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WILLIAM KERSHAW, APPELLANT, V. A. W. JANSEN ET AL., APPELLEES.

FILED OCTOBER 21, 1896. No. 6848.

1. **Municipal Corporations:** VACATING PLAT. The vacation by the owner, of a plat of an addition to a city, the land being within the corporate limits, does not *ipso facto* disconnect the land platted from the corporation.

2. **Taxation:** DESCRIPTION OF LAND: TAX LEVY: ESTOPPEL. The owner of land subject to taxation cannot avoid the payment of taxes because the description of the land on the assessment roll and tax list does not refer to a lawfully existing recorded plat or subdivision. It is sufficient if the description, by reference to generally known plats or otherwise, describes the land with such certainty as to afford notice and protect the owner's rights. *Bryant v. Estabrook*, 16 Neb., 217, and *Roads v. Estabrook*, 35 Neb., 297, followed.

APPEAL from the district court of Johnson county. Heard below before BUSH, J.

Davidson & Giffen, for appellant:

After a plat has been vacated, the land can no longer be taxed in parcels. (*Merton v. Dolplin*, 28 Wis., 456.)

J. Hall Hitchcock, contra.

IRVINE, C.

This was an action by Kershaw against Jansen and Bush to restrain Jansen from receiving, and Bush, the treasurer of Johnson county, from issuing a tax deed on property described as block 20, and lots 1 and 10, in block 11, of Kershaw's Second Addition to the city of Tecumseh, and to quiet title in the plaintiff as against the taxes complained of. The petition alleges that prior to December 3, 1883, John Kershaw, then being the owner of a tract of land adjoining the city of Tecumseh, caused the same to be surveyed, laid off, and platted as an addition to said city, known as Kershaw's Second Addition to Tecumseh; that said plat was filed for record; that on

the 3d day of December, 1883, John Kershaw and wife and John Graff, being the owners of said property, executed, delivered, and caused to be recorded a deed vacating that part of said plat known as block 20, and lots 1 and 10, in block 11, with certain streets adjacent thereto; "that thereby said tract, described on said plat as last above mentioned, ceased to be a part of said addition to said city and ceased to be included within the corporate limits of said city." The petition then proceeds to allege that for the years 1884, 1885, and 1886 the property in controversy was recognized by said city as not a part thereof, and was not assessed as a part of the city; that without any authority of law, and without any act replacing said tract within said city, city taxes were levied thereon for the years 1887, 1888, 1889, 1890, 1891, and 1892; that the plaintiff is now the owner of the land in controversy, and each year tendered, before the same became delinquent, full payment of all taxes except said city taxes; that in 1892 the land in controversy was by the county treasurer sold to Jansen for delinquent taxes including said city taxes, and that the treasurer was, when the suit began, about to execute and deliver to Jansen deeds therefor. Jansen demurred to the petition, his demurrer was overruled, he was allowed time to answer, he did not answer, and his default was never entered. The treasurer answered, but it is not material to set forth the terms of the answer. On the hearing of the case there was a finding in favor of the defendants and the action was dismissed. The plaintiff appeals.

The petition admits that prior to the vacation of the addition in 1883 the land in controversy was within the corporate limits of the city of Tecumseh. It does not plead that the land was ever disconnected from the city, except as a conclusion from the allegation that the plat was vacated. The theory of the plaintiff was and is that by the vacation of the plat the land became disconnected from the city and no longer subject to city taxes. This is the question principally relied on in argument. We think

in assuming this position the plaintiff has misconstrued the statutes. The act relating to cities of the second class and villages (Compiled Statutes, ch. 14, art. 1) contains (secs. 114-117) certain provisions in regard to surveying, platting, and recording additions. These provisions have, however, nothing to do with the incorporation of cities and villages. They merely provide a method whereby lands may be subdivided for the purpose of laying out cities, villages, additions thereto, or suburban lots. The effect of so subdividing and platting land and recording the plat is to establish a record of the subdivision, so as to render descriptions convenient, and to dedicate to the use of the public the streets and alleys. The act also provides a method whereby such plat may be vacated and the rights of the public to streets and alleys and public grounds divested. This, however, has nothing to do with the incorporation of cities and villages. In the remainder of the chapter are several provisions whereby the annexation and disconnection of lands adjacent to incorporated cities and villages are regulated. (See, for instance, secs. 92-103, inclusive.) In each case the annexation of adjacent territory to a city or village requires the consent and affirmative action of the corporate authorities, and the disconnection of territory requires the action of the district court. It is claimed that the provision for disconnecting territory is, by its express terms, not applicable to land laid out into city or village lots, and therefore it is not applicable to this case. The argument makes, however, the other way. Where land is not so subdivided, it may be disconnected by the action provided for by the statute referred to. The conclusion follows that if it be so subdivided, no provision exists for disconnecting it. But the plaintiff was not for that reason without his remedy. If the conditions existed which permitted him to vacate the plat, the land then became unsubdivided property, and he might have proceeded to have his right to disconnect it from the city determined under the provisions of the act. Until some action was

taken legally removing the land from the corporation, it remained within it, and the plaintiff's voluntary act in vacating the plat did not have the effect of disconnecting it.

Another point presented is that the land was assessed and the taxes levied in accordance with its description upon the vacated plat; that upon the vacation of the plat the lots had no longer any legal existence as such, and that the description was, therefore, insufficient for the purposes of taxation and the taxes, for that reason, were void. We do not regard this question as any longer an open one in this state. The cases of *Bryant v. Estabrook*, 16 Neb., 217, and *Roads v. Estabrook*, 35 Neb., 297, are, to our minds, conclusive on the subject. In those cases the land in controversy was within the original town-site of the city of Omaha. A survey had been made and for years a plat in accordance with that survey had been generally recognized by the public and property owners, and taxes had been assessed and levied in accordance with the descriptions indicated by such survey and plat. The plat, however, had never been recorded. The same contention was urged in those cases as here. In each case it was frankly admitted by this court that the weight of authority sustained the contention of the property owner resisting the tax; but it was in each case decided that under the circumstances he could not be permitted to set up the failure to record the plat as a defense. There are intimations in the opinions that the decisions rest upon the ground of estoppel; but Estabrook had done no act, so far as the cases disclose, which placed the city or county or the state at a disadvantage. They had not altered their position in reliance upon any act of his. So there was no estoppel *en pais*. There certainly was no technical estoppel. The principle which must have governed the cases was one of public policy, and the language of both opinions indicates that that was the real basis on which the court placed its decision; to-wit, that all property is legally liable to taxation, and that where,

for the purposes of taxation, a description is used so certain in its terms that it must, as to the taxpayer, have apprised him of the proceedings and of the land assessed, he cannot avoid his share of the public burden merely because there is nothing of record which ascertains the property described. So in this case the description on the assessment roll and tax list, in accordance with the former subdivision, was sufficiently certain to clearly point out these particular tracts. They were subject to taxation under some description, and the owner should not be permitted to avoid the burden merely because, by a vacation of the plat, there was no longer of record anything which definitely ascertained the land assessed. While not so ascertained of record, a description was given which certainly would have been sufficient in a deed between the parties; and which must have afforded him such notice as would protect him in all his rights. While there were features in *Bryant v. Estabrook* and *Roads v. Estabrook* which might by subtle reasoning permit a distinction between those cases and the case at bar, we think a fair examination of the cases discloses a fundamental principle, which we have endeavored to state, common to all three cases; and while the writer, in justice to himself, feels obliged to repeat the admissions of Judge COBB and Judge POST in the cases cited, that they are contrary to the weight of authority in similar cases, he nevertheless believes that they are founded on a sound principle, which is stronger than authority.

It is suggested that no city taxes having been levied for three years after the vacation of the plat, the city thereby recognized the land as disconnected, and could not thereafter levy city taxes upon it without reannexing it. We see no force in this argument. Here, again, no principle of estoppel can be invoked. The action of an assessor or a board of equalization in omitting assessable property from the list cannot take the place of proceedings required by law for disconnecting incorporated territory. It was no more than an omission, possibly by

inadvertence, probably from a mistake of law, to properly levy taxes for the years referred to upon the land. The owner derived a benefit to which he was not entitled, and the city lost a portion of its revenue by this omission. But it did not disconnect the territory and it did not estop the city from levying taxes in subsequent years.

We have considered this case solely upon the allegations of the petition. We have done so because Jansen, the tax purchaser, failed to answer after his demurrer was overruled. The appellant claims that on that account he was at least entitled to a decree against Jansen. A decree against him would be incongruous, in view of the conclusion reached as to the rights of the parties. The petition failed to state a cause of action, and the case having been contested by one of the defendants, a decree of dismissal as to both was, if error, error without prejudice. Notwithstanding the fact that the demurrer was overruled, if the court subsequently had come to the conclusion that no cause of action was stated, it might on the trial, or after a finding for the plaintiff, arrest judgment and dismiss the case.

AFFIRMED.

JOSEPH H. MILLER V. SAMUEL FREY.

FILED OCTOBER 21, 1896. No. 6671.

1. **Depositions:** NOTICE: NAMES OF WITNESSES. Under our statute requiring a notice to take depositions to "specify the names of witnesses to be examined," the deposition of "G. A. Hollem" cannot be taken under a notice specifying the name of "Gus Hahn" or "Gus Halin," such names not being *idem sonans.*

2. **Physicians and Surgeons:** MALPRACTICE: MEASURE OF DAMAGES. In an action against a surgeon for malpractice in setting and treating a broken arm, the measure of damages is the damage accruing to the plaintiff in excess of that which would have accrued naturally from the breaking of his arm had he been treated with that degree of skill ordinarily possessed by surgeons. It is not the damage resulting from the breaking of the arm.

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

W. W. Stowell and *Steele Bros.*, for plaintiff in error.

Evans & Hale and *Matt Miller*, *contra.*

IRVINE, C.

Frey sued Miller, a practicing physician, for damages alleged to have been caused by malpractice in setting and treating a broken arm of the plaintiff. He recovered a judgment and Miller prosecutes these proceedings in error. Of the numerous errors assigned we shall consider only two. The plaintiff, prior to the trial, took the deposition of G. A. Hollem. Before the trial the defendant moved to suppress this deposition on the ground that the name of the witness was not stated in the notice. This motion was overruled and the defendant excepted. When the deposition was offered in evidence he again objected on the same ground. The objection was overruled and he again excepted. Section 378 of the Code of Civil Procedure provides, among other things, that a notice to take depositions shall "specify the names of the witnesses to be examined." The notice in this case was that on a day named, and at a place specified, the plaintiff would take the depositions of "D. M. Frey and Gus Hahn," or "Gus Halin." From the transcript before us it is somewhat difficult to decipher the name, but it is plainly not G. A. Hollem, whose deposition was taken, or anything which could be considered *idem sonans* with that name. We do not hold that in the notice to take a deposition the name of the witness must be stated with orthographical accuracy; but the rule of *idem sonans* applied in other departments of the law should prevail, and there was certainly nothing in the notice served to apprise the defendant that it was the intention to take the deposition of G. A. Hollem, either by a correct writing of that name or by the use of letters indicating a name hav-

ing the same or similar pronunciation. The motion to suppress the deposition should have been sustained.

On the measure of damages the court gave the following instruction: "If the plaintiff has shown himself entitled to recover in this case under the evidence and instructions of the court, he can recover only the actual damages that he has sustained by reason of the injury complained of; that is, such damages as will compensate or pay him for the injury he has sustained. But in estimating the compensatory damages in cases of this nature, all the consequences of the injury are to be taken into consideration, future as well as past; the plaintiff is therefore entitled to recover all damages which he has suffered up to the time of the trial, and for all damages which it is reasonably probable that he will sustain in the future, not to exceed the sum claimed in his petition, which has before been estimated to be $5,000. In estimating the amount of such damages, the elements that the jury are entitled to take into account consist of all effects of the injury complained of; consisting of personal inconvenience, all bodily or mental suffering, disfigurements or permanent annoyance which is liable to be caused by the deformity resulting from the injury complained of; and the permanent impairment of the plaintiff's capacity or power to earn money in the future. In determining this last element you are at liberty to consider the health, condition, and earning capacity of the plaintiff before the injury complained of, as compared with his present condition in consequence of the injury, and how far that injury is calculated to disable the plaintiff from securing employment at his usual vocation or calling, or receiving money thereat, or from engaging in those pursuits or callings for which in the absence of the injury he would have been qualified; you may consider also the age of the plaintiff, his present health, and his reasonable expectancy of life." It will be observed that several times in this instruction the court makes the test the loss sustained by reason of "the

injury complained of." Elsewhere in the charge the broken arm is referred to in similar terms as "the injury." This instruction was misleading and erroneous. If the defendant was guilty of malpractice, he was not liable for all the injuries resulting from the breaking of plaintiff's arm. He was liable only for such damages as resulted from his failure to exercise that degree of care and skill ordinarily exercised and possessed by physicians and surgeons in the treatment of such cases. That plaintiff suffered damages by reason of the breaking of his arm was indisputable; that some damages would have resulted from that injury in spite of the most skillful treatment is clearly unquestionable. The defendant, no matter how unskillful he may have been, was not liable for all the injuries resulting from the breaking of the arm. He was only liable for those resulting from malpractice; that is, for the damages accruing to plaintiff on account of the injury in excess of those which would have accrued to him naturally from the breaking of his arm had he been treated with that degree of skill and care ordinarily possessed by physicians and surgeons.

For the errors discussed the judgment must be reversed. Other questions presented by the record may not recur and have not been closely examined and are not decided.

REVERSED AND REMANDED.

POST, C. J., not sitting.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. PATRICK MCCARTY.

FILED OCTOBER 21, 1896. No. 6751.

1. **Master and Servant:** RISKS OF EMPLOYMENT. A servant generally does not assume the risk of dangers due to his master's negligence, nor does he, in all cases, assume the risk of dangers arising from

sudden unforeseen circumstances, not ordinarily incident to the employment.

2. ———: ORDERS: OBEDIENCE: NEGLIGENCE. When a master gives a servant a command requiring the doing of an act not within the usual scope of the servant's duty, which must be performed at once or not at all, without opportunity for deliberation, the servant is not charged with contributory negligence, even though there may have been danger apparent to him in the performance of the act, unless the danger was so patent that a prudent man would not have obeyed.

3. ———: ———: ———: ———. In such case the master may be negligent in giving the command, although the servant was not negligent in obeying it.

4. ———: ———: ———: ———. The test of contributory negligence in such cases, as in others, is whether the servant in obeying conducted himself as a man of ordinary prudence would conduct himself under the circumstances. An instruction that the servant was not negligent unless no one but a reckless or foolhardy man would have obeyed, is therefore erroneous.

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

The facts and issues appear in the opinion.

M. A. Low, *W. F. Evans*, and *C. S. Montgomery*, for plaintiff in error:

The petition does not state a cause of action. It is not alleged therein that defendant in error was ignorant of the danger of complying with the order of the foreman, or that the danger was not connected with, or was not within the scope of, his employment. Admitting the facts alleged in the petition to be true, the defendant in error cannot recover unless the danger was unknown to him and not within the scope of his employment. (*Indianapolis & St. L. R. Co. v. Watson*, 114 Ind., 20; *Louisville, N. A. & C. R. Co. v. Sanford*, 117 Ind., 265; *Louisville, N. A. & C. R. Co. v. Corps*, 24 N. E. Rep. [Ind.], 1046; *New Kentucky Coal Co. v. Albani*, 40 N. E. Rep. [Ind.], 702; *Missouri P. R. Co. v. Baxter*, 42 Neb., 793; *Skidmore v. West Virginia & R. R. Co.*, 23 S. E. Rep. [W. Va.], 713.)

If the evidence tended to show that the order given by

the foreman was a negligent one, it showed beyond a doubt that defendant in error, in attempting to comply with it, assumed the danger, or was guilty of gross negligence in attempting to obey it. The court erred in refusing to instruct a verdict for defendant below. (*Skidmore v. West Virginia & R. R. Co.*, 23 S. E. Rep. [W. Va.], 713; *Bell v. Western R. Co.*, 70 Ga., 566; *Patterson v. Pittsburg R. Co.*, 76 Pa. St., 393; *East Tennessee V. & G. R. Co. v. Duffield*, 12 Lea [Tenn.], 63; *Baker v. Western R. Co.*, 68 Ga., 706; *Roul v. East Tennessee R. Co.*, 11 S. E. Rep. [Ga.], 395; *Jones v. Galveston, H. & S. A. R. Co.*, 31 S. W. Rep. [Tex.], 706; *Cassidy v. Maine C. R. Co.*, 76 Me., 488; *Dowell v. Vicksburg & M. R. Co.*, 61 Miss., 519; *Smith v. Winona & St. P. R. Co.*, 42 Minn., 87; *Brown v. Oregon Lumber Co.*, 33 Pac. Rep. [Ore.], 557; *Priestley v. Fowler*, 3 M. & W. [Eng.], 1; *Rush v. Missouri P. R. Co.*, 36 Kan., 129; *Pennsylvania R. Co. v. Lynch*, 90 Ill., 334; *Dougherty v. West Superior Iron & Steel Co.*, 60 N. W. Rep. [Wis.], 274; *Atchison, T. & S. F. R. Co. v. Schroeder*, 47 Kan., 315; *Ft. Smith Oil Co. v. Slover*, 58 Ark., 168; *Leary v. Boston & A. R. Co.*, 139 Mass., 584; *Wormell v. Maine C. R. Co.*, 79 Me., 397; *Hogan v. Northern P. R. Co.*, 53 Fed. Rep., 519; *Patnode v. Harter*, 20 Nev., 303; *Hunter v. Cooperstown & S. R. Co.*, 112 N. Y., 371; *St. Louis, I. M. & S. R. Co. v. Rosenberry*, 45 Ark., 256; *Bardwell v. Mobile & O. R. Co.*, 63 Miss., 574; *Vimont v. Chicago & N. W. R. Co.*, 71 Ia., 58; *Yeager v. Burlington, C. R. & N. R. Co.*, 61 N. W. Rep. [Ia.], 315; *Toomey v. Eureka Iron & Steel Works*, 50 N. W. Rep. [Mich.], 850; *Showalter v. Fairbanks*, 60 N. W. Rep. [Wis.], 257; *Linch v. Sagamore Mfg. Co.*, 143 Mass., 206.)

The court erred in giving the instruction relating to the servant's duty to obey orders and the question of negligence. (*Missouri P. R. Co. v. Baxter*, 42 Neb., 793; *Ransom v. Getty*, 37 Kan., 76; *Whitsett v. Chicago, R. I. & P. R. Co.*, 67 Ia., 150; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S., 703; *Union P. R. Co. v. Ogilvy*, 18 Neb., 643; *Cropsey v. Averill*, 8 Neb., 152; *Spears v. Chicago, B. & Q. R. Co.*, 43 Neb., 720; *Kearney Electric Co. v. Laughlin*, 45 Neb., 390.)

Mahoney & Smyth, contra.

In argument against plaintiff in error's first contention, reference was made to the following cases: *Mattise v. Consumers Ice Mfg. Co.*, 16 So. Rep. [La.], 400; *Promer v. Milwaukee, L. S. & W. R. Co.*, 63 N. W. Rep. [Wis.], 90; *Missouri, Kansas & T. R. Co. v. Hamilton*, 30 S. W. Rep. [Tex.], 679; *Settle v. St. Louis & S. F. R. Co.*, 30 S. W. Rep. [Mo.], 125; *Strong v. Iowa C. R. Co.*, 62 N. W. Rep. [Ia.], 799; *Sioux City & P. R. Co. v. Findlayson*, 16 Neb., 578; *Lee v. Smart*, 45 Neb., 318; *Kearney Electric Co. v. Laughlin*, 45 Neb., 390; *Dehning v. Detroit Bridge & Iron Works*, 46 Neb., 556; *English v. Chicago, M. & St. P. R. Co.*, 24 Fed. Rep., 906; *Miller v. Union P. R. Co.*, 12 Fed. Rep., 600; *Hawley v. Northern C. R. Co.*, 82 N. Y., 370; *Patton v. Western N. C. R. Co.*, 1 S. E. Rep. [N. Car.], 863; *Stephens v. Hannibal & St. J. R. Co.*, 86 Mo., 221; *Union Stock Yards Co. v. Conoyer*, 38 Neb., 488; *Mays v. Chicago, R. I. & P. R. Co.*, 14 N. W. Rep. [Ia.], 340; *Wells v. Burlington, C. R. & N. R. Co.*, 9 N. W. Rep. [Ia.], 364; *City of Lincoln v. Walker*, 18 Neb., 244; *Union P. R. Co. v. Broderick*, 30 Neb., 735; *Union P. R. Co. v. O'Hern*, 24 Neb., 775; *Kelley v. Chicago, M. & St. P. R. Co.*, 50 Wis., 381.

Defendant in error was not guilty of contributory negligence in attempting to obey the order of his master. (*Johnson v. Westchester & P. R. Co.*, 70 Pa. St., 357; *Swigert v. Hannibal & St. J. R. Co.*, 75 Mo., 475; *Texas & P. R. Co. v. Murphy*, 46 Tex., 356; *Filer v. New York C. R. Co.*, 49 N. Y., 47; *Texas & P. R. Co. v. Reed*, 31 S. W. Rep. [Tex.], 1058; *Lee v. Smart*, 45 Neb., 318; *Union P. R. Co. v. Broderick*, 30 Neb., 735; *Thompson v. Hermann*, 47 Wis., 602; *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St., 390; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich., 205; *Mann v. Oriental Print Works*, 11 R. I., 152; *Lalor v. Chicago, B. & Q. R. Co.*, 52 Ill., 401; *Rogers v. Overton*, 87 Ind., 410; *Miller v. Union P. R. Co.*, 12 Fed. Rep., 600; *Shadd v. Georgia, C. & N. R. Co.*, 21 S. E. Rep. [N. Car.], 554; *Hurlbut v. Wabash R. Co.*, 31 S. W. Rep. [Mo.], 1051.)

IRVINE, C.

This was an action by McCarty against the railway company to recover for personal injuries sustained by McCarty while in the employ of the company. He recovered a judgment for $10,000. The railway company, by petition in error, seeks to reverse this judgment. McCarty, by cross-petition in error, seeks also to reverse it, on the ground of error in sustaining a motion for a new trial after a former verdict in his favor for $15,000, and to have judgment entered on such former verdict.

The cross-petition in error may be briefly disposed of. The motion for a new trial after the first verdict contained numerous assignments requiring for their review a consideration of the evidence. What purports to be a bill of exceptions embodying the evidence on the first trial, and also certain evidence used in support of the motion for a new trial, is not authenticated as the law requires and cannot, therefore, be considered. Error in sustaining the motion, therefore, does not appear, for this reason if for no other.

On the second trial the evidence, which was, except in a few details, uncontradicted, was to the following effect: McCarty had had some experience in railroad work in the general line of service in which he was employed by this company. He had been employed by Butler, a foreman of a construction crew, some eight weeks prior to the accident, and during that interval his work had been with a crew engaged in moving earth by means of a steam shovel. This shovel occupied a temporary track from twelve to eighteen feet from the main track. A train of flat cars, moved along the main track, was loaded by means of the steam shovel and then drawn several miles away for the purpose of unloading. The train had a conductor, engineer, and a fireman, as well as two men designated as "cable men," whose duty it was to assist in the unloading of the train. At the shovel, in addition to Butler and the men operating it, were four laborers,

one of whom was McCarty, and whose general business it was to work on the ground and assist in loading. These men were employed and discharged by Butler, and subject generally to his orders. When the hour for ceasing work had almost arrived on the day the accident occurred the train had been loaded, and it was Butler's desire to unload it that night. He concluded, therefore, to send the men working at the shovel with the train to assist in unloading. He testifies that before the train started he gave them a general order to get aboard. This is contradicted; but no particular significance attaches, because it is undisputed that if such an order was given it did not reach McCarty's ears. The train then started, and as it was pulling out Butler commanded McCarty to get aboard. McCarty undertook to do so. There were no steps or hand-holds on the cars, and McCarty, for the purpose of boarding them, seized with his right hand a stake on the side of a car and placed his right foot on the casing above one of the journals. This casing was rounded on top and McCarty's foot slipped off and the other foot passed beneath the wheels, crushing it so that a partial amputation of the foot was necessary. The testimony as to the condition of the ground adjoining the tracks and the construction of the cars is such as to create a very reasonable inference that to board the cars while in motion was a more or less dangerous proceeding. There is no evidence tending to show that any better or safer method existed of getting upon the cars than that which McCarty undertook to pursue. The argument of the railway company, stated in a condensed form, is that there is no obligation resting upon a master to exercise greater care for a servant's safety than the servant is himself required to exercise; and that if it was negligence for Butler to command McCarty to board the train while it was in motion, it was contributory negligence for McCarty to obey the order, it being neither alleged nor proved that the danger was not so apparent and so well known to McCarty as to Butler. Numerous authorities

are cited in support of the arguments on either side of this proposition; but we do not believe that their review in the opinion would be of any utility. It is only necessary to say that they disclose the hopeless conflict which exists among the authorities on many questions connected with the rights of master and servant in such cases; and to here collate them would only serve to show the desirability of "employers' liability acts," which would, by harmonizing the law, make it more nearly just both to master and servant than can be claimed as a result of the work of the courts in attempting to adjust the antiquated rules of common law to the vastly changed conditions of modern times.

Our conclusion, after a consideration of the subject, is that it is a harsh and unreasonable rule which charges a servant, when commanded to perform an act by his master, with the duty of at once determining whether or not the act can be safely performed, and then performing it at his peril, or refusing to perform it at the expense of losing his employment. The risk incurred by obeying a negligent command of the master is not one ordinarily incident to the servant's employment, and is not an assumed risk, because negligence on the part of the master is not presumed to be a feature of the employment. It is true that where ample time exists for examination and reflection, a servant may not, beyond a certain limit, continue in the service, performing dangerous acts, except at his own risk; and it is this consideration which governs the cases holding that the continued use of defective appliances without protest and a promise by the master to remedy them, discharges the master from liability. With the case, however, of a command given suddenly, which must be obeyed immediately or not at all, a different question is presented. The servant is confronted with a new danger, one not contemplated when he entered the employment, and one not made a part of it by continued use. The servant has certainly in the first place a right to presume that the master gave the com

mand advisedly and in the exercise of due care. If the servant disobey, he forfeits his employment; and even though he be aware of the danger, whether or not it is negligence for him to obey depends upon circumstances. The act may be so foolhardy, so clearly entailing disaster, that the only reasonable course is to disobey. The test of negligence is in such cases as in others, whether or not a man of ordinary prudence so situated would obey or refuse. In many cases a man of ordinary prudence compelled to decide instantly, even though aware of the existence of danger, would prefer obedience and would take the risk. It is not true, however, because the servant in such cases may not be guilty of negligence in obeying, that it follows necessarily that the master was not negligent in giving the order. In the first place, reflection and the exercise of discretion is the business of the master, and not of the servant. It is the duty of the master to determine what shall be done, and how. In general, the duty of the servant is merely to obey; and even when the command is given suddenly and without previous reflection, as in this case the master charged with the exercise of discretion has imposed upon him the duty of rightly directing and safely directing. Of course, a sudden exigency may arise which would relieve the master of any imputation of negligence in requiring, under such circumstances of exigency, a dangerous act to be suddenly performed. But here the failure to command McCarty to board the train before it started was not due to any sudden exigency, but apparently to mere inattention on the part of the foreman, and a failure by him to conceive the idea of sending men with the train until the last moment. It was not McCarty's duty to go with the train in the absence of a specific order for that purpose; and under the circumstances we think there was evidence to support a finding that Butler was negligent in giving the command and McCarty not negligent in obeying it. The law is thus stated by Judge Brewer in *English v. Chicago, M. & St. P. R. Co.*, 24 Fed. Rep., 906:

"Where a master commands a servant to go outside of his regular employment to do a work which is attended with a special danger, and the servant, in response to the specific commands of the master, goes and does the work, in the way and at the time directed, the fact that the servant knew that it was dangerous does not exonerate the master from responsibility or make the servant guilty of contributory negligence, unless the character of the danger is so patent and so extreme that no one but a foolhardy, reckless man would attempt it." (See, also, to the same effect, *Miller v. Union P. R. Co.*, 12 Fed. Rep., 600; and to a similar point, *Missouri P. R. Co. v. Tietken*, 49 Neb., 130.)

