. Brogan, contra.

POST, C. J.

This was an action upon a policy of insurance, in the district court for Douglas county, where, on a trial of the issues joined, there was a judgment upon a verdict for the plaintiff therein, and which has been removed into this court for review by means of the petition in error of the defendant company.

The property covered by the policy was a story and a half frame dwelling-house situated upon lot 3, in block 6, Hawthorne Addition to the city of Omaha, and was, according to the pleadings, destroyed by fire October 2, 1890. The defense relied upon is the alleged breach of the following condition of the policy: "If the premises described in this policy be unoccupied for more than ten consecutive days, * * * then, and in every such case, this policy shall be void." It is alleged that the premises insured were at the time of the loss, October 2, unoccupied, and had been so unoccupied for more than ten days immediately preceding said date. The reply is a general denial. The plaintiff below introduced in evidence the policy above mentioned, and testified in his own behalf to the loss by fire of the property insured. The defendant thereupon introduced in evidence the proof of loss made and certified by the insured on the 11th day of December, 1890. The plaintiff, in the preparation of said proof, employed a blank

form apparently furnished by the defendant company for that purpose, and which, among other printed matter, contains the following: "The building described by said policy or containing said property was occupied in its several parts by the parties hereinafter named, and for the following purposes, to-wit." In the space immediately following the above is inserted in writing these words: "Used as a residence by Hill Adair up to 3:30 P. M. Sept. 20, 1890," and which is followed by the printed words "and for no other purpose whatever."

The judgment complained of is clearly right. Indeed, it is the only one possible upon the record before us, and the district court might with propriety have directed a verdict for the plaintiff at the conclusion of the trial. The statement quoted from the proof of loss, and which is relied upon for a reversal of the judgment, raises no presumption of a breach of the condition of the policy with respect to the occupancy of the building insured. The language therein employed obviously refers, not to the fact, but to the character of the occupancy, and by no reasonable construction can it be inferred therefrom that said building remained unoccupied after the removal of the particular tenant on September 20,—twelve days previous to the loss. The defense relied upon was an affirmative one, as to which the burden was upon the defendant company, and on account of the failure of proof to sustain the allegation of the answer, the judgment must be

AFFIRMED.

STATE OF NEBRASKA, EX REL. S. H. KING ET AL., v. CHARLES L. HALL, JUDGE OF THE DISTRICT COURT.

FILED MARCH 18, 1896. No. 8338.

1. **Supreme Court:** JURISDICTION. The original jurisdiction of this court is by section 2, article 6, of the constitution restricted to cases relating to the revenue, civil cases to which the state is a party, *mandamus*, *quo warranto*, and *habeas corpus*.

2. ———: ———. It is not within the power of the legislature to confer upon this court original jurisdiction over subjects not enumerated in the constitution. (*Miller v. Wheeler*, 33 Neb., 765.)

3. ———: ———: PROHIBITION. The constitution has not conferred upon this court original jurisdiction to award a writ of prohibition as an independent remedy.

4. ———: ———: ———. Whether a writ of prohibition may be allowed by this court in aid of its appellate jurisdiction, *quære*.

ORIGINAL application for a writ of prohibition forbidding the respondent from entertaining any proceeding or making any order in a certain cause pending in the district court for Lancaster county. *Dismissed.*

J. R. Webster, *G. A. Adams*, and *Fred Shepherd*, for relators:

Prohibition is a remedy provided by the common law against encroachment of jurisdiction and is regarded as generally applicable unless abrogated by positive and express statutory enactment. (*Arnold v. Shields*, 5 Dana [Ky.], 18; *Mayo v. James*, 12 Gratt. [Va.], 18; *Thomson v. Tracy*, 60 N. Y., 31; *State v. Judge*, 38 La. Ann.,

247; *Hutton v. Fowke*, 1 Keb. [Eng.], 648; *North Bloomfield Gravel Mining Co. v. Keyser*, 58 Cal., 315.)

Like other common law remedies, prohibition is generally considered as pertaining to the jurisdiction of courts possessing common law powers, unless abolished by statute, as one of the means by which appellate courts exercise their jurisdiction. (2 Spelling, Extraordinary Relief, secs. 1719, 1733; *Connecticut R. R. Co. v. Commissioners of Franklin County*, 127 Mass., 58; High, Extraordinary Legal Remedies, secs. 762, 765, 767, 768; *Day v. City of Springfield*, 102 Mass., 312.)

So much of the common law of England as is applicable, and is not inconsistent with the federal or state constitution, or with any statute law of the state, is declared to be the law of this state. The supreme court has jurisdiction to issue the writ. (Compiled Statutes, ch. 15; State Constitution, art. 1, sec. 24, art. 6, secs. 1, 2; High, Extraordinary Legal Remedies, sec. 763.)

Charles L. Hall, pro se.

L. C. Burr and *A. S. Tibbets*, for receiver, John E. Hill.

POST, C. J.

A rule was, upon the sworn information of the relators, allowed against the respondent, one of the judges of the district court for Lancaster county, to show cause why a writ of prohibition should not issue from this court restraining him, the said respondent, from making certain orders in the case of William G. Morrison v. Lincoln Savings Bank & Safe Deposit Company, pending

in said district court. The ground of the application, briefly stated, is that the defendant is one of the subscribers for the original stock of said bank, which is now insolvent; that of the amount so subscribed there has been paid ten per cent and no more, leaving the respondent liable to the creditors of the bank for ninety per cent of his aforesaid subscription, by reason of which he is disqualified to act in said case or to make any orders therein affecting the rights of the creditors; but notwithstanding said fact, the respondent did, on the 12th day of January, 1896, while presiding over one of the divisions of the district court for said Lancaster county, assume to appoint one J. E. Hill, as receiver, to wind up the business and affairs of said bank; that a motion was subsequently made by the relators for the discharge of said receiver and for the appointment of a more suitable person to execute the said trust, and that the respondent, although disqualified to act in the premises by reason of the facts herein stated, is about to, and will, unless restrained by this court, pass upon and decide said motion, etc. The respondent, in obedience to the *nisi* order, has submitted a statement, under oath, denying *seriatim* the allegations of the information, and unites with the relator in affirming the jurisdiction of this court to entertain the proceeding, notwithstanding our intimation to the contrary. We appreciate the delicacy of the position in which Judge Hall is placed by this proceeding, and can but commend his course in insisting upon a determination of the merits of the controversy, although we must decline, for reasons hereafter stated, to entertain that question. Owing to the fact already appearing, that

the parties hereto agree in asserting the jurisdiction of this court over the subject of the controversy, we have been deprived of the assistance which would, under other circumstances, have been expected from counsel in the investigation of so important a subject. We have, however, devoted to an examination of that question the time at our disposal, and which has resulted in a conclusion adverse to the contention in favor of our jurisdiction.

The development of the remedy by means of the writ of prohibition in the court of queen's bench, and also in this country, is both entertaining and profitable as a field for study; but that subject is foreign to the present inquiry, since the question here involved is one of constitutional construction, and depends upon the interpretation given to the express provisions of that instrument. This court, except in the exercise of its appellate jurisdiction, is one of limited and enumerated powers. It shall have jurisdiction, says the constitution, "in cases relating to the revenue, civil cases in which the state shall be a party, *mandamus*, *quo warranto*, *habeas corpus*, and such appellate jurisdiction as may be provided by law." (Constitution, art. 6, sec. 2.) That provision, it was held in *Miller v. Wheeler*, 33 Neb., 765, is a grant of power and by implication limits the original jurisdiction of this court to the subjects therein enumerated. The peculiar character of a constitutional tribunal is that it is not susceptible of change in any essential respect save in the manner prescribed in the fundamental law itself. That principle was early recognized by the supreme court of the United States in giving effect to the provision of the federal consti-

tution defining its original jurisdiction, viz., the supreme court shall have original jurisdiction "in all cases affecting ambassadors and other public ministers and consuls, and those in which a state shall be a party." (Constitution, U. S., art. 3, sec. 2.) The question of the power of congress to confer upon that court jurisdiction in *mandamus* proceedings was presented in *Marbury v. Madison*, 1 Cranch [U. S.], 137, and resolved in the negative, Chief Justice Marshall using this forcible language: "If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction where the constitution has declared their jurisdiction shall be original, and original jurisdiction where the constitution has declared it shall be appellate, the distribution of jurisdiction made in the constitution is form without substance." The doctrine thus stated is supported by an unbroken line of decisions by that court, including the recent case of *California v. Southern Pacific Co.*, 157 U. S., 229. Other courts have gone still further in denying to the legislature power to enlarge their jurisdiction. For instance, in *Sevinsky v. Wagus*, 76 Md., 335, under a constitutional provision conferring upon the Maryland court of appeals jurisdiction "co-extensive with the limits of the state, and such as is now, or may

hereafter be, prescribed by law," that court refused to entertain an application for a writ of *habeas corpus*, although the legislature had expressly declared that "the court of appeals and the chief judge thereof, shall have power to grant the writ of *habeas corpus* and to exercise jurisdiction in all matters relating thereto throughout the whole state." In the opinion of the court, Alvey, C. J., after proving that the court of appeals had under the previous constitution appellate jurisdiction only, says: "It would therefore seem to be clear that the jurisdiction of this court is appellate only; for if not so, and the legislature could confer original jurisdiction upon it in cases of *habeas corpus*, it could also confer such jurisdiction in cases of *mandamus*, or in cases of any other subject-matter of original jurisdiction." But the precise question here involved was before the supreme court of Illinois in the recent case of *People v. Horton*, 12 National Corporation Rep., 7, under a constitution after which ours appears to have been modeled and which confers upon that court original jurisdiction "in cases relating to the revenue, in *mandamus* and *habeas corpus*, and appellate jurisdiction in all other cases." It was held, citing *Field v. People*, 2 Scam. [Ill.], 79, and *Campbell v. Campbell*, 22 Ill., 664, that the original jurisdiction of that court cannot be extended by implication, but is limited to the subjects specially enumerated in the constitution, and that it was accordingly without authority to allow the writ of prohibition. It was further held,—but as to which we express no opinion,—that that court is without authority to award the writ of prohibition even in an ancillary proceeding in aid of

its appellate jurisdiction. (See, also, Hawes, Jurisdiction of Courts, sec. 39; Brown, Jurisdiction of Courts, sec. 14; Works, Courts and Their Jurisdiction, 428.) A consideration of the authorities cited can lead to a single conclusion, viz., that it is not within the constitutional power of this court to grant the relief sought. The rule should therefore be discharged.

RULE DISCHARGED.

PHILIP ANDRES ET AL. V. W. H. KRIDLER.

FILED MARCH 18, 1896. No. 6284.

1. **Bill of Exceptions:** AUTHENTICATION. The original bill of exceptions allowed by the district court or judge will not be examined by this court unless authenticated in the manner prescribed by statute.

2. **Review:** EVIDENCE: BILL OF EXCEPTIONS. Assignments of error relating to the sufficiency of the evidence and the rulings of the court in receiving and excluding evidence, will be disregarded in the absence of a bill of exceptions properly allowed and authenticated.

3. **Pleading:** NAMES OF PARTIES. Where the pleadings disclose a cause of action against a defendant personally, superadded words, such as "agent," "executor," or "director," should be rejected as *descriptio personæ*. (*Thomas v. Carson*, 46 Neb., 765.)

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

Charles W. Haller, for plaintiffs in error.

John P. Breen, contra.

POST, C. J.

The defendant in error, as plaintiff in the district court, recovered a judgment against the plaintiffs in error, defendants therein, upon an instrument of which the following is a copy:

"$500. OMAHA, NEB., March 24, 1888.

"Ninety days after date we promise to pay to Dennis J. Keleher, or order, five hundred dollars, for value received, payable at the banking house of McCague Brothers, Omaha, Nebraska, with interest at the rate of ten per cent per annum until paid. PHILIP ANDRES, *Pres.*

"J. W. MCDONALD,
"J. H. STANDEVEN,
"THOMAS FALCONER,
"C. M. O'DONOVAN,
"DENNIS J. KELEHER,
"JOHN JENKINS,
"Directors Omaha Truth P. & P. Company."

Separate answers were filed by the several defendants, in all of which it was in substance alleged that the instrument sued on was the note of the Omaha Truth Printing & Publishing Company, a corporation; that it was taken and accepted by Keleher, the payee therein named, with the distinct understanding and agreement that it was the obligation of the corporation named and not the contract of the individual signers, or any of them. It was further alleged that the plaintiff therein was not a *bona fide* holder of said note, and that he took it after maturity with notice of the defendants' rights in the premises. The plaintiff, in reply, denied the allegations of the answers, and charged that said note was executed by the

defendants as their personal obligation, and not in behalf of said corporation.

From the transcript of the judgment it appears that the cause was called for trial, having been reached in its order November 7, 1892, and there being no appearance for the defendants, a jury was waived by the plaintiff and a trial had to the court, with the result stated. The defendants, in due time, moved to set aside the judgment so rendered, and for a new trial, assigning therefor the following grounds:

"1. There was irregularity in the prevailing party, by which the above named five defendants were prevented from having a fair trial.

"2. There was misconduct of the prevailing party.

"3. Said five defendants and the attorneys of said five defendants were the victims of accident and surprise, which ordinary prudence could not have guarded against.

"4. There was error in the assessment of the amount of recovery.

"5. The decision is not sustained by sufficient evidence, and is contrary to law."

Said motion coming on for hearing at a later day of the term was by the court overruled, to which order exceptions were duly taken and the cause removed into this court for review. It appears from the transcript that evidence was submitted in support of the allegations made in the first, second, third, and fifth assignments of the motion for new trial. But the alleged bill of exceptions, although apparently allowed by the trial judge, is not authenticated in the manner required by statute to make it a record of this court. Indeed, there is no pretense whatever of an authen-

tication, and the assignments which depend upon a bill of exceptions must accordingly be disregarded. (*Flynn v. Jordan*, 17 Neb., 520; *Wood Mowing & Reaping Machine Co. v. Gerhold*, 47 Neb., 397; *Oltmanns v. Findlay*, 47 Neb., 289, and cases cited.)

It is, however, contended that the petition failed to state a cause of action against the defendants therein named, for the reason that the instrument sued on is the contract of the corporation named and not of the individual signers. We held in *Thomas v. Carson*, 46 Neb., 765, that where a petition or complaint states a cause of action in favor of the plaintiff personally, superadded words, such as "agent," "executor," or "trustee," should be rejected as *descriptio personæ*. (See, also, *Farrell v. Reed*, 46 Neb., 258.) The rule as there stated is sanctioned by the overwhelming weight of authority, and is without doubt applicable to the facts of the case at bar.

Our attention is also called to an error in the assessment of damage, whereby judgment was allowed for eighteen cents in excess of the amount actually due on the note. The amount named, although small, is not beneath the cognizance of the court, and the defendant in error will accordingly be required to remit the amount erroneously assessed in his favor; and upon the filing of such remittitur within twenty days the judgment will be affirmed.

JUDGMENT ACCORDINGLY.

THEODORE GALLIGHER V. AARON WOLF ET AL.

FILED MARCH 18, 1896. No. 6316.

1. **Appeal Bonds:** ADDITIONAL SECURITY: PRACTICE. If, in an appeal to the district court from a judgment of a justice of the peace, the appeal bond is believed to be insufficient, it is proper for the appellee to file a motion asking the court to order a change or renewal of such undertaking.

2. ———: ———: ———: DISMISSAL NISI. In such a case, if the court is satisfied of the insufficiency of the appeal undertaking, it may make the order requested, and it is proper practice to fix the time within which such change or renewal shall be effected and to enter a dismissal of the action for a non-compliance with such order.

3. **Conflicting Evidence:** REVIEW. The finding of a trial court on conflicting testimony will not be disturbed on error or appeal, unless clearly and manifestly wrong.

4. **Order for Sufficient Appeal Bond:** EVIDENCE. The evidence examined, and *held* to sustain the findings of the trial court.

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

David Van Etten, for plaintiff in error.

Smith & Sheean and *Will H. Thompson, contra.*

HARRISON, J.

In an action commenced and in which there was a trial and judgment for defendants in justice court in Douglas county there was an appeal taken by the unsuccessful party to the district court, and during the pendency thereof the defendants moved the court to require the appellant to furnish a further and sufficient appeal

undertaking, for the alleged reason that the surety who signed the bond on file in the case was insolvent and judgment on the bond would be uncollectible. This motion was filed March 28, 1892, soon after the appeal was docketed in the district court, and on June 4, following its filing, was sustained on the showing, as to the facts involved, made by the party in whose interest it was filed, the other party offering no evidence, in form of affidavits or otherwise, on the points raised by the motion, and the appellant was ordered to furnish new and sufficient appeal undertaking within fifteen days. This order was not complied with, and on July 7, 1892, the defendant moved the court to dismiss the appeal because of such non-compliance. On July 11 another motion was filed for defendant, similar in terms, and the purpose sought to be attained, with that filed July 7, four days prior. The motion to dismiss was presented to the court and, on hearing, was sustained and the case dismissed at the cost of plaintiff. On the last mentioned date there was a motion filed for plaintiff to vacate the order made June 4, by which plaintiff was required to furnish a new and sufficient appeal bond, the ground of the motion being that the surety who signed the original undertaking was responsible and had justified when he executed it, or before its approval. On the 19th day of July plaintiff moved the court to vacate the order of dismissal of the action for stated reasons: "(1.) Said decision is contrary to law. (2.) Said order was irregularly obtained, without the knowledge or consent of plaintiff and by misconduct of the prevailing party." This motion was supported by affidavits, the statements of which

tended to show the responsibility of the surety on the appeal undertaking, and what was claimed to be irregularity in obtaining the order dismissing the case. Contradictory affidavits were filed on behalf of defendants, and, on the hearing, plaintiff's motion to vacate the court's order dismissing the cause was overruled. To secure a reversal of this ruling is the purpose of these proceedings.

It is contended that there was not sufficient evidence to support the order of the court by which the plaintiff was required to file a new and sufficient appeal bond; and further, that, on the facts as shown by the parties, the action of the court in overruling the motion to vacate the order of dismissal was erroneous and clearly opposed to the weight of the evidence on such point. If the appeal undertaking was considered insufficient, it was proper for the appellee to file the motion asking the court to order its change or renewal (see sec. 1016, Code of Civil Procedure), and for the court, if satisfied of its insufficiency, to make the order requested; and it was proper practice, although there did not exist any statutory provision to such effect, to fix the time within which such change or renewal should be effected and also to enter a dismissal of the action for a non-compliance with its order in respect to the undertaking. (*Robare v. Kendall*, 22 Neb., 677.) We are satisfied from the record that the action of the court in ordering the renewal of the appeal undertaking was supported by sufficient evidence; and further, that, in respect to the alleged irregularities in obtaining the order dismissing the case, the evidence was conflicting, and the decision of the trial judge thereon entitled to

stand, from which conclusions it follows that the judgment of the trial court must be

AFFIRMED.

OMAHA REAL ESTATE & TRUST COMPANY V. JOSEPH S. KRAGSCOW.

OMAHA REAL ESTATE & TRUST COMPANY V. SARAH J. SHAW ET AL.

OMAHA REAL ESTATE & TRUST COMPANY V. JOHN W. RODEFER ET AL.

OMAHA REAL ESTATE & TRUST COMPANY V. CHARLES E. REITER.

FILED MARCH 18, 1896. Nos. 6377, 6378, 6379, 6380.

1. **Ejectment:** EVIDENCE. A plaintiff, in an action of ejectment, must recover on the strength of his own title or right to the property and cannot rely upon the weakness or invalidity of the defendant's title or right.

2. ———: ———. The plaintiff, to recover in ejectment, must possess and prove a legal title.

3. **Conflicting Statutes:** CONSTRUCTION. Where there exist two statutes between which there is a direct and irreconcilable conflict, the later in point of time will be upheld and prevail.

4. ———: ———. Where there are two sections of a statute on the same general subject and enacted at the same time, and one section is afterwards amended so that it directly conflicts with the other, the amended section, being the latest expression of the law-maker on the subject, will prevail and the other be repealed by implication when not repealed in express terms.

5. ———: ———. Section 5 of an act entitled "Of real estate and the alienation thereof by deed," passed January 26, 1856 (Session Laws, p. 80, ch. 31), as amended February 13, 1864 (Session Laws, p. 58, ch. 12), was in direct and irreconcilable conflict with the provisions of section 44

of chapter 31 of the same statute, passed at the same time, and, consequently, operated its repeal by implication.

6. ———: ———. Where two sections or portions of the same statute, passed at the same time, are inconsistent with and repugnant to each other, so much so that both cannot be enforced, the last section, or last words, will be allowed to prevail and the section or words in conflict therewith held to be repealed.

7. ———: ———. Sections 5 and 41 of chapter 43, Revised Statutes of 1866, entitled "Real Estate," were enacted at the same time, as parts of the same statute, and being in some of their provisions so repugnant that both could not be executed, inasmuch as they conflicted, the last section—41—prevailed and the other was repealed.

8. **Evidence:** DEEDS: NAMES. The title to real estate appeared from the record to be in Joel S. Smith. A deed which purported to convey such real estate and which, in its recitals and also in the acknowledgment designated the grantor as "Joel S. Smith," but which was signed "John S. Smith," *held* not competent evidence to prove a conveyance of the title of Joel S. Smith in the absence of other proof establishing that the person who signed the deed, John S. Smith, and Joel S. Smith were one and the same person.

9. **Trial:** RIGHT TO WITHDRAW REST: REVIEW. The granting or overruling of an application by a party to a suit who has rested his case, to withdraw the rest and offer or introduce further testimony, is a matter within the discretion of the trial judge, and where such an application has been allowed for the purpose of affording a party an opportunity to offer or introduce testimony on certain subjects specified in the motion and allowance, and the party seeks to extend the privilege accorded, further so as to include other and entirely different subjects, it is within the discretion of the trial court to grant or refuse such extension, and unless an abuse of discretion appears in a refusal so to do, it will not be error or cause for a reversal of the judgment.

10. **Acknowledgments.** The rule announced in the first paragraph of the syllabus in the case of *Hoadley v. Stephens*, 4 Neb., 431, to the extent it relates to the acknowledgment of deeds in another state than this, before a commissioner of deeds for this state, overruled.

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

The opinion contains a statement of the case.

George W. Covell, for plaintiff in error:

The provisions relating to the acknowledgment of deeds are made for the protection and security of creditors and purchasers, but so far as the grantor is concerned, the title vested in him passes by the deed to the grantee as completely as it would if the conveyance had been acknowledged and recorded. (*Hastings v. Vaughn*, 5 Cal., 315; *Stewart v. Mathews*, 19 Fla., 752; *Gibbs v. Swift*, 12 Cush. [Mass.], 393; *Raines v. Walker*, 77 Va., 92; *Strong v. Smith*, 3 McLean [U. S.], 362; *Harrison v. McWhirter*, 12 Neb., 152; *Goodenough v. Warren*, 5 Sawyer [U. S.], 494; *Brown v. Manter*, 22 N. H., 468; *Stevenson v. Cloud*, 5 Blackf. [Ind.], 92; *Sicard v. Davis*, 6 Pet. [U. S.], 124; *Simpson v. Mundee*, 3 Kan., 172; *Hill v. Samuel*, 31 Miss., 307; *McMahon v. McGraw*, 26 Wis., 614; *Jackson v. Allen*, 30 Ark., 110.)

The want of the acknowledgment, or of the proof which may authorize the admission of the deed to record, does not invalidate the deed as between the grantor and grantee; and it is good as to all persons who are charged with such notice. The acknowledgment and recording of the deed are provisions which the law makes for the security of creditors and purchasers. They are not essential to the validity of the deed as to the grantor. (*Blain v. Stewart*, 2 Ia., 378; *Ricks v. Reed*, 19 Cal., 551; *Dole v. Thurlow*, 12 Met. [Mass.], 164; *Hepburn v. Dubois*, 12 Pet. [U. S.], 375; *Moore v. Thomas*, 1 Ore., 201; *Musgrove v. Bouser*, 5 Ore., 313.)

The certificate of acknowledgment is not essential to the validity of the deed, which is operative, without acknowledgment between the parties. The certificate is simply evidence of the execution of the deed supplying the place of direct proof, and, like all other evidence, should receive a reasonable construction. (*Gray v. Ulrich*, 8 Kan., 112; *Harrington v. Fish*, 10 Mich., 415.)

Where the acknowledgment of a deed is taken without the state by a commissioner of deeds appointed by the executive authority of such state, no proof of his authority other than authentication by his seal is required. (*Smith v. Van Gilder*, 26 Ark., 527; *Vance v. Schuyler*, 1 Gil. [Ill.], 160; *Thompson v. Schuyler*, 2 Gil. [Ill.], 271; *Irving v. Brownell*, 11 Ill., 402.)

A party interested in part of an entire tract may take the acknowledgment of a distinct interest in the same tract. (*Dussaume v. Burnett*, 5 Ia., 95.)

An officer related to one of the parties may take an acknowledgment, because the act is not judicial but ministerial. (*Lynch v. Livingston*, 6 N. Y., 422; *Kimball v. Johnson*, 14 Wis., 682*.)

The fact that an acknowledgment is taken by a party to the conveyance does not invalidate the deed. It is good between the parties and those who have actual notice of its existence. (*Beaman v. Whitney*, 20 Me., 413; *Hogans v. Carruth*, 18 Fla., 587; *Stevens v. Hampton*, 46 Mo., 404; *Caldwell v. Head*, 17 Mo., 561; *Cooley v. Rankin*, 11 Mo., 642; *Black v. Gregg*, 58 Mo., 565.)

The current of authority is to the effect that the taking of an acknowledgment is an act purely ministerial in its character, and not in any sense judicial. It involves no compulsion or summons

of any person who does not appear of his own accord, and rarely, if ever, requires an investigation of the circumstances under which the deed was executed. (*Learned v. Riley*, 14 Allen [Mass.], 109; *Odiorne v. Mason*, 9 N. H., 24; *Hill v. Bacon*, 43 Ill., 477; *Biscoe v. Byrd*, 15 Ark., 655; *Schultz v. Moore*, 1 McLean [U. S.], 520.)

A defective acknowledgment can be taken advantage of only by a purchaser for a valuable consideration. (*Bishop v. Schneider*, 46 Mo., 472; *Mastin v. Halley*, 61 Mo., 196; *Choteau v. Burlands*, 20 Mo., 482.)

Reference was also made to the following cases: *Connell v. Galligher*, 36 Neb., 749; *Hoy v. Allen*, 27 Ia., 208; *Lake v. Gray*, 30 Ia., 415, 35 Ia., 459; *Doe v. Naylor*, 2 Blackf. [Ind.], 32; *Ricks v. Reed*, 19 Cal., 571.

Wharton & Baird and *J. E. Nevin, contra:*

One who was a member of the Omaha Real Estate & Trust Company, and therefore a party in interest, could not properly witness or acknowledge the mortgage. (*Wilson v. Traer*, 20 Ia., 233; *Child v. Baker*, 24 Neb., 188; *Winsted Savings Bank v. Spencer*, 26 Conn., 194; *Hammers v. Dole*, 61 Ill., 307; *West v. Krebaum*, 88 Ill., 263; *Doil v. Moore*, 51 Mo., 589; *Withers v. Baird*, 7 Watts [Pa.], 227; *Kimball v. Johnson*, 14 Wis., 734.)

Bartlett, Crane & Baldrige, also for defendants in error.

HARRISON, J.

October 3, 1891, an action of ejectment was commenced by the plaintiff against Joseph S. Kragscow in the district court of Douglas county the

property involved being described in the petition as follows: "Lots number thirty-nine (39) and number forty (40), in block number one (1), in Saunders & Heimbaugh's Addition to Walnut Hill, an addition to the city of Omaha." It was alleged that the defendant had, ever since the 23d day of December, 1890, unlawfully kept and was holding possession of the property, and keeping plaintiff out of possession thereof. It was also charged that defendant had received rents and profits of the premises to the amount of $94. Plaintiff prayed judgment for the possession of the property and a recovery of the rents and profits. Defendant answered, admitting possession of the property and alleging affirmatively his lawful possession thereof since February 1, 1888, and denying the other allegations of the petition. To this there was a reply denying the allegations of the answer in regard to the lawful possession of the defendant. On the same date, October 3, 1891, three other cases of ejectment were instituted in the same court, one against Sarah M. Shaw and others, one against John W. Rodefer and others, and one against Chas. E. Reiter, each to recover possession of property situate in the addition hereinbefore stated; also to recover rents and profits of the premises involved in each case, alleged to have been received by the parties defendants. Issues were joined, and on March 27, 1893, the first mentioned case was called for trial, a jury was waived and trial had to the court. At the beginning of the trial the parties entered into the following agreement, which was made of record: "It is agreed by the parties to try this case, and that a finding shall be had by the court, and the other cases, being numbers 27—160,

27—161, 27—162, 27—163, shall abide the result of the finding in this case, except as to proof and finding and judgment as to rental values." The cases have, by stipulation, all been presented to this court together, there being a separate record and bill of exceptions in each case. The judgments in the district court were adverse to the plaintiff and reversals are sought here.

In the brief filed for plaintiff there is a statement of some facts which serves, and is almost necessary, as an introduction, in order to a proper understanding of the other and further facts and questions developed by the evidence as offered and introduced or rejected during the trial. We will, for this statement, quote from the brief: "Prior to the 1st day of August, 1886, the Omaha Real Estate & Trust Company purchased the tract of land on which Saunders & Himebaugh's Addition to Walnut Hill was, after said purchase, situated, and laid out and platted said addition upon said tract, and duly dedicated the same. On August 1, 1886, the said Omaha Real Estate & Trust Company sold and conveyed the premises in controversy in these actions, as well as a large number of other lots in said addition, to the Pleasant Hill Building Association, a corporation of Douglas county, Nebraska. On that day the Omaha Real Estate & Trust Company loaned to the Pleasant Hill Building Association sixteen thousand one hundred and seventy-five ($16,175) dollars, and took the notes of said last named corporation therefor, bearing interest at eight and ten per cent, and, as security for the payment of said notes, received from said corporation a mortgage for said amount upon the property in controversy in these suits, as well as the other property

which was conveyed to said corporation by plaintiff August 1, 1886, which mortgage was, immediately upon delivery thereof, recorded. On or about March 22, 1890, an action to foreclose said mortgage was begun, which resulted in a decree of foreclosure against all of the real estate described in said mortgage and an order of sale thereof, directing J. F. Gardner, as special master commissioner, to sell the premises after appraising and advertising the same, who proceeded to appraise, advertise, and sell the same. At the said sale the Omaha Real Estate & Trust Company became the purchaser of all the lots described in the mortgage and the decree, which included the property in controversy in these suits in ejectment. The sale of these lots was confirmed by the court and deed ordered to be made to the purchaser, and on December 23, 1890, a deed was executed and delivered by said special master commissioner for the premises in controversy herein, and other property, to the Omaha Real Estate & Trust Company, which deed was on that day recorded." Counsel for plaintiff states that it was his understanding that plaintiff and defendants claimed that their rights to the properties arose from the same or a common source of title, the Pleasant Hill Building Association, and in accordance with this belief or understanding, he first introduced in evidence the mortgage foreclosure proceedings which were noticed in the preliminary statement of facts, also the deed of the special master commissioner, made to plaintiff pursuant to its purchase of the property at the foreclosure sale. A certified copy of the deed executed by plaintiff to the Pleasant Hill Building Association was offered on behalf of plaintiff, for

the purpose of showing that at the time of the foreclosure proceedings such association had the title to the property, and after introducing some evidence in regard to rental values of the premises in controversy the plaintiff rested his case, but the record shows that the rest was withdrawn and the plaintiff was allowed to introduce further testimony. We will now say that whenever hereafter reference is herein made to a deed, conveyance, or will, it will be one which purports to transfer or affect the premises in controversy. Counsel for plaintiff next offered as evidence a warranty deed from Alexander H. Baker and wife to Pierce C. Himebaugh and Nathan Merriam; then a deed from the last mentioned parties to the Omaha Real Estate & Trust Company, and next, a quitclaim deed from Alexander H. Baker to the same company. There was next introduced a plat of Saunders & Himebaugh's Addition to Walnut Hill and the record shows the taking of testimony closed. Then appears the following: "Plaintiff now asks to withdraw his rest and show source of title from the government of the United States to Alexander H. Baker. I desire also to show by extrinsic evidence, or by the original deed to the Pleasant Hill Building Association, executed by the Omaha Real Estate & Trust Company, that it was conveyed in the conveying clause to the Pleasant Hill Building Association; and I ask it on the ground of surprise, because, until today, it was never brought to my notice that there was any defect in the records of the grantee of the Omaha Real Estate & Trust Company,—that is, it was never brought to my notice that the grantee's name in the conveying clause was not the Pleasant Hill Building Association,—and I

offer to make this proof by the production of the original deed to the Pleasant Hill Building Association, the secretary of that association, I believe, being in town, and having in his possession the original deed. I don't include in the proposition an offer of the deed for the purpose of showing that the party who witnessed the deed was other or different than the one that has been shown to be a stockholder of the Omaha Real Estate & Trust Company."

The Court: "I will allow you to trace the title from the government down to Baker if you want to. I will allow you to introduce the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association, if you can, but inasmuch as you say that in no manner you expect to prove the witnessing of the deeds is different from what has been shown."

Mr. Covell: "And further, if the original deed to the Pleasant Hill Building Association cannot be found, I ask to show by parol evidence, in consequence of ambiguity in the deed, that the deed was actually made to the Pleasant Hill Building Association, instead of to the Pleasant Hill Association, by reason of ambiguity in the deed."

The Court: "You can introduce what you stated—chain of title from the government down to A. H. Baker, and the original deed, if you can, for the purpose of showing whatever the deed may show."

There was then offered in evidence a certified copy of a patent from the United States to Samuel Conger, a certified copy of the record of a deed from Conger to Enos Lowe, and a certified copy of the record of a deed from Enos Lowe and wife to Roswell G. Pierce. To this last deed, when of-

fered, a number of objections were interposed, among which was the following: "That the deed purports to be acknowledged before Thomas J. Ratham, a commissioner of deeds for Nebraska, for Pottawattamie county, Iowa; that the acknowledgment has not affixed or attached thereto the certificate of the secretary of state, as required by the laws in force at the time of the recording of the same, and was therefore not entitled to admission in the records." The objection was sustained and the deed excluded. There was next offered in evidence a deed by the sheriff of Douglas county to one Joel S. Smith, purporting to convey any title held by Roswell G. Pierce. This deed, on objection, was excluded. This was followed by an offer of a deed which, in its recitals, gave the name of the grantor as Joel S. Smith, the same name being stated in the acknowledgment, but the instrument was signed by John S. Smith. On objection, this deed was excluded. A number of other instruments were offered to complete the chain of title, including the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association, also the original mortgage from the building association to the real estate and trust company, both of which were objected to on the ground that no title had been shown in the party grantor in either conveyance, and that the first offered deed was witnessed by a stockholder of the company, who was also its secretary, and purported to have been acknowledged before a person who was a shareholder in the grantor company; that the mortgage was attested by the secretary, also a stockholder of the association, the grantor, and its acknowledgment purported to have been

taken before a stockholder of the company, the mortgagee. The objections were sustained and both deed and mortgage were excluded from the evidence. The counsel for plaintiff at this time asked a witness he had called to the stand whether he was acquainted with defendant John S. Kragscow and the defendants in the other actions, and following his answer asked him: "You may state, if you know, under what claim of title the defendants in this action claim, if they make any claim of title." Immediately succeeding this in the record appears the following:

"Objection by defendant, first, as incompetent, irrelevant, and immaterial; second, for the reason that counsel for the plaintiff only asked permission of this court at the time these cases were being decided by his honor and at the close of his decision to simply make a record here showing title from the government down to Baker, and also asking the privilege to offer in evidence the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association, and permission having been given by the court simply for those two purposes and no other."

The Court: "The court only gave permission that in these four cases, after having announced the opinion of the court against the plaintiff when the case was regularly reached on the 27th day of March, 1893, counsel for the plaintiff then requested that the plaintiff be permitted to introduce evidence of title from the government down to Baker and the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association, that leave was granted after the judgment had been announced by the

court plaintiff in those four cases, and the court will not now permit evidence to be introduced other than as that requested by the counsel for plaintiff and sustains the objection going into the evidence sought by these interrogatories. Plaintiff excepts.

"Plaintiff offers to prove by this witness that the defendants in the several actions in which we are seeking to introduce testimony claim under the Pleasant Hill Building Association and to be in possession of the premises in controversy in this action under the Pleasant Hill Building Association by virtue of contracts of sale for the premises involved in this action executed to them by the Pleasant Hill Building Association; and this offer is made of proof by this witness because he knows the fact, having seen the contracts himself in the hands of the defendants to this action, whom he has stated that he knew."

The same objection was made to the offer as to the question, and this further: "And for the additional reason that the testimony offered is not the best evidence, the contracts themselves being the best evidence." The objections to question and offer were sustained.

Before proceeding with the examination and discussion of the alleged errors of the trial court, relied upon by counsel for plaintiff in the argument herein, it may be as well to state that defendants did not offer any proof of title, but rested their rights and relied upon possession of the premises. This, in actions of ejectment, they could do, as it is the rule therein that the plaintiff must recover upon the strength of his own title or right and cannot rely upon the weakness of that of his adversary the defendant. (*Gregory v. Ken-*

yon, 34 Neb., 640; *Franklin v. Kelley*, 2 Neb., 112; *Morton v. Green*, 2 Neb., 451; *O'Brien v. Gaslin*, 24 Neb., 561; *Buck v. Gage*, 27 Neb., 306.) If there is a common source of title, or the defendant claims under the same person as plaintiff, in proving title the plaintiff need go no further back than the common source (*Barton v. Erickson*, 14 Neb., 164; *Carson v. Dundas*, 39 Neb., 503); but where this is not the case, the plaintiff must show a grant from the state or United States and a regular and uninterrupted chain of title to himself, or, in other words, he must prove title. No doubt proof of title would be sufficient if possession necessary to establish title was shown either in plaintiff or those under whom he claims, but with this we have nothing to do in this case. It was not shown during the trial that plaintiff and defendants claimed under the same person or from common source of title; hence it devolved upon plaintiff to prove title in itself. In the attempt to do this, as we have before stated, as one link of the chain of title there was offered a certified copy of the record of a deed from Enos Lowe and wife to Roswell G. Pierce, which was objected to because it was acknowledged before a commissioner of deeds for Nebraska, in a county of the state of Iowa, and was not authenticated by the certificate of the secretary of state, which objection was sustained and the deed not allowed in evidence. This is one of the errors of which counsel for plaintiff complains, and for the strength of this complaint he relies upon matter contained in certain sections of the statute, viz., sections 4 and 5 of chapter 73, Compiled Statutes, which are in reference to the acknowledgment of deeds or instruments of conveyance and are as follows:

"Sec. 4. If executed and acknowledged or proved in any other state, territory, or district of the United States, it must be executed and acknowledged or proved either according to the laws of such state, territory, or district, or in accordance with the law of this state, and such acknowledgment shall be made before and certified by any officer authorized by the laws of such state, territory, or district to take and certify acknowledgments, or by a commissioner of deeds appointed by the governor of this state for that purpose.

"Sec. 5. In all cases provided for in section four of this chapter (if such acknowledgment or proof is taken before a commissioner appointed by the governor of this state for that purpose, notary public or other officer using an official seal) the instrument thus acknowledged or proved shall be entitled to be recorded without further authentication; *Provided*, That in all other cases the deed or other instrument shall have attached thereto a certificate of the clerk of a court of record or other proper certifying officer of the county, district, or state within which the acknowledgment or proof was taken, under the seal of his office, showing that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be; that he is well acquainted with the handwriting of such officer; that he believes the said signature of such officer to be genuine, and that the deed or other instrument is executed and acknowledged according to the laws of such state, district, or territory."

To which we will add the following from section 13 of the same chapter:

"Sec. 13. Every deed acknowledged or proved, and certified by any of the officers before named, including the certificate specified in section five of this chapter, whenever such certificate is required by law, may be read in evidence without further proof, and shall be entitled to be recorded," etc.

In support of the defendants' contention that the excluded conveyance was not authenticated as by law required, we are referred especially to section 36 of this same chapter, 73, which is as follows: "When any deed or other instrument shall be proved or acknowledged, or any oath or affirmation shall be taken before any commissioner appointed by virtue of this chapter, before it shall be entitled to be used, recorded, or read in evidence, in addition to the preceding requisites there shall be subjoined or affixed to the certificate signed and sealed by each commissioner as aforesaid a certificate under the hand and official seal of the secretary of Nebraska certifying that such commissioner was, at the time of taking such proof or acknowledgment, or of administering such oath or affirmation, duly authorized to take the same, and that the secretary is acquainted with the handwriting of such commissioner, or has compared the signature to such certificate with the signature of such commissioner deposited in his office, and has also compared the impression of the seal affixed to such certificate with the impression of the seal of such commissioner deposited in his office, and that he verily believes the signature and the impression of the seal of the said certificate to be genuine."

The three or four preceding sections of the chapter are in reference to the appointment of

commissioners of deeds and in a general way defining their duties and powers. Section 36, quoted above, appears as section 44, chapter 31, entitled "Real Estate and the Alienation Thereof by Deed," approved January 26, 1856, also as section 41, chapter 43, Revised Statutes, 1866, under title "Real Estate," section 36, General Statutes, 1873, and section 4360, Cobbey's Annotated Statutes, 1893. This section was enacted in 1856 and was re-enacted February 15, 1864, in an act entitled "An act to revise and consolidate the laws of a general nature passed at the second session of the legislative assembly of this territory," being section 42 of chapter 12 of the act. February 13, 1865, there was passed an act entitled "An act to amend chapter twelve of an act entitled 'An act to revise and consolidate the laws of a general nature passed at the second session of the legislative assembly of this territory,' approved February 15, 1864" (Session Laws, 1865, p. 53), and which was as follows:

"Section 1. *Be it Enacted by the Council and House of Representatives of the Territory of Nebraska,* That section five of chapter twelve of an act entitled 'An act to revise and consolidate the laws of a general nature passed at the second session of the legislative assembly of this territory' is hereby amended so as to read as follows, namely: In all cases provided for in section four of this act (if such acknowledgment or proof is taken before a commissioner appointed by the governor of this territory for that purpose, notary public, or other officer using an official seal) the instrument thus acknowledged or proven shall be entitled to be recorded without further authentication. * * *

"Sec. 2. This act shall take effect and be in force from and after its passage.

"Approved February 13, 1865."

It is strenuously argued by counsel for plaintiff that the passage of this act operated a repeal by implication of the section now numbered 36, then numbered 42 of chapter 12, which required the certificate of the secretary of state to be attached to the acknowledgment of a deed taken before a commissioner of deeds. It is clear that there was an irreconcilable conflict between section 42 of chapter 12 and section 5 as amended by the later act, that they could not both stand and be enforced, for, if a deed was executed and acknowledged before a commissioner of deeds and presented for record without the certificate of the secretary of state, it would be sufficiently authenticated under the provisions of section 5 as amended, but its record necessarily denied if the provisions of section 42 (now 36) were enforced, and the last act, or the amended section 5 prevailed, and the other section was repealed by implication. (*State v. Howe*, 28 Neb., 618.) Sections 4 and 5, as enacted January 26, 1856, were as follows:

"Sec. 4. If acknowledged or proved in any other state or territory or district of the United States, it must be done according to the laws of such state, territory, or district, and must be acknowledged or proved before any officer authorized to do so by the laws of such state, territory, or district, or before a commissioner appointed by the governor of this territory for that purpose.

"Sec. 5. In cases provided for in the last section, unless when taken before such commissioner, the deed shall have attached thereto a

certificate of the clerk or other proper certifying officer of a court of record of the county or district within which it was taken, under the seal of his office, that the person whose name is subscribed to the certificate of acknowledgment or proof was, at the date thereof, such officer as he is therein represented to be; that he is well acquainted with the handwriting of such officer, and that he believes the signature of such officer to be genuine, and that the deed is executed and acknowledged, or proved according to the laws of such state or territory." (Session Laws, 1856, p. 80, ch. 31, secs. 4, 5.)

Section 4 was again enacted in the same terms, February 15, 1864. Section 5 was at the same date again enacted with the following changes: "In place of the words 'unless when taken' the words 'except where such acknowledgment is taken' were used, and also the words 'or state' were inserted after the word 'district,' and the words 'within which the acknowledgment was taken' were substituted for the words 'within which it was taken.'" Section 4 was again enacted unchanged February 12, 1866, and section 5, as amended February 13, 1865 (the amendment we have hereinbefore noticed), was also again enacted February 12, 1866, but the section in regard to the authentication of a conveyance acknowledged before a commissioner of deeds by the certificate of the secretary of state also appeared in the Revised Statutes of 1866 as section 41 of chapter 43 thereof. The sections 4 and 5 hereinbefore referred to were, by such numbers, sections of this same chapter, and there was the same conflict between the provisions of section 41 and section 5 as had existed as they appeared

as numbered in prior enactments, subsequent to the amendment of section 5, February 13, 1865, as hereinbefore noticed. It was said in an opinion in *Albertson v. State*, 9 Neb., 429, in which this court considered the question of a conflict between different parts of sections of the Revised Statutes of 1866: "The Revised Statutes of 1866 were passed as one act, and in such case the well-known rule applies that where there is an irreconcilable conflict between different sections or parts of the same statute, the last words stand, and those which are in conflict therewith are, so far as there is a conflict, repealed;" and it was held: "Where there is an irreconcilable conflict between different sections or parts of the same statute the last words stand and those in conflict therewith are repealed." Applying this rule in the case at bar, the section now numbered 36 must stand and so much of section 5 as is in conflict therewith must be held to be repealed, or without force.

It is further insisted in this connection by counsel for plaintiff that by the second section of an act passed June 13, 1867, to amend section 38 of chapter 43 of Revised Statutes of 1866, entitled "Real Estate," now section 33, chapter 73, Compiled Statutes, and a part of section 4357 of Cobbey's Annotated Statutes of 1893, which reads as follows:—"All acts performed in pursuance of the laws of this state or of the laws of the territory of Nebraska, by commissioners of deeds heretofore appointed by the governor of the territory of Nebraska shall be deemed and held to be valid and binding in law" (Session Laws, 1867, special session, p. 52, sec. 2),— has made binding and legalized all deeds acknowledged before commis-

sioners of deeds prior to its passage, and the deed from Lowe to Pierce, being one of such, was thus relieved of any defect which may have existed; and further, that section 4 of chapter 61 of an act passed in 1887, which section is now section 4*a* of chapter 73 of the Compiled Statutes and section 4328 of Cobbey's Annotated Statutes of 1893, and which reads as follows:—"All deeds heretofore executed and acknowledged in accordance with the provisions of this act shall be and are hereby declared to be legal and valid,"—was effectual in curing any defect which may have existed in the authentication of the deed from Lowe to Pierce. These two sections, when examined, and the first in connection with the provisions of the section of which it was enacted as amendatory, it is plain have no reference to the authentication of the acts or deeds mentioned in them and were not passed with the purpose in view of relieving acts performed or deeds acknowledged before commissioners of deeds, of any defects in their authentication and did not do so for the deed in question. The deed served no doubt to pass the title to the land from the grantor to the grantee. This it would do without an acknowledgment or authentication; but lacking the certificate of the secretary of state, it was not entitled to be used, recorded, or read in evidence, and if recorded, a certified copy of it as so recorded could not properly be received in evidence, and the trial court did not err in rejecting it when offered.

In the case of *Hoadley v. Stephens*, 4 Neb., 431, in which the question of whether a deed executed in Virginia and acknowledged before a justice of the peace there would be received in evidence in

the courts of this state without further authentication or any proof that it was executed and acknowledged according to the laws of Virginia, sections 4 and 5 of the statutes as hereinbefore quoted, were referred to and their provisions applied, and it was held: "Where a deed is executed and acknowledged in another state before a commissioner of deeds of this state, a notary public or other officer using an official seal, the law presumes a compliance with the law of the place of execution, and no further authentication is necessary. But in all other cases there must be attached thereto a certificate of the clerk of a court of record or other certifying officer, under his official seal, showing that the person taking such acknowledgment was the officer therein represented; that he is well acquainted with his handwriting; that he believes his signature to be genuine, and that such deed is executed according to the laws of such state." Whether the provisions of section 36 (as it was then) of the General Statutes, requiring the certificate of the secretary of state to be attached to a deed acknowledged before a commissioner of deeds, was considered we cannot say. No reference to or mention of it was made in the opinion. It follows from the views herein expressed that so much of the rule announced in the case alluded to as affected acknowledgments taken before commissioners of deeds must be overruled.

A certified copy of the record of a deed executed by the sheriff of Douglas county, purporting to convey the title of Roswell G. Pierce to Joel S. Smith, was offered, and immediately following this a certified copy of a deed which recited that the grantor's name was Joel S. Smith,

and by the acknowledgment he was stated to be Joel S. Smith, but the deed was executed by John S. Smith. This offered testimony was objected to and the objection sustained, and, we think, correctly. It was clearly not competent to prove a conveyance of any title of Joel S. Smith by a deed signed by John S. Smith. They would not be presumed to be the same persons. Conceding for the purpose of argument that the title was in Joel S. Smith, conveyance of the title from him to a grantee could not be proved by a deed executed by John S. Smith in the absence of proof that he was the same person as Joel S. Smith. (*Ambs v. Chicago, St. P., M. & O. R. Co.*, 46 N. W. Rep. [Minn.], 321, and cases cited.) There was offered by plaintiff in connection with the certified copy of the record of this deed a certified copy of the record of an affidavit, in which it was sought, by statements therein made, to show that the deed was that of Joel S. Smith and had been executed by him and not John S. Smith, but on objection this was excluded. In this action, we think, there was no error. It was the record of an *ex parte* affidavit and was plainly not competent as evidence on the trial of a cause of this nature.

The determination of the further question of the competency as evidence of the deeds attested by a stockholder of the grantor or grantee, and acknowledged before a stockholder, is not necessary to a decision of the case and we need not now discuss or settle it. If it was error to exclude the deed, it was error without prejudice, as the proof of the chain of title was broken and incomplete before these deeds were reached.

There is one further matter of complaint urged in behalf of plaintiff, viz., that the trial court

erred in not allowing the proof offered to show that the defendants were in possession of and claiming a right to the premises involved in the action, under and by virtue of contracts of purchase with the same person or company under whom the plaintiff claimed title, or that the source of title was a common one. It will be remembered that the case had been tried on the theory, as stated by counsel for plaintiff, that the parties to the action were claiming under a common source of title, and had been submitted to the court and a decision had been announced on the conditions as established by the circumstances and facts then in evidence and before the court, and on motion of plaintiff the case had been reopened for the hearing of further testimony on particular subjects specifically named, to prove a chain of title from the United States, and to offer the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association. Full opportunity was afforded for the introduction of the matters requested, and at the close of the hearing thus accorded the offer was made of testimony in regard to the contracts of purchase. The opening of a case after the parties thereto have announced the closing of offers of testimony, at the instance or request of either, for the offer or introduction of further evidence, is a matter which rests wholly within the discretion of the trial judge; but it should be given a wide range and liberally exercised in cases where such action will subserve the due administration of justice between litigants, always with a proper regard, however, to the observance and enforcement of settled rules and laws of procedure and an orderly course of

business. In full view of what had transpired during the trial of this case and the stage of the proceedings at which the action of the court against which this complaint is directed occurred, we cannot say that there was any abuse of its discretion in such action calling for a reversal of the judgments. The judgments of the trial court must be

AFFIRMED.

W. D. MATHEWS ET AL. V. SARAH M. JONES.

FILED MARCH 18, 1896. No. 6305.

1. **Merger of Estates.** Whenever a person acquires a greater and a lesser estate in the same property and there is no intervening estate, the lesser does not further exist as a separate estate but is destroyed by or is considered in law as merged in the greater, but when, in such a case, an intention that the estates remain separate and distinct is expressed or may be implied or inferred, no merger can ensue but the intention will prevail.

2. **Mortgages:** COLLATERAL NOTES: DEEDS: MERGER. A mortgagee acquired the title to the mortgaged property, and in the deed by which it was conveyed to him it was stated that the title was passed "subject to a mortgage of three hundred dollars which grantee hereby assumes and agrees to pay." *Held*, That it was evident from this that the intention was to continue the life of the lien of the mortgage and no merger ensued as between the parties, or against a *bona fide* purchaser of the notes secured by the mortgage, and the deed, if recorded, was notice of the fact of such intention to parties who subsequently purchased the premises, and also afforded such notice to parties to whom it was so exhibited as to bring to their knowledge the existence of the clause in the deed, and who afterwards bought the property.

3. **Vendor and Vendee:** MORTGAGES: RELEASE: BONA FIDE PURCHASERS OF NOTES. Where parties before buying real

estate examine the records and find the property to be encumbered by a mortgage, and apply to the mortgagee for information and are by him told that he has received a conveyance of the title, and a deed from the mortgagor to the mortgagee conveying the property is exhibited to them, and such deed contains a clause by which the grantee assumes and agrees to pay the indebtedness secured by the mortgage, and they subsequently buy the property at a time when, to their knowledge, the mortgage debt had not matured, they are chargeable with such notice as required them to make further inquiry and are not innocent purchasers, and a *bona fide* purchaser of the mortgage notes, at a date prior to the time of the purchase of the property by such parties, may enforce the mortgage as against their rights, and this, notwithstanding at the time they purchased the premises the mortgagee released the lien of the mortgage of record.

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

H. M. Uttley, for plaintiffs in error.

Loomis & Abbott, contra.

HARRISON, J.

It appears from the pleadings and evidence in this case that lot 3, in block 17, Nye-Hawthorne Addition to the city of Fremont, was conveyed by C. H. Toncray to R. H. Taylor by warranty deed, the deed, according to its recitations, being executed October, 1888. Neither the statement in regard to time of the signature nor acknowledgment named the day of the month of October on which the act was done. The consideration expressed in the deed was $600. On October 1, 1888, a promissory note in the sum of $300, due October 1, 1891, also notes evidencing the amounts of semi-annual interest to be paid on the sum stated in the principal note, from its date until maturity, were

executed and delivered by R. H. Taylor to Toncray, and these notes, all secured by a mortgage on the lot hereinbefore described, conveyed by Toncray to Taylor. The mortgage was signed by Taylor and wife, of date October 1, 1888, and acknowledged October 12, 1888. Both deed and mortgage were filed for record October 18, 1888. Of date October 5, 1888, a warranty deed for the same premises was executed and acknowledged by Taylor and wife and delivered to Toncray. This deed was not placed on the record until August 27, 1890. At some time during the month of June, 1890,—the exact date does not appear,—one W. D. Mathews purchased, or bargained with Toncray for, the property, and on August 27, 1890, was given a deed for it, which was recorded on the same day. On the day prior, August 26, 1890, Mathews and wife had made and delivered a deed conveying the premises to Charles A. Manville, which was filed for record August 27, 1890, and on this same day Toncray released by entry on the margin of the record the mortgage which he had received from Taylor. Long prior to this time, or in October, 1888,—the date was not definitely shown,—Toncray had assigned the notes secured by the mortgage to the defendant in error herein. There was a failure to pay the principal note and some of the interest notes, and defendant in error instituted this action to enforce collection by foreclosure of the mortgage, and seeking a reversal of the decree in her favor rendered in the district court, the case was brought to this court by error proceedings.

The plaintiffs in error admitted in the district court, both in pleading and as a matter of evidence, the execution and existence of the mort-

gage in suit, and the notes secured thereby; denied the transfer of the notes to defendant in error, or sufficiently so to demand proof thereof, and Mathews asserted that in June, 1890, when he was bargaining with Toncray, having in view the purchase of the lot, he examined the records of Dodge county, the county wherein the real estate was situate, and discovered the title, as shown by the record, to be in R. H. Taylor, incumbered by the mortgage in suit, and, upon inquiry made to Toncray in regard to it, was by him shown the deed from the Taylors to Toncray, and was informed by Toncray that its not having been recorded was because of neglect, inattention, or forgetfulness on his part, that he would have it made of record at any time desired, and would also execute a release of the mortgage. Manville, who claims to have purchased of Matthews, also pleads that he examined the records in reference to this property August 26, 1890, the date of his purchase, or of the deed by which the property was conveyed to him; that the record disclosed the title to be in Taylor, incumbered by the mortgage to Toncray; that he applied to Toncray for further information, and was shown the conveyance from Taylor to Toncray, and was told that because of neglect on Toncray's part it had not been presented for record and that he would attend to it any time, and would also discharge the mortgage of record. Each of plaintiffs in error claims to have placed reliance, in purchasing the lot, upon the record, combined with the examination of the deed exhibited by Toncray and his statements and agreements, and the subsequent recording of the deed and release of the mortgage and the apparent condition of its title

as so shown and established; and further, being without any knowledge or notice of the transfer of the notes secured by the mortgage to defendant in error, and her consequent ownership of the lien, that they were innocent purchasers and are entitled to protection as such; that as against them and their rights the lien should not and will not be enforced; that conceding to defendant in error the purchase, in good faith, of the notes, and her resulting ownership of the mortgage and right to its due enforcement, yet, as she failed to take an assignment of it in writing and to have the same recorded, she put it in the power of Toncray, the mortgagee, to harm or wrong plaintiffs in error, and the mortgage must be held to be of no force as against the rights they acquired by the conveyance to them respectively. They further assert that when Toncray received from Taylor and wife a deed conveying to him the title to the lot there was vested in him both title and lien, they were united in one party, or there was a merger and the mortgage lien was discharged or extinguished. The plaintiffs in error agree in the statement that when the deed from Taylor to Toncray was made it contained the following recital: "Subject to a mortgage of three hundred dollars, which grantee hereby assumes and agrees to pay," and that they noticed it when the deed was exhibited to them by Toncray. It must further be borne in mind that the transactions by which Mathews and finally Manville became owners of the lot were of time several months prior to the maturity of the principal note secured by the mortgage.

It is argued in the briefs filed for plaintiff in error that the deed from Taylor to Toncray, being executed on October 5, 1888, and the mortgage,

although dated and presumably signed on October 1, 1888, was not acknowledged until October 12, 1888, could not have been delivered to take effect until after its acknowledgment, and consequently the title was not in Taylor when he executed the mortgage, but had been conveyed to Toncray, hence the mortgage could not and never did have any real existence. It must be remembered that Toncray conveyed this lot to Taylor and that the consideration expressed in such conveyance was $600. This deed was made in October, 1888, and it and the mortgage in suit were both filed for record on the same day, October 18, 1888. The mortgage was for $300, the one-half of the apparent purchase price of the property. From these facts it is quite evident that the mortgage was given to secure a portion of the purchase price of the lot, the conveyance by Toncray to Taylor and mortgage from Taylor to Toncray were but parts of the one transaction and the mortgage intended to create a lien on the property, and that by it the intention was fully met and accomplished. The plaintiffs in error, and each of them, scanned the record before purchasing and by it were informed of the existence of this mortgage as a subsisting lien on the premises, and when Toncray exhibited to them the deed to him from Taylor, of date October 5, 1888, they obtained the information that the mortgage was a lien on the lot; that Toncray, the immediate source of the title to Mathews, recognized it as such, and not only this, but he assumed and agreed to pay it. Surely they are in no position to ask, nor is there any valid reason to be urged in their behalf, to induce us to alter the relations and conditions established by these different conveyances as in-

tended and recognized by the original parties to them; further on this point, during the trial it was admitted as evidential matter, as follows: "It is admitted by all the parties appearing to this suit that at the time R. H. Taylor and wife made the notes and mortgage set out in plaintiff's petition, that the said R. H. Taylor was the owner in fee-simple of the real estate described in the said mortgage." This, it seems, must have been meant to apply to, and put at rest, the subject or question of the apparent conflict in this particular, disclosed by an inspection of the dates of the several conveyances executed by the parties and involved by this question.

It is contended that when Toncray, the mortgagee, received the title to the lot by conveyance from Taylor, all the interests vested in him and were united; that there was a merger and it operated an extinguishment of the lien of the mortgage. On the subject of merger, in the opinion in the case of *Miller v. Finn*, 1 Neb., 254, written by MASON, C. J., it was said: "It is said the general rule is that whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or, in the law phrase, is said to be merged, that is, sank or drowned in the greater. (*James v. Morey*, 2 Cow., 284; 2 Blackstone, Com., 177.) * * * In Co. Litt., 388, it is said: 'Mergers were not favored in courts of law and still less in courts of equity.' They are never allowed unless for special reasons, and then only to preserve the intention of the parties. (*Phillips v. Phillips*, 1 P. Wm., 41.) When there is a union of rights, equity will preserve them distinct if the intention so to do is either express or implied;"

and it was held: "There can be no merger when the intention to keep the estates distinct may be inferred or has been expressed." (See, also, *Ætna Life Ins. Co. v. Corn*, 89 Ill., 170; *Shaver v. Williams*, 87 Ill., 469; *Richardson v. Hockenhull*, 85 Ill., 124; *Worcester Nat. Bank v. Cheeney*, 87 Ill., 602.) In the case at bar the mortgagee transferred the notes to the defendant in error and the ownership of the mortgage followed them, and in the deed from Taylor to Toncray, by which the latter took the title, the existence of the mortgage as an incumbrance on the title was set forth and he assumed and agreed to pay it. We think the intention that no merger or extinguishment of the mortgage lien was to be effected clearly appeared, or was to be inferred, and sufficiently so to charge the purchaser cognizant of the facts, as were the plaintiffs in error, with knowledge or notice of it. (*Ætna Life Ins. Co. v. Corn*, 89 Ill., 170; 1 Jones, Mortgages, secs. 870, 872.)

It is strenuously insisted that it was negligence on the part of defendant in error not to obtain a written assignment and have it recorded; that lack of such action placed in the hands of Toncray the power, by releasing the mortgage of record, to commit a fraud, and that it calls for the application of the rule that where one of two innocent parties must suffer loss, it must be borne by the one who, by negligence, placed it in the power of another to perpetrate the fraud, and that, under its application to the facts as developed in this case and its enforcement, defendant in error must bear the loss and should not have been granted a decree of foreclosure. This view is as earnestly combated in argument by counsel for defendant in error. The direct and main question involved

was discussed in an opinion written by NORVAL, C. J., in the case of *Whipple v. Fowler*, 41 Neb., 675, and it was held: "A satisfaction entered on the record by a mortgagee, after he has sold and delivered the notes secured by the mortgage to a third party, will protect a subsequent mortgagee in good faith or *bona fide* purchaser of the mortgaged premises, in case he had no notice at the date of the purchase, or the payment of the consideration, that the debt was assigned, or was unpaid, or that the release was unauthorized, but as to all other persons the lien of the mortgage will not be impaired;" but, as we view the facts and circumstances of the case at bar, a discussion or re-examination of this subject, even if it was deemed best to be made, is not necessary to a determination of the question, which we think a controlling one in this branch of the case, in respect to the relative rights of the parties. This is, were Mathews and Manville *bona fide* purchasers of the property? If they were, then the other and further question which counsel have argued would arise and call for an answer. If not, it is not necessarily involved, or to be decided. They examined the record, and it disclosed the incumbrance or mortgage in suit, in favor of Toncray. On application to the mortgagee they were shown a deed from the mortgagor to him, unrecorded, which contained a statement that the title was conveyed to him subject to the incumbrance, and also that he assumed and agreed to pay it, and further, at the time these matters occurred and the property was conveyed to them respectively, the principal note secured by the incumbrance was not due. It was more than a year before its maturity. A knowledge of these facts was suffi-

cient to make it their duty, before purchasing, to ascertain the whereabouts and ownership of the notes and mortgage, to put them upon inquiry, and, having such notice and failing in the ensuing duty, they cannot now claim and be accorded the privileges and rights of *bona fide* purchasers. (*Purdy v. Huntington*, 42 N. Y., 334.) It follows that the judgment of the district court must be

AFFIRMED.

WIN S. WHITE, APPELLEE, V. NANNIE SMITH ET AL., MORTGAGORS, AND W. A. POLLOCK, INTERVENOR, APPELLANT.

FILED MARCH 18, 1896. No. 6178.

Review: BILL OF EXCEPTIONS. A decree of the district court cannot be reviewed upon a question of fact, when the evidence has not been preserved by a bill of exceptions duly settled and allowed.

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

Addison M. Gooding, for appellant.

W. E. Gantt, contra.

NORVAL, J.

Win S. White brought suit in the court below to foreclose a real estate mortgage executed by Nannie Smith and Levi Smith. Subsequently Pollock filed a petition of intervention, but no copy thereof is to be found in the record. A decree of foreclosure was entered, and leave given

plaintiff to answer the petition of the intervenor, which answer was duly filed. In the meantime the property was sold under the decree to the plaintiff, the sale was confirmed, and a sheriff's deed was issued to him. Subsequently, but at what time, or what term of court, the record does not show, the cause was heard upon the petition of the intervenor Pollock, the answer thereto of White and the evidence, and a decree was entered in favor of the latter cancelling a quitclaim deed from J. L. Krosen and wife to Pollock, under which conveyance the latter claimed title to the property described in the mortgage, and quieting the title in the plaintiff. From the last decree Pollock appeals, claiming that the findings are contrary to the evidence.

The condition of the record is such that we are unable to review the findings and decree. The testimony was not preserved by a bill of exceptions. There is attached to the transcript a draft of a proposed bill, but it was never allowed by either the trial judge or the clerk of the district court, and plaintiff now protests against its being considered. The proposed bill was returned by plaintiff to intervenor with objections to its allowance, and no steps were taken to secure its settlement, so far as this record discloses. There is, however, attached to said draft of the bill of exceptions the following certificate:

"STATE OF NEBRASKA, }
CEDAR COUNTY. } SS.

"I, Jno. J. Goebel, clerk of the district court in and for Cedar county, hereby certify that the foregoing is a true and complete transcript of all papers and proofs received or known to me as such clerk in this case. JNO. J. GOEBEL,

"Clerk Dist. Court."

This did not constitute a settlement or allowance of the bill. Moreover, the clerk had no power to settle a bill of exceptions in this case, inasmuch as he had not been authorized or empowered to do so by a written stipulation of the parties or their attorneys. As the testimony has not been made a part of the record by a bill of exceptions duly allowed, the decree must be

AFFIRMED.

ANHEUSER-BUSCH BREWING ASSOCIATION V. ALEXANDER H. MURRAY.

FILED MARCH 18, 1896. No. 6259.

1. **Agency:** EVIDENCE. Agency cannot be proved by the mere declarations of one assuming to act in that capacity.
2. **Review:** FINDINGS: PRACTICE. The finding of a jury will be set aside where there is not sufficient evidence to support it.

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

Capps & Stevens, for plaintiff in error.

C. H. Tanner, *contra.*

NORVAL, J.

Alexander H. Murray brought suit in the court below against the Anheuser-Busch Brewing Association, alleging in the petition, substantially, that the defendant on the 1st day of January, 1891, contracted with him to manufacture for it

175 tons of ice at eighty-five cents per ton, if taken at the place of manufacture, or $1.15 per ton if delivered by plaintiff at the vaults, vats, and beer cooling-house of the defendant in the city of Hastings; that in pursuance of said contract plaintiff manufactured said quantity of ice for the defendant and tendered the same to it, both at the place of manufacture and at the other point designated in the contract; that defendant refused to receive any of said ice, or pay plaintiff for its manufacture, and that there is due from defendant $148.75 and interest at seven per cent from February 15, 1891, for which sum, with interest, judgment is demanded. The answer puts in issue the averments of the petition. Upon the trial to a jury, a verdict was returned for the plaintiff for $127.50, and judgment was entered thereon. The defendant has prosecuted a petition in error to this court.

We will notice but one of the forty-two assignments of error, and that is that the trial court erred in holding there was evidence upon which to found a liability against this plaintiff. The record discloses that the defendant is engaged in the manufacture of beer at St. Louis, Missouri, and that one J. K. Ellis is a wholesale dealer in the city of Hastings in keg and bottle beer of defendant's manufacture. In January, 1891, Murray, being the owner or manager of a natatorium in the city of Hastings which contained a large pool or artificial lake, capable of collecting and holding water in a body until frozen into ice, entered into a verbal contract with Ellis to put up 175 tons of ice upon the terms stated in the petition. The pool or lake was thereupon filled by Murray with water, which after the mercury had

fallen low enough, formed into ice about twelve inches thick, and sufficient in quantity to meet the requirements of said contract. Ellis refused to receive or accept the ice when tendered. The defendant below insists that Ellis was not authorized to, nor did he represent it in the making of the contract in question. Upon a careful reading of the evidence we are satisfied that it fails to show that Ellis was the agent of the defendant for any purpose whatever. He handled its beer, it is true, but not under a contract of agency. Ellis purchased the beer of the manufacturer in St. Louis in car load lots on thirty days' time and shipped the same to Hastings, where he sold it to retail dealers on his own account, and alone reaped whatever profits there were derived therefrom. Ellis, in handling the beer, used the defendant's cooling-house, vaults, and vats in the city of Hastings, but the defendant was not to, nor did it, furnish the ice used in storing, preserving, and cooling the beer bought by Ellis. The latter alone contracted for and procured the ice on his own account. The only evidence tending to establish the relation of principal and agent between the defendant and Ellis are certain alleged declarations of the latter, and the fact that he procured to be printed on the defendant's wagon used by him in his business, "J. K. Ellis, Agent." It is not shown that any officer or representative of the defendant had any knowledge that the foregoing sign was upon the wagon. Agency cannot be established by the mere declarations of the alleged agent. (*Nostrum v. Halliday*, 39 Neb., 828; *Burke v. Frye*, 44 Neb., 223; *Richardson & Boynton Co. v. School District*, 45 Neb., 777.) There is an entire failure of proof to show that

Ellis was the agent of defendant or possessed authority to bind it in the transaction. Whether the alleged contract is within the statute of frauds, and therefore void, because not in writing, it is unnecessary to determine. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

RYAN, C., not sitting.