The district court, evidently endeavoring to follow the general principles which we have indicated, and guided largely by the language of Judge Brewer in *English v. Chicago, M. & St. P. R. Co., supra*, gave the following instruction: "It is in general the duty of an employe to obey the orders of his superior, and in the absence of knowledge or means of knowledge to the contrary, he may presume it safe for him to do so. However, he may not obey blindly and without regard to his personal safety; for it is incumbent on him to protect himself by the exercise of such care and diligence as the circumstances require. But when he receives an order which must be obeyed immediately or not at all, and when he has no time or opportunity for considering the situation or the danger, if any, of a compliance with the order, he may rely on the skill and judgment of his superior, unless to obey the order would be reckless, rash, or foolhardy on his part. If to obey would be so dangerous as to indicate that the employe had abandoned all care and consideration for his own safety, then obedience would be negligence in itself, which if it contributed to the injury would prevent a recovery." We think there was error in this instruction, notwithstanding the general principles we have indicated; although the language employed does not perhaps go beyond that of Judge Brewer in the

case referred to. The performance of an act by an employe not within the usual line of his duties and in obedience to a command acting instantly and under circumstances permitting no deliberation, is not the assumption of a risk ordinarily incident to the employment, and is, therefore, not one of the assumed risks of servants. The right to recover for injuries sustained in the course of performing such acts depends upon ordinary considerations of negligence and contributory negligence. The test of negligence is whether a man of ordinary prudence would so conduct himself under the circumstances, and, therefore, the master is in such case only liable for the consequences of a command which a person of ordinary prudence would not have given under the circumstances, and which a man of ordinary prudence would have obeyed under the circumstances. In stating the law to the jury the court should have borne in mind this test. But the instruction we have quoted departs from the rule in several respects. In the first place, the first sentence was erroneous in implying that as a matter of law McCarty had a right to presume that it was safe for him to obey this command. Where the danger is not known or obvious, as the instruction states, the servant may presume the act safe because it was commanded. But here the danger was as apparent to him as to the master, and there was no basis in the evidence for submitting the case on the theory that the danger was not known or susceptible of knowledge. In the second place, according to the instruction, the servant would be excused in obeying the order unless obedience would be "reckless, rash, or foolhardy." This can only mean that in order to charge a plaintiff with contributory negligence in such cases his act must not only be one which an ordinarily prudent man would not perform, but must be one which no man except a reckless, rash, and foolhardy man would perform. In other words, instead of holding up to the jury as a test of conduct that of a man of ordinary prudence, it raises before them as a type the conduct of a man reckless and

foolhardy, and excuses contributory negligence if not within the line of conduct that such a man would pursue. Finally, this erroneous idea is emphasized by the last sentence of the instruction, by which it is plainly implied that obedience to the command would not constitute negligence unless the circumstances were such as to indicate that the servant had abandoned all consideration for his own safety. This last sentence, to a certain extent, explains the previous one, and the combined effect of the two is to state to the jury that the servant might recover if the circumstances were such that any man, however imprudent, however careless, might have performed it, provided he kept in view the slightest consideration for his safety. In the respects indicated the instruction fails essentially to propose to the jury the true test of negligence, to-wit, the conduct of a man of ordinary prudence under the circumstances.

REVERSED AND REMANDED.

THOMAS CUMMINGS, APPELLEE, V. BENJAMIN EMSLIE ET AL., APPELLEES, IMPLEADED WITH JOHN G. WILLIS, APPELLANT.

FILED OCTOBER 22, 1896. No. 6769.

Mechanics' Liens: MORTGAGES: PRIORITIES. A mortgagee who encourages the improvement of the mortgaged property by an agreement to subordinate his lien to the cost thereof, will, as to persons furnishing labor and material for use therein upon the faith of his promise, be deemed a promoter of such improvement, and their liens for labor and material so furnished will be entitled to priority over his mortgage. (*Bohn Mfg. Co. v. Kountze*, 30 Neb., 719.)

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

John W. Lytle, for appellant.

Smith & Sheean, W. M. Cowherd, Silas Cobb, Curtis & Shields, Donovan & Evans, George M. O'Brien, and *W. T. Nelson, contra.*

POST, C. J.

This action was brought by the appellee, Thomas Cummings, to foreclose an alleged mechanic's lien upon lot 19, in block 2, Idlewild addition to the city of Omaha, the defendants therein being Benjamin Emslie, the owner of the title to the property described, Dan Burr, George Gilbert, Benjamin Ames, the Phœnix Foundry Company, Wyatt Bullard Lumber Company, John J. Rounds, Edward Barrick, Wearne Brothers, John Swisher, and Joseph Haines, who claim mechanics' liens thereon, and John G. Willis, whose interest is that of a mortgagee. The latter filed a cross-bill setting up his mortgage for $3,237, which bears date of January 1, 1891, and praying for an accounting and decree of foreclosure, to which Burr, Gilbert, Rounds, and the Wyatt Bullard Lumber Company filed answers, in all of which it is alleged that on or about May 1, 1891, the said Willis entered into a verbal agreement with his co-defendant Emslie, whereby the latter agreed to erect upon the mortgaged premises a two-story brick building, and whereby "the said Willis promised and agreed to take a first mortgage upon the said premises for the sum of $500, and to subject the balance of his claim against the said Emslie to all the claims for work, labor, and material furnished to the said Emslie by any and all persons whomsoever for the erection of the said brick building." It is further alleged by the defendants named that they were advised by Emslie of said agreement, and that the work, labor, and material claimed for was furnished pursuant to contract with the latter in the construction of the building thus provided for, and upon the faith of the agreement above mentioned. Issue was joined by a general denial of the allegations of said an-

swers, and a hearing had, resulting in a decree for Willis in the amount of his note and mortgage, of which the sum of $1,000 is declared to be a first lien upon the mortgaged premises and the balance of $1,673.93 subordinated to the liens of his contesting co-defendants, and from which an appeal is by the former prosecuted to this court.

The only question presented by this appeal is whether Willis was, in a legal sense, a promoter of the building in question, so as to give the liens of laborers and material men contributing thereto priority over the lien of the mortgage. Gilbert, one of the contesting defendants, referring to an account rendered to Emslie for brick and labor employed in the construction of said building, testified as follows:

He [Emslie] said it was all right and told me if I would go with him to Mr. Willis I would get my $50.

Q. Did he ever pay you anything upon that work that you performed there?

A. Well, he and I went over to Mr. Willis.

Q. Very well, you may state when, and the circumstances connected with the payment of it.

A. I asked him for $100 and he said that if I would go over with him to Mr. Willis he could get it for me from Mr. Willis. I went over and Mr. Willis paid me $50 with the understanding that he would pay me $50 more the following Saturday provided I would go on and finish up the walls of the second story. I agreed to do so. The Saturday came, but he never paid me the second $50. * * *

Q. Did you ever have a conversation with Mr. Willis with reference to his subjecting his mortgage to these claims or to a mortgage for the payment of these claims?

A. I had a conversation with both Mr. Willis and Mr. Emslie to the effect that he had to take a second mortgage and release his first mortgage to enable Emslie to get a loan and that the loan was to be big enough so that he could pay him $1,000 on his mortgage and still have

enough left to build a building and that would leave about $500, and that Mr. Willis said he had to do it to save himself and help Emslie too.

Emslie was, it is shown, engaged with the knowledge and consent of Willis in an effort to effect a loan in the manner and for the purpose alleged. Referring to that subject the defendant Burr testified:

Q. What conversation did you have with Mr. Willis before going to Mr. Dale about the loan?

A. The substance of it was this, that he had an arrangement that he would take a part of his claim second to these material claims, or take a second mortgage—second to the mortgage that would be necessary to pay these material claims, but as he told me the exact amount had not been agreed upon. * * *

Q. Was there anything said between you and Mr. Willis as to whether or not the claims for material and labor should be paid out of the amount of a new loan?

A. Only this, that he told me if I went on and finished the contract that I would get my pay, that he would see that I would get my pay. * * *

Q. He was to have the balance out of the loan that was being made after your claim and other claims for labor and material were paid?

A. That is the idea I got of it.

Q. From the conversation with him?

A. Yes sir.

Willis' testimony contains an explicit denial of the alleged agreement, while the statements of Emslie bearing upon that subject are, to say the least, vague and unsatisfactory, although he assured each of the appellees that Willis had agreed to accept in lieu of his first mortgage, $1,000 in cash and a second mortgage which should be subject to the amount of claims for labor and material. The evidence, we think, fairly warrants the finding of the district court, that Willis was a promoter of the building described, and that as such he empowered Emslie, the mortgagor, to contract with appellees for the labor and

material furnished by them with the understanding that his claim in excess of $1,000 should be subordinate to their liens. The case is, therefore, within the principle recognized by this court in *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719; *Millsap v. Ball*, 30 Neb., 728; *Pickens v. Plattsmouth Investment Co.*, 37 Neb., 277, and *Holmes v. Hutchins*, 38 Neb., 601.

DECREE AFFIRMED.

MISSOURI PACIFIC RAILWAY COMPANY V. LENA GEIST.

FILED OCTOBER 22, 1896. No. 6821.

1. **Railroad Companies:** HIGHWAY SIGNALS: DAMAGES. It is provided in section 104 of chapter 16 of the Compiled Statutes of this state: "A bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect."

2. ——: ——: INSTRUCTIONS. Under the foregoing provision, in an action where an engine started from a position at a distance from a street or road crossing of less than eighty rods, it would have been proper to instruct a jury in the trial of the cause that the bell should have been rung or the whistle blown from the starting place until the engine had crossed the road or street. But under the existent circumstances it was not an error which calls for the reversal of a judgment for plaintiff, that the judge instructed the jury that it was the duty of defendant to cause the bell to be rung or the whistle to be blown at a distance of at least eighty rods from the place where the railroad crosses a street, and be kept ringing or whistling until it shall have crossed such street, without further informing the jury that if the bell was rung or the whistle blown from the starting point, as in the case at bar, but some sixty or seventy feet distant from the crossing, it would have fulfilled the duty.

3. ——: ——: ——. The jury was informed by one portion of an

instruction given as follows: "But defendant is not required to both ring the bell and blow the whistle, but must do one or the other; a failure to do either, under the statute, renders the defendant criminally liable." *Held*, That the portion in which the jury was told that for a failure to perform the designated duty the defendant became criminally liable, was improper in a civil action for damages, and calculated to mislead the jury in estimating the damages to be allowed, if any, and hence prejudicial to the rights of defendant.

4. ———: ———: ———: NEGLIGENCE. The failure of a railroad company to cause a bell to be rung or a whistle to be sounded as its engine approaches a street or road crossing, is evidence which tends to prove negligence on the part of the company. It may, but does not necessarily demand an inference of negligence. It does not establish negligence as a matter of law, and it is error for the court to instruct a jury that such failure on the part of the company constitutes negligence and renders it liable. Rule announced in *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb., 848, and *Omaha & R. V. R. Co. v. Talbot*, 48 Neb., 627, approved and followed.

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

Lee S. Estelle, J. W. Orr, and *B. P. Waggener*, for plaintiff in error:

There was error in the seventh instruction. (Compiled Statutes, ch. 16, sec. 104; *Atchison, T. & S. F. R. Co. v. State*, 22 Kan., 1; *State v. Heins*, 14 Neb., 479; *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb., 848; *Omaha & R. V. R. Co. v. Talbot*, 48 Neb., 627.)

Mahoney & Smyth, contra.

References: *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb., 475; *Union P. R. Co. v. Rasmussen*, 25 Neb., 810.

HARRISON, J.

Lena Geist, a girl, at the time of the commencement of this action, six years of age, by her father and next friend, Anton Geist, instituted these proceedings in the district court of Douglas county against the defendant railroad company to recover damages alleged to have accrued to her by reason of injuries caused by the negligence of the

defendant company. It was pleaded that the injuries to plaintiff were received May 3, 1892, at a place where a line of railroad operated by the defendant crossed Nicholas street, in the city of Omaha, and where it devolved upon defendant, as a duty, to have present a flagman to give persons about to cross the track of defendant warning or notice of any approaching trains, engines, or cars. It is stated in the petition: "That said injuries were caused wholly by negligence and want of care of the defendant, in negligently omitting to give a signal of the approach of said locomotive and train to said crossing, either by whistling or ringing the bell, and in negligently neglecting to properly flag said crossing and to give notice to said Lena Geist of the approach of said train upon said railroad." There is in the petition, in another portion than that just quoted, this sentence: "That the said defendant, by its servants, agents, and employes, negligently ran a locomotive with a train of cars very rapidly along its said tracks, and to and across said Nicholas street at said crossing." The defendant's answer, to the extent we need notice it, was as follows: "For further answer this defendant says that the said plaintiff ought not to have or maintain her said action against this defendant, because it says that the parents of said Lena Geist were guilty of gross and criminal carelessness in permitting the said Lena Geist, a mere infant, to go about unattended upon the public streets and upon railroad tracks which were being used in operating engines, cars, and locomotives thereon and thereover. That the said parents of Lena Geist, well knowing that she was incapable of taking care of herself, and of the dangers that she incurred in crossing railroad tracks, took no precaution whatever to protect her from injury and accidents. That if the said parents of Lena Geist had exercised reasonable and ordinary care and diligence as her parents and natural guardians and protectors, the injury complained of would not have occurred, and the same was solely the result of the gross and criminal negligence and

carelessness of the said parents of said Lena Geist." The foregoing, coupled with denials of matters stated in the petition, were all the defenses contained in the answer. There was a reply, and of the issues joined the result of a trial was a verdict and judgment for plaintiff in the sum of $8,333.33 1-3. The defendant company presents the cause here for review.

One of the errors assigned is directed against the action of the trial judge in giving paragraph No. 7 of the instructions to the jury, which was as follows: "You are further instructed that under the statutes of this state the defendant is required to have upon each locomotive engine upon its tracks a bell and steam whistle, which bell must be rung or the steam whistle must be blown at the distance of at least eighty rods from the place where the railroad crosses a street, and be kept ringing or whistling until it shall have crossed such street, but defendant is not required to both ring the bell and blow the whistle, but must do one or the other. A failure to do either, under the statute, renders defendant criminally liable, and would be negligence on the part of the defendant, and if you find from the evidence, under these instructions, that plaintiff was injured by reason of defendant not ringing the engine bell or not blowing the whistle, as above explained, and you further find that such neglect to ring the bell or blow the whistle was the proximate cause of the injury complained of, and you find that plaintiff has established by the evidence the other material alleged facts in her behalf, your verdict should be for the plaintiff."

The evidence in the case disclosed that the place from which the locomotive and train started was only some sixty or seventy feet distant from the crossing where the plaintiff was struck by the engine, and it is urged that it was wrong for the court, in view of such condition of the facts, to inform the jury that it was the duty of the defendant to cause the bell of the engine to be rung, or the whistle blown, "at the distance of at least eighty rods

from the place where the railroad crosses a street, and be kept ringing or whistling until it shall have crossed such street," without further informing that body that it would have been sufficient in this case if it had been shown that either was done from the time the engine started, sixty or seventy feet distant from the crossing, and continued until the engine had crossed the street. It would have been proper to tell the jury that the bell should have been rung or the whistle blown from the time the engine started with its train until it reached and passed the crossing from a place distant eighty rods, or any shorter distance therefrom, to agree with the facts in the particular case, and the instruction would have been better if so framed. But we do not feel warranted in saying that because it was not, the jury were misled and rendered a verdict for plaintiff influenced to any extent by the statement that the bell must have been rung or the whistle blown at least eighty rods from the crossing on the approach of an engine to it, when, according to the existent facts, there were but sixty or seventy feet intervening between the starting place of the engine and the crossing. We do not consider that there was such an error here as, in itself, calls for a reversal of the judgment for plaintiff.

It is further complained of in this paragraph of the instructions that it was error for the trial court to state to the jury, "but defendant is not required to both ring the bell and blow the whistle, but must do one or the other. A failure to do either, under the statute, renders defendant criminally liable." That this being a civil action, without reference to the penalty attached by statute to the failure to ring the bell or blow the whistle of the engine when approaching the crossing of a road or street, it must be said that the information which was conveyed to the jury, in the statement that a failure to comply with the statute rendered the defendant criminally liable, has no possible application in this case. It was entirely irrelevant to the issues in the case and was well calcu-

lated to mislead a jury; possibly to raise the thought that as the failure of the defendant in the particulars in question made it criminally liable, it would not be amiss to assess heavier damages against it than in a case where no criminal liability accrued. A jury might well conclude that such a statement had some significance and be entitled to consideration and weight in its deliberations on the issues involved and submitted, from the mere fact that the judge, on whom the jury knew it was to depend for its information in respect to the rules of law applicable to the issues and evidence, embodied such a statement in the charge, and hence give it the force and application to which it seemed entitled. It is urged by counsel for plaintiff that there was no prejudicial error in this portion of the instructions, and if any, it was cured by giving the tenth paragraph of the charge, in which the jury were told, after an enumeration of elements of damages to be considered, that the plaintiff was entitled to such an amount as, in the judgment of the jury, "under all the facts disclosed by the testimony, you think will fairly compensate her for the injury." It may be said that this confined the damages to compensation, but it is a very general statement and not sufficient to overcome the error committed in the former instruction.

In support of the argument that it was not wrong for the trial court to inform the jury that defendant became criminally liable if it failed to observe the statutory requirements in regard to ringing the bell and blowing the whistle, our attention is directed by counsel to the opinion in the case of *Union P. R. Co. v. Rasmussen*, 25 Neb., 810, in which it is asserted this court approved two instructions, in each of which the trial court quoted the section of the statutes in which the requirements are made. The section is 104 of chapter 16 of Compiled Statutes, and reads as follows: "A bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad

shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect." In the opinion cited there is the following in regard to the two instructions: "In two other instructions the court quoted section 104 of chapter 16 of the Compiled Statutes, which requires the ringing of the bell and sounding of the whistle before reaching public crossings, and instructed the jury that a failure to comply with the requirements of this statute was 'a matter properly to be considered by the jury in determining whether defendant was guilty of negligence in killing the cow.' It is said that the bell was rung and that the cow was not killed upon the crossing. Upon the subject of the ringing of the bell, and as to the exact location at which the cow was killed, the cause was submitted to the jury upon conflicting testimony, some witnesses testifying that the cow was struck at the crossing, and others that she was feeding by the track near the crossing. The engineer in charge of the train testified that the bell was rung continuously, while others who were near by testified that it was not. The cause was submitted to the jury upon these two theories and the instruction complained of was not erroneous." It is evident that no complaint had been made of quoting that part of the section affixing a penalty for the failure to fulfill the exactions of the section. It was not under consideration, was not referred to or passed upon by the court. The instructions were approved as properly submitting the two mooted questions to the jury. Whether error or not to quote the portion of the section in relation to a penalty in an instruction to a jury in a civil case, we need not now discuss or decide. To tell the jury, as was done in this case, that it rendered the defendant "criminally liable," as descriptive of what conse-

quences would attach to omissions to do as was required by law, gave it greater import, or moment, than would the incorporation of the words of the section in the instruction, for the like purpose.

It is further objected to paragraph 7 that by it the failure to comply with the statutory requirements was made negligence as a matter of law, determined so by the trial court; that it was, at most, but evidence of negligence, and hence the trial court erred in treating it in the instruction as negligence as a matter of law. In the decision in the case of *Chicago, B. & Q. R. Co. v. Metcalf*, reported in 44 Neb., 848, wherein the same question was discussed on objection to an instruction that it had the weakness alleged against this one, it was announced by this court that in such a case it was erroneous to instruct the jury that the railroad company was liable if it failed to give the signal required by statute, provided the injury was caused in consequence of such omission. (See, also, *Omaha & R. V. R. Co. v. Talbot*, 48 Neb., 627; *Kansas City & O. R. Co. v. Rogers*, 48 Neb., 653.)

We are very earnestly urged to re-examine the question in this case and reverse the rule established in what we will designate, for convenience, the Metcalf Case; and some quite forcible arguments in support of a contrary doctrine are presented in the briefs filed in this case, and also in those filed in other cases now pending and in which a similar question arises for consideration. We have carefully considered the cases which were cited by Commissioner IRVINE in the Metcalf Case, and from an investigation of which a conclusion was reached that the doctrine stated in the Metcalf Case had been forecast in prior decisions of this court, in cases where the same or a kindred principle was more or less directly involved and considered. We have been furnished with no arguments sufficiently convincing to cause us to change our views on this point as embodied in the opinion to which we have referred, and hence must again signify our approval of the reasoning in that case.

In the absence of any statutory provisions on the subject, it is the duty of the railway company, in approaching with its train the crossing of a highway, to use ordinary care to avoid a collision with, or injury to, persons on the highway, to provide the means and to give suitable warnings of the approach of the train. (4 Am. & Eng. Ency. of Law, 910.) By statutes in some states certain precautions have been made necessary to be observed on the nearing of a train to a crossing, and an absolute liability placed upon the company for a failure of the observance of the requirements of the statute. (See Code of Tenn., 1884, secs. 1298, 1300.) In other states the enactments are not so stringent, and of the latter is our own state. We have hereinbefore quoted it. As we view it, the legislature selected the bell and whistle as the best means, and the ringing of one and blowing of the other, the best manner of giving notice of the coming of an engine and train to the crossing of a street or highway. This may be said to be but the expression of what the law-makers afforded as, in their judgment, the best method of effecting the purpose sought, the performance of some, at least, of the duties of a railway company to observe ordinary care in the running of its trains. To this was added the liability to accrue for a failure to perform any duty which arises on the part of any person or corporation when in a situation or under conditions where the exercise of ordinary care is required. The section does not change the existing rules of evidence in regard to the establishment of any of the elements or constituents of the act or acts referred to in it, by making any greater or lesser amount of evidence necessary to the proof, or attach more or less weight to the proof of any of the facts; and it follows that any and all the facts proved, including that of failure to comply with the prescription of the statute, are but evidential of negligence; whether there is negligence, not being established as a matter of law for the court to determine, but whether existent, in view of the facts and circumstances of the case, as a matter of fact, the answer is

to be given by the jury. The section does not mean, "If you have performed what is herein commanded, you have exercised ordinary care, and all that is required, and will be relieved from liability," nor does it mean that if you have not performed or complied with the exactions, you have been guilty of negligence as a matter of law; but its fair meaning, and under the doctrine adopted and now approved by this court is: "Your failure to comply with the requirements hereof shall furnish evidence from which a jury may infer your negligence."

There are other and further assignments of error, but we do not deem their discussion essential at the present time. It follows, from what we have hereinbefore expressed, that the judgment be reversed and the cause remanded.

REVERSED AND REMANDED.

NORVAL, J.

I concur in the conclusion reached, but do not agree to all the reasons given in the above opinion for the reversal of the judgment of the trial court.

VERNON W. HALBERT V. M. H. B. ROSENBALM ET AL.

FILED OCTOBER 22, 1896. No. 6079.

1. **Trial:** EXCLUDING WITNESSES: REVIEW. An application to have the witnesses excluded from the court room during the progress of the trial of the cause in which they are to be examined is addressed to the sound discretion of the trial judge. Where a request for such action is refused and no abuse of the discretion is apparent, there is no available error.

2. **Review:** CONFLICTING EVIDENCE. A verdict upon conflicting evidence, with sufficient evidence to sustain it, will not be disturbed.

3. ———: ISSUES IN APPELLATE COURT. In an appeal from the county court to the district court, the cause must be tried on the same issues as were tried in the county court, unless some new matter

has arisen since the trial there, such as payment, etc. (*Fuller v. Schroeder*, 20 Neb., 631.)

4. **Conversion of Note:** MEASURE OF DAMAGES. The general rule is that in an action for the conversion of a promissory note, the measure of damages in the event of a recovery is the value of the note at the time of its appropriation, with interest thereon.

5. **Negotiable Instruments:** INTEREST: CONVERSION: ACTIONS. A promissory note which provided for interest annually on the principal sum evidenced by it, had been for a number of years in the possession of one who it was determined was not the owner of it or entitled to its possession, but who, during the time he had the note in possession, collected the annual installments of interest as they became due, and appropriated them to his own use. *Held*, That an action would lie and could be maintained in favor of the owner of the note for the aggregate amounts of the payments of interest so collected against the party who received and appropriated them.

6. **Rulings on Evidence:** HARMLESS ERROR. Alleged errors in relation to the exclusion of evidence examined, and *held* that, if any errors in the action of the court, inasmuch as evidence of a like character and to the same effect of that excluded was admitted or appeared in other portions of the evidence, both prior and subsequent to the time of its exclusion, they were without prejudice.

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

Charles Offutt, for plaintiff in error.

Jesse T. Davis and *W. W. Slabaugh*, *contra*.

HARRISON, J.

This action was commenced by the plaintiff in the county court of Washington county, originally, against M. H. B. Rosenbalm of defendants, and in the petition there filed it was in substance alleged that on October 5, 1883, the defendant executed and delivered to Vilina Wild a promissory note, which was afterward, and prior to its maturity, sold by her and assigned to one Victor G. Lantry; that at the time she sold the note she indorsed the same in blank and thereby became liable for its payment; that the note was sold and assigned on the day he purchased it, by V. G. Lantry, to John S. Halbert, who soon thereafter sold and assigned it to the plaintiff, the

owner and holder thereof; that no part of the note had been paid except such sums as were thereon indorsed (the note was attached to the petition and made a part thereof), and that there was due the plaintiff from defendants on the note the sum of $740.77, for which judgment was demanded.

The defendant Rosenbalm answered, admitting the execution and delivery of the note and the amount due and unpaid, as alleged in the petition, but denied the plaintiff's ownership of the note, and alleged that the pretended indorsement of the note by Vilina Wild was a forgery, and that the assignment to plaintiff was by Victor G. Lantry, who had no interest in the note. There was a general denial of the other allegations of the petition.

Vilina Wild made application to intervene and plead and litigate her rights, and she filed what was denominated an answer, in which she admitted the allegations of the petition in regard to the making and delivery of the note to her by Rosenbalm and denied each and every other allegation in the petition contained, and further pleaded as follows:

"3. And further answering, I, Vilina Wild, allege that on or about the 5th day of October, 1883, I left the said note with Victor G. Lantry as a trustee and for safe-keeping, to be returned to me whenever same was demanded; I have demanded the same, and said Lantry refused to return the same; that I never sold, assigned, or in any way parted with the possession of said note; that the same was left in the possession of said Lantry; that it was presumed by me to be in the possession of said Lantry, as trustee, until shortly before the beginning of this suit; that Lantry never informed me, Vilina Wild, that he claimed the ownership of said note; that I, Vilina Wild, never sold or assigned said note to said Lantry, or to any person or persons; that she never made her mark on said note; that the pretended indorsement is fraudulent and unlawful, and is a forgery; that said Vernon W. Halbert

and said John S. Halbert are not innocent purchasers of said note.

"4. That the plaintiff has collected as interest on said note the following sums of money, to-wit: October 3, 1884, $65.12; November 4, 1885, $65.12; December 12, 1886, $65.12; December —, 1887, $65.12; October 5, 1888, $65.12; October 5, 1889, $65.12; October 5, 1890, $65.12; total amount, $390.72; that said interest was and is now due and owing to Vilina Wild as owner of said note.

"The said Vilina Wild prays plaintiff's cause of action may be dismissed, and that the ownership of said note may be adjudged in the intervening defendant, Vilina Wild, and that judgment may be entered against the plaintiff herein for the sum of $390.72, with interest at seven per cent per annum on the amount above stated to have been paid said plaintiff from the dates of payment thereof, and for costs of suit."

To this the plaintiff pleaded as follows:

"And now comes the said plaintiff and for answer to the petition of Vilina Wild, intervenor herein, denies each and every allegation in said petition contained, which does not admit the allegations of the petition of this plaintiff herein filed against the defendant, M. H. B. Rosenbalm, to be true.

"And this plaintiff further answering says that the said Vilina Wild should not recover as intervenor in the cause for the following good and sufficient reasons, in addition to the allegations of ownership in the petition of this plaintiff herein filed:

"1. That the said Vilina Wild is not the owner and holder of said note and is not entitled to the proceeds thereof, but sold and assigned the same and all her interest therein, sometime in the month of March, 1884, whereby her said cause of intervention should abate.

"2. That on the 18th day of October, 1890, she filed her petition in the district court of Washington county, Nebraska, against one Victor G. Lantry, praying that an accounting be had and that answer was filed therein by

said Lantry, fully accounting to her for said note and the proceeds thereof, which said issue is now joined and said cause of action and intervention has never been withdrawn from said cause, but the issues thereof are still pending in the district court of said county.

"3. That heretofore, to-wit, on the 3d day of January, 1891, the said Vilina Wild brought her action in the district court of said county against Victor G. Lantry and William H. Eller, defendants in replevin, the object and prayer of said petition being for judgment against the defendant for a return of said note and a certain mortgage therewith, or for the value thereof if the same is not returned, and for costs and damages for its detentions, and the said issues are now pending in that court."

The case at bar was tried in the county court, and from a judgment there in favor of Vilina Wild was appealed to the district court of Washington county, wherein the plaintiff filed a petition, which was, in substance, the same as that filed in the county court. Rosenbalm answered in like effect as in county court, and the answer filed for Vilina Wild did not differ materially from that filed by her in the county court, except in the amount of the recovery demanded being increased from $390.72 to $445.84.

A motion was filed for plaintiff to strike from Vilina Wild's pleading all of paragraph 4 thereof, which is the portion in which the collection of the interest on the note by the plaintiff was stated; also to strike from the prayer all reference to such interest or demand for the recovery thereof. On hearing, this motion was overruled and plaintiff was given leave to plead. The plaintiff then replied to Vilina Wild's answer, stating:

"This plaintiff objects and protests against the consideration of any matters or allegations made in said answer and objects and protests against the trial or hearing of any of the issues offered or tendered in said answer for the reason that this action was instituted in the county court of Washington county, Nebraska, which

said court has a jurisdiction limited to civil cases in any sum not exceeding $1,000, exclusive of costs, and the amount in controversy in this action, as claimed by the said defendant, Vilina Wild, in her answer and cross-petition, is more than the sum of $1,000, exclusive of costs, for inasmuch as the said Vilina Wild, in said answer, seeks to recover a promissory note of the value of $720.63 with interest from October 5, 1890, at nine per cent, and the further sum of $445.84, with interest from dates prior to said October 5, 1890, at seven per cent," and also denied each and every allegation of the third and fourth paragraphs of such answer, except as to portions in the reply expressly admitted and charged to be true, and further pleaded:

"Further replying to said answer of the defendant Vilina Wild, this plaintiff says:

"1. That this plaintiff purchased said note, as in his petition alleged, from John S. Halbert, and the said John S. Halbert purchased the same from Victor G. Lantry, the same Victor G. Lantry mentioned and named in the third paragraph of the said defendant Vilina Wild's answer; that said purchase was made from said Victor G. Lantry by said John S. Halbert, on the — day of ———, 1884, and the said John S. Halbert paid the said Victor G. Lantry therefor the sum of $729.60, and the said Victor G. Lantry received the same in execution and discharge of the trust under which he, the said Lantry, held said note.

"2. And plaintiff says that the said money so received by said Victor G. Lantry was by said Victor G. Lantry applied in discharge of the trust under which he, said Lantry, held said note, and the beneficiary of said trust received thereafter the full amount of the proceeds of said note so paid to said Victor G. Lantry, and thereby acquiesced in and ratified the sale of said note by said Victor G. Lantry.

"3. Plaintiff further says that at the time said Victor G. Lantry sold said note said Lantry was the trustee

holding the same for the said Vilina Wild as the possessor of the legal title, and for one M. B. Wild, the husband of Vilina Wild, as the owner of the equitable title to said note, one or both, this plaintiff is not informed and cannot positively state which.

"4. That the said Vilina Wild and the said M. B. Wild, the owners of the legal and equitable title respectively to said note, have acquiesced in the sale of the same by receiving the proceeds thereof from the said Victor G. Lantry and by failing for all time since the sale of said note by the said Victor G. Lantry to John S. Halbert on the day aforesaid, to make any objections whatsoever thereto, to demand the payment of any of the interest from the maker thereof, or from this plaintiff, or the said John S. Halbert, or the said Victor G. Lantry, the said Vilina Wild and the said M. B. Wild, each and both of them, during all of said time, since the assignment of said note to said John S. Halbert, well knowing of said assignment thereof and well knowing that the maker of said note, the defendant M. H. B. Rosenbalm, was able to pay the same when due and that the same was well secured by a mortgage upon real estate, and notwithstanding that fact have never demanded any payment of said note or the interest thereon or any part thereof, either from the maker of said note or from this plaintiff, and by virtue of said laches and delay, the said Vilina Wild is estopped to assert any claims whatsoever against this plaintiff, either to said note or to the money which this plaintiff has collected thereon.

"5. That by virtue of the facts aforesaid, and by virtue of the further fact that the said Victor G. Lantry was the trustee of the defendant Vilina G. Wild and of the said M. B. Wild, he, the said Lantry, had authority to collect the said note and to indorse the same and receive the proceeds thereof, and the said Victor G. Lantry did so collect said note and receive the proceeds thereof for the use, behoof, and benefit of the owner thereof.

"6. That though said note was made payable to the

said Vilina Wild, the said Vilina Wild was not the real party in interest therein, and was not in her own right or person entitled to the proceeds of said note, and did not actually own the same, but that the real owner thereof was the said M. B. Wild, and that said note was made payable to said Vilina Wild because the same was secured by a mortgage upon real estate in Washington county, Nebraska, and in recording said mortgage the record and description of the said note would necessarily appear upon the records in the county clerk's office of Washington county, Nebraska; that at the time the said M. B. Wild was insolvent and unable to pay his debts, and a number of his, said M. B. Wild's, creditors had obtained judgment against said M. B. Wild in the courts of Washington county, Nebraska, and were instituting supplementary proceedings for the purpose of satisfying their said judgments, executions on said judgments having been returned 'no property found,' and for and on account of these facts, the said note was made payable to the said Vilina Wild, the wife of the said M. B. Wild, in order to prevent said M. B. Wild's creditors from knowing that he, the said M. B. Wild, owned said note or had any interest therein; that said note never was the actual property of the said Vilina Wild, nor the proceeds thereof nor the money called for by the same, but the same belonged to the said M. B. Wild, the husband of the said Vilina Wild; that said Vilina Wild, at the time said note was taken, well knew that the reason and purpose of taking the same in her own name was as hereinbefore stated, and that the said M. B. Wild was the real owner thereof and that she was by law charged with the trust of accounting to him for the full amount thereof, and the plaintiff says that the full amount of said note has been received and appropriated by said M. B. Wild; that the defendant Vilina Wild fully acquiesced therein and that she is estopped to set up any title to the same against this plaintiff or charge this plaintiff with the amount of said note or any sum collected thereon by reason of the matters and facts hereinbefore stated."

To this counsel for intervenor interposed a motion to strike out all except the second defense, which was the general denial, for the reason that they presented new issues not raised and tried in the county court. This motion was overruled. In a trial of the issues to the court and a jury there was a verdict and judgment for the intervenor, and the plaintiff has prosecuted error proceedings to this court.

At the inception of the trial of the case in the district court the plaintiff requested the separation of the witnesses and also their exclusion from the court room, which request was denied. It is urged that in this there was error. It was a matter within the discretion of the trial court; the litigant was not entitled to it as a matter of right. (*Binfield v. State*, 15 Neb., 484.) There was no abuse of discretion in refusing the request which calls for a reversal of the judgment.

It was assigned for error that the verdict was not sustained by the evidence. We have carefully examined and considered the evidence. It is conflicting as to the points in the case necessarily passed upon by the jury in arriving at a verdict, but sufficient to support it, hence this assignment is of no avail.

It is argued that the cause of action stated in Vilina Wild's answer was barred by the statute of limitations. By reference to the statement of the pleadings herein, in the county court, it will be seen that the plea of the bar of the statute of limitations was not interposed in that court, either by demurrer or answer. The case being on appeal from the county to the district court, the issues for trial in the appellate court could not be different from those presented and tried in the county court unless some new matters had arisen since the trial, such as payment, release, etc. (*Fuller v. Schroeder*, 20 Neb., 631.) It is true, as we have before stated, that the judges of the district court overruled a motion to strike from the plaintiff's plea to Vilina Wild's answer the portions of it under which we presume it is claimed the bar of the statute

was stated, but, subsequently, the court refused to give to the jury, in the charge, an instruction on the subject of the statute of limitations and its effect upon the rights of Vilina Wild to recover in the action, as prepared and requested on behalf of the plaintiff, and wholly ignored in the instructions to the jury the matter of the statute of limitations as applicable in the case, thus clearly indicating that it was not considered as of the issues, and we approve of the action of the trial court in this particular, hence the effect of the statute of limitations as an issue need not now be considered.

In regard to the question of whether or not the intervenor had lost the right to the relief claimed through laches we will say that, in view of all the facts and circumstances adduced in evidence bearing upon this subject, it was within the province of the jury to determine it, and it was properly submitted by an instruction. The jury settled it on conflicting evidence which was sufficient to support the finding, hence it will not be disturbed.

Before pleading to the answer of Vilina Wild the plaintiff moved the court to strike from her answer all of paragraph 4 thereof, which contained the allegations in regard to the collection by plaintiff of interest which accrued annually on the note, and also to strike from the prayer of her answer all the portion in which demand was made for the recovery of such amounts of interest. This motion was overruled, and, under an assignment of error as to such action, it is argued that the intervenor could not claim ownership of the note and recovery of interest thereon, which had, prior to the commencement of this action, been collected by the plaintiff. As we read and understand the answer of the intervenor, it denies plaintiff's ownership of the note; denies that the intervenor ever indorsed or transferred it; asserts her ownership and the collection by plaintiff of the interest installments and their appropriation by him. The case seems to have been presented by the attorneys for inter-

venor, and the trial proceeded at all times on the theory that Vilina Wild had been the owner of the note and entitled to the interest, which, at any time, by its terms, became due, and her consequent right to recover it, and any sums of it collected and appropriated by any person without authority so to do. It is alleged by counsel for plaintiff that the cause of action, if one for conversion, accrued when the note was appropriated by plaintiff and that the interest payments were but subsidiary to the notes and incidental, and the action for the recovery of the note necessarily one and indivisible, in which there might be a recovery of the value of the note as of the time of the conversion, but not for any interest which, by the terms of the instrument, had become due and been collected by the party in possession of the note. The general rule is, no doubt, that in an action for the conversion of a promissory note the measure of damages is the value of the note at the time of appropriation, with interest thereon. But here we have a case in which the party in possession of a note which provides for the payment of interest installments during the life of the note and before its maturity, who, after the debt was due, came into court to recover the amount thereof from the maker of the note, also the original payee who intervenes and claims ownership of the note in suit, and prays a recovery of sums of interest collected when due by the party in possession of the note, and who at no time, according to the finding of the jury, was owner of the instrument and consequently not entitled to the interest. The interest payments, it is true, were provided for by and in the note, but they were to be made at definitely designated dates, the amounts so outlined as to be ascertainable by slight computations, and the payment of each not in any manner or degree connected with the final payment of the principal, certainly not as to time, and not necessarily as to the person to whom it must be made, as it was possible that this might be different as to each payment of interest, if the ownership at each time was in a different

person. To say that the intervenor should recover but the face value of the note at the time of the conversion, with interest allowed by law to date of verdict or payment, would not be exact justice between the parties. The amount of damages to the intervenor is ascertained and measured by the evidence. The plaintiff, when he made collections of interest, was not the owner of the note; he had no right to them and his retention and use of them were direct wrongs, as against the rights of the intervenor. Justice in the case would seem to demand that the intervenor be allowed a recovery in the amount of the value of the note, if asked, together with such interest as had been collected by plaintiff, or for the aggregate sum of the installments of interest collected without including the value of the note if she desired to recover, as she signified in her pleading herein that she did. In an action to recover for the conversion of corporate stock (see *Hubbell v. Blandy*, 49 N. W. Rep. [Mich.], 502) it was held: "In such case the bailor may recover the value of the stock at the time of conversion, with all dividends paid from the time of delivery, together with interest on the value of the stock from date of conversion, and on the dividends from date of respective payments." (*Bank of Montgomery v. Reese*, 26 Pa. St., 143; *Morris v. Coburn*, 9 S. W. Rep. [Tex.], 345.)

It is claimed that the trial court erred in excluding certain evidence offered on behalf of plaintiffs. One contention is that M. B. Wild, the husband of the intervenor, made a trade out of which arose an indebtedness in his favor which was evidenced by the note herein involved; that it belonged to him and was made payable to his wife, the intervenor, as payee, pursuant to his directions, and to induce his creditors, who were numerous and clamorous, to believe that it was her note. It is further asserted that evidence of the facts just outlined was competent on the issue of whether the intervenor did indorse the note, as alleged; that it would tend to support the allegations that she did so, for the reason that it would

tend to show that she had no real interest at stake, and hence would more readily indorse the note than if such action effected a transfer of her actual ownership of the instrument. The portion of the record to which we are referred as showing this alleged error is as follows:

Q. Will you state, please, the reason why the note was taken payable to Vilina Wild?

A. Why, the sheriff was after Milt pretty lively, and he put it in her name.

Objected to, as irrelevant, incompetent, and immaterial. Objection sustained, and plaintiff excepts.

Mr. Offutt: I offer to show by this witness that at the time the note was taken, to-wit, on October 5, 1885, it was given in consideration for property, the whole equitable and beneficial title to which was in Milton B. Wild, the person who afterwards received credit for the note, and that the note was made payable to the wife, Vilina Wild, because at that time, to-wit, on the date that the note was executed, Milton B. Wild was insolvent and being pursued by his creditors, by creditors' bills and bills of discovery, and that inasmuch as this note was to be secured by a mortgage and would appear of record, the legal title is taken in Vilina Wild while the beneficial ownership was conceded to be in Milton B. Wild.

Objected to, as irrelevant, incompetent, and immaterial. Objection sustained, and plaintiff excepts.

If the offered evidence, or any part of it, was competent and should have been admitted, which we do not decide, it was, according to the argument here, such of it as tended to establish that the real owner of the note was Milton B. Wild, and that his wife, to whom it ran in terms, had no interest therein. By a glance at the question and answer which immediately preceded the offer, and which we have just quoted, it will be noticed that it appears that the note was made to the intervenor simply because "the sheriff was after Milt pretty lively." No motion was made to strike this out of the record and it stood as evidence. Immediately preceding it appears the following:

Q. Were you present at the time this note of October 5, 1883, was executed?

A. Why, yes; it was executed at my office.

Q. Who else was present at the time?

A. I don't recall now; it was one of Milt's deals, and I think I drew up the mortgages.

Q. Do you know whether Vilina Wild was present or not?

A. Why, no, she was not there.

Q. What was done with the note immediately after it was executed or signed by Rosenbalm?

Objected to, as having been gone over.

Q. From that time until the time it was indorsed, as you stated, by Mrs. Wild?

A. Oh, I put it in Milt's package. He had a package of notes there at that time.

Q. You may state whether it went out of your office in the meantime or not. Did it go out of your office from the time it was executed until the time that the indorsement was made?

A. Never.

Q. Did Vilina Wild see the note from the time that the note was executed until the time that the indorsement was made?

A. Why, she had no knowledge of the note and never saw it.

There was other evidence given by this witness, which was to the effect that Milton B. Wild, and not the intervenor, was the owner of the note; that "there was nothing peculiar about this other than about other notes, besides this,—taken in her name, but always for Milt's benefit." There was also evidence that the transaction from which sprung this note was a trade of Milton B. Wild's, and with which the intervenor had no concern, and in which she took no part; hence, if any error in the exclusion of the offered evidence, it was without prejudice. (*Green v. Hughitt School Township*, 59 N. W. Rep. [S. Dak.], 224; *Barber v. James*, 31 Atl. Rep. [R. I.], 264; *Schwartz v. Karlovsky*, 51 Ill. App., 371.)

It follows from the conclusions reached herein on the questions presented and discussed that the judgment of the district court must be

AFFIRMED.

E. J. ROSECRANS, SHERIFF, V. MARGARET I. ASAY.

FILED OCTOBER 22, 1896. No. 6793.

1. **Replevin:** DAMAGES: PLEADING. In replevin special damages must be pleaded by the plaintiff or they cannot be recovered.
2. ———: ———: ———. *Held*, That the petition is sufficient, after judgment, to sustain the findings.
3. ———: ———. Damages *held* not excessive.
4. **Review:** AFFIDAVITS: BILL OF EXCEPTIONS. Affidavits used at a hearing of a motion for a new trial cannot be considered in the supreme court in error proceedings unless made a part of the record by a bill of exceptions.

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

C. Patterson, *W. W. Wood*, and *Stewart & Munger*, for plaintiff in error.

Thomas L. Redlon, *contra*.

NORVAL, J.

This is an action to recover the possession of certain personal property. The petition contains the usual allegations in replevin, and prays damages for the unlawful detention and for the loss and injury to the property. The answer consists of a general denial. There was a trial to the court, with findings and judgment for the plaintiff, her damages being assessed at $500. Upon a motion for a new trial a remittitur for $250 was required to be, and was, filed by plaintiff as a condition of sustain-

ing the judgment, for a like sum. The defendant prosecutes error.

Three grounds are relied upon for a reversal of the judgment: 1. The findings are contrary to the evidence. 2. The damages are excessive. 3. There was error in not granting a new trial because of newly discovered evidence.

Margaret I. Asay, the plaintiff below, was the owner of a quantity of personal property, consisting of seven or eight wagon loads of household goods, furniture, pictures, books, bric-a-brac, etc. In April, 1891, she caused the same to be carefully and securely packed in strong wooden boxes at Pine Ridge Agency, and transported thence by teams to Gordon for shipment to Illinois. While at Gordon the goods were attached as the property of J. F. Asay by the defendant as sheriff. The next day plaintiff recovered possession by a writ of replevin, and on the same day the defendant seized the goods under other attachments, issued against said J. F. Asay. Nine days later plaintiff instituted this action, obtaining possession, it is claimed, of only a portion of the property attached, and that in a badly damaged condition. Whatever goods were taken under the second replevin writ were shipped by rail from Gordon, this state, to Oregon, Illinois, where plaintiff received them. When they reached the said place a considerable part was missing, and numerous articles were injured. But it is insisted that there is no testimony to show that the loss and injury occurred while the goods were in defendant's possession, but that the same may have happened while being transported on the cars, or by wagon from Pine Ridge Agency to Gordon. The evidence shows that the goods were packed with unusual care, under the personal supervision of the plaintiff, the boxes were bound with wire, and that it was impossible that any part could have been abstracted or injured while en route to Gordon, since none of the boxes were missing or had been opened. After the attachments were levied, and while the goods were in

defendant's possession, the boxes were broken open and contents removed, and a portion put back therein in a haphazard manner. When plaintiff obtained possession by virtue of the writ of replevin it was found that many of the articles were broken and damaged, and others missing. Those recovered were reboxed and placed on the cars, Jules Ecofey accompanying them to Oregon, Illinois. He testified that the boxes had not been opened or injured from the time they were shipped from Gordon until they reached plaintiff's home, near Oregon. The defendant admitted when upon the witness stand that he opened all the boxes but one or two, and invoiced the goods. The testimony is ample to show that the loss and injury occurred while the goods were in defendant's custody. This was sufficient. It was not necessary to show that the sheriff personally abstracted, or made way with, or injured the goods. If they were stolen or damaged while under his control, he is responsible to plaintiff therefor.

There is no finding, although the evidence would have justified one, assessing damages for the value of the property lost, stolen, or wholly destroyed. The court merely assessed damages for unlawful detention. Therefore, in determining whether the damages allowed are excessive, we must leave out of consideration the articles that were lost or destroyed. It is insisted that under the pleadings no recovery can be had for injury to the goods, because special damages are not pleaded by the plaintiff. In replevin, special damages resulting in injury to property while in defendant's possession must be specially averred. (*Whitney v. Levon*, 34 Neb., 443.) The amended petition alleges "that during the time the said goods were in the possession and under the control of the defendant, the articles of said goods described in Exhibit C, which is hereto attached and made a part of this petition, were damaged and destroyed without the consent of plaintiff, as stated in said exhibit, to the amount set opposite each article in said exhibit, and, in the aggregate, to the amount of $1,840, to plaintiff's damages in the sum of

$1,840." The exhibit referred to is attached to the pleading. The above averment, after judgment, is sufficient to sustain a finding for damages resulting from injury to the property. An examination of the testimony shows that the depreciation in the value of the property from breakage alone exceeds the sum of $250, the amount of the judgment, after the filing of the remittitur; hence a reversal cannot be had on the ground that the damages are excessive.

Attached to the motion for a new trial are several affidavits relating to evidence discovered since the trial, but these affidavits are of no avail here, since they are not embodied in the bill of exceptions. (*Credit Foncier of America v. Rogers*, 8 Neb., 34; *Walker v. Lutz*, 14 Neb., 274; *Tessier v. Crowley*, 16 Neb., 372; *Vallindingham v. Scott*, 30 Neb., 187.) The judgment is

AFFIRMED.

GEORGE L. BARNEY V. STATE OF NEBRASKA.

FILED OCTOBER 22, 1896. No. 8497.

1. **Jury**: DISCHARGE OF PANEL. A district judge may, for any lawful cause, discharge a regular panel of the petit jury and direct the sheriff to call other jurors to take its place.

2. ———: CAUSE FOR DISCHARGE. The fact that the jury was illegally drawn is a sufficient cause for discharging it from service.

3. ———: ———. The fact that all, or nearly all, jurors upon the regular panel are disqualified from sitting in any case remaining to be tried at the term is a sufficient cause for discharging the panel.

4. ———: SPECIAL VENIRE. The provisions of section 465*a* of the Criminal Code are not exclusive but are to be construed in connection with section 664 of the Civil Code.

5. ———: ———. Therefore, when the causes exist which authorize the court to order a special venire under section 465*a* of the Criminal Code, the court may, instead of so doing, in its discretion, the regular panel being disqualified from sitting in other cases during the term, discharge that panel and direct a new jury to be drawn under the provisions of section 664.

6. ——: ——: RULE OF COURT. A rule of court is an order made by a court having competent jurisdiction, and therefore under section 8, chapter 5, Compiled Statutes, in a district where there are two district judges the court may, by special order, direct a jury of less than forty-eight to be drawn, such special order being a "rule" within the meaning of that section.

7. **Information:** NAMES OF WITNESSES: INDORSEMENT. Permitting names of witnesses to be indorsed on an information after the information is filed is a matter resting within the discretion of the trial court, and notwithstanding a general rule of court requiring such names to be indorsed within twenty-four hours after their discovery, a judgment will not be reversed where the application to indorse the names was not made until a later time, provided no prejudice to the accused resulted.

8. ——: ——: ——: REVIEW. The accused having made no motion for a postponement of the trial because of the indorsement of such additional names, no prejudice will be presumed.

9. **Criminal Law:** INSTRUCTIONS. In a criminal case it is not erroneous to direct the jury that its oath imposes upon it no obligation to doubt, where no doubt would have existed if no oath had been administered. (*Spies v. People*, 122 Ill., 1, followed.)

10. ——: SENTENCE: CLEMENCY. Where no error appears in the record of a criminal case and the sentence imposed is one warranted by the statute, it will not be reduced by this court because of apparent undue severity. To so reduce it would in such case be an act of clemency and not a judicial review of the trial, and the exercise of such clemency is a power reposed by the constitution in the governor and not in this court.

11. **Larceny.** Evidence *held* to sustain the verdict.

ERROR to the district court for Holt county. Tried below before WESTOVER, J.

R. R. Dickson, for plaintiff in error.

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

IRVINE, C.

The plaintiff in error was informed against in the district court of Holt county for stealing four steers, the property of George Sinlinger. He was convicted and sentenced to imprisonment in the penitentiary for six years. He brings the case here for review, assigning numerous errors.

Several of the assignments relate to the legality of the jury by which the plaintiff was tried. The record discloses that on the 4th day of April, 1896, the court discharged the regular panel of the petit jury for the reason that it had been illegally drawn, and forthwith ordered the sheriff to summon twenty-four good and lawful men having the qualifications of jurors to serve as petit jurors for the remainder of the term. Subsequently, on the 18th day of April, an order was entered reciting that it having been suggested to the court by the county attorney and other members of the bar that this special panel, having been drawn from for the trial of the case of the state against Fanton and the case of the state against Dunham, and Barney and Dunham being informed against together and the evidence against the two being largely the same, from such information and the judge's personal knowledge of the facts, the members of that panel were disqualified from sitting in the trial of the remaining cases or any other case to be tried at the term, it was ordered that the panel be discharged. The same day an order was entered directing the sheriff to summon twenty-four other good and lawful men to serve as jurors until discharged. In short, the record discloses that the regular panel was discharged because not lawfully drawn. A new jury was summoned by the sheriff and this one discharged because its members were disqualified from sitting on any of the cases remaining to be tried at that term of court; and a third jury was summoned by the sheriff. The plaintiff in error did not object or except to the first order discharging the regular panel. He did, however, move to quash the second panel, because the first had been unlawfully discharged, and he moved to quash the third panel, by which he was tried, because of irregularity in the prior proceedings and because it had not been drawn according to law. Preliminary to his first motion, he sought to correct the record by having it show that while Dunham had moved to quash the first regular panel, this motion had

been withdrawn and the court quashed it on its own motion, no objection thereto being then pending. The court overruled this motion to correct the record. Conceding that the control of its records by a court may be reviewed by appellate procedure, we cannot review this action, for the reason that the evidence on which the court acted in refusing to change the record does not here appear by bill of exceptions or by any other authenticated record. Nearly all the other questions suggested by this somewhat complicated procedure are not open to review for the same reason. The motions by which the questions were raised in the trial court were supported by affidavits, which are not preserved by any bill of exceptions. The rule is so well settled that we should never be again required to announce it, that in order to make affidavits used on the hearing of a motion a part of the record in such manner as to permit this court to consider them, they must be embodied in a bill of exceptions.

In this state of the case we have presented merely the power of the court to discharge the regular panel if illegally drawn, its power to order the sheriff to summon a new jury, its power to discharge that jury when it appears that the men composing it are disqualified from further sitting during the term, and its power to then direct the sheriff to call a third jury. The statutes applicable to the subject are section 664 of the Code of Civil Procedure and section 465*a* of the Criminal Code. The latter section was passed as an independent act in 1881, and is the later expression of the legislature. These sections are as follows:

"Sec. 664. Whenever the proper officers fail to summon a grand or petit jury, or when all the persons summoned as grand or petit jurors do not appear before the district courts, or whenever at any general or special term, or at any period of a term, for any cause there is no panel of grand jurors or petit jurors, or the panel is not complete, said court may order the sheriff, deputy sheriff, or coroner to summon without delay good and lawful men, having

the qualifications of jurors, and each person summoned shall forthwith appear before the court, and if competent, shall serve on the grand jury or petit jury, as the case may be, unless such person may be excused from serving or lawfully challenged."

"Sec. 465*a*. That when two or more persons shall have been charged together in the same indictment or information with a crime, and one or more shall have demanded a separate trial, and had the same, and when the court shall be satisfied, by reason of the same evidence being required in the further trial of parties to the same indictment or information, that the regular panel and bystanders are incompetent, because of having heard the evidence to sit in further causes in the same indictment or information, then it shall be lawful for the court to require the clerk of the court to write the names of sixty electors of the county wherein said cause is being tried, each upon a separate slip of paper, and place the same in a box, and after the same shall have been thoroughly mixed, to draw therefrom such a number as in the opinion of the court will be sufficient from which to select a jury to hear said cause, and the electors whose names are so drawn shall be summoned by the sheriff to forthwith appear before the court, and after having been examined, such as are found competent and shall have no lawful excuse for not serving as jurors shall constitute a special venire, from which the court shall proceed to have a jury impaneled for the trial of the cause, and the court may repeat the exercise of this power until all the parties charged in the same indictment or information shall have been tried."

The power of the court to discharge for cause one or more of the regular panel cannot seriously be questioned. This is a matter resting within the judicial discretion of the district judge, and having discharged certain or all of such regular jurors, the statute first quoted authorizes the court to direct the sheriff to summon others to take their places. (*Dodge v. People*, 4 Neb., 220.) This record

shows that the regular panel was discharged because not legally drawn. This was certainly a sufficient reason for the order. The reasons given for discharging the second panel were substantially those recited in 465*a* of the Criminal Code as justifying the procedure therein provided. In the absence of a bill of exceptions, at least, we must presume that those facts existed, and the court, on that state of facts, having discharged the panel and ordered the sheriff to summon a new panel, the question is, therefore, presented whether section 664 of the Code of Civil Procedure applies to such a case, or whether, on the other hand, the provisions of section 465*a* of the Criminal Code are exclusive. If the latter view be correct, then a special venire should have been drawn by the clerk, and a jury summoned by the sheriff except in pursuance of that method was illegal. Section 466 of the Criminal Code provides that in all cases, except as may be otherwise expressly provided, the jury summoned and impaneled according to the provisions of the laws in force relating to the summoning and impaneling of jurors in other cases shall try the accused. Therefore, the method provided by the Civil Code for drawing, summoning, and impaneling jurors applies to criminal cases except as otherwise provided. (*Dodge v. People, supra.*) Section 465*a* of the Criminal Code, it will be observed, has in view a state of affairs where the regular jury is incompetent, because of having heard the evidence, to sit in a particular case, and it provides that in such case "it shall be lawful" for the court to require the clerk to draw a jury as the section provides, and the jurors so drawn shall constitute a special venire for the trial of that particular cause. The language of the section is not mandatory, it is simply permissive. Undoubtedly the court in the case before us might, on the finding of facts contained in its order, have proceeded under section 465*a* to draw a special venire for the trial of Barney's case, retaining the old panel in service. But the condition was presented that there was no further work for the regular panel to

perform except the trial of cases in which it was disqualified, and the court, instead of adopting this special procedure, absolutely discharge the old panel and caused a new general panel to be drawn in accordance with the general law. This, we think, it had power to do. Section 664 provides that this procedure may be resorted to when "for any cause" there is no panel of petit jurors. It is certainly a good cause for discharging a panel that the jurors are incompetent to sit in any case remaining to be tried. The two sections are not conflicting, the language of the later act is not mandatory, and we hold that the provisions of section 465*a* are not exclusive, and that the court acted neither illegally nor in abuse of its discretion in proceeding under the former section instead of the latter. So far as the record discloses, no objections were made to any of the jurors so summoned, and it does not appear that the accused was in any way prejudiced by the procedure.

It is suggested that the last panel was unlawful for the reason that there are two judges of the fifteenth judicial district, and that section 8 of chapter 5, Compiled Statutes, enacts that in such districts there shall be drawn a panel of forty-eight jurors, with a proviso that "where such number of jurors may not be required the judges may, by appropriate rule, provide for the drawing of a less number." It is argued that there was no rule of court existing in Holt county whereby a less number than forty-eight might be drawn, and that the court therefore erred in ordering only twenty-four to be drawn. To this assignment there are two answers. In the first place, it does not appear that, by challenge or otherwise, even the twenty-four names drawn were exhausted in obtaining a jury, so that Barney was not prejudiced by the drawing of a less number than forty-eight names. In the second place, counsel misapprehend the force of the word "rule" in the statute quoted. The statute does not contemplate a fixed, permanent, and general rule of court fixing the number of jurors. This is to be governed from time to

time by the condition of business. A rule of court may be general or special. Generally it is "an order made by a court having competent jurisdiction." (Bouvier's Law Dictionary.) The order directing twenty-four jurors to be drawn was a rule providing for a less number than forty-eight within the meaning of the statute.