EDWARD ROSEWATER V. STATE OF NEBRASKA.

FILED MARCH 18, 1896. No. 6898.

1. **Contempt:** PUBLICATIONS. To constitute any publication contemptuous it must reflect upon the conduct of the court in reference to a cause or proceeding then pending in court and undetermined, and be of a character tending to influence its decision, or obstruct, interrupt, or embarrass the due administration of justice. *Percival v. State*, 45 Neb., 741, followed.

2. ———: ———. Where a newspaper article is not *per se* contemptuous, or where it is susceptible of more than one reasonable construction, one of which is innocent and requires an innuendo to apply its meaning to the court, and the record fails to disclose that the language was employed in its culpable sense, the publisher is not liable for contempt. (*Hawes v. State*, 46 Neb., 149.)

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

Edward W. Simeral, for plaintiff in error.

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

The editor-in-chief of a newspaper is liable as

for contempt for articles which appear in the columns of his paper, though it is affirmatively shown that he had no knowledge of the articles until after publication. (*People v. Wilson*, 64 Ill., 195; *State v. Frew*, 24 W. Va., 416; *Commonwealth v. Morgan*, 107 Mass., 199; *People v. Stapleton*, 33 Pac. Rep. [Colo.], 167; *Rex v. Gutch*, M. & M. [Eng.], 433; *Commonwealth v. Nichols*, 10 Met. [Mass.], 259; *Smith v. Utley*, 65 N. W. Rep. [Wis.], 744.)

NORVAL, J.

Edward Rosewater was adjudged, by the district court of Douglas county, guilty of having committed a contempt of that court, and sentenced to pay a fine of $500 and to imprisonment in the county jail for the period of thirty days. The defendant is charged with the publication in the Omaha *Bee* of the following portion of an article which appeared therein, to-wit:

"JUSTICE WITHOUT EQUALITY.
Sentences Adjusted to Fit the Men.
One Party to a Crime Gets a Five-year Sentence in the Penitentiary, While Another Gets the Benefit of a Pull.

"Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. These same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary if the pull is worked for all it is worth."

The charge is founded upon the same fragment, or portion, of the newspaper article upon which the contempt proceedings were based in the case of *Percival v. State*, 45 Neb., 741. The only sub-

stantial difference between the information or affidavits filed by the county attorney in the two cases, is that in the reported case it was averred that Percival wrote and caused to be published the article in question, while in the one at bar it is alleged that Mr. Rosewater, as editor, proprietor, and manager of the Omaha *Bee*, "published and caused to be published and permitted to be published" the aforesaid article in the evening addition of said newspaper. The record discloses that no part of the article of which complaint is made was written by Mr. Rosewater; that he had no knowledge of its existence until after it was published; and that he did not directly or indirectly order or cause it to be inserted. It is also established that the Omaha *Bee* is published by the Bee Publishing Company, a corporation; that the defendant is, and was, one of the stockholders therein and the editor-in-chief of said newspaper, and as such had the general management and control of the policy of the paper and the different editions thereof, at the time the alleged contemptuous article was published.

The attorney general contends that the editor-in-chief of a newspaper is liable in a proceeding like this for contemptuous articles which appear in the columns of his paper, even though he had no knowledge of such articles until after their publication. The brief of the state contains an able argument in support of this proposition, fortified by decisions from courts of recognized ability and standing. We do not feel called upon now to enter upon a discussion of the question, or to decide it, although the point may be fairly raised by the record. We adopt this course, inasmuch as the defendant in his answer to the rule

to show cause why he should not be attached for contempt has expressly disclaimed any desire to evade responsibility for the publication in question by reason of the fact that he is the editor-in-chief of the different editions of the *Bee*, and because in his brief filed in this court he has cited no authorities in opposition to the principle contended for by the attorney general. Furthermore, conceding, for present purposes, the doctrine invoked by the state to be sound, yet the cause must be reversed for the reasons hereafter stated.

As already indicated, this conviction is based upon the same publication that was alleged to constitute a contempt in the Percival case. It was there shown that Percival did not write or cause to be published the caption or head-lines of the article; but that he did write the following: "Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. These same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary if the pull is worked for all it is worth." The conviction in that case was reversed, the court holding that the language quoted was not *per se* libelous; that unaided by innuendo it did not apply to the court or reflect upon its integrity, nor tend to corrupt or embarrass the administration of justice; and that the article was susceptible or capable of an innocent interpretation. HARRISON, J., in the opinion filed therein, in commenting upon that portion of the article admitted to have been written by Percival, says: "It cannot be said, upon its face, to refer to any case pending at

the time it was written and published or to any designated case. In its terms it deals with some past transaction or proceedings. The phrase 'possessed of a pull' is, to speak strictly, without an intelligible meaning, and is, in any event, so doubtful and uncertain that it cannot be applied as imputing that the court was corrupt as is claimed in the complaint, with any greater certainty than it may be said to refer to some other person or persons, or to actions or motives erroneous and improper, but not corrupt. The portion of the article admitted and proved to be the work of plaintiff in error and the proof made were insufficient to support a charge and conviction of contempt and sentence therefor." Upon a reconsideration of the question, aided by the briefs and arguments of counsel, we are fully satisfied with the conclusion there reached. That decision therefore controls this as to that portion of the publication set out in the information herein, which is not included in the head-lines or caption.

It remains to be determined whether the head-lines, either standing alone or when read in connection with the remainder of the publication upon which these proceedings are based, in law, constitute a contempt of court. We again quote that portion of the article set out in the information which we designate as the head-lines: "Justice Without Equality.—Sentences Adjusted to Fit the Men.—One Party to a Crime Gets a Five-Year Sentence in the Penitentiary, While Another Gets the Benefit of a Pull." It will be observed that the foregoing, whether considered by itself or taken in connection with the rest of the article alleged in the information to be contemptuous, is

not *per se* libelous. It purports on its face to relate to proceedings past and ended, and to have no reference to any matter or cause at the time pending in court. The comments in question, unaided by innuendoes, cannot be said to be of a character tending to influence the decision of the court, or to impede, interrupt, or embarrass it in the exercise of its proper functions, and as the proofs fail to show that they were employed in their culpable sense they do not amount to a contempt of court. (*Hawes v. State*, 46 Neb., 149.) "Justice Without Equality" is a meaningless expression. No wrong or improper motive is imputed to the court or judge in the statement "Sentences Adjusted to Fit the Men." It is our understanding that sentences should be so imposed. A person convicted for his first offense, and who is young in years, ordinarily, ought not to receive so severe a punishment as an old, hardened criminal convicted of crime of the same grade. Some good citizens have expressed the thought that the courts of the country have not at all times adjusted their sentences to fit the men and their crimes. In other words, some criminals have been punished too severely, while others have received sentences so light as to amount to a travesty upon justice. The phrase, "the benefit of a pull," as was said in the Percival case, has no intelligible meaning. At least, in the connection in which it was used, we cannot say that it necessarily signifies that the court was corrupt, or unduly influenced. The part of the article complained of, in and of itself, casts no reflection upon the court. The defendant in his verified answer to the rule entered against him to show cause denies that the language of the publication is sus-

ceptible of the interpretation placed thereon by the innuendoes in the information, or that the defendant "did willfully, wrongfully, unlawfully, and contumaciously, and with the intent of bringing the district court of Douglas county which is presided over by Judge Cunningham R. Scott into public contempt, disrepute, or ridicule, or to destroy the influence, honor, and integrity of said court and said Cunningham R. Scott, as the judge thereof, or to have it believed that said court or the said Cunningham R. Scott, as judge thereof, was corrupt or influenced by corrupt motives, or for the purpose of destroying the efficacy of the court in the administration of public justice, or for the purpose of vilifying or traducing the said court or the judge thereof in the due administration of justice in any suit then and there pending." Considering the publication in connection with the above unequivocal denials in the answer of the innuendoes of the information, the conclusion is irresistible that the conviction cannot stand. The defendant insists that the language of the article was not employed in a libelous sense or with intent to cast reflections upon the court or judge. As it is capable of an innocent meaning, such a construction must be given it. The language made the basis of the charge preferred against the defendant is a very small segment of the article of which it formed a part. That portion of the article not set out in the information contains some very strong expressions which may have been a flagrant abuse of the liberty of the press. These proceedings are not, however, predicated thereon, and we do not wish to be understood as in any manner approving such portion of the publication. We are deciding the case alone

upon the fragment of the article which is set out in the information; and we hold that it is not contemptuous. The constitution guaranties that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty." (Constitution, art. 1, sec. 5.) But this constitutional right does not protect any person from punishment for contempt of court for publishing a newspaper article commenting upon a pending cause or proceeding when the publication is calculated to hinder, obstruct, or impede the due administration of justice. The power conferred upon a court to punish for contempt is to enforce respect and obedience to its authority, and is necessary to accomplish the objects and purposes for which it was created. The power is not given to compel sentimental respect. It is not every uncomplimentary comment or criticism upon a judge that he can afford to notice. "While the power to punish when contempts are really committed is one which should be exercised promptly in proper cases, yet it is in some respects an arbitrary power, and hence one which ought to be kept within prudent limits. This is particularly the policy of the law in regard to indirect contempts. (*Haskett v. State*, 51 Ind., 176.) No one ought to be found guilty upon a doubtful charge of indirect contempt, and especially so in a case in any manner involving the freedom of the press. It is true that too often, under the guise of a guarantied freedom, the press transcends the limits of manly criticism and resorts to methods injurious to persons and tribunals justly entitled to the moral support of all law-abiding citizens, but such digressions are not always unmixed evils, and it is only in rare in-

stances that legal proceedings in repression of such a license can with propriety be resorted to." (*Cheadle v. State*, 11 N. E. Rep. [Ind.], 426.) While the power to punish for indirect contempt exists in the court, it should only be exercised when it is manifest that the publication was intended to bring the court into disrepute and to destroy confidence in it, and obstruct or embarrass the administration of justice. The record failing to present such a case, the judgment and sentence are reversed and the cause dismissed.

REVERSED AND DISMISSED.

JAMES L. CALLEN V. JOHN W. ROSE.

FILED MARCH 18, 1896. No. 6160.

1. **Chattel Mortgages:** FORECLOSURE: CONVERSION OF CHATTELS BY MORTGAGEE. A mortgagee of chattels in the foreclosure of his mortgage must comply substantially with the requirements of the statute, where they have not been waived by the mortgagor, and if the mortgagee fails to do so in an essential matter, he is liable to the mortgagor for the value of the property, less the mortgage lien thereon.

2. ———: ———: ———: DAMAGES. Evidence examined, and *held* that the damages assessed in this case are not excessive.

3. **Pleading and Proof.** Testimony must be confined to the issues tendered by the pleadings.

4. **Compromise:** EVIDENCE. Unaccepted propositions of compromise are inadmissible in evidence.

5. **Instructions:** RECORD: REVIEW. Where there are no instructions in the record brought to this court, none will be reviewed.

ERROR from the district court of Sherman county. Tried below before HOLCOMB, J.

J. R. Scott, for plaintiff in error.

Nightingale Bros. and *Aaron Wall, contra.*

NORVAL, J.

John W. Rose recovered a judgment in the sum of $194 against James L. Callen for the conversion of certain chattels, which the defendant took from him under a chattel mortgage. Callen is a resident of Mills county, Iowa, and owns a farm in Sherman county, this state. Rose, during the transactions hereafter stated, occupied said farm as Callen's tenant. On October 24, 1889, Rose being indebted to Callen, gave him a chattel mortgage upon two horses, a mare, sixty head of hogs, two cows, three calves, and some farming implements to secure the payment of a claim of $412.40, due November 1, 1890. Subsequently Rose butchered one of the cows, and disposed of part of the hogs, but the remainder of the property continued in his possession until in September, 1890, when, before the maturity of the mortgage debt, Callen seized the chattels under the mortgage, and disposed of most of them at private sale without advertisement, and without the mortgagor's consent, so he testified. The remainder of the property Callen converted to his own use. Rose sued for the value of the property, and Callen has brought error upon the judgment rendered against him.

It is the settled law of this state that the mortgagee of chattels in the foreclosure of his mortgage must comply substantially with the requirements of the statute, unless waived by the mortgagor, and that if he fails so to do in an essential

matter the mortgagor is entitled to have the value of the property applied upon the mortgage debt, and if such value exceeds such debt, the mortgagor may recover the difference from the mortgagee. (*Loeb v. Milner*, 21 Neb., 392; *Coad v. Home Cattle Co.*, 32 Neb., 762; *Rockford Watch Co. v. Manifold*, 36 Neb., 801; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb., 128.) The soundness of this rule is not now assailed, but it is claimed that the damages assessed by the jury are excessive; in other words, that the jury rendered a verdict for more than the excess of the value of the property above the amount due on the mortgage. Plaintiff below, in his testimony, gave a description of each piece of property, and testified to the market value thereof at the time it was taken, the aggregate estimate, according to his testimony, being over $740. Jean Whitman, a witness for the plaintiff, who was acquainted with the chattels and their worth, in his testimony placed the value about $90 less. The total amount of the mortgage lien, when the property was taken by the defendant, was $450. A verdict for $194 based upon the testimony of these witnesses was not excessive. It is true the witnesses for the defendant fixed the market value of the property considerably lower than that given by the other side, but it was for the jury alone to pass upon the credibility of the witnesses. Their finding being supported by sufficient testimony, cannot be molested by us.

The court excluded testimony offered by the defendant to show that one of the articles seized, a mower, had been previously mortgaged to another party by the plaintiff, and that the lien created thereby had not been paid. It claimed that this ruling of the court was erroneous; that

the defendant was entitled to have the amount of such mortgage deducted from the value of the mower. A sufficient answer to this contention is that no such issue was tendered by the pleadings. The defendant should have set up that fact in his answer; not having done so, he could not avail himself of it upon the trial.

Complaint is made of the exclusion of the testimony of one J. P. Braden relating to a conversation between defendant and plaintiff. It is disclosed that Braden went with Callen to see Rose in regard to the property, before it was taken, for the purpose of effecting a settlement with the latter. Propositions of compromise were made from one to the other, which were not accepted, and it was the conversation which on that occasion took place between them relating to the proposed settlement that defendant sought to prove. It was clearly inadmissible in evidence, and was properly excluded. (*Kierstead v. Brown*, 23 Neb., 595; *Eldridge v. Hargreaves*, 30 Neb., 638.)

It is finally insisted that errors were committed in the giving and refusing of the instructions. No particular instruction is pointed out in the brief as being bad, nor are we informed of the number of defendant's request to charge which it is claimed was wrongly refused. Besides no complaint is made either in the motion for a new trial or petition in error of any instruction. Furthermore, not a single instruction is to be found in the record before us, hence none will be reviewed.

This disposes of the questions discussed, and the judgment must be

AFFIRMED.

GEORGE BUSH V. STATE OF NEBRASKA.

FILED MARCH 18, 1896. No. 8203.

1. **Review:** CONTINUANCE: RULINGS BELOW. An assignment of error for the overruling of a motion for a continuance will not be considered by this court when the record fails to disclose that such motion was passed upon by the trial court.

2. **Instructions:** EXCEPTIONS: REVIEW. Instructions will not be reviewed unless the record shows they were excepted to when given.

3. ———: REPETITIONS. It is not error to refuse an instruction where the substance thereof has been given to the jury in other instructions.

4. **Burglary:** EVIDENCE. *Held,* That the evidence sustains a conviction for burglary.

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

Coffin & Stone, for plaintiff in error.

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

NORVAL, J.

The defendant, George Bush, was tried and convicted on a charge of feloniously breaking and entering a dwelling-house in the night time with the intent to commit a larceny. Judgment and sentence of imprisonment in the penitentiary for the period of eight years were entered against him, from which he prosecutes error to this court.

The defendant's motion to strike out the unauthenticated statement of the trial judge, found in the transcript, of what transpired during the

proceedings, is sustained, as it is not made part of the record in this case.

It is argued that the court erred in overruling the defendant's motion for a continuance. With the statement above referred to eliminated from the record there is nothing to show that the defendant's application for a continuance was not granted, or if denied that an exception was taken to the ruling. This assignment is not, therefore, well taken.

Criticisms are made in the brief of the second, third, fourth, fifth, sixth, ninth, and tenth instructions given by the court on its own motion. The record fails to disclose that an exception was taken to the giving of any of said instructions, hence no foundation has been laid for their review here, and they will not be considered. (*Heldt v. State*, 20 Neb., 492; *Hill v. State*, 42 Neb., 519; *Carleton v. State*, 43 Neb., 373; *Gravely v. State*, 45 Neb., 878.)

The defendant requested twenty-one instructions, all of which were refused by the court, and an exception was taken to such refusal. We have examined the several requests to charge, and find that in so far as they correctly state the law applicable to the case they have been fully covered by the instructions given, therefore it was not reversible error to refuse to repeat them. (*Kerkow v. Bauer*, 15 Neb., 150; *City of Lincoln v. Smith*, 28 Neb., 762; *Olive v. State*, 11 Neb., 1.)

It is argued that the evidence failed to show that the breaking and entering of the building occurred in the night-time. If the state's witnesses are to be believed, the crime was committed during the night-season. There is in the record some evidence tending to show that it was

daylight at the time the defendant effected an entrance to the building. The jury passed upon the conflicting evidence, and we discover no reason why their verdict should be disturbed.

AFFIRMED.

HENRY LIVESEY, APPELLEE, V. JOHN R. HAMILTON ET AL., APPELLEES, AND JAMES G. WINSTANLEY ET AL., APPELLANTS.

FILED MARCH 18, 1896. No. 6351.

1 **Mechanics' Liens**: WAIVER: NOTES. The mere fact that the owner of real property has ; n his note for a portion of the amount due for materials furnished for making erections on his property does not relieve such property from a mechanic's lien filed against the same for the entire amount of the material so furnished.

2. ———: ———: ———. Where a party has furnished materials for the improvement of real property and in all respects has complied with the mechanic's lien law in respect thereto, his rights will not be *held* destroyed merely because in taking a note for the amount due he has described himself by the fanciful designation of the "Western Cornice Works," where there is no claim that thereby anyone was misled or injured.

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

Weaver & Giller, for appellants.

Kennedy, Gilbert & Anderson and *Wharton & Baird, contra.*

RYAN, C.

The appellants in this case are James G. Winstanley and Jacob B. Emminger, purchasers of

certain real property from John R. and Francis Hamilton, by whom improvements thereof had been previously contracted for. The case was begun in the district court of Douglas county by Henry Livesey, as the assignee of a mechanic's lien held by John McGowan on account of services rendered and material furnished by him. The contract between McGowan and John R. and Francis A. Hamilton consisted of an oral acceptance of a written bid for doing certain of the work specified and for furnishing such material as therefor should be required. There was no necessity that this mere bid should be attached to the claim for a lien, for it was not a written contract.

It is urged that Livesey cannot maintain an action as the assignee of the claim for a lien, because such lien, as alleged, was not perfected when the assignment thereof was made. The filing was of date October 22, 1891. The assignment was made February 25 thereafter, so that the facts are not correctly assumed for the purposes of this argument. Before the claim for a lien was filed J. R. Hamilton gave his note for $500, a part of the amount due to John McGowan, who indorsed the same to Henry Livesey, by whom it was discounted at a bank. Not being paid at maturity the note was taken up by Henry Livesey, who now holds the same as owner. As already stated, McGowan transferred to Henry Livesey his whole claim for a lien as an entirety. We, therefore, cannot understand how this assignment can be injuriously affected by the mere fact that Livesey holds a note for $500 evidencing as due him a part of the claim in respect to which the mechanic's lien held by him was filed. There

was no evidence that this note was given or accepted as payment. Therefore, no good reason exists for treating it as a *pro tanto* satisfaction of the lien assigned to Livesey.

There was made a defendant Christian Specht, by whom there was filed a cross-petition in which he alleged that under a verbal agreement he had furnished material and performed labor in improving the real property above referred to; that after allowing all credits for payments made there still remained due $280. There was in the cross-petition of Christian Specht this language: "This defendant further represents that as a part of said indebtedness the said John R. Hamilton executed and delivered to this defendant by the name, style, and description of Western Cornice Works, his promissory note for the principal sum of $265," etc. There are urged in opposition to the enforcement of Mr. Specht's lien the objections that the above described note had been by him used as collateral security, and that whatever claim really exists is in favor of the Western Cornice Works and not in favor of Specht. As indicated by the language above quoted, the designation "Western Cornice Works" was not employed to indicate a corporation or company, but it was a picturesque and fanciful description of Mr. Specht, invented and used by himself. The evidence shows that he was the sole proprietor and manager of the business and property and controlled it absolutely, although in doing so its proprietorship and management were referred to by him as that of the "Western Cornice Works." By this fiction no one was deceived, and it is not suggested that any one interested was not aware of the identity of Christian Specht with the

Western Cornice Works. There was, therefore, no substantial reason for not granting the relief prayed by Mr. Specht, as was done in the district court, for no other objection has been urged except that there was not set up in connection with the claim for a mechanic's lien a written contract with Mr. Specht. This objection is of the same unsubstantial character as that which, in this action, was set up adversely to Henry Livesey, and must therefore be held unavailing.

No other question is discussed by the appellants, and the judgment of the district court is

AFFIRMED.

GEORGE A. BULL, APPELLEE, V. RUDOLPH MITCHELL ET AL., APPELLANTS.

FILED MARCH 18, 1896. No. 6393.

1. **Mortgages:** NEGOTIABLE INSTRUMENTS: PAYMENT. Where a mortgage was made to secure payment of a negotiable promissory note, the parties making such note and mortgage are not necessarily entitled ot protection as to payments to the mortgagee, made solely on the assumption that the original payee of the note still remained the holder thereof. Following *Eggert v. Beyer*, 43 Neb., 711, and *Stark v. Olsen*, 44 Neb., 646.

2. ———: ———: ———: PRINCIPAL AND AGENT. Where payment of a negotiable note secured by mortgage was made to an investment company of which the mortgagee was manager and such payment was never forwarded to the party to whom such note had been transferred, *held*, that the mere fact that antecedent payments made in like manner had been made to be forwarded to the transferee of such note and had been so forwarded, did not bind the holder of the note as to the final payment not forwarded,

it being shown by the evidence that such holder had never in any way held out or recognized the mortgagee as his agent.

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

The facts are stated by the commissioner.

Grimison & Thomas, for appellants:

The final payment was, in contemplation of law, made to the plaintiff. (*Columbia Mill Co. v. National Bank of Commerce*, 53 N. W. Rep. [Minn.], 1062; Herman, Estoppel, secs. 1079, 1080; *Swartz v. Leist*, 13 O. St., 424; *Smith v. Kidd*, 68 N. Y., 130; *Brewster v. Carnes*, 9 N. E. Rep. [N. Y.], 323.)

Payment to the mortgagee should be held to constitute a discharge and release of the mortgage. (*Johnson v. Carpenter*, 7 Minn., 176; *Hortsman v. Gerker*, 49 Pa. St., 282; *Olds v. Cummings*, 31 Ill., 192; *Walker v. Dement*, 42 Ill., 273; *Bailey v. Smith*, 14 O. St., 396; *Bryant v. Vix*, 83 Ill., 11.)

The record disclosed a mortgage payable to Toncray. Under the record and as to Mitchell, Toncray could discharge the mortgage. (*Fisher v. Cowles*, 21 Pac. Rep. [Kan.], 228; *Lewis v. Kirk*, 28 Kan., 497; *Connecticut Mutual Life Ins. Co. v. Talbot*, 113 Ind., 373; *Swartz v. Leist*, 13 O. St., 419.)

Phelps & Sabin and *C. C. Flansburg*, *contra*.

References to question of agency: *Henn v. Conisby*, 1 Ch. Cas. [Eng.], 93; *Curtis v. Drought*, 1 Mol. [Irich Ch.], 487; *Whitlock v. Waltham*, 1 Salk. [Eng.], 157; *Williams v. Walker*, 2 Sandf. Ch. [N. Y.], 325; *Smith v. Kidd*, 68 N. Y., 130; *James v. Wilder*, 25 Minn., 312; *Lozier v. Horan*, 55 Ia., 75; *Armistead v. Armistead*, 10 Leigh [Va.], 525; *Fitler*

v. Beckley, 2 Watts & S. [Pa.], 458; *Osborne v. Baird*, 45 Wis., 189; *Wallace v. McConnell*, 13 Pet. [U. S.], 136; *Balme v. Wambaugh*, 16 Minn., 116; *Hills v. Place*, 48 N. Y., 520; *Caldwell v. Cassidy*, 8 Cow. [N. Y.], 271; *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St., 62; *Caldwell v. Evans*, 5 Bush [Ky.], 380; *Ward v. Smith*, 7 Wall. [U. S.], 447; *Freeman v. Curran*, 1 Minn., 169.

References in reply to the contention that payment to the mortgagee should be held to constitute a discharge and release of the mortgage: *Webb v. Hoselton*, 4 Neb., 308; *Kuhns v. Bankes*, 15 Neb., 92; *Mundy v. Whittemore*, 15 Neb., 647; *Cheney v. Janssen*, 20 Neb., 128; *Studebaker Mfg. Co. v. McCargur*, 20 Neb., 500; *Todd v. Cremer*, 36 Neb., 430; *Carpenter v. Longan*, 16 Wall. [U. S.], 271; *Wilson v. Troup*, 2 Cow. [N. Y.], 197; *Sargeant v. Howe*, 21 Ill., 148; *Vansant v. Allmon*, 23 Ill., 30; *Bridges v. Bidwell*, 20 Neb., 185; *Lee v. Clark*, 89 Mo., 553; *Treadwell v. Brooks*, 50 Conn., 262; *Scott v. Field*, 75 Ala., 419; *Burnhans v. Hutcheson*, 25 Kan., 625; *Williams v. Keyes*, 51 N. W. Rep. [Mich.], 522; *Dutton v. Ives*, 5 Mich., 515; *Reeves v. Hayes*, 95 Ind., 521.

RYAN, C.

There was a decree in favor of George A. Bull in the district court of Colfax county whereby was foreclosed a mortgage securing payment of a promissory note for the sum of $1,000. Both the note and the mortgage bore date December 31, 1885; the maturity of the note was January 1, 1891. The makers were Anna Schuldt and John Schuldt, and the note, negotiable by its terms, was payable to the order of C. H. Toncray, and Toncray was likewise the mortgagee. Before this

loan matured the mortgaged premises were conveyed to Rudolph Mitchell, who, with his wife, was therefore made a defendant. The interest was evidenced by ten coupons, each of which was for the sum of $37.50. On the original note and each coupon was indorsed these words:

"Pay to order of ——, without recourse.

"C. H. TONCRAY."

The Nebraska Mortgage & Investment Company was organized at Fremont in the early part of the year 1888. Of this company, C. H. Toncray was the vice president and manager until January 14, 1891, and its office was in the building in which the Farmers & Merchants National Bank transacted its business. Of this bank, C. H. Toncray was cashier until January 1, 1889, and G. W. Dorsey was its president until October, 1891. Previous to the organization of the Nebraska Mortgage & Investment Company, Mr. Dorsey and Mr. Toncray were making farm loans in Nebraska and selling in the eastern states the notes in this manner obtained. When Mr. Toncray had received the note which gave rise to this suit, with its coupons and mortgage, he sent them to Alfred Walker to be sold. Alfred Walker at this time was engaged in selling farm loans. Afterward, in October, 1888, he caused to be organized to carry on the same business the partnership firm of Alfred Walker & Co., which on February 1, 1890, was succeeded by a corporation under the name of "The Alfred Walker Company." While there were the changes indicated, the line of business remained the same, and it was transacted at New Haven, Connecticut. There seems to have been no special arrangement between the brokerage concerns of which Alfred Walker constituted

the whole or only a part, on the one hand, and the party or parties who sent notes for sale on the other, further than that sales of the same nature as that above indicated were made. In respect to the subsequent transactions in relation to the note and its security under consideration further statements will be given hereafter.

The confidential clerk, who testified as to the transactions of the above mentioned brokerage with reference to the particular loan with which we are now concerned, said that this note, coupons, and accompanying security were sent to Alfred Walker by the Farmers & Merchants National Bank of Fremont, Nebraska, to be sold in Connecticut, and on this point there was no other direct evidence. It is very difficult to ascertain the facts with relation to the Nebraska part of the history of this entire transaction. It seems, however, that Anna Schuldt and John Schuldt lived in Colfax county, and that it was customary with them to send to C. H. Toncray, at Fremont, in Dodge county, the amount of each coupon as it matured. This was done by sending by some person or perhaps by the use of a draft of a bank near them. Within about a month after each amount had been sent their coupon would be returned to them from Fremont, marked "paid." This notation of payment was always made at Fremont. After Mr. Mitchell became the owner of the mortgaged property, he, on December 30, 1890, purchased from Mr. Folda, a banker, a draft for $1,000 drawn on the First National Bank of Omaha in favor of the Nebraska Mortgage & Investment Company. This draft, in compliance with the request of Mr. Mitchell, was sent for Mr. Mitchell by Folda to Mr. Toncray at Fremont to

take up the note of Anna and John Schuldt which matured January 1, 1891. From the testimony of Charles Collins we learn that in December, 1891, he was appointed receiver of the Nebraska Mortgage & Investment Company. With the testimony of this witness there was submitted a page of the loan register used by the Farmers & Merchants National Bank of Fremont and a page of the ledger of the Nebraska Mortgage & Investment Company. Upon the bank's loan register with respect to the loan made by C. H. Toncray to Anna and John Schuldt appears the following entry: "Paid in full Jany. 5—91. Pd. by R. Folda for Rudolph Mitchell, Schuyler, Nebr." On the page of the ledger of the Nebraska Mortgage & Investment Company there appears the following entries:

1891. Alfred Walker & Company, Cash. Cr.
Jany. 5th. A. Schuldt.....$1,000.00
1890.
Dec. 30. Anna Schuldt..... 37.50

It is unfortunate that Mr. Toncray did not give his testimony to assist in unraveling this affair, but, as he did not, we must now consider who must suffer for his misconduct in the light of such evidence as is available for that purpose. It is very clear that Mrs. Schuldt and Mr. Mitchell assumed that they could safely make payments to Mr. Toncray, and acted accordingly. The note upon which these payments were made was negotiable, and therefore it was not sufficient to entitle to protection for them to pay to the original mortgagee as such. (*Eggert v. Beyer*, 43 Neb., 711; *Stark v. Olsen*, 44 Neb., 646.) Another principle which operates to the disadvantage of these parties in respect to the payments made by them is

thus stated in *First Nat. Bank of Omaha v. Chilson*, 45 Neb., 257: "One paying money to another, to be applied on a note which such person has not in his possession, assumes the burden to show the authority of the person to whom payment is made to receive the money. (*South Branch Lumber Company v. Littlejohn*, 31 Neb., 606.)" Even if there had been introduced no other evidence, it is extremely doubtful whether that submitted by appellants to show payment was sufficient for that purpose. The payments of interest in each instance were sent to Toncray. He for several years was acting as cashier of a bank and was manager of a mortgage and investment company. During this time there is no evidence that individually he was transacting any business. About a month after each payment of a coupon was made it was returned to the makers bearing an indorsement showing that Mr. Toncray had probably parted with all interest in it. It does not appear that there was ever any inquiry excited by this fact, neither are we informed that between Toncray and the mortgagors there was ever any inquiry made or instructions given upon any subject. The reliance of the mortgagors evidently was upon the fact that in the first instance they had borrowed of Mr. Toncray and had executed to him their note and mortgage. Even if this showing standing alone was sufficient to raise a presumption of payment to a purchaser of the note, this doubt would be dispelled by the rebutting evidence furnished by Mr. Walker and Mr. Bull, by which it was made clear that Mr. Bull purchased the note from Mr. Walker, who was acting not as a general agent for Mr. Toncray, but as a broker generally for the sale of such evi-

dences of indebtedness, and that thereafter Mr. Bull only presented the coupons to Mr. Walker for payment as they matured and never constituted Mr. Walker his agent for any purpose, except on one occasion to have the note registered by state authority to exempt it from taxation. Such interest as was paid was remitted from Nebraska to Mr. Walker, or one of the companies which succeeded him, by whom it was paid to Mr. Bull, and the coupon in each instance paid was, without being canceled, sent to Fremont. Both Mr. Bull and Mr. Walker testified that Mr. Walker was never employed to act for Mr. Bull, and from Mr. Walker's evidence it is clear that he received no compensation for receiving or remitting payment of the coupons. His services in this regard seem to have been donated in consideration of the commission which he had originally received from the seller of the note for making the sale. We cannot see how Mr. Bull could do less than he did to encourage the mortgagors in making their payments as they were made, and most certainly the exercise of such care as knowledge that the note was negotiable and the means of knowing it had probably been negotiated would have called for was wanting on the part of the mortgagors. Where one of two innocent persons must suffer through the misfeasance of the agent of one, that one must suffer who has placed the agent in a position to perpetrate the fraud complained of. (*City Nat. Bank of Hastings v. Thomas*, 46 Neb., 867; *Scroggin v. Johnston*, 45 Neb., 714.) Mr. Mitchell predicates his right to protection in paying the principal sum upon the course of dealing to which the mortgagors had been parties. The failure of this to protect these mortgagors in like degree operated

against Mr. Mitchell, even if he was in a position to avail himself of it,—a question rendered somewhat doubtful by the fact that he caused the final remittance to be made to the Nebraska Mortgage & Investment Company, and not to C. H. Toncray, as had his predecessors in liability. The judgment of the district court is

AFFIRMED.

JOHN M. CARTER, APPELLANT, V. BENJAMIN A. GIBSON, APPELLEE.

FILED MARCH 18, 1896. No. 6283.

Judgment Foreign to Issues: REVERSAL: PLEADING. A judgment foreign to the issues joined and for which there was no prayer by the party in whose favor it was rendered, must, upon appeal, be reversed in the supreme court.

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

H. D. Travis and *A. M. Russell*, for appellant.

Wooley & Gibson, contra.

RYAN, C.

The issues presented in this case were fully described in *Carter v. Gibson*, 29 Neb., 324. After the case had been remanded there was a trial in the district court, and upon findings of fact there was a decree, which plaintiff seeks to review by this his appeal.

The action was brought by John M. Carter, as *cestui que trust*, against Benjamin A. Gibson, as

trustee, to compel an accounting by the latter with respect to lands by the *cestui que trust* entrusted to the trustee to sell for the payment of certain enumerated debts owing by Carter to different parties, among whom was B. A. Gibson. The prayer of plaintiff's petition was for an accounting of the moneys, notes, and securities received by B. A. Gibson in consideration of the sale of any of said land, with interest thereon; that said Gibson be required to account for the actual value of such land as had been sold to Francis N. Gibson; that of the proceeds of the sales made by him, B. A. Gibson be required to apply on the indebtedness of Carter a sufficient amount to extinguish it; that B. A. Gibson be required to pay the balance of such proceeds to plaintiff and cancel the liens named in the contract between plaintiff and defendant; that B. A. Gibson be enjoined from disposing of any more of said land; "that he may do all things as agreed, and that plaintiff may have such other and further relief as justice and equity may require." By his answer, B. A. Gibson described the particular debts with respect to the payment of which Carter had caused to be conveyed the real property in trust, and described various transactions which he alleged entitled him to credits on such amounts as he had realized from sales of portions of said land, and finally denied that defendant was in any manner liable to account to plaintiff under the agreement set forth in plaintiff's petition, or under any other agreement, for any lots or land sold by defendant. Following this averment there was this prayer: "Hence the defendant asks that the plaintiff's bill filed in this action be dismissed at his costs, and that this defendant may be accorded such further

relief as may be just and equitable." There was a reply, which requires no special notice in this connection.

The portion of the decree from which specially Carter prosecutes this appeal was in the following language: "It is hereby ordered, adjudged, and decreed that there is due the defendant Gibson from the plaintiff John M. Carter the sum of $3,754.21, which is made a lien on the lands hereinafter described." In connection with the facts pursuant to which the above figures were reached there was filed a paper of which the heading was "Computation by the Court." The first item of this computation was a charge of "Carter's indebtedness," drawing interest at ten per cent per annum, $2,658.73. The next item was interest thereon to August 1, 1887, $22.15, making a total of $2,680.88. From this were deducted proceeds of sales, $1,581.95, leaving a balance of $1,098.93. There were then alternate additions of interest and credits of sales until the balance due was $127.43 on December 1, 1887. To the amount last named there was added "indebtedness of note due F. N. Gibson, principal and interest at nine per cent to December 1, 1887, $1,981.75." The sum of $127.43 and the sum of $1,981.75 were added together and upon this total there were credited "proceeds of sales for November, 1887, $212.95." By reason of interest accrued and credits for sales this amount was reduced to $145.88 on May 1, 1888. This balance, to constitute a new principal, was added to $5,914.52, described as "amount due on claim Connecticut River Savings Bank, July 1, 1887." To this was added interest on the last named amount to May 1, 1888, $443.50. The grand total thus made up was then credited

with sales to May 1, 1888, $1,050, and thereafter were additions of accruing interest and reductions by amount of sales alternately, until on December 15, 1892, there still remained a balance of $3,209.21. To this was added the commission allowed the trustee for his services, of the sum of $545. In this way there was ascertained, as expressed in the above mentioned computation, the "Total amount due, which is a lien on the real estate held by the trustee, $3,754.21." It has already been stated that by the court it was "ordered, adjudged, and decreed that there is due the defendant Gibson from the plaintiff John M. Carter the sum of $3,754.21." This was, in terms, made a lien on the lands in the aforesaid decree described as still remaining unsold. As the finding of facts was referred to in the judgment entry as constituting a part thereof, there is no impropriety in making reference to it for the purpose of rendering clear the matters hereinafter to be discussed.

From the brief description of the pleadings hereinbefore given it is very clear that there was no prayer for judgment against Mr. Carter. In his answer B. A. Gibson alleged that there was due from Carter to the Connecticut River Savings Bank about $4,200, and to Francis N. Gibson about $1,700, and to B. A. Gibson himself about $3,800. The computation by the court above referred to took up each of these three items in the inverse order of their being named herein and first extinguished the claim due B. A. Gibson, then likewise treated that of F. N. Gibson. To the claim of the savings bank, of $5,914.52, due July 1, 1887, was added interest thereon till May 1, 1888, and the sum of these two items was added to

the balance of $145.88 still unpaid to F. N. Gibson, and the grand total, with interest on it up to December 15, 1892, was reduced to $3,209.21. This last balance was by the computation recognized as being due to the Connecticut River Savings Bank. B. A. Gibson, so far as the record shows, had nothing to do with it except that he held as trustee certain real property to be by him sold, and with the proceeds of which sales he was by contract charged with the duty of making payments to said savings bank. The contract by virtue of which he became such trustee was made between himself and John M. Carter. The privity was between Gibson and Carter; there was none between Gibson and the savings bank. It was therefore erroneous to render a judgment in favor of B. A. Gibson against Mr. Carter. Even if there had been such a relation between B. A. Gibson and John M. Carter that the former might be entitled to relief against the latter, such relief could not be granted upon the issues actually joined, for such relief was not therein sought. The action was brought by Carter to compel Gibson to account as trustee. It resulted in a judgment in favor of the latter against the former for an amount by all parties confessedly due to a bank which was not a party to the action. It is not necessary to review the processes, step by step, by which the court reached the conclusion that there was due from Carter to Gibson the exact amount stated in its decree, for, as we have already clearly shown, whatever this balance was, it was due a bank not a party to this action, and the decree entered was foreign to the issues presented for determination. Whether or not the amount allowed for the services of B. A. Gibson

can be created a lien upon the lands entrusted to him for sale will not be determined in this action. Such real property as remained unsold at the time the judgment appealed from was rendered, and has not since been properly disposed of, should be required to be sold in such manner as shall be deemed by the court to be advisable, and thereupon a final accounting should be had between the parties to this action. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

GEORGE A. MCCALL V. STATE OF NEBRASKA.

FILED MARCH 18, 1896. No. 7359.

Criminal Law: RECORD FOR REVIEW. When the grounds of complaint of a plaintiff in error depend upon the existence of certain facts in respect to which there is no recitation or evidence in the record, such assignments of error must be disregarded in the supreme court.

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

Allen G. Fisher, for plaintiff in error.

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

RYAN, C.

In the district court of Dawes county plaintiff in error was convicted of carnally knowing and abusing, with her consent, a female child of the age of thirteen years. It is first insisted in his

behalf that while the information before the examining magistrate charged the same offense as that charged in the district court, the evidence tended to show that there had been committed a rape by the use of violence. As there is no bill of exceptions, this statement of counsel cannot be verified, and hence must be disregarded.

It is said by counsel in the brief submitted in behalf of the plaintiff in error that there were irregularities in the charging, in the absence of said counsel, a jury which had failed to agree upon a verdict. There is found in the record no evidence of this alleged fact. It cannot be assumed to exist and the argument based thereon must be disregarded. So also of the claim that a *nunc pro tunc* order was improperly made, and that the defendant was sentenced in vacation. The judgment of the district court is

AFFIRMED.

J. D. MACFARLAND V. WEST SIDE IMPROVEMENT ASSOCIATION.

FILED MARCH 18, 1896. No. 7635.

1. **Trial:** EVIDENCE: LEAVE TO WITHDRAW DOCUMENTS: PRACTICE. A trial court should never permit a document introduced in evidence to be withdrawn unless the party so withdrawing it, at the time, leaves with the reporter a concededly correct copy of the document withdrawn; and the furnishing of such copy should be made a condition precedent for leave to withdraw the original document.

2. **Bill of Exceptions:** AMENDMENTS: EXHIBITS: PRACTICE. This court will not, as a matter of course, permit a record to be withdrawn for the purpose of amending a bill of

exceptions; and especially is this true where it appears that a failure to incorporate into the bill of exceptions all the evidence is due to the laches of the party seeking the amendment.

8. ——: ——: ——: ——. The plaintiff in error filed here a bill of exceptions from which two exhibits introduced in evidence on the trial of the case in the district court were omitted. These exhibits, when introduced in evidence, were by counsel for defendant in error, by leave of the court, withdrawn, but counsel did not then nor afterward furnish the court reporter with copies of such exhibits. *Held*, That leave would be granted plaintiff in error to withdraw the record here for the purpose of submitting the bill of exceptions to the trial judge, on application for amendment.

ERROR from the district court of Lancaster county. Tried below before TIBBETS, J. Heard on motion of plaintiff in error for leave to withdraw the record for the purpose of submitting to the lower court an application to insert exhibits omitted from the bill of exceptions. *Motion sustained.*

A. G. Greenlee, for the motion.

Ricketts & Wilson, contra.

RAGAN, C.

This is an application of the plaintiff in error for leave to withdraw the record for the purpose of having the bill of exceptions amended by inserting therein two exhibits which he alleges were introduced in evidence on the trial of the case and by inadvertence omitted from the bill of exceptions when signed and allowed by the trial court. The application is resisted by the defendant in error, and the evidence as to whether these exhibits were in the bill of exceptions when presented to the trial judge for allowance is con-

flicting. The affidavits filed by the defendant in error in resistance of this application are to the effect that the exhibits in question were introduced in evidence on the trial of the case; that counsel for the defendant in error then asked and obtained leave of the court to withdraw said exhibits; that they did withdraw the exhibits and have since retained them in their possession; that neither at the time they withdrew them nor since did they furnish the official court reporter with copies of the exhibits withdrawn. On this evidence alone we think the application of the plaintiff in error should be sustained. A trial court should never permit a document introduced in evidence to be withdrawn unless the party so withdrawing it at the time leaves with the reporter a concededly correct copy of the document withdrawn. The furnishing to the reporter of such copy should be made a condition precedent by the court of the leave to withdraw the original document. It appears from the affidavit of the judge who tried this case in the court below that he did not decide it until the evidence had been type-written and presented to him, and at that time neither of the exhibits in question, nor copies thereof, were in the type-written evidence. We think that the failure of the present bill of exceptions to contain these exhibits is due to the fact of defendant in error's counsel withdrawing the exhibits after they were introduced in evidence and not supplying the reporter with copies thereof. This court will not, as a matter of course, permit a record to be withdrawn for the purpose of amending a bill of exceptions; and especially is this true where it appears that the failure to incorporate into the bill of exceptions

all the evidence is due to the laches of the party seeking the amendment. Here the court has jurisdiction of the subject-matter and of the parties to the action. The record before us shows that the exhibits in question were introduced in evidence. There is no dispute whatever as to their identity, and it appears that the defect in the bill of exceptions is probably due to the conduct of counsel for the defendant in error in withdrawing the exhibits and not at the time supplying the court reporter with copies thereof.

The motion of the plaintiff in error for leave to withdraw the record for the purpose of having the bill of exceptions submitted to the trial judge on application for amendment is sustained. Record to be returned to this court in twenty days.

MOTION SUSTAINED.

WILLIAM KINSELLA V. J. C. SHARP, ADMINISTRATOR.

FILED MARCH 18, 1896. No. 6307.

1. **Party in Interest.** The real party in interest, under section 29 of the Code of Civil Procedure, is the person entitled to the avails of the suit.

2. **Sales:** GIFTS: CONVERSION: PARTIES. Except as against his creditors, one may sell his property for a nominal consideration or give it away; and if he does either, his vendee or donee is the real party in interest in a suit for the conversion of such property.

3. **Action Against Sheriff:** DAMAGES: EVIDENCE. Evidence examined, and *held* wholly insufficient to sustain the verdict of the jury.

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

E. C. Page, for plaintiff in error.

References: *Cooper v. Reynolds*, 10 Wall. [U. S.], 308; *Pennoyer v. Neff*, 95 U. S., 714; *Sherman v. Hogland*, 54 Ind., 578; *Albertoli v. Branham*, 80 Cal., 631; *Wake v. Griffin*, 9 Neb., 47; *Ahlman v. Meyer*, 19 Neb., 66; *Dunbier v. Day*, 12 Neb., 596.

Joel W. West and *Hall & McCulloch*, *contra*.

RAGAN, C.

In July, 1890, one Herman Deiss brought an action in the district court of Douglas county against the Western Dry House & Construction Company, and caused an attachment to be issued and levied upon certain personal property as the property of the construction company. Subsequently, William Kinsella brought this action in replevin for the attached property against the sheriff of Douglas county, but failing to give the bond required by statute, the property was returned to the sheriff and by him disposed of to satisfy the judgment rendered in the attachment suit of Deiss. Kinsella's action proceeded against the sheriff as one for damages. The sheriff died pending the action and it was revived against Sharp, his administrator, who had a verdict and judgment, to reverse which Kinsella prosecutes to this court a petition in error.

The first assignment of error argued is that the verdict is not supported by sufficient evidence. After as patient and careful an examination of the record as we are capable of making we have

reached the conclusion that this assignment of error must be sustained. There is absolutely no evidence in the record that will support this verdict. One point insisted on before the jury by defendant in error, and submitted to them, was that Kinsella was not the real party in interest; and counsel for the defendant in error now insist that the general finding of the jury includes a finding that Kinsella was not the real party in interest, and that such finding is sustained by sufficient evidence. If the jury reached the conclusion it did by finding that Kinsella was not the real party in interest, the verdict still lacks evidence to support it. The undisputed evidence in this record is that at the time Deiss attached the property in controversy, and long prior to that time, one George Hinchliff was the owner of and in the possession of the property attached. After the attachment suit was brought Hinchliff sold this property to Kinsella. Both Hinchliff and Kinsella testified as to the sale made by the former to the latter of the property in controversy and the consideration paid for it, and their evidence is uncontradicted. Counsel for the defendant in error contend that the jury was justified in believing that Kinsella did not pay Hinchliff any consideration for the property, notwithstanding the evidence. We do not think the jury would have been justified in any such a course, as the evidence stood undisputed; but the sheriff in this action occupies precisely the position that Deiss himself would occupy had he been sued for the conversion of this property; and since Deiss was not a creditor of Hinchliff, it is no concern of the sheriff whether Kinsella paid a valuable consideration to Hinchliff for the property or not. As

the property attached was Hinchliff's property, he had a right, except as against his creditors, to sell the property for a nominal consideration to Kinsella or to give it to him, and if he did either, Kinsella was the real party in interest. The real party in interest, under section 29 of the Code of Civil Procedure, is the person entitled to the avails of the suit. (*Hoagland v. Van Etten*, 22 Neb., 681.) The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN REGIER V. GEORGE W. SHRECK ET AL.

FILED MARCH 18, 1896. No. 6352.

1 **Review:** REMITTITUR. Where the only reversible error in the record is that the amount of the recovery is excessive, this court will affirm the judgment upon the excess being remitted, if the evidence will support the remainder of the finding.

2. **Evidence.** The law requires the production of the best evidence obtainable, and if the primary evidence is lost, then secondary evidence satisfies the rule.

3. ———: LOST RECORDS. Where the files of a case have been lost,—such as papers in an attachment proceeding,—that such papers existed, and their contents, may be proved by parol, the proper foundation having been laid for the introduction of secondary evidence.

4. ———: ORIGINAL PAPERS AND OFFICIAL RECORDS: PRACTICE. The practice of introducing in evidence in a case on trial the papers and files belonging to another case, or the original records of an office, is not to be commended. If such files or records are needed as evidence certified copies should be procured for that purpose.

5. **Fraudulent Conveyances:** BONA FIDE PURCHASERS: ATTACHMENT: DAMAGES. Certain instructions of the trial court set out in the opinion and approved.

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

George B. France, for plaintiff in error.

C. P. Halligan and *Harlan & Harlan*, *contra*.

RAGAN, C.

This is an action in replevin brought in the district court of York county by John Regier against George W. Shreck and James Powers, the sheriff and a constable of said county. Shreck and Powers had a verdict and judgment, and Regier brings the case here for review.

1. The first assignment of error is that the judgment is excessive. The jury found the value of the interest of the defendants in error in the property to be $975. The court ordered a remittitur of $100, and rendered judgment against the plaintiff in error for $875. The interest of the defendants in error in the property arose from certain executions and orders of attachment which they had levied upon it at the suits of certain creditors of one Gerhard Regier, of whom John Regier claimed to have purchased the property. An examination of the record leads to the conclusion that the amount of the liens which the defendants in error had against this property at the time the judgment was rendered was $833 only, and that the judgment is $42 too large. Counsel for the plaintiff in error insists that this error alone should work an absolute reversal of the judgment; but the doctrine and practice of

this court are contrary to the contention of counsel. (See *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Boston Tea Co. v. Brubaker*, 26 Neb., 409; *Meharry v. Halligan*, 29 Neb., 565; *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 27; *City of Friend v. Ingersoll*, 39 Neb., 717; *St. John v. Swanback*, 39 Neb., 841; *Omaha & R. V. R. Co. v. Ryburn*, 40 Neb., 87; *Fremont, E. & M. V. R. Co. v. Leslie*, 41 Neb., 159; *Gordon v. Little*, 41 Neb., 250; *Culbertson Irrigating & Water Power Co. v. Wildman*, 45 Neb., 663; *Chicago, R. I. & P. R. Co. v. Archer*, 46 Neb., 907.) In all of these cases the judgments were affirmed upon condition that the defendants in error file remittiturs. These are not all the cases in which this practice has been followed, but they are sufficient to show what the practice of the court is; and they establish the rule that where the only reversible error in a record is that the amount of the recovery is excessive this court will affirm the judgment upon the excess being remitted if the evidence will support the remainder of the finding.

2. The second assignment of error is in the following language: "The court erred in admitting in evidence the several judgments recovered against Gerhard Regier before Justice Fay." At least some of the judgments introduced in evidence were properly admitted, and as the assignment is that the court erred in admitting all the judgments, the assignment, without further examination, will be overruled.

3. The third assignment of error is in the following language: "The court erred in admitting in evidence before the jury the testimony of the witness Halligan, in reference to the affidavits, orders of attachment, and attachment proceed-

ings had before Justice Fay." As already stated, the defendants in error had seized the property replevied on certain executions and orders of attachment against Gerhard Regier. It appears, also, that this case was twice tried in the district court of York county, and on the second trial the various orders of attachment issued by the justice and the other papers in the attachment proceedings could not be found, and the court, after the proper foundation was laid, permitted the attorney who prepared the attachment papers to testify as to their contents. We do not think the court erred in doing this. The law only requires the production of the best evidence obtainable, and if the primary evidence in a case is lost, then secondary evidence satisfies the rule. In *Keller v. Amos*, 31 Neb., 438, it was held: "Where papers in a case have been lost, as the license to sell real estate, proof that such license or other papers actually existed at the time of the sale may be shown by parol or other secondary evidence." The practice often indulged in of introducing in evidence in a case on trial the papers and files belonging to another case, or the original records from an office, is not to be commended. The records of a public office belong in that office and should never be taken therefrom except in case of emergency. If parties desire to introduce in evidence the record of a mortgage or a deed they should procure from the officer having the custody of the record a certified copy of the instrument which they wish to introduce; and if parties desire to introduce in evidence an order of attachment or any other process or pleading belonging to another case, they should not use the original files, but certified copies.

4. The fourth assignment of error is that the verdict is not sustained by sufficient evidence. Without quoting the evidence or any part of it we have no hesitancy in saying that it supports the verdict.

5. The fifth assignment of error is "errors of law occurring at the trial and duly excepted to." This assignment is sufficient in a motion for a new trial to challenge the attention of the trial court to any error it may have committed in the admission or rejection of evidence, but it is too indefinite in a petition in error to enable the supreme court to review anything.

6. The sixth assignment of error is that the court erred in giving instruction No. 3 on motion of the defendants in error. The instruction is as follows: "To constitute a *bona fide* purchaser such purchaser must have parted with something that is valuable upon the faith of his purchase before he had knowledge or notice of any prior right or equity." This is the precise language of this court in *Gregory v. Whedon*, 8 Neb., 373, and the instruction is also supported by the decision of this court in *Savage v. Hazard*, 11 Neb., 323. The instruction was correct.

7. The seventh assignment relates to an instruction given by the court in the following language: "You are further instructed that if you find from all the circumstances and facts taken together that Gerhard Regier executed and delivered a bill of sale of the property in question to the plaintiff for the purpose of and with the intent of hindering, delaying, and defrauding the creditors of the said Gerhard Regier; and if you further find that the plaintiff had knowledge or notice of such fraudulent intent or design on the part of

the said Gerhard Regier or had knowledge of such facts or circumstances as would have aroused the suspicions and put an ordinarily prudent man upon inquiry, which inquiry if pursued would have led to a knowledge or notice of such fraudulent intent on the part of the said Gerhard Regier, then your verdict should be for the defendants, even though you should find that the plaintiff paid a full, adequate consideration for said property." Under the evidence in this case we think this instruction was proper.

8. The eighth assignment of error relates to instruction No. 10 given by the court upon its own motion. The substance of this instruction was that if the jury found for the defendants in error, the measure of their damages would be the aggregate amounts due on the several executions and orders of attachment under which they held possession of the property; not to exceed, however, the value of the property. This was correct.

The defendants in error will have leave to remit $42 from the judgment rendered, as of the date of the judgment, within forty days from this date; and if they do so, the judgment of the district court will be affirmed; otherwise it will stand reversed.

JUDGMENT ACCORDINGLY.

WILLIAM B. TAYLOR V. STANDARD LIFE & ACCIDENT INSURANCE COMPANY.

FILED MARCH 18, 1896. No. 6328.

1. **Principal and Agent:** CONTRACT OF EMPLOYMENT: ALTERATION: EVIDENCE: LIABILITY OF AGENT'S SURETIES. A contract between an insurance company and its agent provided that the latter should make monthly reports of business transacted and on demand pay over to his principal all moneys due him. The agent's compensation was fixed at twenty-five per cent of the business done and he gave a bond to secure the performance of his contract. After the execution of the bond, and without the knowledge of the surety thereon, the agent's compensation was changed to twenty-eight and one-third per cent, and he was given permission to employ solicitors of insurance, paying them out of his commission. In a suit against the surety on the bond to recover money which it was alleged the agent had not accounted for, *held*, (1) that the compensation of the agent was not an essential ingredient of the contract of the surety; and increasing his compensation did not amount to a re-employment of the agent at a different compensation from that fixed in the contract; (2) that there had been no material alteration in the terms of the contract to secure the performance of which the bond was given, and that the surety thereon was not released.

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

The facts are stated in the opinion.

Frank T. Ransom, for plaintiff in error:

There was a clear departure from the terms of the contract. The testimony offered to prove the alteration in the terms of the agreement should have been received. (*Hibbs v. Rue*, 4 Pa. St., 348; *Anderson v. Bellenger*, 87 Ala., 334; *Farnsworth v.*

Coots, 46 Mich., 117; *Kimball v. Baker*, 62 Wis., 529; *Stull v. Hance*, 62 Ill., 52; *Phillips v. Singer Mfg. Co.*, 88 Ill., 305; Brandt, Suretyship, sec. 397, and cases cited.)

George W. Ambrose and *Frank H. Gaines*, *contra*.

References: *Atchison & N. R. Co. v. Washburn*, 5 Neb., 123; *Stoddard v. Onondaga Annual Conference*, 12 Barb. [N. Y.], 573; *McKyring v. Bull*, 16 N. Y., 308; *Peet v. O'Brien*, 5 Neb., 363; *Lawrence v. Wright*, 2 Duer [N. Y.], 674; *Van Schaich v. Winne*, 16 Barb. [N. Y.], 90; *Schenck v. Naylor*, 2 Duer [N. Y.], 675; *Chamberlain v. Gorham*, 20 Johns. [N. Y.], 145; *Reynolds v. Rogers*, 5 O., 170; *Strawbridge v. Baltimore & O. R. Co.*, 14 Md., 360; *Minor v. Mechanics Bank*, 1 Pet. [U. S.], 73.

RAGAN, C.

On the 23d day of September, 1890, one M. C. Nichols was a general or district agent of the Standard Life & Accident Insurance Company of Detroit, Michigan, hereinafter called the "Insurance Company." On that date he appointed one R. C. McClure his agent, for the purpose of canvassing for applications for insurance in the Insurance Company, issuing policies and tickets therefor, and attending to such other duties as might properly appertain to the agency in and for the city of Denver, Colorado. By the terms of McClure's contract of employment, which was in writing, he agreed to keep regular and accurate statements of all the transactions and business done by him as Nichols' agent, and on or before the 10th of each month transmit to Nichols a report in detail of the business transacted up to and including the last day of the previous month.

These reports were to show the balance for which McClure was accountable by reason of his agency. The contract of employment provided further that McClure should hold in trust for Nichols all moneys and securities collected and received by him as agent, and faithfully pay over and account for the same to Nichols or to the Insurance Company, or its representative, in case of Nichols' resignation, removal, or death. On the 24th day of September, 1890, McClure as principal, and W. B. Taylor as surety, executed a bond to Nichols, conditioned for the faithful performance by McClure of his agreements in his said contract of employment as Nichols' agent. Nichols brought this action in the district court of Douglas county against Taylor, the surety on the bond, to recover a sum of money which he alleged McClure had collected as agent and failed to account for and pay over. By agreement of counsel the Insurance Company was substituted in the district court as plaintiff for Nichols. It had a verdict and judgment and Taylor prosecutes to this court a petition in error.

1. The first assignment of error argued in the brief here relates to the ruling of the district court in excluding evidence offered by Taylor to prove that the principals in the bond had changed the contract to secure the performance of which the bond sued on was given, or, in effect, that whatever money McClure had collected and failed to account for while agent of Nichols, he had collected under a contract made between Nichols and McClure subsequent to the date of the contract of the 23d of September, 1890, and materially different from said contract. Taylor, in his answer, admitted the execution of the con-

tract of September 23d, 1890, between Nichols and McClure, the execution of the bond sued upon, and substantially denied all the other allegations in the petition. Another defense interposed by Taylor was that from the time of the execution of the contract of the 23d of September, 1890, McClure made regular monthly reports to Nichols; that said reports showed what was due from McClure on account of his agency; that Nichols, upon receipt of said reports, did not insist on McClure paying the amount which the report showed he owed, but allowed McClure to retain said amounts and extended the time within which the said sums of money might be paid. Another defense of Taylor was that Nichols, knowing that McClure was in default, neglected to notify Taylor, the surety, of the fact and continued to deal with McClure and allow him to continue to act as agent under the contract and bond. A still further defense pleaded by Taylor was that Nichols was guilty of negligence in not demanding from McClure on the 10th of each month, when he made a report, the amount of money for which the report showed he, McClure, was indebted, and was guilty of negligence in neglecting to notify Taylor of the condition of McClure's accounts. Neither argument nor citation of authority is necessary to show that under this answer the plaintiff in error was not entitled to have the evidence he offered go to the jury. If the principals to the contract, to secure the performance of which by McClure the bond was given, materially modified that contract so that the money collected by McClure and not accounted for by him was in fact collected under a contract materially different from the one to

secure which the bond sued on was given, then that fact should have been pleaded as an affirmative defense. The fact, if it existed, was new matter and could not be proved under a general denial.

2. The second assignment of error argued relates to the refusal of the district court to give the jury the following instruction: "If you believe from the evidence that up to the 3d day of June, 1891, the said R. C. McClure acted as agent, under the contract of September 23, 1890, for the plaintiff, and up to that date he paid over to the plaintiff or its agent all moneys coming into his hands by virtue of the agency, and that about that date said McClure and the plaintiff modified the contract of September 23, 1890, by a letter of June 3, 1891, and that all the money for which said McClure is now in default was collected by him as agent of the plaintiff under the modification of June 3, 1891, you will find for the defendant, W. B. Taylor." The letter introduced in evidence, by which plaintiff in error claims that the contract of the 23d of September, 1890, was modified by Nichols and McClure, conceded to McClure a commission on all new business of twenty-eight and one-third per cent, whereas under the contract of September 23, 1890, McClure's commission on business was to be twenty-five per cent. This change in the amount of compensation which McClure was to receive in no manner changed the duties of McClure and did not amount to a material modification of the contract between McClure and Nichols; and were it competent and relevant evidence, it would not prove or tend to prove a material alteration of the contract to secure the performance of which the bond in suit was given.

(*Domestic Sewing Machine Co. v. Webster*, 47 Ia., 357; *Amicable Mutual Life Ins. Co. v. Sedgwick*, 110 Mass., 163.) The letter also authorized McClure to secure or appoint solicitors of insurance if he should think best, on the basis that his, McClure's, commission was to be twenty-eight and one-third per cent on new business, the persons so appointed as solicitors by him to be paid their commission out of the commission allowed him, McClure. This was not adding to the obligations or duties required of McClure by his contract, and not a material alteration of it. In other words, the risk which the surety assumed in signing McClure's bond was not increased nor indeed changed by this letter. The letter itself was irrelevant testimony under the issues made by the pleadings and should not have been admitted. But the letter as evidence did not have the effect claimed for it by the plaintiff in error. The compensation of McClure was not an essential ingredient of the contract of the surety, nor did this letter amount to a re-employment of McClure at a different compensation. The court did not err in refusing to give the instruction. The judgment of the district court is right and is in all things

AFFIRMED.

STATE BANK OF LUSHTON V. O. S. KELLEY COMPANY.

FILED MARCH 18, 1896. No. 6353.

1. **Partnership:** JOINT OWNERSHIP OF THRESHING-MACHINE: EVIDENCE. Evidence that two farmers purchased a threshing-machine, paid for the same with their joint

and several notes secured by a chattel mortgage on the machine purchased, and jointly took possession of and used the machine in threshing grain for others, will not support a finding that the threshing-machine was partnership property, nor that a copartnership relation existed between the farmers. Such evidence warrants rather the conclusion that the farmers were joint owners or tenants in common of the machine.

2. **Chattel Mortgages:** FAILURE TO REGISTER: SUBSEQUENT LIENS: REPLEVIN. In such case the machine company neglected to file its mortgage or a copy thereof in the county where the farmers resided. Subsequently one of the farmers mortgaged the machine to a bank to secure a pre-existing debt which he owed it. The bank had no knowledge of the mortgage of the machine company, took possession of the machine under its chattel mortgage, and the machine company replevied it. *Held*, (1) That the mortgage made by the farmer invested the bank with a lien on whatever interest he had in the machine; (2) that the bank was a mortgagee in good faith within the meaning of section 14, chapter 32, Compiled Statutes.

3. ———: ———: ———. A mortgagee in good faith, within the meaning of section 14, chapter 32, Compiled Statutes, is one who takes his mortgage to secure a debt actually and justly owing to him, without notice, actual or constructive, of other existing claims against the mortgaged property.

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

George B. France, for plaintiff in error.

Sedgwick & Power, *contra*.

RAGAN, C.

On the 8th day of May, 1891, Peter Peters and John Peters, by their order or contract in writing, purchased a threshing-machine of the O. S. Kelley Company. The machine was to be delivered to them not later than the 20th of July of that year and they were to pay for the same $585. Part of

this payment was to be made in cash on delivery of the machine and the remainder to be evidenced by their notes, secured by a chattel mortgage on the machine. The machine was delivered on the 23d of July, cash payment made, and John and Peter executed their joint and several promissory notes to the Kelley Company for the remainder of the purchase price of the machine, and at the same time executed to the Kelley Company a chattel mortgage on the machine to secure the payment of their notes. By mistake this mortgage was filed in the office of the county clerk of York county, although the mortgagors resided in Hamilton county. On the 13th day of October, 1891, Peter Peters mortgaged the threshing-machine to the State Bank of Lushton to secure a debt which he then, and had for some time, owed the bank. The bank subsequently took possession of the threshing-machine under its chattel mortgage and was proceeding to foreclose the same when the Kelley Company, by this action, replevied the threshing-machine from the bank. The action was tried to a jury in the district court of York county, a verdict and judgment rendered for the Kelley Company, and the bank prosecutes to this court a petition in error.

1. On the trial the district court, at the request of the Kelley Company, instructed the jury as follows: "The jury are instructed that the law is that partnership effects cannot be released from liability for the unpaid debts of the partnership without the consent of every member of the firm. The corpus of partnership effects is joint property and neither partner separately has anything in that corpus; but the interest of each is only his share of what remains after the partnership ac-

counts are taken. In this case, if you believe from the evidence that Peter Peters and John Peters purchased of the plaintiff in this case the power and separator described in the plaintiff's petition, in partnership, to be used and operated by them in threshing; and as a part of the transaction the said Peter Peters and John Peters executed and delivered to the plaintiff the notes and mortgage described in the petition and put in evidence by the plaintiff in this case, to secure the payment of the purchase price of the said outfit, then the plaintiff in this case would have the first lien upon the property in question to the amount unpaid upon said mortgage, and the said Peter Peters would have no right to execute a mortgage upon the said threshing outfit to secure his individual indebtedness, to the prejudice of the plaintiff in this case; and any mortgage so given by the said Peter Peters to secure his individual indebtedness would be subject to the mortgage of this plaintiff, regardless of whether plaintiff's mortgage was ever filed in the office of the clerk of the county or not." The first assignment of error argued is directed to the giving of this instruction. The evidence shows that John and Peter Peters were farmers and brothers residing in Hamilton county at the time they purchased the threshing-machine and executed the notes and mortgage to the Kelley Company; that Peter Peters and a son of John Peters accompanied the machine from place to place and used it in threshing grain. Whatever may be said of this instruction as an abstract proposition of law, we think it had no place in this case. It submitted to the jury the question as to whether John and Peter were co-partners, and there is no evidence what-

ever in the record which would justify the jury in making such a finding. Counsel for the defendant in error assume that because John and Peter jointly purchased and jointly owned this property, that therefore a partnership relation existed between them; but such a result by no means follows. They were rather joint owners or tenants in common, so far as the record shows, of the property. In *Waggoner v. First Nat. Bank of Creighton*, 43 Neb., 84, it was held, following the definition given by Chancellor Kent, that "Copartnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions;" and in *Iliff v. Brazill*, 27 Ia., 131, it was held: "Where two farmers buy in common a threshing-machine, which they use and operate together, and for which they execute to the vendor a note, signed by both individually, they are to be treated as joint owners and not as partners." In *Quackenbush v. Sawyer*, 54 Cal., 439, it was held that "a mere joint ownership in personal property does not constitute a partnership." To the same effect see *Wheeler v. Farmer*, 38 Cal., 203; *Hawes v. Tillinghast*, 67 Mass., 289; *Goell v. Morse*, 126 Mass., 480; *Moore v. Curry*, 106 Mass., 409; *Vose v. Singer*, 86 Mass., 226; *Donnan v. Gross*, 3 Ill. App., 409; *Sargent v. Downey*, 45 Wis., 498; *Cinnamond v. Greenlee*, 10 Mo., 578; *Ward v. Bodeman*, 1 Mo. App., 272; *Runnels v. Moffat*, 41 N. W. Rep. [Mich.], 224. We do not say that John and Peter were not partners, nor that the threshing-machine was not partnership property, but what we do decide is that the mere fact that they jointly purchased, owned, and operated the

threshing-machine does not establish that a copartnership existed between the joint owners, nor that the threshing-machine was copartnership property. So far as the record before us goes, John and Peter were joint owners—tenants in common—of the threshing-machine, and the bank acquired a lien upon the interest of Peter Peters in the threshing-machine by virtue of the mortgage he made thereon.