On the 30th day of April the county attorney filed a motion for leave to indorse upon the information the names of John J. Dunham and Serene Holts as witnesses against the accused. On May 4 the motion was sustained, over the objections of the accused, and the trial was proceeded with on the same day. This is complained of on several grounds. In the first place, a general rule of court is pleaded, whereby it is made the duty of the county attorney to indorse the names of all witnesses known to him, upon whose testimony the state will rely, previous to filing the information, and that the names of all other witnesses afterwards discovered shall be indorsed within twenty-four hours after their discovery. The motion shows that the facts were discovered by the county attorney on April 28, more than twenty-four hours before the motion was filed. Section 579 of the Criminal Code provides that the county attorney shall indorse on the information the names of such witnesses not known to him at the time of filing the information, "at such time before the trial of any case as the court may, by rule or otherwise, prescribe." The general rule has been adopted that permitting names of witnesses to be indorsed on the information is a matter within the discretion of the trial court. A rule of court which would arbitrarily forbid the indorsement of names of witnesses essential to the state, under circumstances not prejudicing the rights of the accused, and thereby defeating a just administration of the criminal law, would be unreasonable and more honored in the breach than the observance. Notwithstanding any such general rule, a rule made by the court itself and within its power to rescind, the court would be justified in permitting names to be indorsed within a reasonable time

after their discovery, provided the rights of the accused were properly protected. The application was filed April 30. While it was not ruled upon until May 4, the filing of the application was ample notice to the accused of the purpose of the state. When the court gave permission to indorse the names, no application was made for a postponement of the trial. If such application had been made it should undoubtedly have been granted. But in the absence of such an application no prejudice can be presumed, and it is certain no prejudice resulted. In such cases the error, if any, lies in forcing the accused to trial immediately upon the indorsement of new names on the information, and not in permitting those names to be indorsed. (*Rauschkolb v. State*, 46 Neb., 658.)

Error is assigned upon the giving of the seventh instruction, which is as follows: "A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all of the evidence in the case. A doubt produced by an undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt. And the juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible states of facts differing from those established by the evidence. Your oath imposes upon you no obligation to doubt where no doubt would exist if no oath had been administered. If, after a careful and impartial examination and consideration of all of the evidence in the case, you can say that you feel an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charges made against him, then the jury are satisfied beyond a reasonable doubt." The particular portion of this instruction of which complaint is made is that part whereby the jury is told that the oath imposed no obligation to doubt where no doubt would exist if no oath had been administered. Whenever a court undertakes to define a reasonable doubt, it opens the way to a vast amount

of speculative reasoning without any very practical application. As said by Judge Thompson, in his work on Trials: "All the definitions are little more than metaphysical paraphrases of an expression invented by the common-law judges, for the very reason that it was capable of being understood and applied by plain men in the jury box." (2 Thompson, Trials, sec. 2463.) The writer very much doubts whether any confusion has ever existed in the mind of a juryman in regard to the meaning of the term, except where that confusion has arisen from such attempts to define the term. The instruction complained of was, in substance, that given in the so-called "Anarchist Cases" (*Spies v. People*, 122 Ill., 1), and approved by the supreme court of Illinois. The portion complained of was merely a paraphrase of the common expression that a jury cannot doubt as jurymen while they believe as men. With regard to this expression the supreme court of Pennsylvania has said: "It is the familiar language found in the text-books and decisions which treat of the subject." (*Nevling v. Commonwealth*, 98 Pa. St., 322.) As said by the trial judge in the case last cited: "I have heard men who have sat on juries in criminal cases, after they had rendered a verdict of not guilty, say that they believed the man was guilty, but the commonwealth had not proved it. This is a great error, for if you believe a man guilty solely from the evidence, the commonwealth has proved it." This is as good law as it is good sense, and there was no error in directing the jury that in weighing the evidence they should not undertake, by virtue of their oaths, to pursue a course of reasoning differing from that which their experience as men had taught them to be safe and trustworthy.

It is contended that the verdict is not sustained by the evidence. It is true that the most direct evidence against the accused was furnished by certain witnesses who, in their testimony, confessed themselves to be thieves and perjurers. These witnesses were not in all points, or perhaps in the most vital points, corroborated by the testi-

mony of apparently honest men. But their testimony does receive some corroboration of that character. The credibility of the witnesses was for the jury, subject to a cautious revision by the trial judge. We cannot say that there is not sufficient evidence to sustain the verdict.

Finally, we are asked to reduce the sentence as excessive, by virtue of the provisions of section 509*a* of the Criminal Code. We are aware that in two or three cases passed upon soon after the adoption of that provision the court exercised the power which the legislature thereby attempted to confer upon it. According to the state's testimony in this case, the plaintiff was one of three men who jointly committed the offense. The other two men committed perjury upon their own trials to shield themselves, and, apparently hoping still further to avoid the consequences, took the stand in this case and confessed their theft and their perjury for the purpose of convicting Barney. He is the only one of the three who is not, by his own confession, a cowardly and conscienceless criminal. To our minds the sentence was, under the circumstances, unduly harsh. But we find no error in the record, and we think the application now made is one, in effect, for clemency, and not for the rectification of a judicial error. Under the constitution, the power to exercise clemency is vested in the governor, and not in this court. So that, notwithstanding our impressions in the matter, we feel that we are not warranted in interfering, and that the application should be made to the executive department of the government, wherein the constitutional power is vested to grant it.

Some time after the submission of the case, and after the preparation of the foregoing opinion, a motion was filed for leave to file an additional transcript, containing a bill of exceptions embodying some of the affidavits referred to in the motions challenging the array of jurors. The only new matter disclosed, however, by the bill of exceptions tendered is proof tending to support the motion to correct the journal by showing that the first regu-

lar panel was discharged by the court of its own motion, after Dunham's motion to quash it had been withdrawn. Leave is given to file this transcript, but it does not affect the decision of the case, because the judge had power, on learning that the jury had been illegally drawn, to discharge it of his own motion. He was not required to proceed with an illegal jury until some litigant challenged the array.

AFFIRMED.

JOHN D. CREIGHTON V. HARRY HAYTHORN ET AL.

FILED NOVEMBER 5, 1896. No. 6875.

1. **Instructions:** ASSIGNMENTS OF ERROR. An assignment of error directed generally against a group of instructions will be considered no further than to ascertain whether any one thereof was rightly given or rightly refused.

2. **Replevin:** LIEN: MEASURE OF DAMAGES. Where the defendant in an action of replevin claims a special interest only in the property in controversy by virtue of a mortgage or other lien, his measure of damage, in case the property cannot be returned, is the amount of his lien with interest and costs, within the value of the property.

3. ———: ———: ———: FINDINGS. A verdict for the defendant in an action of replevin, whose claim arises from a lien upon the property in controversy, without a finding as to the value of his possession, is not responsive to the issues and is contrary to law, within the meaning of subdivision 6 of section 314 of the Code.

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

John R. Brotherton and *McClanahan & Halligan*, for plaintiff in error.

Grimes & Gilcox, *F. Q. Feltz*, and *Albert Muldoon*, *contra*.

POST, C. J.

This was an action of replevin in the district court for Keith county by the plaintiff in error, John D. Creighton,

to recover certain horses and colts then in the possession of the defendant therein named, Harry Haythorn, and which were, as charged, unlawfully detained by the latter. The controversy appears to have been settled to the mutual satisfaction of the parties named and a written stipulation executed and filed whereby the plaintiff agreed to dismiss said action at his own cost. Subsequently, however, and before a final disposition of the cause, John W. Hughbank and Lucy Hughbank were, by order of court, permitted to intervene for the purpose of asserting a right to the possession of said property adverse to the claims of both plaintiff and defendant, and upon the issues tendered by said intervenors the cause was prosecuted to judgment in their favor for the return of the property and the sum of $43 damages for the unlawful detention thereof, and which has by the plaintiff been removed into this court for review.

The claim of the intervenors rests upon the fact, as alleged, that the live stock, which is the subject of the controversy, was taken up by them while trespassing upon their cultivated lands, and by them placed in the possession of the defendant Haythorn, to be safely kept and cared for under their direction. Intervenors also charge that they had, previous to the commencement of this action, fully complied with the provisions of the statute, in order to preserve their lien upon said stock for the damage done to their growing crops, which, together with the cost of impounding, is laid at the sum of $200.

The allegations of error which relate to the giving and refusing of instructions may be dismissed with the observation that the record discloses no exception to those given, while those refused are grouped in a single assignment of the motion for a new trial. It is not seriously contended that the court erred in refusing each of the instructions requested, and there was certainly no error in the refusal of paragraph No. 1, since the proposition therein stated had been given in substantially the same language in the charge of the court. An assignment of

error directed generally against a group of instructions will, in accordance with the repeated decisions of this court, be considered no further than to ascertain that any one thereof was rightly given or rightly refused.

A more serious question is presented by the first assignment of the motion for a new trial and also of the petition in error, viz., that the verdict of the jury is contrary to law. The grounds upon which intervenors were allowed to contest the plaintiff's claim was that they were entitled to a lien upon the stock in controversy to the amount of their damage. There was on their part no assertion of title, either in their petition of intervention or otherwise; nor did they at any stage of the proceeding claim the right to recover substantial damage on account of the wrongful detention of said property by the plaintiff. The jury, however, returned a verdict as follows:

"We, the jury in this case, duly impaneled and sworn, do find that the right of property and right of possession of said property at the commencement of this action was in the defendant John W. Hughbank, and we assess the value of said property at the sum of $800. We also assess the damage sustained by the defendant John W. Hughbank by reason of the unlawful detention of said property at the sum of $43. JAMES K. ALLEN,
"Foreman."

Plaintiff in error was, upon the overruling of the motion for a new trial, required to file a remittitur "as to the right of property and value of the same." But that action of the trial court does not operate to cure the obvious and radical errors in the verdict, since the jury have failed to find the value of plaintiff in error's possession, and the finding of damage for the unlawful detention of the property is without support in the pleadings or proofs. It is provided by section 191, Code of Civil Procedure, that "In all cases where the property has been delivered to the plaintiff, where the jury shall find upon the issue joined for the defendant, they shall also find whether the defendant had the right of property or right of possession

only at the commencement of the suit, and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant, for which, with costs of suit, the court shall render judgment." That section has been often construed as limiting the recovery of a defendant who claims a special ownership only by virtue of a lien upon the property replevied, to the amount due upon such lien, within the value of the property as found by the jury. (*Welton v. Beltezore*, 17 Neb., 402; *Cruts v. Wray*, 19 Neb., 581; *Gates v. Parrott*, 31 Neb., 581.) It follows, as held in *Search v. Miller*, 9 Neb., 26, that a verdict for the defendant in such case, whose claim arises from a lien upon the property in controversy, without a finding as to the value of his possession, is not responsive to the issues, and is, therefore, contrary to law, within the meaning of subdivision 6 of section 314 of the Code; and since there is a failure of proof to sustain the finding, damage for the unlawful detention of the property, it follows that the judgment must be reversed and the cause remanded for a new trial, unless the defendant in error, within thirty days from this date, remit all damage assessed in his favor in excess of the sum of ten cents.

REVERSED.

SOREN T. PETERSON V. FRANCIS E. REISDORPH.

FILED NOVEMBER 5, 1896. No. 6653.

1. **Malicious Prosecution**: EVIDENCE OF MALICE. Where, in an action for malicious prosecution, the purpose of the proceeding complained of is shown to have been the collection of a debt, and not the enforcement of the laws against crime, malice may be inferred from that fact alone, the question being one of fact for the jury. (*Ross v. Langworthy*, 13 Neb., 492.)

2. ——: STATEMENTS TO COUNSEL. One who, before instituting a criminal prosecution, makes a full and complete statement to the prosecuting attorney of all the facts within his knowledge or

which he could ascertain by the exercise of reasonable diligence, bearing upon the guilt of the accused, and in good faith acts upon the advice of such officer, will not be liable to an action for malicious prosecution. But if he withholds from counsel in such case material facts within his knowledge, the advice received will be no protection in an action by the injured party.

3. ———: EVIDENCE. Evidence examined, and *held* to sustain the finding that the prosecution complained of was malicious and without probable cause.

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

W. M. Cowherd and *George W. Poynton*, for plaintiff in error.

David Van Etten, contra.

POST, C. J.

The defendant in error, as plaintiff in the district court for Douglas county, recovered a judgment against the plaintiff in error in an action therein for malicious prosecution, and which has by means of the petition in error of the latter been removed into this court for review.

The prosecution upon which this action is based was commenced by the plaintiff in error before a justice of the peace for Douglas county on the 22d day of July, 1890. By the complaint lodged with said justice the defendant in error was charged with the removal from Douglas county, without the consent of the plaintiff in error, of certain personal property before that time mortgaged by him to the latter. Upon his arrest in obedience to a warrant issued pursuant to said complaint, the defendant in error was taken from his home in Saunders county to the city of Omaha, where, in default of bail for his appearance for examination on the day following, to-wit, July 24, he was committed to the jail of Douglas county. On the day last named the prosecution was, at the instance of the defendant therein, continued to the 23d day of August following, at which time a hearing was

had upon the merits of the charge, resulting in a finding for the defendant and an order discharging him from custody. That prosecution was, it is alleged, malicious and without probable cause. The answer consists of an admission of the prosecution, and the result thereof as charged, and a denial of the other allegations of the petition. Accompanying the answer is a counter-claim for $51 as a balance upon two promissory notes of the plaintiff therein for $35 and $50, respectively, to which further reference will hereafter be made. The plaintiff below in his reply admits the execution of the notes above described and pleads usury, and payment thereof in full.

Among the facts, as to which there is no controversy in the evidence, are the execution on the 15th day of January, 1887, of the $50 note above described, payable January 27 after date, secured by the mortgage of the defendant in error covering five head of horned cattle, one buggy, and one saddle; also, the execution on the 9th day of February, 1887, of the $35 note described, payable February 26 after date, secured by the mortgage of the defendant in error upon two cows; that the live stock described in said mortgage was, at the several dates above named, in the possession of the mortgagor in the city of Omaha, and that it was by him at a subsequent date, and during the existence of the lien created by such mortgages, removed from Douglas county to the county of Sarpy without the express consent of the said mortgagee. There was evidence tending to prove that said notes were usurious,—the one for $50 being confessedly so,—and that both were fully satisfied previous to the prosecution complained of. Defendant in error, as a witness in his own behalf, testified to the receipt by him for the note last mentioned of $40 only, and for the $35 note the sum of $30, and no more, the difference between the amounts so received and the face of the note,—$15,—being reserved by the plaintiff in error as interest. He also testified to payment upon such indebtedness at different times during the year 1887, amounting in the ag-

gregate to the sum of $55, and that the plaintiff was indebted to him for services rendered as a carpenter and joiner in the sum of $36.96, which amount he claimed the right to set off against the balance legally due upon said notes. In explanation of the removal of the mortgaged cattle from Douglas county he testified that, being unable to keep said cattle in the city of Omaha on account of the interference of the pound master, he removed them to Sarpy county in the spring of 1887; that quite soon thereafter he advised the plaintiff in error of the action so taken and that no objection thereto was interposed by the latter until about the time of said prosecution, in July, 1890. He testified further that said cattle were not returned to Douglas county subsequent to their removal therefrom in the year 1887, and that all had died previous to said prosecution, which statement finds support in the testimony of his son. The plaintiff in error on the other hand, in his own behalf, denied the payments alleged, except the sum of $10, which was admitted by him. He testified that defendant in error received credit for the value of his services as a carpenter upon a third past due note of the latter then held by him. He also denies notice of the removal of the mortgaged cattle and testified to seeing a portion of said property on the premises of the defendant in error in the city of Omaha about the time of the removal therefrom of the latter with his family to Saunders county in 1888, at which time he forbade the removal of said property without the payment in full of the mortgage debt. The following letter was also introduced in evidence by the plaintiff in error:

"ASHLAND, NEB., June 20, 1888.

"*Mr. S. T. Peterson, Omaha:* I have written you two or three letters, but got no answer from them, but I have got two from you full of threats. I told you in my first letter that nearly all the cattle I had had died, and with them the ones you had a mortgage on, and by losing them it left me without anything to raise money on, and the best I could do for you was to pay you as soon as I could

get my hay to market, which will be in four to five weeks from now. If you wait until I can do this you will get your pay and interest, but if you commence law you will get $47 and no interest. I would like to have you give me a chance to get through without law, but of course it is optional with yourself. Hoping you will keep quiet until I can pay you, I remain yours with respect,

"F. E. REISDORPH.

"P. S.—The bull I sold was not the one you had a mortgage on."

Counsel strongly urge that the language above quoted is an admission that there was, at the date thereof, a balance due upon the notes above mentioned; but in answer to that contention it may be said that the evidence fails to identify the notes here in controversy as the subject of the correspondence to which reference is therein made. Again, it is said in explanation of the foregoing communication that it should be construed as a mere threat to interpose the plea of usury rather than an admission against the interest of the writer. It should also be observed in this connection that counsel sought by repeated, and we think proper, questions to show by the testimony of the defendant in error the charges and credits which were taken into account in order to reach the balance of $47 mentioned in said communication, but which evidence was excluded on the objection of the plaintiff in error. The issue upon this branch of the controversy was purely one of fact, and the jury were, upon the evidence, warranted in finding that the prosecution complained of was without probable cause, and that the purpose of the plaintiff was thereby to enforce the payment of a debt rather than the vindication of the law. The jury were also, as said in *Ross v. Langworthy*, 13 Neb., 492, from that fact alone warranted in finding that the prosecution was malicious. Plaintiff in error claims that previous to said prosecution he made a complete and true statement of the facts in the case to Hon. T. J. Mahoney, county attorney for Douglas county, upon whose advice he in good

faith relied, in the action subsequently taken by him. It was said by NORVAL, J., in *Dreyfus v. Aul*, 29 Neb., 191, that in order to establish probable cause by proof that the prosecutor acted upon the advice of counsel, it must appear that the advice of such counsel was in good faith sought upon a statement of the real facts of the case. It is not pretended that Mr. Mahoney was advised of the claim that there was at that time nothing due plaintiff in error on said notes, and that although notified of the removal of the cattle from Douglas county as early as the spring of 1887, he interposed no objection on that account for more than two years thereafter, and that, assuming the act of removal to have been fraudulent within the meaning of the Criminal Code, the prosecution, therefore, was barred by virtue of the statute of limitations. The question of the truthfulness of his statements as the foundation of the advice upon which he claims to have acted was fairly submitted to the jury, and with the finding against his contention we are unable to interfere.

Exception is taken to certain paragraphs of the instructions given at the request of the plaintiff below, and to the refusal of certain others requested by the defendant therein. But those to which our attention is directed by the arguments of counsel are by the assignments of the petition in error, as well as the motion for a new trial, grouped with others, to which no exception is taken and which, without doubt, embody the law applicable to the issues presented. The cause below appears to have been fairly and impartially tried, and there being no error apparent from the record, the judgment will be

AFFIRMED.

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

FILED NOVEMBER 5, 1896. No. 6284.

1. **Courts:** RULES: REVIEW. Courts of general jurisdiction possess inherent power to make and enforce needful rules for the transaction of business before them, and in the absence of a clear abuse of such power their discretion in that regard will not be controlled by courts of appellate jurisdiction.

2. **Review:** NEW TRIAL: ASSIGNMENTS OF ERROR. Rulings, except such as are made during the trial of a cause, to be available as grounds for the reversal of the judgment by proceedings in error, should be specially assigned in the motion for a new trial.

REHEARING of case reported in 47 Neb., 585.

Charles W. Haller, for plaintiffs in error.

John P. Breen, contra.

POST, C. J.

In addition to the facts appearing from the opinion heretofore filed in this cause (*Andres v. Kridler*, 47 Neb., 585), it is necessary upon this hearing to notice the showing made by plaintiffs in error in support of their motion below for a new trial. It appears from the affidavits so filed, and is not disputed, that during the afternoon of November 4, 1892, this cause, with others, was, in accordance with the rules of the district court for Douglas county, set for trial on November 7, following, before Judge Scott, in court room No. 3 of said county; that according to the assignment thus made said cause was preceded by several others, so that it was the eighteenth in number for trial on the day last named. In addition to the foregoing, Mr. Haller, counsel for plaintiffs in error, testified to his familiarity with the course of business in the court below, and that the probability of said cause being reached on the day named was, owing to its position on Judge Scott's calendar, too remote to justify the

attendance of plaintiffs in error or their said attorney in anticipation of a trial on said day, and that the fact that it was called for trial during their absence was due to the unexpected continuance of a number of cases preceding it on said list. There had also been, as shown by said affidavits, some talk by the parties of a settlement of the controversy, by reason of which, as claimed, plaintiffs in error had neglected to prepare for trial at the time set therefor. To the first contention a sufficient answer is that the cause was set down and noticed for trial in accordance with the rules of the district court, and was reached for trial and disposed of in its order.

Courts of record possess inherent power to make and enforce the rules necessary for the transaction of business before them, and it is only in cases where there is a clear abuse of such power that their discretion in that regard will be invaded or controlled by courts in the exercise of appellate jurisdiction. There is in this record nothing whatever to suggest an abuse of the discretion conferred upon the trial court or extraordinary hardship to the plaintiffs in error. Nor does the evidence, which is conflicting, warrant interference by this court on the ground that plaintiffs in error were induced to make default by reason of the pending negotiations for settlement.

It is further contended that the cause was not at issue when reached for trial on the 7th day of November, at which time the defendant in error, as plaintiff below, was by the court permitted to file a reply denying the allegations of the several answers. But the action of the court in allowing the plaintiff below to join issue by reply after the cause had been reached in its order is not distinctly presented either by the motion for a new trial or the petition in error, and is accordingly not available as a ground for the reversal of the judgment assailed by means of this proceeding. The judgment of the district court will be affirmed upon the filing of a remittitur in the amount and within the time specified in the former opinion.

JUDGMENT ACCORDINGLY.

COUNCIL BLUFFS CANNING COMPANY V. OMAHA TINWARE MANUFACTURING COMPANY.

FILED NOVEMBER 5, 1896. No. 6906.

1. **Foreign Corporations:** FORUM OF JURISDICTION. Where a foreign corporation has business transactions in this state with citizens and residents of the state, out of which arise accounts or claims against the corporation, such accounts or claims may be enforced in the courts of this state if jurisdiction can be obtained by legal service of process.

2. ———: SERVICE OF SUMMONS. Service of summons upon the managing agent of the corporation is sufficient to confer jurisdiction under the provisions of section 59 of the Code of Civil Procedure.

3. **Review:** CONFLICTING EVIDENCE. Where the evidence is conflicting, the conclusions of the trial court thereon will not be disturbed, if there is evidence to sustain them.

ERROR from the district court of Washington county. Tried below before DUFFIE, J.

The opinion contains a statement of the case.

Wright & Baldwin, for plaintiff in error:

A foreign corporation having no office, no business, no agents, no officers, and no property in this state cannot be sued here upon a transaction arising out of a contract entered into without the state, and a judgment *in personam* cannot be obtained against it in Nebraska by serving a summons on its secretary while temporarily in this state on private business. (*M'Queen v. Middleton Mfg. Co.*, 16 Johns. [N. Y.], 7; *Peckham v. North Parish*, 16 Pick. [Mass.], 286; *Libbey v. Hodgdon*, 9 N. H., 394; *Moulin v. Trenton Ins. Co.*, 24 N. J. Law, 222; *St. Clair v. Cox*, 106 U. S., 350; *Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn., 301; *Hall v. Williams*, 6 Pick. [Mass.], 240; *Rubel v. Beaver Falls Cutlery Co.*, 8 Am. & Eng. Cor. Cas. [Ill.], 164; *Day v. India Rubber Co.*, 1 Blatchf. [U. S. C. C.], 628; *Baltimore & O. R. Co. v. Harris*,

12 Wall. [U. S.], 65; *Lafayette Ins. Co. v. French*, 18 How. [U. S.], 404; *Boston Electric Co. v. Electric Gas Lighting Co.*, 23 Fed. Rep., 838; *Hunter v. International R. Co.*, 26 Fed. Rep., 299; *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. Rep., 635; *Fitzgerald & Mallory Construction Co. v. Fitzgerald*, 137 U. S., 106; *Wilson v. Seligman*, 144 U. S., 41; *Shaw v. Quincy Mining Co.*, 145 U. S. 444; *United States v. American Bell Telephone Co.*, 29 Fed. Rep., 34; *Carpenter v. Westinghouse Air Brake Co.*, 32 Fed. Rep., 434; *Maxwell v. Atchison T. & S. F. R. Co.*, 34 Fed. Rep., 286; *Clews v. Woodstock Iron Co.*, 44 Fed. Rep., 31; *Hazeltine v. Mississippi Valley Fire Ins. Co.*, 55 Fed. Rep., 743; *Gottschalk Co. v. Distilling & Cattle Feeding Co.*, 50 Fed. Rep., 681.)

Brome & Burnett, contra:

If the corporation authorizes its officers to transact business for it in a state other than the one of its incorporation, it submits itself to the jurisdiction of such foreign sovereignty with reference to such business and is liable to suit therein when summoned according to the laws of that state. (*Klopp v. Crescent City Water-Works*, 34 Neb., 808; *Colorado Iron Works v. Sierra Grande Mining Co.*, 25 Pac. Rep. [Colo.], 325; *Baltimore & O. R. Co. v. Harris*, 12 Wall. [U. S.], 65; *Baltimore & O. R. Co. v. Gallahue*, 12 Gratt. [Va.], 655; *Bennington Iron Co. v. Rutherford*, 18 N. J. Law, 158; *Moulin v. Trenton Fire Ins. Co.*, 24 N. J. Law, 244; *National Condensed Milk Co. v. Brandenburgh*, 40 N. J. Law, 112; *Bank of Augusta v. Earle*, 13 Pet. [U. S.], 519; *Day v. Essex County Bank*, 15 Vt., 97; *Newly v. Van Oppen*, L. R., 7 Q. B. [Eng.], 293.)

HARRISON, J.

The defendant in error commenced an action against the plaintiff in error in the district court of Washington county to recover the amount alleged in its petition to be due on account of money advanced, services performed, and goods sold and delivered to plaintiff in error. It was stated in the petition that the defendant (plaintiff in

error) is a corporation organized and existing under the laws of the state of Iowa; "that the contract, agreement, and undertaking between plaintiff and defendant, under which said indebtedness from the defendant to this plaintiff was contracted, was made in the city of Omaha, Douglas county, Nebraska." A summons was issued and delivered to the sheriff of Washington county, which was returned as follows:

"Received this summons February 20, 1893, at 11 o'clock A. M. The president, mayor, chairman of the board of directors or trustees, or other chief officers not being found in the county, I, on the 20th day of February, 1893, served the within summons upon the within named defendant by leaving a true and certified copy of the same with D. W. Archer, personally, the secretary and managing agent of the within named defendant, in Washington county, Nebraska."

The plaintiff in error filed the following objections to the jurisdiction of the court:

"1. That there has been no service of summons in this action upon the defendant so as to require it to appear and answer plaintiff's petition.

"2. That the defendant is a corporation organized under and by virtue of the laws of the state of Iowa and having its principal place of business in the city of Council Bluffs, in the state of Iowa.

"3. That all of the officers and agents of said incorporated company reside in the city of Council Bluffs, Pottawattamie county, state of Iowa, and said company has no place of business or agent for the transaction of business in the state of Nebraska at the time of the service of the summons in this action.

"4. That said defendant neither is, nor was, at the time of the service of the summons in the above entitled action, a citizen or resident, permanent or temporary, of the state of Nebraska, or within the jurisdiction of said court; that the defendant neither had at the time of the service of the summons herein, nor has it now, any prop-

erty or estate subject to attachment and within the jurisdiction of said court; and that no property of the defendant was attached in this action.

"5. That the debt sued on herein was not contracted in the state of Nebraska, but was contracted in the state of Iowa, and that the said D. W. Archer, upon whom the alleged service was made, was not at the time of the alleged service of the summons upon him, nor is he now, the managing agent, general agent, or agent of any kind for the said Council Bluffs Canning Company, defendant, in or for the state of Nebraska."

Also filed some affidavits in support of the objections. the said Council Bluffs Canning Company, defendant, in error. The trial court, on hearing of the objections to its jurisdiction, overruled the same, and of the statements of the journal entry of such action is found the following: The court "finds that the defendant is a foreign corporation having a managing agent within the state of Nebraska; that service of summons was made in this action, upon said managing agent of said defendant corporation in the manner provided by law." The plaintiff in error did not further appear, and, in the course of the business of the court, judgment was entered against it and error proceedings have been prosecuted to this court.

The error proceedings herein raise for consideration two main questions: First—Was the corporation, plaintiff in error, doing business within this state in such manner as to be subject to the jurisdiction and the writs of the courts thereof? Second—Was service of summons made upon it in a manner provided by law? In answer to the first it may be said that the company, plaintiff in error, was an Iowa corporation; that the evidence adduced at the hearing on the objections to the jurisdiction of the court, although conflicting, was amply sufficient to sustain the finding that the contract, from which arose the claim involved herein, was a Nebraska contract, a business transaction of the foreign corporation, within this state, and further, that it was engaged in other and

further acts in this state, directly within its province as a corporation. By so doing it brought itself within the state and subject to the jurisdiction of the courts of Nebraska, and subject to their process, at least in actions growing out of such affairs. By the transactions of the corporation, including the one out of which arose the claim on which this action is based, the corporation was sufficiently engaged in business in this state to be amenable to the jurisdiction of its courts and subject to the process thereof when legally served, at least in an action for the recovery of the account, the result of such business. (*Colorado Iron Works v. Sierra Grande Mining Co.*, 25 Pac. Rep. [Colo.], 325, and cases cited; *Klopp v. Creston City Water-Works Co.*, 34 Neb., 808.)

We will now turn to the second question. In our Code of Civil Procedure, in the portion relative to the county in which actions are to be brought, in section 59, it is provided as follows: "An action other than one of those mentioned in the first three sections of this title, against a non-resident of this state or a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found; but if said defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose." The action at bar is not one of those referred to in the foregoing sections mentioned in "the first three sections of this title," hence could be instituted in any county where the defendant could be found. Section 60 under the same title is as follows: "Every other action must be brought in the county in which the defendant, or some one of the defendants resides, or may be summoned." The evidence presented at the hearing in the trial court, though there was a conflict as to this particular point, warrants the finding that the party served was the manager or "managing agent" of such business as was conducted by or for the corporation (plaintiff in error) in this state. This being true, service on him was the service prescribed by law as

set forth in our Code in the section last quoted. We then have the corporation, by doing business in this state, subject to the jurisdiction of its courts in the litigation arising therefrom, and such service of process on it as the law prescribed. It follows from the conclusions reached that the decision of the district court will be

AFFIRMED.

HENRY T. CHURCH V. D. R. CALLIHAN & COMPANY.

FILED NOVEMBER 5, 1896. No. 6862.

1. **Record for Review:** JOURNAL ENTRIES. In the record presented to this court appeared a copy of a journal entry in which was set forth the overruling of a demurrer by the trial court and that the demurrant failed to plead or answer further, but elected to stand on the demurrer. *Held,* That such recitals must be taken by this court as true statements of what occurred in the trial court.

2. **Actions:** NAME OF FIRM. The provisions of section 24 of the Code of Civil Procedure in relation to the institution of an action in the name of a firm are special in their character, to be strictly construed, and the prescribed mode of procedure must be closely followed.

3. **Partnership:** PLEADING. If, in an action commenced by a partnership in the firm name, there is no statement in the petition that it was "formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property in this state," the pleading is open to attack by demurrer on the second ground assigned by section 94 of the Code, viz., "That the plaintiff has not legal capacity to sue."

4. **Conversion:** PLEADING: NAMES: NOTES: CHATTEL MORTGAGES. The action herein was one of conversion to recover the value of property, of which it was alleged the firm had a special ownership by virtue of a chattel mortgage. Neither the mortgage nor a copy thereof was attached to or appeared in the petition, but if it had been pleaded that the mortgage was executed to the partnership by its firm name, it would not have constituted it such an action as is contemplated by section 23 of our Code, which is as follows: "In all actions upon bills of exchange or promissory notes or other written instruments, whenever any of the parties thereto are

designated by the initial letter or letters or some contraction of the Christian or first name or names, it shall be sufficient to designate such person by the name, initial letter or letters, or contraction of the first name or names, instead of stating the Christian or first name or names in full."

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

W. S. Morlan, for plaintiff in error.

J. L. White, contra.

HARRISON, J.

This action was instituted against the plaintiff in error in the district court of Frontier county, defendant in error being designated therein as D. R. Callihan & Co., with no statement that it was formed for the purpose of carrying on or doing any business or holding any species of property in this state, or pleading the names of the individual members of the partnership. That the defendant in error was a partnership appears from the verification to the petition filed, as follows: "D. R. Callihan, being one of the members of the firm plaintiff, says that he has read the foregoing petition; that the matters therein set forth are true as he verily believes." To the petition the plaintiff in error interposed a demurrer as follows: "The defendant demurs to the plaintiff's petition for the following reasons: First—The plaintiff has no legal capacity to sue. Second—There is a defect of parties plaintiff. Third—The petition does not state facts sufficient to constitute a cause of action;" which was overruled and judgment rendered for defendant in error. To obtain a review of the action of the trial court the case is presented to this tribunal.

Counsel for defendant in error states that when the demurrer was heard and overruled in the district court plaintiff in error was allowed thirty days in which to answer; that this was a waiver of the right to further

insist on the objections to the petition raised by the demurrer. The record as filed in this court, on the subject of the hearing and ruling on the demurrer, etc., is as follows:

"Afterwards, to-wit, on the 6th day of November, 1893, this case came on for hearing on the petition of the plaintiff, and the defendant's demurrer thereto; on consideration whereof the court doth overrule said demurrer, to which ruling of the court the defendant excepts.

"And afterwards, to-wit, on the 5th day of March, 1894, the defendant having failed to plead further or answer in said case, and the defendant not desiring to plead further in said case, but electing to stand on said demurrer, the plaintiff demanded judgment," etc.

In our considerations of the questions discussed we must be governed, as to what occurred in the trial court, by the statements contained in the journal entry which we have just quoted. One ground of the demurrer herein was that the plaintiff, defendant in error, had no legal capacity to sue. Section 24 of our Code of Civil Procedure, reads as follows: "Any company or association of persons, formed for the purpose of carrying on any trade or business or for the purpose of holding any species of property in this state, and not incorporated, may sue and be sued by such usual name as such company, partnership, or association may have assumed to itself or to be known by, and it shall not be necessary in such case to set forth in the process or pleading, or to prove at the trial, the names of the persons composing such company." In respect to the provisions of the foregoing section it has been said: "But this mode of bringing an action by a partnership being unknown at the common law, and different from the general import of the statutes in respect to parties to an action, these special provisions must be strictly construed, and the exact mode of procedure required of partners must be closely pursued. (*Lease v. Vance*, 28 Ia., 509; *Bailey v. Bryan*, 3 Jones' Law, 357.) * * * Another requisite is that it must appear that

the company is formed to carry on some trade or business, or to hold some species of property in this state, and is not incorporated." (*Burlington & M. R. R. Co. v. Dick*, 7 Neb., 242.) The requirements of the Code of Civil Procedure were not fulfilled in the pleading under consideration, hence it was insufficient. The objection to the petition was properly raised by the paragraph of the demurrer in which it was set forth that the petition did not show that the plaintiff, defendant in error, had the legal capacity to sue. (*Sanborn v. Hale*, 12 Neb., 318, citing Bliss, Code Pleading, secs. 407, 408; *Haskins v. Alcott*, 13 O. St., 210.)

The action is one to recover against the plaintiff in error for an alleged conversion of certain personal property in which it was alleged in the petition that defendant in error had a special ownership by virtue of a chattel mortgage executed and delivered to him by a person named in the pleading, other than the plaintiff in error. Counsel for defendant in error urges that inasmuch as its alleged ownership of the property was based upon the chattel mortgage, a written instrument, the case was within the provisions of section 23 of the Code, in which it is stated: "In all actions upon bills of exchange or promissory notes, or other written instruments, whenever any of the parties thereto are designated by the initial letter or letters or some contraction of the Christian or first name or names, it shall be sufficient to designate such person by the name, initial letter or letters, or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full." This section was under consideration in the case of *Burlington & M. R. R. Co. v. Dick, supra*, and it was held to be a special provision—an exception to the general rule—and to be strictly construed. The section, if read and strictly construed, cannot be said to authorize a partnership to commence an action in the firm name, without further allegation, merely because the action is based upon a written instrument executed to it in its partnership appellation. Moreover, the action of defendant in

error was predicated upon the alleged conversion of the property by plaintiff in error, and that its alleged ownership was evidenced by a written instrument in which it may have been referred to by its firm name would not alone authorize the commencement of the action in such firm name. The district court erred in overruling the demurrer and the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

CHARLES GREENE, APPELLEE, V. RACHEL B. GREENE, APPELLANT.

FILED NOVEMBER 5, 1896. No. 6446.

1. **Divorce and Alimony.** Alimony may be defined to be such sum as is ordered by the court to be paid to the wife by the husband, for her support during the time she lives separate from him, or to be paid by her late husband for her maintenance after divorce from the marriage tie. This latter is a creation of modern law and is what is known as permanent alimony. (2 Bishop, Marriage & Divorce, sec. 351.)

2. ———. A husband cannot, in this state, whether he or the wife be granted the divorce, recover alimony to be paid out of the divorced wife's separate estate.

3. ———. Section 10, chapter 25, Compiled Statutes, which reads, "A petition or bill of divorce, alimony, and maintenance may be exhibited by a wife in her own name, as well as a husband; and in all cases the respondent may answer such petition or bill without oath; and in all cases of divorce, alimony, and maintenance, when personal service cannot be had, service by publication may be made as is provided by law in other civil cases under the Code of Civil Procedure," *held*, to confer upon the wife the right to commence an action of divorce in her own name and without the intervention in the suit of a next friend as was formerly required, and not to authorize the granting of alimony or maintenance to the husband, to be paid from the estate of the former wife.

4. **Bill of Exceptions:** OMISSION OF EVIDENCE. When it appears from statements in the bill of exceptions that it does not contain all

the evidence introduced at the trial of the case, such must be taken to be the fact, in the absence of any other or further proof on the subject than the certificate to the bill to the effect that it contains all the evidence.

5. ———: ———: REVIEW. Where a bill of exceptions does not contain all the evidence adduced at the trial, the evidence will not be examined by this court to ascertain whether it was sufficient to support the finding and decree of the trial court.

6. Review: OBJECTIONS. The record presented to this court did not disclose that any objections were made in the district court to its trial and adjudication in this, an action for divorce, of the alleged rights of a husband in real estate, the title to which rested in the wife. *Held,* That the questions will not be considered in this court.

APPEAL from the district court of York county. Heard below before BATES, J.

John H. Ames, Sedgwick & Power, and *Harwood, Ames & Pettis,* for appellant.

George B. France and *N. V. Harlan, contra.*

HARRISON, J.

This action was instituted in the district court of York county, by the appellee against appellant, the objects sought being to obtain a divorce from her, and other relief in regard to certain property rights. Appellant's desertion of him was alleged by appellee as the ground for the claim of divorce. It was pleaded in the petition that the parties were married at Johnsonburg, New Jersey, October 13, 1869, and that on or about November 1, 1888, the appellant deserted appellee, and for more than two years had been willfully absent from him without just cause or reason. The petition also contained a somewhat extended account of the beginning and course of their married life, and more particularly the business and financial transactions engaged in by the appellee, and reverses therein, and the consequent changes in location, etc.; and it is of the statements that appellee purchased

a certain tract of forty acres of land in York county and near York; also a lot in York, upon which he claims to have erected a store building; that this property belonged to appellee, but had been placed in the name of Robert Blair, contrary to the wishes and against, or in fraud of, the rights of appellee; that Robert Blair, deceased at the time of this action, made a will in which he devised the aforementioned land and lot to his three daughters,—the undivided one-half interest therein to appellant, and the undivided one-half to the other two. It is pleaded in the answer, and shown by the evidence, that the two sisters of appellant afterwards conveyed to her the title which they acquired to the aforesaid property. It was further set forth in the petition that there were four children, issue of the marriage, with the care, custody, and education of whom it was alleged the appellant was wholly unqualified to be trusted; that by the will of appellant's father the sum of $125,000 was bequeathed in such manner that she was entitled to receive the income therefrom, amounting to $6,000 per annum; that appellant "is the owner of a large amount of property, as hereinbefore alleged, and the plaintiff is possessed of but little means and has but little annual income, and he is unable to perform manual labor, as he is afflicted with what is commonly known as hip-joint disease, and is unable to support himself by reason thereof, and the defendant absolutely refuses to convey that which is justly due him, or to contribute anything to his support." The prayer of the petition was as follows: "The plaintiff therefore prays that he may be divorced from the defendant, and that he may be given the custody of the said minor children, and that the defendant be decreed to pay him reasonable alimony, and to convey to him each and every part of the lands hereinbefore described, and for such other and further relief as equity may require." In her answer the appellant set forth the purchase of the properties in and near York, as having been made with money furnished by her father; that they were so purchased for

her, but that the title was taken in the name of her father; that after his death it was discovered that in his will she had been given the one-half interest in them, and her two sisters one-half interest; that the two sisters afterwards conveyed to her all title or interest they had in the properties in York county, and the answer continued: "That prior to the beginning of this action * * * the said plaintiff, by a certain indenture of deed, duly executed, signed, witnessed, acknowledged, and delivered with and to one Thomas Kays, as the trustee and agent of this defendant, for a good and valuable consideration, released, relinquished, and conveyed to and for the use of this defendant all his claim, right, title, or interest, or pretended claim, right, title, or interest, in or to several tracts of land and every of them, and thereby, upon consideration as aforesaid, expressly admitted and acknowledged that this defendant was the true and only owner of all the same as her own separate estate and property, free from all interest, title, or control of said plaintiff, whereby the defendant avers that this plaintiff is estopped to assert or maintain that he has, or has had since the 24th day of July, 1888, any right, title, claim, lien, or interest in or to said lands or any of them; all of which matters were and are at issue between these same parties in an action pending in the district court of York county, Nebraska, between the same parties as in this action, which other action was pending at the time this action was commenced, and has ever since been and is now so pending as hereinbefore set forth." One portion of the answer was in the nature of a cross-petition, and contained, among others, allegations of appellee's cruelty toward appellant and his family, and his unfitness to have the custody and control of the children. Appellant asked that she be granted a divorce, that she be awarded the custody of the children, and that the title to the property in controversy be quieted and confirmed in her, and some other relief, which need not be particularly noticed. To this answer and cross-petition

the appellee filed a denial of each and every allegation of new matter therein contained. The appellant filed a supplemental answer in which it was pleaded that of the action to which reference was made in the former answer as pending in the district court of York county between the parties hereto, and in regard to the title of the lands and property herein involved, there had been a trial and a judgment therein, favorable to appellant, by which she had been awarded the ownership and title of the real estate drawn into controversy, and that the cause of action in that case was the same as in the case at bar. To this supplemental pleading the appellee replied, admitting the other action and that it had run its course to judgment, but alleged that the sole issue in that case was whether a contract upon which it was predicated had been made by appellant under duress. This reply was, further, a general denial of the allegations of the supplemental answer, except such as were specifically admitted. Of the issues joined there was a trial. Appellant was granted a divorce and the custody of the children. There were further findings and decree as follows: "The court further finds that the plaintiff has an equitable interest in the following described real estate, which real estate appears on the records as the property of the defendant, to-wit, has an interest in lot 11, block 58, in the city of York, York county, Nebraska, according to the original plat of the town of York, and that said interest is of the value of $1,400. The plaintiff has also an equitable interest in the southwest quarter of the southeast quarter of section 31, township 11 north, of range 2 west, 6th P. M., in York county, the title to which also appears of record in the name of defendant, and that the interest of said plaintiff in said premises is of the value of $3,000, and the said sum of $1,400 is a valid lien on said lot, and the said sum of $3,000 is a valid lien on said southwest quarter of southeast quarter, section 31, township 11, range 2 west. * * * It is further ordered and adjudged by the court that the plaintiff have and recover of the defendant,

Rachel B. Greene, the sum of $4,400, the value of his equitable interest in the property hereinbefore described, and that said sum be a lien on said premises in the order named." From this latter portion of the decree this appeal has been prosecuted.

One of the questions presented is, can alimony be allowed to the husband? Alimony is defined in 2 Bishop, Marriage & Divorce [6th ed.], section 351, as follows: "Alimony, in divorce law, is the allowance which a husband pays, by order of court, to his wife while living separate from him for her maintenance; or, it may be a like provision ordered for the sustenance of a woman divorced from the bond of matrimony, out of her late husband's estate,—the latter branch of the definition denoting a form of alimony known only to the modern law, not to the ancient. It may be for the wife's use during the pendency of a suit, called alimony *pendente lite*, or after its termination, known as permanent alimony." (See, also, further definition in note 1 on same page.) In section 469, in the same volume, the author observes: "If a husband is obliged to seek a divorce from his wife, and the property of the two is mainly, or entirely, vested for her separate use, it will, under special circumstances, be impossible to do justice without transferring to him some of this property. And perhaps there may be statutes in some of our states under which something approximating this can be done. But it cannot generally. Nor, where the common law rules of property prevail, are the circumstances numerous in which it ought to be; because these rules put what justly belongs to the wife as well as to the husband into his hands, to be used by him for the family's support as well as his own. Yet legislation in some of the states is setting strongly in a direction ultimately to exhibit the spectacle of rich wives supporting poor husbands; and of husbands defrauding their creditors while wealth embraces them in the arms of their wives. This condition of things is for the legislatures, not the courts; but the courts, seeing these things, may

also see a reason why they should not feel compunction, when, in a proper case, they withhold all allowance of alimony to the wife." "Alimony is allowed the wife in recognition of the husband's common-law liability to support her. Therefore, in the absence of legislation readjusting domestic relations and allowing it, there being no corresponding liability on the wife's part to support her husband, alimony cannot be granted him. In several of the states, however, alimony, or an allowance from the wife's estate in the nature of alimony, is allowed the husband by statute." (Am. & Eng. Ency. of Law [2d ed.], 92.) "An action for alimony cannot be maintained by the husband against the wife." (*Somers v. Somers*, 39 Kan., 132; Nelson, Divorce & Separation, sec. 904.) Unless allowed by our statute, the husband could recover no alimony.

It is argued that by virtue of the provisions of section 10, chapter 25, Compiled Statutes of 1895, entitled "Divorce and Alimony," that the right to recover alimony was conferred upon the husband. The section reads as follows: "A petition or bill of divorce, alimony, and maintenance may be exhibited by a wife in her own name, as well as a husband; and in all cases the respondent may answer such petition or bill without oath; and in all cases of divorce, alimony, and maintenance, when personal service cannot be had, service by publication may be made as is provided by law in other civil cases under the Code of Civil Procedure." Before the enactment of this section a wife was obliged to commence the action by a representative, by her next friend, and the evident intent of the enactment was to allow her to commence the suit in her own name without the interposition of a "next friend," and the addition of the words "as well as a husband" were meant to, and do, convey no other meaning than that the wife may commence an action in the same manner as a husband, and they do not reach back and connect with the words "alimony and maintenance" and confer upon the husband the right to alimony and maintenance in an action of divorce, either of which, unless

given by this section, he could not obtain in the action. The words were but used as a part of the description of the action which the law-makers gave the wife the right to institute in her own name. It would be a strained construction which would give them the force of raising in the husband the new right to obtain alimony and maintenance in an action of divorce. (*Wood v. Wood*, 8 Wend. [N. Y.], 357.) The rights of the appellee to receive any of the property, then, could not be predicated upon his claim for alimony and maintenance, but must be derived from such equities as accrued in his favor from the manner of the original purchase of the property and the subsequent improvement thereof, and his participation therein, and contributions thereto.

In relation to this branch of the case it is asserted by appellant that there is no evidence, or at least not sufficient evidence, to support the findings and decree of the court. To this attorneys for appellee answer that there was testimony offered and received at the trial in the district court which was not made a part of the bill of exceptions and is not presented in this court, and that it is the established rule, when such is the existent condition of the record, that the question of the sufficiency of the evidence to sustain the findings and judgment will not be examined. The record in this case discloses that the bill of exceptions was prepared and presented to the attorneys for appellee for examination and amendment and was returned to the attorney for appellant indorsed: "I herewith return this draft of a bill of exceptions in the case of Charles Greene v. Rachel B. Greene, submitted to me on the — day of ——, 1893, and propose no amendments thereto." It was said by this court, in deciding the case of *Cattle v. Haddox*, 14 Neb., 59: "Where a bill of exceptions purporting to contain all the testimony is submitted to the adverse party for amendment, and such party certifies that he has no amendments to propose to the same, the court will presume that such bill contains all the evidence, notwithstanding the certificate may not

fully so certify;" but in *Missouri P. R. Co. v. Hays*, 15 Neb., 231, it was stated: "Where all the evidence used on a trial is not before us, we cannot say that the finding was unsupported. It is true that the certificate to the bill of exceptions is to the effect that it is complete and contains all the evidence produced on the trial; but we find within the bill itself, in the questions and answers especially, incontestible proof that it does not. Where such is the case the certificate will not be taken as conclusive on that point." In the bill of exceptions we find the following statement: "Plaintiff now reads in evidence depositions of Aaron Kisselbach, Euphrennia Cramer, Fanny C. Widenor, Nicholas Harris, Howard Barron," etc. The depositions which the record refers to are not in the bill of exceptions, and where the fact that evidence was used which is not incorporated in the record appears, as it does here, it must be noticed notwithstanding the certificate to the bill and the presumption arising from the indorsement of counsel hereinbefore quoted, and where the bill does not contain all the evidence used on the trial, the objection that the finding and decree of the trial court are not supported by the evidence cannot be considered. That it would not be fair or right to do so is too apparent to need argument in its support. (*Chamberlain v. Brown*, 25 Neb., 434; *Aspinwall v. Sabin*, 22 Neb., 73; *Nelson v. Jenkins*, 42 Neb., 133.) The record before us does not disclose any objection made to the litigation of the question of the appellee's rights, if any, in the property, in this, an action of divorce. The question was presented by the pleadings, and, as shown in the record, was fully submitted to the trial court; hence we need express no opinion on it at present. (*Somers v. Somers*, 39 Kan., 132; *Sherwin v. Gaghagen*, and cases cited, 39 Neb., 238.)

It is urged by counsel for the appellee that the appeal from the branch of the case in respect to the property by the appellant presents the whole decree here and that the action of the trial court, in any and all particulars, is

open to examination and reversal or modification at the instance of either party to the cause, and further contends that there was not sufficient evidence to sustain the findings made, on which is based the decree of divorce in favor of appellant. Without discussion or decision of the presentation of this subject at this time, in an appeal which in terms was limited to one branch of the case by the party successful in the portion of the decree sought to be attacked by the opposing party, it will suffice to say that it has developed that the evidence is not all contained in the bill of exceptions, and hence the question of the sufficiency of the evidence to support the findings of the trial court is not open to consideration. It follows from the views hereinbefore expressed and the conclusions reached that the decree of the district court will be

AFFIRMED.

GEORGE W. PURNELL V. JULIA A. MINOR.

FILED NOVEMBER 5, 1896. No. 6813.

1. **Bailment:** TEAMS: NEGLIGENCE: DAMAGES. The hirer of a team is liable to the owner for want of ordinary care in the use of the team.
2. ———: ABUSE OF HORSES: EVIDENCE. The evidence was conflicting. *Held*, That a verdict for plaintiff would not be disturbed.

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

L. C. Chapman, for plaintiff in error.

W. S. Summers, contra.

NORVAL, J.

In 1891 Julia A. Minor hired a team of horses to George W. Purnell for farm work. This action was

brought to recover for a balance due for the use of the team, and for damages sustained by reason of improper care and overwork of the horses by the defendant. The answer was a general denial, and a trial to a jury resulted in a verdict for the plaintiff in the sum of $168, for which sum judgment was rendered.

It is argued that the court erred in permitting plaintiff to testify to the items of her account for the use of the team from a copy of the original account. The record does not so show. It does appear that plaintiff when testifying held in her hands both the original account as made by her and a copy thereof; but it is not disclosed whether she testified to the different items of debits and credits from her own personal recollection or not. She was not even cross-examined on that point. Besides, the amount claimed for the use of the team was established by proving the admission of the defendant.

The last contention is that the verdict is against the evidence. The jury having allowed plaintiff practically the full value of the team at the time of the hiring, it is argued that there was no evidence from which negligence and want of care on the part of the defendant could be found. The testimony on behalf of the plaintiff tended to show that the horses, when hired and received by the defendant on May 11, weighed from 1,200 to 1,300 pounds each, both sound and in good condition, and worth from $100 to $125; that they were overworked and poorly cared for by defendant; that after being worked all day they were turned out at night unfed; that when they were returned to plaintiff in August following they were entirely used up, one having the fistula and the other scarcely able to get up without help, and continued to grow worse until it died two weeks later; and that neither was of any value when the defendant returned them, but both were entirely worthless. If the defendant and his witnesses are to be believed, the team, while under Purnell's control, had proper care and feed and attention, was not overworked, and that the horses were

sound when delivered to plaintiff. The jury saw and heard the witnesses and passed upon the conflicting testimony, and the verdict being supported by the evidence, should not be disturbed. The defendant was liable to plaintiff for all damages resulting from a want of ordinary care in the use of the team while in his possession. The judgment is

AFFIRMED.

ANNA D. EINSPAHR ET AL. V. EXCHANGE NATIONAL BANK OF HASTINGS, NEBRASKA.

FILED NOVEMBER 5, 1896. No. 6819.

Review: UNAUTHENTICATED TRANSCRIPT: DISMISSAL. A petition in error will be dismissed out of the supreme court when the transcript filed therein is not authenticated by the clerk of the trial court.

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

Capps & Stevens, for plaintiff in error.

Tibbets, Morey & Ferris, contra.

NORVAL, J.

The petition in error must be dismissed, for the reason the transcript of the proceedings and judgment filed in this court is not authenticated by the clerk of the court below. (*City of Brownville v. Middleton*, 1 Neb., 10; *Ward v. Urmson*, 40 Neb., 695; *Moore v. Waterman*, 40 Neb., 498; *Baker v. Kloster*, 41 Neb., 890; *Garneau v. Omaha Printing Co.*, 42 Neb., 847; *McDonald v. Grabow*, 46 Neb., 406; *Otis v. Butters*, 46 Neb., 492.)

DISMISSED.

STATE OF NEBRASKA, EX REL. MARQUETT, DEWEESE & HALL, V. A. BAUSHAUSEN ET AL.

FILED NOVEMBER 5, 1896. No. 5875.

1. **Mandamus**: PLEADING. The pleadings in proceedings in *mandamus* have the same effect and are to be construed as in ordinary civil actions. Hence a material averment in a petition for *mandamus*, not denied by the answer, is to be taken as true.

2. ———: DEMAND: WAIVER. As a general rule, *mandamus* will not issue at the suit of a private individual to compel a public officer to do any official act until a demand has been made upon him to do it. But a formal demand is unnecessary where the conduct and action of the respondent are equivalent to a positive refusal.

3. ———: COUNTY BOARD: RES JUDICATA. The allowance of a writ of *mandamus* to compel a county board to include relators' claim in its estimates of the taxes to be levied for the ensuing year is not necessarily an adjudication that a definite sum is due from the county to the relators.

4. **County Board**: ALLOWANCE OF CLAIM: RECONSIDERATION. Under section 40 of the act of the legislature of 1879, entitled "An act concerning counties and county officers" (Compiled Statutes, ch. 18), a county board has authority to once reconsider its action in the allowance of a claim against the county, upon notice to the parties interested.

5. ———: ———: ———: WAIVER OF NOTICE. The formal notice required by said section to be given may be waived by the person entitled thereto.

6. ———: ———: RES JUDICATA. Where a claim presented to the county board for examination and audit is disallowed, which decision is appealed from by the claimant, and he afterwards dismisses such appeal, the action of the board is final and conclusive.

ORIGINAL application for *mandamus* to compel the supervisors of Sherman county to draw a warrant in favor of relators in payment of their claims against the county.

A. G. Greenlee, *F. M. Hall*, and *J. W. Deweese*, for relators.

Long & Mathew and *Emerson A. Smith*, *contra*.

NORVAL, J.

This is an application for a peremptory writ of *mandamus* to compel the respondents, as supervisors of Sherman county, to draw a warrant in favor of the relators in payment of certain claims against the county. The respondents filed an answer to the petition, and the relators interposed a general demurrer thereto, which was overruled at the September term, 1892. This court subsequently appointed a referee to take the testimony and report the same to the court with his findings of facts and conclusions of law thereon. Upon the coming in of the report of the referee each party filed exceptions thereto, which have been argued and submitted for consideration.

It appears from the proofs, and the referee substantially so found, that in 1890 relators filed with the county clerk of Sherman county three claims against the county for legal services, aggregating $1,100; that at a session of the board of supervisors held on January 16, 1891, there was allowed on said claims $800, and relators, by their attorney, at the time agreed to accept said sum in full payment of said claims; that on June 12, 1891, the county board, without notice to relators, reconsidered its action in allowing relators' claims, and ordered the county clerk not to issue a warrant thereon, and further consideration of said claims was postponed; that on June 15, 1891, J. W. Long, the attorney for relators, was notified that further action on said claims would be taken by the county board, which was then in session, and said Long on said day appeared before the board and, at his request, further consideration of said claims was laid over until the next meeting; that on September 16, 1891, the county board, when Long was present, disallowed the claims, and notice of appeal from the decision was then given; that relators subsequently appealed to the district court, and afterwards dismissed their said appeal; that in pursuance of a writ of *mandamus* issued out of this court the claims were included by the board in the esti-

mate of expenses for the year 1892, and there is a sufficient amount in the county treasury, together with the taxes levied, out of which the warrant can be paid; that no formal demand that a warrant be issued relators was ever made upon the county board of Sherman county. The referee found as conclusions of law, in effect:

1. That the granting of the writ of *mandamus* by the court to compel the county board to include the claims of the relators in their estimate of taxes to be levied for 1892 was not an adjudication of the amount due from the county to relators.