2. The court, on its own motion, also instructed the jury as follows: "If you find from the evidence that the cashier or assistant cashier of the defendant, the State Bank of Lushton, had actual notice or knowledge of plaintiff's mortgage upon the threshing-machine and power in controversy at the time or prior thereto of taking the mortgage of Peter Peters in favor of such bank upon such machinery, then such bank is not a mortgagee in good faith and your verdict should be for the plaintiff." The second assignment of error argued is directed to the giving of this instruction. Counsel for plaintiff in error says, and correctly says, that the instruction was wrong because there was no evidence in the record which justified its being given. The only evidence in the record which tends to show, if that does, that the bank officers had any knowledge or notice of the mortgage held by the Kelley Company is this: The bank was a subscriber for a "bulletin" issued by someone in York county, which bulletin gave the names of parties making mortgages filed in York county and a description of the mortgaged property. It was shown that a bulletin which came to the bank soon after July 23, 1891, recited that John and Peter Peters had executed a chattel mortgage to the Kelley Com-

pany on a threshing-machine, such as the one in controversy, and that this mortgage had been filed in the clerk's office of York county, but there is no evidence in the record that any officer or agent of the bank ever read this bulletin. If the jury had specially found that the officers of the bank had actual knowledge or notice of the mortgage of the Kelley Company, the evidence would not have supported the finding, and the court therefore erred in giving the instruction.

3. But it is insisted by the defendant in error that the judgment rendered was the only one which could have been correctly rendered under the facts in evidence in the case; and that, therefore, all errors in the record are without prejudice to the plaintiff in error. This contention rests upon the fact that the undisputed evidence shows that the mortgage made to the bank by Peter Peters on the threshing-machine was made to secure a then pre-existing debt, and that, therefore, the bank is not a mortgagee in good faith, within the meaning of section 14, chapter 32, Compiled Statutes, which declares that "every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagors in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides," etc. It is not pretended but that John and Peter Peters retained possession of the threshing-

machine after they mortgaged it to the Kelley Company; nor that this mortgage, or any copy of it, was ever filed in the office of the county clerk of Hamilton county, where the mortgagors resided, nor that Peter Peters was not justly indebted to the bank. The sole contention is that a mortgagee of chattels to secure a pre-existing debt is not a mortgagee in good faith. To sustain this contention counsel cite us to *Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863. In that case it was correctly held that "when goods obtained by fraud have been mortgaged by the fraudulent vendee solely to secure a pre-existing debt due from him to the mortgagee, the latter cannot claim the protection which the law affords an innocent and *bona fide* purchaser of property from a fraudulent vendee;" but in that case the mortgagor had obtained possession of the property which he mortgaged by fraud; the title as between him and his vendor had never passed. By making the mortgage to the Chadron bank the bank acquired only a lien upon such interest as its mortgagor had, and that interest was nothing, and therefore the bank acquired nothing. In the case at bar, however, the title and possession of the threshing-machine without fraud passed and vested in John and Peter, and the bank acquired by the latter's mortgage a lien on whatever interest Peter had in the threshing-machine. A mortgagee in good faith, within the meaning of the statute quoted, is one who takes his mortgage to secure a debt actually and justly owing to him, without any notice, actual or constructive, of other existing claims against the mortgaged property. The case cited to sustain the argument of counsel for the plaintiff in error is not in point.

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

REVERSED AND REMANDED.

POST, C. J., not sitting.

CHARLES E. MALM V. MARY THELIN.

FILED MARCH 18, 1896. No. 6109.

1. **Witnesses:** OBJECTION TO ANSWER: WAIVER. Where a question is asked a witness, in itself proper and not open to objection, the adverse party does not waive his right to object to an answer to such question containing inadmissible matter by not having objected to the question itself.

2. ———: ———: MOTION TO STRIKE: REVIEW. In such case the admissibility of testimony contained in the answer is properly presented for review by a motion to strike out the answer and an exception to an order overruling such motion.

3. **Master and Servant:** RISKS OF EMPLOYMENT. A servant assumes risks arising from defective appliances used or to be used by him, or from the manner in which the 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. *Missouri P. R. Co. v. Baxter*, 42 Neb., 793, followed.

4. ———: ———: BURDEN OF PROOF. The presumption is that such risk has been assumed by the servant, and, in order to recover, the burden is upon the plaintiff to establish one of the exceptions to the rule.

5. ———: ———: PLEADING. In his petition he must plead the existence of the facts creating such exception.

6. ———: ———: ———: EVIDENCE. Evidence tending to

show that defective machinery was used under a promise by the master to remove the defect, *held* inadmissible where such promise had not been pleaded.

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

John P. Breen, for plaintiff in error.

Gustave Anderson and *C. P. Halligan*, *contra*.

IRVINE, C.

The defendant in error brought this action against the plaintiff in error to recover on account of injuries sustained by defendant in error in operating machinery while in the employ of the plaintiff in error, a laundryman. She recovered judgment for $2,500. For convenience the parties will be referred to as plaintiff and defendant as their positions were in the district court. The petition, after alleging that the defendant was the owner of and operated a laundry in Omaha, and that the plaintiff was his servant in the operation thereof, alleged that there was in the laundry a certain machine called a mangle, which was on June 27, 1890, incomplete, imperfect, unsafe, and wholly unfit for use in that it had no guard or protection for the fingers or hands at the point where the clothes were received into the machine; that the defendant well knew of the defect in the machine but negligently used and operated said machine and directed the plaintiff to operate the same; that on said 27th of June, while plaintiff was using said machine as directed by the defendant, she had three fingers of her left hand cut and bruised by said machine so that amputation was necessary; "that said in-

jury was caused by or through no fault or negligence on the part of said plaintiff, but because and solely on account of the incompleteness of said machine and the want of the aforesaid guard or protection on said machine, and the recklessness, carelessness, and negligence on the part of said defendant for ordering or directing this plaintiff to work with said machine while said machine was in the condition hereinbefore set forth." The answer admits that defendant owned and operated the laundry in question and that plaintiff was his servant; that he kept a mangle in said laundry; that plaintiff was injured therein; and denied all other allegations of the petition. An accord and satisfaction were also pleaded, but it will not be necessary at this time to notice this defense. It will be observed that the petition does not charge that plaintiff was inexperienced, that she was not aware of the defect in the machine, and it is not charged that she used it relying on the promise of the defendant to repair the defect. The evidence, without contradiction, shows that before plaintiff was directed to use the machine, attention was especially called to the defect, and that she was aware thereof.

At this point in plaintiff's testimony, the following occurred:

You may state whether or not he [the defendant] said anything to you in regard to using the mangle?

A. Yes, the first day we was using the mangle he said, "We will get that guard as soon as we can."

Mr. Breen: What is that answer?

A. He will get that guard as soon as he can get it.

Defendant objects to the last answer, and moves that it be stricken out, on the ground that there is no such issue in the pleadings as a promise to repair the defect in this machine. Motion overruled, to which defendant excepts.

The overruling of this motion is assigned as error. In considering this assignment the question first arises whether, under the circumstances, the question having been answered without objection, the overruling of a motion to strike out the testimony is open to review. It has been several times held that where a question is answered without objection, objections to the evidence are waived and cannot thereafter be presented by a motion to strike out the evidence so admitted. (*Palmer v. Witcherly*, 15 Neb., 98; *Oberfelder v. Kavanaugh*, 29 Neb., 427; *Western Home Ins. Co. v. Richardson*, 40 Neb., 1; *Brown v. Cleveland*, 44 Neb., 239.) In all of these cases, however, it either affirmatively appears from the report, or it is a fair presumption from the facts stated, that the questions which elicited the objectionable evidence were of such a character that objections interposed thereto before the questions were answered would have prevented the admission of the evidence. Where the objectionable matter appears in an answer not properly responsive to a question, the rule must be different. This distinction was indicated in *Gran v. Houston*, 45 Neb., 813. In *Kissinger v. Staley*, 44 Neb., 783, it was held that if the evidence was recited in a narrative form or volunteered by the witness, or if it was not responsive to a question asked, a motion to strike out must be made in order to present anything for review. The reason is that where the evidence is given

in narrative form, or volunteered by the witness, or appears in an answer not responsive to the question propounded, no opportunity exists for objecting before the evidence is elicited, as no question has been asked sufficient to apprise the court or counsel that such evidence is about to be adduced. The same reasons exist and the same rule should apply where a question has been asked, in itself proper and not open to objection, and the witness in answer thereto states something which is objectionable, although it may be fairly responsive to the question. Now the question asked in this case was whether or not the defendant said anything in regard to using the mangle. This question, strictly speaking, called only for a categorical answer upon which further questions might be founded; but assuming that it called for a specific answer as to what was said, the question was not in itself open to objection. The plaintiff pleaded that she had been commanded by defendant to operate the machine; and in view of this pleading the question seemed to call for that command, and an objection urged to it would have been properly overruled. Instead of that the witness answered that the defendant said that he would get the guard as soon as he could. This answer was evidently not heard, and counsel asked to have it repeated, and then moved to strike it out, because irrelevant under the pleadings. Under the circumstances, we think that defendant availed himself of the first opportunity to object to evidence of this character, and that his motion to strike out the answer raises the question of the admissibility of the evidence of a promise on the part of defendant to remove the defect in the machine. A

servant assumes the risks arising from defective appliances used or to be used by him, or from the manner in which the 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. (*Missouri P. R. Co. v. Baxter*, 42 Neb., 793; *Dehning v. Detroit Bridge & Iron Works*, 46 Neb., 556.) In this state this rule has been modified to this extent that where the servant in obedience to the requirements of his master incurs the risk of machinery or appliances which, although dangerous, are of such a character that they may 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; *Dehning v. Detroit Bridge & Iron Works, supra.*) Therefore, the presumption is that a servant employing machinery obviously defective has assumed the risk occasioned by the use of such machinery, and in order to recover he must rebut that presumption, and in order to rebut it he must not only prove, but he must plead, the facts which create an exception to the rule,—as, for instance, that, on complaint to the master, a promise was made to remove the defect and the machinery was used relying upon that promise. In *Missouri P. R. Co. v. Baxter, supra*, a judgment was reversed because the petition did not plead such exceptions, and in *Dehning v. Detroit Bridge & Iron Works, supra*, an amendment had been required in a similar case

before the plaintiff was permitted to introduce evidence of such exceptions. The following cases also hold that in order for the plaintiff to avail himself of such exceptions, they must be specially pleaded: *Bogenschutz v. Smith*, 84 Ky., 330; *International & G. N. R. Co. v. Doyle*, 49 Tex., 190; *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind., 265; *Hayden v. Smithville Mfg. Co.*, 29 Conn., 548; *Stephenson v. Duncan*, 73 Wis., 404; *Coal & Car Co. v. Norman*, 49 O. St., 598. In this case the plaintiff, without pleading the particular exception to the general rule referred to, was permitted, over objections, to introduce evidence of the existence of that exception. This was erroneous, and particularly prejudicial, because it was neither pleaded nor proved that the defect was not obvious, that the plaintiff was inexperienced, or that other circumstances existed except the one referred to which would permit a recovery, and the case finally rested largely on the fact of this promise. The judgment must be reversed and the cause remanded, with directions to the district court to permit the plaintiff, if she so desires, to amend her petition.

REVERSED AND REMANDED.

JAMES E. MURPHEY V. MARIA VIRGIN.

FILED MARCH 18, 1896. No. 6211.

1. **Action to Recover Money Forcibly Taken from Debtor:** VERDICT FOR PLAINTIFF. Evidence examined, and *held* to sustain the verdict.

2. **Pleading:** INSTRUCTIONS: STATEMENT OF ISSUES. Where

pleadings contain matters of evidence rather than ultimate facts, the court sufficiently states the issues by stating tersely the ultimate facts pleaded, and disregarding such evidentiary facts.

3. **Witnesses:** EVIDENCE: JURY. A jury is not bound to blindly accept as true all testimony which is not directly contradicted or impeached. The testimony of a witness should be weighed in connection with all the facts in the case. Instructions substantially to that effect are not erroneous.

4. **Trover and Conversion:** RECOVERY OF MONEY FORCIBLY TAKEN FROM DEBTOR. Money taken forcibly and without the consent of the owner may be recovered back; and the fact that the owner was indebted to the wrongdoer in an amount as great as the sum taken is no defense.

5. **Instructions:** EVIDENCE. It is not error to refuse to give instructions directing the jury what degree of importance should be attached to particular evidence.

ERROR from the district court of Seward county. Tried below before WHEELER, J.

George B. France, for plaintiff in error.

References: *Mathewson v. Burr*, 6 Neb., 312; *Commings v. Winters*, 19 Neb., 720; *Holland v. Griffith*, 13 Neb., 472; *Sandwich Mfg. Co. v. Feary*, 22 Neb., 53; *Hiatt v. Kinkaid*, 28 Neb., 721; *Galloway v. Hicks*, 26 Neb., 532; *City Bank of Macon v. Kent*, 57 Ga., 283; *Smith v. Grimes*, 43 Ia., 356; *Rockford R. Co. v. Coultars*, 67 Ill., 398; *Lincoln v. Holms*, 20 Neb., 39; *Campbell v. Holland*, 22 Neb., 587; *Parsons v. Hughes*, 9 Paige [N. Y.], 591; *Adams v. Sage*, 28 N. Y., 103; *Baker v. Spencer*, 47 N. Y., 562; *Pearsoll v. Chapin*, 44 Pa. St., 9; *Firemans Ins. Co. v. Cochran*, 27 Ala., 228.

D. C. McKillip, *contra*.

References: *Norwegian Plow Co. v. Haines*, 21 Neb., 691; *Atchison & N. R. Co. v. Washburn*, 5 Neb.,

124; *McKyring v. Bull*, 16 N. Y., 302; Cooley, Torts, 505; *Bradley v. Chase*, 22 Me., 511; *Negley v. Lindsay*, 67 Pa. St., 217; *Obernalte v. Edgar*, 28 Neb., 70; *Schribar v. Platt*, 19 Neb., 628.

IRVINE, C.

The defendant in error was the plaintiff in the district court, and in her petition charged that Murphey, on or about August 3, 1889, assaulted her and took from her possession gold and silver coin of the amount and value of $463,—her money,—and converted the same to his own use. The defense set up was that Murphey had been a surety on the official bond of Alexander Virgin, plaintiff's husband, as treasurer of a school district; that judgment was recovered on the bond for $1,292, and that Murphey, by virtue of said judgment and at the request of Mrs. Virgin, paid upon said judgment, and for other expenses in connection with Mr. Virgin's default, $466.08; that Virgin had been the owner of certain land, which, without consideration, he conveyed to Mrs. Virgin, who held the title in trust for him; that Mr. and Mrs. Virgin agreed, in consideration of Murphey's paying the money referred to, upon the sale of said land to apply its proceeds to the repayment of Murphey; that on August 3, 1889, Mr. and Mrs. Virgin sold said land and out of the money received paid to Murphey said sum of $466.08, being the money here sued for, and took and received from Murphey a receipt acknowledging the payment of the same in full satisfaction of Murphey's claims aforesaid. The plaintiff recovered judgment.

The first assignment of error argued is that the verdict is not sustained by the evidence. Accord-

ing to Mrs. Virgin's testimony, when the sale of the land was consummated she met the purchaser in the office of a third person, and he paid to her the money in coin. Murphey was present and Mrs. Virgin offered to pay him $25, which she said she owed him. She had placed the rest of the money in a reticule. Murphey declared he would have the whole of it, and forcibly took it from the reticule, at the same time threatening Mrs. Virgin with a revolver. It may be here remarked that there is no evidence in the record in support of the averment that the land belonged to Mr. Virgin, although it clearly appears that there was an indebtedness to the amount claimed from Mr. Virgin to Murphey on account of the judgment upon the bond and expenses of litigation. This would seem to quite thoroughly establish the plaintiff's *prima facie* case. Most of Mrs. Virgin's testimony was contradicted by other witnesses, but it was for the jury and not for this court to determine who was most worthy of belief. Murphey does not directly deny that the money was taken against Mrs. Virgin's consent, although he denies he used force. His defense is based chiefly on testimony from several witnesses, to the effect that after the transaction in the office Mrs. Virgin went voluntarily to Murphey's house and paid to him $6.07, being the difference between the money which he obtained in the office and the amount due him from Virgin, and insisted upon taking a receipt from him acknowledging satisfaction of the whole claim. This receipt was not produced, Mrs. Virgin emphatically denying that she had ever obtained it, but was proved by a letter-press copy bearing no signature. There is also testimony to the effect that Mrs. Virgin had said to

third persons that she had so paid Murphey's claim. Most of this testimony is denied by Mrs. Virgin, although she admits going from the office to Murphey's house for the purpose of giving Mrs. Murphey "a piece of her mind," and that she there gave Murphey a dollar. She says she was much excited, and did this, saying that as he had taken the remainder he might as well have the whole of it. We think there was enough to sustain the verdict. There was certainly sufficient to establish a *prima facie* case, and the burden of proving what counsel term "a ratification" was upon Murphey. While his evidence in that behalf was not met by the clearest and most satisfactory proof to the contrary, we think it was fairly within the province of the jury to say whether his defense had been established.

Certain rulings on the evidence cannot be considered, for the reason that in the petition in error there are no assignments specifying such rulings.

The remaining assignments relate to the instructions. It is claimed that the second instruction, which stated the defense, was erroneous because not complete. The instruction was as follows: "For answer the defendant alleges that on and prior to the 3d day of August, 1889, the plaintiff and her husband, Alexander C. Virgin, were indebted to him in the sum of $466.08, and that on the said 3d day of August, 1889, the plaintiff and said Alexander paid and delivered to the defendant the sum of $466.08, being the sum of money due the defendant from the plaintiff; and for further answer the defendant denies each and every other allegation contained in plaintiff's petition." It is argued that the court should have instructed the jury specifically, as

alleged in the answer, that defendant claimed the money because it had been derived from land sold which the plaintiff and her husband agreed should be applied upon the debt. We think this was unnecessary. The instruction given states in concise language the legal effect of the answer. The manner in which the money was obtained, the manner in which the alleged indebtedness arose, and the manner of payment were matters of evidence rather than of pleading.

The fourth instruction was as follows: "You are the judges of the credibility of the witnesses and of the weight to be attached to each and all of them, and you are not bound to take the testimony of any witness as absolutely true, and you should not do so if you are satisfied from all the facts and circumstances proved on the trial that such witness is mistaken in the matter testified to by him, or that for any other reason his testimony is untrue or unreliable." This instruction is complained of because of the statement that the jury was not bound to take the testimony of any witness as absolutely true, it being argued that the jury is compelled to believe a witness where not contradicted or impeached. We think the whole instruction, in connection with the fifth, which is the usual instruction in regard to considering the interest, bias, demeanor, and intelligence of witnesses, states the law correctly. A fair construction of the court's language would not authorize the jury to arbitrarily and unreasonably disregard uncontradicted testimony from an honest, unbiased, intelligent, and apparently truthful witness. The instruction does, however, tell the jury that they need not blindly accept testimony, but should weigh it in connection with all the facts

and circumstances in evidence, and give it such credence as under all the proof is warranted. This is correct. Other instructions are complained of as unfairly repeating the theory of the plaintiff. Without quoting them, we will merely say that we do not think they are in any degree open to that criticism.

The first instruction requested by the defendant was to the effect that even if Murphey's act in getting the money was wrongful, still, if afterwards the plaintiff paid the balance due him and demanded and obtained a receipt therefor, such acts would be a ratification. We think the principle of this instruction was covered by the court's sixth, which was that if the defendant forcibly and without the consent of plaintiff took the money, and the plaintiff afterwards, with full knowledge of the material facts, voluntarily consented to defendant's retaining such money as a settlement of an existing debt against her and her husband, then there would be a ratification. The court's instruction was in this respect fully as advantageous to the plaintiff as the one requested, and was a more accurate statement of the law. The ratification would arise, as stated by the court, from plaintiff's consenting that the money taken should be so retained. The payment of the balance and taking a receipt, elements embodied in the instruction requested, would merely be evidence of such consent.

The second instruction requested, while somewhat involved in its language, was in effect that if the money was due Murphey, plaintiff could not recover, although it was taken against her consent. This doctrine could not for a minute be tolerated. A man has no right to resort to robbery to collect his claims.

The third instruction requested was correctly refused, because it told the jury that the failure of the plaintiff to make a demand for the money was a "strong circumstance that she considered the receipt of the sum by the defendant as a payment." It was not error to refuse to instruct the jury as to the weight to be given different portions of the evidence. It was for the jury to determine how strong the circumstance was.

The remaining instructions requested were on the subject of ratification and were covered by the court's sixth.

JUDGMENT AFFIRMED.

SAMUEL GARBER V. PALMER, BLANCHARD & COMPANY.

FILED MARCH 18, 1896. No. 6350.

1. **Replevin:** DISMISSAL. A plaintiff in an action of replevin, who has obtained possession of the property under the writ, cannot be permitted, without the consent of the defendant, to dismiss the action.

2. ——: RIGHT OF DEFENDANT TO TRIAL: DAMAGES. When a plaintiff in replevin who has obtained the property fails in his proof or fails to prosecute the action, the defendant is entitled to judgment, and to a trial of his right of property or possession, for the purpose of establishing his damages.

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

The issues are stated by the commissioner.

James McNeny, for plaintiff in error:

The order of the court sustaining the motion of defendant in error to dismiss this cause was erroneous. In an action of replevin both parties are actors. On the plaintiff's failure to prosecute, the defendant becomes the real plaintiff in the action. (*Aultman v. Reams*, 9 Neb., 487; *Moore v. Herron*, 17 Neb., 697; *Wilson v. Wheeler*, 6 How. Pr. [N. Y.], 49; *Broom v. Fox*, 2 Yeates [Pa.], 530; *Long v. Buckeridge*, 1 Str. [Eng.], 106; *Marshall v. Bunker*, 40 Ia., 121; Wells, Replevin, 195; *Jewell v. Lamereaux*, 30 Mich., 155; *Reed v, Carpenter*, 2 O. 79; *Ahlman v. Meyer*, 19 Neb., 63; *Dahler v. Steele*, 1 Mont., 206; *Berghoff v. Heckwolf*, 26 Mo., 512; *Kennedy v. Beck*, 15 Kan., 555; *Ranney v. Thomas*, 45 Mo., 112; *Dowling v. Polock*, 18 Cal., 625; *Mikesill v. Chaney*, 6 Porter [Ind.], 52; *Leese v. Sherwood*, 21 Cal., 151.)

No appearance for defendant in error.

IRVINE, C.

This was an action in replevin by Palmer, Blanchard & Co., a corporation, against Garber for 300 head of cattle alleged to be worth $8,000, and appraised at $5,000. The answer was a general denial. After each side had rested its case the plaintiff moved the court "to dismiss this action without liability to the defendant herein." Whereupon the following order was made: "On consideration whereof the court sustains said motion, and it is hereby considered, ordered, and adjudged that said action be, and the same is hereby, dismissed at plaintiff's costs. And it is further considered and adjudged that said plaint-

iff be, and he is hereby, discharged from all liability to defendant herein. Defendant thereupon asks that the cause as to him be submitted to the jury upon the evidence and the instructions submitted to the court. On consideration whereof the court refuses to grant said application. And the court further refuses to grant any other motion or application on the part of the defendant, and refuses to make or render any other ruling, finding, or judgment save and except the above." It appears, not from the record proper, but from the bill of exceptions, that the property had been delivered to the plaintiff under the writ.

The evidence discloses that Garber and one Higby, who was cashier of the Farmers & Merchants Banking Company of Red Cloud, made an arrangement with Palmer, Blanchard & Co., who were live stock commission men at South Omaha, whereby the Farmers & Merchants Bank issued a letter of credit in favor of Garber, on the faith of which Garber bought the cattle in controversy in New Mexico, drawing on the bank for the purchase price. The agreement was that the South Omaha National Bank should issue to the Farmers & Merchants Bank a corresponding letter of credit; that Garber should secure advances by Palmer, Blanchard & Co. by chattel mortgage; that the Farmers & Merchants Bank should, in pursuance of its letter of credit, honor Garber's drafts for the purchase money, and that on the execution of the mortgages, drafts should be drawn, with the mortgages attached, which should be paid by Palmer, Blanchard & Co. The details of the latter part of the agreement were not made clear, nor are they material. It sufficiently appears that through some arrangement

then made, Palmer, Blanchard & Co. were, upon being secured by chattel mortgages executed by Garber, to pay the advances made by the Farmers & Merchants Bank to him. When the cattle arrived in Nebraska, Garber executed two mortgages, each of which covered 150 head of cattle; one for $5,000, the other for $2,435.17. These were delivered to the bank, together with notes representing the debt, and a draft was drawn on Palmer, Blanchard & Co. for the amount. Palmer, Blanchard & Co. refused to accept the draft, claiming that the mortgages should have covered certain hogs and corn in addition to the cattle. After Palmer, Blanchard & Co had refused to accept the draft Garber prepared to ship the cattle for sale to Kansas City, when this action was instituted. It is quite evident that officers of the bank instituted the action; but Mr. Blanchard, representing Palmer, Blanchard & Co., appeared on the scene the next morning, and joined in the replevin bond. On the trial he testified to the foregoing facts, and testified distinctly and positively that his company had refused to accept the mortgages, and that it had no interest in or claim upon the cattle. It was on this state of facts that the court, on plaintiff's motion, dismissed the action and forbade the defendant the privilege of proving his damages. That error was committed is self-evident, but there is the difficulty in stating reasons for reversal which always attends an attempt to demonstrate an axiom. The district court may have proceeded upon the theory that section 430 of the Code gives the plaintiff in every action a right to dismiss without prejudice at any time before final submission; but this provision does not apply to

actions of replevin. In replevin, where the property is delivered to the plaintiff, he practically obtains his execution before judgment. He accomplishes the main object of his suit through the preliminary process of the court. It is sometimes said that both parties then become actors. The plaintiff has taken the property, and the burden falls upon him of establishing his right thereto; and unless he recovers on the strength of his own title, the defendant is entitled to judgment for the return of the property or for its value. He can no more abandon the case than can a defendant in an action of trover. It is true that section 190 of the Code provides that where judgment is rendered against the plaintiff on demurrer, or if the plaintiff otherwise fail to prosecute to final judgment, the court shall impanel a jury to inquire into the right of property and right of possession of the defendant; and if the jury be satisfied that either was in the defendant, they shall assess such damages as may be right and proper; but this section is enacted for the purpose of an assessment of damages, such as a plaintiff is entitled to on default in ordinary actions. The defendant is entitled to judgment unless the plaintiff proves his own title. (*St. John v. Swanback*, 39 Neb., 841; *Jenkins v. Mitchell*, 40 Neb., 664; *Kavanaugh v. Brodball*, 40 Neb., 875; *Peterson v. Lodwick*, 44 Neb., 771; *Johannson v. Miller*, 45 Neb., 53.) In case the plaintiff, by failure of evidence, or by failure to prosecute his case, fails to establish such affirmative right in himself the defendant is entitled to the procedure accorded by section 190, not for the purpose of establishing his right, but for the purpose of assessing his damages. It follows from the

nature of this action, and from the feature of the plaintiff's securing the property before he has established his right, that he cannot by a dismissal of the action avoid the necessity of making the necessary proof. He cannot by his own *ex parte* affidavit obtain property in the possession of another and then by dismissal leave the other party without an opportunity to defend his right and without a remedy. The proposition is so evident, the contrary so unjust, so absurd, and so preposterous, that neither argument nor authority should be necessary. Still the question has been several times decided by this court. (*Aultman v. Reams*, 9 Neb., 487; *Moore v. Herron*, 17 Neb., 697; *Ahlman v. Meyer*, 19 Neb., 63.)

The action taken by the court might have been error without prejudice had the plaintiff beyond contradiction established its right; but it did not do so. In the first place the petition stated no cause of action. It alleged a special ownership in the property without setting out the facts in relation thereto. A plaintiff in replevin claiming under a chattel mortgage must allege a special ownership and plead the facts. (*Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771; *Strahle v. First Nat. Bank of Stanton*, 47 Neb., 319.) In the second place, the plaintiff absolutely failed to prove ownership, general or special, or right of possession; but, on the contrary, its own evidence was that it had no claim at all, and had refused to accept the mortgages under which alone there was any pretense of a claim. Possibly the district court thought that the evidence showed that the suit had not been authorized by Palmer, Blanchard & Co., and that that

company was not, therefore, the actual plaintiff; but such evidence as was introduced to this effect was not in support of any pleading by Palmer, Blanchard & Co. of such facts; it was not relevant under the issues, except as it might operate in favor of the defendant, and was no ground for dismissing the case without a judgment for defendant. Finally, the evidence showed that while the suit had been begun without authority, Palmer, Blanchard & Co. had certainly ratified the acts of the person commencing it. Blanchard signed the replevin bond. Several continuances were taken on Palmer, Blanchard & Co.'s motion. Palmer, Blanchard & Co. prosecuted the action so far as it was prosecuted. It appears that after the cattle had been taken under the writ they were shipped to Palmer, Blanchard & Co. for sale. They were sold by that company and the proceeds remitted to Higby, who had assumed the indebtedness in favor of the Farmers & Merchants Bank, created by the transaction; but this merely shows that Palmer, Blanchard & Co. ratified the suit, and prosecuted it without a shadow of a claim of right, not for their own protection, but in order to protect Higby, it being explained in the evidence that this course was taken in order to prevent creditors of Garber from reaching the cattle. In brief, the transaction was in consummation of a conspiracy between Higby and Palmer, Blanchard & Co. to seize the cattle without any right thereto and without tangible claim of right, knowing they had no such right, for the purpose of in that way securing payment of a debt of Garber. An inexcusable error was committed. Possibly no party to the case has suffered greatly because the

proceeds of the property were applied to the payment of a debt of Garber's; but it is not in such a manner that a creditor can be permitted to obtain a preference.

REVERSED AND REMANDED.

IRWIN STALL, APPELLEE, V. CLAUDIUS JONES ET AL., APPELLANTS.

FILED MARCH 18, 1896. No. 6282.

1. **Mortgages in Form of Absolute Deeds:** EVIDENCE: REVIEW. While a preponderance of the evidence is sufficient to establish an issue in any civil action, and while this court will not, in the exercise of its appellate jurisdiction, weigh conflicting evidence, still, in order to sustain a finding for the plaintiff in an action to have a deed absolute in form declared a mortgage, the evidence on behalf of plaintiff, when taken together, and without regard to the contradicting evidence, should present a state of facts consonant with reason and consistent in its different parts.

2. **Statute of Limitations:** DEEDS AS MORTGAGES. The statute of limitations runs against a bill to declare a deed absolute in form a mortgage, in favor of a grantee in possession, from the time such possession becomes adverse to the grantor's title.

3. **Adverse Possession:** EVIDENCE. That grantee's possession is adverse may be inferred from the exercise by him of acts of ownership after payment of the debt.

4. **Deeds as Mortgages:** TITLE. In this state a deed absolute in form passes the legal title, although intended as security for a debt, and for most purposes treated as a mortgage.

5. ———: FORECLOSURE: SETTLEMENT. Therefore, where the grantee under such a deed is in possession, the grantor's equity of redemption may be defeated by a parol settlement defeating his right to an accounting.

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

The facts are stated in the opinion.

Reese & Gilkeson and *D. C. McKillip*, for appellants:

More than the mere preponderance of evidence is necessary to establish the claim that a deed absolute on its face is a mortgage. (*Cadman v. Peter*, 6 Sup. Ct. Rep. [U. S.], 957; *Tilden v. Streeter*, 8 N. W. Rep. [Mich.], 502; *Howland v. Blake*, 97 U. S., 624; *Woodworth v. Carman*, 43 Ia., 504; *Walker v. Farmers Bank*, 14 Atl. Rep. [Del.], 819; *Satterfield v. Malone*, 35 Fed. Rep., 451; *Lance's Appeal*, 4 Atl. Rep. [Pa.], 375; *Maher v. Farwell*, 97 Ill., 56; *Pancake v. Cauffman*, 7 Atl. Rep. [Pa.], 67; *Luver v. Lyons*, 40 Ia., 510; *Butler v. Butler*, 1 N. W. Rep. [Wis.], 70; *Schade v. Bessinger*, 3 Neb., 144; *Deroin v. Jennings*, 4 Neb., 97; *Ford v. Joyce*, 78 N. Y., 618; *Boardman v. Davidson*, 7 Abb. Pr., n. s. [N. Y.], 439; *Jasper v. Hazen*, 58 N. W. Rep. [N. Dak.], 457.)

The action is barred. (*Morrow v. Jones*, 41 Neb., 867; *Borden v. Clow*, 30 Pac. Rep. [Nev.], 821; *Fisk v. Stewart*, 26 Minn., 372; *Rogers v. Benton*, 38 N. W. Rep. [Minn.], 768.)

Reference was also made to the following cases: *Knowles v. Knowles*, 86 Ill., 6; *Kent v. Lasley*, 24 Wis., 654; *Moreland v. Barnhart*, 44 Tex., 275; *Glisson v. Hill*, 2 Jones Eq. [N. Car.], 256; *Todd v. Campbell*, 32 Pa. St., 250; *Sloan v. Becker*, 26 N. W. Rep. [Minn.], 730; *Cooper v. Skeel*, 14 Ia., 578; *Noel v. Noel*, 1 Ia., 423.

Pound & Burr, R. P. Anderson, George H. Terwilliger, and *Thomas A. Healey, contra.*

References to question as to the quantity of proof required: *Southard v. Curley*, 134 N. Y., 148; *Newman v. Edwards*, 22 Neb., 248; *Price v. Karnes*, 59 Ill., 276; *Littlewort v. Davis*, 50 Miss., 403; *Darst v. Murphy*, 119 Ill., 343; *Perdue v. Bell*, 83 Ala., 396; *Bailey v. Bailey*, 115 Ill., 551; *Gassert v. Bogk*, 7 Mont., 585; *Knapp v. Bailey*, 79 Me., 195; *Cosby v. Buchanan*, 81 Ala., 574; *McMillan v. Bissell*, 63 Mich., 66; *Wylie v. Charlton*, 43 Neb., 840; *Hoyt v. Schuyler*, 19 Neb., 652; *Snowden v. Tyler*, 21 Neb., 199; *Bowman v. Griffith*, 35 Neb., 361.

References to question as to statute of limitations: *Newman v. Edwards*, 22 Neb., 248; *Lebley v. Farmers Loan & Trust Co.*, 139 N. Y., 461; *Paschall v. Hinderer*, 28 O. St., 568; *Woodworth v. Carman*, 43 Ia., 504; *Odenbaugh v. Bradford*, 67 Pa. St., 96; *Darst v. Murphy*, 119 Ill., 343.

The following cases were also cited: *Worthington v. Worthington*, 32 Neb., 338; *Morse v. Raben*, 27 Neb., 145; *Newman v. Edwards*, 22 Neb., 248; *Douglas v. Moody*, 80 Ala., 61; *Russell v. Southard*, 12 How. [U. S.], 139; *Howe v. Powell*, 40 La. Ann., 309.

IRVINE, C.

In December, 1875, Stall conveyed to Jones the northwest quarter of section 22, township 10 north, of range 2 east, in Seward county. December 17, 1891, he instituted this action for the purpose of having the conveyance declared to have been a mortgage, for an accounting of the amount due thereon, and of the rents and profits of the land which had been in Jones' possession

ever since the conveyance. The answer of Jones admits the conveyance, but alleges that it was in pursuance of an absolute sale of the premises, pleads laches, the statute of limitations, and adverse possession. The district court found for the plaintiff and also made special findings, not necessary to here notice because they amounted to a general finding for plaintiff on the issues joined. The defendant Jones appeals, the other defendants not appearing to have any beneficial interest.

The case in its nature calls for a review of the evidence to ascertain whether it supports the findings of the district court; and the appellant insists that the rule in such cases is that a mere preponderance of the evidence is not sufficient to establish the plaintiff's case; that in order to show that a conveyance absolute in form was in legal effect a mortgage, the evidence must be free from doubt, or at least that it must be of a most clear and convincing character. This position is supported to a certain extent by *Schade v. Bessinger*, 3 Neb., 140, and *Deroin v. Jennings*, 4 Neb., 97. The rule stated in the latter case is that a court of equity will not declare a deed absolute in form a mortgage unless the proof is clear, consistent, and satisfactory that the object of the transaction was to create a security for the payment of money. On the other hand, it has been held in relation to similar statements with regard to the degree of evidence required to establish the good faith of a conveyance from husband to wife, that in all civil cases only a preponderance of the evidence is necessary (*Stevens v. Carson*, 30 Neb., 544), and likewise as to the establishment of a parol gift (*Wylie v. Charlton*, 43 Neb., 840). In the case last cited it was said that in determining

on which side the preponderance of evidence lay, the circumstances naturally casting suspicion upon testimony to establish a parol gift were proper for consideration, but that such circumstances did not create a different rule as to the degree of evidence required. We adhere to the doctrine of the two later cases, that only a preponderance of evidence is required to establish an issue in civil actions; and we also adhere to the settled doctrine of this court that it cannot in the exercise of its appellate jurisdiction undertake to weigh conflicting evidence, but will, where the evidence is conflicting, refuse to set aside the finding of the trial court. Still, we do not think that this rule requires that we should in all cases sustain a finding merely because a search through the record discloses here and there isolated statements of witnesses which, taken together and disregarding all the rest, would sustain the finding. It is necessary to regard the case made by the successful party to some extent as an entirety; and we think the rule stated in *Schade v. Bessinger* and *Deroin v. Jennings* a correct one, not at all conflicting with other cases, provided it be applied simply so far as to require that in such cases as we are considering the plaintiff, to prevail, must present consistent and satisfactory evidence, which, if believed, would be sufficient to establish his case. If on his side such evidence is presented, the mere fact that it is contradicted by defendant's witnesses would not prevent a recovery provided the trial court in weighing the testimony considered the evidence on behalf of plaintiff worthy of belief. But the plaintiff's proof, when taken by itself, ought to be reasonable and consistent with known facts. In the case before us it is possible

to accept a portion of the plaintiff's testimony, and a portion of defendant's, and thus gain sufficient to support the findings; but in order to do so it is necessary to believe the plaintiff in some points where he is contradicted by several witnesses, by his own conduct, and by the circumstances, and then to follow this by absolutely disbelieving and rejecting other portions of his testimony and accepting on these points testimony of the defendant contradicted by the plaintiff. A complete review of the 400 pages of evidence is impracticable and it would be unprofitable. We shall content ourselves by an attempt to summarize its most important features.

The plaintiff's testimony is that he bought the land in question in 1874. It was incumbered by a mortgage in favor of R. E. Moore, for $500, bearing twelve per cent interest, and due in May, 1876. Stall became indebted to Jones to an amount of $80 or over, and in the autumn of 1875, an execution having been issued on a judgment against him in favor of a third person, he made arrangements with Jones by which Jones agreed to advance him other money so as to make his indebtedness $520. To secure this Stall executed the deed in question, being in form an absolute conveyance of the premises. Jones, on his part, according to Stall's testimony, agreed to discharge Moore's mortgage when it became due and to carry the debt at ten per cent. It is beyond dispute that an indebtedness of $520 was created from Stall to Jones at about this time, and that Stall paid this from time to time so that it was entirely discharged in March, 1878. Jones was let into possession on the execution of the deed, and has ever since occupied the land by his ten-

ants. When Moore's mortgage came due he paid it. Stall also testifies that in 1877 he found a purchaser for the land at $1,200, and consulted Jones in regard to its sale; but Jones advised him not to sell, saying that he, Jones, would take care of it and that Stall could realize more than he was then offered. Stall also testifies to a recognition by Jones in September, 1882, of Stall's ownership; but, even according to Stall's testimony, this was somewhat equivocal. It was to the effect that Stall met Jones in Seward, and "told him we had better make a sale of the land, as I would like to get a little money out of it, and he told me no, to let the land go till after election, then he told me it was all right, that I could do without the money and after election he would make it all right." There is no distinct evidence of any further transactions until 1889, when Stall testifies that he demanded a reconveyance and Jones wrote him a check for $20, which he handed to him and said that was all he could do, and then rushed out. In cross-examination Stall says that he understood from what Jones said that that transaction ended the business. Stall took the check and used its proceeds. In 1890, according to Stall, he again besought Jones for a settlement, and Jones said the affair was too old to open up. To a certain extent Stall is corroborated by his wife in regard to the purpose of executing the deed; and he is in part corroborated by another witness in regard to the transaction of 1882. Jones squarely contradicts him in regard to all the essential features of the case. He says the $520 loan was secured by chattel mortgage; and Stall admits that one or more chattel mortgages were executed to secure it. It may be stated that it appears quite clearly

that these mortgages were in themselves sufficient security. It is undisputed that Jones has made improvements on the land to the amount of at least $3,000, although Stall swears that he had no knowledge that such improvements were made until shortly before the action was begun. The testimony of strangers is almost altogether corroborative of Jones.

If the case rested entirely upon the proof in respect to the original character of the transaction, without regard to the other circumstances, the findings might be sustained; but taking the plaintiff's own testimony concerning the whole course of the transaction, it is far from satisfactory. According to the plaintiff the land was worth $1,600 at the time of the conveyance. The incumbrance, including the Moore mortgage, was but a little over $1,000. By March, 1878, Stall, by direct payments, had discharged the $520 indebtedness. This left only to be met the debt created on account of the Moore mortgage, of $500 and interest. Stall testifies that during nearly the whole period the rental value of the land has been from $300 to $400 per annum. It is of course possible, but it is very highly improbable, that Stall, who is incidentally shown to have been in financial difficulties during at least a portion of this period, should have permitted Jones to remain in possession and in perception of the profits of this land for sixteen years before bringing suit, for thirteen years after the original indebtedness had been paid, and for at least ten years after the profits of the land should have discharged the Moore indebtedness. This delay cannot be accounted for by any recognition by Jones of Stall's rights, because, according to Stall himself, Jones

was on each occasion guarded and equivocal, and the language which he used could not have been such as to lull Stall into a sense of security. On the contrary, if the events occurred as Stall describes them, Jones' conduct would rather have caused uneasiness and doubt as to his good faith. The evidence shows that Stall lived about five miles from the land, and it is equally improbable that if he thought he had any interest therein he should have been all those years in ignorance of the fact that Jones was making valuable and extensive improvements thereon. In this investigation we disregard much testimony in regard to statements of Stall disavowing interest in the land, because Stall denies having made such statements; but we cannot disregard the fact that in 1890 Stall filed two petitions against Jones in the district court, under his oath, alleging that the conveyance had been made to Jones in trust and for the convenience of Stall, and without consideration, without any reference to an indebtedness or a mortgage.

But if we could sustain the finding as to the nature of the original transaction, we would be at once met by the issue raised on the plea of the statute of limitations. In *Morrow v. Jones*, 41 Neb., 867, it was held that as a rule the right to foreclose and the right to redeem are reciprocal, and that the right to redeem is barred when the right to foreclose would be. In some cases it is held that against a mortgagee in possession the statute runs against a bill to redeem from the payment of the debt. (*Stillwell v. Hamm*, 97 Mo., 579; *Knowlton v. Walker*, 13 Wis., 264.) But it is the more general doctrine that the statute begins to run from the time the mortgagee's possession be-

comes adverse; and that this does not occur while the mortgagor's rights are admitted. (*McPherson v. Hayward*, 81 Me., 329; *Waldo v. Rice*, 14 Wis., 310; *Robinson v. Fife*, 3 O. St., 551; *Fisk v. Stewart*, 26 Minn., 365; *Miner v. Beckman*, 50 N. Y., 337; *Hubbell v. Sibley*, 50 N. Y., 468.) Applying this rule to the present case, it is true it does not appear from the plaintiff's testimony that Jones expressly denied plaintiff's title prior to 1890; but if we are to believe plaintiff in regard to the rental value of the land, the whole indebtedness must have been discharged more than ten years before suit brought. During this period Jones continued to lease the land, to make improvements thereon, and generally treat it as his own. There was certainly enough to justify a finding that his possession had become adverse, although we do not say that the evidence compelled such finding. In order, however, to account in any reasonable manner for Jones' continued possession in subordination to Stall's rights, we must accept Stall's improbable testimony as to the facts surrounding the original transaction, and then disbelieve his testimony as to rental value of the property.

Finally, if we pursue the course indicated, we are confronted with the transaction of 1889, when Stall says Jones gave him a check for $20 and told him that was all he would do, and Stall accepted the check and used its proceeds, understanding that Jones tendered it as a final settlement of the transaction. In the case of an ordinary mortgage, which under our law creates a lien and passes no title, it is reasonably clear that a right to redeem could not be barred by a transaction of this character lying entirely in parol; but in this state a deed absolute in form, although intended

as security, and in general treated as a mortgage, passes the legal title to the mortgagee. (*Gallagher v. Giddings*, 33 Neb., 222; *Harrington v. Birdsall*, 38 Neb., 176.) Where the legal title has passed, where the mortgagee is in possession, and where an arrangement is entered into which defeats the mortgagor's right to an accounting, we see no reason why it should not bar a redemption. Where a deed absolute in form is executed and a written defeasance or bond for reconveyance is given back, and the mortgagor voluntarily surrenders or cancels the defeasance or bond, this renders the conveyance absolute and vests complete title in the mortgagee. (*Trull v. Skinner*, 17 Pick. [Mass.], 213; *Harrison v. Trustees of Phillips Academy*, 12 Mass., 456; *Shubert v. Stanley*, 52 Ind., 46.) So where an absolute deed is given as security for the payment of money, the grantor may abandon the payment of the debt, cancel the secret agreement, and treat his conveyance as absolute; and if he do so, he will be bound by his election. (*Carpenter v. Carpenter*, 70 Ill., 457.) The Massachusetts cases go upon the ground that the mortgagor, by voluntarily destroying the evidence which would constitute the conveyance a mortgage, estops himself from thereafter claiming that it was a mortgage. So here, if Stall, knowing that the check was tendered him as a complete and final settlement of the account, accepted it and retained it, he bound himself by the accounting so had, and is without standing to maintain this bill for an accounting and redemption, because the accounting is essential to the redemption. It is true that Stall's account of the last transaction is contradicted by Jones and by other witnesses, who testify that it related to an entirely different

matter; but we repeat that we cannot zig-zag through the record, accept Stall's testimony on some points and entirely discredit it on others, believing the witnesses who contradict him, and so reach a conclusion that there was satisfactory evidence in support of the decree.

We hold that the findings are not supported by the evidence, not because we have weighed the conflicting evidence and believe that the trial court wrongfully passed upon the conflict, but because Stall's testimony and that offered in support thereof, when taken alone, does not present a consistent and reasonable state of facts entitling him to relief. We are not bound to accept isolated statements of witnesses as sufficient to make out a case, when they are inconsistent with one another, and not reasonably reconcilable with known and established facts.

REVERSED AND DISMISSED.

OAKLAND HOME INSURANCE COMPANY V. BANK OF COMMERCE OF GRAND ISLAND.

FILED MARCH 18, 1896. No. 6363.

1. **Insurance:** OWNERSHIP OF PROPERTY: QUESTION FOR JURY. In an action upon an insurance policy, one defense being that the insurer had parted with all interest in the insured property before the policy was issued, the question whether the insured was at the time the policy issued the owner of the property, was on conflicting evidence properly submitted to the jury. *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb., 537, followed.

2. **Transfer of Property:** ASSIGNMENT OF POLICY: RIGHTS OF MORTGAGEE. The policy was sued on by the Bank of

Commerce, a mortgagee of the premises. It was issued to the owner, J., and contained provisions whereunder a transfer of the property, or an assignment of the policy without consent of the insurer, avoided the policy. Before the loss, J. had conveyed the premises to B., and assigned the policy to him. The insurer pleaded this conveyance and assignment without consent of the insurer, as a defense. Attached to the policy was the following: "Loss, if any, under this policy, payable to the Bank of Commerce, or its assigns, as its mortgage interest may then appear." In the body of the policy was the following: "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest, as shall be written upon, attached or appended hereto." *Held*, (*a*) That these two clauses should be construed together; (*b*) that the clause in the body of the policy rendered conditions expressed in the policy applicable to the interest of a mortgagee having rights thereunder, only where there was written upon, attached or appended to the policy some provision or condition rendering such conditions of the policy applicable, and defining the manner of their applicability; (*c*) that the clause attached to the policy containing no such provision or condition, the mortgagee was entitled to recover, notwithstanding conditions in the policy which might defeat a recovery by the owner.

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

The facts are stated in the opinion.

W. H. Platt and *Ralph Platt*, for plaintiff in error:

The assured, J. Nelson Jones, has no standing or rights under the policy. The pleadings and evidence show that long prior to the loss he parted with all interest he may have had in the

property. (*McCluskey v. Providence Washington Ins. Co.*, 126 Mass., 306; *Ætna Ins. Co. v. Tyler*, 16 Wend. [N. Y.], 385; *Wilson v. Hill*, 3 Met. [Mass.], 66.)

There was no valid assignment of the policy from Jones to the owner of the property at the time of the loss. The company is not liable to such owner. (*Jecko v. St. Louis Fire & Marine Ins. Co.*, 7 Mo. App., 308; *Morrison v. Tennessee Marine & Fire Ins. Co.*, 59 Am. Dec. [Mo.], 299.)

The company is not liable to the Bank of Commerce to which the loss, if any, was made payable. (*Carpenter v. Providence Washington Ins. Co.*, 16 Pet. [U. S.], 500; *Loring v. Manufacturers Ins. Co.*, 8 Gray [Mass.], 28; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y., 391; *Davis v. German American Ins. Co.*, 135 Mass., 251.)

Reference is also made to the following cases: *Friemensdorf v. Watertown Ins. Co.*, 1 Fed. Rep., 68; *Bates v. Equitable Fire Ins. Co.*, 10 Wall. [U. S.], 33; *Illinois Mutual Fire Ins. Co. v. Fix*, 53 Ill., 151; *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y., 401; *Pupke v. Resolute Fire Ins. Co.*, 17 Wis., 378.

W. H. Thompson and *W. A. Prince, contra.*

References: *Wilson v. Conway Fire Ins. Co.*, 4 R. I., 141; *Columbia Ins. Co. v. Cooper*, 50 Pa. St., 331; *Neilson v. Harford*, 8 M. & W. [Eng.], 813; *Boner v. Mahle*, 3 La. Ann., 600; *Watrous v. McKie*, 54 Tex., 65.

IRVINE, C.

This was an action on a policy of fire insurance written in favor of J. Nelson Jones, and having attached an instrument signed by the agents issu-

ing the policy, the essential part of which is as follows: "Loss, if any, under this policy payable to the Bank of Commerce, or its assigns, as its mortgage interest may then appear." The policy and the slip attached both bore date October 17, 1889, and were both executed on that day. The policy ran for five years from that date. Not far from the time when the policy was issued, the premises insured were conveyed to one Brownfield, and an assignment to Brownfield signed by Jones appears on the policy. This bears two dates,—October 17, 1889, and December 12, 1890. No written approval of this assignment appears on the policy. The Bank of Commerce was the owner of mortgages on the premises to the full amount of the policy. A total loss occurred October 19, 1890. In the district court there was a verdict and judgment for the plaintiff, which is defendant in error, to reverse which the insurance company brings the case here.

The contentions of the insurance company, based on proper assignments of error, are as follows:

First—That the conveyance to Brownfield was prior to the issuance of the policy, and that therefore Jones had no insurable interest, and the policy never took effect.

Second—That under the conditions of the policy it was avoided by the attempted assignment thereof before loss without the consent of the company.

Third—That what is styled the "loss payable clause" attached to the policy was merely a direction as to who should receive the proceeds in case of loss; that it was subject to all the conditions of the policy, and the policy not being

available to Jones because of a want of insurable interest by his conveyance of the property and assignment of the policy to Brownfield, the bank, deriving its rights entirely through Jones, cannot recover.

We shall consider these several propositions without special reference to the assignments of error on which they are based.

As to the first point, it is enough to say that there was evidence sufficient to sustain a finding that while negotiations had been carried on before the policy was issued, looking toward a sale of the property by Jones to Brownfield, and while a deed of conveyance had actually been executed, the deed had not been delivered and the contract of sale had not assumed an obligatory form until some time after the issuance of the policy. This issue was submitted to the jury under instructions, part of which were not excepted to by the company. It was properly a question for the jury. (*Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb., 537.) The verdict on this issue cannot be disturbed, and it must therefore be taken as settled that Jones was the owner when the policy was issued.

We may pass over the second contention and assume, for the purposes of this case, that the subsequent transfer of the property and assignment of the policy by Jones to Brownfield would be sufficient to prevent a recovery by Jones and would vest no right in Brownfield. We do not think the soundness of this contention is necessarily involved in the decision of the case.

We therefore go directly to the claim of the plaintiff. The "loss payable clause" has already been quoted. In the body of the policy appears

the following: "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest, as shall be written upon, attached, or appended hereto." That the plaintiff did have an interest as mortgagee in the subject of insurance, and that this interest was created with the consent of the company is indisputable. The question is as to the construction of the latter portion of this clause. There can be no doubt that the "loss payable clause," and this clause quoted from the body of the policy, must be construed together. It is the contention of the insurance company, in effect, that the "loss payable clause" was not an independent contract between the mortgagee and the insurer, but was simply a direction as to payment, and that the mortgagee's rights must be derived through those of the owner, in spite of the clause in the body of the policy, which it claims should be so construed as to make all the conditions and provisions of the policy binding upon the mortgagee except as other stipulations in the "loss payable clause" might vary those provisions and conditions. If the language were ambiguous in its grammatical signification, we would be compelled to adopt that construction which would be more favorable to the insured. Insurance policies are not contracts deliberated upon, clause by clause, and effected after detailed negotiations between insured and insurer. The actual

contract is for the most part entered into before the policy is delivered. The policy is proposed and tendered by the insurer on its own form. If it seeks to protect itself by a condition it should clearly express that condition by the policy. If it resorts to ambiguous language, under familiar rules of construction, such language must be taken most strongly against the party proposing it and in favor of the other party. But we do not see any marked ambiguity in this policy. We repeat the clause, omitting words not essential to its construction on the feature before us. "If * * * an interest * * * shall exist in favor of a mortgagee * * * the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto." "The conditions hereinbefore contained shall apply," not absolutely, but in a qualified way, "in the manner expressed in such provisions and conditions * * * * as shall be written upon, attached, or appended hereto;"—that is, in order to render the general conditions of the policy applicable to the interest of a mortgagee there must be written upon, attached, or appended to the policy, relating to the interest of the mortgagee, some provisions or conditions expressing in what manner the conditions of the policy shall be so applicable. Neither in the "loss payable clause" nor otherwise by writing upon, attached to, or appended to the policy was there any provision or condition carrying the conditions of the policy into such clause or rendering them in any manner applicable. The authorities cited by plaintiff in error are not op-

posed to this construction. In some cases the mortgage clause was not executed until after the policy had become voidable, and was then issued without new consideration while the insurer was ignorant of the facts avoiding the policy. In other cases the "loss payable clause" stood alone without provision in the policy as to its meaning or extent. In this case, in view of the clause in the policy, the "loss payable clause" must be taken as if it contained an express provision insuring the mortgagee without regard to the conditions imposed upon the owner in the body of the policy. So construed, the case falls within the rule announced in the *Phenix Ins. Co. v. Omaha Loan & Trust Co.*, 41 Neb., 834. As we view the case, the mortgagee was entitled to recover to the extent of its interest without regard to acts or omissions of the owner which might, as between the insurer and such owner, defeat a recovery.

JUDGMENT AFFIRMED.

HARRISON, J., not sitting.

DUDLEY M. STEELE ET AL., APPELLANTS, V. KEARNEY NATIONAL BANK, APPELLEE, IMPLEADED WITH MEYER & RAAPKE ET AL., APPELLANTS.

FILED APRIL 7, 1896. No. 6383.

1. **Partnership: INSOLVENCY: ASSETS: TRUST FUNDS.** The assets of an insolvent partnership will in equity be treated as a trust fund for the payment of the firm creditors, and cannot be applied in satisfaction of the personal obligations of the individual partners to the prejudice of those to whom it equitably belongs.

2. ———: CHATTEL MORTGAGES: CREDITORS' BILL. Evidence examined and *held* to sustain the finding of the district court that the mortgage assailed was given to secure a partnership indebtedness.

APPEAL from the district court of Buffalo county. Heard below before HOLCOMB, J.

The opinion contains a statement of the case.

Dryden & Main, for appellants:

An insolvent partnership cannot secure with partnership assets an individual debt of one of the members of the firm to the exclusion of firm creditors; and an attempt to do so renders the entire security void, unless, from facts shown by the security itself, the individual and firm indebtedness can be separated. (*Keith v. Armstrong*, 26 N. W. Rep. [Wis.], 446; *Menagh v. Whitewell*, 52 N. Y., 146; *Arnold v. Hagerman*, 14 Am. St. Rep. [N. J.], 719; *Clements v. Jessup*, 36 N. J. Eq., 569; *Wilson v. Robertson*, 21 N. Y., 589; *Keith v. Fink*, 47 Ill., 272; *Heineman v. Hart*, 20 N. W. Rep. [Mich.], 792; *Phillips v. Ames*, 87 Mass., 185; *Patterson v. Seaton*, 28 N. W. Rep. [Ia.], 598; *Morehead v. Adams*, 18 Neb., 573; *Caldwell v. Bloomington Mfg. Co.*, 17 Neb., 489; *Roop v. Herron*, 15 Neb., 80; *Smith v. Jones*, 18 Neb., 483; *Grover v. Wakeman*, 11 Wend. [N. Y.], 187.)

Charles B. Keller, also for appellants.

In an argument in favor of the point already stated reference was made to the following cases: *Wallach v. Wylie*, 28 Kan., 138; *Baldwin v. Short*, 125 N. Y., 553; *Denny v. Dana*, 2 Cush. [Mass.], 160; *Clark v. Lee*, 78 Mich., 221; *State v. Hope*, 102 Mo.,

410; *Russell v. Winne*, 37 N. Y., 591; *School District v. Randall*, 5 Neb., 411.

Marston & Nevius, contra.

POST, C. J.

This is an appeal from a decree of the district court for Buffalo county. The proceeding below was in the nature of a creditors' bill by the appellants, Dudley M. Steele & Co., to set aside a chattel mortgage executed by the firm of Hayden & Pargeter in favor of the appellee, Kearney National Bank, under date of July 13, 1891, covering a stock of general merchandise in the city of Kearney, to secure an alleged indebtedness of the mortgagors in the sum of $2,990. Meyer & Raapke and Groneweg & Schoentgen, attaching creditors of Hayden & Pargeter, were made defendants and join with the plaintiffs in prosecuting an appeal from the decree of the district court in favor of the defendant bank.

The mortgage above mentioned is assailed upon the ground that the amount therein named, $2,990, is largely in excess of the actual indebtedness of Hayden & Pargeter to the bank, and includes the sum of $1,300 and over of the personal obligation of Richard Pargeter, a member of said firm. We agree with counsel for appellants that the assets of an insolvent partnership will in a court of equity be treated as a trust fund for the payment of the firm creditors, and that one partner will not be permitted to divert such property to the prejudice of those to whom it equitably belongs. (*Ripley v. Board of County Commissioners of Gage County*, 3 Neb., 397; *Sample v. Hale*, 34 Neb., 220; *Lyman v. City of Lincoln*, 38 Neb., 794; *Perkins*

v. Butler County, 46 Neb., 314.) But that question was distinctly raised by the pleadings and proofs, and the finding of the court upon the issue thus presented is entitled to the same consideration as would be accorded the verdict of a jury. (*Bank of Cass County v. Morrison*, 17 Neb., 341; *Bickel v. McAleer*, 35 Neb., 515.)

The circumstance chiefly relied upon in support of the appellants' claim is that the amount of a note for $1,000, executed by Mr. Pargeter to the bank January 4, 1888, and secured by mortgage upon certain lands in Sherman county, was included in the alleged indebtedness of Hayden & Pargeter. It appears, however, from the testimony of Mr. Pargeter given in behalf of appellants that the $1,000 note represented money borrowed for said firm and used in the partnership business; that it was, in short, not his individual indebtedness, but the debt of Hayden & Pargeter, and that the note and mortgage executed by him were intended as security for said firm, in which he is corroborated by Mr. Tillson, cashier of the bank. This evidence is quite sufficient to sustain the finding of the district court. The decree will therefore be

AFFIRMED.

JOHN C. GRISWOLD V. WILLIAM F. HUTCHINSON ET AL.

FILED APRIL 7, 1896. No. 6449.

Physicians and Surgeons: MALPRACTICE. The law does not exact from physicians and surgeons the utmost degree of care, or the highest attainable skill in the practice of

their profession, although they, by virtue of their relation toward patients, impliedly engage that they possess ordinary knowledge and skill, and that they will, in the course of their employment, exercise such proper care and attention as may be reasonably expected from members of their profession. (*Hewitt v. Eisenbart*, 36 Neb., 794.)

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

Campbell & Wallis, H. C. Brome, and *Clarke Gapin*, for plaintiff in error.

John S. Robinson and *W. E. Reed, contra.*

POST, C. J.

On the trial of this cause in the district court for Madison county judgment was entered in favor of the defendants therein upon a verdict rendered in accordance with the peremptory instruction of the court, and which it is sought to reverse by means of this proceeding.

According to the allegations of the petition below the plaintiff therein employed the defendants, who are practicing physicians and surgeons, to treat his (plaintiff's) wife for an ailment pronounced by said defendants to be an ovarian tumor; that acting upon the advice of the defendants he accompanied his said wife from his home in Madison county to the city of Omaha, where, after an examination of her person, they (defendants) advised an operation for the removal of said supposed tumor; that relying upon the knowledge and skill of defendants, and believing that they had made a careful and proper examination of the person of his wife, and believing such operation to be necessary in order to save her life, he entered

into a contract whereby he agreed to pay therefor the sum of $200; that the defendants thereupon proceeded in the absence of the plaintiff to perform said operation by making an incision in his wife's abdomen, and advising him and his said wife that such operation had been entirely successful and that they had removed from the person of the latter an ovarian tumor of large size, whereupon he paid to the defendants the sum of $200, the agreed price for their services in that behalf; that he paid out and expended in caring for his wife in consequence of said operation the sum of $79, and that his own time thus necessarily employed is of the value of $40. He alleges further that subsequent to the payment of the defendants' bill he learned that his wife was not suffering from an ovarian tumor, and that the defendants had not removed from her person a tumor of any kind, but that her only ailment was a fibroid tumor of the uterus, which fact, although discovered by the defendants upon the opening of her abdomen, was by them fraudulently concealed from him until about the time of the commencement of this action; that if the examination of his wife's person had been conducted with reasonable care and skill the nature and extent of her ailment would have been disclosed, but that such examination was carelessly, negligently, and improperly made by the defendants, and that in consequence of such wrongful and negligent acts his wife has been permanently injured in health, to his damage in the loss of her service, etc. The defendants answered separately, Doctor Hutchinson admitting that he is a practicing physician and surgeon residing in Madison county; that Elizabeth Griswold, mentioned in the petition, is

the wife of the plaintiff, and denying the other allegations thereof. Doctor Foote, after an admission in substantially the same language as that employed by his co-defendant, admits the performance of an operation upon the person of the plaintiff's wife, and the receipt therefor of the sum of $200 as alleged, but denies the charge of negligence, and alleges that said operation "was skillfully performed, and that the same was necessary to a correct understanding of the ailment from which the said Elizabeth Griswold was suffering." The plaintiff, by way of reply, denied the allegations of new matter in the respective answers.

One proposition clearly established by the record is that the defendants were mistaken respecting the cause of Mrs. Griswold's affliction, which, according to their diagnosis, was an ovarian tumor, but which was, as alleged, during the operation mentioned discovered to be a fibroid tumor of the uterus. The evidence bearing directly upon that subject was given by Dr. Sprague, who, by invitation of defendants, witnessed the operation, and who testified, in substance, that no tumor was removed from the person of the patient; also, by Mrs. Brown, proprietress of the hospital in the city of Omaha to which Mrs. Griswold had been taken for the purpose of the operation, who testified to a conversation with Dr. Foote shortly thereafter, in which the latter remarked that the only tumors discovered during the operation were immovable fibroid tumors of the uterus, and in which conversation he requested the witness to make no statement concerning the subject to Mrs. Griswold's friends. It is shown that Dr. Hutchinson made a super-

ficial examination when first consulted upon the subject, which satisfied him respecting the cause of the illness from which Mrs. Griswold was suffering, and that the only other examination was made by Dr. Foote in the presence of his co-defendant the day preceding the operation. As to what transpired at the time last mentioned the plaintiff testified: "Dr. Foote made the examination. He first placed her (the patient) in his chair and exposed the abdomen, and with his hands pressed in every way, pushing and working the abdomen in every possible way. Then he took one hand and tapped, and then the other, then one side and then the other, and then from below. That is all the external examination he made. Then after that he inserted his finger in the vagina and seemed to be feeling of the uterus. * * * I think the first remark was made by Dr. Foote to Dr. Hutchinson. He said, 'Doctor, it is just as you said.' My wife next asked the question 'What is it?' He said, 'It is an ovarian tumor, no doubt about it.' " The examination referred to by the witness did not consume to exceed ten minutes and was made without the assistance of instruments or of an anæsthetic of any kind. The plaintiff called as witnesses several physicians and surgeons, who concur in the opinion that an operation should not be attempted for a suspected uterine or ovarian tumor without a most thorough examination of the person of the patient; and they agree that in all cases of doubt, where the theory of pregnancy is excluded, the uterus should be explored by means of a sound in order to ascertain the depth of that organ. One witness, Dr. Crummer, testified as follows:

Q. Is there any case except in which the tumor

has attained such a size where the life of the patient demands its immediate removal, in which it can be said that the sounding of the uterus might be omitted from the diagnosis of the case and still an attempt be made to perform an operation?

A. No, I think there would be nothing to justify an operation in the case except something that would threaten the life of the patient. * * * A complete and thorough examination of the case where an abdominal tumor is suspected would be by several methods; first, by palpation, which simply means the use of the hands over the abdomen; a feeling of the parts by careful manipulation of the hands over the abdomen, and percussion or tapping of the parts with the fingers externally, or with some instrument to get the sounds elicited by percussion; an examination of the parts that can be reached through the vagina; by measurement of the abdomen as to the breadth and height of the mass; an examination with the vaginal speculum; and in many other cases, and in all case of doubt where pregnancy is absent, the use of the uterine sound. * * *

Q. Are the methods of examination you have suggested necessary and indispensable to a careful and proper examination of the patient where pregnancy does not exist and the presence of a tumor is suspected?

A. Yes, sir; of course where there is a prospect of an operation, it always demands a more careful examination if possible than a man would make simply for the purpose of trying to tell the patient in a general way what the matter is. The very fact that a man is going to make an operation increases his responsibility in diagnosing the case,

and he had better make a mistake where he is not going to operate than where he is.

Dr. Somers, another witness, testified that the surgeon should be able, by means of conjoined manipulation, *i. e.*, a digital exploration of the vagina with one hand and the manipulation of the abdomen with the other to determine "to a tolerable certainty" the size and location of the tumor, and whether it is liquid or solid; that if connected with the uterus it is pretty certain to be solid, and if connected with the ovaries it is pretty certain to be a cyst.

It is not pretended that there was in this instance any suspicion of pregnancy, and no objection existed on that ground to the exploration of the uterus in determining the location and character of the tumorous growth. Nor can it on the record before us be contended that this case is within the other exception mentioned by Dr. Crummer, viz., where the condition of the patient is so critical as to require heroic treatment, and where an operation is justifiable as a last resort without the precautionary sounding of the uterus. The testimony of the medical witnesses tends therefore directly to prove the wrong alleged, viz., negligence in the examination of the plaintiff's wife and the consequent unfortunate result thereof. We agree with counsel for defendants that physicians and surgeons are not required to exercise the utmost degree of care or to possess the highest attainable skill in their profession. They do, however, by virtue of the relation assumed by them toward patients, impliedly engage that they possess ordinary skill and that they will in the course of their employment exercise such necessary and proper care and

attention as may reasonably be expected from members of their profession under like circumstances. (*Barney v. Pinkham*, 29 Neb., 350; *Hewitt v. Eisenbart*, 36 Neb., 794; *Smothers v. Hanks*, 34 Ia., 286; *Branner v. Stormont*, 9 Kan., 51; *Ely v. Wilbur*, 49 N. J. Law, 685; *Small v. Howard*, 128 Mass., 131; Ordronaux, Medical Jurisprudence, 42.) The rule above stated is not limited in its application to physicians and surgeons, but applies with equal force to the members of all professions, including attorneys and counselors at law, who assume to possess technical knowledge or skill.