2. In this action the merits of the claims cannot be inquired into, since the action of the county board in allowing the same is conclusive unless reversed or modified on appeal.

3. The county board in passing upon the claims of relators acted judicially, and it had no power to reconsider its action thereon.

4. The appeal taken from the reconsideration and disallowance of relators' claims was a nullity, and did not affect relators' rights.

5. Where the party instituting a suit in *mandamus* has a private interest in, or claims the immediate benefit of, the act sought to be coerced, he must allege and prove a demand upon the officer to perform said act, in order to maintain the suit.

6. That as no demand upon the respondents has been proved, the writ should be denied.

Exception is taken by the relators to the conclusion of law last above stated, and we think the exception should be sustained for the reasons hereafter given. In the application for the writ it is expressly alleged that the respondents have refused to draw a warrant in favor of the relators in payment of their claims. This averment is not denied, or put in issue, by the answer. On the contrary, the respondents plead matter in justification of their refusal to issue a warrant upon the claims. The answer must therefore be treated as an admission of a

prior demand, and refusal, and relators were not called upon to establish the same by the proofs. The pleadings in proceedings in *mandamus* have the same effect, and are to be construed as in ordinary civil actions (Code, sec. 653); hence a material averment in the application, not denied in the answer, must be taken as true. (*State v. Hawes*, 43 O. St., 16; 14 Am. & Eng. Ency. of Law, 330.)

The writ should not be refused merely for the failure to prove a demand upon the respondents for another reason. The answer pleads a reconsideration of the former action of the board in allowing the claims, the subsequent disallowance, the appeal from said decision by the respondents to the district court, and the dismissal of the action in that court. The defenses pleaded plainly disclose a determination not to draw the warrant or pay the claim. A formal demand upon the respondents, had one been made, in view of the answer and the evidence adduced before the referee, would have been unavailing A refusal to draw the warrant was based upon grounds other than that no demand therefor had been made. Ordinarily, when an application for *mandamus* is made by a private party, a demand must be made upon the respondent to perform the duty prior to the commencement of the action. (*Kemerer v. State*, 7 Neb., 130; *State v. Eberhardt*, 14 Neb., 201; *State v. Smith*, 31 Neb., 590.) But there is an exception to the rule, as firmly established as the rule itself. A demand or refusal to perform the duty is not necessary in all cases before a suit of *mandamus* will lie. In the language of Mr. Merrill in his work on Mandamus, section 225: "The law never demands a vain thing, and when the conduct and action of the officer is equivalent to a refusal to perform the duty desired, it is not necessary to go through the useless formality of demanding its performance. Anything showing that the defendant does not intend to perform the duty is sufficient to warrant the issue of a *mandamus*." The doctrine just quoted, in somewhat different language, is laid down in Moses, Manamus, 127; 2 Dillon, Municipal Corpora-

tions, sec. 867; *United States v. Town of Brooklyn*, 10 Biss. [U. S.], 466; *Commonwealth v. City of Pittsburgh*, 34 Pa. St., 496, 512; *State v. Clinton County*, 6 O. St., 280; *Supervisors v. Thompson*, 61 Fed. Rep., 914; *Maddox v. Graham*, 2 Met. [Ky.], 56.

Palmer v. Stacy, 44 Ia., 340, was an application for a *mandamus* to compel the levy of a tax for the payment of a judgment against the Bank of Algona. No demand was made upon the defendant to perform the act, yet the court held this was not fatal, since it was disclosed that the defendants had no intention to levy the tax.

State v. Freeholders of Hudson County, 35 N. J. Law, 269, was a rule for *mandamus* to respondents to receive relators as members of the board of chosen freeholders of the county of Hudson. It was held that a formal demand to be admitted was not necessary, because it was manifest from the resolution passed by the respondents declaring the election of the relators to be void and to allow the sitting members to retain their seats that they did not intend to admit them. So in the case at bar, the reconsideration of the action of the board of supervisors in allowing relators' claims, and afterwards disallowing the same, amounted, substantially, to a refusal to perform the act now sought to be enforced, and no formal demand was therefore necessary.

Relators have also excepted to the first conclusion of law made by the referee. By the sixth subdivision of section 25, article 1, chapter 18, Compiled Statutes, it is made the duty of the county board, at their regular meeting in January of each year, to prepare and publish an estimate of the necessary expenses of the county during the ensuing year, and it is also provided that no levy of taxes shall be made for any other purpose or amounts than are specified in such estimate as published. Section 34 of said article and chapter declares: "It shall be unlawful for the county board of any county in the state to issue any warrants for any amount exceeding the aggregate of eighty-five per cent of the amount levied by tax

for the current year, except there be money in the treasury to the credit of the proper fund for the payment of the same; nor shall it be lawful for the county board to issue any certificate of indebtedness in any form in payment of any account or claim, nor to make any contracts for or to incur any indebtedness against the county, in excess of the tax levied for county expense during the current year, nor shall any expenditure be made or indebtedness be contracted to be paid out of any funds of said county in excess of the amount levied for said fund." It is very evident from a reading of the foregoing sections that it was the intention of the legislature that the making of the estimate of expenses required to be made by the county board should precede the allowance of a claim against the county and the drawing of a warrant in payment of the same. This being true, it follows that in the *mandamus* proceedings to compel the respondents to include the claims of relators in the estimate of taxes to be levied for the year 1892 the issues in the case at bar were not necessarily adjudicated, nor were the merits of such claims, or the amount due thereon, unalterably established or determined. The only purpose and scope of the writ in that case was to require the county, by proper estimate and levy of taxes, to provide means for the payment of any sum which might be found due relators. (*State v. Cather*, 22 Neb., 796.)

Exception is taken by the respondents to the referee's third conclusion of law, which raises the question whether under the existing statute a county board can reconsider its action in passing upon claims presented against the county for audit and allowance. We agree with counsel for relators that a county board can exercise only such powers as are granted by express statute, or such as are necessarily or fairly implied in, or incident to, those expressly granted. It follows that such boards have no power to review or reconsider its former adjudication, unless authorized by statute to do so. It is no longer an open question in this state that a county board

has exclusive original jurisdiction to pass upon claims, and that in so doing it exercises functions judicial in their nature. The allowance or disallowance of a claim by the board has the force of a judgment until reversed or set aside. The cases so holding are collated in *Stenberg v. State*, 48 Neb., 299. It has been ruled by this court that prior to 1879 a county board was without jurisdiction to reconsider or set aside its former action in allowing or rejecting a claim. (*State v. Buffalo County*, 6 Neb., 454; *Kemerer v. State*, 7 Neb., 130; *State v. Cathers*, 25 Neb., 250.) Whether those decisions are applicable, and should be now followed as precedents, depends upon the construction which shall be placed upon legislation which was not in existence at the times the facts in the cases referred to arose.

In 1879 the legislature passed an act concerning counties and county officers. (Session Laws, 1879, p. 353; Compiled Statutes, ch. 18.) Section 23 of said act provides: "The county boards of the several counties shall have power: * * * Second—To manage the county funds and county business, except as otherwise specifically provided. * * * Fifth—To examine and settle all accounts against the county, and all accounts concerning the receipts and expenditures of the county." Section 40 declares: "The provisions of this subdivision shall not be so construed as to prevent the county board from once reconsidering their action on any claim, upon due notice to parties interested." It is insisted by respondents that this last section confers power upon county boards to reconsider their decisions made in passing upon accounts or demands against the county. It must be conceded that if such was the purpose of the legislature in framing the law, more apt or appropriate language could have been employed in expressing such object; nevertheless, we are convinced that the construction placed upon the section by respondents is the only proper one, when considered in the light of prior legislation, and the course of judicial decisions in this state previous to the adoption

of the act of 1879. The law as it stood prior to that year relating to the allowance of claims was substantially the same as the fifth subdivision of section 23 quoted above, except that it contained no provision similar to section 40 of the act of 1879; nor was any authority expressly or impliedly given for the reconsideration of claims by the county board. It had been decided in *Brown v. Otoe County*, 6 Neb., 111, under the statute then in force, which conferred upon county boards exclusive original authority "to examine and settle all accounts for the receipts and expenditures of the county, and allow all accounts chargeable against the county," that the decisions of such boards in the allowance or rejection of claims are conclusive unless reversed upon appeal. In other words, their decisions in that regard have the effect of judgments. It had also been ruled in at least two cases, previous to the act of 1879 that a county board possessed no authority to reconsider its adjudication of a claim. (*State v. Buffalo County*, 6 Neb., 454; *Kemerer v. State*, 7 Neb., 130.) It was those decisions which prompted the legislature to enact said section 40; and when its provisions are read in the light of those adjudications,—which should be done,—it is manifest that it was the intention to give power and authority to a county board to once reconsider its action upon a claim against a county upon notice to parties interested. Any other interpretation of the section would make its provisions entirely meaningless and nugatory. It is a familiar rule in the interpretation of statutes to ascertain the intention of the legislature and to give effect to such intent rather than to the literal sense of the terms employed by the law givers. (*Swearingen v. Roberts*, 12 Neb., 337.)

Relators argue that if the construction we have adopted is the proper one, then this section 40 is unconstitutional, because it encroaches upon the power conferred by the constitution on the judiciary. Ordinarily, the interpretation of statutes is for the courts; nevertheless, legislative construction of a law frequently controls as to sub-

sequent transactions. In the language of Frazier, C. J., in *Dequindre v. Williams*, 31 Ind., 444: "It is not ordinarily the function of the legislature to interpret statutes, nor is such interpretation binding upon the courts as to past transactions. But, as to matters occurring thereafter, such legislation guides all departments of the government. (Sedgwick, Constitutional Law, 253.) If a legislative construction be even plainly contrary to the terms of the act construed, it must, nevertheless, be taken as a new enactment, changing the old law." In the statute under consideration appears the legislative construction or definition of its provisions, and for that body to thus define its own language is not an invasion of the functions of the judicial branch of the government.

The law requires notice of the reconsideration by the board of its decision on a claim to be given the party interested. It is insisted that the statute in regard to notice was ignored, and for that reason the action of the respondents in reconsidering and in disallowing the claims was void. The referee finds that the evidence fails to show that relators had any notice of the pendency of the motion of reconsideration until after action was taken. It does, however, appear that Mr. Long, the attorney for relators in this matter, was notified that the board would take further action on the claims on a certain date, that he appeared in response thereto, and that at his request action was postponed until the next meeting of the board, at which time he again appeared before the board, and the claims were then rejected or disallowed. The appearance by relators' duly-constituted attorney was a waiver of the notice contemplated by statute.

The action of the relators in appealing from the disallowance of the claims to the district court, and in subsequently dismissing their appeal, constitutes a final adjudication, and leaves their claims standing disallowed. (*Richardson County v. Hull*, 24 Neb., 536.) The writ is denied.

WRIT DENIED.

LININGER & METCALF COMPANY V. GEORGE T. WHEAT.

FILED NOVEMBER 5, 1896. No. 6881.

1. **Guaranty**: NOTICE OF ACCEPTANCE. A guarantor, as a condition precedent to his liability, is not entitled to notice of the acceptance of a guaranty in the following form: "The undersigned does hereby guaranty the faithful and full performance by the party of the second part to the contract of all the agreements and engagements therein entered into by the party of the second part."

2. ———: NOTICE OF DEFAULT. The neglect to notify the guarantor of the default of his principal does not operate to discharge the guarantor, unless such neglect is, on its face, unreasonable in view of all the circumstances of the case.

3. ———: CONSIDERATION: CREDIT. A consideration sufficient to sustain a guaranty of the faithful performance of the undertakings of the principal exists when the party for whose protection the guaranty was executed has extended credit to the principal on the faith of such guaranty.

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

Smith & McCreary, for plaintiff in error.

Capps & Stevens, contra.

RYAN, C.

This action was brought in the county court of Adams county by the plaintiff in error April 20, 1893. From a judgment for the sum of $391.70 the defendant appealed to the district court, wherein judgment was rendered on the verdict of a jury in his favor.

On the 12th day of February, 1892, plaintiff, Lininger & Metcalf Company, entered into a written agreement with W. H. Shellhammer whereby Mr. Shellhammer was appointed its agent for the sale of certain of its goods at Holstein and Norman. Among other undertakings of this agent under his agreement he was to be liable to the company for any damages that goods might sustain by reason

of not being properly stored. It was also stipulated in the agreement that for such goods as should not have been ordered away and remained unsold on January 1, 1893, Mr. Shellhammer was to be liable to pay the cash value, if so required by the company. This action was for the balance alleged to be due under the above provisions and was brought against the defendant in error on this his guaranty, which was indorsed on the aforesaid written agreement:

"GUARANTY.

"For value received the undersigned does hereby guaranty the faithful and full performance by the party of the second part to this contract of all the agreements and engagement therein entered into by the said party of the second part.

"Witness — hand and seal the day and date within written. GEORGE T. WHEAT."

On the trial there was introduced as evidence on behalf of Mr. Wheat a stipulation entitled as in this case and dated and filed October 11, 1893. It was in this language: "It is hereby stipulated and agreed by and between the parties hereto that there was due on January 1, 1893, from W. H. Shellhammer to the Lininger & Metcalf Company, this plaintiff, under the terms of the contract set out in plaintiff's petition herein, the sum of three hundred and ninety-one and .70 dollars ($391.70), no part of which has been paid, and all of which is now due." It is by this stipulation rendered unnecessary that the evidence showing what was due from Shellhammer should be discussed. That was admitted, in so far as Mr. Wheat was concerned, by this stipulation. The defenses in support of which evidence was introduced and as to which plaintiff asked instructions which were refused and embraced in the following propositions: (1) Want of notice to Wheat of the acceptance of his guaranty after its execution; (2) failure within a reasonable time after January 1, 1893, to give notice to Wheat of the default of Shellhammer, and (3) want of such a consideration as would

support the contract of guaranty. In relation to the last of these propositions it is sufficient to say that credits upon the faith of it were, after its execution, extended by the company to Mr. Shellhammer. This was, therefore, a sufficient consideration to uphold the contract of guaranty. (*Huff v. Slife*, 25 Neb., 448.) In the case just cited it was also held that the mere neglect of the holder of a note to sue the maker did not discharge the guarantor, although the maker becomes insolvent. Knowledge of the default came to Mr. Wheat on February 24, 1893, and there was no evidence that in the interim between January 1 and February 24 immediately thereafter there was any change in the financial condition of Mr. Shellhammer. If Mr. Wheat is to be released, it must be by reason of the mere lapse of this time, and this circumstance alone, as already indicated in the case of *Huff v. Slife*, is insufficient. It has been held by this court that to hold the guarantor liable no notice of acceptance of guaranty is necessary. (*Wilcox v. Draper*, 12 Neb., 151; *Klosterman v. Olcott*, 25 Neb., 382.) We conclude, therefore, that the district court erred in refusing, on plaintiff's request, to instruct the jury consistently with the views above stated. For the error in these refusals the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

JAMES TALCOTT V. SAMUEL F. BENNETT.

FILED NOVEMBER 5, 1896. No. 6866.

Limitation of Actions: CONCEALMENT. The concealment or absconding which, under section 20 of the Code of Civil Procedure, suspends the operation of the statute of limitations, must be such as affects the commencement of judicial proceedings in Nebraska, and not those of another state.

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

Bartlett, Baldrige & De Bord, for plaintiff in error.

References: *Edgerton v. Wachter*, 9 Neb., 500; *Harper v. Pope*, 9 Mo., 403; *Harman v. Looker*, 73 Mo., 622; *Bobb v. Shipley*, 1 Mo., 229; *Scroggs v. Daugherty*, 53 Mo., 497; *Fike v. Clark*, 55 Mo., 155; *Thomas v. Black*, 22 Mo., 330; *Butler v. Lawson*, 72 Mo., 227; *Campbell v. Rowe*, 32 Neb., 345.

Charles Offutt, contra.

References as to what constitutes "absconding" or "concealment" within the purview of section 20 of the Code, relating to limitation of actions: *Hoggett v. Emerson*, 8 Kan., 262; *Frey v. Aultman*, 30 Kan., 181; *Myers v. Center*, 47 Kan., 324; *Minneapolis Harvester Works v. Smith*, 36 Neb., 616; *Harrison v. Union Nat. Bank*, 12 Neb., 499; *Sisson v. Niles*, 64 Vt., 449; *McDonald v. Underhill*, 10 Bush [Ky.], 584; *Crane v. Jones*, 33 Pac. Rep. [Ore.], 869; *Way v. Colyer*, 55 N. W. Rep. [Minn.], 744.

RYAN, C.

This action was begun in the district court of Douglas county for the recovery of judgment for the value of certain goods sold by the plaintiff to the defendant in the state of New York in November of the year 1869. The question involved was whether or not the statute of limitations of this state had barred plaintiff's alleged cause of action. On sufficient evidence the jury found specially that the defendant came to the state of Nebraska in December, 1878, and that on August 18, 1891, the commencement of this action, he could, for an aggregate period of four years, have been served with summons in the state of Nebraska. It was further specially found by the jury that the defendant had not concealed himself so that a summons could not be served upon him in this state since his coming therein to reside. There was a general verdict

for the defendant and from the judgment thereon plaintiff prosecutes error to this court.

Section 20 of the Code of Civil Procedure contains this language: "If, when a cause of action accrues against a person, he be out of the state or shall have absconded or concealed himself, the period limited for the commencement of action shall not begin to run until he come into the state, or while he is absconded or concealed." It is apparently not questioned by the plaintiff in error that under ordinary circumstances an action of the nature of this would be barred in four years if the defendant did not abscond or conceal himself; but the argument insisted upon is that, in this case, the absconding was from the state of New York, and the concealing by the debtor consisted in not furnishing his creditor with means of information as to his whereabouts. The jury found specially that the defendant might have been served with summons in Nebraska for the space of five years, and this is more time than our statute ordinarily allows for the commencement of an action on an account for the recovery of money. The absurdity of the construction insisted on by the defendant may be illustrated by a reference to another statutory provision. Section 198, Code of Civil Procedure, provides that if a debtor conceals himself so that a summons cannot be served upon him, the plaintiff may have an attachment against the property of such defendant. If the same rule of construction is applicable to this section of the Code of Civil Procedure as plaintiff contends should be applied to section 20, there is no one residing in this state indebted to a creditor resident in another state who can avoid an attachment against his property, obtained on the ground of concealment so that a summons cannot be served in the state wherein his creditor resides. As clear as this seems upon principle and upon analogy, it has required consideration for its settlement by the supreme court of Kansas, wherein it has been held that the absconding or concealment must be with reference to judicial proceedings in that state. (*Hoggett*

v. Emerson, 8 Kan., 262; *Frey v. Aultman*, 30 Kan., 181; *Myers v. Center*, 47 Kan., 324.) This construction we think the only one of which our statute is susceptible. There is found no error in the record and the judgment of the district court is

AFFIRMED.

NORTH BRITISH & MERCANTILE INSURANCE COMPANY OF LONDON AND EDINBURGH V. WILLIAM G. BOHN ET AL.

FILED NOVEMBER 5, 1896. No. 6897.

1. **Insurance:** OWNERSHIP: MISREPRESENTATIONS: RIGHTS OF MORTGAGEE. A representation by two individuals that they were owners of the property sought to be insured, when in fact it was owned by a corporation, of the capital stock of which they were the sole proprietors, *held*, not such a misrepresentation as avoided the right of a mortgagee to assert its rights under a "union mortgage clause" attached by the insurer to the policy, the mortgagee having no knowledge of, or participation in, the said misrepresentation.

2. ——: ——: ——: EVIDENCE. Under the circumstances above stated, it was not prejudicial error to refuse to permit the plaintiff in error to show the insolvency of the corporation grantee at the time either of the insurance affected or of the loss suffered.

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

A. S. Churchill and *George A. Day*, for plaintiff in error.

Charles Offutt, *James B. Meikle*, and *Byron G. Burbank*, *contra*.

RYAN, C.

In *Hanover Fire Ins. Co. v. Bohn*, 48 Neb., 743, the facts involved in this case were stated, with the exceptions that the amount and exact date of insurance and the name of the insurer and its agent are not identical. These are,

however, unimportant, for upon these slight differences no claim of rights is predicated by the plaintiff in error in this case. There are urged certain arguments, which, it is asserted, were not involved in *Hanover Fire Ins. Co. v. Bohn, supra*, and we shall content ourselves with reviewing these, without a restatement of all the facts involved. It is urged that as the original insurance was of the interest of Conrad and W. G. Bohn as sole owners, the subsequent transfer of the title by those parties to the Bohn Manufacturing Company operated to avoid the policy which formed the basis of this action. It is not necessary to determine what might be the rights of Conrad and W. G. Bohn to sue as individuals upon said policy, for the judgment in this case was, by the district court, ordered paid to the National Life Insurance Company of Montpelier, Vermont,—a party impleaded as plaintiff with said Conrad and W. G. Bohn. This company held a mortgage on the premises upon which stood the insured structures as security for the payment of the sum of $25,000, of which sum there still remains due more than $20,000. When insurance was effected by Conrad and W. G. Bohn upon the property afterwards destroyed, the plaintiff in error, by attaching to the policy issued by it a separate mortgage slip, agreed that the loss, if any, should be paid to the mortgagee as its interest should appear. This policy was for the sum of $1,500, which, so far as the proofs in this case show, was much less than the debt owed by Conrad and W. G. Bohn and secured by the aforesaid mortgage on the insured property. The mortgagee was neither aware of nor party to any misrepresentation as to the title of the property insured made by Conrad and W. G. Bohn, hence its right to recover was unaffected thereby, as has already been shown by the authorities cited in *Syndicate Ins. Co. v. Bohn*, 12 U. S., C. C. A., 531,—another case which arose out of the same loss.

It is insisted that there was error in refusing to admit evidence of the insolvency of the Bohn Manufacturing

Company. In explanation of this contention it should be stated that the defendants in error urged that the transfer of Conrad and W. G. Bohn to the Bohn Manufacturing Company could not lessen the solicitude of the grantors for the preservation of the property conveyed, for the reason that the stock of the manufacturing company was held entirely by Conrad and W. G. Bohn. To avoid this inference of their solicitude remaining unimpaired by the conveyance, plaintiff in error sought and was refused permission to show the insolvency of the corporation, from which insolvency, it was claimed, it must result that whatever recovery should be had on account of loss by fire would first inure to the benefit of the creditors of the corporation. If the recovery in this case had been for the benefit of Conrad and W. G. Bohn, there would perhaps be force in this suggestion. The recovery was for the payment of the mortgage in accordance with the provisions of the "union mortgage slip;" hence, what might be the natural effect of a payment to the creditors of the Bohn Manufacturing Company instead of to Conrad and W. G. Bohn, is a matter of no practical importance in this case. In this connection it may properly be remarked that these same considerations render unavailing the complaint because of the refusal of the district court to permit proofs that upon the renewal of the policy a greater premium than was collected would have been exacted if the insurance company had been aware of the transfer of title. The jury found specially that the loss was total, and, therefore, the argument as to the failure to arbitrate and furnish an itemized appraisement of the property destroyed has no force.

We cannot review the instructions either asked or refused, for there were several in each of these two classes, and, in the motion for a new trial, each class was grouped for the purposes of criticism, and in each class there were instructions which afforded no ground for complaint. There is found no error in the record and the judgment of the district court is

AFFIRMED.

JOHN N. BROWN, APPELLANT, V. MARY A. FITZPATRICK ET AL., APPELLEES.

FILED NOVEMBER 5, 1896. No. 8450.

Review: RECEIVERS. The refusal of the district court to appoint a receiver must be affirmed when, neither by the petition nor by the proofs adduced, was there a showing that such refusal was erroneous.

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

Morris, Beekman & Marple, for appellant.

I. J. Dunn, contra.

RYAN, C.

On November 23, 1895, there was filed in the district court of Douglas county a petition in which John Nicholas Brown was named as plaintiff and Mary Ann Fitzpatrick and others were named as defendants. The first paragraph of this petition was in the following language: "Now comes the plaintiff and shows to the court that on the 8th day of October, 1895, he purchased the property in controversy herein at sheriff's sale under decree of foreclosure herein for the sum of $8,944.52, and that on the 26th day of October, 1895, said sale was fully confirmed by this court and that on the 11th day of November, 1895, the defendants, Mary Ann Fitzpatrick and Dennis Fitzpatrick, filed a supersedeas bond herein and intended to take said case on appeal from the order confirming said sale to the supreme court." Following the above quoted language the petition contained averments that the value of the said premises was not in excess of $8,000; that the defendants were insolvent and in possession of said premises, collecting the rents and profits therefrom for their own benefit. As grounds for praying the appointment of a receiver it was alleged in the petition that

said premises were in danger of being materially injured, and that said premises had been sold for taxes in 1894, and that in 1895 the tax purchaser had paid the taxes thereon for 1894, and that at the time of filing the petition there was unpaid the city tax for 1895. In the petition it was further alleged that the appeal from the order of confirmation could not be determined in the supreme court within two years, and that meantime the defendants would continue to collect and use the rents and profits as they accrued, permitting additional taxes, assessments, and interest to accumulate against said premises. The prayer of the petition was as follows: "Wherefore the plaintiff prays for the appointment of a receiver herein to take charge of said real estate and to collect the rents and profits therefrom and to apply the same toward the payments of the taxes and assessments against said real estate, and for such other relief as may be just and equitable." Upon affidavits alone there was a hearing which resulted in a denial of the prayer of the petition. It is very probable that the above petition was filed in a cause pending, but unfortunately there is nothing in the record to show that such is the case except the averments above noted. There is in this court no record of confirmation or of other proceedings precedent to confirmation, either pleaded or offered in evidence. It is easy to imagine that counsel on either side should naturally assume in this court that we understand the conditions which surrounded the filing of the application for a receiver. We can only know what is disclosed by the record, and with this suggestion in mind counsel can readily see why we cannot discuss several propositions urged in argument. One of the material issues which was presented, and in respect to which, however, contradictory proofs were offered, was whether or not the defendants were insolvent. The finding generally for the defendants, it would seem, solved the question of fact in their favor. The taxes, which it is urged the defendants have not paid, were liens when plaintiff purchased under the foreclosure, and,

as paramount liens, should have been deducted from the amount of the appraisement. (*Vide* Code of Civil Procedure, sec. 491*b*.) As there is no proof as to this, we are bound to assume that the payment by the bidder was decreased by the amount of these taxes; hence the injustice of requiring the defendants to pay them is quite clear. It was alleged generally in the petition that the premises were in danger of material injury, but in what respect this danger was threatened there was neither averment nor proof. The prayer of the petition was that a receiver might be appointed to collect the rents and profits and apply the same to the payment of taxes and assessments against the real property. There was no prayer that any of such rents or profits might be used to ward off threatened danger. As to waste permitted or suffered, there was neither averment nor prayer in the petition. Under these circumstances we cannot say that there was error in the order denying the receiver prayed, and the judgment of the district court is, therefore,

AFFIRMED.

CREIGHTON UNIVERSITY, APPELLEE, V. JOHN MULVIHILL ET AL., APPELLANTS.

FILED NOVEMBER 5, 1896. No. 6895.

Review: CONFIRMATION OF SALE: OBJECTIONS. On an appeal from an order confirming a sale, this court will consider only the specific objections made in the district court to such confirmation.

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

Gregory, Day & Day, for appellants.

Frank T. Ransom, contra.

RAGAN, C.

This is an appeal from an order of the district court of Douglas county confirming a sale made pursuant to a decree of foreclosure of a mortgage upon real estate. Three arguments are made in the briefs filed here by the appellants for a reversal of this decree. The first and second arguments assail the valuation put upon the real estate by the appraisers. It does not appear from the record, however, that any objection was made by the appellants to the appraised value of the property prior to its sale. After the sale of the property it was too late for the first time to assail the appraisement, except for fraud. Objection that the property was appraised too high or too low should have been made and filed in the case with a motion to vacate the appraisement prior to the sale. (*Ecklund v. Willis*, 44 Neb., 129, and cases there cited.)

The third argument is that the sheriff neglected to file with the clerk of the district court a copy of the appraisement as soon as made, and in fact did not file such appraisement until the day before the sale. If this was true it was an irregularity for which the district court should have set aside the sale on his attention being called thereto, as a copy of the appraisement together with the written application for liens and the certificates of liens mentioned in section 491*d* of the Code must be deposited in the office of the clerk from which the execution issued before the sale is advertised. (See *Burkett v. Clark*, 46 Neb., 466.) But the objection to the sale argued here was not presented to the district court on the hearing of the motion to confirm the sale appealed from. The objection there was that the sheriff made the sale without filing any copy of the appraisement with the clerk of the district court. It was the duty of the appellants to specifically allege in the district court every reason which they wished to urge as an objection against the confirmation of the sale; and only the objections made there can

be urged here on appeal. We will not consider the objection urged here, because it was not made to the district court and it given an opportunity to pass upon it. (*Ecklund v. Willis, supra; Johnson v. Bemis*, 7 Neb., 224.) The decree appealed from is

AFFIRMED.

I. L. ALBERT, APPELLEE, V. CHARLES H. DAVIS ET AL., APPELLANTS.

FILED NOVEMBER 5, 1896. No. 8536.

Municipal Corporations: WATER-METERS: REGULATIONS. A city of the second class having less than 5,000 inhabitants, and owning and maintaining water-works, has not the power to require an inhabitant, as a condition precedent to the use of water, to purchase and place in position, at his own expense, a water-meter.

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

W. N. Hensley and *McAllister & Cornelius*, for appellants.

References: *Jackson v. City of Ellendale*, 61 N. W. Rep. [N. Dak.], 1030; *Sheffield Water-Works Co. v. Bingham*, 25 L. R., Ch. Div. [Eng.], 451.

Albert & Reeder, contra.

References: *Smith v. Birmingham Water-Works Co.*, 16 So. Rep. [Ala.], 123; *Red Star Steamship Co. v. City of Jersey City*, 45 N. J. Law, 246; *Spring Valley Water-Works Co. v. City of San Francisco*, 22 Pac. Rep. [Cal.], 911; 2 Beach, Private Corporations, sec. 834*c*.

IRVINE, C.

The city of Columbus is a city of the second class, owning and operating a system of water-works for the supply

of the city and its inhabitants with water. The city undertook by ordinance to provide that all water should be supplied to private consumers through a meter of standard manufacture, to be approved by the water commissioner, and that the cost of such meter and of placing the same and keeping the same in repair should be paid by the consumer. The plaintiff was the owner of real property within the city and a consumer of water. He neglected or refused to purchase and place in position a meter and the city was about, for that reason, to shut off the water from his premises, when he instituted this action against the city and Davis, the water commissioner, to restrain such threatened action. A perpetual injunction was allowed by the district court, and the defendants appeal.

The sole question presented is whether the city has authority under existing laws to require consumers of water to obtain and place in position meters at their own expense. Our attention has been called to several cases in the courts of this country and England where a similar question has been considered. The authority of a municipal corporation in the premises is, however, so purely a question of statutory construction that the adjudications of foreign courts are practically of no assistance.

Section 69, subdivision 15, article 1, chapter 14, Compiled Statutes, confers the authority vested in cities of the class of Columbus with reference to water-works. It provides, among other things, that such cities may make contracts with and authorize any person, company, or corporation to erect and maintain a system of water-works and water supply, and give such contractors the exclusive privilege for a term not exceeding twenty-five years to lay in the streets and alleys of said city water mains and supply pipes and to furnish water to such city or village and the residents thereof under such regulations "as to price, supply, rent of water-meters as the council or board of trustees may from time to time prescribe by ordinance for the protection of the city, village,

or people." Further, that such cities may provide "for a supply of water for the purpose of fire protection and public use and for the use of the inhabitants of such cities and villages by the purchase, erection, or construction of a system of water-works and by maintaining the same;" that in such case "the council or the board of trustees of such towns and villages shall have power to make and enforce all needful rules and regulations in the erection, construction, use, and management of such water-works and for the use of the water therefrom; and such cities and villages shall have the right and power to tax, assess, and collect from the inhabitants thereof such tax, rent, or rates for the use and benefit of water used or supplied to them by such water-works as the common council or board of trustees shall deem just or expedient." It is further provided that "it shall be the duty of such water commissioner, subject to the supervision of the mayor and council or board of trustees, to have the general management and control of the system of water-works in the city or village, fixing the rates to be paid by the inhabitants thereof within such limits as may be prescribed by ordinance for the use of water, water meters, and hydrants."

It will be observed that there is a very general, although ill-defined power conferred to enforce all needful rules and regulations for the use of water, and to tax, assess, and collect a tax, rent, or rates for the use of water supplied; and it is contended that this grant includes the power to require the consumer to supply himself with a meter, this argument being re-enforced by the contention that the duty of the city in erecting and maintaining works ends with laying mains upon the streets, and that an inhabitant, in order to entitle himself to use water, must himself provide the necessary service and supply pipes on his own premises, and consequently, if the city sees fit to sell the water by measurement, he must, as a portion of his private water service, supply himself with the necessary meter. Whether this would be true if this general grant

of power stood alone we need not determine. In the case of a grant of a franchise to a private corporation the authority of such corporation is to supply water "under such regulations as to price, supply, rent of water-meters as the council * * * may * * * prescribe." There is no express grant of power, either to such franchised corporation or to the city, in maintaining its own water-works, to sell meters or to compel consumers to supply themselves with meters. On the contrary, with regard to cities maintaining their own water-works, there is a provision that the water commissioner, subject to the supervision of the mayor and council, shall have the general management of the system, fixing the rates to be paid for the use of water, water-meters, and hydrants. We think that the affirmative grant of power to fix and collect charges for the use of water-meters excludes by implication the power to compel consumers to furnish their own meters. It is contended that inasmuch as power is vested in the city to purchase water-works already erected by a franchised corporation, and because the grant of power to such corporation extends to the collection of rents for water-meters, the provision with reference to charges for the use of water-meters referring to city ownership is made to meet the case of the purchase by a city of private water-works which, under the first portion of the section, have been erected, furnishing their own meters and charging rent therefor. But this line of construction would be too narrow. Reading the whole section, which is too long for quotation here, it is quite evident that in the portions quoted the legislature had not in view merely the case of purchase by a city of private water-works already in existence, but that it was providing generally for the management of public water-works however constructed or obtained. We cannot better express our views upon the construction of the statute than by quoting as follows from the opinion of the district judge: "It is highly improbable that the legislature would make the power to charge for the mere use of meters the

subject of an express grant, and at the same time permit the more important power of compelling consumers of water to buy and own their own meters to rest in doubtful implication. In this connection another thought occurs. The grant of a power in express terms affords always an inference against the grant of the same power by implication in the same act. If that portion of the statute from which the city claims to derive its authority is broad enough to warrant the council in ordaining that consumers of water shall buy meters, it is, of course, also broad enough to require them to rent meters; and if it is broad enough to require them to rent meters, the express provision on that subject is wholly unnecessary. To hold that both provisions of the statute mean the same thing would be to impute tautology and redundancy of expression to the legislature, which, in doubtful cases, is never permissible by the rules of construction. It is rather to be presumed that the language has been used intelligently, and that different sets of words stand for different ideas. Considering together the several provisions of the charter relating to water-meters, I conclude it was the intention of the legislature that where water is furnished by the meter system only, whether by the city itself or by some private person or corporation under its authority, the patrons of the water-works may be required to pay meter rents, but may not be required to purchase and own meters."

AFFIRMED.

POST, C. J., not sitting.

FIRE ASSOCIATION OF PHILADELPHIA V. JAMES A. RUBY ET AL.

FILED NOVEMBER 5, 1896. No. 6636.

1. **Judicial Sales:** PAYMENT OF PROCEEDS: DUTY OF SHERIFF. It is the duty of an officer selling land under a decree of foreclosure to pay the proceeds of the sale, upon confirmation thereof, directly to the persons entitled thereto under the decree, unless the court shall have ordered the proceeds to be paid into court.

2. ———: LIABILITY OF SHERIFF FOR PROCEEDS. In an action against such officer for failure to pay the proceeds to the party entitled, the officer, admitting in his answer the receipt of the money, does not discharge himself from liability by showing that he paid it over to the clerk.

3. **Res Judicata:** AMERCEMENT: ACTION ON OFFICER'S BOND. A judgment of amercement against an officer is, in a subsequent suit upon the official bond, conclusive evidence of the facts necessary to sustain the judgment against the officer, and it is *prima facie* evidence against the sureties.

4. **Bill of Exceptions:** AUTHENTICATION: ATTORNEY AND CLIENT. A stipulation is sufficient to authorize the clerk to sign a bill of exceptions when, by its terms, it clearly shows that the particular bill of exceptions to which the stipulation is attached is agreed upon by the parties as a correct bill.

5. **Action on Sheriff's Bond for Proceeds of Sale:** VERDICT FOR DEFENDANTS. Evidence examined, and *held* not to sustain the verdict.

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

G. Norberg and *Dryden & Main*, for plaintiff in error.

S. A. Dravo, F. G. Hamer, C. H. Roberts, and *Stewart & Munger, contra.*

IRVINE, C.

This was an action by the Fire Association of Philadelphia against Ruby, formerly sheriff of Phelps county, and his sureties upon his official bond. It was founded upon the alleged failure of Ruby as sheriff to pay over to

the plaintiff the proceeds of a sale of real estate under a decree of foreclosure in favor of the plaintiff. There was a verdict and judgment for the defendants, which the plaintiff seeks to review by these proceedings.

Owing to imperfect exceptions and assignments of error, we cannot consider the questions presented as to the instructions given by the court to the jury. We shall confine ourselves to the consideration of a single assignment, to-wit, that the verdict was not sustained by the evidence.

The petition alleged the official capacity of Ruby and the execution of his official bond. It then alleged that in the performance of his duties as sheriff Ruby sold certain land under an order of sale issued out of the district court of Phelps county in an action wherein the plaintiff foreclosed a mortgage upon said land; that after paying the costs Ruby had remaining from the proceeds of said sale the sum of $743.07; that he had paid to the plaintiff the sum of $308.07, and had neglected and refused to pay to the plaintiff the remaining $435, the whole amount due the plaintiff under the decree being $1,351; that thereafter a motion had been filed for the amercement of the sheriff; that due notice thereof was given and that a judgment of amercement had been entered in the sum of $435. Wherefore plaintiff prayed judgment. The defendants by their answer admitted the official capacity of Ruby and the execution of the bond. They further admitted the sale of the land as alleged and that after paying costs Ruby "had remaining in his hands from the proceeds of said sale the sum of $708.07." As a defense they then pleaded that Ruby paid in to the clerk of the court that sum, and thereby fully discharged his duty, and that thereafter he was induced by Ellsworth, the deputy clerk of the court, to sign a receipt on the docket for said sum, whereby he acknowledged having received said sum back from the deputy clerk; that immediately after signing said receipt Ruby and Ellsworth agreed that the money should not be paid over, and that no money

was in fact paid back by the clerk to Ruby; that said receipt was to be canceled, but Ellsworth failed to do so; that the signing of said receipt was not an official act, but was performed after the sheriff discharged his full duty, and was, therefore, not binding upon the defendants. Secondly, the defendants alleged that the judgment of amercement was made without notice to Ruby and was void; and thirdly, they alleged that the plaintiff, by its counsel, entered into an agreement with Ellsworth whereby it was agreed that Ellsworth had the money in his possession; that plaintiff received from Ellsworth $308.07, and agreed with Ellsworth, in consideration of the payment thereof, to extend the time of payment of the remainder until such time as it was convenient to Ellsworth. The reply denied the averments of the answer.

The evidence seems to show that a conspiracy was entered into between Ellsworth, Ruby, and Dravo, the purchaser of the land at the foreclosure sale, whereby the purchase money was paid in the first instance to the clerk, the sheriff gave his receipt to the clerk therefor on the docket, Ellsworth gave to Ruby his individual receipt in return, and then, according to Ellsworth's testimony, lent the money to Ruby, and all this for the purpose of permitting Dravo to institute an action and garnish the fund. What became of the garnishment proceedings does not appear. What the liability of the sheriff and his bondsman would be under this peculiar state of facts, we need not consider. We must treat the evidence in the light of the issues made by the pleadings. The defendants admitted that Ruby had made the sale, and that he had remaining in his hands $708.07. As a defense they pleaded, first, that he had discharged his liability by paying this money to the clerk; second, that the judgment of amercement was void for want of notice; third, that the plaintiff's attorneys had recognized the money as being in the clerk's hands, and had agreed with him, in consideration of payment of part, to extend the time of paying the re-

mainder. Upon these issues the evidence did not sustain the verdict.

Section 498 of the Code of Civil Procedure provides that upon the return of any writ of execution or order of sale for the satisfaction of which any lands have been sold, the officer making the sale "may retain the purchase money in his hands until the court shall have examined his proceedings as aforesaid, when he shall pay the same to the person entitled thereto agreeable to the order of the court." Section 507 provides that "If on any sale made as aforesaid, there shall be in the hands of the sheriff or other officer more money than is sufficient to satisfy the writ or writs of execution, with interest and costs, the sheriff or other officer shall, on demand, pay the balance to the defendant in execution, or his legal representatives." Section 513 provides that if the sheriff "shall refuse or neglect on demand to pay over to the plaintiff, his agent or attorney of record, all moneys by him collected or received for the use of said party," he shall be amerced as provided in the section. There is no room to doubt from these expressions that the statute contemplates that the sheriff or other officer making the sale shall make distribution of the proceeds, paying out the money directly to the persons entitled thereto under the judgment or decree, except where the court has otherwise ordered. (*Luce v. Foster*, 42 Neb., 818.) It is neither pleaded nor proved that in this case the court had directed the proceeds of the sale to be paid into court or to the clerk. The plaintiff's decree being for more than the amount realized on the sale, it was the duty of the sheriff to pay the money to the plaintiff, and he did not discharge his duty by paying it to the clerk. The answer admitting that the money came into his hands, the first portion of the answer, therefore, presented no defense, and the verdict was, so far as that portion of the answer was concerned, contrary to law.

It is contended by the plaintiff that the judgment of amercement was conclusive on all the defendants. We

cannot concur in this view, although we think the second branch of the defense was not good. A judgment of amercement, on due notice, is, when the officer is sued upon his bond, conclusive against the officer, but only *prima facie* evidence against the sureties. (*Graves v. Bulkley*, 25 Kan., 249, where many authorities are cited; *Fay v. Edmiston*, 28 Kan., 105.) The Kansas statutes are in these respects precisely similar to our own. Ruby failed signally to prove that the judgment was rendered against him without notice. The record recites notice and that the order was made by consent. There is affirmative proof that notice was actually served, and Ruby, in answer to a question as to whether notice was served, merely said that he had no recollection of it; that he would not swear it was not served. The judgment was, therefore, conclusive against him, and the plaintiff was entitled in this case to judgment against him at least. As to the sureties, the burden devolved upon them of showing that the judgment was wrong, and while they might make any defense in this action which the sheriff might have made in the original proceedings, they failed, as we have shown, to allege facts in regard to the receipt and payment of the money, which would constitute a defense, and, as will immediately appear, they failed to make out the other defense pleaded. This other defense was a recognition by the plaintiff of Ellsworth as its debtor and an extension of time granted to him. In the first place it is more than doubtful whether attorneys for the plaintiff in a foreclosure suit have any implied authority to release an officer holding money realized for the benefit of the plaintiff, by recognizing a payment made by him to a third person, and accepting that third person as a debtor. But these questions we cannot decide, because the court, on the objection of the plaintiff, excluded all evidence offered to establish this defense. The result of an examination of the whole evidence is that the plaintiff's *prima facie* case was admitted. The first defense was not good in law. The second defense was not proved.

The third defense also was not proved, whether or not it was good in law.

It is contended that the bill of exceptions should not be considered because it was settled by the clerk without sufficient authority. The stipulation whereby it was settled was as follows: "Returned this bill of exceptions this 5th day of August, 1893, without amendments, and it is hereby stipulated by and between the parties hereto that the clerk of the district court shall allow, sign, and certify this bill of exceptions and make the same a part of the record in this case, and be the bill of exceptions." The decisions of this court are that in order to authorize a clerk to settle a bill of exceptions the facts must appear which, under section 311 of the Code of Civil Procedure, confer upon the clerk that authority. One of the cases in which the clerk may settle the bill is "where the parties interested shall agree upon the bill of exceptions and shall have attached a written stipulation to that effect to the bill." We think the language of this stipulation was sufficient to show an agreement upon the bill of exceptions. The stipulation itself shows that it was returned without amendments. It was stipulated that the clerk shall allow "this" bill and make "the same" a part of the record "and be the bill of exceptions." This shows as plainly as language can an agreement upon this particular bill as the bill of exceptions in the case. In *School District v. Cooper*, 44 Neb., 714, cited by the defendants, the stipulation was that the clerk might settle "the within bill of exceptions." It is true this was held insufficient, the court considering the case analogous to *Scott v. Spencer*, 42 Neb., 632. But in that case the stipulation was that "the bill of exceptions may be settled by the clerk," with nothing whatever to show that any particular bill of exceptions had been agreed to, and in the case of *School District v. Cooper*, *supra*, while the stipulation referred to "the within bill," the argument that the bill was correct could be implied, if at all, only from the use of the word "within." In the case before us the several

expressions in the stipulation taken together plainly show an agreement upon this particular bill as the correct one.

REVERSED AND REMANDED.

LOUIS C. WACHSMUTH ET AL. V. ORIENT INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

FILED NOVEMBER 5, 1896. No. 6787.

1. **Court Records:** CORRECTIONS. A court has power, even after the term at which judgment was rendered, to correct its record for the purpose of making it disclose truthfully what occurred in the course of its proceedings.

2. **Findings After Judgment.** A special finding made at the request of one party after judgment, and without notice to the adverse party, is absolutely void.

3. **New Trial:** ASSIGNMENTS OF ERROR. The assignment in a motion for a new trial that the finding is not sustained by the evidence does not, in an action on contract, raise the question of error in the assessment of the amount of recovery.

4. **Offer to Confess Judgment:** COSTS. Section 565 of the Code of Civil Procedure, providing that a defendant may serve on the plaintiff, or his attorney, an offer in writing to allow judgment to be taken against him for a specified sum, and that if such offer be not accepted, and the plaintiff fails to obtain judgment for more than the offer, he shall pay defendant's costs from the time of the offer, contemplates that where there is only one defendant, all costs from the time of the offer shall in such case be taxed against plaintiff.

5. **Review:** TRANSCRIPT OF JUDGMENT: STIPULATION. In order to confer jurisdiction upon this court to review on error a judgment of the district court there must be filed in this court a certified transcript of the judgment. A stipulation as to the character of the judgment, or a recital thereof in the petition in error, is insufficient.

ERROR to the district court for Wayne county. Tried below before JACKSON, J.

The facts are stated by the commissioner.

Montgomery & Hall, for plaintiffs in error:

The special finding of the court is a part of the record in the case and is binding between the parties. (*Davis v. Neligh*, 7 Neb., 78; *Birdsall v. Carter*, 11 Neb., 143; *Rogers v. Sample*, 28 Neb., 141; *Scott v. Chope*, 33 Neb., 41; *Smith v. First Nat. Bank of Chadron*, 45 Neb., 444; *Ganzer v. Schiffbauer*, 40 Neb., 633; *Smith v. Pinney*, 2 Neb., 139; *Thompson v. Connecticut Mutual Life Ins. Co.*, 38 N. E. Rep. [Ind.], 796; *Dowell v. Talbot Paving Co.*, 38 N. E. Rep. [Ind.], 389; *Condee v. Barton*, 62 Cal., 1; *Hayes v. Wetherbee*, 60 Cal., 396; *Ogburn v. Connor*, 46 Cal., 346; *Prince v. Lynch*, 38 Cal., 528; *Pralus v. Jefferson Gold & Silver Mining Co.*, 34 Cal., 558; *Cowing v. Rogers*, 34 Cal., 648; *Hidden v. Jordan*, 28 Cal., 301; *Hathaway v. Ryan*, 35 Cal., 188; *Carpentier v. Gardiner*, 29 Cal., 160; *Vermule v. Shaw*, 4 Cal., 214; *Bosquett v. Crane*, 51 Cal., 505; *Brady v. Burke*, 90 Cal., 1; *Wunderlin v. Cadogan*, 75 Cal., 617; *State Sash & Door Mfg. Co. v. Adams*, 47 Minn., 399; *Pratt v. Pioneer Press Co.*, 32 Minn., 217; *Jones v. Wilder*, 28 Minn., 238; *Swanstrom v. Marvin*, 38 Minn., 359; *Keep v .Sanderson*, 12 Wis., 352*; *Williams v. Ely*, 13 Wis., 1; *Ottillie v. Waechter*, 33 Wis., 252; *Parks v. Wisconsin C. R. Co.*, 33 Wis., 413; *Cramer v. Hanaford*, 53 Wis., 85; *Klatt v. Mallon*, 61 Wis., 542; *Ætna Fire Ins. Co. v. Boon*, 95 U. S., 117; *North v. Peters*, 138 U. S., 271; *Martin v. Minnekahta State Bank*, 64 N. W. Rep. [S. Dak.], 127; *People v. Judge of Circuit Court*, 34 Mich., 62; *Calhoun v. Gilliland*, 2 Wash., 174; *Hathaway v. Ryan*, 35 Cal., 188.)

Charles Offutt, contra.

References as to the validity of the special finding: *Horn v. Miller*, 20 Neb., 101; *Everson v. Graves*, 26 Neb., 264; *Wiley v. Shars*, 21 Neb., 715; *Hamilton v. Armstrong*, 20 S. W. Rep. [Mo.], 1054; *Kahn v. Smelting Co.*, 102 U. S., 641; *Hodges v. Goetzman*, 76 Ia., 476; *Hartlep v. Cole*, 120 Ind., 247; *Brundage v. Deschler*, 131 Ind., 174; *Peninsular Land Transportation & Mfg. Co. v. Franklin Ins. Co.*, 35 W.

Va., 666; *Wheatland Mill Co. v. Pirrie*, 89 Cal., 459; *Masterson v. Cranitch*, 66 How. Pr. [N. Y.], 171; *Trudo v. Anderson*, 10 Mich., 357; *Thomas v. Sprague*, 12 Mich., 120; *Sisson v. Barrett*, 2 N. Y., 406; *Breeze v. Doyle*, 19 Cal., 101; *Emeric v. Alvarado*, 64 Cal., 603.

IRVINE, C.

This was an action by the plaintiffs in error to recover on a policy of fire insurance. The policy had been written on a stock of merchandise. One of the issues litigated at the trial was the amount of the loss. It was claimed by the plaintiffs that a large portion of the goods had been totally destroyed, and an adjustment effected by the parties placed the value of goods saved from the fire at $7,925.05, and the damage sustained by those saved at $783.46. There was a large amount of concurrent insurance on the stock. The trial was to the court without a jury. The finding was made, motion for a new trial overruled, and judgment ordered the last day of the term. As entered, the finding was as follows:

"Now on this 21st day of April, 1893, this cause came on for trial and the same, together with the eight other cases which by consent of the parties and order of the court were consolidated with this cause for trial, was tried and submitted to the court,—a jury having heretofore been waived,—upon the pleadings, the evidence, and argument of counsel; and now, being fully advised in the premises, the court finds specially that the goods, wares, and merchandise in stock and belonging to the plaintiff, Augustus E. Orbeton, the destruction of and injury to which by fire is the subject of the controversy in this and the other actions consolidated with it, were, at and immediately before the fire in controversy, and their injury thereby, of the market value of $13,000, to which finding the defendant excepts.

"The court further finds generally, upon the issues joined in this action and in the other actions consolidated with this action for trial, in favor of the plaintiff, and

assesses the total damage of the plaintiff in this and the other actions by reason of the destruction of a portion and the injury to the remainder of the said goods, wares, and merchandise by fire, as alleged in the petition, at the sum of $783.46, to which finding the plaintiff excepts. And the court further finds that the plaintiffs in this and the said other actions are entitled to recover from the several insurance companies, defendants mentioned and described in the plaintiff's petition, the said principal sum of $783.46, together with interest thereon from the 26th day of January, 1892, being the sum of $68.55, both principal and interest amounting to $852, which should be apportioned among the said several insurance companies according to the face of the policies thereof, and that the proportion of said sum for which the defendant in this cause is liable to the plaintiff is the sum of $81.15, to which finding the plaintiff excepts."

This was followed immediately by the judgment and an order overruling the motion for a new trial. On the first day of the following term of court the defendant filed two motions. One was an objection to the judge's subscribing the journal as made up, until the special finding fixing the value of the stock at $13,000 should be stricken out. As reasons for this it was urged that the entry did not state the true finding; that neither party had requested any finding, and that the case had been decided and general finding made without any special finding. The other motion was a motion to vacate and modify the judgment as entered, for the same reasons. On the hearing of these motions the court directed that the order be corrected to read as follows: "After the court has made its general findings herein for the plaintiffs and directed the entry of judgment for plaintiffs, and after the court had overruled the motion for a new trial and given the plaintiffs time to prepare bill of exceptions, and after the defendant and its attorney had left the court room, the court did make its only special finding on the same day, just before the adjournment of court, at the request

of plaintiff's attorney, in words and figures as follows: 'Finding by the court that the goods in stock before the fire was of the value of $13,000,' and without any notice to the defendant or its attorney." The plaintiffs, by their petition in error and in argument, now contend that the judgment entered is not supported by the findings, and that the special finding of the total value of the stock before the fire must be accepted in connection with certain admissions in the pleadings, not here necessary to state, as fixing the amount of the judgment at a much greater sum than that for which it was rendered. In this connection they contend that the order made at the subsequent term was void for want of jurisdiction, and this on the ground that the court, by the adjournment of the trial term, had lost its control over the judgment. The order of the subsequent term was not, however, an order vacating or modifying the former judgment. It was merely an order correcting the record for the purpose of making it disclose what had in fact occurred. The plenary power of a court of record to so correct its records has been several times upheld. (*Brownlee v. Davidson*, 28 Neb., 785; *Hoagland v. Way*, 35 Neb., 387; *School District v. Bishop*, 46 Neb., 850.) A true conception of the several questions presented on this phase of the case renders it important to bear in mind the distinction between an order of the court causing an incorrect record to be amended in such a manner as to show what in fact occurred, and an order subsequent to the disposition of a case incorporating a new occurrence or a new procedure. In the one case the court merely requires a correct recital of a proceeding actually had at the proper time but not theretofore properly entered. In the other case the court undertakes at a subsequent time to supply a defect in the proceedings themselves. This order belonged to the former class. We must therefore adopt the last order as a proper correction of the journal. It then appears from the journal so corrected that the court entered a general finding for the plaintiffs assessing dam-

ages at $81.15, ordered judgment accordingly, and overruled plaintiff's motion for a new trial; that thereafter on the same day, but after defendant's counsel had left court and without any notice to the defendant or its counsel, at the request of plaintiff's attorney, the special finding was made. We do not think this procedure was warranted by the Code.

Numerous cases are cited in support of the court's action. Most of these cases, however, merely sustain the power of the court after judgment to supply defects and omissions in its record. Such action is equivalent to the action of the court which we have already held to be proper in correcting its record to disclose the facts, and if it had been made to appear that the court, in announcing its judgment had in fact made a special finding as to the value of the property before the fire, then it would have been proper even after judgment, by such an order, for the court to incorporate that finding into the record. But it is not claimed that any such finding was made. The supreme court of the United States in two cases well illustrates this distinction. In *Ætna Fire Ins. Co. v. Boone*, 95 U. S., 117, the circuit court had, at the time of ordering judgment, filed an opinion wherein were informally stated all necessary findings in support of the judgment ordered. The judgment was entered without any finding to support it. It was held that the court had power at the following term to enter a *nunc pro tunc* order supplying the findings from the opinion actually filed. But in that case it is to be observed that the adverse party had notice of and participated in the proceedings. On the other hand, in *Kahn v. Smelting Co.*, 102 U. S., 641, the court undertook, after judgment, and on the request of the plaintiff, to make additional findings of fact. It was held that there was no authority for such action and that the additional findings so made must be absolutely disregarded. It is true that the findings in the latter case were not made until fourteen days after judgment, but the length of time which elapsed is immaterial.

The essential feature is that the findings must precede or must at least be concurrent with the judgment. In *North v. Peters*, 138 U. S., 271, the same court, construing the Dakota Code, held that the court on overruling a motion for a new trial, the motion urging as one of the grounds therefor that material findings had been omitted, might then make such findings in support of its judgment. We have not examined the law of Dakota to ascertain on what provision this case rests, because the identical question has been otherwise decided under our Code. (*Wiley v. Shars*, 21 Neb., 712.) In that case the court had refused plaintiff's request to find questions of law and fact separately, as provided by section 297 of our Code of Procedure. It was held that the error in so refusing was not cured by making such separate finding in overruling the motion for a new trial. There are cases which hold that after judgment special findings may be made not inconsistent with the general findings made at the time of entering judgment. But those cases are not applicable, for here the special finding was inconsistent with the general finding and with the judgment rendered. We shall not undertake a further review of the cases. Except as they fall within the classes already indicated, they are uniformly to the effect that the request for findings and the findings, if made, to be available, must precede the judgment. We are very clearly of the opinion that a special finding made after judgment, in the absence of the adverse party and without notice, is absolutely void and must be disregarded.

It is next contended that even if the special finding cannot be regarded, a new trial must be awarded for the reason that the general finding as to the amount of damages was not sustained by the evidence. In the motion for a new trial the only grounds assigned are errors of law occurring at the trial, that the finding is not sustained by sufficient evidence, and that the finding and decision are contrary to law. Error in the assessment of the amount of recovery, in actions upon contracts, is a dis-

tinct ground for a new trial, as those grounds are fixed by section 314 of the Code of Civil Procedure. The assignment that the verdict or finding is not sustained by the evidence does not reach this point, nor does it present it for review. (*Volker v. First Nat. Bank*, 26 Neb., 602; *Everett v. Tidball*, 34 Neb., 803; *Riverside Coal Co. v. Holmes*, 36 Neb., 858.)