There being competent proof upon the vital issue of the case and tending to sustain the cause of action charged against one of the defendants, a question was presented for submission to the jury, and the direction in favor of both defendants at the conclusion of the plaintiff's evidence was error calling for a reversal of the judgment so far at least as it applies to the defendant Dr. Foote. It remains to be determined whether the court erred in directing a verdict in favor of Dr. Hutchinson. Upon that question the conclusion reached from an examination of the record is that the engagement and responsibility of the last named defendant terminated with the employment of Dr. Foote. When first consulted upon the subject, he advised the plaintiff to consult some physician who was a specialist in that line, saying that he did not consider himself qualified to perform the required operation. To the question "Did Dr. Hutchinson say who you had better go to?" the plaintiff answered, "I don't think he advised any one very strong. The idea was to get the best doctor." He testified further that

just before the operation he made inquiry respecting Dr. Foote's charges, to which the latter answered, "The ordinary fee for such an operation is from $300 to $500, but Dr. Hutchinson tells me you are a poor man and work for your living. I have concluded, therefore, to make it $200." There was some talk at that time about security for Dr. Foote's bill, the plaintiff not being provided with ready money, but before it was given Dr. Hutchinson renewed an offer previously made to advance the necessary funds on the plaintiff's personal note, which offer was accepted and the money thus advanced was, a few days later, by the plaintiff remitted to Dr. Foote at Omaha. Dr. Hutchinson's generosity in that regard, and the interest shown by him in the case, finds a ready explanation in the intimate, personal, and church relations existing between himself and the plaintiff's family. His attitude toward the case after surrendering the patient to the care and treatment of Dr. Foote was that of a friend and counselor only, and in no sense that of a physician or surgeon. The direction in his favor was accordingly right and the judgment as to him will be affirmed. Judgment for defendant Hutchinson affirmed. Judgment for defendant Foote

REVERSED.

C. A. MANKER v. L. P. SINE.

FILED APRIL 7, 1896. No. 6424.

1. **Satisfaction of Judgment.** The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record.

2. **Replevin:** ALTERNATIVE JUDGMENT: SATISFACTION. The plaintiff against whom in an action of replevin judgment had been rendered for the return of the property in dispute, or for the value thereof in case it could not be returned, paid the amount of costs assessed against him, also the damage awarded for the wrongful detention of the property, and thereupon made a sufficient tender of said property to the defendant. *Held*, A discharge of the alternative judgment, and that satisfaction thereof should on his motion be entered of record.

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

Allen Beeson, for plaintiff in error.

Wooley & Gibson, contra.

POST, C. J.

This cause was before us at a previous term, at which time a judgment for the defendant in error was reversed, with directions to the district court for Cass county to enter an alternative judgment upon the verdict of the jury for a return of the property replevied, or for its value in case a return thereof could not be had. (See *Manker v. Sine*, 35 Neb., 746.) Judgment having been rendered in accordance with the mandate of this court, the plaintiff in error, who is also plaintiff below, tendered to the defendant the property in

controversy at the place where it was taken from the latter by virtue of the order of replevin. He also paid to the clerk of the district court the sum of $24.63, costs assessed against him, and the further sum of $1, being the damage awarded by the jury for the wrongful detention of said property, and thereupon, by motion, sought to have the alternative judgment against him discharged and satisfaction thereof entered of record. The evidence upon which said motion was heard and determined is not made a part of the record, although the facts as found are substantially as alleged in the motion, judged by the following entry: "And now on this 29th day of May, 1893, it being one of the days of the regular 1893 term of this court, this cause came on for decision on the motion of the plaintiff for a cancellation of the judgment herein, and the court, being well and fully advised in the premises, doth find that the plaintiff, after the judgment was rendered upon the mandate from the supreme court in this cause, tendered to defendant the property replevied in this cause, and made said tender at the place where said property was taken from the defendant under the writ of replevin, and that plaintiff offered to return said property to defendant, and that plaintiff has made a sufficient tender of said property to defendant, but the court being of the opinion that there is no authority in this proceeding to cancel the alternative judgment, the court refuses to interfere with said judgment, to which ruling and action the plaintiff and defendant each excepts."

The object of this proceeding is to secure a reversal of the foregoing order and for the remanding of the cause in order that the judgment de-

scribed may be satisfied of record under the direction of the district court. The finding being in favor of the plaintiff as to the alleged tender of the property, and payment of the costs and damage for the wrongful detention of such property being undisputed, our investigation is confined to a single question of practice, viz., whether the judgment defendant may in such case proceed in a summary manner by motion for the satisfaction of the judgment against him, or whether his remedy is by bill in equity or other appropriate action. It is by section 322, Code of Civil Procedure, among other things provided that "whenever any judgment is paid off and discharged, the clerk shall enter such fact upon the judgment record in a column provided for that purpose." Courts of general jurisdiction have an inherent supervisory control over their judgments and decrees. They may award process for the enforcement of their judgments and orders, and may, whenever necessary in order to correct or prevent abuse thereof, stay or quash any execution or other writ issued by their authority. The clerk is but the hand of the court, and whatever he is required to do in the discharge of his duties toward litigants or others may be enforced by the command of the court; and the duty to satisfy of record a judgment or decree, upon full performance by the party bound thereby, follows as a necessary incident of the power of the court to enforce its orders. (See *Briggs v. Thompson*, 20 Johns. [N. Y.], 294; *Shaw v. Dwight*, 27 N. Y., 244; *Harper v. Graham*, 20 O., 105; *Lough v. Pitman*, 26 Minn., 345; Black, Judgments, sec. 1014 *et seq.*) That an action may, in a proper case, be maintained

for the cancellation of a judgment after payment in full, or on account of facts amounting to an accord and satisfaction, is not doubted, although the remedy by that means is at most cumulative. The plaintiff in the case at bar has, according to the finding of the district court, satisfied the judgment by a return of the property replevied. True, it may be inferred from the record that the defendant, for reasons not disclosed, refused to receive the property when returned in obedience to the judgment in his favor, but that fact cannot, in view of the finding of the district court, be regarded as material. The question is not whether the defendant in a replevin suit may, upon any conceivable state of facts, refuse to accept the property in dispute when tendered pursuant to an alternative judgment in his favor and afterward assert a substantial right thereunder, but whether, upon the facts of the case before us, the return of the property operated to discharge the alternative judgment. That question must, as we have seen, be answered in the affirmative. It follows that the order complained of should be reversed and the cause remanded with directions to satisfy of record the judgment herein mentioned.

REVERSED.

JOHN W. ALLSMAN V. WILLIAM DALEY.

FILED APRIL 7, 1896. No. 6465.

Sufficiency of Evidence: REVIEW. This case presents questions of fact only, and the judgment, being supported by sufficient evidence, should not be disturbed.

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

Abbott & Abbott, for plaintiff in error.

Hastings & McGintie, *contra*.

POST, C. J.

The defendant in error, plaintiff below, recovered a judgment against the plaintiff in error in the sum of $63.35, upon a finding of the district court for Saline county, and which it is sought to reverse by means of this proceeding. The finding referred to is, in substance, that one Judy, with the knowledge and approval of the defendant below, and without the plaintiff's consent, took possession of a sulky, the property of the latter, to be used during certain races then impending; that said sulky, while so in the possession of the said Judy, was, through the negligence and improper driving of the latter, damaged to the amount of $58.15, and for which, with interest, judgment was ordered.

The sole question presented by the record is that of the sufficiency of the evidence to sustain the finding of the district court. The utmost that can be claimed by the plaintiff in error is that the finding is against the weight of the evidence; but that proposition cannot be conceded. On the contrary, the finding and judgment appear to be supported by the decided weight of the evidence and must be

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. M. C. STEEL, RECEIVER OF BEATRICE RAPID TRANSIT & POWER COMPANY.

FILED APRIL 7, 1896. No. 6355.

1. **Railroad Companies:** EASEMENTS: STREET CROSSINGS. An ordinance authorizing the crossing of the streets of a city by the tracks of a railroad company confers upon the corporation therein named no exclusive use of such crossing, but a use to be enjoyed in common with the general public.

2. ———: ———: STREET RAILWAYS: DAMAGES. A railroad company which has by ordinance acquired a permanent easement in the streets of a city, is not entitled to compensation from a street railway company as a condition to the crossing of its tracks by the latter under a grant of power from the city.

3. ———: ———. *Calvert v. State*, 34 Neb., 616, distinguished.

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

John H. Ames, *A. Hazlett*, and *J. W. Deweese*, for plaintiff in error:

The defendant should be required to compensate plaintiff for damages as a condition precedent to constructing and using a crossing over the latter's right of way. (*Nichols v. Ann Arbor & Y. St. R. Co.*, 87 Mich., 361; *Ford v. Santa Cruz R. Co.*, 59 Cal., 290; *McQuaid v. Portland & V. R. Co.*, 18 Ore., 237; *Sixth Avenue R. Co. v. Kerr*, 72 N. Y., 330; *Fidelity Trust & Safety Vault Co. v. Mobile St. R. Co.*, 53 Fed. Rep., 687; *In re Rochester Water Commissioners*, 66 N. Y., 413; *People v. Dutchess & C. R. Co.*, 58 N. Y., 152; *People v. Chicago & A. R. Co.*, 67 Ill., 118; *In re Trenton Water Power Co.*, 20

N. J. Law, 659; *People v. Troy & B. R. Co.*, 37 How. Pr. [N. Y.], 427; *State v. Northern R. Co.*, 9 Rich. [S. Car.], 247; *State v. Minneapolis & St. L. R. Co.*, 39 Minn., 219; *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Biss. [U. S.], 219; *Little Miami & C. & X. R. Co. v. City of Dayton*, 23 O. St., 510; *In re City of Buffalo*, 68 N. Y., 167; *Milwaukee & St. P. R. Co. v. City of Faribault*, 23 Minn., 167; *Railroad Company's Appeal*, 93 Pa. St., 150, 122 Pa. St., 511; *Pennsylvania R. Co. v. Braddock Electric R. Co.*, 25 Atl. Rep. [Pa.], 780; *Grand Rapids N. & L. S. R. Co. v. Grand Rapids & I. R. Co.*, 35 Mich., 265; *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.*, 62 Mich., 564; *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich., 350; *People v. Lake Shore & M. S. R. Co.*, 52 Mich., 277; *St. Paul, M. & M. R. Co. v. City of Minneapolis*, 35 Minn., 141.)

J. E. Cobbey, contra.

References: *Chicago, B. & Q. R. Co. v. City of Quincy*, 28 N. E. Rep. [Ill.], 1069; *Highland Avenue & B. R. Co. v. Birmingham U. R. Co.*, 9 So. Rep. [Ala.], 569; *Buffalo, R. & P. R. Co. v. Du Bois T. P. R. Co.*, 24 Atl. Rep. [Pa.], 181; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 40 N. E. Rep. [Ill.], 1008; *Kansas City, St. J. & C. B. R. Co. v. St. Joseph T. R. Co.*, 3 L. R. A. [Mo.], 240; *Omaha Horse R. Co. v. Cable Tramway Co.*, 30 Fed. Rep., 331; *Owensborough & W. R. Co. v. Sutton*, 13 S. W. Rep. [Ky.], 1086; *Houston & T. C. R. Co. v. Carson*, 1 S. W. Rep. [Tex.], 107; *Dubach v. Hannibal & St. J. R. Co.*, 1 S. W. Rep. [Mo.], 86.

POST, C. J.

A question distinctly presented by this record is whether a steam railroad company, which has

by ordinance acquired a permanent easement in the streets of a city, is entitled to compensation from a street railway company as a condition to the crossing of its tracks by the latter under a grant of power from the city. Adjudications directly in point are by no means numerous, although the question appears, whenever presented for determination, to have been resolved in the negative as an independent proposition, unaffected by the inquiry whether street car tracks are, or are not, an additional burden upon adjoining private property.

In *New York, N. H. & H. R. Co. v. Bridgeport Traction Co.*, 32 Atl. Rep. [Conn.], 953, the identical question was presented upon the application of the plaintiff for an injunction to restrain the threatened crossing by the defendant of its tracks in the city of Bridgeport. In the opinion of the court reversing the decree below for the plaintiff, this language is used: "It is further insisted that these special grants, if otherwise effectual, give the defendant no right to construct the crossing without first making compensation for the direct damage it will do to the plaintiff's property. The injunction was asked to prevent a threatened obstruction of the plaintiff's right of way. It is not alleged or found that it owns the fee of the highway. It has only a right to cross it at grade. The defendant's tracks are laid upon the highway by the authority of the state and as a highway for public travel. We are not called upon to consider whether electric cars impose any additional burden upon land occupied for a highway for which the owner of such land can claim compensation. The plaintiff is not in a position to raise that question. It claims

that the proposed crossing at Fairfield avenue will affect the safe and beneficial use of its right of way at that point, and thereby impair the general value of its franchises and property. But it holds these subject to the police power of the state, under which the use of highways for all purposes of public travel is fully within the control of the legislature."

The supreme court of Indiana, in *Chicago & C. T. R. Co. v. Whiting, H. & E. C. St. R. Co.*, 139 Ind., 297, affirmed a decree of the circuit court restraining the defendant below—a steam railroad company—from interfering with the construction of the plaintiff's street car line across its tracks in the city of Hammond. Referring to the question of compensation it is there said: "Appellant contends that this will be a burden and a hindrance to the free and unobstructed use of the appellant's steam railway, which it is claimed is a taking of private property without just compensation, in violation of the constitution. True, it is a hindrance and an obstruction to the use of appellant's steam railway. But having obtained its right of way subject to the burden of the easement in the public generally, and the street railway being entitled to the use of that easement, all the rights appellant obtained in the street for its steam railway were subject to the right of the street railway to use the street. In short, the appellant's rights obtained in the use of the streets for its steam railway were subject to the burden of the appellee's use thereof, in the ordinary and proper manner, for its street railway. The complaint shows that appellee was only proposing to use the streets at the crossings, in the ordinary and in a proper manner, for the

construction of street railway crossings, and that it had been hindered and obstructed therein by the appellant by the use of force. It would therefore not be a taking of private property without just compensation, because it does not propose to take from appellant anything it ever owned. It never owned its right of way over and across the streets named free from the burden of the public easement, a part of which belongs to the appellee, the street railway."

In *Du Bois T. P. R. Co. v. Buffalo R. & P. R. Co.*, 149 Pa. St., 1, the supreme court approve of an opinion by the common pleas judge, from which we quote the following: "There is therefore no such injury or damage done to the respondent's rights as are the subject of compensation in damages. The crossing of its track by the passenger railway company gives no greater right to damages, in the view we take of the case, than it would have if the claim was made against an omnibus line."

The same question was carefully considered by the supreme court of Illinois in *Chicago, B. & Q. R. Co. v. West Chicago S. R. Co.*, 156 Ill., 255, in which it is held that an ordinance of the city of Chicago authorizing the plaintiff to lay and operate its tracks across certain streets did not confer upon it an exclusive use of such crossings, but a use thereof to be enjoyed in common with the public; also that a railroad company which has acquired a permanent easement in the streets crossed by its tracks is not entitled to compensation for the crossing of such tracks by a street railway company under permission from the city, such easement being subordinate to the rights of the public, and the use of street cars being a le-

gitimate exercise of the public right is in no sense a violation thereof.

There are to be found many cases which rest upon the same principle as the foregoing, and in harmony therewith, but involving controversies between railroad companies or between street railway companies claiming superior easements in public streets. (See *Kansas City, St. J. & C. B. R. Co. v. St. Joseph T. R. Co.*, 97 Mo., 457; *Highland Avenue & B. R. Co. v. Birmingham U. R. Co.*, 9 So. Rep. [Ala.], 568; *Market Street R. Co. v. Central R. Co.*, 51 Cal., 583; *Omaha Horse R. Co. v. Cable Tramway Co.*, 32 Fed. Rep., 729.)

Calvert v. State, 34 Neb., 616, cited as opposed to the conclusion announced, is not in point, as that case turned upon an entirely different question. True the subject here involved was there suggested, although incidentally, as shown by the following language of MAXWELL, C. J., on page 632: "Whether the right exists to construct such a track across the network of railway tracks where trains are being constantly made up, we do not decide, because the question is not presented."

The doctrine of the cases cited, and which to us appears altogether reasonable and sound, is that a railroad company acquires no exclusive use of streets crossed by its tracks with the consent of the city or other municipal body, but must enjoy the right so conferred in common with the general public; that it is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interests and necessities; and that any mere inconvenience suffered by it on account of the crossing of its lines

by the tracks of street railways by permission of the proper authorities is *damnum absque injuria.*

There are other questions presented by the record and other sufficient reasons for affirming the decree of the district court, but which, in view of the conclusion above stated, need not be noticed.

AFFIRMED.

FARMERS & MERCHANTS INSURANCE COMPANY V. JACOB PETERSON.

FILED APRIL 7, 1896. No. 6474.

1. **Insurance:** TITLE OF INSURED: EVIDENCE. A policy of insurance is *prima facie* an admission, by the insurers, of the title of the insured to the property embraced in the policy. *Western Horse & Cattle Ins. Co. v. Scheidle,* 18 Neb., 495, followed.

2. ———: INCUMBRANCES: PLEADING. In an action on a policy of insurance, a breach of the contract thereof, such as incumbering the property, is a matter of defense to be pleaded and proved by the company, and it is not incumbent upon the insured to negative the fact in the first instance either in pleading or proof.

3. ———: ———: ———. The reply in this case *held* to admit that the provision for forfeiture of the insurance if the property should be incumbered was one of the stipulations of the contract of insurance, but that it did not admit the signing of the application alleged in the answer, nor the mortgaging of the property by the insured.

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

J. C. Crawford, for plaintiff in error.

A. R. Oleson and *C. C. McNish, contra.*

HARRISON, J.

On the 8th day of October, 1892, the defendant in error commenced this action against the plaintiff in error in the district court of Cuming county to recover the sum of $1,250, alleged to be his due by reason of the destruction by fire of property of which he was the owner, and covering which and insuring him against such destruction he held a policy issued by plaintiff in error, hereinafter referred to as the "company." An answer and a reply were filed whereby issues were joined and a trial thereof had before the court and a jury. The defendant in error was sworn and testified. The issuance of the policy and the insurance thereby of the property had been established by the pleadings. During the time the defendant in error was testifying in his own behalf it was admitted on the part of the company that the premium, or consideration for the contract of insurance, had been paid by defendant in error; that of the property insured there had been destroyed by fire of date January 29, 1892, sufficient to aggregate in value $1,097; that due notice of the loss had been given and demand made for payment. It was proved that no payment had ever been made. At the close of his own testimony, with the facts as just indicated either admitted or proved, the defendant in error rested his case. For what further occurred at this stage of the proceedings we will quote from the record: "At this time the defendant moved that the case be dismissed for the reason that it is incumbent upon the plaintiff to prove, as alleged, that he has kept and performed his part of the agreement, which they haven't

attempted to prove. Motion overruled, to which ruling defendant excepts. Whereupon defendant rested. At this time plaintiff asked the court to instruct the jury to return a verdict for plaintiff for the amount of $1,097 and interest from the 29th day of January, 1892. At this time the defendant asked the court to instruct the jury that they cannot bring in a verdict for the plaintiff exceeding the amount defendant offered to admit, $190.63. Instruction asked for by plaintiff given, to which instruction defendant excepts. Instructions asked for by defendant denied, to which ruling defendant excepts." The jury, in accordance with the instruction of the court, returned a verdict for plaintiff in the sum of $1,132.20, being the $1,097 and interest thereon, and after motion for new trial heard and overruled, judgment was rendered for such sum. The case is presented here by error proceedings in behalf of the company.

It is urged that the defendant in error did not prove his ownership of the insured property, either at the time of its insurance or of its destruction by fire. On this point it may be said it has been held by this court: "A policy of insurance is *prima facie* an admission by the insurers of the title of the insured to the property embraced in the policy." (*Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb., 495.) In the text of the opinion in that case it was observed: "The mere fact of the contract of insurance being effected, should, we think, be enough *prima facie* to prove the ownership of the property. If the contract was procured by fraud and such ownership did not exist, or if the insurance was simply a wager policy, it was proper matter of defense, and if

relied upon should be pleaded as a defense. The same may be said of the second objection, that it is not alleged that defendant in error was the owner of the horse at the time of his death."

It is insisted that the defendant in error, having pleaded in his petition that he kept and performed all and singular the conditions of the policy on his part to be kept and performed, and this allegation being denied in the answer of the company, it devolved on plaintiff in error to prove that there had been no breach of the condition of the policy by which it was stated that it was avoided if the property was mortgaged or incumbered while insured. This was a matter of defense, and it was for the company to allege it and prove it, and it was not the duty of the insured to, in the first instance, negative the fact that the property had been mortgaged, in either pleading or proof, or to prove it under the general allegations in respect to the conditions of the policy hereinbefore set forth. (*Butternut Mfg. Co. v. Manufacturers Mutual Fire Ins. Co.*, 47 N. W. Rep., [Wis.], 366; *Perine v. Grand Lodge A. O. U. W.*, 53 N. W. Rep. [Minn.], 367; *Price v. Phœnix Mutual Ins. Co.*, 17 Minn., 497; *Bank of River Falls v. German-American Ins. Co.*, 40 N. W. Rep. [Wis.], 506.)

For a thorough understanding of the further question discussed in the briefs it will be necessary to know fully certain allegations of the answer of the company and the reply thereto. In the answer it was alleged:

"This defendant, for further answer to plaintiff's petition, says that prior to the issuance of the policy of insurance to the plaintiff by this defendant the plaintiff made a written application for said insurance in which he stated that

none of said property was incumbered in any way, together with various other statements therein contained, a copy of which application is hereto attached and made a part hereof and marked exhibit 'A;' that relying upon the truth of the statements therein contained the defendant issued the policy insuring the property in said application described.

"8. That the said policy of insurance sued on in this action contains the following conditions: 'This insurance is based on the representations contained in the assured's application of even number herewith, on file in the company's office in Lincoln, Nebraska, each and every statement of which is hereby specifically made a warranty and a part hereof; and it is agreed that if any false statements are made in said application this policy shall be void * * * or if the property be or shall hereafter become mortgaged or incumbered; or upon commencement of foreclosure proceedings; or in case any change shall take place in the title, possession, or interest of the assured in the above mentioned property; or if this policy shall be assigned * * * then, in each and every one of the above cases, this policy shall be null and void;' that notwithstanding the representations made by the plaintiff in his application, on the faith of which said policy was issued, and notwithstanding the conditions contained in said policy, the plaintiff did not own the stock mentioned in said application and policy at the dates of said application and at the time the said property was insured by defendant, but had conveyed the same or a portion thereof by chattel mortgage to Jurgen Peterson on March 17, 1891; that, in violation of the conditions contained in

said policy of insurance, plaintiff conveyed the live stock described in said application and said policy of insurance to one Soren Amderson, of Thurston county, Nebraska, by chattel mortgage on the 1st day of October, 1891, and on the 21st day of July, 1891, plaintiff conveyed four of the horses described in said policy to the Beemer State Bank, whereby said policy became void and of no force or effect.

"9. Defendant for further answer says that the said plaintiff obtained the said policy of insurance by fraud and misrepresentation in that he represented that, at the time said application was made for said insurance, none of said property was incumbered in any way, whereas a large portion of said property was incumbered by chattel mortgage, and the statement of the said plaintiff that the same was not incumbered was false and was known to be false by the plaintiff at the time he made the same."

The reply was as follows:

"The plaintiff, for reply to the defendant's answer in the above entitled cause, denies each and every allegation of new matter therein set forth, except such matter and facts as are hereinafter expressly admitted.

"2. The plaintiff admits that he signed an application for insurance to the said defendant through their agent, W. H. Fleming, but that he signed such application for insurance upon the reliance placed in the representations of said W. H. Fleming; that the said agent did not read nor cause to be read, nor make known to this plaintiff, any of the interrogatories or representations in said application to this plaintiff, that said agent having the said plaintiff believe at the time he

signed such application that it was a matter of form; that the said plaintiff is unable to read the English language, and therefore could not inform himself as to the contents of said application and did not know the contents thereof; and that the said W. H. Fleming did not, at the time he delivered the policy of insurance to said plaintiff, make known any of the conditions therein, other than stating to said plaintiff that the fine print therein contained would not affect his insurance in any manner; and the plaintiff, being unable to read the same, relied on those representations and was wholly unacquainted with the contents thereof, except believing that the said W. H. Fleming truly represented the effect of said application and policy at the time the same were made and delivered."

It is contended for the company that the reply was in effect a plea in confession and avoidance, and that by it there was admitted the making of the application and its statements, also the requirements of the conditions of the policy quoted in the portion of the answer which we have set forth herein, and the further facts of the existence of the mortgage on the property at the time it was insured and the execution of the other mortgages covering it, or portions of it, as stated in the answer; that these facts being thus admitted, it established the defense in favor of the company, and hence it was error for the court to instruct the jury to return a verdict for defendant in error. Counsel for defendant in error strenuously insist that the reply is not and cannot be considered or construed as an admission to the extent it is claimed to be by counsel for the company, and in this connection attention is directed

to the statement in the reply in respect to the application, whereby it is said "The plaintiff admits that he signed an application," and it is argued that this was not an admission of the existence of the application pleaded in the answer; that by the use of the word "an" the pleader merely admitted the fact of signing an application without reference to any particular one or the one attached to the answer; that the denial, in the reply, of all new matter contained in the answer applied to the application therein included and the fact of its making, and the burden was upon the company to identify or prove the application pleaded in the answer to be the one signed by defendant in error. The ordinary meaning or force of the words employed in the reply was not to admit the signing of any special application, or the application set forth in and made a part of the answer, but to admit the signing of one or some application; and the fact of the making of the one constituting a part of the answer having been denied, it was for the company to prove it.

But there was pleaded in the answer a clause in the policy by which all rights under it were forfeited if the property insured was mortgaged or incumbered at any time during the existence of the policy, and in the reply matter was pleaded in avoidance of this condition. This clearly admitted it as one of the stipulations of the contract of insurance. Did the plea of avoidance in the reply also admit the mortgaging of the property? We do not think so. "Where the answer contains new matter, the plaintiff may reply to such new matter denying generally or specifically each allegation controverted by him; and he may allege, in ordinary and concise language, and without

repetition, any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer." (Code of Civil Procedure, sec. 109.) The plea of new matter in the reply, if a good plea (a question which was not raised or discussed in the briefs and which we will not discuss or determine), contained matter in avoidance of the operations of all the conditions of the contract of insurance printed in small type, and its effect was to admit the existence of the stipulations in all their requirements, but, as we view it, it did not extend further and necessarily admit the making of mortgages upon the insured property or breaches of any of the conditions. These facts were denied in the reply, and the issue thus raised was not one inconsistent with the admission of the existence of the conditions and their avoidance, and the defendant in error was entitled to have his denial of the giving of the mortgages stand, and rely upon it, and the company should have introduced proof of such traversed facts. Had the plea of avoidance in the reply, instead of being general, as it was, been a special one, and directed against the particular conditions pleaded in the answer, and applied the avoidance to the particular alleged breach, of mortgaging the insured property, in terms, then it would have been an admission of the facts relied upon as constituting the breach. The plea of avoidance, if good and sustained, would, it is true, have been as effectual against the condition providing for a forfeiture of the contract of insurance if a mortgage was given, as it would have been as to any other, but it was framed to apply generally, and its existence and force as a plea would not be inconsistent with the force or exist-

ence of the general denial of the execution of the mortgages, and the defendant in error could of right insist on both.

The conclusions herein reached are such as to show a condition of the issues in the case upon the pleadings and proofs before the trial court at the time it directed the verdict for defendant in error which warranted such direction, and the jugment must be

AFFIRMED.

WILLIAM W. BARNHOUSE ET AL. V. VILLAGE OF ADAMS.

FILED APRIL 7, 1896. No. 6392.

Final Order: REVIEW. To entitle a party to a review by this court of the rulings of the district court, there must have been a final judgment rendered on the merits of the cause in the trial court.

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

J. C. Johnston and *Charles E. Bush*, for plaintiffs in error.

George A. Murphy, *contra*.

HARRISON, J.

This action, or proceeding, was commenced in the district court of Gage county, the object or purpose being to have disconnected from the village of Adams, in such county, certain pieces or tracts of land or territory described in the peti-

tion. The descriptions of the tracts of land and averments as to their ownership, as stated in the petition, to the extent we need notice them, were as follows:

"These applicants further aver that said Mrs. S. Disher owns the north half of the northeast quarter of said section 27, and also the northeast quarter of the northwest quarter of said section 27; that said Benjamin Harnley owns the northwest quarter of the northwest quarter of said section 27, and blocks 3 and 7 and the east half of block 2 of Harnley's Division, which is a part of the south half of the northwest quarter of said section 27; that said Jacob Hildebrand owns the southwest quarter of said section 27; that said T. J. Iden owns the south half of the southeast quarter of said section 27; that said Mrs. Bryson owns the west twenty acres of the south half of the southwest quarter of said section 26; and that said Naomi and T. D. Moseby own the west twenty acres of the north half of the southwest quarter of said section 26, also the west twenty acres of the south half of the northwest quarter of said section 26.

"These applicants further aver that said W. W. Barnhouse owns a part of the south half of the northwest quarter of said section 27 which is described as follows: Commencing at the center of the south line of the south half of the northwest quarter of section 27, in township 6, range 8 east, running thence east 18 rods, thence north 36 rods, thence west 18 rods, and thence south 36 rods, also commencing at same point and running thence north 36 rods, thence west 6 rods, thence south 36 rods, and thence east 6 rods to place of

beginning, which is also upon the border and within the corporate limits of said village of Adams, and said Barnhouse is the sole occupant thereof."

An answer was filed for the village, to which there was a reply, and of the issues joined there was a trial to the court with the following result, according to the record presented in this court:

"And now on this 3d day of March, A. D. 1893, it being the twenty-third day of the term, this cause coming on to be heard and all parties being present in open court, and after the introduction of the evidence and arguments of counsel, the court, being fully advised in the premises, finds that plaintiff Elizabeth Bryson is the owner of the west twenty acres of the south half of the southwest quarter of section 26 mentioned in the petition, and finds generally in favor of the said Bryson. The court further finds for plaintiff Benjamin Harnley, and that he is the owner of the northwest quarter of the northwest quarter of section 27 mentioned in the petition. The court finds generally in favor of the plaintiff Jacob Hildebrand, and that he is the owner of the west half of the southwest quarter of said section 27 and all of the southeast quarter of the southwest quarter of said section 27 except a strip recently sold off of the north side thereof. The court further finds for the plaintiff Thomas J. Iden, and that he is the owner of the south half of the southeast quarter of said section 27. The court further finds that all of the lands above mentioned are on the border of the village of Adams and that all of the said lands are used for farming purposes, and that it is an injury thereto and to the owners

thereof to have said lands retained within the corporate limits of said village of Adams, Nebraska, and that said lands were wrongfully taken into said corporate limits of said village of Adams, Nebraska. The court further finds, as to the balance and residue of the lands and real estate mentioned and described in said petition, for the defendant; to which latter finding plaintiffs each of them except, whereupon said plaintiffs generally and plaintiffs Disher, Naomi Moseby, and Hildebrand, each for himself and herself, having filed motions for new trial, it is ordered, considered, and adjudged by the court that said motions and each of them be and the same are hereby overruled, to which ruling said plaintiffs generally and each of the above named plaintiffs separately except.

"Whereupon it is considered, adjudged, and decreed that the west twenty acres of the south half of the southwest quarter of said section 26, in township 6 north, of range 8, and the northwest quarter of the northwest quarter of section 27, in township 6 north of range 8, and the west half of the southwest quarter of said section 27, and all that part of the southeast quarter of the southwest quarter of said section 27 not heretofore sold by Jacob Hildebrand, and all of the south half of the southeast quarter of said section 27 be, and the same are hereby, disconnected from and taken out of the corporate limits of said village of Adams and that the same from henceforth cease to be a part of the corporate limits of said village.

"And now on this 15th day of March, 1893, it being the thirty-first day of the term, this cause

coming on to be heard further, and each party is ordered to pay his own costs."

Separate motions for new trial were filed on behalf of Jacob Hildebrand, Sarah Disher, and Mrs. T. D. Moseby, and a joint one filed for all the plaintiffs, the journal entry in regard to the disposition made of them being as follows:

"And now on this 17th day of March, 1893, it being the thirty-second day of the term, this cause coming on to be heard upon the motions for new trial, and the court being duly advised in the premises overrules all of said motions, to which ruling of the court the plaintiffs except. Plaintiffs pray an appeal, which is allowed by the court, and forty days given to prepare bill of exceptions."

The complaint in the petition in error is in the following terms:

"The appellants complain of the said defendant, for that on the 1st day of March, A. D. 1893, the appellee recovered a judgment against them herein in the district court of Gage county, Nebraska, dismissing appellants' cause of action in a case wherein William W. Barnhouse *et al.* were plaintiffs, and the Village of Adams was defendant. A transcript of the proceedings containing said final judgment is filed herewith."

By referring back to the journal entry of the decree which was rendered it will be ascertained that there was no such judgment as is alleged to be erroneous. There is a final decree as to the rights of some of the parties to the action, by which the territory belonging to them was disconnected from the village, but, as to the rights of the parties who removed the case to this court,

while there was a general finding adverse to them, there is no final disposition therof, nor is the action as to them dismissed. No final judgment having been rendered, there is nothing which this court can affirm or reverse. The judgment for costs is not one from which appeal or error will lie. It follows that the petition in error must be dismissed and such order is hereby made.

DISMISSED.

PHILIP H. BEAVERS V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED APRIL 7, 1896. No. 6464.

1. **Review:** ASSIGNMENTS OF ERROR. To present for review errors alleged to have occurred during the trial of a cause the assignment should, in apt words, set forth some matter for which a motion for a new trial is authorized by the Code of Civil Procedure.

2. ———: ———. An assignment of error that "The verdict is contrary to the evidence and is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice, or undue means," does not raise the question of error in assessment of the amount of the recovery by the jury independently, or aside from the consideration of the influence of passion, prejudice, or undue means.

3 ———: ———. Neither is such question presented by the portion of the assignment quoted, contained in the foling words: "The verdict is contrary to the evidence." Error in the assessment of the amount of recovery, whether too large or too small, has been specifically stated in the Code as one of the grounds of a motion for new trial (Code, sec. 314), from which it is clear that it was not included in either of the other causes.

4. **Railroad Companies:** DAMAGE TO RESIDENCE PROPERTY: VERDICT FOR PLAINTIFF. *Held*, That a consideration of

all the evidence discloses that the jury were not governed by passion, prejudice, or undue means in the assessment of the amount of recovery.

5. **Instructions:** REPETITIONS. It is not error to refuse to give an instruction requested in behalf of either party to a cause, where the subject-matter of the instruction is fully stated and explained in the charge of the court to the jury.

6. ———: HARMLESS ERROR. It is not error calling for a reversal of a judgment to give an instruction which could not, and it is clear did not, prejudice the rights of the complaining party.

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

Abbott & Abbott, for plaintiff in error.

F. I. Foss, *B. P. Waggener*, *J. W. Orr*, and *David Martin*, *contra*.

HARRISON, J.

This is an action instituted in the district court of Saline county to recover damages alleged to have resulted to plaintiff's residence property, some lots and his dwelling situated in the city of Crete, from the location and operation, in proximity thereto, of defendant's railroad, its main line and a switch, and also its roundhouse in the city named. Issues were joined and a trial had to the court and a jury. A verdict in the sum of $100 was returned for plaintiff, and after motion for new trial in behalf of either party was overruled, judgment was rendered on the verdict. The plaintiff brings the case to this court by error proceedings.

It is claimed that the amount of the recovery is too small; that the testimony shows damages to

the property in a much larger sum than was allowed by the jury. The only assignment in the motion for new trial which can be said to have any reference to this point is as follows: "First, the verdict is contrary to the evidence and is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice, or undue means." This does not raise the question of an error in the assessment of the amount of recovery unaffected by passion, prejudice, or undue means. If this was sought to be done there should have been an assignment in apt words, which would have set forth the fifth cause, for which it is stated in our Code of Civil Procedure a new trial will be granted, viz.: "Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property." (Code, sec. 314; *Barmby v. Wolfe*, 44 Neb., 77.) Error in the assessment of the amount by the jury is not raised by the portion of the assignment that the verdict is contrary to the evidence. Errors in the assessment of damages must be assigned in the motion for a new trial, and the Code having given this as one of the special grounds for a motion for new trial, it is clear that it was not included in either of the others. (*Riverside Coal Co. v. Holmes*, 36 Neb., 858.) The only point that can be said to be presented by this assignment in the motion for new trial is that the verdict is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice, or undue means. It is true that there was evidence which would have warranted the assessment of a much larger sum as the amount of recovery; on the contrary, there

was also testimony which tended to show that the damages were even less than the amount of the verdict, and, when viewed in connection with all the evidence adduced on the subject of the sum of damages, it is quite plain that the jury could not have been influenced by either passion, prejudice, or undue means in fixing the amount of the recovery. This being true, the portion of the attack on the verdict now under consideration must be overruled.

The plaintiff complains of the refusal of the court to give the third instruction requested to be read for him, which was as follows: "In estimating the value of plaintiff's property you should not be governed by the price that it would bring at forced sale, or the price that could be obtained for it from a speculator who might buy it for the purpose of speculation; but you should consider what it is worth to the owner for the purpose for which he uses it and desires to use it." The court charged the jury on the subject embraced in the instruction offered in the following language:

"If you shall find for the plaintiff in this action, you should assess his damages at such sum as you shall find from the evidence that he has sustained by reason of the construction and ordinary operation of the defendant's railroad along and adjacent to plaintiff's property. The items to be considered by you in making your estimate of damages are: The smoke, soot, and cinders which envelope or are thrown upon plaintiff's property or the necessary approaches thereto by passing engines; also the noise and jar of buildings caused by passing trains and engines, as well as the noise caused by ringing of bells, sounding of whistles of engines used on the road, while

it is also the inconvenience of ingress and egress to the property, if any, by being operated in an ordinary and proper manner proven. In short, you should consider every element arising out of the proper and ordinary operation of defendant's road that tends to diminish the value of plaintiff's property, so far as the same is shown by the evidence in this case.

"2. In estimating the plaintiff's damages in this case, if you should find from the evidence that he has sustained any by reason of the construction and operation of defendant's railroad as alleged in the petition, you are at liberty to take into consideration the fair market value of plaintiff's property as it was before the road was built and in operation and its fair market value after the road was built and in operation, and assess the plaintiff's damages at such sum as shall equal the difference between the two estimates, if you shall find there is any such difference, and in ascertaining the fair market value of the property you are not to determine that by what it would bring at forced sale or from one that might buy it for speculative purposes, but what a reasonably prudent and competent man would pay for it provided he wanted it where it is, and as it is, and for his own use, and was willing and able to buy."

Without commenting upon the rule announced in the instructions asked and refused, as to whether correct or not, it is clear that the true doctrine on the subject was fully and thoroughly stated in the charge of the court in relation to the questions involved, and consequently it was not error to refuse to give the instruction requested.

The court, at request of defendant, gave the following as a portion of its charge: "The mere fact

that plaintiff and his family may sometimes be annoyed or disturbed by sound or noise occasioned by the blowing of locomotive whistles, or the ringing of locomotive bells, or by the rattling or rumbling of passing engines and cars does not make out a case in his favor, if it is an annoyance suffered by plaintiff in common with all others who happen to reside or be in the vicinity of railroads." It appears from the record that the trial court modified the instruction as originally prepared and tendered, but in what particular the record does not disclose, but as modified it was given. The plaintiff contends that the instruction was erroneous and misleading, in that it confined consideration to those who "may happen to reside or be in the vicinity of railroads," instead of, as it should, extending it to include the general public. We need not now determine whether the instruction is open to the objection urged against it. If it be conceded, for the sake of argument, that it is so, its only application could be to the question of whether the plaintiff had suffered any damages or not, and this question the jury solved in his favor. The instruction under discussion, it is very evident, could in no manner affect the jury in determining from the evidence the market value of the property before and after the building and commencement of the operation of the railway, and hence could not have prejudiced the plaintiff. It follows that the judgment of the district court must be

AFFIRMED.

BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA V. E. C. GORSUCH.

FILED APRIL 7, 1896. No. 6115.

1. **Railroad Companies:** DAMAGES FOR KILLING LIVE STOCK: NEGLIGENCE. Evidence examined, and *held* to present a question of negligence on the part of the defendant in the action, for the determination of the jury, and to support their finding on such question.

2. **Instructions:** HARMLESS ERROR. The giving of an instruction which is not applicable to the issues or evidence in a case does not call for a reversal of the judgment when no prejudice resulted to the rights of the complaining party.

3. ———: NEGLIGENCE. The refusal of the trial court to give certain instructions requested by plaintiff in error, examined and *held* not erroneous.

4. ———: HARMLESS ERROR. Where, in the trial of a cause, instructions are given which in substance are objectionable and some of which are in conflict, but it appears that the jury were not misled thereby and no prejudice resulted to the rights of the complaining party, there is not sufficient cause for a reversal.

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

J. W. Deweese and *Dilworth & Smith*, for plaintiff in error.

Tibbets, Morey & Ferris and *S. H. Smith, contra.*

HARRISON, J.

The defendant in error instituted this action in the district court of Adams county to recover of plaintiff in error damages alleged to have accrued to defendant in error by reason of the agents and

employes of plaintiff in error so negligently running one of its trains on and over its road and track as to kill, or cause to be killed, one dark brown horse which belonged to defendant in error, of the value of $125. The petition in the case was based upon the statutory liability of the company for injury to live stock on its tracks or line of road, where there had been a failure to comply with the requirements of the statute in regard to building a fence on either side of its line of road, also in the negligent operation of one of the company's engines or trains. A trial of the issues resulted in a verdict in favor of defendant in error, and after a motion for new trial filed in behalf of the company was heard and overruled, judgment was rendered on the verdict. To obtain a review of the rulings of the court during the trial the company has prosecuted error proceedings to this court.

It is contended by counsel for the company that the action was one predicated upon whatever liability might have arisen from the failure of the company to fence its right of way, coupled with the other facts and circumstances incident to the occurrence which resulted in an injury to the animal—a horse—by which it was rendered entirely useless; and not because of any negligence of the employes of the company in the operation of its train. To determine this, and further whether it was error to submit the question of such negligence to the jury, a knowledge of some of the salient points of the testimony becomes necessary. Hence we will, as briefly as may be, state them. The engineer in charge of the engine pulling the train testified in part as follows:

A. Well, when I pulled over the junction switch at Kenesaw, I saw some horses on the track about a mile from Kenesaw; four or five. I think five. I pulled on up towards them and they moved up. They were below a crossing—a road crossing east of the road crossing, and when they came to the crossing they slowed up and let me run within about twenty-five or thirty rods. I gave the alarm then and the horses started and run on.

Q. Where did they start? Were they in the track?

A. Some of them were in the track and some beside the track. Two or three were in the track, but they changed.

Q. State what you did.

A. A mile from the crossing there is another crossing, and when they run up to that crossing I sounded the alarm again and they slowed up until I came within probably twenty rods again, and somewhere near a mile from that crossing is a bridge, so I held back and did not make any alarm or anything until they run into the bridge.

Q. How far was you from them when they run into the bridge?

A. About eighty rods.

Q. What is the condition of the track along there?

A. Well, there is in some places a little cut and in some places a small fill and other places are level. There is two road crossings between where I seen them.

He said further that he had the train under such control from when he sounded the stock alarm until he stopped near the trestle or bridge that he could have stopped at any time before

reaching or coming up with the horses, and in respect to the speed of the train said:

Q. About how fast was you running at any one time?

A. Oh, I run probably eight or ten miles an hour until I gave the alarm the first time.

Q. And from that on?

A. I run probably ten or twelve miles an hour after the horses crossed the crossing. They run pretty lively and got ahead quite a ways. I slowed and had to pull up again to catch up. * * * I wasn't any closer than twenty rods and I think I could stop in that distance.

Q. You wasn't closer than twenty rods at any time?

A. Not until they got on the bridge.

He also said that he knew of the existence of the trestle or bridge, and its location.

Q. Did you come to any stop from the time you started the horses until they came into the bridge?

A. No, sir.

Q. Could you have come to a stop?

A. Yes, sir.

Q. Easily?

A. Yes, sir.

The testimony of the fireman agreed in the main with that of the engineer; also, in substance, did that of the conductor. The evidence on the part of the plaintiff tended to show that the train—a freight train—was running at about its usual rate of speed as the witnesses had noticed similar trains on this line at this particular place, and after pulling up near the horses, followed them along the track about ten rods behind them, for a distance of one mile or more, to where

there was a cut, and thirty or forty rods beyond the farther end of the cut was located a bridge; that at this end of the cut the track was almost level with the ground or land on either side; that there was a fill or embankment comprising the approach to the trestle, which, at the bridge, was four, six, or eight feet high; that the engine was about six or ten rods behind the horse which was hurt, when he ran or jumped on the trestle. We infer that the legs of the horse went down into the spaces between the timbers of the trestle, although there was no direct evidence to such effect. All agree, however, that the train was stopped just before it reached the bridge, and the trainmen and some passengers rolled the horse off the bridge and that one of his front legs was broken, which rendered him entirely valueless. There was no fence on either side of the track at the point where the horses went upon it, or any portion of it on which they ran, up to and beyond the bridge where the horse was injured. It seems clear that the testimony was mainly directed to an effort on the part of the defendant in error to prove the want of ordinary care on the part of the men running the train, or to show acts by them which, when taken in connection with all the surrounding circumstances, showed negligence to a degree which rendered the company liable for any injuries to the horse, and on the part of the company to combatting or controverting any such construction or belief, arising from the circumstances and acts which caused the injury to the horse. This being the theory upon which both parties tried the cause, the question of negligence or no negligence was, under the evidence adduced, one for determination by the jury. It was proper to

submit it to them and their answer to this question upon the evidence will not be disturbed.

Of the instructions prepared on behalf of the company and requested to be read to the jury, paragraphs 1 and 2 were as follows:

"1. The court instructs the jury that if they shall find that the horse of the plaintiff got on the track and became frightened and ran along the track and ran into a bridge and injured itself, and that neither the engine nor any part of the train struck the horse, then you will find for the defendant.

"2. The jury are instructed that the evidence in this case will not warrant you in finding a verdict against the defendant. You will therefore decide for the defendant."

The trial judge refused to give either of them and such refusals are assigned for error. It was not error to refuse the first, for the reason it entirely omitted the element of negligence of the parties operating the train, and hence was improper and erroneous. The second was a direction to find the issues for the company, and, as we have concluded there was testimony which raised questions for the consideration of the jury and which it was their province to answer, the second paragraph requested was wrong and the refusal of the judge to give it in the charge to the jury was correct.

The trial judge, at the request of defendant in error, gave an instruction to the jury in which there was quoted from the statute the statement of the liability to the owner of any live stock injured, killed, or destroyed by their agents, employes, or engineers arising against railroad companies from the failure to build fences along the

sides of the track, followed by a further statement that if the jury ascertained from the evidence that the company had neglected to fence its tracks at or along the place stated in the petition setting forth the cause of action, and that the horse was there injured, killed, or destroyed by the agents, employes, or engines of the company, or by the agents, employes, or engines of any other company running over and upon the road, the company became liable. It is urged that this was erroneous, there being no evidence that the horse was injured or killed by the agents, employes, or engine of the company, except as it was claimed to have been because of the negligence of the employes in charge of the engine and train following the horse closely along the track for a long distance, into the cut, and through it and to the trestle beyond. The instruction was framed to apply to a case under the provisions of what is commonly known as the "fence law," and was only pertinent to the facts developed in this case in its reference to the failure of the company to build fences along the sides of its road; and to make it fully applicable in view of the issues and the theory upon which the case was tried, should have contained a further statement embodying the element of negligence as attributable to the parties in charge of the train and the manner in which it was handled or run at the time in question.

Instructions requested by counsel for the company and given were in the following terms:

"The jury are instructed that if the jury find that the horse got on the railroad track for want of a fence such as the law requires the company to erect and maintain to enclose its track, and while on or near its track is frightened by a passing

train and in its fright is injured by falling through a bridge on the line of the railroad, and no negligence or willful misconduct is chargeable to the agents of this company in charge of the train at that time, and where no injury is done to the horse by any actual collision or contact with the engine or cars of the train, the railroad company will not be liable to the owner of the horse for the injury."

"The true meaning of sections 1 and 2 of chapter 72, Compiled Statutes, is that the injury to stock must be caused by the actual collision, that is, it must be done by the agents, engineers, or cars of the company, or the locomotive or trains of any corporation permitted and running over or upon the road, or the willful misconduct of the trainmen in the course of their employment, to make the company liable."

These were doubtless framed and presented by counsel for the company to meet and destroy any impression, erroneous or otherwise, which might have been created in the minds of the jury by the instruction on the same subject given at the request of the counsel for the opposing party, and if construed in connection with such instruction they might be said to have effected the purpose. If construed together, they announced the rule in favor of the company which prevails when the duty to build fences has been performed, that there must have been acts negligently or willfully done. But it may be said that the errors, if any, in this instruction requested by defendant in error in its statements of the law as applicable to the case on trial could not and were not cured by giving other and further instructions on the same subject, framed with a view and purpose of adding to the former and correcting its imperfections or

supplying its deficiencies. This would be within a well established doctrine with reference to instructions to a jury, but the jury were not misled nor the rights of the complaining party prejudiced by the giving of the instruction under consideration; hence there was no available error. (*Labaree v. Klosterman*, 33 Neb., 150.)

The instructions numbered 2 and 3 requested for defendant in error and given were excepted to by counsel for the company, and their giving is properly assigned as error. They were in regard to the duties of the parties in charge of the engine or train, to stop it after seeing the horses on the track, if, by so doing, the injury could have been avoided, and submitting to the jury the question of negligence in the running of the train at the time and place of the injury. The judge modified the paragraph of the instructions numbered 3, and as given it informed the jury that the finding should be for the company unless the employes were proven to have been guilty of negligence and willful misconduct. This was as favorable to the company as it could have been if it had been shown that it had fulfilled the requirements of the statute as to building fences along its track. These instructions, when viewed in connection with all the facts and circumstances of the case, are not open to any of the objections urged against them in the argument contained in the brief filed for the plaintiff in error.

Some of the instructions which were given, and to which objections were made and have been here urged, should probably not have been given in form and substance as they were, but the jury were not misled by them, nor did any prejudice result therefrom to the rights of the complaining

party. There was sufficient evidence to show a degree of negligence to render the company liable and to sustain the verdict of the jury. (*Fremont, E. & M. V. R. Co. v. Pounder*, 36 Neb., 247; *Indianapolis, B. & W. R. Co. v. McBrown*, 46 Ind., 229; *Missouri P. R. Co. v. Vandeventer*, 28 Neb., 112.) It follows that the judgment of the district court must be

AFFIRMED.

JAMES B. KITCHEN V. DELIA CARTER, ADMINISTRATRIX.

FILED APRIL 7, 1896. No. 5935.

1. **Negligence:** CONSTRUCTION OF DANGEROUS BUILDINGS. The owner of real property in exercising his own tastes and inclinations as to the character of a building he will erect thereon, has no right to build and maintain a structure which, by reason of defects or inherent weakness either in material or construction, is liable to fall and do injury to an adjoining owner or the public.

2. ———: ———: DAMAGES. If a building falls because of defects in material and workmanship reasonably within the knowledge of the owner thereof, and thereby inflicts injury upon adjoining owners or their property or any person lawfully in its vicinity, the owner is liable for the damages ensuing therefrom.

3. ———: CAUSE OF INJURY. A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with, but independent of, his acts, not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produces the injury, it is the proximate and dominant cause.

4. ———: ———. The question of the proximate cause of an injury is one for the jury, but when their decision thereof is clearly and manifestly wrong it will be set aside.

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

George E. Pritchett and *J. C. Cowin*, for plaintiff in error.

References: *Lewis v. Flint & P. M. R. Co.*, 19 N. W. Rep. [Mich.], 744; *Jucker v. Chicago & N. W. R. Co.*, 52 Wis., 150; *Pennsylvania Co. v. Hensil*, 70 Ind., 569; *Larson v. St. Paul & D. R. Co.*, 45 N. W. Rep. [Minn.], 1096; *Whitman v. Wisconsin & M. R. Co.*, 17 N. W. Rep. [Wis.], 124; *Pease v. Chicago & N. W. R. Co.*, 20 N. W. Rep. [Wis.], 908; *Fowler v. Chicago & N. W. R. Co.*, 21 N. W. Rep. [Wis.], 40; *Bernso v. Gaston Gas Coal Co.*, 27 W. Va., 285; *Childrey v. City of Huntington*, 12 S. E. Rep. [W. Va.], 536; *Marvin v. Chicago, M. & St. P. R. Co.*, 47 N. W. Rep. [Wis.], 1123; *St. Louis, A. & T. R. Co. v. Neel*, 19 S. W. Rep. [Ark.], 963; *St. Louis I. M. & S. R. Co. v. Commercial Ins. Co.*, 139 U. S., 223; *Ewing v. Pittsburgh C. C. & St. L. R. Co.*, 23 Atl. Rep. [Pa.], 340; *Herr v. City of Lebanon*, 24 Atl. Rep. [Pa.], 207; *Shaaber v. City of Reading*, 24 Atl. Rep. [Pa.], 692; *Deming v. Merchants Cotton-Press & Storage Co.*, 17 S. W. Rep. [Tenn.], 89; *Lynch v. Northern P. R. Co.*, 54 N. W. Rep. [Wis.], 611; *Nelson v. Chicago, M. & St. P. R. Co.*, 14 N. W. Rep. [Minn.], 360; *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb., 101; *McGowan v. St. Louis Ore & Steel Co.*, 19 S. W. Rep. [Mo.], 200; *Keightlinger v. Egan*, 65 Ill., 236; *Beehler v. Daniels*, 29 Atl. Rep. [R. I.], 6; *Purcell v. English*, 86 Ind., 34; *McAlpin v. Powell*, 70 N. Y., 126; *Pittsburgh, F. W. & C. R. Co. v. Bingham*, 29 O. St., 364; *Sweeny v. Old Colony & N. R. Co.*, 10 Allen [Mass.], 372; *Larmore v. Crown Point Iron Co.*, 101 N. Y., 391; *Severy v. Nickerson*, 120 Mass., 306; *Omaha &*

R. V. R. Co. v. Martin, 14 Neb., 298; *Gibson v. Leonard*, 37 Ill. App., 344; *Woodruff v. Bowen*, 34 N. E. Rep. [Ind.], 1113.

Connell & Ives, contra.

References: *Hayes v. Michigan C. R. Co.*, 111 U. S., 228; *Mutual Ins. Co. v. Tweed*, 7 Wall. [U. S.], 44; *Baltimore & P. R. Co. v. Reaney*, 42 Md., 117; *Grimes v. Louisville, N. A. & C. R. Co.*, 30 N. E. Rep., [Ind.], 200; *Davis v. Garrett*, 6 Bing. [Eng.], 716; *Campbell v. City of Stillwater*, 32 Minn., 308; *Boss v. Northern P. R. Co.*, 49 N. W. Rep. [N. Dak.], 655; *Couts v. Neer*, 9 S. W. Rep. [Tex.], 40; *Village of Carterville v. Cook*, 22 N. E. Rep. [Ill.], 14; *Denver, T. & G. R. Co. v. Robbins*, 30 Pac. Rep. [Colo.], 263; *Houghkirk v. Delaware & Hudson Canal Co.*, 92 N. Y., 219; *Lockwood v. New York, L. E. & W. R. Co.*, 98 N. Y., 526; Cooley, Torts [2d ed.], p. 367, and cases cited; *Gilbert v. Nagle*, 118 Mass., 278; *Welch v. McAllister*, 15 Mo. App., 492; *Indermaur v. Dames*, 1 C. P. [Eng.], 274; *Carleton v. Franconia Iron & Steel Co.*, 99 Mass., 216; *Nickerson v. Tirrell*, 127 Mass., 236; *Low v. Grand Trunk R. Co.*, 72 Me., 313; *Smith v. Lambeth Assessment Committee*, 10 L. R., Q. B. [Eng.], 327; *Toomey v. Sanborn*, 146 Mass., 28; *Bennett v. Louisville & N. R. Co.*, 102 U. S., 577; *Learoyd v. Godfrey*, 138 Mass 315; *Gorham v. Gross*, 125 Mass., 232; *Hannem v. Pence*, 40 Minn., 127; *Shipley v. Fifty Associates*, 106 Mass., 194; *Khron v. Brock*, 11 N. E. Rep. [Mass.], 748; *Simmons v. Everson*, 26 N. E. Rep. [N. Y.], 911; *Wilkinson v. Detroit Steel & Spring Works*, 41 N. W. Rep. [Mich.], 490; *Bensen v. Suarez*, 28 How. Pr. [N. Y.], 512; *City of Anderson v. East*, 19 N. E. Rep. [Ind.], 726; *Hydraulic Works Co. v. Orr*, 83 Pa. St., 332; *Schilling v. Abernethy*, 112 Pa. St., 437; *Gramlich*

v. Wurst, 86 Pa. St., 80; *Gillespie v. McGowan*, 100 Pa. St., 149; *Lynds v. Clark*, 14 Mo. App., 74; *Glidden v. Moore*, 14 Neb., 84.

HARRISON, J.

The plaintiff in error, during the year 1886 and prior and subsequent thereto, was a part owner and had control of the premises known as the "Paxton Hotel property" in the city of Omaha. In 1886 the southwest portion of the building was what was called an "annex" to the main body of the building and this annex was fifty feet long, twenty-two feet wide, and two stories high. During the year stated the plaintiff caused an additional or third story to be built upon the annex. For this third story there were no plans and specifications made and no architect was employed to superintend its construction. A pencil sketch of the desired improvement was made and given by plaintiff in error to an experienced contractor and builder with directions to furnish the material and perform the labor, or have the necessary labor performed, the payment to be the reasonable value of the labor and material, or such sum as could be agreed upon between the parties. During the early part of the night of April 12, 1891, fire was discovered in the southwestern lower room of the annex, then being used as a kitchen. A fire-alarm was turned in and was promptly responded to by some of the organizations or companies belonging to the fire department, the members of which, as soon as they reached the premises, took active measures for stopping the fire. Some of them discovering, as they believed, evidences of fire in the upper northwest corner or room in the third

story of the annex, a ladder was raised from a vacant portion of an adjoining lot and placed so that the upper end reached or rested against the window sill of the room; and some of the firemen,—among them Michael J. Carter,—started up the ladder with a line of hose. They had proceeded but a short distance when a portion of the brick wall, against and by which the ladder was supported, fell outward and struck and injured the firemen who were upon the ladder. From the effect of injuries so received, Michael J. Carter soon afterward died, and this suit was instituted by Delia Carter, his wife and the administratrix of his estate, to recover damages under the provisions of our statute for the pecuniary loss resulting from his death. The right to recover in the action was predicated upon the alleged negligence of plaintiff in error in procuring or allowing the use of poor, inferior material in the building of the third story of the annex and its faulty and defective construction in certain particulars specifically designated in the petition. These statements all and singular of the petition in relation to negligence imputed to plaintiff in error and defects of any nature in the construction of the additional story to the annex, were denied in the answer. The result of a trial in the district court was a verdict and judgment in favor of defendant in error in the sum of $5,000, and to secure a review of the proceedings in that court the case has been removed to this court by petition in error.

Counsel for plaintiff in error, in a reply brief, state, or assume it to be proven, that the deceased fireman was in or on the premises or building of plaintiff in error and was there a mere licensee,

and hence the plaintiff in error owed him no duty, and even conceding that negligence had been shown, yet no liability accrued. That a licensee, in entering upon property, assumes the risks of injury resulting to him from any defective, imperfect, or dangerous conditions of the premises, but this we need not discuss or decide as we do not think the question is raised by either the pleadings in the case or the facts. It was alleged in the petition that the fireman, when injured, was on a vacant lot adjoining the Paxton Hotel property, and the evidence discloses that he, with other firemen, went on the vacant lot first referred to, and reared a ladder against the hotel building, or more properly speaking, the annex, and was in the act of ascending it to go upon or into the building, when the brick wall fell on them and they were not in or on the premises of plaintiff in error. It was alleged in the petition that a part of the wall of the building,—the third story of the annex,—for no sufficient cause except its own defects and inherent weakness, fell westward and outward and injured the firemen. The theory of this portion of the cause of action was based upon the proposition that in erecting the building, the third story, if it was so defectively constructed, to the knowledge of the proprietor, as to be dangerous, and because of weakness it fell and injured anyone lawfully in its vicinity, or, as in this case, on the adjoining lot, the owner of the building was liable for any damage so suffered. Carter, the fireman, was lawfully on the adjoining lot. He had a right to go and be there for the purpose of fighting fire in this or any other of the buildings in that portion of the city. With regard to insecure build-

ings and liability attaching to the owners thereof it is said in Wood, Nuisances, p. 140, sec. 109, "While a man has a right to follow his own tastes and inclinations as to the style and character of the building that he will erect upon his own land, yet he has no right to erect and maintain there a building that is dangerous, by reason of the materials used in, or the manner of its construction, or that is inherently weak or in a ruinous condition and liable to fall and do injury to an adjoining owner or the public. Such a building on a public street is a public nuisance, and is a private nuisance to those owning property adjoining it; and if the building falls and inflicts injury upon the adjoining owners or their property, or to any one who is lawfully in its vicinity, the owner is liable for all the consequences that ensue therefrom." (See authorities cited in support of the text.) "The owner of a building is not an insurer against accident from its condition, but so far as the exercise of ordinary care will enable him to do so he is bound to keep it in such condition that it will not, by any insecurity or insufficiency for the purpose to which it is put, injure any person rightfully in, around, or passing it." (*Ryder v. Kinsey*, 64 N. W. Rep. [Minn.], 94.)

But it is urged by counsel for plaintiff in error that the evidence is insufficient to support a finding of defective construction of the third story of this building, and the falling as a consequence thereof; and further, that if it be conceded that the structure was not of the safest character, or was not safe, the proximate cause of the falling of the wall was the effect of the fire; that this was an intervening cause, and the immediate and principal one, and not within the reasonable contem-

plation of the proprietor of the premises when building or having built the third story to the annex, including the wall in question, or set in motion by him or arising from the construction of the wall or the manner of its erection; that he was not bound to foresee and so guard against any but natural and probable consequences,—things likely to follow his acts; or, in other words, the fire and the resultant falling of the wall, not being in any manner or degree connected with or referable to him or the construction of the wall, he was relieved from any liability for injuries caused thereby. It appears from the evidence that the portion of the wall which fell was of a side wall of a third story, which had been built during the year 1886, on the top of one of the walls of a two-story brick building theretofore built and existing; that the first story had what some witnesses called "a sixteen-inch wall," and some a seventeen-inch. The second story had what was denominated "a twelve-inch wall," and the third story, or new one, was an eight, or, as one witness called it, "a nine-inch wall." The new wall was a twelve-inch one up to the top of the floor joists put in for the new or third story, then to its top—eleven feet—was an eight-inch wall. There were ceiling joists, two by eight and twenty-two feet long, put on sixteen inches apart, some of them anchored in a twelve-inch wall of the Paxton building, and all attached to or resting on it, and, at the other end, attached to or resting on the new wall, and fastened to some of them were iron anchors which extended through the new wall, and were bolted or appropriately fastened at the outer end—at the outer side of the wall. The roof timbers were 2x10 or 2x12 and at

one end were two feet or more above the ceiling timbers, and at the other rested on them or on a level with their upper edges, and both roof and ceiling timbers were connected or tied by a system of braces, on trusses. There were some partitions in the new or third story, one of which served, in part, to separate from the general space and form a room called, in the record, the "fire room," being the one from which the portion of the wall fell. This room, in size, was twenty-two by twenty-four feet six inches. This new wall reached to and overlapped a piece of new eight-inch wall on another building, known as the "Goodrich Building," some witnesses state, and some say made an abutting joint with it. It appears that they were not in line, and at this place, a number of witnesses say, the two walls were connected by spikes and pieces of iron. There is also evidence tending to show that they were not so joined. Mr. Whitlock, city building inspector, testified, and in so doing stated that "the west wall of the old building had sagged in toward the east. In running up the additional wall and making the third story, they kept carrying it over until they got a straight wall from the window. The result was it left an overhang of nearly half the thickness of the wall, which showed at the time the extent that was between the two windows. There was a bow in the wall." All the other witnesses who testified on this point stated that the old wall had bulged out and the new wall was drawn in instead of built out, or so as to overhang. All agreed in the statement that the brick used in building the wall were good, and this may be said to be established by the great weight of the evidence as to the mortar. Some of

the witnesses gave it as their opinion that the eight-inch wall was not a proper one to build; that it was not such a one as in their judgment should have been built there. The city inspector of buildings said in his judgment it was not a safe wall, but the preponderance of the evidence was to the effect that it was a properly built and safe eight-inch wall and proper in the position, under the circumstances, and for the use for which it was intended. In regard to the fire and the part it played, if any, in causing the wall to fall, the chief of the fire department and some of the firemen who were present at this fire testified to the effect that the most of the burning in this third-story room occurred after the falling of the wall, but the chief was asked the following question: "Q. Now, then, it had got up into the ceiling, between the ceiling and the roof, before the wall fell?" To which he answered: "A. Why, she must have."

The city building inspector was interrogated upon cross-examination and answered as follows:

Q. At the coroner's inquest were you asked this question, and did you make this answer. I am not now asking you with respect to the facts in the answer or the matters inquired of, but simply ask you whether you so testified at the coroner's inquest: "Q. So far as you can observe, there was nothing to indicate that the wall was hot, or that it fell out by reason of the heat?" To which you answered: "No, I think the ceiling joist, and that is what threw the wall over."

A. That is what I thought at the time.

Q. And that is the way you testified?

A. I presume that is the way I did, if it is down that way.

Q. And that was your theory,—that the fire burned off the ceiling joist? "The fire followed the steam pipes and came up in between the roof and the ceiling and of course shows there, now, to have burned the ceiling joist off, and as soon as they burned off it threw the wall out."

A. That is what I said about that.

Q. Was this question asked you by Mr. Connell: "If that ceiling joist that burned and the wall fell in, can you account for the falling of the wall on any other theory except that the wall was of insufficient thickness and was not properly joined and connected together—can you account for it in any other way?" "A. I will say this, that the morning after the fire, that the ceiling joists, they were broken off, but whether they were burned off before the wall fell, I should judge, from the ceiling joists that were burned and remained there, that they must have burned before the wall fell." Did you so testify?

A. I think so, about that way; it is a good while ago.

During re-direct examination:

Q. In reference to the burning of the ceiling joist, did you, at the coroner's inquest, or do you now claim to have any personal knowledge as to when the burning of those joists occurred?

A. Well, it must have occurred before the fire, because the joists could not have burned in the position they were in. The part down in the ground, they must have burned before the wall fell.

Q. Have you any personal knowledge except merely that is your conclusion?

A. That is what I found the morning after the fire.

Q. Were you at the fire?

A. No, sir; I was not at the fire.

Q. You have not any personal knowledge as to how the burning actually took place?

A. I was not there to see it, of course.

It was shown that just where the wall fell a number of the ceiling joists had been entirely severed by the fire, and pieces of them were among the brick and mortar which fell to the ground. One piece was there with an anchor attached, and ends of these ceiling joists were also in the "fire room," on the floor, with anchors attached. The roof timbers were none of them entirely burned off, but were blackened or rather charred. We are not unmindful here of the argument of counsel for defendant in error, in part founded upon the supposition that the anchor attached to the piece of lumber which was found in the debris was one which had fallen with a piece of floor joist, and the further argument on this part of the case, in which they refer to the different theories advanced by the witnesses in reference to what caused the wall to fall. We must include, in any view we attempt to take of this subject, a few facts which were not controverted. The wall was placed there during the year 1886 and stood almost, if not quite, five years, and was, to all appearances, safe and fit for the uses to which it was put and to withstand the effects of use, time, and any ordinary tests to which it might be subjected, and, as stated by counsel for defendant in error in their brief: "There was the fact that the wall fell at the time of the fire, which was not disputed;" and in this connection we may add that there was the evidence, not contradicted, of the destruction by the fire of some of the means

which had been adjusted, some primarily and some secondarily, with the purpose to assist in retaining the brick wall in an upright position and make it safe. A careful review and analysis of the testimony leads us to the conclusion that it establishes that the fire and its accompanying facts and circumstances caused the falling of the wall. Whether or not, or to what extent, any inherent weakness or defect in the wall was a factor in bringing about such a result, is not very readily perceivable or answerable. However this may have been, Mr. Kitchen, in constructing or having constructed this third story of the wall thereof, had exercised such care that it had been and was safe, sufficient, and secure for any and all purposes or uses for which it was intended, and would not, from any inherent defects, fall and injure any person or persons passing it, or near it. It stood, in the condition in which it was made, for several years, and if the fire had not occurred, would no doubt have stood for years more. The fire did not have its origin in any act of the plaintiff in error, nor did it flow from or have its source in that wherein it is claimed he had been negligent, the erection of the wall. The fire was the immediate and dominant cause of the falling of the wall, and hence was the proximate cause of the injury.

But it is urged that what was the proximate cause was a question of fact for the jury, and their determination of it should not and will not be disturbed. Ordinarily, what is the proximate cause of an injury is, in any case where the question is involved, one of fact for the jury to determine; but where, as in this case, their decision of the question is manifestly wrong, it will be set aside. This is a case in which the sympathies are strongly

appealed to and enlisted, but justice and right must prevail and govern the course of the decision. On the facts and circumstances as they appear in the record, the judgment of the trial court must be reversed and the cause remanded.

REVERSED AND REMANDED.

JAMES E. STOVER V. DAVID M. HOUGH ET AL.

FILED APRIL 7, 1896. No. 6341.

1. **Summons:** SERVICE BY PUBLICATION: PROCEEDING TO OPEN JUDGMENT: EVIDENCE. To entitle a party, under the provisions of section 82 of the Code of Civil Procedure, to open a judgment rendered against him upon service by publication, it must appear that he had no actual notice of the pendency of the action in time to appear therein and make his defense. Should he fail to establish the want of such notice by a preponderance of the evidence, the motion to open the judgment must be denied, although all other requirements of said section have been complied with.

2. ———: ———: ———: ———. On the hearing of an application to open a judgment under said section 82, the adverse party may present counter affidavits to establish that the applicant had actual notice of pendency of the action a sufficient time before judgment to appear in court and make his defense.

3. **Trial to Court:** INCOMPETENT EVIDENCE: HARMLESS ERROR. A judgment will not be reversed merely for the admission of incompetent or irrelevant evidence in a cause tried to the court without a jury.

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

Andrew Bevins, for plaintiff in error.

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

NORVAL, J.

This is a proceeding in error to review the action of the district court in refusing to open a judgment rendered therein against James E. Stover, upon service by publication alone. On the 4th day of October, 1888, David M. Hough and Charles P. Ford instituted an action in the district court of Douglas county against James E. Stover and Anna Stover, copartners as James E. Stover & Co., on an account for boots and shoes alleged to have been sold and delivered by plaintiffs to defendants. An order of attachment was issued on the ground of non-residence of the defendants, and certain real estate was attached. Service of summons was made in the cause by publication only, and the defendants made no appearance. The default of James E. Stover was entered by the court on May 2, 1889, and nine days later judgment was rendered against him and in favor of the plaintiffs in the sum of $580.90, and it was further ordered that the attached property be sold. On the 21st day of June, 1892, James E. Stover filed a motion in said cause to open said judgment under the provisions of section 82 of the Code of Civil Procedure and permit him to defend. The motion was accompanied by an answer, consisting of a general denial of the allegations of the plaintiffs' petition, also the affidavit of Mr. Stover setting forth that no service of summons was had upon him except by publication, and that he had no actual notice of the pendency of the suit in time to appear and defend before such judgment was rendered against him. Notice of the motion was duly given to the plaintiffs, a hearing was had upon affidavits and counter-affidavits and

documentary evidence, and the motion was overruled by the court, which order is before us for review.

By section 82 of the Code of Civil Procedure, a party against whom a judgment has been rendered, upon service by publication merely, is entitled as a matter of right to have the judgment opened and be let in to defend, upon complying with the provisions of said section. The application must be made within five years after the entry of the judgment, and it must be made to appear that the defendant had no actual notice of the pendency of the action in time to appear in court and make his defense. The application in this case to open the judgment was timely made. The controverted question is whether Stover had actual notice of the pendency of the suit. Mr. Stover in his affidavit states positively that he had no such notice. Upon the hearing of the motion there were read the affidavits of William H. Duffield and E. G. McGilton. The former deposed, in effect, that prior to the month of October, 1888, affiant received a conveyance from the defendant Stover for certain real estate described in the affidavit by metes and bounds, being the same premises which were attached in this action; that in said month of October, or during November of the same year, which was after the publication of the summons, and more than five months prior to the date of the judgment, affiant had a conversation with defendant in the city of Chicago, during which "Stover stated to and informed the affiant that the real estate above referred to had been attached in a suit brought against him by Hough and Ford; and that the amount of the claim of said firm against him for which such suit was

brought was about $500," and further, that such attachment proceedings had been commenced but a short time prior to the date of said conversation. E. G. McGilton deposed, substantially, that he is one of the attorneys herein; that in the month of April, 1889, about a week before the end of said month, he met Stover in the latter's place of business, located on Thirteenth street, between Harney and Howard streets, in the city of Omaha, and at that time and place deponent informed Stover of the pendency of this action against him, to which the defendant replied that he was aware of that fact, but that plaintiff would never be able to collect a dollar, for the reason that he, Stover, had nothing, and that the property seized under the writ of attachment did not belong to him, but to his father-in-law; furthermore, that the defendant in the same conversation admitted the validity of the account upon which suit was brought, and that he was individually liable for the payment thereof. James E. Stover testified in rebuttal that he is not acquainted with the said E. G. McGilton, and never conversed with him upon any subject, and that defendant did not commence business at the place in which McGilton stated the conversation occurred, nor in that vicinity until December 26, 1891. The defendant, in one particular,—namely, as to the time he commenced business on South Thirteenth street, in Omaha,—is corroborated by the testimony of two or more witnesses. The defendant, however, failed to deny having the conversation testified to by Mr. Duffield, which occurred in Chicago prior to the rendition of the judgment in question. While the evidence adduced on the hearing in the district court was conflicting, it was sufficient to

justify the finding that the defendant had actual notice of the pendency of the suit in ample time to have made a defense had he desired to do so. Having had such notice, the motion to open the judgment was properly denied. (*Merriam v. Gordon*, 20 Neb., 405.)

It is claimed the court erred in admitting in evidence the affidavits of Duffield, McGilton, and Healey. The section of the statute above referred to expressly provides that the adverse party, on the hearing of an application to open a judgment, may present counter-affidavits for the purpose of showing that the defendant had notice of the pendency of the suit in time to appear in court and make his defense. The affidavits objected to tended to prove that the defendant had actual notice of the pendency of the action, hence the court did not err in admitting them.

It is urged that there was error in admitting the transcript of the evidence of James E. Stover and Andrew Bevins, given in another action. A sufficient answer to the contention is that the hearing was to the court without a jury, therefore the admission of incompetent or irrelevant evidence is not reversible error. (*Enyeart v. Davis*, 17 Neb., 228; *Richardson v. Doty*, 25 Neb., 424; *Ward v. Parlin*, 30 Neb., 376.) Excluding the evidence which is made the basis of this assignment, there yet remained sufficient competent evidence to sustain the order of the court.

It is stated in the brief that more than six months after the suit was brought the plaintiff voluntarily dismissed it as to all the defendants except James E. Stover, and the judgment sought to be opened was not rendered in the original action, but is a judgment against James E. Stover

personally. The record fails to disclose a voluntary dismissal as to any defendant. It is true judgment was entered against James E. Stover alone; yet if there was any error in rendering a judgment against one of the partners, conceding the action was against the firm and not the individual members thereof, it cannot be reviewed in this proceeding, since such judgment was pronounced more than one year before the cause was brought to this court. (Code, sec. 592.)

We discover no reversible error in the record, and the order is

AFFIRMED.

W. B. SCARBOROUGH V. MYRON N. MYRICK.

FILED APRIL 7, 1896. No. 6243.

1. **Proceedings in Error:** TIME. Proceedings in error may be commenced in the supreme court at any time within one year from the rendition of the judgment or decree, or final order sought to be reviewed.

2. **Sufficiency of Petition:** REVIEW. A motion for a new trial is unnecessary to present to this court the question whether the petition states a cause of action.

3. **Quieting Title:** PLEADING. The petition in an action to quiet title examined, and *held* to state a cause of action.

4. **Summons:** SERVICE BY PUBLICATION: PROCEEDING TO OPEN JUDGMENT. To entitle a party to have a decree rendered against him upon service by publication opened, under section 82 of the Code, it must appear that he had no actual notice of the pendency of the action in time to interpose a defense.

5. **Notice of Proceeding to Open Judgment:** WAIVER. Notice of an application, under said section, to open a judgment or decree must be given to the adverse party; but where such party appears and resists the application, it is a waiver of formal notice.

6. **Quieting Title:** SERVICE BY PUBLICATION. In an action to quiet title to real estate, service by publication may be made upon a non-resident defendant who cannot be summoned in the state.

7. **Summons:** AFFIDAVIT FOR SERVICE BY PUBLICATION. Plaintiff's cause of action is not required to be set forth in an affidavit for service by publication. It is sufficient if such affidavit states that the defendant is a non-resident of this state, and that service of summons cannot be had upon him therein, and facts showing the action to be one of those mentioned in section 77 of the Code, in which constructive service is authorized.

8. ———: SERVICE BY PUBLICATION: WAIVER OF DEFECTS: APPEARANCE. Where a decree is rendered upon service had by publication, and the defendant subsequently files an answer to the merits, and asks to have the decree opened under section 82 of the Code of Civil Procedure, such appearance is a waiver of all defects and irregularities in the service.

9. **Names of Parties:** ERRORS: WAIVER: APPEARANCE. Except in actions specified in section 23 of the Code of Civil Procedure, it is bad pleading to describe the plaintiff or defendant by the initials only of his Christian name; but if so designated it is merely a misnomer, and if the defendant appears, or is personally served, and no objection on that ground is made in the trial court, the defect is waived.

10. ———: JUDGMENTS. In the absence of a showing to the contrary, it will not be presumed for the purpose of invalidating a judgment rendered against a defendant, that he has any other Christian name than the initials by which he was sued.

11. **Service by Publication:** DEFECTS: PROCEEDING TO VACATE JUDGMENT. A decree rendered against a defendant upon service by publication alone, he having made no appearance in the cause, and the published notice requiring him to answer on or before a date anterior to the filing of the petition, instead of the third Monday after the completed service, as required by statute, may be set aside on motion of the defendant, as having been irregularly entered, under the provisions of section 602 *et seq.* of the Code of Civil Procedure. (*Wilkins v. Wilkins*, 26 Neb., 235.)

ERROR from the district court of York county. Tried below before WHEELER, J.

Sedgwick & Power, for plaintiff in error.

George B. France, contra.

NORVAL, J.

This action was instituted in the district court of York county on the 5th day of April, 1892, by Myron N. Myrick against W. B. Scarborough, to quiet the title to the real estate herein described, and to annul a certain contract entered into by and between them, by the terms of which the plaintiff agreed to convey, upon certain considerations, the southwest quarter of section 3, the southeast quarter of section 4, the northeast quarter, and the northeast quarter of the northwest quarter of section 9, and the west half of the northwest quarter of section 10, all in township 12 north, range 3 west, York county, Nebraska. Affidavit for substituted service of summons was made and filed, notice of the pendency of the suit was duly published, and, without any appearance on the part of the defendant, a decree as prayed was rendered against him on the 16th day of June, 1892. At a subsequent term of the court, to-wit, December 30, 1892, the defendant, through his attorneys, filed a motion to set aside said decree, accompanied with the affidavits of his attorneys in support thereof, and filed his answer in said cause. The application was heard upon affidavits, and also evidence taken by the oral examination of witnesses, which testimony is embodied in the bill of exceptions found in the record. The court refused to set aside the decree, and the defendant has brought the case into this court for review.

One of the grounds urged for a reversal is that the petition fails to state a cause of action. Plaintiff insists that the sufficiency of the petition cannot now be raised, since the cause was not docketed in this court within six months from the entry of the decree, and further, because no motion for a new trial was filed in the court below. The cause is not here upon appeal, but by proceedings in error. Therefore the defendant was not required to have the cause docketed within six months from the date of the decree. Proceedings in error may be commenced in this court at any time within one year from the rendition of the judgment, or decree, or final order sought to be reviewed. (*Bemis v. Rogers*, 8 Neb., 149; *Rogers v. Redick*, 10 Neb., 332; *Hendrickson v. Sullivan*, 28 Neb., 790.) The record discloses that the transcript and petition in error were filed in this court on June 14, 1893, which was less than a year after the decree was pronounced in the district court. No motion for a new trial was necessary to test in this court the sufficiency of the petition. (*Hays v. Mercier*, 22 Neb., 656; *O'Donohue v. Hendrix*, 13 Neb., 255; *Schmid v. Schmid*, 37 Neb., 629; *Hansen v. Kinney*, 46 Neb., 707; *Harris v. State*, 46 Neb., 857.)

It is insisted that the petition does not state a cause of action, and is therefore insufficient to support the decree, because it fails to allege that plaintiff was the owner of the lands in controversy at the time the action was brought. Undoubtedly a plaintiff must have title to, or claim an interest in, the real estate in order to maintain an action *quia timet*, but he is not required to allege and prove a fee-simple title; especially is this so where he is in possession of the property.

(*Brewer v. Merrick County*, 15 Neb., 180; *McDonald v. Early*, 15 Neb., 63; *Foree v. Stubbs*, 41 Neb., 271.) In the case at bar the petition alleges "that the plaintiff was, at the time of the making and execution of the contract hereinafter mentioned [the one he sought to have canceled], the owner, and is now, and has been for more than five years last past, in the possession" of the premises in controversy. There is no averment in the pleading attacked that plaintiff has ever parted with the title in the property which he at one time held, and, at least after decree, we must presume that plaintiff continued to be the owner of the property when this suit was brought. Manifestly this is so, since the plaintiff alleges the making of the contract to convey the property to the defendant, and that the latter has wholly failed and refused to perform the conditions and stipulations therein contained on his part to be kept and observed, thereby showing affirmatively that the defendant has forfeited all rights or interest which he may have had in the contract and lands therein described. While the petition is not as full in its averments as might be desired by some pleaders, yet we think, under the liberal rules of code pleading, it states a cause of action.

One of the grounds stated in the motion to set aside the decree and permit a defense to be made is that there was no other service of summons upon the defendant than by publication. Under section 82 of the Code of Civil Procedure a party against whom a judgment or decree is entered upon constructive service alone, has a right to have such judgment or decree opened any time within five years by complying with the several requirements of said section, two of which being

that the party shall give notice of his application to his adversary, and also establish that the defendant had no actual notice of the pendency of the suit in sufficient time to appear in court and contest the cause. This record fails to disclose that notice of the motion to open the decree was served upon the plaintiff. It does, however, show that he appeared and resisted the application, which was a waiver of formal notice. The evidence adduced on the hearing fails to establish that the defendant did not have actual notice that the suit was pending. It follows that the defendant was not entitled to have the decree opened under said section 82. (*Merriam v. Gordon*, 20 Neb., 405; *Stover v. Hough*, 47 Neb., 789.)

It is urged that the trial court did not acquire jurisdiction on account of alleged defects in the affidavit for publication and in the published notice. It is true that the affidavit upon which constructive service of summons was based is jurisdictional, and if there is an entire omission of an averment upon a vital or material matter, the court will not acquire jurisdiction by the published notice, but the proceedings will be absolutely void. The affidavit must disclose, in addition to the fact that the defendant is a nonresident of this state, and service cannot be had upon him therein, that the action is one of those mentioned in section 77 of the Code, in which constructive service can be made. Tested by this rule the affidavit for publication in the case at bar is sufficient. It states the date of the filing of the petition against the defendant, that the object and prayer of the petition is to declare an agreement entered into between plaintiff and defendant on February 26, 1890, to be null and void, to cancel

the same of record, and to quiet in plaintiff the title to certain real estate specifically described in said contract, as in the petition set forth, and that the defendant is a non-resident of the state and service of summons cannot be made upon him therein. It was not necessary that the affidavit should disclose plaintiff's title to the property in controversy. He was not required to state his cause of action in the affidavit, but in his petition. (*Grebe v. Jones*, 15 Neb., 312.) The affidavit shows that the nature or the character of the suit is one in which the statute authorizes service by publication to be had, and that is sufficient so far as that point is concerned. (*Fouts v. Mann*, 15 Neb., 172; *Taylor v. Coots*, 32 Neb., 30.) Our statute authorizes service by publication in actions to quiet title to real estate when the defendant is a non-resident. (*Arndt v. Griggs*, 134 U. S., 316.)

Another complaint is that in the petition, affidavit, and notice of publication the defendant is designated by his family or surname, and the initial letters only of his Christian name. The statute contemplates that the parties to a suit, whether plaintiff or defendant, shall be described in the pleadings by their full Christian names, except in actions specified in section 23 of the Code. In all other cases it is bad pleading to describe the plaintiff by the initials only of his Christian name. But the absence of his first or Christian name amounts merely to a misnomer, and if objection on that ground is not made in the trial court, it will be waived. (*Walgamood v. Randolph*, 22 Neb., 493; *Real v. Honey*, 39 Neb., 516; *Laws v. McCarty*, 1 Handy [O.], 191; *Wilson v. Shannon*, 6 Ark., 196; *Monroe Cattle Co. v. Becker*, 147 U. S., 47; *Kenyon v. Semon*, 45 N. W. Rep. [Minn.],

10.) In the case at bar the defendant is sued by the name of W. B. Scarborough, no other description being inserted in the petition or proceedings; nor in the verification of the petition is it stated that the real name of the defendant is unknown. Neither in the answer filed by the defendant, nor in the motion and affidavits filed by him, has he disclosed his full Christian name. The defendant signed the contract sought to be canceled by his initials alone. We have carefully examined the entire record and find it nowhere discloses that the defendant has any other Christian name than the initials by which he was sued. This being true, we cannot presume that he had any other Christian name; therefore the objection that the defendant was described in the petition by his initials is not available in this court. (*Oakley v. Pegler*, 30 Neb., 628; *Fewlass v. Abbott*, 28 Mich., 270; *Kenyon v. Semon*, 45 N. W. Rep. [Minn.], 10.)

It is, however, argued that service by publication conferred no jurisdiction; in other words, that the summons should have been personally served upon the defendant. Section 148 of the Code of Civil Procedure provides: "When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words, 'real name unknown,' and a copy thereof must be served personally upon the defendant." This section was before the court in *Enewold v. Olsen*, 39 Neb., 59. It was there held,

in an action to recover a personal judgment not brought under section 23 of the Code, where the defendant was sued as F. Olsen, "full name unknown," and the return on the summons showed that he was served by leaving a copy at his usual place of residence, that the court acquired no jurisdiction over the defendant, and that the judgment was void. The scope of this decision is that a personal judgment cannot be rendered when the defendant is sued by his initials, unless the summons is personally served upon him, or he appears, except in cases brought under said section 23. Whether in an action *in rem*, and in which no personal judgment is sought, service by publication can be had where the defendant is sued by the initials of his Christian name, it is unnecessary to decide, since, if there was any defect in the service in this case, it was waived by the defendant filing his answer to the merits and asking to have the decree opened under section 82 of the Code. (*Warren v. Dick*, 17 Neb., 241; *Seely v. Boon*, 1 N. J. Law, 138.)

Objection is made to the published notice. The proof of publication shows that the notice was published four consecutive weeks in the York *Republican*, the first publication thereof being on April 5, 1892, and the last insertion on the 29th day of the same month. The notice to the defendant required him to answer the petition on or before the 16th day of March, 1892, which was not only prior to the first publication, but before the petition was filed in the district court. By statute the time for filing answer is fixed "on or before the third Monday * * * after the return day of the summons or service by publication." The notice in question is manifestly defective. It

should have required the defendant to answer on or before the third Monday after the completed service. The defect indicated did not invalidate the notice to such an extent as to prevent the court from acquiring jurisdiction or to render the proceedings absolutely void. It was a mere error or irregularity not available in a collateral attack upon the decree, but constituting sufficient ground for a reversal in a direct proceeding like this, or to set aside the decree under the third subdivision of section 602 of the Code, which authorizes a district court to vacate its own judgments or decrees after the term at which the same were entered "for mistakes, neglect, or omissions of the clerk, or irregularity in obtaining a judgment or order. (*Wilkins v. Wilkins*, 26 Neb., 236.)

The case cited was an action for divorce, in which a decree was rendered against the defendant. Service was by publication only, the notice requiring the defendant to answer on the second Monday, instead of the third, after the last publication. Nearly three years after the rendition of the decree the defendant filed a motion in the same court to vacate the decree for said defect in the notice in fixing the time for answer, which motion was sustained, and the ruling was subsequently affirmed by this court. The decree in the case at bar was irregularly entered, and it should have been set aside. The decree, and the order refusing to vacate the same, are reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

PHILADELPHIA MORTGAGE & TRUST COMPANY, TRUSTEE, V. PETER GOOS ET AL.

FILED APRIL 7, 1896. No. 8250.

1. **Mortgages:** RENTS AND PROFITS: RECEIVERS. Although section 55, chapter 73, Compiled Statutes of Nebraska provides that "in the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof," yet it does not abrogate the power of the court to appoint a receiver, in a proper case, to collect the rents and profits from mortgaged premises, notwithstanding the mortgage contains no stipulation as to the right of possession.

2. ———: ———: APPOINTMENT OF RECEIVER PENDING APPEAL. After a confirmation of sale of mortgaged premises, and an appeal from such order by the defendant, the trial court may, in a proper case, when necessary to protect the mortgagee's interests, appoint a receiver to collect the rents pending the determination of such appeal.

3. ———: ———: RECEIVERS. *Chadron Banking Co. v. Mahoney*, 43 Neb., 214, distinguished.

4. ———: ———: ———. In an action to foreclose a mortgage, the plaintiff is entitled to the appointment of a receiver to take charge of the property and collect the rents, when it is disclosed that the mortgaged property is "probably insufficient to discharge the mortgage debt." *Jacobs v. Gibson*, 9 Neb., 380, followed.

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

The opinion contains a statement of the case.

Wharton & Baird, for plaintiff in error:

The appeal by Iszard from the decree of the district court and the filing of his bond did not divest the district court of power to hear the application and appoint a receiver. (*Pasco v. Gamble*, 15 Fla.,

562; *Connelly v. Dickson*, 76 Ind., 440; *Schreiber v. Carey*, 48 Wis., 217; *Mitchell v. Roland*, 63 N. W. Rep. [Ia.], 606; *Stockman v. Wallis*, 30 N. J. Eq., 449; *Chetwood v. Coffin*, 30 N. J. Eq., 450; *Eastman v. Cain*, 45 Neb., 48.)

Under the law of Nebraska, except as otherwise provided, the mortgagor is entitled to the rents and profits and the possession of the mortgaged property until the final confirmation of the sale. (Compiled Statutes, sec. 55, ch. 75; *Yeazel v. White*, 40 Neb., 432; *West v. Conant*, 34 Pac. Rep. [Cal.], 705; *Swan v. Mitchell*, 47 N. W. Rep. [Ia.], 1043; *American Investment Co. v. Farrar*, 54 N. W. Rep. [Ia.], 361.)

After the decree had been entered, the sale confirmed, and the order of confirmation superseded by the appeal bond, the court had no power to appoint a receiver pending the appeal. (Code of Civil Procedure, sec. 266; *Chadron Banking Co. v. Mahoney*, 43 Neb., 214.)

The supersedeas bond provides for payment of waste. It therefore protects the plaintiff against unpaid taxes. (*Phelan v. Boylan*, 25 Wis., 679; *Wilkinson v. Wilkinson*, 59 Wis., 557; *Stetson v. Day*, 51 Me., 434; *Cannon v. Barry*, 59 Miss., 289; *Mehle v. Bensel*, 2 So. Rep. [La.], 202; *Sherrill v. Connor*, 12 S. E. Rep. [N. Car.], 588.)

Cowin & McHugh, contra.

NORVAL, J.

This is a proceeding in error to review the order of the district court refusing to appoint a receiver to collect the rents and profits of the mortgaged premises, pending an appeal to this court from an order confirming a sale. On the 23d day of June, 1894, a decree of foreclosure of the mort-

gaged premises was entered in the district court of Douglas county in favor of the plaintiff for the sum of $72,678.66, with interest on $67,000 at seven per cent, and ten per cent interest on the remainder of the amount found due by the decree. The defendant, John E. Iszard, in due time filed a written request for a stay of the order of sale for the period of nine months. Subsequently, on the 29th day of March, 1895, an order of sale was issued, the premises were appraised, and the sale thereof advertised to take place on April 30, 1895. On motion of the defendant Iszard, the appraisement was set aside by the court; a second appraisement of the property was made by new appraisers, which likewise was vacated on motion of Iszard, and a third appraisement was ordered. The premises were again appraised by other appraisers, and advertised for sale. A motion to set aside this appraisement and to remove the special master commissioner was filed by Iszard, but the same was not heard or passed upon until after the day fixed for the sale of the real estate. The property was sold under the appraisement to the plaintiff for $68,100. Iszard filed objections to the sale, which, with his motion to set aside the appraisement and to remove the special master commissioner, were overruled, and the sale confirmed August 31, 1895. Thereupon Iszard prosecuted an appeal to this court, giving a supersedeas bond in the sum of $7,000, conditioned for the prosecution of such appeal without delay, and that during the pendency of said appeal he would not commit, or suffer to be committed, any waste upon the mortgaged premises. Subsequently, on the 30th day of September, 1895, plaintiff filed its petition for the appointment of a receiver to col-

lect the rents, issues, and profits pending the appeal, setting forth in the application, in addition to the foregoing facts, that the appeal was prosecuted for delay merely; that the amount due plaintiff on his decree was $79,455.45; that the value of the property is insufficient and grossly inadequate to satisfy said sum; that the defendants have failed and neglected to pay the taxes due and delinquent on said premises; that the accrued taxes and assessments, for which the property is liable, and which the defendants have failed to pay, amount to about $3,300, and that they have neglected to keep the property insured, and the plaintiff, for the protection of its security, has been compelled to pay for premiums and insurance on said property, since the rendition of the decree of foreclosure herein, the sum of $1,867.06. Notice of the petition was duly given, and upon the hearing the application was denied and a receiver refused. A motion for a new trial was filed by the plaintiff, which was overruled. The district court of Douglas county had jurisdiction to hear and determine the application for the appointment of a receiver herein, notwithstanding such application was not made until after the decree of foreclosure had been entered, the sale confirmed, and the cause appealed to this court. (*Eastman v. Cain*, 45 Neb., 48.)

There is no controversy over the facts in this case; but the question is whether sufficient facts existed at the time the application was presented to the court below to authorize the appointment of a receiver. Section 266 of the Code of Civil Procedure provides for the appointment of a receiver in either of the following cases: "Second—In an action for the foreclosure of a mortgage,

when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt. Third—After judgment, or decree to carry the same into execution, or to dispose of the property according to the decree or judgment, or preserve it during the pendency of an appeal. * * * Fifth—In all other cases where receivers have heretofore been appointed by the usages of courts of equity." It is obvious the application for a receiver was not made to carry the decree of the district court into effect, nor to dispose of the property according to the decree. That had already been done. The second subdivision of section 266 of the Code authorizes the appointment of a receiver in an action to foreclose a mortgage when the mortgaged property "is probably insufficient to discharge the mortgage debt." In other words, the inadequacy in value of the premises to pay the mortgage lien thereon is alone sufficient ground to entitle the mortgagee to the appointment of a receiver to take charge of the property and collect rents accruing therefrom. (*Jacobs v. Gibson*, 9 Neb., 380; *Ecklund v. Willis*, 42 Neb., 737.)

Our attention has been called to section 55, chapter 73, Compiled Statutes, which provides: "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." It is argued that, under the foregoing provision, the mortgagor, except as otherwise stipulated in the mortgage, is entitled to the rents and profits, and the possession of the mortgaged premises until final confirmation of the sale. The mortgage under which the foreclosure in this case was made is not before us; hence we are not advised of its pro-

visions. Assuming that it contained no stipulation as to the right of possession of the property, it does not follow that a receiver may not be appointed to collect the rents and profits, in case the premises are insufficient in value to satisfy the lien of the mortgage. That such power exists was held by this court in *Jacobs v. Gibson*, 9 Neb., 380. LAKE, J., speaking for the court in that case, said: "In the absence of an agreement to the contrary, we suppose no one would contend but that a mortgagor is entitled to the rents and profits of mortgaged premises until condition broken,—or, in other words, until such time as the mortgagee is authorized to proceed by action on the mortgage to subject the property to the payment of his debt. Such, doubtless, is the law. On the other hand, it is equally clear that on a condition broken, by which the mortgagee is authorized to commence foreclosure proceedings, if the property be inadequate security, he has thenceforward an equitable lien upon the rents and profits, or so much thereof as may be necessary to the security of the mortgage debt, which he may enforce by proper proceedings." (See High, Receivers, sec. 666; *Schreiber v. Carey*, 48 Wis., 208; *Pasco v. Gamble*, 15 Fla., 562; *Mahon v. Crothers*, 28 N. J. Eq., 567; *Hyman v. Kelly*, 1 Nev., 179; *Lowell v. Doe*, 44 Minn., 144.) The last case cited was an appeal from an order appointing a receiver of mortgaged real estate pending foreclosure proceedings. It was urged that under a statute of Minnesota which declares that "a mortgage of real property is not to be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure," the court had no power to appoint

a receiver to dispossess the mortgagor. The court overruled this contention, saying, after quoting the foregoing section of the statute: "The mortgagee is no longer entitled to the possession of the mortgaged premises before foreclosure by reason of his having any title or estate in the land. The mortgagor having the legal title, may without doubt remain in possession until his title is divested, unless, in the application of the established principles of equity, and consistently with the legal title remaining in the mortgagor, the court shall find it necessary to lay its hand upon the property for the protection of the equitable rights of the mortgagee. The exercise of this power by courts of equity in the past was not based upon the ground that the legal title had passed from the mortgagor to the mortgagee, but upon the equitable rights of the mortgagee to have his security preserved so that it should be adequate for the satisfaction of the mortgage debt. * * * The jurisdiction of equity in the appointment of receivers, long exercised upon grounds peculiar to courts of equity, is not to be deemed to have been taken away by the statute unless that is its necessary effect, or at least its obvious purpose. Such is not the obvious purpose or necessary effect of the statute. It is to be read in harmony with the existing principles of equity jurisprudence, if the intention to do away with the application of such principles is not manifest. * * * It is very clear from the language of this statute, the meaning of which is plain, precise, and impossible to be misunderstood, that it was intended to abrogate the common law doctrine that a mortgage created an estate upon condition in the mortgagee, which, upon default in

the performance of the condition, became absolute, entitling the mortgagee to recover possession. But the language of the act expresses no more than this; and it cannot be fairly construed as abrogating, also, the power of courts of equity to afford to mortgagees such remedies for the protection of their equitable rights as, upon equitable grounds, those courts had always been accustomed to afford, and the granting of which did not rest upon the doctrine of the legal title or right of possession being in the mortgagee?" The reasoning is sound, and is equally applicable to our statute. We might cite many other cases to the same effect. Indeed, the general current of authority sustains the exercise of the power to appoint a receiver to collect rents of mortgaged premises in a proper case, though there is no stipulation in the mortgage giving the mortgagee the right of possession of the property. The case of *Yeazel v. White*, 40 Neb., 432, is plainly distinguishable, and not in the least in conflict with the foregoing authorities. There are decisions rendered under statutory provisions similar to ours which deny the power of a court to appoint a receiver to collect the rents, in the absence of such a stipulation in the mortgage. While we entertain the greatest respect for the opinions of the courts asserting the doctrine last stated, we are satisfied the reasons advanced in them are insufficient to justify us in overruling our prior adjudication on the question, especially since it is in line with the general authority in this country.

It is insisted that no power exists to appoint a receiver after decree under the second subdivision of said section 266, but that it merely authorizes one to be appointed while the case is pending and

undetermined in the district court. The case of *Chadron Banking Co. v. Mahoney*, 43 Neb., 214, is cited by counsel to sustain this contention. That case lacks analogy. There the petition in foreclosure prayed the appointment of a receiver to collect the rents pending the action, but no hearing was had on the application for receiver until the final decree was entered, when one was appointed, before an appeal was taken or an application was made for a stay of the order of sale. It was held, and, we think, rightly, there was no occasion for making the appointment, and the order was reversed. IRVINE, C., speaking for the court, observed: "But this order was made a part of the final decree; no appeal had been taken; no steps had been taken towards instituting an appeal. It is possible, though this we do not decide, that in some cases a receiver might be appointed pending a stay of execution, but no stay had been asked for. For all that appeared when this receiver was appointed, the mortgagees might have proceeded in twenty days (the time fixed for redemption) to sell the property." In the case at bar no application for the appointment of a receiver was filed or presented to the court until the defendant had prosecuted an appeal to this court from the order confirming the sale. The appeal had at that time been perfected, and a supersedeas bond given, so the plaintiff could not reap the benefit of the decree. When this application was made there existed sufficient reason why the appointment should be made. The property was insufficient to pay the mortgage, and there will be a large deficiency judgment. The cause was then pending and undetermined on appeal, and according to the rules and practice which obtain

in this court, such appeal could not be heard on its merits for two years. In the meantime the mortgage debt increases, the defendant collects the rents, amounting to $5,000 per annum, which he pockets, and refuses to insure the mortgaged premises, or pay the accruing taxes against the property. It will be observed that section 266 of the Code does not provide when the application for a receiver may be made, whether before or after judgment, except that the third subdivision provides for the appointment of a receiver after judgment or decree, for certain purposes. As has already been stated, we have decided in *Eastman v. Cain*, 45 Neb., 48, that the district court possesses jurisdiction to appoint a receiver in a foreclosure case to collect the rents, although the application therefor is made after an appeal has been taken on the merits to this court. Had no appeal been prosecuted from the order of confirmation, doubtless a receiver could not be appointed merely to collect the rents; but an appeal having been perfected, the action must be regarded as still pending for the purpose of appointing a receiver of the rents and profits of the mortgaged property. (*Brinkman v. Ritzinger*, 82 Ind., 358; *Connelly v. Dickson*, 76 Ind., 440; High, Receivers, sec. 110; *Merrill v. Elam*, 2 Tenn. Ch., 513; *Moran v. Brent*, 25 Gratt. [Va.], 104; *Adkins v. Edwards*, 83 Va., 316; *Schreiber v. Carey*, 48 Wis., 208; *Beard v. Arbuckle*, 19 W. Va., 145; *Hutton v. Lockridge*, 27 W. Va., 428; *Astor v. Turner*, 11 Paige Ch. [N. Y.], 436.) The fact that the mortgaged premises are of insufficient value to pay the amount of plaintiff's claim, and costs, coupled with the further facts that the order confirming the sale may possibly be reversed, that the de-

fendant is collecting the rents and refuses to apply the same on the decree, or in payment of the taxes and assessments against the property, or to keep the premises insured, and the liability of the real estate being sold for the non-payment of said taxes, justify the appointment of a receiver. As was aptly said by Taylor, J., in delivering the opinion of the court in *Schreiber v. Carey, supra:* "We think the facts in this case show that the mortgagor, by his willful neglect in not paying the taxes, is casting a burden upon the mortgaged estate which equity demands he should discharge. It is clearly a want of good faith on the part of the mortgagor to neglect to pay the interest on the mortgage debt or to pay the taxes upon the mortgaged property, and yet remain in possession and appropriate all the profits of the use of the estate to his own purposes." The cases already cited fully sustain the right of the plaintiff to have a receiver appointed.

It is argued by the defendant that the plaintiff is protected against any possible damages by reason of the non-payment of the taxes, by the supersedeas bond given in the appeal taken from the order of confirmation. This bond is conditioned that appellant "will not during the pendency of such appeal commit, or suffer to be committed, any waste upon such real estate." Authorities are cited to the effect that non-payment of taxes constitutes waste. If we accept the reasoning of the decisions relied on by counsel, the defendant Iszard had committed waste upon the mortgaged premises, and it is clear that the commission of waste is sufficient ground to authorize a court of equity to appoint a receiver to take possession of the mortgaged property pending an appeal. Even

though the supersedeas bond is broad enough to cover the non-payment of taxes, which we do not determine, still that is no reason for refusing a receiver. The plaintiff is entitled to have his debt satisfied out of the property pledged as security for its payment, without being forced to resort to other remedies he may have. The statute authorizes the appointment of a receiver in an action of foreclosure when the mortgaged premises are "probably insufficient to discharge the mortgage debt." In the case at bar there is no room for doubt that the property is wholly inadequate to pay the amount of the decree. We must not be understood as holding that the plaintiff would be entitled to the rents and profits accruing from the property pending the appeal from the order of confirmation, in case such order should be affirmed. What we do decide is that the rents should be impounded and retained to await the further order of the lower court in the premises.

It was suggested on the argument that the real estate in controversy was Iszard's homestead. Whether in any case a receiver can be appointed to take possession of the mortgagor's homestead pending foreclosure proceedings is unnecessary to decide, since that question is not presented by this record.

The order refusing a receiver is reversed, and the cause remanded with directions to the district court to appoint some suitable person receiver to collect the rents and profits of the mortgaged premises.

REVERSED AND REMANDED.

MARY FITZGERALD, ADMINISTRATRIX, V. J. H. MCCLAY ET AL.

FILED APRIL 7, 1896. No. 6224.

1. **Contracts to Erect Public Buildings:** BONDS: LIABILITY OF SURETIES. P. and S. entered into a contract with the state to erect for it a building at a stipulated sum. The contract required, *inter alia*, that the contractor should pay for all labor performed or materials furnished, and a bond for the faithful performance of the contract was given. *Held*, That the sureties on such bond are liable to a subcontractor for materials furnished by him and used in the construction of the building.

2. **Action on Builder's Bond:** PLEADING. *Held*, That the petition states a cause of action.

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

A. G. Greenlee, for plaintiff in error.

Samuel J. Tuttle, contra.

NORVAL, J.

Thomas Price and J. N. Shoemaker, on the 4th day of March, 1889, entered into a written contract with the state of Nebraska, through the board of public lands and buildings, whereby they agreed to furnish all the labor and materials necessary for the construction of a brick building for an engine house on the grounds at the hospital for the insane at Lincoln, at the stipulated sum of $11,000. One-half thereof was to be paid when the roof was on and the remainder when the building was fully completed. The contract contained this provision: "And it is further agreed

that the first party [Price and Shoemaker] will pay off in full all laborers and material-men for labor performed or materials furnished, so that each and every person connected with this contract may receive his just dues." At the time this contract was made a bond in the sum of $11,000 for the faithful performance of the contract was executed to the state by Price and Shoemaker as principals, and J. H. McClay and P. H. Cooper as sureties, which was accepted and approved by the state. The bond contained the same conditions as those considered in *Sample v. Hale*, 34 Neb., 220, and *Hickman v. Layne*, 47 Neb., 177. This action was brought by John Fitzgerald against the principals and sureties upon the bond of indemnity already mentioned, to recover for materials furnished the contractors, Price and Shoemaker, and used by them in the construction of said building. The sureties interposed a general demurrer to the petition, which was sustained, and as to them the court dismissed the action. To reverse the judgment the plaintiff prosecutes error.

The petition alleges the execution and delivery of such contract and bond, and copies thereof are made parts of the pleading. It is also averred that in pursuance of said contract Price and Shoemaker purchased of plaintiff, for use in said building, 200,000 bricks at the agreed price of $10 per thousand; that said bricks were sold, furnished, and delivered by plaintiff, and the same were used in said building; that no part of the purchase money has been paid, except the sum of $1,400, and that there is due the sum of $609, with interest at seven per cent from April 11, 1889; that by reason of the failure of said Price and Shoemaker to pay said bal-

ance according to the requirements and stipulations of said contract, the conditions of said bond have been broken, and the defendant sureties have become liable to the plaintiff for the full amount so due for said bricks. The demurrer was, doubtless, sustained upon the ground that the bond was given alone to protect the state, and that third parties could not avail themselves of the stipulations; but since that decision was rendered this court has frequently held, in suits brought on bonds given for the faithful performance of a building contract similar to the one before us, that a person furnishing labor or materials for the principal in such bond may maintain an action upon the bond to recover the price of such labor or materials. (*Sample v. Hale*, 34 Neb., 220; *Habig v. Layne*, 38 Neb., 743; *Doll v. Crume*, 41 Neb., 655; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb., 649; *Kauffman v. Cooper*, 46 Neb., 644; *Lyman v. City of Lincoln*, 38 Neb., 794.) The petition shows a breach of the conditions of the bond, and, tested by the rule laid down in the foregoing authorities, it states a cause of action against the sureties. The judgment will be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

GRANT GUTHRIE, TREASURER OF THE VILLAGE OF HARRISON, V. STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT NO. 7, SIOUX COUNTY.

FILED APRIL 7, 1896. No. 6248.

1. **School Districts**: INTOXICATING LIQUORS: LICENSE FEES. Moneys arising from a license granted by a village for the sale of intoxicating liquors belong to the school district in which such village is located, and must be applied to the support of the common schools in said district.

2. ———: ———: ———: MANDAMUS. *Mandamus* will lie to compel a village treasurer to pay such moneys to the proper school district, even before the expiration of the municipal year for which such license was issued.

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

H. T. Conley, for plaintiff in error.

C. H. Bane and *D. B. Jenckes*, *contra*.

NORVAL, J.

On the 1st day of May, 1893, the proper municipal authorities of the village of Harrison, in Sioux county, issued a license to one Isador Richsten to sell intoxicating liquors within the corporate limits of said village for the municipal year ending May 1, 1894. The applicant paid to Grant Guthrie, the respondent, as treasurer of said village, the license moneys required by ordinance, to-wit, the sum of $500. The relator, School District No. 7, of Sioux County, is located and embraced within the corporation limits of said village of Harrison, and is the only school district located within the limits of said village. On May 12, 1893, the school

district demanded said license moneys from respondent, and upon his refusal to pay over the same an application for a *mandamus* was presented to the court below. From an order granting a peremptory writ the defendant prosecutes error.

Section 5, article 8, of the constitution of this state declares: "All fines, penalties, and license moneys arising under the general laws of the state shall belong and be paid over to the counties respectively where the same may be levied or imposed, and all fines, penalties, and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivision less than a county shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the same may accrue." Frequently the foregoing provisions have been before us for consideration, and in an unbroken line of decisions it has been held that all moneys arising from licenses granted by cities or villages for the sale of intoxicating liquors, since the adoption of the present constitution, belong to the school district in which the municipality granting the license is situated, and must be appropriated exclusively to the support of the common schools in said district (*State v. McConnel*, 8 Neb., 28; *City of Hastings v. Thorne*, 8 Neb., 160; *School District v. Saline County*, 9 Neb., 403; *State v. Wilcox*, 17 Neb., 219); and where parts of more than one district are within the limits of the municipality issuing such license, the license moneys will be divided in equal parts between such districts. (*State v. Brodball*, 28 Neb., 254; *State v.*

White, 29 Neb., 288.) The constitution and these authorities alike settle the right of School District No. 7 to the moneys in controversy.

The only proposition urged by the respondent in opposition to the granting of the writ is that the license moneys do not belong to the school district as soon as paid into the village treasury and the license is issued, but that the licensee retains an interest in the unearned portion of the moneys, and hence the respondent would not be justified in paying the same to the relator faster than the money is earned. This argument is based upon the fact that this court has held that where a liquor license is canceled or revoked through no cause or fault of the licensee, he is entitled to a repayment *pro tanto* of the amount paid therefor for the unexpired term of the license. (*State v. Cornwell*, 12 Neb., 470; *Lydick v. Korner*, 15 Neb., 501; *State v. Weber*, 20 Neb., 473; *Chamberlain v. City of Tecumseh*, 43 Neb., 221.) With these cases we find no fault, but they are not applicable to the case under consideration. There is no claim here that Richsten's license has been annulled for any cause, nor has it been made to appear that there is even a remote possibility of its being canceled through any cause not the fault of the licensee. Had such a showing been made, it is probable that the court below, in the exercise of a sound discretion, would have denied the writ. We cannot anticipate that the license will be revoked. On the contrary, the presumption must be indulged that the license was legally granted, and that it will not be annulled. In case the respondent had paid the money to the relator, and the license had been subsequently revoked, the respondent would be protected. He would not be liable for the repay-

ment of the money to the licensee. This was held in *Lydick v. Korner*, 15 Neb., 501. So soon as the respondent received the money and the license was granted, no appeal therefrom being taken, it was his duty immediately to pay the money over to the treasurer of the school district. The decision of the district court is

AFFIRMED.

LYSLE I. ABBOTT, APPELLANT, V. JOHN BARTON ET AL., APPELLEES.

FILED APRIL 7, 1896. No. 6396.

Ruling on Demurrer: EXCEPTION: REVIEW. To secure a review of alleged error in sustaining a demurrer to a petition, an exception is indispensably necessary, even though the action is solely for equitable relief.

APPEAL from the district court of Saline county. Heard below before HASTINGS, J.

Cowin & McHugh and *Abbott & Abbott*, for appellant.

F. I. Foss and *W. R. Matson, contra.*

RYAN, C.

This action was brought into the district court of Saline county by the appellant to enjoin the collection of a judgment rendered against him in the county court of Hall county. The appellee, John Barton, was made a defendant because as sheriff of Saline county he was, as alleged, about to levy an execution for the collection of the afore-

said judgment upon the real property of the plaintiff, and Edward Hooper was made defendant because the said judgment was in his favor. The grounds upon which it was sought to prevent the enforcement of the aforesaid judgment were that it was rendered in favor of Hooper who was not the real party in interest; that service of the summons issued by the county court of Hall county had been made upon the appellant, who at that time was within and a resident of Douglas county, and that there was a defense to the collection of the note sued upon; wherefore, as plaintiff claimed, the county court of Hall county was without jurisdiction to render the said judgment. It is said, in argument, that a general demurrer was sustained to this petition, and that plaintiff having elected to stand thereon, his action was dismissed. This may be assumed to be true, though, as will hereafter appear, it is not very clear that a demurrer was overruled. There is, however, an insurmountable obstacle to our proceeding further in this matter, and that is, that to the ruling of the court no exception was taken. The journal entry first recites the submission of the demurrer to the court and immediately thereafter contains the following language: "On consideration whereof the court overrules said motion. Plaintiff not desiring to plead further, it is therefore considered by the court that the temporary injunction allowed herein be, and the same is hereby, dissolved, and this action is hereby dismissed, and that the defendants have and recover of and from the plaintiff their costs herein expended. Plaintiff gives notice of an appeal and the supersedeas bond is fixed at the sum of $200." There may be an appeal from the judg-

ment of the district court in an equity case, and in this court the review will be had upon the evidence introduced in the district court when properly preserved, but the requirement of an exception to a ruling, whereby a demurrer is sustained to the petition, is as indispensable in an equitable action as in an action at law. The judgment of the district court is

AFFIRMED.

NELSON & LITTLE v. W. H. H. MILLS.

FILED APRIL 7, 1896. No. 6467.

Conflicting Evidence: REVIEW. A judgment rendered on a verdict reached upon consideration of merely conflicting evidence will not be disturbed where there is presented on error proceedings no question other than the sufficiency of the evidence to sustain the verdict.

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

J. R. Patrick, for plaintiffs in error.

Hall, St. Clair & Roberts, contra.

RYAN, C.

In this action in the district court of Phelps county the firm of Nelson & Little sought to recover judgment for goods sold W. H. H. Mills. The answer contained a general denial and a claim of set-off on account of merchandise sold to the plaintiff. By reply the right of set-off was put in issue, and on a trial of the issues joined there was a verdict in favor of the defendant,

upon and in accordance with which judgment was rendered for defendant in the sum of $28.35 and costs.

The matter in this court specially contested is whether clothing of the value of $19 sold by plaintiff to one Lindsey was properly charged to the defendant. There was evidence that Lindsey, when he purchased the aforesaid clothing, was in the employ of Mills, and that Mills directed that the clothes sold Lindsey should be charged to himself. In his testimony Mills explicitly denied that he ever gave any authority to charge against him the clothes purchased by Lindsey. The jury, on conflicting evidence, found in favor of Mills, and we cannot disturb this verdict. There was no assignment of error which can be considered independently of the mere tendency of the evidence to prove or disprove the liability of Mills for the clothes sold to Lindsey. There is no fault found with the instructions given, but it is complained that the jury ignored them. The question submitted by these instructions was whether the promise of Mills was one to answer for the debt of another or was an indebtedness contracted by Mills for clothes purchased for Lindsey. There is no complaint of the correctness of the principles stated in these instructions as applied to the evidence upon which the jury was required to act, but it is urged that the jury arrived at a conclusion which, in view of these instructions, they should not have reached. In brief, this argument is that the jury should have found that the promise of Mills was really to pay an indebtedness contracted by himself, and not that of Lindsey. This contention is, therefore, simply that the verdict was contrary to the weight of the evidence, and thus we are

brought back to the first proposition herein considered and held adversely to the argument of the plaintiff in error. The judgment of the district court is

AFFIRMED.

HORNICK, HESS & MOORE, APPELLANTS, V. MARTIN MAGUIRE, APPELLEE.

FILED APRIL 7, 1896. No. 6459.

1. **Review:** JUDGMENTS: JOURNAL ENTRIES. This court will not review a judgment rendered by the district court prior to the formal entry of such judgment upon the journal of the trial court. (*Ward v. Urmson*, 40 Neb., 695.)

2. ———: ———: ———. A memorandum of a judgment made by a judge of the district court upon his trial docket will not authorize a review thereof in this court before the extension of such judgment upon the journal of the district court, in apt language and in due form. (*Ward v. Urmson, supra.*)

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

Miller & Ready and *J. S. Lothrop*, for appellants.

J. C. Robinson and *Benjamin M. Weed, contra.*

RYAN, C.

Appellants in their brief state that they brought suit in the district court of Cedar county to recover $468.37, and that by virtue of a writ of attachment the sheriff levied upon and attached a small stock of drugs, the property of the defendant, of the estimated value of about $1,000. It may be that these statements are true. It is un-

fortunate, if such is the case, that they were not evidenced by the record which begins with a copy of "An Inventory of, and Claim for Exemption," in support of which is found attached the affidavit of Martin Maguire. Following this affidavit is found an "Answer to Affidavit of Defendant for Exemption," verified upon belief. There is next found a transcript of what is denominated, "Trial Docket, Judge's Entries," from which it appears that the application for exemption was sustained, to which plaintiffs excepted, as they likewise did to an order overruling a motion for a new trial. The above facts shown by the "Judge's Entries," appear in the journal entry, in which, however, there is no final judgment. The entry of the presiding judge in his trial docket of the words "Judgt. for plaintiff for $468.—On $103.55, int. 10 per cent.—On $364.52, int. 7 per cent," does not amount to and cannot take the place of a final judgment. (*Ward v. Urmson*, 40 Neb., 695; *Brown v. Ritner*, 41 Neb., 52; *Garneau v. Omaha Printing Co.*, 42 Neb., 847.) This proceeding is therefore

DISMISSED.

LITTLE, MAXWELL & COMPANY V. ROSS GAMBLE.

FILED APRIL 7, 1896. No. 6484.

Costs: FINAL ORDER: REVIEW. A mere judgment for costs in favor of the defendant, in whose favor a verdict had been returned, without a final disposition of the cause in the district court, cannot be reviewed in the supreme court.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

Marston & Nevius, for plaintiff in error.

Ross Gamble, pro se.

RYAN, C.

This action was brought by the firm of Little, Maxwell & Co. for the purchase price of certain goods of the value of $469.20, and, upon a trial had in the district court of Buffalo county, there was a verdict for the defendant. Whether or not this verdict was justified by the proofs we cannot determine, for the record shows no final judgment. Just after the recitations showing the overruling of a motion for a new trial and the allowance of time to settle a bill of exceptions, the language of the final journal entry is as follows: "Defendant demands judgment on the verdict, and, in pursuance of the verdict rendered herein, it was ordered by the court that the defendant Ross Gamble recover of and from the plaintiff Little, Maxwell & Co. his costs herein expended, taxed at $31. Judgment on the verdict." This was not a final disposition of the case in the district court. (*Nichols v. Hail*, 5 Neb., 194; *Gapen v. Bretternitz*, 31 Neb., 302; *Smith v. Johnson*, 37 Neb., 675.) The petition in error is, therefore,

DISMISSED.

ALBERT DAVISON V. LIZZIE B. CRUSE.

FILED APRIL 7, 1896. No. 6412.

1. **Witnesses:** CONTRADICTORY STATEMENTS: IMPEACHMENT. To impeach a witness by showing a statement at variance with that made at the trial, it is necessary to call attention to such inconsistent statement and inquire whether or not it was made by the witness at a time and place indicated.

2. **Bastardy:** CHASTITY OF COMPLAINANT: EVIDENCE. Evidence of the unchastity of complainant in a bastardy proceeding, outside the period of gestation, whether in the nature of proof of her improper conduct or of her general reputation for chastity, is irrelevant to the issues presented for trial.

3. ———: EVIDENCE. The probable duration of the period of gestation is a question of fact to be shown by proper evidence in each particular case wherein that question is material.

4. ———: ———. In bastardy proceedings a mere preponderance of the evidence is sufficient to sustain a verdict of guilty.

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

Winter & Kauffman and *A. D. McCandless*, for plaintiff in error.

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

RYAN, C.

On May 5, 1892, plaintiff in error filed and caused to be docketed in the district court of Douglas county a certain transcript of appeal from a justice of the peace. By her information on oath, which was certified in said transcript,

Lizzie B. Cruse, an unmarried woman, on April 21, 1892, charged that she was then pregnant with a bastard child of which Albert Davison was the father. This cause, which was brought to the district court aforesaid, was therein continued till December 23, 1892, when it was called for trial. The defendant in the district court was found guilty as charged and was adjudged the putative father of the complainant's bastard child, and charged with its maintenance in the sum of $2,088, payable in monthly installments of $12 each, until said child should attain the age of fifteen years. To reverse these findings and the judgment of the district court the defendant has prosecuted error proceedings to this court. The questions presented will be considered in the order of their occurrence in the petition in error.

There is a recitation in the journal entry of date December 23, 1892, that a motion of Davison for a continuance was overruled, and of this ruling there is now a great deal of complaint in the brief submitted on his behalf. It is unfortunate that there is not in the record a copy of this motion and that the affidavit set out in the brief of plaintiff in error is to be found nowhere else than therein. It is equally unfortunate that no copy of the rules of the district court of Douglas county was offered in evidence that we might ascertain how far, if at all, there was ground for complaint as to the action of the court in setting the case for trial at the time, and on the particular docket, on which the order for trial was entered. There was in the record in the district court a copy of the statements of the evidence of Lizzie B. Cruse given before the justice of the peace in respect to the averments contained in the information sworn to

by her. This in the district court was not offered in evidence by either party.

The first error in the petition in error alleged to have occurred during the progress of the trial, was the refusal of the court to permit cross-examination of the complainant touching her evidence given before the justice of the peace. She was at the time under cross-examination as to the date when she first informed Davison that she was likely to become a mother, when counsel for the plaintiff in error asked her if she was positive it was on the 23d of September, and she answered she was. This answer was followed by the question: "Then why did you swear in the police court that it was not until the 1st of October?" To this question an objection was properly sustained for several reasons,—one of which was that there was in evidence nothing about a trial in police court; and another was that the question in no way tended to show that she did so testify in any court.

The next complaint in the petition in error is that the court refused to permit the defendant in the district court to introduce in evidence the cross-examination of Harry J. Hooper contained in his deposition. As to this offer plaintiff in error has quoted in his brief the following language from the record, to-wit: "The deposition of Harry J. Hooper is offered in evidence. The portions marked on the margin are excluded. Exception. The cross-examination is not read in evidence by the defendant, and after handing the deposition to counsel on the other side, and he refusing to read it, defendant offers to read that portion of the deposition which the court refused to allow the defendant to do, the part, being in

cross-examination." Upon this quoted part of the record it is urged that there affirmatively appear two errors,—one as to the portion of the direct examination excluded; the other as to the entire cross-examination. The part of the direct examination excluded was devoted to the reputation of Lizzie B. Cruse for chastity, during almost two years when she was for the most part a domestic in the hotel of the witness at Pawnee City, and to proof of improper conduct on her part. This period ended in September, 1891. It has been held by this court that evidence of unchaste conduct of the prosecutrix not confined to the probable period of gestation is incompetent. (*Masters v. Marsh*, 19 Neb., 458.) There was none of the direct examination excluded in which the misconduct of the prosecutrix was fixed more definitely than in "June, July, or August." The only proof submitted as to the length of the period of gestation was by the testimony of Dr. Nickles, who stated that it was about 280 days, and this witness also testified that the child of Lizzie B. Cruse was born on June 8, 1892. If we assume 280 days as the period of gestation, it could only extend back to the 1st of September, 1891, in this case; hence evidence of the unchastity of the prosecutrix anterior to this time, whether established by reputation or proof of specific acts, was irrelevant. Because of language of COBB, J., *arguendo*, in *Masters v. Marsh*, *supra*, the defendant in error's counsel say in their brief: "And the period of gestation, as fixed by law of this state, was limited to August 13 and September 30, 1891." Lest there may be misapprehension on this point, we most emphatically deny this soft impeachment. This is not a question of law. It is a question of fact

to be determined upon the evidence submitted in each particular case, and in this respect it is quite analogous to the existence of negligence as contributing to personal injuries.

The complaint as to the exclusion of the cross-examination of Mr. Hooper is in effect determined by what has been said as to the inadmissibility of the part of the direct evidence by which was called in question the chastity of Lizzie B. Cruse previous to September 1, 1891, for the cross-examination of Hooper was on this same line. It is urged that in admitting in evidence only the fourth interrogatory and answer thereto of the deposition of W. A. Spees there was error prejudicial to the plaintiff in error. The interrogatory and answer referred to which were read to the jury fixed the month's duration which W. A. Armstrong boarded at the hotel in Wymore in which the prosecutrix was a domestic as being in the months of August and September, 1891, and this was the only matter at all relevant in this deposition. The testimony of H. W. Crowe was with reference to the improper conduct of Lizzie B. Cruse in 1888, and it was therefore properly excluded under the rule already stated and applied.

Plaintiff in error requested the court to give instruction numbered 1, and the refusal to give this instruction was in the motion for a new trial assigned as error jointly with the refusal to give instruction numbered 2, asked by the same party to this litigation. The aforesaid instruction numbered 1 was in the following language: "You are instructed that the evidence of the plaintiff shows that she was not a resident of Douglas county, Nebraska, at the time this suit was commenced, and your verdict must therefore be for the defend-

ant." There was uncontradicted evidence that the complainant was, and had been, a resident of Douglas county since April 1, 1892. The complaint was filed with the justice of the peace April 21, 1892, and whether or not at that time she had a legal settlement in another county was immaterial. (*Clark v. Carey*, 41 Neb., 780.) This instruction was therefore properly refused, and this precludes an examination of instruction numbered 2 grouped with it by the motion for a new trial. There was at most conflicting evidence, and though the jury accepted as true that of the complainant, we cannot on that account alone say its verdict was without proper support. (*Robb v. Hewitt*, 39 Neb., 217; *Dukehart v. Coughman*, 36 Neb., 412.) The judgment of the district court is

AFFIRMED.

LOMBARD INVESTMENT COMPANY V. A. J. SNOWDEN ET AL., IMPLEADED WITH W. C. TILLSON, APPELLEE, AND A. B. SLATER, APPELLANT.

FILD APRIL 7, 1896. No. 6450.

Sufficiency of Evidence: REVIEW. This appeal involves only a question of fact. The record examined, and the conclusion reached that the decree of the district court is supported by sufficient evidence.

APPEAL from the district court of Buffalo county. Heard below before HOLCOMB, J.

Jones & Brome, for appellant.

Gaslin, Newman & Hallowell and *Warren Pratt*, *contra*.

RAGAN, C.

The title of this case is the Lombard Investment Company against A. J. Snowden; but these parties have no interest in the matter in controversy here. The suit was brought by the Lombard Investment Company in the district court of Buffalo county against Snowden to foreclose a real estate mortgage. One A. D. Slater was made defendant, he having acquired Snowden's interest in the real estate previously mortgaged by the latter to the investment company. W. C. Tillson was also made a party defendant, and he filed a cross-petition and sought to foreclose a mortgage on the real estate described in the investment company's mortgage, claiming a lien subject to the lien of the investment company. Slater answered the cross-petition of Tillson, admitting the execution and delivery by his grantor, Snowden, of the mortgage sought to be foreclosed, but pleaded as a defense to Tillson's cross-action that the debt which it secured had been paid. Tillson had a decree as prayed and Slater appeals.

The record involves only a question of fact, namely, does the evidence support the finding of the district court that Tillson's mortgage had not been paid? The evidence is very unsatisfactory, and in some cases self-contradictory, but we are constrained to say that there is sufficient evidence in the record to support the finding of the district court, and its decree is therefore

AFFIRMED.

HARRY B. DAVIS V. CITY OF OMAHA.

FILED APRIL 7, 1896. No. 6460.

1. **Municipal Corporations:** STREETS: SIDEWALKS. The fee of the streets of the municipalities of this state is vested in the municipalities themselves; and the sidewalks of the various municipal corporations are parts of the streets thereof.

2. ———: ———: ———. The law of this state devolves upon the various municipal corporations thereof the duty of at all times keeping their streets and sidewalks in a reasonably safe condition for travel by the public, and no municipal corporation, by any act of its own, can devolve this duty on another so as to relieve itself from a liability resulting from its failure to perform such duty. *City of Omaha v. Jensen*, 35 Neb., 68, and *City of Beatrice v. Reid*, 41 Neb., 214, followed.

3. ———: ———: ———. The law does not make it the duty of a lot owner to build, maintain, or repair the sidewalks—being part of the streets—in front of his premises.

4. ———: ———: ———. A municipal corporation may employ such agency as it sees fit in the construction or repair of its streets and sidewalks, and may license or permit a lot owner to build or repair a sidewalk in front of his premises under its direction.

5. ———: ———: ———. A general permission or license given by a city to a lot owner to build or repair a sidewalk on his premises will continue until revoked by the city, either expressly or by such conduct on its part as authorizes an inference of revocation.

6. ———: DEFECTIVE SIDEWALKS: DAMAGES: LIABILITY OF CITY. If a lot owner be licensed by a municipal corporation to build a sidewalk in front of his lot, which walk it is the duty of the corporation to build and maintain, and in the performance of such work the lot owner negligently leaves an obstruction in the street which causes an injury, the city is liable therefor.

7. ———: ———: ———: ———: NEGLIGENCE. A municipal corporation may be liable for an injury caused by an obstruction placed in its streets by a mere trespasser, but to make it liable in such case it must be shown to have been guilty of negligence in the premises.

8. ———: SIDEWALKS: ORDER TO BUILD: OBSTRUCTIONS BY LOT OWNER: PERSONAL INJURIES: LIABILITY OF CITY. A municipal corporation notified a lot owner to construct a permanent sidewalk in front of his lot within a time specified and that in default of his so doing the corporation would build the walk and assess the cost thereof to the lot. The lot owner did nothing towards building the sidewalk within the time specified. Afterwards, without the knowledge or permission of the municipal corporation, the lot owner proceeded to build the walk and for that purpose on an afternoon deposited a number of flagstones in the street opposite his lot and left them there without barriers or signals. The night following the afternoon of the deposit of said flag-stones a traveler was injured by coming in contact with them, and sued the municipal corporation for damages. *Held*, (1) That it was the duty of the municipal corporation, and not the duty of the lot owner, to build and maintain the sidewalk; (2) that the municipal corporation had the right to permit or license the lot owner to build the walk; (3) that the notice given by the municipal corporation to the lot owner to build the walk was merely a license or permission to him to do so in the time specified; (4) that the license given was not a general or continuing one, but conditioned and limited to the time therein fixed; (5) that the lot owner, in the construction of the walk after the license from the municipal corporation had expired, was not acting either as the agent, employe, or licensee of the municipal corporation, but was a mere trespasser in the streets; (6) that as the municipal corporation had no knowledge that the lot owner had done anything towards constructing the walk before the happening of the injury sued for, and as the evidence disclosed no negligence on its part in the premises, it was not liable for the injury.

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

The facts are stated by the commissioner.

E. R. Duffie and *John D. Howe*, for plaintiff in error:

The city is directly responsible for the unsafe condition of the street. It was the duty of the

city to construct the sidewalk in front of the lot where the accident occurred. This duty could not be imposed upon the owner of the property. A public duty cannot be imposed upon a private citizen, and any ordinance or statute which seeks to reach such a result is unconstitutional. (Elliott, Roads & Streets, 539; *Noonan v. City of Stillwater*, 33 Minn., 198; *Gridley v. City of Bloomington*, 88 Ill., 554; *City of Keokuk v. Independent District of Keokuk*, 53 Ia., 352; *City of Cincinnati v. Stone*, 5 O. St., 38.)

The city was negligent in not discovering the dangerous condition of the street and providing means to warn the public of such dangerous condition. (*Pettengille v. City of Jonkers*, 116 N. Y., 558; *Glasier v. Town of Hebron*, 131 N. Y., 447; *Brusso v. City of Buffalo*, 90 N. Y., 679; *Detroit & M. R. Co. v. Vansteinburg*, 17 Mich., 99; *City of Beatrice v. Reid*, 41 Neb., 214.)

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

In reply to the first contention of plaintiff in error reference was made to the following cases: *Hill v. City of Boston*, 122 Mass., 344; *City of Rahway v. Carter*, 26 Atl. Rep. [N. J.], 96; *Fort Smith v. York*, 52 Ark., 84; *Winbigler v. City of Los Angeles*, 45 Cal., 36; *Hewison v. City of New Haven*, 37 Conn., 475; *Aldrich v. Inhabitants of Gorham*, 77 Me., 287; *City of Detroit v. Putnam*, 45 Mich., 263; *McKeller v. City of Detroit*, 57 Mich., 158; *McArthur v. City of Saginaw*, 58 Mich., 357; *Eastman v. Meredith*, 36 N. H., 284; *Sweeney v. City of Newport*, 65 N. H., 86; *Pray v. Jersey City*, 32 N. J. Law, 394; *Wild v. City of Patterson*, 47 N. J. Law, 406; *Wixon v. City of Newport*, 13 R. I., 454; *Young v. City of Charleston*, 20 S. Car., 116; *Welsh v. Rutland*, 56 Vt., 228; *Wil-*

kins v. Rutland, 61 Vt., 336; *Wiltse v. Tilden*, 77 Wis., 152; *Goeltz v. Ashland*, 75 Wis., 642; *City of Warsaw v. Dunlap*, 112 Ind., 576; *King v. City of Cleveland*, 28 Fed. Rep., 835; *City of Cleveland v. King*, 132 U. S., 295; *Hiner v. City of Fond du Lac*, 36 N. W. Rep. [Wis.], 632; *City of Omaha v. Ayer*, 32 Neb., 375.

In reply to the second contention of plaintiff in error the following cases were cited: *Dittrich v. City of Detroit*, 57 N. W. Rep. [Mich.], 125; *Reed v. City of Detroit*, 58 N. W. Rep. [Mich.], 44; *Davis v. City of Kingston*, 5 N. Y. Supp., 506; *Butler v. Town of Oxford*, 13 So. Rep. [Miss.], 626.

RAGAN, C.

Harry B. Davis brought this suit to the district court of Douglas county against the city of Omaha, the city being a municipal corporation existing under the laws of the state as a city of the metropolitan class, to recover damages which he alleged he had sustained by reason of injuries which he had received through the negligence of the city. At the close of the evidence the jury, in obedience to an instruction of the court, returned a verdict for the city. Judgment of dismissal of Davis' case was rendered upon this verdict, and he prosecutes here a petition in error.

The undisputed facts, so far as the same are material to this opinion, are: That Judge Doane owned a lot fronting on Seventeenth street, in said city; said street was one of the public thoroughfares of the city and used and traveled by the public as such. On the 3d of May, 1892, the authorities of the city, by resolution, ordered a plank sidewalk in front of Judge Doane's premises to be replaced by a permanent one, and gave

notice to Judge Doane that unless he constructed such sidewalk within five days from the date of the service on him of said notice it would construct the sidewalk and assess the costs thereof to his property. On the 31st of May, 1892, the five days within which Judge Doane was to construct the sidewalk expired and he had not at that time done anything towards constructing it. The city thereupon notified Judge Doane to designate the kind of material of which he desired the sidewalk to be constructed. On the 9th of July, 1892, the city ordered the city contractor to lay an artificial stone sidewalk in front of Judge Doane's premises, but this was not done. On the 15th of October, 1892, Judge Doane began the construction of the sidewalk of Bandera stone in front of his lot; and in the prosecution of this work, and in the afternoon of said day, his employe hauled and deposited in the street, outside the curb in front of said lot, a number of large flag-stones. During the night of said 15th of October Davis was driving on this street in a buggy and it ran against these stones, was partially overturned, he was thrown out and injured. No barriers had been erected to prevent the traveler from coming in contact with these stones, nor had any signals been displayed to warn him of their presence. On the 15th of October, 1892, the city did not know that Judge Doane was proceeding to build the walk in front of his premises. On the 4th of November, 1892, the city, being still in ignorance that Judge Doane had built the sidewalk in front of his premises, ordered the city contractor to build a walk there of Indiana stone. Judge Doane testified on the trial as follows:

Q. State if in the fall of 1892 you received an

order from the city officials that a permanent sidewalk had been ordered laid in front of that property.

A. Yes, sir; I received a notice in the fall, but I had several previous notices to lay the walk, and what time the notice was served I can't now recollect, but having a good plank sidewalk there I concluded I wouldn't pay any attention to the notice, but afterwards in the fall, just what time I cannot tell, I received a blank containing prices of stone, kinds of stone the city had a contract for, and notifying me to select from that such stone as I desired laid.

Q. Well, then what did you do?

A. Then I went on and made the contract with a stone man to lay the walk myself.

Q. So you laid it yourself after having received this order?

A. Yes. * * *

Q. Laid it under the order of the city?

A. Yes, sir.

Cross-examination:

Q. You may state whether or not in laying that walk or making your contract you acted under the directions or control in any manner of the city of Omaha?

A. Nothing further than under the directions they had given me to lay the walk.

Redirect examination:

Q. Never molested you in carrying out that order?

A. No, rather insisted upon its being carried out, rather more than I thought they would do.

Under this evidence the learned district court was of opinion that Davis could not recover against the city, and we agree with him. The fee

of the streets of the municipalities of this state is vested in the municipalities themselves, and the sidewalks of the various municipalities are parts of the streets thereof. We know of no statute of this state, nor of any ordinance of the city of Omaha, which makes, or attempts to make, it the duty of a lot-owner to build, repair, or maintain the sidewalks adjoining his property. Without quoting the statutes under which the city of Omaha exists it may be safely said: That that corporation, as the other municipal corporations of the state, is, by law, charged with the duty of at all times keeping its streets and sidewalks in a reasonably safe condition for travel by the public; and that no municipal corporation, by any act of its own, can devolve this duty on another so as to relieve itself from a liability resulting from its failure to perform such duty. (*City of Omaha v. Jensen*, 35 Neb., 68; *City of Beatrice v. Reid*, 41 Neb., 214.) And in the case at bar, if Doane was acting for the city, either as its agent, employe, or contractor, or with its knowledge and permission, then his acts in and about the construction of the sidewalk in front of his premises became and were the acts of the city; and if his placing and leaving the flag-stones in the street in the manner in which they were placed and left was negligence, which caused an injury to Davis, he being free from negligence, we have not the slightest doubt but the city would be liable to Davis for such injury. (See the cases cited above, and *Stephens v. City of Macon*, 83 Mo., 345.)

But what were the relations existing between Doane and the city of Omaha at the time the injury sued for occurred, and at the time the flagstones were placed in the street which caused such

injury? Section 69 of chapter 12*a*, Compiled Statutes,—part of the charter of the city of Omaha,—so far as the same is material here, is as follows: "The mayor and city council shall have power * * * to construct and repair, or cause and compel the construction and repair of sidewalks in such city, of such material and in such manner as they may deem proper and necessary; and to defray the costs and expenses of improvements, or any of them, the mayor and council of said city shall have power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent or abutting upon the streets, avenues, alleys, or sidewalks thus in whole or in part * * * constructed or otherwise improved or repaired, or which may be specially benefited by any of said improvements; * * * *Provided further*, That in case the grade of any street or part of street used by the public shall not have been established or in any case any street or part thereof shall not have been worked to grade, then and in such case the owner or owners of any lot or lots or lands abutting on such streets or portions of streets as aforesaid shall only be required to construct or repair the sidewalk along such street or part thereof with plank as the council may direct," etc. As we read this statute it does not make or attempt to make it the duty of a lot-owner to build, maintain, or repair the sidewalks on his premises; but this statute, and others not quoted, devolve upon the municipal corporation the control of all of its streets and alleys and the duty of paving, grading, and maintaining its streets, building and maintaining and repairing its sidewalks. What means the city may employ, what agencies it may engage in the performance

of these duties, is left by the legislature to the city authorities. To reimburse itself for the expense of building and maintaining sidewalks in front of lots the municipal corporation is invested with the power and authority to levy and collect special taxes and assessments upon the lots in front of which the sidewalks are built and maintained. True, the statute quoted says that on certain streets lot-owners shall only be required to construct or repair the sidewalks with plank as the council may direct; but this statute falls far short of imposing, or attempting to impose, on a lot-owner the duty of building, maintaining, or repairing the sidewalks adjoining his property.

As already stated, on the 3d of May, 1892, the city authorities notified Doane that the plank sidewalk in front of his premises must be replaced by a permanent one, and also notified him that unless he should build such permanent walk within five days after the service of that notice upon him, that it, the city, would at once proceed to construct such permanent sidewalk. This action of the city was in conformity with its ordinances; and we think the statute, under which the city exists, authorizes the passage of such ordinances. The city, in giving notice to Doane to construct a permanent sidewalk upon his lot, simply licensed him to furnish the material and construct that walk, in accordance with the ordinances of the city, instead of paying the taxes and assessments which the city might levy on the lot to pay the cost of constructing the walk; in other words, Doane became and was a mere licensee of the city; and had he proceeded with the construction of this walk within five days after the service upon him of the notice to construct the walk, then

we have no doubt that he would have been acting in that manner for and in behalf of the city; and for his negligence in constructing the walk, if he was guilty of negligence, the city would have been liable. (*Stephens v. City of Macon*, 83 Mo., 345.) It is doubtless true that an agency once established is presumed to continue until it is shown to have ceased; and we have no doubt that a general permission or license, given by a city to a lot-owner to build or repair a sidewalk on his premises, will continue until revoked by the city, either expressly or by such conduct on its part as would authorize an inference of revocation. In the case at bar the city, in effect, said to Doane: We have determined that the plank sidewalk in front of your premises shall be replaced by a permanent one. We have the authority to build this walk and charge the expense of it to your property, but we give you permission to construct the walk yourself, in accordance with the ordinances of the city, provided you do it within a certain time. The permission then given Doane was coupled with a condition that the work which he was permitted to do should be undertaken by a certain time, and the failure of Doane to avail himself of the permission given, in the time fixed, worked a revocation of such license. But again, after the license given Doane to construct the sidewalk had expired by its own limitation, he was requested by the city to designate the kind of material out of which he desired the walk constructed. Here, then, was an additional notice given Doane by the city that it had revoked the permission given him. Doane, in whatever he did towards constructing this sidewalk, after the time fixed by the city council in which he might construct it, so far as

this record shows, was a mere trespasser. A lot-owner, because such, has no authority to tear up the sidewalks in front of his premises or to replace them with others. We reach the conclusion, therefore, that the evidence in the record shows that at the time the accident in question happened, and at the time the flag-stones which caused the accident were placed in the street by Doane, he was neither the agent nor the licensee of the city. The city of Omaha is, however, none the less liable in this case for the injury sustained by Davis, if it knew prior to the accident of the existence in the street of these flag-stones; or if they had remained in the street such a length of time prior to the accident as to sustain a finding that the city, by the exercise of ordinary care, could have known of their existence, and was guilty of negligence in not so knowing. The flag-stones which caused Davis' injury were left in the street in the afternoon of the night he was injured. The record does not show that any officer of the city knew of the existence of these flag-stones in the street, or that Doane was building the sidewalk prior to the time the accident occurred. The burden of showing that the city was guilty of negligence in not knowing of the presence of the flag-stones in the street was upon Davis. It does not appear from the record that these flag-stones were deposited in a part of the street used for business purposes, nor in a part of the street which was so constantly used and traveled as to make it negligence *per se* for the city officials not to know of their existence during the short time that intervened between their being left in the street and Davis' being hurt. The judgment of the district court is

AFFIRMED.

J. F. SIEBERLING & COMPANY V. ANSON L. FLETCHER.

FILED APRIL 7, 1896. No. 6436.

Bill of Exceptions: AUTHENTICATION. A bill of exceptions, though signed and allowed by the clerk of the district court in pursuance of the stipulation therefor required by statute, cannot be used in this court for any purpose, unless the clerk also certifies such bill of exceptions to be the original or a true copy. *Martin v. Fillmore County*, 44 Neb., 719, followed.

ERROR from the district court of Sherman county. Tried below before HOLCOMB, J.

Paul & Templin, for plaintiff in error.

Nightingale Bros., *contra*.

RAGAN, C.

J. F. Sieberling & Co. brought this suit in the district court of Sherman county against Anson L. Fletcher on a promissory note. Fletcher had a verdict and judgment, and Sieberling & Co. prosecute here a petition in error.

1. The assignments of error argued in the brief are directed first to the action of the district court in the admission and rejection of certain evidence at the trial. These assignments of error cannot be reviewed, for the reason that the bill of exceptions is not authenticated as required by law. It is in precisely the condition that the bill of exceptions was in in *Martin v. Fillmore County*, 44 Neb., 719, and *Romberg v. Fokken*, 47 Neb., 198. The bill of exceptions is signed and allowed by the clerk,

but there is nowhere in the record any certificate of the clerk that the bill of exceptions is either the original or a copy.

2. The second assignment argued in the brief relates to the action of the district court in giving and refusing certain instructions. On looking into the record we discover that no exception was taken by any person to any instruction given or refused. This assignment, therefore, cannot be considered.

The pleadings support the judgment rendered. It must therefore be, and is,

AFFIRMED.

D. C. DALEY ET AL. V. WILLIAM T. PETERS.

FILED APRIL 7, 1896. No. 6487.

1. **Executions**: EXEMPTIONS: APPRAISEMENT: DUTY OF OFFICER. When an officer seizes property under execution or attachment, and the debtor makes and files an inventory under oath in accordance with section 522 of the Code of Civil Procedure, the officer then has but one duty to perform, and that is to call appraisers and have the property levied upon appraised, and, if the appraised value of the property is five hundred dollars or less, release and return the property to the debtor.

2. ———: ———: UNLAWFUL SALE: CONVERSION. Where an officer makes a levy upon personal property, and the debtor files under oath the inventory required by section 522 of the Code of Civil Procedure, and the officer neglects or refuses to cause the property to be appraised, but proceeds to sell it to satisfy his writ, he is thereby guilty of the conversion of the property.

3. ———: ———: AFFIDAVIT: CONVERSION. Where, in such case, the officer is sued for the conversion of such property, the fact that the averments, or any of them, in the

affidavit attached to the inventory were false, affords him no defense to the action.

4. ——: CONVERSION: DAMAGES. The only issue available in such an action is the value of the property wrongfully converted. *Smith v. Johnson*, 43 Neb., 754, and *Bender v. Bame*, 40 Neb., 521, reaffirmed.

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

B. N. Robertson, for plaintiffs in error.

No appearance for defendant in error.

RAGAN, C.

Before a justice of the peace in Douglas county one McCargar obtained a judgment against William T. Peters for $19.25. An execution was issued on this judgment and delivered to one Daley, a constable, and he levied the same upon a horse and wagon and buggy and some harness belonging to Peters. Thereupon Peters filed with the justice of the peace an inventory, under oath, of the whole of the personal property owned by him, as required by section 522 of the Code of Civil Procedure. The constable, however, disregarded the inventory and neglected and refused to call appraisers and have the personal property of Peters appraised, as provided by said section of the Code, and sold all the property levied upon under his execution. The constable then made return on his execution that he had received $97 in money for the property sold; that he had disbursed of that money $50 in discharging a chattel mortgage lien upon the property; paid $12 for feeding the horse, $3.25 for storing the buggy, $1.50 for expressage, $2.91 commission, $2 for ad-

vertising, $2 for a clerk, $2.40 for his fees, and turned in to the justice $20.94 to apply on the judgment. Peters then brought this suit in the district court of Douglas county against Daley and the sureties on his bond for the conversion of the property levied upon and sold by the constable. Peters had a verdict and judgment and defendants prosecute to this court a petition in error.

The inventory filed by Peters with the justice recited that it was an inventory of the whole of the personal property owned by him, and that he was a resident of the state of Nebraska, the head of a family, and that he had neither lands, town lots, nor houses subject to exemption as a homestead. This inventory was duly signed and sworn to by Peters. It is now insisted that the judgment of the district court must be reversed because the answer alleges that Peters, at the time he made and filed the inventory, was possessed of and in possession of a homestead in Douglas county, and that the reply does not deny this. Section 521 of the Code of Civil Procedure provides: "All heads of families who have neither lands, town lots, or houses subject to exemption as a homestead under the laws of this state, shall have exempt from forced sale on execution the sum of $500 in personal property." Section 522 of the Code provides: "Any person desiring to avail himself of the exemption as provided for in the preceding section must file an inventory, under oath, in the court where the judgment is obtained, or with the officer holding the execution, of the whole of the personal property owned by him. * * * And it shall be the duty of the officer to whom the execution is directed to call to his

assistance three disinterested freeholders of the county where the property may be, who, after being duly sworn by said officer, shall appraise said property at its cash value." If it be true that Peters owned a homestead exempt from execution under the laws of the state at the time he made and filed the inventory herein, is that a defense for Daley in this action? What was the duty of Daley, the constable, holding the execution when this inventory was filed? In *People v. McClay*, 2 Neb., 7, a debtor filed an inventory of all his personal property as required by said section 522 of the Code of Civil Procedure. The officer refused to call appraisers, as required by the statute, and have the property appraised. The execution debtor then applied to this court for a writ of *mandamus* to compel the officer to call appraisers and have the property mentioned in the inventory filed by the judgment debtor appraised. The officer made answer to the alternative writ that the execution debtor, though the head of a family, was an alien, not a resident of the state. The court held that the answer was entirely insufficient and awarded the writ prayed for. LAKE, J., speaking for the court, said: "The relator filed an inventory of all his personal property as required by section 522 of the Code of Civil Procedure. * * * This done, the respondent had but one course to pursue. This was to call three disinterested freeholders of the county and have them appraise the property," etc. *State v. Cunningham*, 6 Neb., 90, was a *mandamus* proceeding in this court to compel a sheriff to call freeholders and cause certain personal property levied upon by him to be appraised, the execution debtor having filed the inventory required by section 522 of

the Code of Civil Procedure. The opinion does not disclose what reason the sheriff alleged as an excuse for failing to comply with the mandates of the statute. The court awarded the writ as prayed, MAXWELL, J., saying: "In the case of *People v. McClay*, 2 Neb., 8, it was there held that when an inventory, under oath, was filed with the officer he had but one course to pursue, and that was to call three disinterested freeholders of the county and have them appraise the property. * * * We approve of that decision. The officer cannot question the correctness of the inventory. If the debtor has real estate which is exempt under the homestead law, or other personal property than that contained in his list, such personal property is liable to be seized for his debts and he may be prosecuted for perjury. But when an inventory under oath is made by the debtor and filed with the officer holding the execution * * he must call appraisers to ascertain the value of the property seized. He has no discretion in the matter." In *Kriesel v. Eddy*, 37 Neb., 63, a constable of Douglas county levied an execution upon certain goods of Kriesel, who thereupon filed an inventory under oath with the justice of the peace before whom the judgment was rendered, reciting that he was the head of a family, etc., and that he had no other property except the goods which had been seized by the constable. The constable refused and neglected to cause the property levied upon to be appraised, but proceeded and sold it under the execution. Kriesel then sued the constable and his bondsmen for the conversion of the property. On the trial of the case the district court permitted evidence to go to the jury to contradict the averments of the affidavit attached to

Kriesel's inventory; that he was the head of a family and a resident of the state, and at the close of the testimony directed a verdict for the defendant. This judgment on proceedings in error here was reversed, the court, through RYAN, C., saying: "Upon the filing of such an affidavit containing an inventory of all the property owned by Kriesel, the law devolved upon the constable holding the execution but one course of action, and that consisted in his calling three disinterested freeholders of Douglas county to appraise said property levied upon at its cash value.* * * In this case the constable ignored the affidavit containing the inventory and sold all the property which he held under his execution. This rendered him liable for the fair value of said property, at least to the amount of $500, and there was no issue in the district court properly triable except such value. Officers holding executions should act under the statutes as well to protect the judgment debtor in the enjoyment of the exemption provided by statute as to collect the judgment upon which the execution issued. Such officers may, by arbitrarily overriding the statute, prevent the beneficent operation of the exemption law in favor of the debtor. This is but one species of oppression in office, for which such officers as are guilty will be held liable to strict accountability if their victims are able to apply to the courts for redress." *Bender v. Bame*, 40 Neb., 521, was a suit against an officer for conversion of certain personal property. The execution debtor, at the time the property was levied upon, filed an inventory under oath as required by the provisions of section 522 of the Code of Civil Procedure. The officer refused and neglected to make any appraisement and sold the

property. NORVAL, C. J., speaking for the court, said: "That the officer did not cause an appraisement to be made is no fault of the defendant in error [judgment debtor]. All the law required of him was to make and file with the justice an inventory under oath of his personal property, and, after the appraisement has been made, to select therefrom property to the amount of the statutory exemption. It is the well settled law of the state that exemption laws are to be construed liberally to the end that the purpose for which they were adopted may be accomplished. After the debtor has complied with the law on his part he ought not to be deprived of his exemption by the failure of the officer to perform his duty. To hold, when exempt property has been seized under execution and the proper inventory has been filed, that an action for conversion will not lie, where the officer fails or refuses to make an appraisement, would, in many cases, destroy the value of the exemption by preventing the debtor from deriving any benefit from it." And in *Smith v. Johnson*, 43 Neb., 754, where all the cases cited above were reviewed, this court held: "It is without the province of an officer holding property under levy of writ, pending sale by order of the court in attachment proceedings, to question the validity or sufficiency of a schedule and affidavit made according to the provisions of the statute governing such proceedings and filed by the attachment debtor for the purpose of setting aside the property levied upon as exempt." These cases, then, establish the following propositions: (1.) That when an officer seizes property under execution or attachment and the debtor makes and files an inventory under oath in accordance with the provisions of section

522 of the Code of Civil Procedure, the officer then has but one duty to perform, and that is to call appraisers and have the property levied upon appraised; and if the appraised value of the property is $500 or less, to release and return it to the debtor. (2.) Where an officer makes a levy upon personal property and the debtor files under oath the inventory required by said section of the Code, and the officer neglects or refuses to cause the property to be appraised and proceeds to sell it to satisfy his writ, that he is thereby guilty of a conversion of the property. (3.) And when sued for a conversion of such property the fact that the averments, or any of them, in the affidavit attached to the inventory were false affords him no defense to the action. (4.) The only issue available in such action is the value of the property wrongfully converted.

If an officer holding an execution may arbitrarily disregard his duties as prescribed by the statute, and, notwithstanding an inventory under oath be filed by the debtor as required by the statute, refuse and neglect to cause the property to be appraised and sell it, then the very object and purpose of these wise and beneficent exemption laws will always be thwarted. It has been well said: "The common law had no favors to offer the debtor or his family in the way of exempting any portion of his property from execution for the benefit of his family; and if he owned two gowns one might be seized and sold. Modern legislation has removed this reproach to the law and there is probably no state or civilized country in the world in which some kind of an exemption is not now allowed. These statutes are designed as a protection for poor and destitute families and

the law thus seeks to mitigate the consequence of the husband's thoughtlessness and improvidence. They are based upon considerations of public policy and humanity and should be liberally construed." (7 Am. & Eng. Ency. of Law, p. 130.)

It is no concern of a constable or sheriff whether an affidavit attached to an inventory filed by a debtor be true or false. If it is false, the debtor may be prosecuted for perjury. That is a matter between him and the state of Nebraska. The law has not committed to the sheriffs and constables of the state the authority or the duty to inquire into the truth of the averments of the affidavit attached to an inventory filed by an execution or attachment debtor.

Another argument insisted upon for the reversal of this judgment is, in effect, that in any event the constable should not be charged with the full value of the property levied upon and sold by him, but that the judgment at least should be credited with the amount of the mortgage on the property which the constable paid off and discharged out of the proceeds of the sale. We have been cited to no authority to sustain this remarkable contention, nor do we think any can be found. The constable was a wrong-doer in everything that he did with the property after the filing of the inventory by Peters. If the property had been subject to execution the constable, by selling it, would have sold only the interest which Peters had therein; and the purchaser at the sale would have taken the property subject to the mortgage lien, if any, thereon. The constable was not the administrator, agent, or guardian of Peters. He was not charged by the latter with the duty of calling in the creditors of Peters and paying his

debts out of his property. Looking at the express provisions of the exemption laws of the state, their purpose and object, and liberally construing these statutes, and influenced also by considerations of public policy, we hold: Where an officer levies an execution or writ of attachment upon personal property and the debtor files an inventory under oath as required by section 522 of the Code of Civil Procedure, and such officer neglects or refuses to cause the property levied upon to be appraised, but proceeds and sells the same, and the debtor then sues him for the conversion of the property, that the courts will not permit him to urge as a defense to that action that any of the averments in the affidavit attached to the debtor's inventory were false.

The judgment of the district court is right and it is in all things

AFFIRMED.

JOHN RIDER ET AL. V. JOHN H. MURPHY.

FILED APRIL 7, 1896. No. 6468.

1. **Malicious Prosecution:** PROBABLE CAUSE: MALICE. To render a prosecuting witness liable in an action for malicious prosecution, it must be alleged and proved that his conduct in the premises was inspired by malicious motives and was without probable cause.

2. ———: ———. Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable man's mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. (14 Am. & Eng. Ency. Law, 24.)

3. ———: ———: MALICE. Evidence examined and found

wholly insufficient to sustain the finding of the jury that the plaintiffs in error were inspired by malicious motives in causing the defendant in error to be prosecuted for the crime of embezzlement, and wholly insufficient to support the finding of the jury that such prosecution was begun and carried on without probable cause.

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

James W. Orr and *Lee S. Estelle*, for plaintiffs in error.

Schomp & Corson, contra.

RAGAN, C.

In the district court of Douglas county John H. Murphy sued John Rider and Fred H. Glick and one J. A. Rider, since deceased, for damages for malicious prosecution. Murphy had a verdict and judgment, and Rider & Glick prosecute to this court a petition in error.

It appears that in the autumn of 1891 Rider & Glick were engaged in business in the city of Omaha, and dealing in butter, eggs, and poultry and other farm products. On the trial of this case the evidence of Murphy, so far as the same is material here, was, in substance, as follows: In November, 1891, at the instance of Rider & Glick, he went to Milford, in this state, to purchase butter and eggs and poultry. He purchased a considerable quantity which he shipped to Rider & Glick. Murphy paid his traveling expenses and Rider & Glick furnished the money to pay for the products bought. These products Murphy shipped to Rider & Glick at Omaha and they disposed of them. When Murphy returned to Omaha from the Milford trip, a difficulty arose be-

tween him and Rider & Glick as to the amount of money that was coming to him from them for the products he had bought and shipped them on this Milford trip. Murphy claimed that he was to have one-half the profits realized from the products purchased, and that those profits ought to be somewhere in the neighborhood of $300. Rider & Glick, on the other hand, claimed that the amount due to Murphy was $6.77. They made him out a statement from the books showing this fact and offered him a check for that amount of money. Murphy became enraged and refused to accept the check in settlement, threw it down, and left the office of Rider & Glick. He called at the office of Rider & Glick several times after that time, but the Milford deal was not talked of at all those visits.

Early in December, 1891, Murphy, while at the office of Rider & Glick, was told by them that he could make some money by buying potatoes in Iowa for them; that they would furnish the money to pay for the potatoes and pay thirty cents a bushel for all the potatoes—not exceeding a certain quantity—which he might buy, Murphy to have as compensation the difference between what he might pay for the potatoes and the thirty cents a bushel which Rider & Glick were to pay. He agreed to go to Iowa and buy potatoes on these terms and went to Glick and said, "I will take that check now." Glick thereupon handed Murphy the check for $6.77. The check was dated the 8th of December, 1891, and Murphy the next morning presented this check to the bank on which it was drawn, and he then discovered that it had written across the back of it, "in full settlement of account," whereupon he erased that

indorsement and cashed the check. Murphy then went to Iowa and contracted for some potatoes. He caused Rider & Glick to deposit $100 in a bank in Iowa to his credit with which to pay for the potatoes bought. He then came to Omaha and told Rider & Glick that he had bought some potatoes for them; that they would be shipped in refrigerator cars and would not arrive for about a week, and then demanded of them that they first settle up the Milford deal in accordance with what he claimed. This, we repeat, is substantially Murphy's evidence. The record further shows that no part of the money which Rider & Glick furnished Murphy was ever returned to them nor did they ever receive any of the potatoes bought with that money by Murphy. Very soon after the last interview described between Murphy and Rider & Glick the latter ascertained that Murphy had used the money sent him in buying potatoes; that he had put them in a car and consigned them to Hayden Bros., a firm doing business in the city of Omaha. Acting upon this information Rider & Glick swore out a complaint charging Murphy with embezzlement. He was bound over to the district court, an information charging him with embezzlement was filed by the prosecuting attorney, on which he was tried and acquitted. This is the prosecution made the basis of the present action. Does this evidence support the verdict? In *Dreyfus v. Aul*, 29 Neb., 191, this court held: "To entitle the plaintiff to recover in such an action he must prove a want of probable cause, malice of the defendant, and that the criminal prosecution is ended." This case was followed in *Vennum v. Huston*, 38 Neb., 293, and it was there held: "To render a

prosecuting witness liable in an action for malicious prosecution it must be alleged and proved that his conduct in the premises was inspired by malicious motives and was without probable cause." In *Davie v. Wisher*, 72 Ill., 262, probable cause is thus defined: "Probable cause is defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged." And in 14 American & English Encyclopedia of Law, 24, the authorities, as to what constitutes probable cause, are collated, and it is there said: "Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted."

Now, let us examine the undisputed evidence in this case, and the evidence of Murphy himself, in the light of the rules and authorities quoted above. Rider & Glick prosecuted Murphy for the crime of embezzlement. They knew at the time they did so that he had been acting as their agent to purchase potatoes for them; that he had used the money they furnished him for that purpose in the purchase of potatoes; that he had shipped these potatoes to other persons and that he had in effect, according to his own evidence, demanded of them that they allow him some $300 which he claimed was due from the Milford deal, as a condition precedent to his delivering to them the potatoes which he had bought for them with their money, or the proceeds thereof. They also knew that when he was first informed as to the amount

coming to him from the Milford deal that he had refused to accept it; that subsequently he had undertaken to buy potatoes for them and had voluntarily demanded the check which he had refused in settlement of the Milford deal; that he had received and cashed that check; and they had the right to believe from Murphy's conduct that the difference which had existed between them in reference to the profits of the Milford deal had by them been settled to Murphy's satisfaction, or that he had accepted the check in settlement. (*Treat v. Price*, 47 Neb., 875.) It seems to us that these facts and circumstances known to Rider & Glick, and on which they acted, were sufficient to excite the belief in their minds, they being reasonable men, that Murphy was guilty of the crime with which they charged him, but whether Murphy accepted the check of $6.77 in settlement of the Milford deal or not, the evidence shows beyond all question that Rider & Glick thought he had; and the argument is now made here in behalf of Murphy, that Rider & Glick had the books showing the profits of the Milford deal; that they had Murphy in their power, and that he, Murphy, felt and realized his position, and thought what he lacked in power he must supply by policy; he must in some way get the firm of Rider & Glick to be his creditor rather than his debtor; in other words, this argument is a concession by Murphy's counsel, that at the time he accepted the check not only did Rider & Glick believe that he accepted it in settlement, but that Murphy knew they so understood. But if it be conceded that Murphy did not accept this check in settlement of the Milford deal, he was none the less the agent and trustee of

Rider & Glick in the transaction of purchasing the potatoes. We think, therefore, that Rider & Glick had probable cause to believe Murphy guilty of embezzlement at the time they caused him to be arrested for that crime.

There is in the record no evidence to support the finding of the jury that the conduct of Rider & Glick in causing Murphy to be prosecuted for embezzlement was inspired by a malicious motive; nor to support the finding of the jury that the prosecution was begun and carried on without probable cause. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

DAVID NEHR V. JOHN A. DOBBS.

FILED APRIL 7, 1896. No. 6452.

1. **Malicious Prosecution**: PROBABLE CAUSE: EVIDENCE: CONVICTION. In an action for malicious prosecution, a presumption of the existence of probable cause is established by proof that the plaintiff was convicted in the criminal action. But this presumption may be rebutted.

2. ——: ——: ——: ——. It is not true that the evidence of probable cause afforded by proof of a conviction, can be rebutted only by showing that the conviction was procured by fraud or perjury. These are only instances. Such evidence may be rebutted by proof of any facts which show that the conviction was under circumstances depriving it of any naturally probative effect.

3. ——: ——: PLEADING. A petition in an action for malicious prosecution pleaded that the plaintiff had been convicted in the county court and on appeal in the district court; that the conviction had been reversed by the supreme court and the cause thereafter dismissed.

It was also pleaded that the defendant, when he instituted the prosecution, was aware of certain facts which in law established the innocence of the plaintiff; that he had himself in the county court testified to those facts; whence it appeared that the conviction in the lower courts was not upon any consideration of evidence which would justify a conviction, but was due solely to a misapprehension of law. *Held*, That the petition sufficiently pleaded want of probable cause.

4. ———: ———: QUESTION OF LAW. The existence of probable cause, the facts being established, is a question of law, and if the defendant is aware of facts establishing the innocence of the plaintiff, a misapprehension of the law does not create probable cause, although it may affect the issue of malice.

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

The opinion contains a statement of the case.

Hardy & Wasson, for plaintiff in error:

In an action for malicious prosecution a judgment of conviction against the plaintiff is *prima facie* evidence that there was probable cause for the prosecution, but such evidence may be rebutted by proof that the judgment was based upon false testimony and was without foundation in law. (*Olson v. Neal*, 63 Ia., 216; *Burt v. Place*, 4 Wend. [N. Y.], 591; Newell, Malicious Prosecutions, 275; *Hazzard v. Flury*, 120 N. Y., 223; *Goodrich v. Warner*, 21 Conn., 432; *Phillips v. City of Kalamazoo*, 53 Mich., 33; *Richter v. Koster*, 45 Ind., 440.)

The criminal action was voluntarily dismissed. The burden of showing cause for its commencement was upon defendant. (*Burhans v. Sanford*, 19 Wend. [N. Y.], 417; *Gilbert v. Emmons*, 42 Ill., 143; *Kinsey v. Wallace*, 36 Cal., 462; *Green v. Cochran*, 43 Ia., 544.)

Hugh J. Dobbs, contra:

A conviction of the offense charged, when obtained without perjury, subornation of perjury, fraud, collusion, conspiracy, or other misconduct on the part of the complaining witness and trial court, is sufficient evidence of probable cause to defeat an action for malicious prosecution, although such conviction be followed by a reversal of the judgment, or by a new trial and an acquittal. (*Cloon v. Gerry*, 13 Gray [Mass.], 201; *Witham v. Gowen*, 14 Me., 362; *Payson v. Caswell*, 22 Me., 212; *Bitting v. Ten Eyck*, 82 Ind., 421; *Parker v. Farley*, 10 Cush. [Mass.], 279; *Parker v. Huntington*, 2 Gray [Mass.], 125; *Commonwealth v. Davis*, 11 Pick. [Mass.], 433; *Whitney v. Peckham*, 15 Mass., 243; *Herman v. Brookerhoff*, 8 Watts [Pa.], 240; *Adams v. Bicknell*, 126 Ind., 210; *Reynolds v. Kennedy*, 1 Wils. [Eng.], 232; *Griffis v. Sellars*, 31 Am. Dec. [N. Car.], 422; *Clements v. Odorless Excavating Apparatus Co.*, 67 Md., 461; *Burt v. Place*, 4 Wend. [N. Y.], 591.)

IRVINE, C.

This was an action for malicious prosecution by the plaintiff in error against the defendant in error. A general demurrer to the petition was sustained, and from a judgment entered thereon the plaintiff prosecutes error.

The point relied on in support of the demurrer is that the petition discloses that the plaintiff suffered a conviction in the court in which the prosecution complained of was instituted, and that while it is alleged that this conviction was reversed on appeal, the conviction in the original court was conclusive of the existence of probable

cause for the prosecution, or, if not conclusive, it could be rebutted only by evidence of fraud, perjury, or subornation of perjury, leading to the conviction, none of which was pleaded. The petition alleges that the defendant falsely and maliciously, and without probable cause, charged the plaintiff before the county judge of Gage county with having maliciously and unlawfully shot and killed a certain dog, the property of Dobbs; that he caused plaintiff's apprehension in such cause; that on the trial before the county court, Dobbs testified and admitted that the dog killed had no collar upon his neck with a metallic plate thereon inscribed with the name of his owner; and that the dog was running at large and attacked the plaintiff; that all such facts were well known to the defendant when the charge was made; that the plaintiff was convicted in the county court; that he appealed to the district court; that he was there again convicted; and that he prosecuted error to this court, where the judgment was reversed; and that after the cause was remanded to the district court it was dismissed. That it is not unlawful to kill a dog running at large, not bearing the collar required by law, was decided in *Nehr v. State*, 35 Neb., 638, which, by the way, is the case which constitutes the foundation of this action. It is therefore in effect pleaded that defendant caused plaintiff to be prosecuted, knowing the fact, which showed that he was guilty of no offense; that in the county court he testified frankly to those facts; that the plaintiff was, notwithstanding, convicted by the county court, and on appeal by the district court, on account of a misapprehension of law; and that the error was corrected by this court on proceedings in error,

the conviction reversed, and the cause finally dismissed. The question, therefore, presented is whether the conviction in the county court, or in the district court, or in both, was conclusive evidence of the existence of probable cause for the prosecution, notwithstanding the fact that the plaintiff was aware of the facts which on a correct interpretation of the law would defeat the prosecution. The older cases are, we think, all to the effect that a conviction is conclusive evidence of the existence of probable cause for the prosecution; and there are many cases holding that this is true, although there may be an acquittal on an appeal or after a reversal of the judgment. (*Herman v. Brookerhoof*, 8 Watts [Pa.], 240; *Clements v. Odorless Excavating Apparatus Co.*, 67 Md., 461; *Cloon v. Gerry*, 13 Gray [Mass.], 201; *Whitney v. Peckham*, 15 Mass., 243.) In the Maryland case cited there is a strong dissenting opinion published in an appendix. (67 Md., 605.) There are many other Massachusetts cases in line with those cited, although that of *Morrell v. Trenton Mutual Life & Fire Ins. Co.*, 10 Cush., 282, recognizes the fact that there may be some exceptions to the rule. The same may be said of *Phillips v. City of Kalamazoo*, 53 Mich., 33. On the contrary, the injustice of a universal application of such a rule has been long recognized. An early case of this character is *Burt v. Place*, 4 Wend. [N. Y.], 591. In that case it was held that although there had been a conviction, the evidence afforded by that fact of the existence of probable cause was rebutted by proof that a full defense had existed to the knowledge of the defendant, and that he had caused the plaintiff to be detained as a prisoner for the purpose of preventing him procuring such evidence

to establish his defense. Following this case, there is a long and well reasoned line of authorities to the effect that although the plaintiff may have been convicted, still if his conviction was procured by fraud, by perjury, or by subornation of perjury on the part of defendant, these facts may be shown to rebut the presumption of probable cause arising from the conviction. (*Olson v. Neal*, 63 Ia., 214; *Witham v. Gowen*, 14 Me., 362; *Payson v. Caswell*, 22 Me., 212; *Richter v. Koster*, 45 Ind., 440; *Adams v. Bicknell*, 126 Ind., 210; *Goodrich v. Warner*, 21 Conn., 432.) The last two cases cited do not undertake to define the exceptions to the general rule, but are to the effect generally that the conviction, although it be afterwards reversed, is *prima facie* evidence—and that only—of the existence of probable cause. To the same effect is *Knight v. International & G. N. R. Co.*, 61 Fed. Rep., 87. The best review of the cases to which our attention has been called is contained in the case of *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U. S., 141. The conclusion was there reached that all the cases can be reconciled by adopting the doctrine that the presumption of probable cause arising from a conviction can be rebutted only by showing that the conviction had been obtained by fraud. This court has recognized the principle that where the conviction has been procured by fraud or perjury, even an unreversed conviction does not necessarily defeat a recovery. (*Murphy v. Ernst*, 46 Neb., 1.)

A bald application of the foregoing cases would lead to an affirmance of this judgment, because the petition does plead a conviction both in the county and in the district courts; and it is not pleaded that the defendant resorted to any fraud,

perjury, or false testimony to procure the same. We think, however, that the cases cited hardly warrant so narrow a conclusion as that adopted by the supreme court of the United States in *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co., supra.* Indeed, the court in that case did not undertake to precisely define the rule, and expressly stated that no such precise definition was necessary to a decision of the case before it. All the cases, with one exception, in which the courts undertook to define the exceptions were cases where fraud or perjury was alleged, or cases resolved in favor of the defendant because no exception was alleged, and where fraud and perjury were merely mentioned incidentally as sufficient to take the case out of the rule. The principle which we induce from the cases is this: that a conviction is always sufficient *prima facie* evidence of the existence of probable cause; but that this is a rule of evidence, founded upon the fact that ordinarily if a court has proceeded to conviction, it must have had before it such evidence as in the mind of a prudent and reasonable man would convince him of the guilt of the accused; and that, therefore, a subsequent reversal, while it may show that the accused was in fact innocent, does not show that there was no probable cause for believing him guilty. Where, however, the conviction is under such circumstances as to deprive it of such naturally evidentiary effect, this presumption ceases. Where it is shown that the conviction is procured by fraud, or by perjury, or by subornation of perjury, we have cases where the conviction has no convincing effect upon the mind; and when the courts have stated that establishing that the conviction was had under these circumstances re-

buts the natural presumption from an ordinary conviction, they have simply declared that such exceptions do exist, and have not declared that there may not be other exceptions. In the case before us it is pleaded that the defendant knew and testified that the dog was running at large without a collar. This court has declared that under such circumstances it is lawful to kill the dog. Therefore, the conviction in the county court and in the district court could not have been due to an error in weighing the evidence, but it must have been due solely to a mistake of law arising from such admitted facts. The presence or absence of probable cause for a prosecution, the facts being established, is for the court and not for the jury (*Turner v. O'Brien*, 5 Neb., 542),—that is, it is a question of law and not of fact; and while a mistake of fact on the part of defendant in an action of malicious prosecution may affect the question of probable cause, a mistake of law does not. (*Hazzard v. Flury*, 120 N.Y., 223.) A misapprehension of the law may affect the issue of malice, but not that of probable cause. If the county court had properly interpreted the law the plaintiff would have been discharged, and the fact that defendant was aware of those things which justified plaintiff's conduct could have been shown in evidence to establish want of probable cause. Is there any reason why the misapprehension of law by the county judge should affect the case and destroy a cause of action which would have existed had the law been correctly determined in the first instance? We think not. The reason that a conviction procured by perjury is not proof of the existence of probable cause for the prosecution is that the false testimony deceived the trial court,

so that the inference naturally drawn from a judgment of that court is no longer a reasonable inference. So where it is pleaded that the proof disclosed an entire want of probable cause, but that the court mistook the law, and that on appeal the judgment was for that reason reversed, the probative character of the judgment of conviction is in like manner destroyed. The case is very different from nearly all the cases in which the old rule was laid down, which were cases where the law was clear, and the only question was whether the facts had been correctly determined on conflicting evidence. In such cases the judgment of conviction is most clearly and forcibly probative. We have found no case supporting the application of the rule just announced, in direct terms. But we think it is in principle supported by all the cases which recognize a conviction only as *prima facie* evidence and hold that it may be rebutted. The case of *Herman v. Brookerhoof*, *supra*, was a case like this, and is contrary to the view which we have taken. But it was decided in 1839, citing only very early cases, and only a few years after the case of *Burt v. Place*, *supra*, marked the first departure from the old doctrine. It proceeds upon purely technical grounds, and we do not think it should be followed. We hold, therefore, that the petition, by pleading a knowledge by the defendant, at the time he instituted the prosecution, of facts which in law discharged the plaintiff from culpability, and in pleading sufficient to show that the conviction in the lower court was due to a misapprehension of law, and not to a consideration of evidence justifying a conviction, sufficiently rebutted the presumption of probable cause arising from the first conviction. The effect

of these facts on the issue of malice we do not determine. Malice was pleaded and is a question for the jury.

REVERSED AND REMANDED.

FRANCIS M. CUMMINS V. ALICE V. CUMMINS.

FILED APRIL 7, 1896. No. 6430.

1. **Divorce:** EVIDENCE: COLLUSION. In an action for divorce, even where there is no appearance by the defendant, the trial judge must be satisfied that the case is prosecuted in good faith and without collusion, and that a cause of action exists. He is not bound to accept as conclusive, in all cases, the testimony of the plaintiff, although corroborated in some minor details.

2. ———: ———: REVIEW. Where the testimony in such a case, when taken in connection with all the circumstances, is weak and open to suspicion, through a failure to corroborate it on points admitting of corroboration, the action of the district judge in denying a divorce will not be set aside, although the evidence may have been such that it would have sustained a decree for plaintiff, and in cases of a different character might have required it.

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

Simeon Bloom, for plaintiff in error.

No appearance for defendant in error.

IRVINE, C.

The plaintiff in error brought this action to procure a divorce from the defendant in error. Service was had by publication. There was no

appearance by the defendant in error, but on the evidence the court found for the defendant and dismissed the case. The errors assigned are that the judgment is not sustained by sufficient evidence; that it is contrary to law; and that the court erred in overruling the motion for a new trial. The grounds assigned in this motion are that the judgment is not sustained by sufficient evidence, and that it is contrary to law. We have, therefore, presented, in effect, simply the sufficiency of the evidence. The ground on which the divorce was claimed was cruelty practiced by the wife against the husband. The husband's testimony is to the effect that the defendant had always been harsh and unkind to him; that she had refused to cook for him, wash for him, and mend his clothes; that she had denied him sexual intercourse, and that certain events had persuaded him that she had attempted to poison him. The last charge, if true, undoubtedly constitutes cruelty (1 Nelson, Divorce and Separation, secs. 266, 308), but the sufficiency of the evidence to establish an attempt to poison was in the first instance for the trial court, as was the sufficiency of the evidence on other branches of the case. The evidence on this subject was that, after two successive meals, the plaintiff was taken violently sick. Thereafter he detected some foreign substance in his coffee cup, and observed his wife pouring something from a paper into the coffee. He found some article in her possession which he supposed to be the same substance, but he had made no effort to ascertain its character. The parties had three children, aged seventeen, nineteen, and twenty-two years. The plaintiff, it appears, knew where these children were. They

were living in the household at the time of these events. They remained with their mother after the separation and their testimony was not produced. The plaintiff was corroborated in some parts of his testimony by a woman who had lived next door to the parties in Kansas, and who testified that she had done washing for the plaintiff and had heard the defendant use harsh and abusive language toward him. His testimony was not corroborated in other particulars. It has been said that the state is a third party to all divorce cases. It is not true that a petition stands confessed because not answered; nor is the judge who tries a divorce case obliged to find for the plaintiff, simply because he testifies to a state of facts, which, if believed, would warrant a decree in his favor. The judge should be satisfied that there is no collusion; that the case is prosecuted in good faith, and that a cause of action exists. This case was begun scarcely seven months from the time the plaintiff came to the state, which was the time of separation. He had then left his wife and his three children behind him, the children choosing to remain with the mother. The parties had lived together for more than twenty-two years. The charges of harshness and unkindness were proved only in the most general and vaguest way. The charge that the wife had refused to do the cooking, laundry work, and mending for the family was probably not the charge of a very great offense, in view of plaintiff's testimony that his earnings were $140 per month. The charge of denying the plaintiff sexual intercourse was as vaguely substantiated as the charge of unkind language. It did not appear for what period or under what circumstances

there had been such denial. The charge of poisoning was in no degree corroborated, while the evidence showed that through the children and the services of a chemist corroboration might have been obtained had the charge been true. If the trial judge had seen fit to grant a divorce upon the testimony, we would not disturb his action, but in such cases so much depends upon the manner and demeanor of the witnesses that, in view of the weakness of the evidence in this case, while it would be sufficient to support a different finding, we cannot disturb the finding which was made. (2 Nelson, Divorce and Separation, sec. 809.)

JUDGMENT AFFIRMED.

C. P. TREAT V. THOMAS PRICE.

FILED APRIL 7, 1896. No. 6326.

1. **Accord and Satisfaction:** CONSIDERATION: DISPUTED CLAIMS. The rule that when a certain sum is due from one to another, the payment of a lesser sum is no discharge as to the remainder, notwithstanding an agreement to that effect, is founded upon the fact that the later agreement is without consideration. Such rule does not apply where the amount due is disputed or unliquidated.

2. ———: ———: ———: DEFINITION OF "LIQUIDATED." The word "liquidated," when used in this connection, means that the amount due has been ascertained and agreed upon by the parties or is fixed by operation of law.

3. ———: ———: ———. The rule does not apply where there is a *bona fide* dispute between the parties as to the sum justly due.

4. ———: ———: ———. The fact that the sum paid is in

such case only the amount that the debtor concedes to be due, does not invalidate the settlement.

5. **Receipt:** SETTLEMENT: CONSIDERATION. If a consideration is necessary to sustain a settlement made by the payment and receipt in full satisfaction of the sum which the debtor admits to be due, it is found in the fact that the creditor by accepting such sum thereby avoids the delay, expense, and labor of an accounting, and avoids threatened litigation.

6. **Accord and Satisfaction:** PAYMENT: CONDITIONAL ACCEPTANCE. Where a certain sum of money is tendered by a debtor to a creditor on the condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the debtor must either refuse the tender or accept it as made, subject to the condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary.

7. ———: ———: ———: RECEIPT. A being indebted to B in an uncertain amount sent to the C bank the amount which A conceded to be due, with instructions to pay the sum to B but only in full settlement, and on his signing a receipt to that effect. B, protesting that more was due, accepted the money and signed the receipt, but caused the bank to send back, accompanying the receipt, a letter declaring that he only received the money on account and not in settlement. *Held*, That by receiving the money he had accepted the condition on which it was tendered, and that his protest availed nothing.

8. ———: ———: ———: ———: AGENCY: NOTICE. *Held further*, That the terms of the receipt and the refusal of the bank to pay the money except upon his signing it, were notice to him that the bank had no authority to pay it except on the condition that it should be received in full settlement.

9. ———: RECEIPT. An *obiter dictum* in conflict with some of the foregoing statements, in *Price v. Treat*, 29 Neb., 536, disapproved.

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

See opinion for statement of the case.

Cowin & McHugh and *Munger & Courtright*, for plaintiff in error:

Defendant below was entitled to a verdict under the evidence in this case and the court should have so instructed the jury. The release executed by Price upon the last payment was a complete satisfaction of the demand. The rule, that payment of a smaller sum cannot be a satisfaction of a larger debt, is applicable only to cases where the larger debt is fixed and liquidated, and does not apply where the previous claim is unliquidated and uncertain. (*Cumber v. Wane*, 1 Str. [Eng.], 426, and note; *Stearns v. Johnson*, 17 Minn., 142; *Fuller v. Kemp*, 33 N. E. Rep. [N. Y.], 1034; *American Manganese Co. v. Virginia Manganese Co.*, 21 S. E. Rep. [Va.], 466; *Reynolds v. Empire Lumber Co.*, 85 Hun [N. Y.], 470; *McDaniels v. Lapham*, 21 Vt., 222; *Bull v. Bull*, 43 Conn., 455; *Cummings v. Baars*, 36 Minn., 350; *Donohue v. Woodbury*, 6 Cush. [Mass.], 148.)

Charles O. Whedon and *C. A. Baldwin*, *contra*.

IRVINE, C.

Treat sued Price alleging in one count that he had performed, under a contract with Price, certain grading work for a railroad and asking judgment for an unpaid balance on account thereof; and in another count alleging the conversion by Price of certain tools used in the work. The district court entered judgment for the defendant on the pleadings. The plaintiff brought the case to this court on error, and the judgment of the district court was reversed. (*Price v. Treat*, 29 Neb., 536.) The former report of the case contains a

sufficient statement of the pleadings. After the cause was remanded, there was a trial to a jury resulting in a verdict and judgment in favor of the plaintiff for $10,372.13. The defendant now brings the cause here by petition in error. Recurring to the former opinion it will be found that one of the defenses pleaded was that the defendant rendered to the plaintiff a statement of the account, and that the parties fully settled and adjusted the same, finding due the plaintiff $6,532.27, which sum was paid by defendant and accepted by plaintiff; in consideration whereof Price executed and delivered to defendant the following instrument:

"Received from C. P. Treat $6,532.27, in full settlement of the within contract and in full of all demands. In consideration of said payment already received by me, I hereby release him, and also the Fremont, Elkhorn & Missouri Valley R. R. Co., and the Chicago & Northwestern Ry. Co., from all claims, actions, or causes of action which have arisen or may or can arise to me against any or either of them by reason of any connection I may have had with them heretofore.

"Dated May 21, '86. THOMAS PRICE.

"Witness: C. W. MOSHER."

The reply, among other things, while admitting that plaintiff signed the receipt, denied that it was executed in full settlement, or that the money was received in settlement, and alleged that the money was paid and received merely on account, and with that agreement and understanding. Discussing these pleadings the writer of the opinion in 29 Neb. expressed himself to the effect that the acceptance of a portion of an undisputed claim not being a bar to an action for the

remainder, this case fell within that rule, because, to the extent of the payment made, the defendant admitted the amount to be due, and that this part was therefore not disputed; and the fact that plaintiff claimed a greater amount did not render the claim a disputed one. In this respect we think the former opinion was *obiter* and of no controlling force on the present hearing. The reply had put in issue the allegation that the money had been tendered and received in full satisfaction. Judgment had gone for the defendant on the pleadings, and the question before the court was only whether the written instrument set out was *prima facie* evidence alone or a formal contract, the terms of which were not open to contradiction by parol evidence. If the latter, then the reply, admitting the execution of the instrument, was in other respects immaterial; but if the instrument was merely a receipt and open to contradiction, then the reply sufficiently traversed the answer, and the judgment, in the absence of evidence, was wrong. That the court recognized this as the only question decided may be inferred from the fact that nothing else appears in the syllabus, as well as from the general current of the opinion itself.

The issue presented by these portions of the pleadings has now been tried. An instruction relating thereto was given at the request of the plaintiff, and one requested by the defendant was refused. The giving of the one and the refusal of the other are presented for review by appropriate exceptions and assignments of error. These instructions present sharply the different contentions of the parties as to the law on the subject, and we quote them. That given was as follows:

"The defendant claims in his answer that he has settled with the plaintiff and that he has paid him the full balance due him, through the Capital National Bank at Lincoln, Neb., and offers in evidence a receipt that was prepared by defendant and forwarded by him to the bank, together with an amount of money to be paid plaintiff, with instructions to the bank that the money should be paid over to plaintiff when he signed the receipt so forwarded with the money, which receipt is signed by the plaintiffs and purports to be a receipt in full of all claim on the part of plaintiff against defendant growing out of the contract here sued upon. You are instructed that the receipt so offered by the defendant is *prima facie* evidence of the fact stated therein, but is not conclusive. It places the burden upon the plaintiff to show by evidence to your satisfaction not only that the amount paid at the time the receipt was signed was not the actual amount due, but he must go further and show that at the time he signed the receipt and took the money he did not accept nor intend to accept the sum named in the receipt as a full settlement of his claim, and that he so notified the defendant, that such notice was given by him without unreasonable delay." The instruction refused was as follows: "You are further instructed that if you find from the evidence that the defendant Treat sent the $6,532.27 to the Capital National Bank at Lincoln for the plaintiff Price at the request of the plaintiff Price, and that the defendant sent said money to said bank to be delivered to plaintiff only upon condition that the same should be accepted by him in full satisfaction and settlement of what was due from the defend-

ant to plaintiff under the contract sued upon in this action, and that the plaintiff Price, with knowledge of the fact that the defendant Treat so sent the money to be paid to him upon such condition, and thereafter accepted said money, that such acceptance would be a full and complete satisfaction, and he would not be entitled to recover in this action, notwithstanding he may, after receiving said money, have notified the defendant Treat that he did not receive or accept the same in full settlement but only to be applied upon account."

A short statement of the evidence applicable to the issue will elucidate these instructions. There is evidence tending to show that Price had requested Treat to remit through the Capital National Bank. Treat accordingly sent the sum named in the form of a draft to the bank, with a letter instructing the bank to pay the amount to Price, "in full settlement of all demands, but only upon his signing the receipt which I have written out for him upon the enclosed contract." The original contract for the work, bearing the receipt pleaded by the defendant, was enclosed together with the draft in this letter. Price had several conversations with Mosher, the president of the bank, and endeavored to get the money without signing the receipt, protesting all the time that a larger amount was due. He finally did, however, sign the receipt, and Mosher paid the money to him. But the same day he wrote the following letter, and delivered it to Mosher with the request that he remit it to Treat with the receipt:

"LINCOLN, 21st May, 1886.

"*C. P. Treat, Esq., Chadron:* I have this day signed the receipt on the contract between you

and me and delivered same to Capital National Bank. I sign this receipt subject to this condition, that any errors or mistakes in the classification of the work are to be corrected hereafter; also, any errors in measurements of the work or in the accounts you have sent me are to be corrected hereafter. I have never seen the vouchers upon which you base your charges against me, nor any of the orders for goods which you have charged against me, and if these accounts are not correct, I shall hold you for the balance due me. I wish you to send these orders and vouchers to the bank here or to me, so I can examine them in connection with your accounts. If there are any errors in these accounts, they must be corrected. I am satisfied there is yet a large sum due me from you on account of wrongful classification of work, wrong measurements, and wrongful and unwarranted charges against me for goods and labor. I do not propose to be bound by any receipts unless I am paid all that is justly due me.

"Yours truly, THOS. PRICE."

In view of this evidence it will be observed that by the instructions requested, both sides, notwithstanding the *dictum* in the former report, conceded that an acceptance of the amount tendered, in full satisfaction, would be a valid settlement and discharge of any claim; and this is right. The doctrine that a debt is not discharged by the receipt, even ostensibly in satisfaction, of a smaller amount, is based on the fact that there is in such case no consideration. (*Pinnel's Case*, 5 Coke [Eng.], 117; *Cumber v. Wane*, 1 Str. [Eng.], 426.) It does not apply to the case of a disputed claim. (*Slade v. Swedeburg*, 39 Neb., 600; *Tanner v. Merrill*, 65 N. W. Rep. [Mich.], 664; *Bull v. Bull*, 43 Conn.,

455; *McDaniels v. Lapham*, 21 Vt., 222; *Alvord v. Marsh*, 12 Allen [Mass.], 603; *Easton v. Easton*, 112 Mass., 438; *King v. City of New Orleans*, 14 La. Ann., 389; *Donohue v. Woodbury*, 6 Cush. [Mass.], 150; *Hills v. Sommer*, 53 Hun [N. Y.], 392; *Reynolds v. Empire Lumber Co.*, 85 Hun [N. Y.], 470; *Fuller v. Kemp*, 138 N. Y., 231; *United States v. Adams*, 7 Wall. [U. S.], 463; *United States v. Child*, 12 Wall. [U. S.], 232.) In some of these cases the old rule is stated to apply to liquidated claims, and the distinction is made between claims that are liquidated and those which are not. The term "liquidated," when used in this connection, means one where the amount due has been ascertained and agreed upon by the parties, or is fixed by operation of law. (*Hargroves v. Cooke*, 15 Ga., 321. See, also, Anderson's, Sweet's, and Bouvier's Law Dictionaries, where similar definitions appear.) In this sense this claim was not liquidated. The contract fixed different prices for excavating solid rock, loose rock, and earth, and while the parties substantially agreed as to the total amount of excavating, the classification of the work was in dispute, so that the amount due was not settled or agreed upon by the parties, nor was it fixed by operation of law; but could only be determined by a future agreement or by proof as to the amount of each class of work. Nor do the adjudicated cases support the *dictum* in the former opinion, to the effect that where only the amount admitted to be due is paid, so far the claim is within the rule as one liquidated or not disputed, notwithstanding the plaintiff claims a greater amount. In many of the cases cited the amount tendered was precisely the sum admitted to be due. If a consideration is in such case necessary, it may be found in

the fact that the payee receives immediate payment of so much as is paid, without the expense, delay, or labor of an accounting, in or out of court; and avoids thereby threatened litigation, which, we think, is always considered a valuable consideration. It has been necessary to consider this broad question, notwithstanding the fact that both instructions seem to have been based on a similar theory of law, because if the law were in accordance with the *dictum* referred to, the instruction given at plaintiff's request would be more favorable to the defendant than was warranted; and any erroneous statements therein would be for that reason without prejudice. The fundamental difference in the instructions was that that given permitted a recovery if a greater amount was in fact due, and if the plaintiff did not intend to receive the sum named in full settlement, and without unreasonable delay notified the defendant; while the instruction refused bound the plaintiff if he accepted the money knowing that it was tendered only upon the condition that it should be received in full satisfaction. The latter rule is correct. When money is offered on condition that it be accepted in full satisfaction of a demand, the person receiving it, if he receives it at all, must take it subject to the condition named. His acceptance of the money under such a tender is an acceptance of the condition, notwithstanding any protest that he may at that time or afterwards make to the contrary. (*Fuller v. Kemp, supra; Reynolds v. Empire Lumber Co., supra; Donohue v. Woodbury, supra; McDaniels v. Lapham, supra.*) This principle is so clear and so well supported by authority that no discussion seems necessary. It was not, there-

fore, the defendant's intention, secret or express, when he received the money, which controlled the legal effect of the transaction. It was the condition attached to the tender of the money, which condition was accepted by the fact of his receipt. So that neither defendant's verbal protests to the bank nor his written declaration to the plaintiff could change the legal effect of his act.

It may be said that there is evidence tending to show that the bank or Mosher was plaintiff's agent for the purpose of paying the money, as there is also evidence tending to show that Mosher informed defendant that his signing the receipt would not affect his legal rights; that, therefore, Mosher's paying the money in the face of defendant's protest that a larger sum was due, was a waiver of the condition. But the answer to this is that Mosher had no authority to waive the condition. His instructions were absolute to pay the money only in full settlement, and on the signing of the receipt. It is true that the evidence is conflicting as to whether plaintiff was shown this letter. But it is immaterial whether it was shown him or not, because the receipt itself and Mosher's requirement that it should be signed was sufficient notice to the plaintiff that Mosher had no other authority and could not waive the condition. We think the instruction requested by defendant should have been given, and that requested by plaintiff refused.

REVERSED AND REMANDED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY V. GEORGE M. WRIGHT ET AL.

FILED APRIL 7, 1896. No. 6480.

1. **Negligence:** PLEADING. An allegation of negligence in a pleading is like one of fraud,—a mere conclusion. The facts from which the inference of negligence arises must be pleaded.

2. ———: ———: INSTRUCTIONS. It is error to submit to the jury an issue of negligence not raised by a pleading of specific facts.

3. **Railroad Companies:** DUTY OF ENGINEER: INJURY TO LIVE STOCK: NEGLIGENCE. It is the duty of an engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions on the track, and if such a precaution would have revealed the presence of stock in time to have avoided their injury by the use of ordinary care, the railroad company is liable for injuries inflicted upon them, although they were not actually seen until too late to avoid striking them, and although they were not within the protection of the statute requiring tracks to be fenced.

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

The facts are stated by the commissioner.

J. M. Thurston, W. R. Kelly, and *E. P. Smith,* for plaintiff in error:

Railroad companies are under no obligations to stop their trains, or to slacken the speed, in order to deliver trespassing animals from peril. It was not the duty of the engineer to keep a lookout for cattle. (*Smith v. Chicago, R. I. & P. R. Co.,* 34 Ia., 509; *Meyer v. Midland P. R. Co.,* 2 Neb., 319; *Kilpatrick v. Richardson,* 37 Neb., 731; *Union P. R. Co.*

v. Mertes, 35 Neb., 204; *Illinois C. R. Co. v. Noble*, 32 N. E. Rep. [Ill.], 684; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St., 375; *Toledo, W. & W. R. Co. v. Barlow*, 71 Ill., 640; *Illinois C. R. Co. v. Godfrey*, 71 Ill., 500; *Kansas City, L. & S. K. R. Co. v. Bolson*, 14 Pac. Rep. [Kan.], 5.)

R. S. Norval, contra:

It is the duty of an engineer to keep a proper lookout for cattle on the track, and the company is liable for damages where stock is killed through a failure to perform that duty. (*Toledo, P. & W. R. Co. v. Bray*, 57 Ill., 514; *Chicago & A. R. Co. v. Kellam*, 92 Ill., 245; *Baker v. Chicago, B. & Q. R. Co.*, 73 Ia., 389; *Missouri P. R. Co. v. Vandeventer*, 28 Neb., 117; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 101; *Virginia M. R. Co. v. White*, 34 Am. & Eng. R. Cases [Va.], 22; *Guenther v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. R. Cases [Mo.], 47; *Reilly v. Hannibal & S. J. R. Co.*, 34 Am. & Eng. R. Cases [Mo.], 81.)

IRVINE, C.

The defendants in error brought this action against the railway company to recover damages on account of cattle belonging to them, killed and injured by a train of the railway company. The petition, while it is in one count, really alleges, or attempts to allege, three grounds of recovery: First, that a gate on one of the fences along the right of way was insufficient and negligently permitted to be out of repair, and that by reason of those facts the cattle got upon the right of way; second, that after they got upon the right of way, their injury resulted from the careless operation of the train; third, that the railway company,

after the stock was injured, took possession of the dead bodies and the injured cattle and refused to permit the owner to retake them,—that is, a charge of conversion. The answer of the railway company was a series of denials, some of them negatives pregnant, but the whole effect practically that of a general denial, coupled with some affirmative allegations in regard to the security of the gate and negligence on the part of the plaintiff. From a verdict and judgment in favor of the plaintiff for $569 the defendant prosecutes error.

Many assignments of error relate to rulings on the admission of evidence and to the refusal of instructions with regard to the character of the gate and the duty and liability of the railway company concerning the gate and flowing from its condition. The railway company is not, however, in any position to complain of these rulings. The statutes on the subject are found in Compiled Statutes, chapter 72, article 1, sections 1 and 2. The court, after stating the issues, stated to the jury the substance of the statute, and then charged the jury that the duty was imposed by statute of erecting and maintaining gates, opens, or bars at private crossings, only with regard to adjoining proprietors, and that if the cattle were upon the premises of an adjoining proprietor, without his consent, and escaped therefrom upon the right of way without negligence of the defendant, and were killed without its negligence, there could be no recovery. The evidence was uncontradicted that the cattle of the plaintiffs, about 340 in number, were in a corral north of the railway and west of the land of one Wallen; that they escaped from the corral upon the land of Wallen,

and thence came through the gate in question upon the right of way. There was no evidence of any act of the railway company leading to their escape. Therefore the effect of this instruction was to absolutely prevent a recovery on the ground of a violation of the fencing law. Whether or not the court correctly interpreted the statute, we need not and cannot here consider, because the construction given it was so favorable to the railway company that under the evidence all question of liability thereunder was eliminated from the case; nor need we extensively consider any questions raised by the pleadings and proof as to the defendant's taking possession of the dead and injured cattle and converting them to its own use. On the trial of the case this issue was evidently a minor consideration. We think there was error on another feature of the case, and the evidence not being of such a character that on this issue it was the only one which could properly be rendered, if not in direction, at least in amount, we pass over such assignments as relate exclusively to it.

It is quite clear under the instructions of the court that the verdict turned upon the negligence of the railway company in operating its train, whereby the cattle were killed and injured after they came upon the right of way. On this branch of the case the allegations of the petition are that the defendant, "by its agents and employes, while running at a high rate of speed, carelessly and negligently, and without using due caution, ran the engine and train of cars connected therewith and attached thereto over and upon the cattle of these plaintiffs; * * that the said defendant carelessly and negligently, by its employes and ser-

vants in operating said train, ran their said engine and train in, over, and upon said plaintiffs' stock; when by exercising proper care and skill in the management and handling of its said engine and train, it could have stopped said train long before striking said plaintiffs' stock." An allegation of negligence or want of care is like an allegation of fraud. It is a bare conclusion. A pleading is not sufficient which merely in general terms charges a want of due care or negligence. It is necessary to plead the facts from which an inference of negligence arises. (*Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90; *Malm v. Thelin*, 47 Neb., 686.) The petition merely alleges that the defendant negligently ran over the stock, while by the use of proper care it might have stopped the train before striking the cattle. The evidence shows that there were about 340 cattle on the right of way. It tends to show that while there was a curve in the road near the point where the cattle were struck, there were no cuts, grades, or other obstructions which would prevent a clear view of the track for a distance of half a mile. The accident occurred shortly after seven o'clock in the morning of December 15. Some of the witnesses testify that it was a clear morning and quite light at that time. Others testify that it was misty and dark. The court submitted to the jury the question of the defendant's liability under instructions that if the engineer saw the cattle, or by the exercise of due care should have seen them in time to have stopped the train and avoid the accident, the company was liable for his not doing so. The railway company contends that the allegations of the petition were in these respects insufficient, and also that the duty of the

railway company was only to exercise ordinary care to avoid injuring the cattle after those in charge of the train actually saw them. On the first contention, we think the railway company was right; on the second, wrong. The second argument is based on those cases—respectable in number, if in nothing else—which hold that a railway company's duty to a trespasser is merely to avoid wantonly or recklessly injuring him after becoming aware of his presence. This is supported by the argument that the cattle were trespassers and that the rules are the same as to liability for property unlawfully upon the track as for persons. We think the same general principle does apply; but the rule in this state is that it is the duty of the railway company not merely to avoid injuring a trespasser after his presence has been discovered, but that those in charge of trains must exercise reasonable care to avoid injuring all persons who are known or who may be anticipated to be upon the track; and the company is liable if the engineer, by keeping such a lookout as is consistent with his other duties, would have observed the trespasser in time to avoid the injury. (*Chicago, B. & Q. R. Co. v. Grablin, supra; Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb., 645; *Chicago, B. & Q. R. Co. v. Wilgus*, 40 Neb., 660.) Therefore we think that there was no error in the statement that if the engineer in the exercise of ordinary care would have seen the cattle in time to have prevented the injury, it was his duty to do so, and the company was liable for a failure in that regard; but applying the rule already stated in regard to pleading, it is not alleged that the cattle were seen, or that by the exercise of such reasonable care as was consistent with the duties

of the engineer, they might have been seen. While from the evidence we think it is a fair inference that an immediate stop of the train would have been dictated by ordinary prudence on discovering 340 head of cattle on the right of way, the failure to slacken speed is the only fact alleged in connection with the charge of negligence. Whether or not it was the duty of the engineer to stop his train would depend upon other circumstances which are not pleaded. Trains must run, and run at considerable speed, even on misty mornings before daylight, and no inference of negligence can certainly be drawn from the fact that a train was running at a high rate of speed and might have been stopped before trespassing cattle were injured, when there is not a showing of facts raising a reasonable inference that it was the engineer's duty to stop or to exercise some other precaution. If, as plaintiff's evidence tends to show, it was a clear morning, daylight, the track unobstructed for half a mile, and 340 head of cattle on the right of way, and the engineer failed to see these cattle in time to stop, or, having seen them, to stop, if he could, then the inference of negligence would be reasonable; but such facts or similar facts are not pleaded and the proof cannot extend the scope of the pleadings. We think, therefore, while the instructions were correct as abstract statements of law, they submitted to the jury an issue not within the pleadings, and for that reason the judgment must be reversed, with directions to permit plaintiff to amend his petition if he desires.

REVERSED AND REMANDED.

BERNARD H. POST V. ROBERT H. OLMSTED, ADMINISTRATOR.

FILED APRIL 7, 1896. No. 6473.

1. **Death by Wrongful Act:** DAMAGES: VERDICT FOR PLAINTIFF. Evidence in an action by an administrator for injuries causing the death of his decedent examined, and *held* sufficient to sustain the verdict.

2. ———: ———: ———: EVIDENCE. A verdict of $2,400 in such a case *held* not so clearly excessive as to warrant a reversal, where the deceased was a boy seventeen years old, a competent compositor, able to earn four dollars a day, and his next of kin his father, forty-six years old, a poor man with four younger children, although there was no evidence that the son had as yet supplied his father with any considerable amounts of money.

3. **Review:** ASSIGNMENTS OF ERROR. Other questions raised not being supported by any sufficient assignments in the motion for a new trial or petition in error, not considered.

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

Cowin & McHugh, Langdon & Clair, and *M. V. Gannon,* for plaintiff in error.

McCoy & Olmsted, contra.

IRVINE, C.

This was an action by Olmsted, as administrator of William Allen Daniel, deceased, to recover from Post for injuries causing the death of plaintiff's decedent, alleged to be due to the negligence of the defendant. There was a verdict and judgment in the district court for the plaintiff for $2,400 which the defendant seeks to reverse.

We designate the parties as they appeared in

the district court. The plaintiff, in a very elaborate brief, urges a number of technical objections to the record, which, he claims, preclude us from an examination of any of the errors assigned. The points so raised are so numerous that we pass them over without a detailed consideration, inasmuch as a consideration of the case on its merits, so far as is permitted by already well settled rules of practice, requires an affirmance of the judgment.

Complaint is made of certain rulings of the trial court on the admission of evidence. These we cannot consider, as there is no assignment in the petition in error presenting such questions.

Complaint is also made of certain instructions given by the court. In the motion for a new trial, and also in the petition in error, the only assignment with reference to these instructions is that "the court erred in giving instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, which was duly excepted to at the time by the defendant." Under a well established rule, this assignment can be considered no further than to ascertain that one of those complained of was correct. It is at once apparent from an examination of the charge that a number were free from error. So this assignment must fail.

Another assignment is that the court erred in not giving instructions 1 and 2 asked by the defendant. No such instructions appear in the record.

A further assignment is that the court erred in overruling the motion for a new trial. As the motion for a new trial assigns six grounds, and no one is designated in the assignment in the petition in error, this presents nothing for review.

The remaining assignments are that the verdict is not supported by sufficient evidence and that it is contrary to law. It is not contrary to law if supported by sufficient evidence. The evidence tends to show that the defendant was a dairyman, using in his business a number of teams and wagons. In January, 1891, two of these wagons, loaded with malt, were being drawn along Seventeenth street in Omaha, each propelled by three horses hitched abreast of one another. The plaintiff's decedent, a boy seventeen years of age, was riding upon a hand sled attached to the rear of the foremost wagon. The horses attached to both wagons were walking; but the rear wagon was approaching the front wagon. It continued to draw nearer until one of the horses attached to the rear wagon stepped upon the dragging coat of the boy, which pulled him from the sled. The horses and wagon then passed over him, inflicting injuries which resulted in death. There is evidence tending to show that for some distance before the accident occurred, the horses attached to the rear wagon were close behind the boy; that the boy shouted to the driver to stop, and that by-standers also shouted to the driver and warned him of the danger; that the driver kept on, regardless of these warnings, until the accident, and continued without stopping until by-standers interfered. Admitting, as argued by the defendant, that the boy's action in placing himself in such a position was negligent, still there is ample evidence from the foregoing facts that, notwithstanding such negligence on his part, the driver of the rear wagon ascertained his perilous position, and could have drawn his team aside or stopped it, or slackened its pace, in time to have

avoided the injury, and that ordinary prudence would have required such a course. There is ample in the evidence to show not only negligence causing the injury subsequent to the contributory negligence of the boy, but even wanton and criminal recklessness on the part of the driver. There is also sufficient to justify the jury in finding that this reckless disregard of the boy's safety continued after a period, when, by reason of the near approach of the horses, it had become impossible for the boy to extricate himself from his dangerous position.

It is also claimed that the evidence is insufficient to sustain the amount of the verdict. Conceding, contrary to several decisions of this court, that this question can be raised under a general assignment of the insufficiency of the evidence to sustain the verdict, we do not think the verdict can be declared excessive. The boy was seventeen years of age. He was a subcompositor on a daily paper, and stood next in line for a permanent position. Within a month before his death, he had earned in one night, $6.16, in six nights, $22.16, and in three nights, $9.24. The foreman testified that his earning capacity was about $4 per night on an average. The evidence tends to show that he was not only a competent compositor, but that he was of naturally industrious and economical habits. His expectancy of life, as shown by the evidence, was more than forty-three years. His next of kin was his father, forty-six years old, with an expectancy of twenty-four, a poor man, with four children younger than the deceased. While it is not shown that he had yet contributed any considerable amount to his father's support, we think that the legal relations

and other facts in evidence were sufficient to sustain a verdict for the amount rendered. The pecuniary damage to the next of kin is always more or less a matter of estimate if not of conjecture; and under acts similar to ours, similar verdicts have been often sustained under slighter proof of expectancy. (*Union P. R. Co. v. Dunden*, 37 Kan., 1; *Johnson v. Chicago & N. W. R. Co.*, 64 Wis., 425.)

JUDGMENT AFFIRMED.

BUFFALO COUNTY NATIONAL BANK V. CLEM V. GILCREST ET AL.

FILED APRIL 9, 1896. No. 6290.

Conflicting Evidence: REVIEW. The only question presented being one of fact, as to which the evidence is conflicting and apparently evenly balanced, the finding and judgment of the district court should not be disturbed.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J.

H. M. Sinclair, *F. G. Hamer*, and *Dryden & Main*, for plaintiff in error.

Marston & Nevius and *R. A. Moore*, *contra*.

POST, C. J.

This was an action by the plaintiff in error in the district court for Buffalo county on the following instrument:

"$9,875.00. KEARNEY, NEB., Sept. 14th, 1889.

"Ninety days after date, for value received, I promise to pay to the order of the Buffalo County

National Bank ninety-eight hundred seventy-five dollars at the Buffalo County National Bank, Kearney, Nebraska, with interest at the rate of ten per cent per annum from maturity until paid.

"Interest paid to December 20th, 1889.

"CLEM V. GILCREST."

On the back of said note are the following indorsements:

F. H. GILCREST.
"A. T. GAMBLE.
"E. B. JONES.

"$5,775.00 paid December 21st, 1889.
"$3,300.00 paid December 30th, 1889."

The defendants Jones and F. H. Gilcrest joined in an answer which is here set out: "That on or about the 1st day of July, 1888, the defendants F. H. Gilcrest and E. B. Jones, upon the representations and at the solicitations of their co-defendant, A. T. Gamble, then an officer and cashier of the plaintiff bank, and upon his representations that the capital stock of the 'Central Nebraska Live Stock Insurance Company' that subsequently they, with the said A. T. Gamble and others hereinafter named, became the owners of the whole of the capital stock of said company; that under the laws of the state of Nebraska the insurance company was required to have $50,000 of paid up capital stock before commencing business; that after the purchase of said stock it became necessary to reorganize said company and take up the old stock and pay in the said sum of $50,000 as the amount required of paid up capital stock; that to make up said required amount the defendants, F. H. Gilcrest, E. B. Jones, together with their co-defendant, A. T. Gamble, and one B. H. Goulding deposited with the plaintiff their notes as follows: One of the said A. T. Gamble

for $12,500, one of the said E. B. Jones for $12,500, one of B. H. Goulding for $12,500, one of F. H. Gilcrest for $12,500, each and every one of which said notes the said plaintiff gave to the said insurance company a credit of $50,000 on the books of the plaintiff as the amount necessary to show paid up capital stock in compliance with the law; that subsequently and as soon thereafter as the necessary arrangements could be made there was substituted for the said notes deposited as aforesaid first mortgage securities to the amount of about $40,000, and the said note sued on in this case was then given to make up the balance of the said $50,000; that no money was ever advanced by the plaintiff upon the said note, or was it ever intended or expected by the plaintiff or the makers of said note that any money should be paid thereon, but that as fast as first mortgage securities belonging to these defendants should be deposited with the treasurer of said company, their amounts should be indorsed upon said note, and when sufficient had been deposited as aforesaid to equal the face of said note, the note should be delivered up to the makers thereof and canceled; that in pursuance of said arrangement and agreement there was indorsed upon said note on December 21, 1889, $5,775, and on the 30th day of December, 1889, there was paid and should have been indorsed upon the said note the sum of $4,200, but there was only indorsed, as appears by copy of said note, the sum of $3,300 on that date; and these defendants aver that there was no consideration moving from the plaintiff to the makers of said note, nor did either of the makers thereof ever receive any money or value therefor, except as above set out."

To the foregoing answer a reply was interposed which is in substance a general denial. Upon the issues thus joined there was a trial to the court, a jury being waived, resulting in a finding and judgment for the defendants therein, which it is now sought to reverse by means of this proceeding.

Practically the only contention at this time on the part of the plaintiff in error is that the finding is unsupported by the evidence. By a close scrutiny of the answer it will be observed that the substantial defense, indeed, the only defense there stated, is that the indebtedness to the bank had been extinguished by means of mortgage securities deliverd to and accepted by the latter in payment of the note in suit.

We have carefully read over the evidence, which is, to say the least, conflicting and apparently evenly balanced, but which is quite sufficient under the rule often recognized by this court to sustain the finding complained of. The judgment of the district court is

AFFIRMED.

BENJAMIM A. GIBSON, APPELLEE, V. SAM MCCLAY, SHERIFF, ET AL., APPELLANTS.

FILED APRIL 9, 1896. No. 6416.

1. **Judgments:** JOINT DEFENDANTS: AGREEMENT TO EXHAUST INDIVIDUAL PROPERTY: EXECUTION: INJUNCTION. The agreement in this case, quoted in full in the opinion, construed to be one by which the judgment creditor bound himself to first make levy, or cause it to be made, on the property of a designated one of the judgment debtors, within the jurisdiction of the court in which the judgment was rendered and to sell or exhaust the prop-

erty of this particularly specified debtor for the satisfaction of a balance of the judgment remaining unpaid, before resorting to or causing levy of execution to be made on property belonging to either of the other debtors.

2. **Injunction:** EXECUTION: WRONGFUL LEVY. *Held*, That injunction was the appropriate and proper remedy for an attempted violation of the agreement, consisting of a levy and proposed sale of the property of one of the debtors favored by its terms, when it appeared at the time there was property of the debtor, from whose property the judgment was first to be satisfied, within the jurisdiction of the judgment court and subject to execution.

3. **Executions:** INJUNCTION: ESTOPPEL. Certain acts and statements of one of the favored debtors reviewed and *held* not to constitute a waiver of his rights under and by virtue of the agreement, or to estop him from asserting them.

4. ———: ———: COSTS. The decree *held* not to be objectionable as restraining the levy and enforcement of the execution in the part thereof with reference to the costs of the case in which the judgment was rendered.

5. ———: ———. The decree and injunction thereby accorded *held* too broad in that it restrained the sale of any of the property of the one debtor until all the property of the other was exhausted, and that it should have been confined to restraining a levy or sale under the execution herein involved and to this extent it is modified and, as modified, affirmed.

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

E. R. French, for appellants.

Wooley & Gibson, contra.

HARRISON, J.

On or about July 20, 1890, Alexander S. Porter, one of appellants herein, recovered a judgment in the district court of Douglas county against Ben-

jamin A. Gibson, appellee in the case at bar, Jonathan Chase and Joseph M. Beardsley, in the sum of $15,000. September 25, 1890, appellee paid on the judgment mentioned the sum of $5,055, and at the time of such payment an agreement was entered into which was as follows:

"Received on this judgment from Benjamin A. Gibson the sum of five thousand and fifty-five dollars ($5,055), being a third of the principal sum and interest to date. Also received of Joseph M. Beardsley the sum of five thousand two hundred and sixty-two and 25-100 dollars ($5,262.25), the same being a certified check payable April 28, 1891, the same to be credited on said judgment when said check is paid. The said defendants to pay the costs to the clerk. In consideration of said payment plaintiff agrees to stay, and not issue, any execution on said judgment or file any transcript thereof in any county prior to the first day of February, 1891, at which time it is agreed that the Jonathan M. Chase's third part of said judgment, the sum of five thousand dollars ($5,000), principal sum and interest to that date, shall be paid, and if the same is not then paid execution may issue for that sum but no more until the 28th day of April, 1891. All parties to said judgment hereby sign and agree to this agreement, and all error and appeal from the aforesaid judgment is hereby waived by both plaintiff and defendants. If execution is issued for Chase's part of said judgment, it shall first be levied off from his property and next off from the property of Benjamin A. Gibson before Beardsley's property is levied upon and exhausted, and in case Beardsley's said check and share shall not be paid and execution is issued, the same shall be made off his property

before that of the other defendants is levied upon and sold."

December 16, 1891, an execution was issued to enforce the judgment and directed and forwarded to the sheriff of Cass county where Jonathan Chase resided, which was returned, no property of Jonathan Chase found whereon to levy. Subsequently, of date March 8, 1892, another execution was issued and forwarded to the sheriff of Lancaster county, ordering a levy to be made on the property of Gibson, which order was obeyed and a levy made on some real estate belonging to appellee, and to obtain an injunction restraining the sheriff and defendant Porter from selling appellee's property until the property of Jonathan Chase should be first resorted to and exhausted, the present action was instituted. It was stated in one portion of the petition filed, that Jonathan Chase was the owner, at that time, of an undivided one-half interest in a tract of land in Lancaster county, of sufficient value to satisfy the balance remaining of the judgment. A temporary injunction was granted, and after a motion to vacate was heard and overruled, issues were joined and as the result of a trial the following findings were made and decree rendered and entered on the journal:

"This cause having been heretofore on a former day of this term of court, to-wit, March 17, 1893, tried and submitted to the court, now comes on for final determination and after due consideration and being fully advised in the premises, the court finds in favor of the plaintiff and against the defendants.

"The court further finds that the plaintiff and defendant Alexander S. Porter entered into the

written agreement set forth in the petition herein, wherein it was agreed by and between the said plaintiff and defendant Alexander S. Porter, in consideration of the payment of one-third of a certain judgment, interest and costs obtained by the said Alexander S. Porter against the said Benjamin A. Gibson, and one Jonathan Chase and Joseph M. Beardsley, in the district court of Douglas county, Nebraska, that the said defendant Alexander S. Porter was not to cause an execution to be issued against the property of the plaintiff Benjamin A. Gibson until the property of the said Jonathan Chase was exhausted.

"The court finds that the said Alexander S. Porter, in violation of said agreement, caused an execution to issue upon the judgment described in the petition herein and a levy was duly made upon the property of the said plaintiff, without previously exhausting the property of the said Jonathan Chase, as the said Alexander S. Porter had agreed to do in said agreement.

"The court finds that the said Jonathan Chase was, at the time of the commencement of this action, and now is, the owner of property in Lancaster county, Nebraska, subject to execution, and that the said defendants should be, and hereby are, restrained and enjoined from levying upon the property of the said plaintiff under said judgment until the property of said Jonathan Chase shall have been exhausted.

"It is therefore considered and adjudged by the court that the said defendants be, and they hereby are, enjoined from levying upon the property of the said plaintiff Benjamin A. Gibson, for the satisfaction of the judgment obtained by the said defendant Alexander S. Porter as above set forth,

until all of the property of the said Jonathan Chase subject to execution shall have been exhausted, and that the said plaintiffs do have and recover of and from the said defendants the costs of this action taxed at $21.85."

The agreement herein quoted may fairly be said to evidence a contract, on the part of the judgment creditor, to first collect any balance of the judgment from Jonathan Chase of the debtors, to the extent that the issuance, levy of execution, and sale thereunder might become necessary in the enforcement of its collection, and we think it not straining the terms of the agreement beyond their fair import to say it contemplated any property belonging to Chase within the jurisdiction of the court, and available by the proceedings mentioned, should be exhausted before recourse should be had to levy of process on property of the other debtors. This being, as we consider, a reasonable construction of the agreement, the issuance of an execution which, by its terms, was directed to be levied on the property of Gibson, as was the one the further effect of which it is herein sought to restrain, and its levy on the belongings of Gibson, and the contemplated sale thereof under the levy, at a time when there existed property of the debtor Chase within the county wherein the levy was made on that of Gibson, was a violation of the rights of the latter raised by the contract referred to, warranting the equitable remedy of injunction to stay its further progress. The evidence introduced established the fact that Chase was the owner of property in Lancaster county subject to execution, and the trial court made a finding to this effect.

It is claimed, however, that appellee, by actions and statements in relation to the judgment and its enforcement, had estopped himself from insisting on the fulfillment of the agreement. Mr. Gibson wrote some letters to the attorney for the appellant, Alexander S. Porter, in one of which, February 1, 1891, he remitted $3,000 to apply on the balance due on the judgment, and in this he said: "Mr. Chase has failed to come to time with his payment on the judgment; and I enclose you herewith my check for $3,000, for which receipt me, and also receipt on the docket and satisfy judgment to that extent. Chase promises me that he will pay the balance in course of a week or two; and I propose to let him if he will. I hope this will be satisfactory all around. I will pay the balance of $5,000 if I can't make Chase do it. It will be something of an accommodation to me if execution does not issue for balance at once, as I want Chase to pay it if he can. If execution should issue under the circumstances I should be hot under the collar, of course; and Mr. Porter wouldn't get his money nearly as quick." February 19, 1891, Gibson sent the attorney $2,000 to apply on the judgment, $1,000 of which was by draft which was dishonored, or not paid when presented. There were some other letters from Gibson to attorney for appellant Porter, in reference to the balance due on the judgment, and the filing of a transcript of it in Lancaster county, and some protestations against any attempts being made to collect the balance in any manner other than as stated in the agreement. There was also testimony from which it appeared that Gibson was in Omaha on or about June 10, 1891, and while there met the attorney for the judgment creditor, and

in a conversation which then occurred, stated that Jonathan Chase, his co-defendant, had no property in Lancaster county. There was also evidence to the effect that Gibson informed the attorney, when in Omaha on the date last mentioned or soon thereafter and prior to the issuance of the execution against the service of which an injunction is sought in this action, that Chase owned an interest in some real estate in Lancaster county. There is other and further testimony on this same subject, but from an investigation of all of it we are satisfied that it was sufficient to sustain the findings of the trial court, and that there was nothing shown from which it can be said that the appellee waived his right to insist on the fulfillment of the agreement in regard to the enforcement of the judgment or estopped himself from demanding such fulfillment.

It is insisted by counsel for appellants that the execution in question was for the balance due on the judgment and for the costs, and that its further enforcement should not have been restrained to the extent it was, for the collection of the costs; that the agreement did not include an execution for the costs, hence the levy of this one was proper and should have been allowed to prevail for the amount of the costs. The agreement was that if execution issued for that part of the judgment which remained for Chase to pay, it was first to be levied upon his property. This we think broad enough to include any execution issued for the purpose indicated, notwithstanding there might be also stated in it the costs and a levy directed for their collection along with the balance due on the judgment. The execution levied, and against which the injunction was granted and became

operative, was for an amount due of the judgment and which, by the actions and agreement of the parties, was known as "Chase's part of said judgment;" that Chase was to pay or it was first to be collected from him, or his property first subjected to its payment, and as such it should have been first levied upon his property for all purposes, and further, from an examination of the decree it appears that the parties were only "enjoined from levying upon the property of said plaintiff, Benjamin A. Gibson, for the satisfaction of the judgment obtained by the said defendant, Alexander S. Porter, as above set forth, until all of the property of the said Jonathan Chase subject to execution shall have been exhausted."

It is further urged by counsel for appellants that the decree rendered in the case was too broad in that it restrained any levy of execution against Gibson's property until such time as all Chase's property should be exhausted, and that it should have been confined, in its scope, to the matters in issue in the present case, and more particularly to stopping the sale under the then existing execution and levy thereof. In this contention we agree with counsel and the decree will be modified so that the appellants will be enjoined from further enforcing the execution, or levy thereof, against the property of Benjamin A. Gibson for the purpose of applying the proceeds thereof in satisfaction of the balance due on the judgment in favor of Alexander S. Porter and against Benjamin A. Gibson, Jonathan Chase, and Joseph M. Beardsley, and as thus modified it is affirmed.

JUDGMENT ACCORDINGLY.

JAMES WHITCOMB ET AL. V. JACOB THOMAS.

FILED APRIL 9, 1896. No. 6440.

Sufficiency of Evidence: REVIEW. Where there was sufficient testimony to sustain the verdict it will not be disturbed.

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

J. N. Curry, Barnes & Tyler, and *Jay & Beck,* for plaintiffs in error.

T. M. Franse, contra.

NORVAL, J.

James Whitcomb, Waldo Whitcomb, and Getty W. Donery are the proprietors of the Bank of Pender. Jacob Thomas commenced this action against them to recover the sum of $129.14, with interest thereon, which he alleges to be the balance due him upon his open account with the bank. In their answer they deny that they are indebted to the plaintiff in any sum whatever, and allege that he is indebted to them upon account in the sum of $13.85, and the further sum of $1,357.60 upon three promissory notes executed by the plaintiff, and which are set out in the answer. The defendants asked judgment against the plaintiff for $1,371.45, with interest. The reply denies that there is anything due from plaintiff to defendants on account, and pleads want of consideration as to a portion of the amount represented by the notes mentioned in the answer, and payment of the remainder of said notes. From a verdict and judgment for the

plaintiff in the sum of $78.70 the defendants prosecute error.

The only complaint in this court is that the verdict is contrary to the proofs adduced on the trial. A careful perusal of the testimony discloses that it is conflicting upon every material issue presented by the pleadings. The evidence of the plaintiff, when considered without reference to that introduced by the defendant, fully supports the verdict. It is the province of the jury, and not ours, to pass upon the credibility of the witnesses and to weigh the testimony. The verdict is not so manifestly contrary to the evidence as to show it to have been the result of either passion or prejudice, hence it cannot be set aside, and the judgment must be

AFFIRMED.

FRANK LEWIS V. W. W. MILLS ET AL.

FILED APRIL 9, 1896. No. 6413.

1. **Res Judicata:** EXECUTION: WRONGFUL LEVY: JUDGMENT AGAINST OFFICER: ACTION ON BOND: DAMAGES. Where an officer holding an execution issued on a judgment against A, by virtue of such execution seizes the property of B, and the latter recovers a judgment against such officer for the value of the property seized, then, in a suit by B against such officer and the sureties on his official bond to recover the amount of the judgment, such judgment is conclusive evidence against the officer and his sureties as to B's ownership of the property at the time it was seized by the officer, the amount of the damages and costs sustained by B by reason thereof, in the absence of a showing that the court had no jurisdiction to pronounce the judgment or that it was procured by fraud or collusion. *Thomas v. Markman*, 43 Neb., 823, followed.

2. **Sheriffs and Constables:** ACTION ON BOND: PLEADING. And in the suit against the officer and his sureties it is immaterial that the officer was not designated as such in the pleadings or judgment of the suit brought against him by the owner of the property.

3. ——: ——: ——: EVIDENCE. And the pleadings and judgment in the action brought by the owner against the officer are competent and relevant evidence in the suit against the officer and his sureties, although such pleadings and judgment show that the owner's suit against the officer was prosecuted and judgment rendered jointly against him and another.

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

Wigton & Whitham, for plaintiff in error.

References: *City of Lowell v. Parker*, 10 Met. [Mass.], 309; *Turner v. Killian*, 12 Neb., 580; *Lammon v. Feusier*, 111 U. S., 17; *Thomas v. Markman*, 43 Neb., 823; *People v. Mersereau*, 42 N. W. Rep. [Mich.], 153; *Dennie v. Smith*, 129 Mass., 143; *Tracy v. Goodwin*, 5 Allen [Mass.], 409.

Robinson & Reed, contra.

References: *Kane v. Union P. R. Co.*, 5 Neb., 107; *Fox v. Abbott*, 12 Neb., 330; *Lucas v. The Governor*, 6 Ala., 828; *Governor v. Shelby*, 2 Blackf. [Ind.], 28; *White v. State*, 1 Blackf. [Ind.], 558; *Pico v. Webster*, 14 Cal., 202; *Carmichael v. The Governor*, 3 How. [Miss.], 236; *Bitting v. Moore*, 53 Ia., 593.

RAGAN, C.

The facts in this case are as follows: A judgment was recovered before a justice of the peace in Madison county against one Van Buren Lewis. Execution was issued on the judgment and deliv-

ered to one W. W. Mills, a constable of said county. Mills thereupon levied the execution upon certain personal property in the possession of one Frank Lewis, who held the possession of said property and claimed a lien upon it by virtue of a chattel mortgage executed to him by Van Buren Lewis. Mills sold the property to satisfy the execution. Frank Lewis subsequently brought an action in replevin in the district court of Madison county for this property against the constable and a man named Sesler, and in this action Mills was not named or sued as constable. The action proceeded as one for damages, and Lewis recovered a judgment against the constable and Sesler for the value of the property. Execution was issued on this judgment and returned wholly unsatisfied, and thereupon Frank Lewis brought this suit in the district court of Madison county against Mills, the constable, and the sureties on his official bond to recover the amount of the judgment and costs which he, Frank Lewis, had recovered against Mills and Sesler. Only the sureties of the constable filed answers to the action. Their answers in effect admitted that Mills was a duly appointed or elected constable; that he as principal and they as sureties duly executed said bond; that the property which he seized and sold under execution against Van Buren Lewis was the identical property for which Lewis subsequently recovered a judgment against the constable and Sesler. The sureties further pleaded as a defense to the action that the judgment of Lewis against Mills and Sesler was procured by fraud and collusion between Frank Lewis and the constable; that the property seized and sold by the constable was in fact and in truth the property of Van

Buren Lewis and known by Mills and Frank Lewis to be his property; that the mortgage held on such property by Frank Lewis was made by Van Buren Lewis to hinder, delay and defraud his creditors, to the knowledge of Frank Lewis and the constable, and that by conspiracy and collusion between Frank Lewis and Sesler and Mills the latter two neglected and refused to defend the action of replevin brought by Frank Lewis. When the case at bar came on for trial to a jury, Lewis, to maintain the issues on his part, offered in evidence the record of the judgment which he had obtained in the district court against Mills and Sesler. To the introduction in evidence of this record the sureties on the bond objected, the objection was sustained, and the offered evidence excluded. Lewis failing to produce any further evidence, the court directed a verdict for the constable and his sureties, on which a judgment dismissing Lewis' action was rendered, and he prosecutes to this court a petition in error.

The evidence offered was admissible and the court erred in excluding it. The judgment of Frank Lewis against Mills and Sesler was conclusive evidence against the constable and his sureties as to Frank Lewis' ownership of the property at the time it was seized by Mills, the amount of the damages and costs sustained by Frank Lewis by reason thereof, in the absence of a showing that the court which rendered that judgment had no jurisdiction to pronounce it, or that it was procured by fraud or collusion. (*Turner v. Killian*, 12 Neb., 580; *Pasewalk v. Bollman*, 29 Neb., 519; *Thomas v. Markman*, 43 Neb., 823.)

The fact that Mills was not designated or described as constable in the pleadings in the action

brought against him and Sesler by Frank Lewis was wholly immaterial. (*Dennie v. Smith*, 129 Mass., 143.)

The fact that Lewis' judgment in the replevin action was rendered against both the constable and Sesler did not affect the validity of the judgment as evidence against Mills and the sureties on his bond. The judgment rendered against Mills and Sesler was offered in evidence to show that Mills had wrongfully taken and converted the goods of Frank Lewis. The fact, if it was a fact, that Sesler assisted Mills in the wrongful conversion of these goods did not lessen the responsibility of Mills nor his sureties. (*City of Lowell v. Parker*, 51 Mass., 309.) The judgment of the district court is reversed.

REVERSED AND REMANDED.

J. G. SLOAN, SHERIFF, V. BRISON BAIN.

FILED APRIL 10, 1896. No. 6344.

1. **Trespassing Animals:** DISTRAINOR'S LIEN: HERD LAW. One taking up stock trespassing upon his cultivated lands must, in order to preserve the lien allowed for his damages, comply substantially with the provisions of our herd law. (Compiled Statutes, ch. 2, art. 3.)

2. ———: ———: NOTICE. The question of the reasonableness of the notice required to be given the owner of stock so taken up, if known, is generally one of fact depending upon the circumstances of the particular case.

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

G. E. Becker and *W. W. Giffen*, for plaintiff in error.

D. D. Davis and *C. N. Mayberry, contra.*

POST, C. J.

This was an action of replevin commenced before a justice of the peace for Pawnee county, from whence it was taken by appeal to the district court for said county, when a trial was had resulting in a verdict and judgment for Bain, the plaintiff therein, and which has been removed into this court for review by means of the petition in error of Sloan, the defendant below.

The facts out of which the controversy arose are, briefly stated, as follows: One George Gartner, in the month of March, 1892, took up certain cattle, the property of the defendant in error Bain, found trespassing upon his, Gartner's, cultivated land in Pawnee county. Fifteen days later he caused Bain to be served with notice of which the following is a copy:

"MAYBERRY, NEB., April 12, 1892.

"MR. BRISON BAIN: You are hereby notified that on the 28th day of March, 1892, I took up some stock that I listed as strays, and from information that I have received I am led to believe that they belong to you. I have ten now in my possession and they are described as follows, * * * which animals did trespass upon my lands, and as I thought that the said animals were strays, I took them up as strays and listed them as required by law. The amount of damage said stock done I have placed at $25. You are required to pay the above charges within forty-eight hours

from the delivery of this notice, or said stock will be sold as provided by law. I have appointed Mr. W. F. Parker to act as arbitrator should you not feel satisfied with the amount of damage in the within notice. GEORGE GARTNER."

Bain, it appears, paid no attention to the foregoing notice, and Gartner in due time filed his claim, with proof of service, with Joseph Brown, a justice of the peace for said county, who found that the cattle in question had been taken up while trespassing upon Gartner's land and ordered them sold to satisfy the damage of the latter, assessed at $25. A writ was thereupon issued to the defendant below, Sloan, commanding him as sheriff to sell said cattle as upon execution, but before the day appointed for the sale they were taken from his possession by virtue of the order of replevin in this cause. Gartner without doubt had a lien upon the cattle in controversy, when taken up by him, for the amount of his damage; hence our investigation involves a single inquiry, viz., whether such lien existed in his favor at the time this action was commenced. It has been frequently held that one taking up stock while trespassing upon his premises must, in order to preserve the lien allowed for his damage, comply substantially with the provisions of our herd law with respect to notice, etc. (Compiled Statutes, ch. 2, art. 3; *Haggard v. Wallen*, 6 Neb., 271; *Bucher v. Wagoner*, 13 Neb., 424; *Hanscom v. Burmood*, 35 Neb., 504.) Although, as said in the case last cited, notice must be given to the owner of stock so taken up, if known, within a reasonable time, the question is generally one of fact depending upon the circumstances of the particular case. And it cannot be asserted as a proposition of law

that the time in this case, fifteen days, is unreasonable, there being no evidence tending to prove knowledge by Gartner of Bain's ownership previous to the date of the notice above set out. There was proof of a tender by Bain before the commencement of this action of the sum of $3 in satisfaction of Gartner's lien, but there was no evidence whatever tending to show the amount of the damage actually suffered by the latter. The evidence is entirely free from conflict and suggests no reason for holding that the statutory lien upon the cattle impounded has been discharged by act of Gartner or by operation of law. It follows that the right of possession of the property in controversy was at the time this action was commenced in the plaintiff in error. The judgment is accordingly reversed and the cause remand for further proceedings in the district court.

REVERSED.

JOHN CANNON ET AL. V. MARGARET SMITH.

FILED APRIL 10, 1896. No. 6221.

Pleading: VERDICT: EJECTMENT. A verdict in order to sustain a judgment must respond to the issues made by the pleadings, or to the allegations of the successful party.

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

J. R. Hanna and *T. J. Doyle*, for plaintiffs in error.

M. B. Gearon, *contra*.

POST, C. J.

This was an action of ejectment in the district court for Greeley county in which judgment was entered in favor of the defendant in error, who was also defendant below, and which has been brought to this court for review by means of the petition in error of the unsuccessful party. The petition below is as follows:

"1. The plaintiffs, John Cannon and Ellen Cannon, complain of the defendant, Margaret Smith, for that the plaintiffs have a legal estate in and are entitled to the possession of the following described premises, to-wit: The east 200 feet of the northeast quarter of section 21, in township 18, range 11, situated in Greeley county, Nebraska, and the said defendant, ever since the 15th day of May, 1889, has unlawfully kept, and still keeps, the plaintiff out of possession of said premises.

"2. The defendant, while unlawfully in possession of said premises, has received the rents and profits thereof from the 15th day of May, 1889, to the commencement of this action, amounting to the sum of $100. The plaintiffs therefore pray judgment for the delivery of the possession of said premises to them, and also for the sum of $100 rents and profits, and for costs of suit."

To the foregoing petition an answer was filed in the following words: "Now comes the defendant by her attorney, M. B. Gearon, and for answer to plaintiffs' petition denies each and every allegation therein set forth, except that the plaintiffs are the owners in fee of said premises, which defendant admits."

The issues thus made were tried to a jury, by which the following verdict was returned: "We,

the jury in this case, being duly impaneled and sworn, do find and say that the plaintiff has not a legal estate in, and is not entitled to the possession of the premises described in the petition."

Numerous errors are alleged as grounds for a reversal of the judgment, but one of which will be noticed at this time. It is contended that the verdict responds to no issue of the pleadings and will not, therefore, sustain the judgment complained of. By a careful analysis of the pleadings it will be observed that the only question at issue was that of the possession of the defendant below, and as to which the verdict is silent. It would seem, therefore, that the objection is well taken, and that the district court erred in rendering judgment upon the verdict.

It is, however, strenuously insisted that the insufficiency of the verdict was not relied upon below. We observe in the record evidence tending strongly to corroborate that statement, although the question is presented by a sufficient assignment of the motion for a new trial, and also by the petition in error. It follows that the judgment must be reversed and the cause remanded for further proceedings in the district court.

REVERSED.

HARRISON, J., not sitting.

OMAHA BREWING ASSOCIATION V. JOHN WUETHRICH ET AL.

FILED APRIL 10, 1896. No. 6388.

1. **Review:** ISSUES NOT RAISED BELOW. Cases will, as a rule, be reviewed in this court upon the theory upon which they are prosecuted or defended in the court of original jurisdiction.

2. ———: ———: CONVERSION: RECOUPMENT: WAIVER. One who in an action for the conversion of personal property defends upon the sole ground of his alleged superior title, and by his conduct disclaims any special interest in such property or lien thereon, will not, on petition in error in this court, be heard to complain on the ground that he should have been permitted to recoup the amount of a lien existing in his favor upon the property in controversy against the damages awarded for its conversion.

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

Lake, Hamilton & Maxwell, for plaintiff in error.

F. W. Fitch, contra.

POST, C. J.

This was an action by the plaintiffs below, John Weuthrich and Margaret Wuethrich, against the defendant therein, the Omaha Brewing Association, for the conversion of certain property, consisting chiefly of saloon fixtures and furniture used by the plaintiffs in their business as saloonkeepers. The defenses relied upon were two in number: First, that said property was delivered to the plaintiffs by Storz & Iler, to whose rights the defendant has succeeded, under and by virtue of a written agreement by the terms of which the

title thereof remained in the said Storz & Iler until paid for in full, said agreement being in the following words:

"Articles of agreement, made and entered into, this 2d day of August, 1890, by and between Storz & Iler, parties of the first part, and Mrs. John Wuethrich, party of the second part, all of said parties being in the city of Omaha, county of Douglas, state of Nebraska, witnesseth:

"Said parties of the first part agree to sell, and said party of the second part agrees to purchase the following described property, situated in the county of Douglas and state of Nebraska, to-wit: All the fixtures and furniture belonging to the saloon and billiard hall, and also all the furniture belonging to the rooms in the second and third story of the three-story brick building situated on the southwest corner of Fifteenth street and Capitol avenue, in the city of Omaha, as described in an inventory hereto attached. The said Mrs. John Wuethrich agrees to pay to said Storz & Iler for said described personal property the sum of forty-five hundred ($4,500) dollars, in payments as follows: One thousand ($1,000) dollars on delivery of this contract; two thousand ($2,000) dollars on the 15th day of November, 1890, according to one certain promissory note of even date herewith; fifteen hundred ($1,500) dollars on the 15th day of May, 1891, according to one certain promissory note of even date herewith, both notes payable at First National Bank, Omaha, Nebraska, with interest at the rate of eight (8) per cent per annum from date.

"So soon as said purchase money and interest shall be fully paid, then, and in that case, Storz & Iler agree to make to said Mrs. John Wuethrich,

her heirs or assigns, a good and sufficient bill of sale of said personal property. In case the said Mrs. John Wuethrich shall fail, refuse, or neglect to pay said sums [notes], or any part thereof or interest thereon, she shall forfeit any rights she may have in this contract for the purchase of said property, and shall also forfeit any moneys she may have paid as herein stipulated to said Storz & Iler. * * * The said parties of the first part agree that whenever said Mrs. John Wuethrich has fully complied with this contract, they will transfer to her all their rights, interest, and title to the lease they now hold on said premises.

"Witness our hands and seal this 2d day of August, 1890. STORZ & ILER.
"MARGARET WUETHRICH.
"JOHN WUETHRICH."

It appears that the plaintiffs paid on said contract the sum of $1,000 on the day of its execution, as therein stipulated, and also the sum of $2,000 and interest maturing November 15, 1890. It is, however, alleged that they failed to pay the sum of $1,500, with interest, which matured May 15, 1891, whereby they forfeited to the defendant the amounts previously paid by them, and from which it is argued that in seizing and disposing of the property above described the defendant merely asserted its right under said contract.

The second defense is an alleged agreement whereby the plaintiffs, on the 29th day of May, 1891, finding themselves unable to make payment of the sum of $4,533.58, then due and owing by them to the defendant, turned over and delivered to the latter all of the property in controversy in satisfaction of their said indebtedness.

Upon a trial of the issues in the district court,

there was a verdict and judgment for the plaintiffs therein in the sum of $1,678.19, and which has by appropriate proceeding been removed into this court for review.

Although the petition in error contains numerous assignments, counsel rely for a reversal of the judgment upon a single proposition, viz., that the defendant below was entitled to recoup, against the damage assessed in plaintiffs' favor, the unpaid portion of the purchase price of the property in controversy, and that the district court accordingly erred in approving of a verdict for the value of the property converted, with interest. There are, it must be confessed, authorities which appear to sustain the proposition that one holding a lien upon personal property is, in an action by the lienor for conversion thereof, entitled, even under a general denial, to have so much of such indebtedness as remains unpaid deducted from the amount which the latter would otherwise be entitled to recover, as bearing directly upon the question of damage. Such a case is *Cushing v. Seymour*, 30 Minn., 301. But we do not understand that case, or the authorities there cited, to hold that it is the duty of the court to direct the allowance of a credit in such case, upon its own motion, without any suggestion from the party entitled thereto, or, as in the case at bar, contrary to the theory upon which the defense was conducted. A rule frequently recognized by this court is that cases must be reviewed here upon the theory on which they are prosecuted or defended in the court of original jurisdiction. (See *Smith v. Spaulding*, 40 Neb., 339; *Norton v. Nebraska Loan & Trust Co.*, 40 Neb., 394; *Woodard v. Baird*, 43 Neb., 310.) The defendant, judging from the evidence

in the record, not only failed to assert a lien upon the property in controversy, but appears to have disclaimed any such contention. We observe, for instance, the following offer shown by the bill of exceptions: "The defendant offers to the plaintiff and now makes a tender of a note of $1,500, marked Exhibit 3 [admitted to be the note above mentioned], which was paid and satisfied by settlement between the parties as set up in the defendant's answer." The cause appears to have been submitted to the jury upon the precise theory indicated by the answer, and the verdict responds to every contention made by the defendant during the trial. Having elected to waive any lien it may have had upon the property by virtue of the original agreement, it will be required to pursue its remedy by an action on the note and will not be heard to complain on the ground that such lien was not recognized and enforced in this cause.

JUDGMENT AFFIRMED.

SAMUEL M. CROSBY V. J. T. RITCHEY.

FILED APRIL 10, 1896. No. 6395.

1. **Fraud:** PLEADING. In pleading fraud it is necessary to set out the facts relied upon for relief. Mere epithets or conclusions of fraud, without any statement of the facts upon which such charge is predicated, are insufficient.

2. **Negotiable Instruments:** FRAUD: CONSIDERATION: PLEADING. Answer examined and *held* to charge a failure of consideration only and not fraud in the inception of the notes sued upon.

3. ———: INDORSEMENTS: CONSIDERATION: BURDEN OF PROOF.

Where the only defense alleged in an action by the indorsee of a promissory note is the failure of consideration, the burden is upon the defendant to overcome the presumption that such note was transferred before due, for value, in the usual course of business. (*Violet v. Rose*, 39 Neb., 660; *Kelman v. Calhoun*, 43 Neb., 157.)

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

Beeson & Root, for plaintiff in error.

W. C. Sloan and *E. H. Wooley*, *contra*.

POST, C. J.

This was an action upon two promissory notes executed by the defendant in error, Ritchey, for $75 and $37.50 respectively, both payable to the order of A. T. McLaughlin and indorsed in blank by the payee. To the petition, which is in the usual form, the defendant below answered as follows: "The defendant for answer denies that he is indebted to plaintiff in any sum upon the pretended notes sued on, and avers that such notes were obtained by A. T. McLaughlin, as the president of the Omaha Medical Institute, without consideration and by fraud and false representations, in this, that as such officer or president of said institute he agreed to furnish medical services for six (6) months from about February 23, 1891, to August 23, 1891; that such service and medical attendance and advice were the only consideration for such pretended notes and a contract for such medical services and advice being made at same time, and are but one contract with the notes, and nothing was to be paid until such medical services had been done and completed; that such medical services being not done nor fur-

nished as so agreed, nor was anything done whatever, though requested to be done; that at the time such pretended notes were obtained this defendant was led to determine and did determine that the whole matter was but a contract for such medical services and attention to be given for in about six months' time. It now appears that all was but a scheme and a device to swindle and defraud this defendant. It is further averred that plaintiff is not an innocent owner of such pretended notes sued on, the plaintiff knew the consideration of said notes had failed before he obtained the same; that the plaintiff is really not the rightful owner and holder of such notes and the plaintiff has no right to sue this defendant." The reply is in effect a general denial. A trial of the issues thus joined was had, resulting in a verdict and judgment for the defendant below, which we are asked to reverse on account of alleged errors, to be hereafter noticed.

Among the instructions given by the court on its own motion, and to which exception was duly taken, are the following:

"2. In this case you are instructed that the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence that he is the owner and holder of the promissory notes in question for a valuable consideration, and that the burden of proof is upon the defendant to satisfy you by a preponderance of the evidence of the want of consideration for said promissory notes, and that the same were obtained from the defendant by fraud and deceit.

"3. You are further instructed that as a matter of law, if you find from the evidence that the plaintiff purchased the notes in controversy in

this action before the day the same became due and payable, and in the usual course of trade for a valuable consideration, without notice of any defense that defendant might have or claim to have thereto, that in such case your verdict should be in favor of the plaintiff, unless you further find from the evidence that at the time defendant signed said notes he was led by the fraud and artifice of the original payee or his agents, and that defendant was not guilty of any neglect whatever in signing the same."

The first question suggested by the assignment relating to the foregoing instructions is the character of the defense alleged. The answer appears to have been by the district court interpreted as charging fraud on the part of the payee in the inception of the notes. But in that view we are unable to concur, since a careful scrutiny of the answer fails to disclose any allegations of fact upon which to predicate the charge of fraud. Mere epithets and conclusions of fraud, without the statement of facts, constitute no basis for relief upon that ground. (*Tepoel v. Saunders County Nat. Bank*, 24 Neb., 815; *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb., 137; *Thomas v. Thomas*, 33 Neb., 373.) The mere allegation is insufficient. Facts showing the fraud relied upon or from which it may be inferred must be stated. (*Leavenworth, L. & G. R. Co. v. Douglas County*, 18 Kan., 169; Kinkead, Code Pleading, sec. 607 *et seq.*)

Another rule recognized by this court is that fraud cannot be predicated upon a mere promise not performed, but in order to be available as a cause of action or defense it is essential that there be a false assertion with respect to existing matters. (*Perkins v. Lougee*, 6 Neb., 220.)

The most favorable construction of which the answer in this case is susceptible from the standpoint of the defendant below is that it charges a failure of consideration on account of the alleged neglect and refusal of the payee of the notes to render the promised medical service and attendance. The case is therefore governed by the rule recognized by this court in *Violet v. Rose*, 39 Neb., 660, and *Kelman v. Calhoun*, 43 Neb., 157, viz., that where the defense alleged in an action by an indorsee of a promissory note is the failure of consideration only, the burden is upon the defendant to overcome the presumption that such note was transferred before due, for value, in the usual course of business. The direction of the court appears to conflict with the authorities here cited. First, in submitting to the jury the question of fraud in the inception of the notes, and second, in imposing upon the plaintiff below the burden of proving that he was a *bona fide* holder thereof. The other assignments relate to rulings of the court during the trial and present questions of practice only, which, in view of the conclusion stated, do not require notice at this time. But for reasons above stated the judgment will be reversed and the cause remanded for trial *de novo*.

REVERSED.

JOHN HOGUE V. CAPITAL NATIONAL BANK OF LINCOLN.

FILED APRIL 10, 1896. No. 6339.

1. **Corporations:** CORPORATE CHARACTER: COLLATERAL ATTACK: LIABILITY OF STOCKHOLDERS. Where a corporation has had a *de facto* existence for a considerable time, its corporate character cannot be collaterally assailed by persons contracting with it in such capacity, relying upon its corporate credit, in order to hold stockholders thereof individually liable on account of the failure to observe the statutory requirements essential to constitute it a technical *de jure* corporation.

2. ———: LIABILITY OF STOCKHOLDERS: STATUTES: ABATEMENT. The liability imposed by section 139, chapter 16, Compiled Statutes, as originally enacted, was penal in its character, and rights of action thereunder not reduced to judgment, abated with the repeal of said section without a saving clause. (Session Laws, 1891, p. 198, ch. 13.)

ERROR from the district court of Sherman county. Tried below before HOLCOMB, J.

E. C. Lane, J. R. Scott, and *J. H. Broady,* for plaintiff in error.

Nightingale Bros., contra.

POST, C. J.

This was an action by the defendant in error, the Capital National Bank of Lincoln, in the district court for Sherman county to recover from the plaintiff in error Hogue, as a stockholder of the Sherman County Banking Company, the sum of $10,272.65, being the face value of twenty-four notes sold by said last named corporation. Upon

the back of each of the notes so sold appears the following indorsement:

"For valuable consideration we hereby guaranty to the Capital National Bank of Lincoln, Nebraska, or its assignees, the payment of the within note, waiving protest and non-payment of the same.

"SHERMAN COUNTY BANKING COMPANY,
"By E. E. WHALEY, *Pt.*"

The ground of Hogue's alleged liability appears from the following statement of the petition:

"The said Sherman County Banking Company, on October 31, 1887, filed its articles of incorporation in the county clerk's office, and on November 1, 1887, commenced to transact business at Loup City, in said county, as a banking corporation, and continued to transact business as such until December 26, 1888, at which last date said banking corporation became wholly insolvent and made a pretended assignment for the benefit of creditors, and by assignment duly executed, conveyed all the corporate property of said banking company to Joseph F. Pedler, sheriff of said county. * * The said Sherman County Banking Company was not a legally incorporated company, but has failed to comply with the provisions of chapter 16, Compiled Statutes, entitled 'Corporations,' in relation to giving notice and other requisites of organization, and thereby subjected its stockholders to the liability imposed by section 139 of said chapter. Such failure to comply substantially with the law affecting and regulating corporations is more specifically as follows: (*a.*) The said Sherman County Banking Company wholly failed to publish notice of its incorporation or organization. (*b.*) The whole of the capital stock of said banking corpo-

ration was not subscribed at the time of commencing business on November 1, 1887, or at any time thereafter, as required by its articles of incorporation and by the general law. (*c.*) The whole of the capital stock of said corporation was not paid for at the time of commencing business, nor at any time thereafter. * * * (*e.*) The said Sherman County Banking Company wholly failed to post up in a conspicuous place at its place of business, subject to inspection, a copy of its by-laws and the names of all of its officers appended thereto, and wholly failed to make and govern itself by by-laws. (*f.*) Said corporation wholly failed to make and publish a quarterly statement of the assets and liabilities of said banking company, and to make and publish the annual notice of indebtedness required by law. (*g.*) Said banking company failed to keep a record of its corporate proceedings and its election of officers and board of directors, failed to open and keep a subscription book, failed to keep a stock ledger or stock transfer book, or any book in which the names of the said stockholders were entered and the amount held and owned by each stockholder, and thereby concealed from the creditors of said banking corporation, from the patrons of said bank, and from the public in general the fact that a large amount of the capital stock of said corporation was held and owned by insolvents and persons of doubtful solvency.

"By reason of the aforesaid failure to comply with the provisions of law as to notice and other requisites of organization as herein set forth, the stockholders of said Sherman County Banking Company became, and are jointly and severally, liable for all the debts of said corporation."

A general demurrer to the petition was overruled and issues joined by answer and reply. A trial was had at a subsequent term, resulting in a verdict and judgment for the plaintiff below in the sum of $14,865.81, and which has by appropriate proceeding been removed into this court for review.

It is unnecessary, in the view we take of the questions presented for determination, to notice the allegations of the answer and reply. Among the facts shown by the petition, proof, and record, and as to which there is no controversy, are the following: (1.) The Sherman County Banking Company had a *de facto* existence for more than a year, during which time the defendant in error had transactions with it in its corporate capacity amounting to many thousands of dollars, including the indorsements upon which it seeks to recover in this action. (2.) The cause of action alleged and relied upon in the district court is the failure of the banking company to comply substantially with the provisions of the statute in relation to the giving of notice and other requisites of organization, and not Hogue's primary liability as a stockholder of said corporation.

Counsel for the defendant in error, with a candor certainly to be commended, admit that the situation, from their point of view, is complicated by the repeal in 1891, without a saving clause, of section 139, chapter 16, of the general corporation law of the state, and in a brief of unusual merit insist that the repealing act should be given a prospective effect only, since to hold otherwise is to destroy vested rights, and accordingly violative of section 10, article 1, of the constitution of the United States. But whatever

view we might feel constrained to take of that subject as an original proposition, it cannot, we think, be longer regarded as an open question in this jurisdiction. Section 139, as originally enacted, reads as follows: "If any corporation fail to comply substantially with the provisions of this subdivision in relation to giving notice and other requisites of organization, the property of all the stockholders shall be liable for the corporate debts." By section 2 of the act of 1891 the foregoing provision was amended to read as follows: "If any corporation fail to comply substantially with the provisions of this subdivision in relation to giving notice and other requisites of organization, after the assets of the corporation are first exhausted, then the property of any stockholder shall be liable for the corporate debts to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and in addition thereto, the amount of capital stock owned by such individual." By section 3 the original section was repealed, and by section 4 it is provided that, "Whereas, an emergency exists, this act shall take effect from and after its passage and approval, and shall be held and taken to apply in any case now pending or hereafter brought in any court in this state." In *Globe Publishing Co. v. State Bank*, 41 Neb., 175, it was held, that where an attempt is in good faith made to organize a valid corporation, and such body actually exercises corporate functions for a considerable time unchallenged by the state, persons contracting with it in its corporate capacity, and in reliance upon its corporate credit, cannot hold stockholders thereof liable for its debts solely because, by mistake or omission not amounting to

fraud, some act is left undone which is essential to constitute it a *de jure* corporation. In *Kleckner v. Turk*, 45 Neb., 176, it was held that the liability imposed by section 139, as originally enacted, was for the omission of acts which are not conditions precedent to the commencement of business by a corporation, that such liability existed solely by reason of the provisions of said section, that it was in the nature of a punishment, and that the right of action thereby conferred, unless reduced to judgment, did not survive, but was destroyed by its repeal. Those cases we regard as decisive of the present controversy. It follows that the judgment must be reversed and the cause remanded for further proceedings in the district court.

REVERSED.

JOHN H. GREEN V. JOSEPH BARKER ET AL.

FILED APRIL 10, 1896. No. 5888.

1. **Patent for Land:** COLLATERAL ATTACK: EVIDENCE. The presumptions arise from the existence of a patent evidencing a grant of land from the United States, that all acts have been performed and all facts have been shown to exist which are prerequisites to its issuance, and that the right of the party grantee therein to have it issue has been presented to and passed upon by the proper officers; and such patent is not open to collateral attack.

2. **Deeds:** TOWN SITE ACT: EVIDENCE: EJECTMENT. Where property has been conveyed under the provisions of the act of congress of May 22, 1844, which may be termed the "Town Site Act" (see 5 United States Statutes at Large, 657), by the United States to the corporate authorities of a town or city, or a trustee designated by law, a deed executed by the trustee or the party author-

ized by law to make the transfer, evidences the determination, by the party executing it, that all the preliminary steps have been taken and necessary requirements complied with, and that the person to whom the deed runs is the one entitled to receive it, and the question of the validity of the deed cannot be litigated in a collateral proceeding.

3. **Office and Officers:** EVIDENCE. It is a presumption of law that every person performs his duty as an official until the contrary is shown.

4. **Deeds:** ERRONEOUS REFERENCE TO STATUTE. A correct designation, in a deed, of the legislative act under and by virtue of which it was executed, *held*, not essential to the validity of the deed.

5. **Evidence:** RECORDS: IDENTIFICATION. A page of a book was identified as a part of the records of the minutes of the meetings of the "Grandview Company." *Held*, Not an identification or foundation for its introduction as showing proceedings had by the board of trustees of the "City of Grandview."

6. **Deeds:** EXECUTION BY TRUSTEE OF CITY: EVIDENCE: EJECTMENT. Deeds were executed purporting to be conveyances of real property by the trustees of the city of Grand View, which were signed "A. B. Moore, chairman." *Held*, That without proof that A. B. Moore who signed the deeds was chairman of the board of trustees of the city of Grand View, the deeds did not evidence the transfer purported to be made.

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

C. A. Baldwin and *James M. Woolworth*, for plaintiff in error.

References: *Mattis v. Boggs*, 19 Neb., 698; *United States v. Southern Colorado Coal & Town Co.*, 18 Fed. Rep., 273; *Abbott v. Omaha Smelting Co.*, 4 Neb., 418; *Morrill v. Taylor*, 6 Neb., 242; *Doody v. Vaughn*, 7 Neb., 31; *Robinson v. Mathwick*, 5 Neb., 255; *Irving v. Brownell*, 11 Ill., 402; *City of St. Louis v. Gor-*

man, 29 Mo., 593; *Sioux City & P. R. Co. v. Washington County*, 3 Neb., 41; *Murphy v. Lyons*, 19 Neb., 691; *McGavock v. Pollack*, 13 Neb., 535; *Williams v. Lowe*, 4 Neb., 396; *Atkins v. Atkins*, 9 Neb., 202; *Yates v. Lansing*, 9 Johns. [N. Y.], 437; *Reynold v. Stansbury*, 20 O., 353; *Bloom v. Burdick*, 1 Hill [N. Y.], 130; *Burbank v. Ellis*, 7 Neb., 156; *Clark v. Titus*, 11 Pac. Rep. [Ariz.], 312; *Mills v. Paynter*, 1 Neb., 445; *Sumner v. Stevens*, 6 Met. [Mass.], 337; *Cooper v. Ord*, 60 Mo., 420; *La Frombois v. Jackson*, 8 Cow. [N. Y.], 611; *Field v. Boynton*, 33 Ga., 239; *Hannibal & St. J. R. Co. v. Clark*, 68 Mo., 371; *Lea v. Polk County Copper Co.*, 21 How. [U. S.], 494; *Rawson v. Fox*, 65 Ill., 200; *Wells v. Jackson Iron Mfg. Co.*, 47 N. H., 253.

H. D. Estabrook and *Edward W. Simeral, contra.*

References: *Field v. Seabury*, 19 How. [U. S.], 324; *St. Louis Smelting & Refining Co. v. Kemp*, 104 U. S., 637; *Taylor v. Winona & St. P. R. Co.*, 45 Minn., 66; *Cofield v. McClelland*, 16 Wall. [U. S.], 331.

HARRISON, J.

The defendants in error instituted this, an action of ejectment, in the district court of Douglas county against the plaintiff in error. The petition filed was as follows: "And now come said plaintiffs and for cause of action against said defendant say: That said plaintiffs, as tenants in common with said defendant, have a legal estate in, are the owners in fee, and entitled to the immediate possession of the undivided interests hereinafter appearing of the following described real property, to-wit: The block or tract of ground known as the Stone Quarry Reserve, in the city of

Grandview, Douglas county, Nebraska, and so designated upon the map of Omaha as lithographed and published by Poppleton & Byers. Said Joseph Barker being the owner in fee of 19-100 of said property; John I. Redick, 1-100; George P. Bemis, 2-100; Lewis S. Reed, 4-100; Ferdinand Streitz, 14-100; Andrew B. Moore, 14-100; said Emma I. Jones, as widow of Henry O. Jones, deceased, who died intestate and without issue, of a life estate of 13-100 of said property; and the said Dana G. Jones, Eva S. Jones, and Patty A. Holton as the owners in fee of the 13-100 interest; said last three named parties being the sole heirs at law of said Henry O. Jones, deceased. But the plaintiffs aver that said defendant unlawfully keeps them out of the possession of said property, and deny the rights of plaintiff herein set forth. Wherefore plaintiffs ask judgment for the possession of the property and costs of suit." To this an answer was filed in behalf of plaintiff in error which first denied generally each and every allegation of the petition, also specifically traversed them and pleaded affirmatively as follows: "And further answering defendant says that this action ought not to be prosecuted against him, for the reason hereinafter stated, that is to say, that this defendant, and those under whom this defendant claims, have been in the actual, open, notorious, and hostile possession and occupation of said premises and all of it, claiming it as their own, for more than ten years next before the institution of this action. And the defendant pleads and relies upon the statute of limitation in such cases made and provided in bar of the plaintiffs' right of recovery herein; wherefore the defendant prays that he may be hence dismissed with judg-

ment for his costs in this action, and that he may have all other relief." To this there was a reply, a general denial. There was a trial before one of the judges of the district court and a jury, resulting in a verdict in favor of defendant in error as to the larger portion of the premises in controversy, upon which, after motion for new trial was heard and overruled, judgment was rendered. The case is presented here by error proceedings on behalf of the defendant in the trial court.

The defendants in error introduced in evidence a patent conveying from the United States to "The trustees of the city of Grandview, and as the proper corporate authority thereof, in trust for the several use and benefit of the occupants thereof according to their respective interests under said act of 23d May, 1844, and to their successors and assigns in trust as aforesaid," certain lands which included the tract in controversy in this case; also deeds signed by "A. B. Moore, chairman," and each containing a recital that it was the act of the trustees of the city of Grandview, by which there was purported to be conveyed certain undivided interests in the title to the Stone Quarry Reserve, together with other property, to parties who, according to the recitals of the deeds, had respectively become entitled to the conveyances; also conveyances from these last mentioned persons to others, and transfers were shown until the defendants in error had been reached, and the title to their respective interests vested in them. The several conveyances were objected to at the time they were offered in evidence. The trial judge instructed the jury in respect to the patent and deeds and what they established, as follows: "The plaintiffs have in-

troduced in evidence a patent from the United States to the trustees of the town of Grandview covering the premises in controversy, and claim title through conveyances received by them or their grantors from A. B. Moore, chairman of such board of trustees; and you are instructed that they have introduced record evidence showing a legal estate in themselves as set out in their petition, and are therefore entitled to recover, unless the defense of adverse possession has been established by the defendant." This was excepted to and is assigned for error.

In order to a proper understanding of the claims of plaintiff in error that the patent from the United States to the city of Grandview and the deed made by A. B. Moore, as "chairman," did not convey any title or were not evidence of such transfers, we deem it proper to set forth here portions at least of the act of congress to which allusion was made in the patent, and of the acts of the territorial legislature which were passed to carry into effect the law enacted by congress. The act of congress reads as follows: "Whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful in case such town shall be incorporated, for the corporate authorities thereof, and if not incorporated, for the judges of the county court for the county in which such town may be situate, to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust as to the disposal of the lots in such town

and the proceeds of the sales thereof to be conducted under such rules and regulations as may be prescribed by legislative authority of the state or territory in which the same is situated. *Provided*, That the entry of the land intended by this act be made prior to the commencement of the public sale of the body of land in which it is included, and that the entry shall include only such land as is actually occupied by the town and be made in conformity to the legal subdivisions. * * *Provided, also*, That any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void and of none effect." (5 United States Statutes at Large, ch. 17, p. 657.) The territorial enactment to prescribe the rules and regulations, which was passed February 10, 1857 (see Session Laws, 1857, p. 133), is as follows:

"Section 1. That whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing preemption laws, it shall be lawful and be the duty, whenever required by the occupants and owners by deed of the lots within the limits of such town, for the corporate authorities of the town, if incorporated, and if not incorporated, then for the commissioners for the county in which such town may be situated * * * to enter at the proper land office the land so settled and occupied as a town site, in trust for the several use and benefit of the occupants and those holding by deed or otherwise, according to the laws of this territory.

"Sec. 2. After the purchase of such land as above described it shall be the duty of the mayor of the town, if incorporated, or if the town is not incorporated, then of the commissioners of the

county in which the town is situate, to make out, execute, and deliver to each person who may be legally entitled to the same a deed in fee simple for such part or parts, lot or lots of such lands as each person may be entitled to."

Section 3 makes provision for hearing and determining disputes between contesting claimants. Sections 4 and 5 we need not notice here. Section 6 provided for an appeal to the proper district court from a decision of a mayor or the commissioners. In 1858 an act was passed on this same subject which repealed the act of 1857. (See Laws of Nebraska, 1858, p. 266.) In sections 4 and 5 of the law of 1858 it was provided:

"Sec. 4. After the entry of the land settled upon and occupied as a town site, as hereinbefore prescribed, the corporate authorities or the county judge, as the case may be, having entered the land, shall cause public notice to be given of the fact of such entry by posting written or printed notice in at least three public places in the town, and no deeds for the land nor any part thereof shall be executed and delivered within the period of thirty days after the first day of the publication of such notice.

"Sec. 5. After the lapse of thirty days from the first day of the publication of such notice, the mayor of the town, or if there is no mayor, the chairman of the board of trustees, if such town is incorporated, and if the town is not incorporated, then the county judge of the county wherein the town is situated, shall on demand execute and deliver to each person who may be legally entitled to the same a deed in fee simple for the part or parts, lot or lots of such land as the person demanding may be lawfully entitled to."

In regard to a patent issued by the proper officers of the United States, it was observed in the case of *St. Louis Smelting Co. v. Kemp*, 104 U. S., 636: "The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces." (*Polk v. Wendall*, 9 Cranch. [U. S.], 87; *Cofield v. McClelland*, 16 Wall. [U. S.], 331; *Moffat v. United States*, 112 U. S., 24, 5 Sup. Ct. Rep., 10.) The principle is also recognized in *Van Sant v. Butler*, 19 Neb., 351. The supreme court of Colorado has said on this same subject: "The doctrine announced was that the deed upon its face purported to have been issued in pursuance of law, and was therefore only assailable in a direct proceeding to set it aside. Another proposition insisted upon is that it was admissible to attack the Hughes deed for fraud in its execution, and for this purpose the offer to prove that Hughes had never filed upon the lot in question should have been allowed. The fraud alluded to is imputed to the probate judge. The language of counsel is: 'That the action of Downing in issuing the deed in question to

Hughes was a fraud upon the rights of plaintiff in this case, will hardly be questioned.' Whether this charge be true or not, the proposition that upon this ground the validity of the deed was examinable in an action of this character is in conflict with the leading cases on the subject. The doctrine is established by numerous decisions of the supreme court of the United States that, should the officers of the land department, in issuing a patent, err in respect to their duty as to questions of fact or law, or even act from corrupt motives, the patent cannot be collaterally attacked for such cause, if upon any state of facts the patent might have lawfully issued; and that against collateral attack it will be presumed the necessary facts existed. Parties aggrieved by such error or fraud must resort to a direct proceeding to set aside the patent." (*Chever v. Horner*, 11 Colo., 72 and cases cited.)

It is settled doctrine, well supported by both authority and reason, that from the existence of the patent evidencing the grant the presumption arises that all the acts have been performed and all the necessary facts have been shown to exist by the party to whom it was made, which were prerequisites to its existence, and that the proper officers have examined and adjudicated the question of the right of the applicant, and the patent, the evidence of such determination, is unassailable collaterally. The patent in this case ran to the trustees of the city of Grandview, and the deeds, purporting to convey title to the various claimants of lots and undivided interests in the "Stone Quarry Reserve," were signed "A. B. Moore, chairman." The recitals of these deeds, or such as we need notice, were as follows:

"This indenture, made this fifth day of March, in the year of our Lord one thousand eight hundred and fifty-nine, witnesseth: That whereas the congress of the United States passed an act entitled 'An act for the relief of citizens of towns upon the lands of the United States, under certain circumstances,' approved May 23, A. D. 1844;

"And whereas the legislative assembly of the territory of Nebraska, under and in pursuance of said act of the said congress, passed an act entitled 'An act regulating the disposal of lands purchased in trust for town sites,' approved February 10, A. D. 1857;

"And whereas the trustees of the city of Grandview have paid for and received a title from the United States in trust for the occupants and owners of the lots and pieces of land in the city of Grandview and territory of Nebraska, which city it located upon—[Here follows a description of the land]:

"Now, therefore, by virtue of the power in said board of trustees vested by the two several acts as such trustees aforesaid, the said trustees of the city of Grandview, in consideration of the premises and of the sum of twenty-nine (being one-tenth of the costs of entry) dollars in hand paid, the receipt whereof is hereby acknowledged, do by these presents convey unto—[Here follows the name of the grantee and description of the property conveyed].

"In witness whereof I have hereunto set my hand this fifth day of March, A. D. 1859, by authority of the said board of trustees.

"ANDREW B. MOORE,
"Chairman."

It is argued by counsel for plaintiff in error that inasmuch as the instruments state that they are executed under and by virtue of the provisions of the act of 1857, this must be accepted as true and binding, and further, since the act of congress required the deeds to be executed in conformity to the rules and regulations prescribed by the legislative assembly of states and territories, and if not so executed they should be void and of none effect, and the territorial act of 1857 prescribed that the conveyances therein provided for should be made by the mayor of the town, if incorporated, and if not incorporated, by the county commissioners, these deeds, being executed by neither, were void unless the word mayor in the act be construed as a generic term, and as such to include the chairman of the board of trustees of a town or city, and if this last view be entertained, that it devolved upon the parties introducing the deeds, and whose success depended on their validity in order to establish it, to show that the chairman of the board of trustees of the city of Grandview possessed such authority and was empowered or required to perform acts and duties which usually appertain to the office of mayor of a city, and thus bring him within the scope of such appellation, viewed as a generic term. This argument is not tenable. It must be remembered, as we have hereinbefore stated and shown, that by an act of the territorial legislature, passed in 1858, the act of 1857 was repealed, and these deeds were all executed subsequent to the passage of the act of 1858. At the time, then, of the making of these deeds, the law of 1857 had no further existence. The date of the entry of the land does not appear in the record. The date of

the patent is April 1, 1859, so we cannot say whether the entry was made during the life of the act of 1857, or after the enactment of the law of 1858 on the subject; but however this may have been, at the date of the conveyances in question the act of 1858 was in force and the law of 1857 did not exist, had been repealed, and the recital in the deeds referring to the act of 1857 as the basis or source of authority for their execution had no other or greater force or effect than if there had been no recital, no reference to any law as authorizing the performance of the act of making the deeds. If there had been no recital of the authority it would not have invalidated the deeds. (*Burbank v. Ellis*, 7 Neb., 156.) The deeds must be viewed as executed under the authority and provisions of the act of 1858.

It is insisted that it should have been shown that the city of Grandview had been incorporated and that the parties to whom transfers had been made were occupants of the premises or portions of the property conveyed to them, or, in other words, it was necessary that proof be made that the parties to whom the deeds were made were the proper ones; that all the acts to be performed had been done or the facts required to exist by the statute were existent at the time of the execution of the deeds. These were matters to be investigated and determined by the person holding the trust and upon whom it devolved as a duty, on demand by the proper party, to make a deed,—in this case the chairman of the board of trustees of the city,—and his settlement of the questions was not subject to collateral attack. As was said in the decision of the case of *Taylor v. Winona & St. P. R. Co.*, 47 N. W. Rep. [Minn.], 453,

"The execution of a deed of a part of the town site by the judge, who is trustee for that purpose, is analogous to the grant of a patent by that department of the government whose province it is to supervise the various steps necessary to be taken to obtain title. The execution of a deed by the judge is in the nature of an official declaration and determination by him that all the requirements preliminary to the execution of the deed have been complied with, and that the person to whom it is issued is the person entitled to it. The doctrine of presumptions in favor of official acts obtains,—that the judge did his duty in all respects and had required the grantee to show by legal proofs that he was the party entitled to a deed and that he had complied with all the necessary prerequisites to its execution. Moreover, when a trustee in whom is vested the land constituting a town site, in trust for the occupants, has executed a deed of a parcel of such land to one claiming to be a beneficiary of the trust, no one who is not a beneficiary of the trust, but a mere stranger to the title, as is the defendant here, can call in question the validity or regularity of such conveyance, or, by subsequent intrusion upon the possession, acquire any right to inquire into or litigate the question whether all the steps required by law were taken, or whether the party to whom the deed was executed was the person entitled thereto. (*Anderson v. Bartels*, 7 Colo., 256; *Murray v. Hobson*, 10 Colo., 66; *Chever v. Horner*, 11 Colo., 68; *Mathews v. Buckingham*, 22 Kan., 166; *Ming v. Foote*, 23 Pac. Rep. [Mon.], 515; *Whittlesey v. Hoppenyan*, 72 Wis., 140; *Smelting Co. v. Kemp*, 104 U. S., 640; *Cofield v. McClelland*, 16 Wall. [U. S.], 331." *Tucker v. Chicago, St. P., M. & O. R. Co.*,

65 N. W. Rep. [Wis.], 515; *Lamm v. Chicago, St. P., M. & O. R. Co.*, 47 N. W. Rep. [Minn.], 455.) Nor was it necessary to prove the organization of the city in order to make the deeds properly receivable in evidence. (*Mathews v. Buckingham*, 22 Kan., 166.)

It is contended that it was necessary for the parties depending on the deeds from the trustees of the city as evidence of title, to show that A. B. Moore who signed the conveyance was chairman of the board of trustees, before they should have been received in evidence, or at least before instructing the jury that they were competent evidence and established one link in the chain of title. This was not one of the facts, the existence of which as a prerequisite to the execution of the transfer, he determined before making the conveyances. We have herein quoted portions of one of the deeds, and it was agreed that in such statement as we have copied they were all similar; and it will be remembered that it was not recited in the deed that A. B. Moore was chairman of the board of trustees, and he signed it "A. B. Moore, chairman," with no statement indicating of what body or organization he was chairman, and no reference to the board of trustees of the city of Grandview, unless it should be said that the deed, being one which, according to its recitals, was made by such trustees, and he signing it as "chairman," it must be presumed to be as such officer of the board stated in the deed. Had the recital of the capacity in which he executed the deeds appeared therein, or after his signature, it would have proved no more, as against plaintiff in error, than that he claimed to have executed them as such officer. It would not have been proof of the

fact that he was such chairman. The acknowledgment identified Moore as chairman of the board of trustees of Grandview city, but this was but for the purposes of the acknowledgment, which was no part of the deed, and was not substantive proof of the fact as an independent fact. During the trial there was introduced in evidence, over the objection of the plaintiff in error, "Page 14, Book of Corporation of Grandview," which, from its statements, would seem to be the minutes of the proceedings at a meeting of the board of trustees of the city of Grandview, and that among other things which transpired at the meeting of date August 4, 1858, A. B. Moore was appointed chairman. This was identified by but one witness, who was asked: "Q. You remember an organization known as the Grandview Company?" to which he answered: "A. Yes, sir," and his examination was continued in part as follows: "Q. Were you a member of it? A. I was." He was shown a book and stated: "That is the minutes or records of the meetings and transactions of the company—of the board of trustees;" and again, in answer to a question propounded by counsel for plaintiff in error, he answered: "I know that it is the book of the records of the transactions of the company;" and again: "Why, it is the records of the proceedings of the company—the Grandview Company—kept by the secretary or secretaries of that company." From which it will be gathered that the page of the book introduced in evidence was not identified as being the minutes of a meeting of the board of trustees of the city of Grandview, but of the "Grandview Company," and was not competent as evidence of the proceedings of the board of trustees of the city of Grandview. This witness also testified that he was a

member of the Grandview Company, and at one time its secretary; he thought its last one; that he knew who was chairman of the board of trustees of the company; that it was A. B. Moore and that there was never any other. Proof that A. B. Moore was chairman of the board of trustees of an organization called the Grandview Company had no relevancy or competency in this case. Unless he was chairman of the board of trustees of Grandview city he had no power or authority to act and execute the deeds transferring the title, held in trust by the board, to the beneficiaries of the trust, and without proof that he was such chairman the deeds were not evidence of the conveyance of the title. There being no proof of the fact of his chairmanship of the board of trustees of the city of Grandview, the court erred in instructing the jury that the defendants in error had shown a complete title, as these deeds signed by "A. B. Moore, chairman," constituted an indispensable link in the chain of each title to be proved.

On the facts or circumstances involved in the second, or affirmative defense, viz., adverse possession for a sufficient length of time to bar any action for recovery of the possession or title of the premises, we will not now comment. As there must be a new trial and they must again be submitted to the jury or a trial judge for determination, a discussion of them at this time is unnecessary and might be prejudicial to the rights of one or the other of the parties in another trial. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

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

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1. The rule that where a certain sum is due from one to another, the payment of a lesser sum is not a discharge as to the remainder, though the parties agree that the payment is made in discharge of the entire debt, does not apply to an unliquidated claim, or to a *bona fide* dispute as to the amount due. *Treat v. Price* 875
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Chattel Mortgages. See PARTNERSHIP, 3, 4. SALES, 5.
1. In a suit by a creditor to subject to the payment of his claim the debtor's goods in possession of agents of other creditors, plaintiff did not disclose a right superior to that of defendants' by merely showing that they took possession of the goods and were disposing of them under defective chattel mort-

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gages. *Commercial Nat. Bank v. Merchants Exchange Nat. Bank* 217

2. The title to mortgaged chattels remains in the mortgagor until divested by foreclosure. *Murray v. Loushman* 256
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3. A mortgagee's right to the use of the chattels, in the absence of a special agreement, is merely an incident to foreclosure proceedings. *Murray v. Loushman* 256

4. A mortgagee who takes possession of the chattels and retains them an unreasonable time before foreclosing his lien is liable to the mortgagee for their use. *Id.*

5. A mortgagee who fails to comply with the statutory requirements relating to foreclosure is liable to the mortgagor for the value of the property, less the mortgage lien. *Callen v. Rose* 638

6. One who accepted from a joint owner a chattel mortgage upon a threshing-machine incumbered by an unrecorded purchase-money mortgage of which the former had no knowledge, *held* a mortgagee in good faith within the meaning of sec. 14, ch. 32, Comp. Stats. *State Bank of Lushton v. Kelley* 678

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2. A debtor receipting for money tendered upon condition of its acceptance in satisfaction of the amount in dispute, though protesting that more is

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3. The fact that the sum paid in satisfaction of a disputed claim is only the amount the debtor concedes to be due, does not invalidate the settlement. *Id.*

4. Avoiding delay, litigation, and expense of an accounting may constitute a consideration for a settlement by the payment and receipt of the sum the debtor admits to be due. *Id.*

5. The terms of a receipt for money tendered upon condition of its acceptance in satisfaction of the amount in dispute, and the refusal of payor's agent to pay the money before the signing of the receipt, *held* notice to the creditor that the agent had no authority to make payment except upon the condition of the tender. *Id.*

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Titles of Bills.

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Police Powers.

3. The legislative power to subserve the public welfare by regulations in the interest of health and safety is inherent in the sovereignty of the state and cannot be bartered away by contract or otherwise. *Chicago, B. & Q. R. Co. v. State* 550

4. The power to subserve the public welfare by regulations in the interest of health and safety may be asserted directly by the legislature or delegated to municipal corporations or other agencies. *Id.*

5. The essential quality of police power as a governmental agency is that it imposes upon persons and

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6. The legislature cannot, under the guise of police regulations, arbitrarily invade personal rights or private property. *Id.*

7. "Due process of law" does not necessarily imply a hearing, by one whose property is taken or damaged for public use, according to established practice in courts. *Id*..... 550

8. "Due process of law" is satisfied whenever an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the object sought to be attained. *Id.*

9. Courts should not interfere to prevent the enforcement of statutes on account of a mere difference of opinion between them and the legislature respecting the wisdom or necessity of particular measures. *Id.*

10. Section 48, ch. 12*a*, Comp. Stats., authorizing the city of Omaha to require, by ordinance, railroad companies to construct and keep in repair viaducts over streets crossed by their tracks, is a valid exercise of police power. *Id.*

11. An ordinance requiring the reconstruction by two railroad companies of specific portions of a viaduct previously erected by them jointly with the city of Omaha *held* not to violate prior contract obligations. *Id.*

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1. County officers may be punished for refusing to obey a *mandamus* ordering them to pay a judgment, though the judgment is void. *Boasen v. State*, 245

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3. Where a newspaper article is susceptible of an innocent construction, requires an innuendo to apply its meaning to the court, and the language is not shown to have been employed in a culpable sense, the publisher is not liable for contempt. *Id.*

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3. Defendants *held* not liable on a conditional agreement to pay plaintiff a certain sum upon completion of a contract with others. *Barsby v. Warren* 275
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2. Rights of action under sec. 139, ch. 16, Comp. Stats., abated with the repeal of said section without a saving clause. *Hogue v. Capital Nat. Bank*..... 929
3. Persons contracting with a *de facto* corporation relying upon its corporate credit, where it has been in existence for a considerable time, cannot assail its corporate character collaterally in order to hold its stockholders liable for its failure to become a *de jure* corporation. *Id.*

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2. Money paid into court for a party cannot be applied to the payment of the fees of the sheriff for serving process for the other party. *Van Etten v Coburn*... 283
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2. Where the evidence will warrant a conviction it is not error to refuse to direct a verdict for defendant. *Id.*
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2. It is the object of the statute to cut off inheritance *per stirpes* among collaterals, where, at any point beyond the children of brothers and sisters, the surviving kindred are of unequal degrees, and in such case those nearest in degree take the estate to the exclusion of those more remote. *Id.*
3. The rule of inheritance *per stirpes* is in general applied only from necessity, as where the heirs are of unequal degree of kinship to the intestate, and where they are of equal degree, they take as principals. *Id.*
4. Where an intestate left neither issue, father, mother, brother, nor sister, the surviving nephews and nieces took, under sec. 30, ch. 23, Comp. Stats., the intestate's land *per capita*, and the grand-nephews and grand-nieces took nothing. *Id.*

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1. A creditor who subjected a portion of mortgaged land to the payment of his judgment, and afterward bought the mortgage, is not estopped by the creditors' bill and the proceedings thereunder from foreclosing as to the unsold land. *Hall v. Hooper*..... 112
2. A creditor who signed a stipulation authorizing the agent of a rival creditor to sell the debtor's goods and remit the proceeds to the principal, in the absence of fraud, was estopped from asserting a superior right to the proceeds of the sale. *Commercial Nat. Bank v. Merchants Exchange Nat. Bank*..... 217
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4. Commission merchants who obligated themselves by a letter of credit to pay to a bank drafts for the cost or value of stock shipped to them were not estopped, in an action based on their refusal to accept a draft, from proving that they applied to an earlier draft a later shipment made the day the earlier draft was accepted. *Id.*

5. A judgment debtor, protected by an agreement under which his property is to be kept free from levy until that of another has been exhausted, *held* not estopped by his acts or statements from asserting his rights under the agreement. *Gibson v. McClay*.. 901

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1. Courts will take judicial notice of the incorporation of a village by a special legislative act, where the legislature has, in the act, declared it to be a public law. *Hornberger v. State*..... 40

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5. Original papers and records should not be introduced in evidence instead of copies. *Id.*

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altered, it may generally be received in evidence. *Goodin v. Plugge* 284

Judgments.

8. Pleadings and judgment in an action against a sheriff for a wrongful seizure of property, *held* admissible in an action on his bond for the judgment, though it was rendered jointly against him and another. *Lewis v. Mills* 911

Names. Deeds.

9. A conveyance of Joel S. Smith's title was not proved by a deed of John S. Smith. *Omaha Real Estate & Trust Co. v. Kragscow* 592

Minutes of Meetings.

10. Minutes of the meetings of the "Grandview Company" *held* not evidence of the proceedings of the board of trustees of the "City of Grandview." *Green v. Barker* 935

Deeds.

11. Conveyances by the trustees of a city cannot be shown by deeds executed by one as "chairman" without proof that he was chairman of the board of trustees. *Id.*

Rulings.

12. Error cannot be predicated on the admission of evidence, where ample evidence of the same nature was admitted without objection. *Hickman v. Layne,* 178

13. Unaccepted propositions of compromise are inadmissible. *Callen v. Rose* 638

Weight.

14. A preponderance of the evidence is sufficient to establish an issue in any civil action. *Stall v. Jones* .. 706

Exceptions. See BILL OF EXCEPTIONS. INSTRUCTIONS, 9, 17.

Executions. See EXEMPTIONS. JUDGMENTS, 17. RES JUDICATA, 2.

Affirmative relief from a judicial sale and conveyance under a void decree will not be granted in favor of one who fails to show an equitable interest in the land sold. *Hall v. Hooper* 111

Exemption.

An officer holding a levy is liable for conversion where he sells the property without an appraisement after the debtor claims his exemption and

Exemption—*concluded.*
files an inventory under sec. 522, Code. *Daley v. Peters* 848

Extradition.
A fugitive may be prosecuted for an extraditable offense other than that for which he was extradited from another state, without having had an opportunity to return thereto. *State v. Leidigh* 126

False Representations. See INSURANCE, 3, 5. VENDOR AND VENDEE, 2, 3.

Final Order. See REVIEW, 36-40.

Findings. See REVIEW, 2.

Foreclosure. See MORTGAGES.

Fraud.
In pleading fraud it is necessary to set out the facts relied upon for relief. *Crosby v. Ritchey* 924

Fraudulent Conveyances.
Certain instructions set out in opinion and approved. *Regier v. Shreck* 671

Garnishment.
1. A judgment debtor disclaiming any interest in the money garnished cannot predicate error upon an order requiring the garnishee to pay the money into court, or upon the refusal to vacate such order. *Burnham v. Ramge* 175
2. Garnishees who paid into court a sum due from them to an attachment defendant are not liable to pay it again at the suit of the attachment debtor, though the payment was made before jurisdiction had been acquired of the person to whom the debt was originally due from them. *Scott v. Kirschbaum*, 332

Gifts.
Except as against creditors, one may give away his property. *Kinsella v. Sharp* 664

Guaranty.
Construction of letter of credit providing for payment of drafts, until further notice, for the cost or value of stock shipped with or without bill of lading attached. *Burke v. Utah Nat. Bank* 247

Guardian and Ward.
1. The disability justifying the removal of a guardian

Guardian and Ward—*concluded.*

need not be one arising after the appointment. *Crooker v. Smith* 102

2. Corruption or malfeasance is not necessary to authorize the removal of a guardian. *Id.*
3. A guardian may be removed whenever found unsuitable. *Id.*
4. Evidence of a failure to properly protect the rights of the ward is sufficient proof of the guardian's unsuitability. *Id.*
5. The word "unsuitable" in sec. 28, ch. 34, Comp. Stats., applies to any case where the guardian is incapable or not in a situation to properly protect his ward's interests. *Id.*

Habeas Corpus.

Habeas corpus is never allowed as a substitute for appeal or writ of error. *State v. Leidigh* 126

Highways.

1. The county board may, in one proceeding, open connecting roads on different section-lines. *Barry v Deloughrey* 354
2. In opening a section-line road a finding that the public good requires it need not be made of record by the county board. *Id.*
3. No petition is necessary to confer power upon a county board to open a section-line road. *Id.*
4. Before a section-line road can be opened there must be proceedings, upon proper notice, to ascertain damages. *Id.*

Husband and Wife. See PRINCIPAL AND AGENT, 2.

Indemnity. See PRINCIPAL AND SURETY, 4.

Indemnity Bonds.

Petition *held* to state a cause of action against the sureties on an indemnity bond given to a stock yards company to secure it against any act or negligence of certain commission merchants. *Union Stock Yards Co. v. Westcott* 301

Indictment and Information.

Sufficiency of information charging that accused kept intoxicating liquor for sale without a license. *Hornberger v. State* 40

Inheritance. See DESCENT AND DISTRIBUTION.

Injunction. See JUDGMENTS, 9. TAX DEEDS.

Injunction is the proper remedy to prevent the violation of an agreement by which a judgment creditor bound himself to exhaust the property of one defendant before proceeding against that of another. *Gibson v. McClay* 901

Insolvency. See PARTNERSHIP.

Instructions.

Numbers.

1. The failure to number instructions is not reviewable in absence of an exception on that ground. *Herzog v. Campbell* 370

Citations.

2. Citations should not be noted on instructions, but prejudice will not be presumed from such references. *Id.*

Requests.

3. A party who neglects to request proper instructions cannot have reviewed the failure of the court to charge the jury upon particular issues or evidence. *Carter White Lead Co. v. Kinlin* 409

Evidence.

4. It is not error to refuse to give instructions directing the jury what degree of importance should be attached to particular evidence. *Murphey v. Virgin,* 693
5. Where pleadings contain matters of evidence rather than ultimate facts, the court sufficiently states the issues by stating tersely the ultimate facts pleaded and disregarding the evidentiary facts. *Id.*

Repetitions.

6. An instruction like one already given may be refused. *Beavers v. Missouri P. R. Co* 761

Harmless Error.

7. Harmless error in an instruction is not a ground for reversal. *Id* 762
Burlington & M. R. R. Co. v. Gorsuch 767

Issues.

8. It is error to submit to the jury an issue of negligence not raised by the pleadings. *Omaha & R. V. R. Co. v. Wright* 886

Exceptions.

9. A general exception to instructions is not sufficient. *City of Omaha v. McGavock* 313
10. Where the instructions were not excepted to, they

Instructions—*concluded.*

will not be reviewed in the supreme court. *Romberg v. Hediger* 201
City of Omaha v. McGavock 313

Assignments of Error.

11. Rulings in giving or refusing instructions should not be reviewed when insufficiently assigned for error in the motion for a new trial. *Hickman v. Layne* 177
12. Assignments of error relating solely to the intelligibility of an instruction do not raise a question as to the correctness of a proposition properly stated in the instruction. *Romberg v. Hediger* 203
13. Where one of the instructions is correct, the other instructions cannot be reviewed upon an assignment of error attacking the entire charge of the court. *First Nat. Bank of Wilber v. Ridpath* 99
Romberg v. Hediger 201
Oltmanns v. Findlay 289

Criminal Law.

14. In criminal cases it is the duty of the court to present the issues to the jury whether requested or not, and a charge which, by the omission of certain elements, has the effect of withdrawing from the jury an essential issue is erroneous, but is not cause for reversal unless prejudicial to accused. *Pjarrou v. State* 294
15. It is not prejudicial error to refuse an instruction inapplicable to the evidence, though it contains correct abstract propositions of law. *Wells v. State,* 74
16. An assignment that an instruction in a criminal case was not sufficiently explicit may be overruled in the appellate court where accused failed to request an instruction more explicit than that given. *Pjarrou v. State* 295
17. Instructions will not be reviewed unless the record shows they were excepted to when given. *Bush v. State* 642
18. It is not error to refuse instructions containing statements already given. *Id.*

Insurance. See PRINCIPAL AND SURETY, 4.

Ownership.

1. The question as to whether the insured at the date of the issuance of the policy was the owner of the

Insurance—*continued.*

insured property is for the jury, where that question is in issue. *Oakland Home Ins. Co. v. Bank of Commerce* 717

Rights of Mortgagee.

2. Case where mortgagee's right to recover on a policy under a clause making the loss payable to him as his interest should appear was sustained, though the mortgagor transferred the insured property in violation of the policy. *Id.* 718

3. Where a loss under a mortgagor's policy is payable to the mortgagee, the right of the latter to maintain an action for the insurance money is not necessarily defeated by such misrepresentations in the application as would prevent a recovery in a suit by the insured on his own behalf. *State Ins. Co. v. New Hampshire Trust Co.* 62

Misrepresentations.

4. A representation by an applicant that no other insurance existed, should not be deemed false in such a sense as to invalidate his policy merely because a former owner of the property procured insurance in his own favor after parting with his title. *Id.*

5. Where the application and the policy bear the same date, it will not be inferred, in absence of evidence, that the officers of the company, at its home office in another state, were influenced to approve the risk by misrepresentations in the application. *Id.*

Letters.

6. Effect of a statement by the secretary of a company, in returning proof of loss, that the insurer "neither admits nor denies its liability nor waives any of its rights" under the policy. *Home Fire Ins. Co. v. Kennedy* 138

Arbitration.

7. Arbitration clause in a policy *held* revocable by either party, and not to oust the courts of jurisdiction. *Id.*

8. A company by denying liability on the ground of forfeiture through insured's breach of warranty, waives its right to insist upon arbitration as a means of determining the amount of insured's damage by fire. *Id.*

9. Where an insurer, with knowledge of a breach of warranty by insured, fails to declare a forfeiture of

Insurance—*concluded.*

the policy and continues to recognize its liability by demanding proofs of loss and by insisting upon arbitration, it waives all defenses based upon such breach of warranty. *Id.*

Occupancy.

10. Statement in proof of loss *held* not an admission that the premises were unoccupied within the meaning of the policy so as to invalidate the insurance. *Hanover Fire Ins. Co. v. Parrotte* 576

Title.

11. A policy is *prima facie* an admission of insured's title to the property. *Farmers & Merchants Ins. Co. v. Peterson* 747

Incumbrances.

12. It is unnecessary for plaintiff to allege in his petition in an action on a policy that he did not incumber the property. *Id.*
13. Reply *held* to admit that the policy contained a provision for forfeiture of the insurance if the property should be incumbered, but not to admit the signing of the application or the mortgaging of the property. *Id.*

Life Insurance.

14. In a suit on a life insurance policy an insurer alleging that the misrepresentations were contained in the written application cannot prove oral misrepresentations made to the examining physician. *Bankers Life Association v. Lisco* 340
15. In a suit on a life insurance policy the beneficiary was permitted to testify that she never knowingly signed an affidavit introduced in evidence to contradict a representation of assured in his application. *Id.*
16. Where an agent is authorized to collect and retain as compensation all admission fees and advanced premiums, he may extend credit therefor without releasing the company from liability, though the application and policy provide that the contract shall not be in force until the fees and premiums are paid, and that the agent has no authority to waive or alter any of the terms of the contract. *Pythian Life Association v. Preston* 374

Intoxicating Liquors. See MANDAMUS, 4.

1. The action of an excise board in passing upon an

Intoxicating Liquors—*concluded.*
application for a license is judicial. *Waugh v. Graham* 153

2. A description in a petition for a license indicating the exact location of the place where the saloon is to be kept is sufficient. *Id.*
3. Where objections to the issuance of a license were not presented at the original hearing of the application, they should be disregarded on appeal. *Id.*
4. On application for a license, findings of the excise board approved by the district court upon appeal will not be disturbed by the supreme court in an error proceeding, unless the findings are manifestly wrong. *Id.*
5. Evidence introduced at the original hearing of an application for a license should be disregarded on appeal unless it was reduced to writing, filed below, and transmitted to the appellate court. *Id.*
6. Information framed under sec. 20, ch. 50, Comp. Stats., *held* to charge a single offense—that accused kept liquor for sale without a license. *Hornberger v. State* 40
7. The unlawful intent with which liquors were kept may be presumed from the fact they were sold in violation of law. *Id.*
8. After proof of a sale the burden is on accused to show he had a license. *Id.*
9. A liquor license cannot be issued lawfully by a city or village until a proper municipal ordinance has been adopted. *Id.*

Journal Entries. See REVIEW, 40.

Judgments. See EXECUTIONS. RES JUDICATA. REVIEW, 2.

Final Orders.

1. A finding by a justice of the peace of the amount due plaintiff from defendant is not a judgment. *Denslow v. Dodendorf* 328
2. An order dissolving a temporary restraining order and denying a temporary injunction is not a final order. *Manning v. Connell* 83
3. A judgment for costs is not one from which appeal or error will lie. *Barnhouse v. Village of Adams* 761
4. A mere judgment for costs of suit without a judgment on the verdict is not a final disposition of a case. *Little v. Gamble* 828

Judgments—*continued.*

Summons.

5. An order setting aside a judgment and quashing the summons before adjournment for the term was approved, where the summons naming February 7 as the answer-day was issued February 6, and served February 13. *Hyde v. Kent* 26

Parties.

6. An adjudication affects only those who were parties to the action and their privies. *Monroe v. Hanson* .. 30

Release.

7. Evidence *held* insufficient to authorize attorneys to make a contract to release a judgment. *Smith v. Jones* 108

Order by Consent.

8. A party cannot predicate error upon an order which he procured to be made. *Norwegian Plow Co. v. Bollman* 186

Injunction.

9. A judgment at law should not be enjoined on the ground of fraud where it does not appear to be inequitable, or where plaintiff in the equity suit did not exercise due diligence in asserting his rights. *Id.*

Validity.

10. The validity of a judgment against a county may be determined on application for a *mandamus* to compel the county officers to pay the judgment. *Boasen v. State* 245

11. A judgment foreign to the issues joined and for which there was no prayer should be reversed upon appeal. *Carter v. Gibson* 655

Satisfaction.

12. Upon satisfactory proof that a judgment has been fully paid, the court may, on motion, order it discharged and canceled of record. *Manker v. Sine* 736

Proceedings to Open Judgment.

13. On motion to open a judgment, under sec. 82, Code, plaintiff may present counter-affidavits to show that defendant had actual notice of the suit in time to make a defense. *Stover v. Hough* 789

14. One seeking to open, under sec. 82, Code, a judgment rendered against him upon service by publication must show by a preponderance of the evidence that he had no actual notice of the suit in time to prepare and make a defense. *Id.*
Scarborough v. Myrick 794

Judgments—*concluded.*

15. Where plaintiff appears and resists defendant's motion to open a judgment under sec. 82, Code, he thereby waives formal notice of the motion. *Id.*

Journal Entries.

16. The judge's memorandum upon his trial docket will not take the place of a formal journal entry of judgment. *Hornick v. Maguire* 826

17. A decree preventing the violation of an agreement by which a judgment creditor bound himself to exhaust the property of one judgment debtor before proceeding against that of another, *held* not objectionable as restraining a levy for the collection of costs, but too broad, as not being limited to the case in which the decree was rendered. *Gibson v. McClay* 901

Judicial Notice. See EVIDENCE, 1.

Judicial Sales. See EXECUTIONS.

Jurisdiction. See COURTS, 1. PROHIBITION. RES JUDICATA, 1.

Justice of the Peace. See APPEAL BONDS, 4.

1. A justice of the peace has no jurisdiction to hear and determine an action against an officer for misconduct in office. *Warren v. Sadilek* 53

2. It is only from a final judgment that appeal lies. *Denslow v. Dodendorf* 328

Landlord and Tenant.

A landlord properly terminated a lease before paying for improvements where he gave to the lessee the notice required by the lease, and tendered in a court of equity payment for improvements in such an amount as upon an accounting should be found due the person entitled to such payment. *Estabrook v. Stevenson* 206

Legislature. See CONSTITUTIONAL LAW, 3. STATE TREASURERS, 9.

Letters of Credit.

Construction of letter of credit providing for payment of drafts, until further notice, for the cost or value of stock shipped with or without bill of lading attached. *Burke v. Utah Nat. Bank* 247

Libel and Slander. See CONTEMPT, 3.

1. In an action by a girl of sixteen for slander, a ver-

Libel and Slander—*concluded.*

dict in her favor for $1,000, for a charge of incest, was not excessive. *Herzog v. Campbell*..... 370

2. Words imputing an indictable offense are actionable *per se*, and no special damage need be proved. *Id.*

Limitation of Actions.

1. A suit to foreclose a mechanic's lien must be commenced within two years from the date of filing the lien. *Monroe v. Hanson*..... 30
2. An opportunity to amend a petition by offering to redeem mortgaged land was properly denied, where the proof showed that the right to redeem was barred. *Hall v. Hooper*..... 113
3. The statute begins to run against a bill to redeem from the time the mortgagee entered into open and notorious possession of the premises under claim of ownership. *Id.*..... 112
4. The statute runs against a bill to declare a deed absolute in form a mortgage from the time the grantee's possession becomes adverse to grantor's title. *Stall v. Jones*..... 706

Malicious Prosecution.

1. In an action for malicious prosecution plaintiff must allege and prove that defendant's conduct was inspired by malicious motives and that he acted without probable cause. *Rider v. Murphy*..... 857
2. Evidence *held* insufficient to show malice or want of probable cause on part of one who caused another to be prosecuted for embezzlement. *Id.*
3. Definition of "probable cause." *Id.*
4. The existence of probable cause, the facts being established, is a question of law. *Nehr v. Dobbs*..... 864
5. A presumption of probable cause is established by proof that plaintiff was convicted in the criminal cause, but such a presumption may be rebutted. *Id.*, 863
6. Evidence of probable cause by proof of conviction may be rebutted by showing that the conviction was procured by fraud or perjury, or by proof of any facts showing that the conviction was under circumstances depriving it of any naturally probative effect. *Id.*
7. Where defendant, at the time he began the criminal prosecution, was aware of facts establishing the in-

Malicious Prosecution—*concluded.*

nocence of plaintiff, a misapprehension of the law, resulting in a conviction, does not create probable cause, though it may affect the issue of malice. *Id.*, 864

8. Petition *held* to plead want of probable cause. *Id.*

Malpractice. See PHYSICIANS AND SURGEONS.

Mandamus.

1. A writ of *mandamus* to compel county officers to pay a judgment against the county is not void because the judgment is void. *Boasen v. State*..... 245
2. Writ of *mandamus* allowed to compel the officers of Red Willow county to remove their offices and records from Indianola to McCook. *State v. Roper*.... 417
3. The duty of railroad companies to construct or repair viaducts as required by a city ordinance may be enforced by *mandamus*. *Chicago, B. & Q. R Co. v. State* 550
4. A village treasurer may be compelled to pay liquor-license money to the proper school district, though the term for which the license was issued has not expired. *Guthrie v. State*..... 819

Master and Servant.

1. A servant assumes the risk of employment known to him or apparent to persons of his experience and understanding, where he voluntarily enters into it and continues therein without complaint or objection as to the hazards. *Malm v. Thelin*..... 686
2. In a suit for personal injuries, a servant must plead the existence of facts creating an exception to the rule that he assumed the risks of employment. *Id.*
3. The presumption is that the servant assumed the risk of employment, and, in a suit for injuries, the burden is upon him to establish an exception to the rule. *Id.*
4. Evidence tending to show that defective machinery was used under a promise by the master to remedy the defect, *held* inadmissible where such promise had not been pleaded. *Id*..... 687

Mechanics' Liens.

1. A foreclosure suit must be commenced within two years from the date of filing the lien. *Monroe v. Hanson* 30
2. The mere fact that the owner of land gave his note for a portion of materials for improvements did not

Mechanics' Liens—*concluded.*

relieve his property from a lien for the entire amount of materials furnished. *Livesey v. Hamilton* 644

3. The right to a lien was not destroyed because the claimant, in taking a note for the amount due, described himself by the fanciful designation of "Western Cornice Works," where no one was misled or injured thereby. *Id.*

Merger.

Where one acquires a greater and a lesser estate, and there is no intermediate estate, the lesser is merged in the greater, but the estates will be kept separate when such is the intention of the parties. *Mathews v. Jones* 616

Misconduct of Attorneys. See TRIAL, 4.

Mistake.

1. Relief against mistake is generally confined to cases where the minds of the parties never met and to cases where the contract made was not correctly expressed. *Moore v. Scott* 346
2. Relief against mistake should not be granted because of misapprehensions in regard to a collateral matter, as in regard to a fact incidentally affecting the value of the subject-matter of the contract, there being no deception or wrongful concealment. *Id.*

Money.

"Money" may include not only legal tender coin and currency, but any other circulating medium, instruments, or tokens in general use in the commercial world as the representative of value. *State v. Hill* .. 459

Mortgages. See INSURANCE, 2. LIMITATION OF ACTIONS, 3. PRINCIPAL AND AGENT, 2.

Assignment.

1. The assignee of notes secured, though the assignment is without consideration, succeeds to mortgagee's right to have redemption made as a condition of canceling the mortgage. *Hall v. Hooper* 111

Merger.

2. Case where a conveyance of title from mortgagor to mortgagee, subject to payment of the mortgage by the latter, did not merge the estates. *Mathews v. Jones* 616

Mortgages—*concluded.*

Innocent Purchasers.

3. One claiming title through a mortgagee who acquired title from the mortgagor under a conveyance subject to the payment of the mortgage, *held* not an innocent purchaser as against a *bona fide* holder of the notes secured by the mortgage, though the mortgagee released the lien of record. *Id.*

Absolute Deeds.

4. Where the grantee under a deed absolute in form, but intended as a mortgage, is in possession, the grantor's equity of redemption may be defeated by a parol settlement defeating his right to an accounting. *Stall v. Jones* 706
5. Plaintiff's evidence in a suit to have a deed absolute in form declared a mortgage should present a state of facts consonant with reason and consistent in its parts. *Id.*

Receivers.

6. In a proper case the court may appoint a receiver to collect the rents and profits, though sec. 55, ch. 73, Comp. Stats., provides that the mortgagor has the legal title and right of possession. *Philadelphia Mortgage & Trust Co. v. Goos* 804
7. In a foreclosure proceeding plaintiff is entitled to the appointment of a receiver when it is shown that the mortgaged property is probably insufficient to discharge the debt. *Id.*
8. After confirmation of sale and appeal therefrom, the trial court, when necessary to protect the mortgagee's interests, may appoint a receiver to collect the rents pending the appeal. *Id.*

Payment.

9. One who executes a mortgage to secure a negotiable note is not necessarily entitled to protection as to payments to the mortgagee on the assumption that the latter did not transfer the note. *Bull v. Mitchell* 647
10. Payment of a negotiable note, secured by a mortgage, to an investment company of which the mortgagee was manager, *held* not to bind the transferee of the note, though payments of interest coupons had been previously made to the mortgagee and forwarded to the holder of the note, it being shown that the latter never recognized the mortgagee as agent. *Id.*

Municipal Corporations. See EVIDENCE, 1, 10, 11. MANDAMUS, 4. RAILROAD COMPANIES, 3, 4.

Liquors.

1. The sale of intoxicating liquors within cities and villages can only be conducted under municipal ordinances duly enacted. *Hornberger v. State*..... 40

Streets. Damages.

2. A city is liable for damage resulting from a material change of the grade of its streets. *City of Harvard v. Crouch*..... 133
3. In a suit against a city for changing the grade of a street the measure of damage is the depreciation in the value of plaintiff's property. *Id.*

Damages.

4. Damage to abutting property by the construction of a viaduct may be shown by evidence that travel was diverted and plaintiff's business injured. *City of Omaha v. McGavock*..... 313

Canal Companies.

5. The canal company contemplated by chapter 71, Session Laws, 1895, is not a municipal corporation. *State v. County Commissioners of Douglas County* 428

Viaducts. Railroads.

6. An ordinance requiring the reconstruction by two railroad companies of specific portions of a viaduct previously erected by them jointly with the city of Omaha *held* valid and binding. *Chicago, B. & Q. R. Co. v. State*..... 550
7. An ordinance requiring two railroad companies to reconstruct specific portions of a viaduct was not void because the city failed to proceed against other companies operating tracks as lessees. *Id*..... 551

Sidewalks. Damages.

8. The fee of streets is vested in the municipalities, and sidewalks are parts of the streets. *Davis v. City of Omaha*..... 836
9. The law does not make it the duty of a lot owner to build, maintain, or repair the sidewalk in front of his premises. *Id.*
10. A city may license or permit a lot owner to build or repair a sidewalk in front of his premises. *Id.*
11. A general permission to a lot owner to build or repair a sidewalk on his premises continues until revoked by the city. *Id.*

Municipal Corporations—*concluded.*

12. The duty of a city to keep its streets and sidewalks in a safe condition cannot be devolved upon another so as to relieve the city from liability for a failure to perform such duty. *Id.*
13. A lot owner who was ordered to build a sidewalk in front of his property within a certain time was a trespasser, where he placed obstructions in the street in attempting to comply with the order after the time expired. *Id.* 837
14. Where a lot owner, in building for a city, under a license, a walk in front of his property, negligently leaves an obstruction in the street, the city is liable for resulting damages. *Id.* 836
15. Negligence on the part of a city must be shown in order to make it liable for damages resulting from obstructions placed in the street by a trespasser. *Id.*

Names. See DEEDS, 9. MECHANICS' LIENS, 3. PARTIES, 4-6.

Negligence. See CARRIERS, 3. INDEMNITY BONDS. RAILROAD COMPANIES, 6.

1. A person is only answerable for the natural, probable, reasonable, and proximate consequences of his acts. *Kitchen v. Carter* 776
2. The question of the proximate cause of an injury is for the jury, but its verdict will be set aside when manifestly wrong. *Id.*
3. The owner of realty has no right to construct a building which, by reason of defects or weakness, is liable to fall and injure adjoining owners or the public. *Id.*
4. The owner of a building, a wall of which fell and killed a fireman who was ascending a ladder supported by the wall, *held,* under the evidence, not liable on the theory that the building was negligently constructed and dangerous. *Id.*
5. The facts from which the inference of negligence arises must be pleaded, conclusions not being sufficient. *Omaha & R. V. R. Co. v. Wright* 886

Negotiable Instruments. See ALTERATION OF INSTRUMENTS. MORTGAGES, 3, 10.

1. Evidence discussed in opinion *held* sufficient to sustain a finding that the purchaser of a note had

Negotiable Instruments—*concluded.*

knowledge of usury therein when he bought it as agent for his father who was bound thereby. *Sanders v. Wedeking* 73

2. Want of consideration in an action on a note must be specially pleaded, and is not available as a defense under a general denial. *Sharpless v. Giffen* ... 146

3. As between the original parties to the indorsement in blank of a note, the terms of the contract may be established by parol evidence. *Corbett v. Fetzer,* 269

4. The liability created by the indorsement in blank of a note cannot be varied by parol evidence, as against a subsequent *bona fide* holder. *Id.*

5. "Without recourse," following the name of the first, and preceding the name of the second indorser of a note, may be shown by parol evidence to apply to the former instead of the latter. *Id.*

6. Where the only defense to an action by an indorsee is failure of consideration, the burden is on defendant to overcome the presumption that the note was transferred for value before maturity. *Crosby v. Ritchey* 924

7. Answer *held* to charge a failure of consideration only and not fraud in the inception of the note in suit. *Id.*

8. Liability of commission merchants under an obligation to accept drafts in pursuance of a letter of credit, where the drafts were made for the cost or value of stock shipped. *Burke v. Utah Nat. Bank* ... 247

New Trial. See BILL OF EXCEPTIONS, 4. INSTRUCTIONS, 11. REVIEW, 45.

1. A petition by a plaintiff for a new trial, under sec. 602 of the Code, should be denied, where he did not state a meritorious cause of action in his original petition and failed to allege therein facts sufficient to support a judgment in his favor. *Gilcrest v. Nantker* 58

2. A verdict should not be set aside for error in instructions, where it is manifest that no other verdict should have been returned under the evidence. *State v. Hill* 458

3. The finding of a jury should be set aside where there is not sufficient evidence to support it. *Anheuser-Busch Brewing Ass'n v. Murray* 627

Newspapers. See CONTEMPT, 3.

Notice. See COMPROMISE AND SETTLEMENT, 5. JUDGMENTS, 15. QUIETING TITLE, 5.

Novation.

The deposit by a treasurer of certificates received by him from his predecessor in the same bank which issued them, the cancellation of the certificates, and the state's acceptance of a credit on open account for the amount thereof, operated as a novation, and made the bank the state's debtor. *State v. Hill*..... 460

Office and Officers. See STATE TREASURERS.

1. A suit against a county treasurer for the costs incurred through the wrongful issuance of a distress warrant after plaintiff's taxes were paid, is an action for misconduct in office. *Warren v. Sadilek*.... 53
2. It is a presumption of law that officers perform their official duties, until the contrary is shown by evidence. *Green v. Barker*..... 935

Opening and Closing. See TRIAL, 2, 3.

Overruled Cases. See TABLE, *ante*, p. xlv.

Parties. See RES JUDICATA, 2.

1. Where plaintiffs in error are not parties to a judgment, or their privies, the petition in error may be dismissed. *Burlington & M. R. R. Co. v. Martin*..... 56
2. Under sec. 29 of the Code, the real party in interest is the person entitled to the avails of the suit. *Kinsella v. Sharp*..... 664
3. Where one lawfully sells his property for a nominal consideration, the purchaser is the real party in interest in a suit for conversion of the property. *Id.*
4. Where a pleading states a cause of action against defendant personally, superadded words, such as "agent," "executor," or "director," should be rejected as *descriptio personæ*. *Andres v. Kridler*..... 585
5. It will not be presumed for the purpose of invalidating a judgment that defendant has a Christian name other than the initial by which he was sued. *Scarborough v. Myrick*..... 795
6. Where defendant appears, or is personally served, and fails to object in the trial court to being described in the petition by the initials of his Christian name, the defect is waived. *Id.*

Partnership. See PRINCIPAL AND SURETY, 1.

1. After a partnership has been dissolved and the accounts settled according to the books of the firm, one partner may sue at law another partner, on his bond, for a share of money received by the latter who kept the books and failed to charge himself with the receipt of such money. *McAuley v. Cooley*, 165
2. Evidence that two farmers bought a threshing-machine, paid for it with their joint and several notes secured by chattel mortgage, and jointly used it, will not support a finding that the purchasers were partners, but rather warrants the conclusion that they were tenants in common. *State Bank of Lushton v. Kelley*..... 678
3. The assets of an insolvent partnership cannot be applied in satisfaction of the personal obligations of the individual partners to the prejudice of firm creditors. *Steele v. Kearney Nat. Bank*..... 724
4. Evidence *held* to sustain a finding that a chattel mortgage was given to secure an indebtedness of the firm. *Id.*

Passes. See CARRIERS, 1.

Patents. See PUBLIC LANDS, 1.

Payment. See COMPROMISE AND SETTLEMENT, 5. MORTGAGES, 10. STATE TREASURERS.

1. Where partial payments have been made on a running account, the debtor may direct their application. *State v. Hill*..... 457
2. Where a debtor fails to direct the application of payment, the creditor may make the application. *Id.*
3. The law will apply partial payments according to their priority of time, where neither party has directed the application. *Id.*

Physicians and Surgeons.

A physician and surgeon impliedly engages that he possesses ordinary knowledge and skill, and that he will, in the course of his employment, exercise such proper care and attention as may reasonably be expected from members of his profession. *Griswold v. Hutchinson*..... 727

Pleading. See BONDS, 2. FRAUD. INDEMNITY BONDS. INSURANCE, 12, 13. LIMITATION OF ACTIONS, 2. MASTER AND SERVANT, 2. NEGOTIABLE INSTRU-

Pleading—*concluded.*

MENTS, 2. NEW TRIAL, 1. QUIETING TITLE, 3. REPLEVIN, 1, 2. REVIEW, 44. SALES, 2. TRESPASS.

1. The allowance of amendments is largely in the discretion of the trial court. *Murray v. Loushman*..... 256
2. A party is not required to prove an averment admitted by a pleading of his adversary. *Johnson v. Reed* 322
3. An allegation in a pleading that the grantor made and executed a deed is a sufficient averment of delivery. *Brown v. Westerfield*..... 399
4. A judgment foreign to the issues joined, and for which there was no prayer, should be reversed upon appeal. *Carter v. Gibson*..... 655

Police Power. See CONSTITUTIONAL LAW, 3-10.

Possession. See VENDOR AND VENDEE, 1.

Practice. See APPEAL BONDS, 4. BILL OF EXCEPTIONS. DISMISSAL. TRIAL.

A motion in the supreme court to affirm a judgment below may be sustained where the petition in error presents no question for review. *State Ins. Co. v. Buckstaff* 1

Principal and Agent. See COMPROMISE AND SETTLEMENT, 5. INSURANCE, 16.

1. A principal who ratifies a cantract made for him by another must adopt all the instrumentalities employed by such agent to bring it to a consummation. *Hall v. Hooper*..... 111
2. Where a purchaser of land has it conveyed to his wife and executes in his own name a purchase-money mortgage, the wife, by accepting the deed, adopts the mortgage, and the fact that the husband acted without authority in writing is immaterial, as the statute of frauds does not apply to such a case. *Id.*
3. Authority of an agent to do a particular act may be inferred from proof that his principal authorized or ratified similar acts of the agent. *First Nat. Bank of Wilber v. Ridpath*..... 96
4. Agency cannot be proved by the mere declarations of one assuming to act as agent. *Anheuser-Busch Brewing Ass'n v. Murray*..... 627
5. Declarations of one assuming to act as agent, and the fact that he printed upon his delivery wagon,

Principal and Agent—*concluded.*

"J. K. Ellis, Agent," *held* insufficient to establish agency. *Id* 629

6. Where one of two innocent persons must suffer through the fraud of the agent of one, that one must suffer who placed the agent in a position to perpetrate the fraud. *Bull v. Mitchell* 654

Principal and Surety. See APPEAL BONDS. BONDS, 3. INDEMNITY BONDS. STATE TREASURERS.

1. Verdict in favor of the sureties on the bond of partners who entered into a contract to erect a public building *held* to be sustained by the evidence in an action for the price of materials, under an issue as to whether the materials were furnished to the contractors or to an individual member of the firm after dissolution of the partnership. *Hickman v. Layne* 177
2. Under a bond for the performance of a contract requiring builders to pay for all labor and material, the sureties are liable to a subcontractor for material furnished by him and used in the building. *Fitzgerald v. McClay* 816
3. An increase in the amount of capital invested in the business of a partnership did not release the sureties on a bond for the faithful performance of the duties of a partner. *McAuley v. Cooley* 165
4. An increase in the compensation of an insurance agent of three and one-third per cent of the business transacted, with permission to employ solicitors and pay them out of his commissions, did not change the contract so as to release the surety on the agent's bond. *Taylor v. Standard Life & Accident Ins. Co* 673

Prohibition.

The supreme court has no jurisdiction to award a writ of prohibition as an independent remedy. *State v. Hall* 579

Public Lands.

1. A patent evidencing a grant of land from the United States is not open to collateral attack. *Green v. Barker* 934
2. A deed executed by a trustee holding title from the United States under the Town Site Act is not open to collateral attack. *Id.*

Publications. See CONTEMPT, 3.

Quieting Title. See PLEADING, 3.

1. A person claiming title may maintain an action to quiet it against any one claiming adversely. *Hall v. Hooper* 111
2. An action to quiet title may be maintained by a remainder-man during the continuance of the particular estate. *Id.*
3. A mortgagor, in order to remove from his title the cloud of a sheriff's deed under a void foreclosure, must offer to pay the sum due on the mortgage, and where he seeks such affirmative relief, he must offer to redeem, though the mortgagee's right to foreclose is barred. *Id.* 112
4. Petition *held* to state a cause of action. *Scarborough v. Myrick* 794
5. In an action to quiet title service by publication may be made upon a non-resident defendant who cannot be summoned in the state. *Id.*

Railroad Companies. See CARRIERS.

1. Section 48 of the charter of the city of Omaha, authorizing an ordinance requiring railroad companies to construct and keep in repair viaducts over streets crossed by their tracks, is a valid exercise of police power. *Chicago, B. & Q. R Co. v. State* 550
2. An ordinance requiring the reconstruction by two companies of specific portions of a viaduct previously erected by them jointly with the city of Omaha *held* not to violate prior contract obligations. *Id.*
3. A city ordinance authorizing the crossing of the streets by the tracks of a railroad company confers upon the latter no exclusive use of the crossings. *Chicago, B. & Q. R Co. v. Steel* 741
4. A railroad company exercising an easement in a street is not entitled to compensation from a street railway company as a condition to the crossing of the former's tracks by the latter under a grant of power from the city. *Id.*
5. In a suit against a company for damages resulting from the operation of its railroad near plaintiff's residence, *held*, under the evidence, that the jury was not governed by passion, prejudice, or undue

Railroad Companies—*concluded.*

means in assessing plaintiff's recovery at a sum so small as $100. *Beavers v. Missouri P. R. Co* 761

6. Evidence in a suit to recover the value of stock killed on the track of a railroad company *held* to present a question of negligence for the determination of the jury. *Burlington & M. R. R. Co. v. Gorsuch* 767

7. Where stock are killed or injured through the engineer's failure to keep a lookout, the company is liable, though the animals were not seen until it was too late to avoid striking them. *Omaha & R. V. R. Co. v. Wright* 886

Ratification. See PRINCIPAL AND AGENT, 1-3. STATE TREASURERS, 2, 8, 9.

Receipt. See COMPROMISE AND SETTLEMENT, 5.

Receivers. See MORTGAGES, 6-8.

Records. See EVIDENCE, 2, 3, 5, 10, 11.

Recoupment. See SET-OFF AND COUNTER-CLAIM.

Release and Discharge. See ATTORNEY AND CLIENT, 3.

Remittitur.

1. Where a judgment was excessive to the amount of eighteen cents, a remittitur for that sum was required as a condition of affirmance. *Andres v. Kridler* 588

2. Where excess in the amount of recovery is the only error in a record for review, the judgment may be affirmed upon the filing of a remittitur for the proper sum. *Regier v. Shreck* 667

Replevin. See SALES, 3.

1. Under a petition alleging general ownership, right of possession and wrongful detention, plaintiff may prove fraud in a previous sale to defendant and a rescission of the sale. *Phenix Iron Works Co. v. McEvony* 228

2. Plaintiff's allegation of general ownership cannot be proved by introducing in evidence a mortgage on the chattels replevied. *Strahle v. First Nat. Bank of Stanton* 319

3. Where plaintiff claims under a chattel mortgage, he must allege a special ownership and plead the facts. *Garber v. Palmer* 704

Replevin—*concluded.*

4. A plaintiff who obtained possession of the property under the writ cannot dismiss the action without defendant's consent. *Id.* 699
5. Where a plaintiff who replevied the property fails in his proof or in prosecuting the case, the defendant is entitled to judgment and a trial to establish his damages. *Id.*
6. A judgment against plaintiff for the return of the property or its value should be satisfied of record where he paid the costs of suit and damages for the wrongful detention and tendered the property to defendant. *Manker v. Sine* 736

Rescission. See CONTRACTS, 2. SALES, 4, 5. VENDOR AND VENDEE, 2, 3.

Res Judicata.

1. Order of a circuit court of United States denying a deficiency judgment in a foreclosure proceeding, *held* to involve the merits of the cause. *Tzschuck v. Mead* 260
2. A judgment against an officer for the value of property wrongfully seized under execution is conclusive evidence, in an action on his official bond against the principal and sureties, of plaintiff's ownership at the time of the seizure and of the amount of damages sustained, and the fact that the officer was not designated as sheriff in the former case is immaterial. *Lewis v. Mills* 910

Review. See APPEAL BONDS. CRIMINAL LAW. INSTRUCTIONS. INTOXICATING LIQUORS, 1-5. NEW TRIAL. TRIAL, 12.

1. The supreme court will not presume the adjournment of a term of the district court from the fact that twenty-three days have intervened since a given day thereof. *Hyde v. Kent* 26
2. In an error proceeding in the district court to review the judgment of an inferior court, a finding of error in the record is sufficient to sustain a judgment of reversal. *Warren v. Sadilek* 55
3. Only parties to a judgment, or their privies, can prosecute error or appeal. *Burlington & M. R. R. Co. v. Martin* 56
4. An appellant who files a petition in error abandons his remedy by appeal. *Childerson v. Childerson* 162

Review—*continued.*

5. Errors in a criminal prosecution cannot be corrected on *habeas corpus*. *State v. Leidigh* 126
6. A party cannot predicate error upon a ruling which he procured to be made. *Norwegian Plow Co. v. Bollman* 186
7. Where an appeal from a justice of the peace was properly dismissed, the dismissal will not be reversed because an untenable reason was assigned for the decision. *Denslow v. Dodendorf* 328
8. Proceedings in error may be commenced in the supreme court any time within a year from the rendition of the final order. *Scarborough v. Myrick* 794
9. A judgment foreign to the issues, and for which there was no prayer, should be reversed. *Carter v. Gibson* 655
10. A case should be reviewed on the theory upon which it was prosecuted or defended below. *Omaha Brewing Ass'n v. Wuethrich* 920

Assignments of Error.

11. An assignment that several instructions are erroneous may be overruled where one of them is found to be correct. *Oltmanns v. Findlay* 289
Pythian Life Ass'n v. Preston 392
12. An assignment that the court erred in admitting in evidence the judgments against defendant may be overruled where a portion of the judgments was properly admitted. *Regier v. Shreck* 667
13. The question as to whether there was error in the assessment of the amount of recovery by the jury *held* not raised by the assignments of error stated in the opinion. *Beavers v. Missouri P. R. Co* 761
14. Assignments as to errors occurring at the trial should set forth some matter for which a motion for a new trial is authorized by the Code. *Id.*
15. Assignments of error not discussed in the briefs are waived. *Wood v. Gerhold* 397
City of Kearney v. Smith 408
16. Arguments on questions not raised by proper assignments of error will be disregarded. *Post v. Olmsted* 893
17. An assignment of a petition in error that a particular instruction is erroneous may be disregarded where the instruction was only excepted to and

Review—*continued.*

assailed below in connection with others properly given. *Bankers Life Ass'n v. Lisco* 345

Bill of Exceptions.

18. Assignments of error relating to evidence or rulings thereon will be disregarded in absence of a properly authenticated bill of exceptions. *Felber v. Gooding* .. 39
First Nat. Bank of Greenwood v. Cass County 172
Union P. R. Co. v. Kinney 393
Wood v. Gerhold 397
Andres v. Kridler 585
White v. Smith 625
McCall v. State 660

19. A written stipulation of facts forms no part of a record for review unless made so by a bill of exceptions. *State Ins. Co. v. Buckstaff* 1

20. A bill of exceptions cannot, by a stipulation of facts, be made part of the record for review in another case in which the stipulation is filed. *Id.*

21. In absence of a bill of exceptions, it will be presumed that instructions containing correct statements of law proper under the pleadings were applicable to the evidence. *Oltmanns v. Findlay* 289

22. In absence of a properly authenticated bill of exceptions, it will be presumed that every essential averment of the petition not negatived by the verdict was proved, and that the instructions refused should not have been given. *Romberg v. Hediger* ... 201

23. In a proper case a bill of exceptions may be withdrawn from the supreme court for amendment below. *Macfarland v. West Side Improvement Ass'n* 661

Affirmance.

24. The judgment below may be affirmed where the petition in error presents no question for review.
State Ins. Co. v. Buckstaff 1
Wood v. Gerhold 397

25. Where special findings are sustained by sufficient evidence, a judgment upon the verdict in accord with the findings may be affirmed. *Sanders v. Wedeking* 71

Evidence.

26. A judgment will not be reversed on account of a difference of opinion between the appellate and trial courts in regard to the weight of evidence. *City of Harvard v. Crouch* 133

Review—*continued.*

27. A judgment supported by sufficient evidence should be affirmed where questions of fact only are presented. *Monroe v. Hanson*..... 30
Martin v. Clarke..... 100
Allsman v. Daley..... 739
Lombard Investment Co. v. Snowden..... 834

28. The judgment should not be disturbed where the only question presented is one of fact as to which the evidence is conflicting. *Wakefield v. Connor*.... 225
Lundgren v. Crum..... 242
State v. Spirk..... 337
Gallagher v. Wolf..... 589
Nelson v. Mills..... 824
Buffalo County Nat. Bank v. Gilcrest..... 897
Whitcomb v. Thomas..... 909

Discretion of Trial Court.

29. A ruling in respect to leading questions will not be disturbed in absence of an abuse of discretion on part of the trial court. *Baum Iron Co. v. Burg*..... 21

30. In absence of an abuse of discretion, a ruling on motion to amend a pleading is not subject to review in the supreme court. *Murray v. Loushman*..... 256

31. Error does not appear in a ruling on application of a party to withdraw a rest for the purpose of offering further testimony, unless an abuse of discretion is shown. *Omaha Real Estate & Trust Co. v. Kragscow*, 592

Exceptions.

32. An order sustaining a demurrer to a petition is not reviewable unless excepted to, though the action is solely for equitable relief. *Abbott v. Barton*..... 822

33. Error cannot be predicated on the admission of evidence, where ample evidence of the same nature was admitted without objection. *Hickman v. Layne*, 178

34. Alleged misconduct of counsel can only be reviewed where there was an objection to the conduct and a ruling on the objection. *Bankers Life Ass'n v. Lisco*, 341

35. Assignments of error relating to giving or refusing instructions will be disregarded where the rulings were not excepted to below. *City of Kearney v. Smith* 408

Final Orders.

36. It is only from a final judgment that an appeal lies. *Denslow v. Dodendorf*..... 328

Review—*continued.*

37. An order dissolving a temporary restraining order and denying a temporary injunction is not appealable. *Manning v. Connell* 83
38. One cannot appeal from a mere judgment for the costs of suit. *Little v. Gamble* 827
39. There must be a final judgment on the merits of a cause before the rulings below can be reviewed. *Barnhouse v. Village of Adams* 756
40. A judgment will not be reviewed before it has been formally entered on the journal, a memorandum upon the judge's trial docket not being sufficient. *Hornick v. Maguire* 826

Harmless Error.

41. A judgment should not be reversed for harmless error. *Baum Iron Co. v. Burg* 21
42. A judgment should not be reversed merely for the admission of irrelevant evidence in a cause tried to the court without a jury. *Stover v. Hough* 789

New Trial.

43. A party waives his right to a review of the ruling on motion to make a pleading more specific, by failing to mention the ruling in his motion for a new trial. *Barker v. Davies* 78
44. A motion for a new trial is unnecessary to present for review the question whether the petition states a cause of action. *Scarborough v. Myrick* 794
45. A motion for a new trial will not be considered in the appellate court unless certified to in the transcript for review. *Romberg v. Fokken* 198

Transcripts.

46. The transcript is the exclusive evidence of the proceedings below. *Norwegian Plow Co. v. Bollman* 186
47. A transcript for review imports verity and can only be corrected in the lower court. *Omaha Loan & Trust Co. v. Hogeboom* 7
48. Assignments of error based on giving or refusing instructions will be disregarded where the instructions have not been authenticated in the transcript for review. *Burlingim v. Baders* 204
49. Instructions omitted from the transcript will not be reviewed. *Callen v. Rose* 638
50. An assignment of error based on an order overruling a motion for a continuance will not be consid-

Review—*concluded.*

error in the record is insufficient to sustain a judgered upon review, where the record fails to show that the motion was passed upon below. *Bush v. State* 642

Roads. See HIGHWAYS.

Robbery.

1. Evidence *held* sufficient to support a conviction. *Pjarrou v. State* 294
2. An instruction submitting to the jury the question as to whether accused, "either alone or in company with others," committed the acts complained of, was *held* proper under the evidence. *Id.* 295

Sales.

1. Instructions were *held* proper, where they recognized defendant's right to insist upon a strict performance of the contract of sale and permitted the jury to consider whether such performance was waived. *Barker v. Davies* 78
2. Proof of a false statement knowingly made by a purchaser who represents that he is possessed of a large amount of property over and above his liabilities, is admissible under an allegation that, being insolvent, he knowingly concealed his insolvency from the seller. *First Nat. Bank of Chadron v. McKinney* 149
3. A merchant who was induced to make a sale on credit through the buyer's fraud may rescind the contract and reclaim the goods, or ratify the sale and sue on the contract, but cannot pursue both remedies. *Id.*
4. A seller seeking to rescind a sale for fraud must generally offer to return the purchase money, but need not do so where the purchaser damaged the property to an amount equal to the sum received. *Phenix Iron Works Co. v. McEvony* 228
5. One who takes a chattel mortgage to secure a preexisting debt is not entitled to protection as a *bona fide* purchaser against an action to rescind a former sale to the mortgagor. *Id.*
6. Except as against creditors, one may sell his property for a nominal consideration. *Kinsella v. Sharp,* 664

Satisfaction. See JUDGMENTS, 12.

School-Land Contracts.

Question whether a school-land contract was forfeited without notice. *State v. Spirk* 337

Schools and School Districts.

Moneys arising from a liquor license issued by a village belong to the school district in which the village is situated and must be applied to the support of the common schools in that district. *Guthrie v. State* 819

Set-Off and Counter-Claim.

In an action for conversion a defendant who relies upon his superior title and disclaims any special interest in the property cannot complain in the appellate court on the ground that he should have been permitted to recoup the amount of a lien against the damages for conversion. *Omaha Brewing Ass'n v. Wuethrich* 920

Settlement. See COMPROMISE AND SETTLEMENT. STATE TREASURERS, 5.

Sheriffs and Constables. See DAMAGES, 3. RES JUDICATA, 2.

1. Where money paid into court for a party has been wrongfully applied to payment of the fees of an officer for serving process for the other party, it may be recovered in a suit against the officer. *Van Etten v. Coburn* 283
2. Where the debtor claims his exemption and files an inventory under sec. 522, Code, it is the duty of the levying officer to call appraisers and release the property if the appraised value is less than $500. *Daley v. Peters* 848

Stare Decisis.

1. Where a line of decisions, though erroneous, has become a rule of property, it should be adhered to until changed by statute. *State v. Hill* 459
2. In absence of complications resulting from property rights, courts should modify or overrule decisions fundamentally wrong. *Id.*

State Treasurers.

1. A state treasurer has no right to receive in payment of the public revenues anything but money. *State v. Hill* 457
2. The state may ratify the acts of the treasurer in re-

State Treasurers—*concluded.*

ceiving for revenues payments not made in money, and where it does so he and his sureties are chargeable as for money. *Id.*

3. In an action by the state on the bond of the state treasurer for a failure to turn over money to his successor, the question as to how much actual money had been received and paid was *held* to be for the jury, and a verdict founded on sufficient evidence was allowed to stand. *Id.* 456
4. The mere delivery and acceptance of certificates of deposit, upon which no money has been realized, is not such a payment as will release an outgoing treasurer. *Id.* 457
5. Where an incoming treasurer is chargeable for payments accepted from his predecessor in certificates of deposit instead of cash, the retiring treasurer is released to the extent of such payment. *Id.* 459
6. An incoming treasurer who accepts from his predecessor payment in certificates of deposit instead of cash is chargeable upon his bond for the amount of such payment, though the bank fails before the certificates are paid. *Id.*
7. The method of transacting business by checks, drafts, and certificates of deposit is so far applicable to custodians of public funds as to render them liable for remittances by that means, where such instruments are in good faith tendered and accepted as payment. *Id.* 458
8. The legislature has the power to ratify the act of an outgoing treasurer in turning over to his successor, as money, certificates of deposit. *Id.* 457
9. It was *held* that the state ratified the act of an outgoing treasurer in turning over to his successor certificates of deposit issued by an insolvent bank, where it was shown that the legislature made an appropriation to reimburse the fund tied up in the bank, and that the state treasurer subsequently sued the receiver of the bank for the sum due on the certificates of deposit. *Id.* 519

Statute of Frauds. See PRINCIPAL AND AGENT, 2.

1. A contract is not within the statute of frauds merely because it may, or probably will, not be performed within a year. *Carter White Lead Co. v. Kinlin* 410

Statute of Frauds—*concluded.*

2. A contract not to be performed within one year, as meant by the statute of frauds, is one which by its terms cannot be performed within one year. *Id.*

Statutes. See CONSTITUTIONAL LAW. CORPORATIONS, 2. EMBEZZLEMENT, 3. TABLE, *ante*, p. li.

1. The statute providing for the creation of canal companies (Session Laws, 1895, ch. 71), is invalid, the subject of the act not being clearly expressed in the title. *State v. County Commissioners of Douglas County* 429
2. Chapter 71, Session Laws, 1895, providing for the creation of corporations to construct and operate canals, is invalid, being an attempt to amend the general corporation law without a reference to its provisions in the amending act. *Id.*
3. Where two statutes conflict, the later in point of time will prevail. *Omaha Real Estate & Trust Co. v. Kragscow* 592
4. Section 5, ch. 31, Session Laws, 1856, as amended by ch. 12, Session Laws, 1864, being in conflict with sec. 44 of said ch. 31, the latter section was repealed by implication. *Id.*
5. Where one of two sections enacted at the same time on the same subject is amended so as to conflict with the other, the latter is repealed by implication. *Id.*
6. Sections 5 and 41, ch. 43, Rev. Stats., 1866, relating to real estate, were enacted at the same time, and being repugnant to each other, sec. 5 was repealed by sec. 41. *Id.*

Summons. See JUDGMENTS, 5, 13, 14.

1. Plaintiff is not required to set forth his cause of action in his affidavit for publication. *Scarborough v. Myrick* 795
2. An affidavit for publication is sufficient where it shows that defendant is a non-resident, that service cannot be had upon him in the state, and that the action is one of those mentioned in sec. 77 of the Code. *Id.*
3. By filing an answer to the merits and asking to have a decree rendered upon service by publication opened under sec. 82 of the Code, defendant waives all defects and irregularities in the service. *Id.*

Summons—*concluded.*

4. A defendant who has not appeared may have a decree against him set aside on motion, where the only notice of suit was given by a publication requiring him to answer before the petition had been filed. *Id.*

Supreme Court. See COURTS, 2.

Suretyship. See PRINCIPAL AND SURETY.

Tax Deeds.

One seeking to enjoin a treasurer from issuing a tax deed on the ground that the tax sale was made in violation of an injunction must prove that the decree allowing the injunction was in force at the time of the tax sale. *Monell v. Irey*..... 213

Tenants in Common. See PARTNERSHIP, 2.

Transcripts. See REVIEW, 45-49.

Treasurers. See STATE TREASURERS.

Trespass.

A petition charging an unlawful entry and damage to plaintiff's land states a cause of action for trespass, though it prays treble damages and does not charge that the trespass was willful, as required by sec. 636 of the Code. *Lundgren v. Crum*..... 242

Trial. See INSTRUCTIONS.

1. Case where prejudicial error did not result from the fact that the jury took to their room an itemized account which had been introduced in evidence. *Hickman v. Layne*..... 177
2. A party who waives the opening argument does not thereby waive his right to close. *Id*..... 178
3. The party upon whom rests the burden of proof is entitled to open and close the evidence and argument. *Id.*
4. A party desiring to review proceedings in relation to the misconduct of an attorney should, at the time, object to the conduct and obtain a ruling on the objection. *Bankers Life Ass'n v. Lisco*..... 341
5. An order sustaining a demurrer to a petition will not be reviewed unless excepted to. *Abbott v. Barton*, 822
6. A ruling of the trial court on application of a party to withdraw a rest and introduce further evidence,

Trial—*concluded.*

should not be reversed except for an abuse of discretion. *Omaha Real Estate & Trust Co. v. Kragscow,* 593

7. A party who has not furnished a copy of a document introduced in evidence should not be permitted to withdraw the document. *Macfarland v. West Side Improvement Ass'n* 661

8. The practice of introducing original papers and records in evidence instead of copies should not be encouraged. *Regier v. Shreck* 667

9. The evidence must be confined to the issues tendered by the pleadings. *Callen v. Rose* 638

10. A verdict should respond to the issues made by the pleadings. *Cannon v. Smith* 917

11. A party by failing to object to a proper question does not waive his right to object to an answer thereto containing inadmissible testimony. *Malm v. Thelin* 686

12. The admissibility of testimony given in an answer to a proper question not objected to may be presented for review by a motion to strike out the answer and an exception to the order overruling the motion. *Id.*

13. In a cause tried to the court without a jury the admission of irrelevant evidence is not reversible error. *Stover v. Hough* 789

Trover and Conversion.

1. Evidence *held* sufficient to sustain a verdict for plaintiff in an action to recover money forcibly taken from her by a creditor of her husband. *Murphey v. Virgin* 692

2. Money taken forcibly from the owner may be recovered though he is indebted to the wrong-doer in a sum equal to the amount taken. *Id* 693

3. In a suit against a sheriff for selling property under an execution, without an appraisement, after the debtor claimed his exemptions, the fact that the latter's affidavit contained a false averment is no defense. *Daley v. Peters* 848

Usury. See NEGOTIABLE INSTRUMENTS, 1.

Vendor and Vendee. See PRINCIPAL AND AGENT, 2.

1. Possession of realty is notice of a claim of right. *Monroe v. Hanson* 30

Vendor and Vendee—*concluded.*

2. A statement by a vendor that third persons, who represented the land to be tillable, being merely the expression of an opinion, is insufficient to charge the vendor in an action to rescind. *Moore v. Scott*..... 346
3. A vendor who stated that reliable third persons represented the land to be tillable, but that he had no personal knowledge in regard to it, did not thereby adopt the representation, and rescission cannot be had merely because the statement proved false. *Id.*

Verdict. See TRIAL, 10.

Viaducts. See RAILROAD COMPANIES, 1, 2.

Waiver. See INSURANCE, 9. JUDGMENTS, 15. MECHANICS' LIENS, 2. SUMMONS, 3.

Witnesses. See TRIAL, 11, 12.

1. The extent to which leading questions may be allowed rests in the discretion of the trial court. *Baum Iron Co. v. Burg*..... 21
2. It is not error to instruct a jury that in determining the credit to be given defendant's witnesses their interest in the result of the suit may be considered. *City of Harvard v. Crouch*..... 133
3. A witness was permitted to show that she never knowingly subscribed to or made the statements contained in an affidavit introduced in evidence. *Bankers Life Ass'n v. Lisco*..... 340
4. A jury is not bound to accept as true all testimony of a witness not directly contradicted or impeached. *Murphey v. Virgin*..... 693
5. A party must call the attention of a witness to a statement before proving it to be at variance with the latter's evidence at the trial. *Davison v. Cruse*.. 829

Words.

1. "Due." *Ryan v. Douglas County*..... 9
2. "Liquidated." *Treat v. Price*..... 875
3. "Loan." *State v. Hill*..... 458
4. "Money." *Id*..... 459

Writs. See SUMMONS.