Before judgment was entered the defendant filed its motion to tax against the plaintiffs "all the costs which have accrued since September 7, 1892," for the reason that plaintiffs had failed to obtain judgment for more than the defendant, on that date, offered in writing to allow judgment to be taken for. This motion the court overruled. The defendant excepted, caused to be settled a bill of exceptions embodying the evidence on such motion, and presents the ruling here for review by cross-petition in error. The evidence discloses that on the 7th day of September, 1892, the defendant served upon plaintiff's attorneys a notice in writing whereby it offered to allow judgment to be taken against it for the sum of $150 and costs. Section 565 of the Code of Civil Procedure provides that the defendant in an action for the recovery of money only may, at any time before the trial, serve upon the plaintiff, or his attorney, an offer in writing to allow judgment to be taken against him for the sum specified therein. The plaintiff may, within five days, serve notice of his acceptance on the defendant or his attorney; or he may file the acceptance, and in either case judgment shall be rendered accordingly. But "if the notice of acceptance be not given in the period limited, the offer shall be deemed withdrawn and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer." (Code of Civil Procedure, sec. 565.) The procedure here adopted seems to have been in compliance with the requirements of this section, and we are at a loss to understand the reason of the district court for overrul-

ing defendant's motion. The plaintiffs, in their reply, briefly suggest the technical reason that the motion was to tax all costs accruing after the offer against the plaintiffs, while the statute merely provides that the plaintiff shall pay the defendant's costs from the time of the offer. It is therefore argued that the motion was not proper in form and asked too much, and was therefore properly overruled altogether. But we think the motion in effect conformed to the statute. It was not the purpose of the statute merely to require the plaintiff in such case to pay the defendant's costs and to permit judgment for plaintiff's costs to be rendered against defendant. It is plainly the purpose of the statute to require in such case the plaintiff to bear his own costs and also to bear the costs of defendant accruing after the offer. Therefore, the proper order where there is only one defendant is, under the circumstances, to tax all costs created after the offer against the plaintiff, and the motion should have been sustained.

As already indicated, there was a large amount of concurrent insurance on this property. There seem to have been nine actions against as many different insurance companies tried together under an order in pursuance of a stipulation consolidating the cases, but providing that separate judgments should be rendered. The petition in error and cross-petition in error are both entitled in all nine cases, and the parties have undertaken, by stipulation, to have all the cases reviewed on the record of the case which we have been considering. By the terms of this stipulation only one record was to be brought up. Parties also undertook, by stipulation, to provide that they might, in a single petition in error, recite the rendition of each judgment. We have before us, however, but a single judgment. In order to confer jurisdiction on this court to review a judgment of the district court there must be filed a transcript of the judgment at least. That has not been done in any but the single case we have considered. A motion to permit the records to be supplied was heretofore overruled, for the reason that the statu-

tory period within which such proceedings must be brought had already expired. We therefore consider but the single case in which we have jurisdiction. The judgment of the district court is reversed in accordance with the foregoing opinion, and the cause remanded with directions to tax against the plaintiffs all costs made after September 7, 1892.

REVERSED AND REMANDED.

HENRY GROSSHANS ET AL. V. WILLIAM GOLD ET AL.

FILED NOVEMBER 18, 1896. No. 6754.

1. **Fraudulent Conveyances:** NOTICE OF INTENT: CHATTEL MORTGAGES. A mortgage given to secure a pre-existing debt will not be declared void from the fact alone that the mortgagee, at the time of its execution, had notice of an intention on the part of the mortgagor to defraud creditors of the latter. In order to avoid the security in such case the mortgagee must have participated in the fraudulent purpose of the mortgagor. (*Jones v. Loree*, 37 Neb., 816.)

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

L. P. Crouch and *E. E. Hairgrove*, for plaintiffs in error.

T. H. Matters and *C. J. Dilworth*, *contra*.

POST, C. J.

This controversy involves the title and right of possession to a certain crib of corn claimed by the plaintiffs in error, who were also plaintiffs below, through one August Grosshans, by means of an instrument which is in form a bill of sale, but in legal effect a chattel mortgage, the purpose of which was to indemnify plaintiffs in error on account of liabilities assumed by them as sureties for the mortgagor. The foundation of the defendants' claim is a levy upon the corn in controversy by one Stewart as con-

stable, within and for Clay county, to satisfy a certain judgment recovered by them against the said August Grosshans before a justice of the peace for said county. The burden was upon the plaintiffs to prove the good faith of the contract through which they claim, for two reasons, viz.: (1.) The parties to said transaction are brothers, and the effect thereof is to defeat other creditors of the said August, who was then insolvent. (2.) There was no change of possession of the property thereby conveyed. It is shown by the undisputed evidence that the plaintiffs were at the date in question liable as sureties for the said August Grosshans in a large amount, of which the said Henry Grosshans has subsequently paid the sum of $10,000, and of which the said Fred Grosshans has paid $5,765. Had the result depended upon the sufficiency of the consideration for the transfer, the plaintiffs would have been entitled to recover and the district court would, no doubt, have directed a verdict in their favor. But there is evidence of other transfers by the said August, bearing the same date as the instrument here involved, covering substantially all the property, including real estate, owned by him. Among the transfers so made is a warranty deed conveying to one Billigmeir a number of lots in the city of Sutton which was by the grantor executed and filed for record without the knowledge or consent of the grantee therein named. Another fact, to which prominence is given by counsel for defendants, is that the corn in controversy was cribbed upon the premises of the said August Grosshans, whose subsequent conduct, including the feeding of his stock therefrom, was plainly indicative of ownership by him. True, the plaintiffs deny knowledge of any acts of assumed ownership by the said August, but the question thus presented was one of fact for the jury, and we cannot, upon the record before us, say that the verdict rendered is so decidedly against the evidence as to call for reversal upon that ground.

Exception is taken to the refusal of the fourth instruc-

tion asked by the plaintiffs, which embodies the proposition that fraud on the part of the said August Grosshans alone will not render the transaction fraudulent as to creditors, but that it must appear further that plaintiffs, having knowledge of the intent of the mortgagor, took the instrument introduced in evidence for the purpose of aiding or abetting in such fraudulent purpose. The question thus presented was, in view of the earlier decisions of this court, not entirely free from doubt. It was, however, in *Jones v. Loree*, 37 Neb., 816, held, after a careful review of the cases by IRVINE, C., that a mortgage, to secure a pre-existing debt, will not be declared void merely because the mortgagee at the time of its execution had notice of an intention on the part of the mortgagor to defraud the creditors of the latter, but in order to have the effect mentioned it must appear that the mortgagee participated in such fraudulent purpose. The case at bar is, upon the facts stated, clearly within the doctrine of *Jones v. Loree* and must be governed thereby. It follows that on account of the refusal of the instruction asked, the judgment of the district court must be reversed and the cause remanded for trial *de novo*.

REVERSED.

FRANKLIN E. JOHNSON V. DAVID MAY ET UX.

FILED NOVEMBER 18, 1896. No. 6905.

1. **Attachment:** RESIDENCE OF DEFENDANTS. The question of residence, within the meaning of the statute regulating attachments in this state, is generally one of intention, to be determined from the facts and circumstances in each particular case.

2. ———: ———: ABANDONMENT. One who has acquired a residence in a given place, within the meaning of the attachment law, is presumed to have abandoned his former domicile, and *vice versa*.

3. ———: ———: ———. Absence for the purpose of business or pleasure is of itself not such an abandonment of one's place of abode

within the state as to authorize the issuance of an attachment against him on the ground of non-residence.

4. ———: ———: NON-RESIDENTS. Evidence examined, and *held* to sustain the finding that defendants were not, at the time of the commencement of the action against them, non-residents of this state.

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

J. H. Broady, for plaintiff in error.

References: *Fitch v. Waite*, 5 Conn., 121; *Winkler v. Barthel*, 6 Ill., 111; *Mathews v. Loth*, 45 Mo. App., 455; *Koch v. Losch*, 31 Neb., 625; *Rockwell v. Blair Savings Bank*, 31 Neb., 128; *Bond v. Dolby*, 17 Neb., 491; *Keith v. Stetter*, 25 Kan., 104; *Baldwin v. Flagg*, 43 N. J. Law, 495; *Hanson v. Graham*, 82 Cal., 631; *Haggart v. Morgan*, 5 N. Y., 422; *In re Thompson*, 1 Wend. [N. Y.], 43; *Frost v. Brisbin*, 19 Wend. [N. Y.], 11; *Carden v. Carden*, 107 N. Car., 216; *Olmstead v. Rivers*, 9 Neb., 236; *Blodgett v. Utley*, 4 Neb., 25.

A. W. Field, contra.

References: *Lane v. Fellows*, 1 Mo., 200; *Kingsland v. Worsham*, 15 Mo., 657; *Ellington v. Moore*, 17 Mo., 424; *Fuller v. Bryan*, 20 Pa. St., 144; *Pfoutz v. Comford*, 36 Pa. St., 420; *Mandel v. Peet*, 18 Ark., 236; *Pitts v. Burroughs*, 6 Ala., 733; *Chariton County v. Moberly*, 59 Mo., 238; *Stratton v. Brigham*, 2 Sneed [Tenn.], 420; *Reed's Appeal*, 71 Pa. St., 378; *Lawson v. Adlard*, 46 Minn., 243; *Keller v. Carr*, 40 Minn., 428.

POST, C. J.

In the district court for Lancaster county the plaintiff in error, Franklin E. Johnson, sued to recover the sum of $2,500 and interest, being the amount of two promissory notes of the defendants below, David May and Tillie May, who are also defendants in error. At the commencement of said action an order of attachment was issued upon

the filing by the plaintiff therein of a bond and an affidavit alleging as grounds for such attachment: (1) The defendants are non-residents of this state; (2) they have absconded with intent to defraud their creditors; (3) they have left the country of their residence in order to avoid the service of summons; (4) they are about to convert their property into money for the purpose of placing it beyond the reach of their creditors; (5) they have property and rights of action which they conceal; (6) they have removed and disposed of a part of their property with intent to defraud their creditors. The defendants subsequently entered their appearance in the district court and moved to discharge the attachment, assigning as grounds therefor: (1) The affidavit upon which said order was issued is insufficient in law; (2) the allegations of said affidavit are wholly false. Said motion was, upon hearing thereof, sustained and an order entered discharging the attachment, whereupon the plaintiff, who had in the meantime given an undertaking as prescribed by statute, removed the cause into this court for review, assigning as error the ruling above mentioned.

The important question presented by the record, and which is decisive of all others argued, is that of the defendants' residence at the date of the commencement of the action, to-wit, January 29, 1894. Defendants, who are husband and wife, have resided in the city of Lincoln for twenty-five years or upwards, during which time the said David May has been engaged in the retail clothing trade and also as a jobber in said line, by means whereof he has accumulated property of considerable value which, aside from his household goods, and a stock of merchandise hereafter described, consists of town lots in Lincoln, and lands in the states of Nebraska, Iowa, Kansas, and Colorado, the title to a portion thereof being in his wife, Tillie May. The real estate mentioned was, at the date above named, according to the affidavit of the said David May, reasonably worth the sum of $400,000, in addition

to which he was possessed of personal property in the city of Lincoln of the value of $18,000, which, with the exception of a paid up life insurance policy for $10,000, was free from incumbrance and subject to seizure in satisfaction of any execution against him. Of the several lots or parcels of land aforesaid, a majority were incumbered by mortgages and other liens, amounting in the aggregate to the sum of $43,000, in addition to which the defendants had unsecured liabilities not exceeding $48,000, making, according to their statements, a total indebtedness of $91,000. On the 13th day of October, 1893, the defendants received information by telegraph of the serious illness of Mrs. May's mother residing in the city of New York, and two days later, in response to a second message of like import, they left Lincoln for New York, intending to visit with relatives in the east some weeks before returning home. Preparatory to his departure, however, Mr. May called upon his Lincoln creditors, who represent the larger portion of his indebtedness, and explained to them the cause of his contemplated absence, as well as his plans for the immediate future, which included the raising of money in New York with which to meet his obligations as they matured. He also furnished creditors with his New York address; and his voluminous correspondence by mail and telegraph with parties in this state, including the plaintiff in error, tends to corroborate the statement that his intention was to return to Lincoln as soon as he had accomplished the purpose of his visit. Defendants, in their affidavits, say that owing to sickness of Mrs. May's father, an aged man, they felt constrained to remain with him for as long a time as possible after the funeral of their mother, who died while they were en route from Lincoln. They testify further that they prolonged their stay in the hope of being able to secure, through friends of high standing, financially, with whom they had had extensive dealings and an unimpaired credit, the funds needed by them at a low rate of interest, and that they were continuously engaged in

their effort to accomplish such purpose until their return to Lincoln early in the month of February, 1894. They deny *seriatim* the several allegations of the affidavit for attachment and state that they had no intention of abandoning their residence in Lincoln; that they have neither absconded nor left the county of their residence in order to avoid the service of process; that they have not concealed any of their property or converted it into money for the purpose of placing it beyond the reach of their creditors; and that they have never removed or disposed of their property, or any part thereof, with intent to defraud their creditors. On the other hand, they testify that all the property possessed by them, the accumulation of their twenty-five years of active business life, was, during the entire period of their absence from the state, within the reach of creditors. Defendants, previous to their departure from Lincoln, caused to be packed, in apparent condition for shipment, the stock of clothing above mentioned, two of the fifty-seven boxes and trunks used for such purpose being marked with the address of a relative in the city of New York. But that seemingly suspicious circumstance is explained by the fact, as testified to by them, that the clothing in question was what is known as "job lot," held for sale or exchange at wholesale for cash or lands; that it was by them packed in the manner indicated for the purpose of preservation only, and that the boxes bearing the address aforesaid contained their wearing apparel and a few presents intended for relatives in New York. We cannot, upon the evidence, say that the district court erred in discharging the attachment. It is a rule often asserted by this court that an order granting or denying a motion to discharge an attachment, based upon conflicting proofs, will not be reversed unless manifestly wrong. (*Mayer v. Zingre*, 18 Neb., 458; *Dolan v. Armstrong*, 35 Neb., 339; *Whipple v. Hill*, 36 Neb., 720.)

It was held in *Wood v. Roeder*, 45 Neb., 311, that the word "residence," as used in the statute, is synonymous

with the term "domicile," and that the residence or domicile of the defendant is, for the purpose of jurisdiction over his person, that place where he has a fixed and permanent abode, and to which, when absent, he has the intention of returning. It was further said that in order to effect a change of domicile there must be not alone a change of residence, but an intention to permanently abandon the former home; and that the mere residing at a different place, although evidence of the required intention, does not *per se* amount to such a change.

We are aware that a distinction has, by some courts, been recognized between the legal and actual residence of debtor, the latter in the jurisdictions referred to being regarded as his domicile, within the meaning of the common law, and not the residence contemplated by statute. It is for instance said by Collins, J., in *Lawson v. Adlard*, 46 Minn., 243, that "in construing statutes relating to attachment of the property of non-residents a wide distinction has been recognized between an actual residence and a legal residence, * * * the word 'residence' being construed in its popular sense as the act of abiding or dwelling in a place for some continuance of time." We prefer, however, to regard the rule applicable in all such cases as one of evidence, rather than of substantive law, since, as said in a recent valuable work (1 Shinn, Attachment & Garnishment, sec. 90), "The question of residence, within the meaning of the attachment law, is one of intention to be deduced from the facts and circumstances of each case." The sound rule is believed to be that one who acquires a residence in a given place, within the meaning of the statutes regulating attachment and garnishment, is presumed to have abandoned his former domicile. Such a solution is altogether reasonable and results logically from the judicial discussion of the subject, while it possesses the additional merit of avoiding the solecism whereby a debtor is permitted to have a residence in one state and at the same time a domicile in another.

In *Lawson v. Adlard, supra*, which is entitled to rank as a leading case of its class, we observe the following language: "The absence must be so protracted as to amount to a prevention of legal remedy by ordinary process and of such a nature that the debtor cannot longer be deemed an actual resident; and as a mere casual or temporary absence will not render his property subject to attachment, so the mere fact that he is occasionally and transiently within the state will not relieve him from the charge of having become a non-resident."

Keller v. Carr, 40 Minn., 428, arose out of a state of facts strikingly similar to those here presented. The defendant therein, a single woman, having packed and stored her personal property, with the exception of her wearing apparel, left the state on the 7th day of June, going to the city of Chicago on business and from there to Canada for the purpose of visiting relatives, intending to return to her home in Minneapolis on the completion of her visit. It did not appear how long she intended to remain in Canada, except that she did not return to Minneapolis until the 15th day of October, her absence having been protracted beyond the period intended by reason of the sickness of her mother. The court, by Mitchell, J., reversing an order of the district court refusing to discharge an attachment against the defendant on the ground of non-residence, say: "No precise or definite rule can be laid down as to the exact duration of the absence which will render a person a non-resident. Each case must be governed somewhat by its own particular facts. * * * In this case the defendant was absent prior to the attachment only about three months, and altogether, only about four months, and this, it appears, was longer than she contemplated when she left. And while the important inquiry is not whether she had acquired a place of residence abroad, but whether she had ceased to be an actual resident of this state, it is important as bearing on the latter question, that defendant had not only acquired no residence out of the state, but the purpose of her absence was

not such as to require or even admit of her acquiring it. * * * Such an absence from the state was not materially different in its nature from that of hundreds of people who temporarily close up their dwellings and go off south or east for health or pleasure for weeks or even months at a time. We think it never occurred to the bar of the state that such persons during such an absence were non-residents, and their property subject to attachment. To so hold would in view of the social and business habits of the people in this age of travel lead to very serious results."

In *Stafford v. Mills*, 31 Atl. Rep. [N. J.], 1023, it is said: "Mere inconvenience in the service of summons or other process furnishes no reason why an attachment should issue against one as a non-resident debtor. Temporary absences for business or pleasure is not an abandonment of one's abode or place of residence." (See, also, to the same effect *Wells v. People*, 44 Ill., 40; *Chariton County v. Moberly*, 59 Mo., 238; *Ritler v. Phœnix Mutual Ins. Co.*, 32 Kan., 403; Kneeland, Attachment, sec. 196; 1 Shinn, Attachment & Garnishment, sec. 90 *et seq.*)

The evidence bearing upon the intention of the defendants is, as may be inferred, conflicting; but the general finding of the district court ascribes to them honesty of purpose in their business affairs, as well as an intention to return to their home in Lincoln upon the termination of their visit. It follows that the order discharging the attachment should be affirmed.

ORDER AFFIRMED.

BENJAMIN F. JONES V. STATE OF NEBRASKA.

FILED NOVEMBER 18, 1896. No. 8670.

Physicians and Surgeons: PRACTICE IN VIOLATION OF LAW: INFORMATION. An information which sufficiently charges the practice by the accused of medicine and surgery in a designated county, without having first obtained from the state board of health the certificate prescribed by chapter 55, Compiled Statutes, states an offense under the provision of said chapter.

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

Sawyer, Snell & Frost and *C. Thompson*, for plaintiff in error.

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

POST, C. J.

The plaintiff in error was, by the judgment of the district court for Saunders county, convicted on the charge of practicing medicine and surgery without having obtained from the state board of health the certificate prescribed by chapter 55, Compiled Statutes, entitled "Medicine." There is accompanying the record no bill of exceptions, and the only question argued relates to the sufficiency of the information, the essential part of which is here set out, viz.: "That one Benjamin F. Jones, late of the county of Saunders, in the said county of Saunders, on the 8th day of December, 1894, * * * then and there being, did unlawfully practice medicine and surgery, * * * and did unlawfully treat, in the capacity of a physician and surgeon, one Henry Craig, without having first obtained and procured registration, filing in the office of the county clerk of Saunders county a certificate as required and provided by law," etc. The provisions of statute above mentioned, declaring

it unlawful for any person to practice medicine, surgery, or obstetrics in this state without having first obtained and caused to be filed a certificate from the state board of health, was cited and construed in *O'Connor v. State*, 46 Neb., 157, and does not call for extended notice in this connection, since the controlling question herein is one of grammatical construction rather than of substantive law.

It is, on the part of the plaintiff in error, contended that the words "without having first obtained and procured registration," etc., as employed in the information, must be construed as referring to Saunders county only, and do not, therefore, exclude the presumption that the plaintiff in error was, at the time laid, authorized to practice medicine by means of the statutory certificate, in due form issued and registered in the county of his residence. The attorney general, on the other hand, contends that the word "obtained" refers to the certificate, which is essential to a lawful registration. It is provided by section 10 of the act above cited that "it shall be the duty of the applicant, before practicing, to file such certificate, or copy thereof, in the office of the county clerk of the county in which he or she resides or in which he or she intends to practice," etc.; and by section 13 it is further provided that "any person who shall have obtained a certificate provided by this act and shall remove to another county shall, before the entering upon the practice of his profession in such other county, cause said certificate to be filed and recorded in the office of the county clerk of the county to which he has removed." We may assume, as argued by counsel for the plaintiff in error, that a licensed physician is not required to procure the registration of his certificate in every county to which he may be called in the practice of his profession, and that the demand of the statute is satisfied by registration in the county of his residence. It follows from such an interpretation that an indictment or information charging

the practice by the accused of medicine, surgery, or obstetrics in a designated county, without having procured the registration therein of the statutory certificate, and without disclosing the county of his residence, would not state an offense under the statute cited. We are, however, unable to so construe the charge in this case, the words "without having first obtained" being, in our judgment, used disjunctively, and refer to the certificate itself, and not to the act of procuring the registration thereof in Saunders county. It follows that the objection to the information is without merit and that the judgment should be

AFFIRMED.

DWIGHT E. JOHNSON V. COLUMBUS BUGGY COMPANY ET AL.

FILED NOVEMBER 18, 1896. No. 6882.

Replevin: VERDICT FOR DEFENDANT: REVIEW. Evidence examined, and *held* to sustain the finding and judgment adverse to the plaintiff in error.

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

F. M. Sturdevant, for plaintiff in error.

Thomas D. Crane, contra.

POST, C. J.

This was an action of replevin, which resulted in a verdict and judgment in the district court for Douglas county for the defendants therein, and which it is sought to reverse by means of this proceeding.

The property in controversy is a double-seated extension top surrey of the alleged value of $150, of which the

plaintiff claims absolute ownership, and which is claimed by the defendants through a certain chattel mortgage executed by one Blazer to the firm of Angene & Firestone, under date of October 1, 1888, to secure a note of the said mortgagor of even date therewith for $165, together with interest from date at the rate of ten per cent per annum. Two facts are assumed by counsel for the respective parties, viz.: The sale of the property in controversy by Blazer to the plaintiff, and the succession by the defendant company to whatever rights existed in favor of Angene & Firestone under the mortgage described. The controversy is, therefore, as counsel for plaintiff in error frankly admits, narrowed to two inquiries, viz.: (1.) Was the mortgage debt satisfied by means of the settlement hereafter referred to? (2.) Are the defendants in error, as assignees of Angene & Firestone, estopped by reason of the representations of the latter to deny that the debt of Blazer is extinguished in consequence of the settlement above mentioned?

Subsequent to the execution of the mortgage here involved Angene & Firestone commenced an action, aided by attachment, against Blazer, in the circuit court of Howell county, Missouri, to recover the sum of $1,250, in which they caused to be seized a sawmill, planing mill, and appurtenances, together with a quantity of lumber therein. On the 6th day of February, 1889, said action was, pursuant to agreement, dismissed and the attachment vacated, one of the considerations therefor being the delivery on board the cars at Mountain View, Missouri, of a quantity of lumber, estimated by plaintiff's witnesses at 110,000 feet and by defendants' witnesses at 90,000 feet, consigned to the Star Union Lumber Company, at Omaha, on account of the said Angene & Firestone. The proceeds of said lumber, to-wit, $541.60, was by the consignee named turned over to Angene & Firestone, and by them applied on an open account against Blazer, then past due.

It is strenuously insisted by the plaintiff that the lum-

ber above described was by Angene & Firestone accepted as settlement and satisfaction in full of Blazer's entire indebtedness to them, including the mortgage relied upon in this action, with four others particularly described in the record. That proposition is, however, controverted by the defendants, whose evidence tends strongly to prove that the lumber in question was received on account only by Angene & Firestone, with no specific agreement as to their claims against Blazer. The utmost that can be claimed by the plaintiff is that the evidence is conflicting, and, we think, ample to sustain the finding of the district court adverse to his contention. Indeed, he is contradicted by one of his own witnesses, Mr. Clark, who, as attorney for the plaintiff in the attachment suit, was advised of the conditions upon which that action was dismissed, and who testifies that Angene & Firestone did not agree to accept any stipulated amount of lumber in satisfaction of their claims against Blazer. Plaintiff testifies that previous to the purchase by him of the surrey in controversy he had a conversation with Mr. Firestone, of the firm of Angene & Firestone, in which he was informed by the latter that the indebtedness of Blazer to said firm had been satisfied in full by means of the settlement aforesaid, and that he purchased the property described relying upon such statement; but upon that proposition also the evidence is conflicting, and was, we must presume, properly weighed by the district court, whose finding must be accepted as conclusive in this proceeding.

JUDGMENT AFFIRMED.

IRVINE, C., not sitting.

R. W. LAFLIN V. STATE OF NEBRASKA, EX REL. WILLIAM L. GRAY ET AL.

FILED NOVEMBER 18, 1896. No. 7613.

1. **Mandamus:** DUTY: ENFORCEMENT. To authorize the issuing of a writ of *mandamus* in this state, the duty in question must be one specially enjoined by law, or which results from the office or station of the respondent.

2. ———: FORM OF WRIT. The peremptory writ of *mandamus* must conform strictly to the command of the alternative writ, or, in the absence of the alternative writ, to the prayer of the petition which is the basis of the proceeding, and clearly indicate the particular duty to be performed.

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

J. W. Carr and *Pound & Burr*, for plaintiff in error.

Charles O. Whedon and *Charles E. Magoon*, *contra*.

POST, C. J.

This was an application for a writ of *mandamus*, addressed to the district court for Lancaster county. It appears from the allegations of the relators that they are members in good standing of the Ancient Order of United Workmen, "a fraternal and benevolent secret society, order, or association issuing fraternal insurance to the members thereof," and that there are within this state numerous subordinate lodges of said order, under the immediate jurisdiction of a grand lodge, the latter being, in authority, subordinate to a supreme lodge. The constitution, a copy of which accompanies the petition, provides for the holding of sessions of the grand lodge biennially, and at a regular meeting thereof, held pursuant to constitutional authority, at the city of Lincoln, in the month of May, 1893, the city of Kearney was selected as the place for the meeting of the next session of said grand

lodge, in the month of May, 1895. At the meeting held as aforesaid in the year 1893 the following grand officers were in due form chosen and installed, to-wit: J. G. Tate, grand master workman; R. W. Laflin, grand foreman; J. C. Hayes, grand overseer; L. A. Paine, grand recorder; and E. A. Polley, grand receiver. By provision of the by-laws adopted in conformity with the constitution subordinate lodges are, at the stated meetings in March next preceding the sessions of the grand lodge, required to elect representatives to the said grand lodge; but, according to the petition, certain of the grand lodge officers, including the respondents herein, in order to postpone the election of their successors and to enable them to hold their said offices until the month of May, 1897, in violation of the constitution and by-laws of said order, conspired to prevent the holding of a session of the grand lodge in the year 1895; that in pursuit of such unlawful purpose respondents procured the submission to the several subordinate lodges of a resolution approving the plan so proposed, and upon the adoption thereof by a majority of the subordinate lodges the respondent Tate, as grand master workman, issued a formal announcement to the effect that the session of the grand lodge appointed for the city of Kearney, in the year last named, had been abandoned. The avowed reason for the action complained of, as appears from the petition, is the want of necessary funds to defray the expenses of a session of the grand lodge, but which, as charged by relators, is not in fact the real motive of the respondents. The prayer of the petition is for a writ of *mandamus* directed to the respondent Tate, as grand master workman (or, in his absence from the state, to the respondent Laflin, as grand foreman), commanding him to notify all subordinate lodges that any and all action by them or the said respondents looking to an abandonment of the session of the grand lodge for the year 1895 is null and void, and to direct said subordinate lodges to elect representatives to the grand lodge for said year, at the time and in the man-

ner prescribed by the laws of the order. An objection to the petition, in the nature of a general demurrer, was overruled and judgment entered awarding a peremptory writ of *mandamus* against the respondent Laflin, as acting grand master workman, commanding him "to immediately inspect the proceedings of the subordinate lodges touching the matter of the postponement and abandonment of the grand lodge in May, 1895, and require said proceedings to conform to the general laws, rules, and regulations of the supreme lodge of said order and the grand lodge of Nebraska." The objection to the petition was, we think, well taken, since respondents, however wrongful the alleged attempt to prevent the session of the grand lodge, are by no provision of the constitution or by-laws of the order charged with the particular duty sought to be enforced.

It is a familiar rule that to authorize the issuance of the writ of *mandamus* in this class of cases the particular duty in question must be one specially enjoined by law, or which results from the office or station of the respondent. (*Thatcher v. Adams County*, 19 Neb., 485.) The provision for biennial sessions of the grand lodge, and also for the selection by subordinate lodges of representatives thereat, is obviously self-acting, and the latter are, by operation of law, charged with notice of the duty thus imposed upon them. The by-law imposing such duty upon subordinate lodges is as much the law of the order as the constitution itself, or the statute under which it was created. (*Presbyterian Church v. City of New York*, 5 Cow. [N. Y.], 538; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; 1 Beach, Private Corporations, sec. 321.) Action such as contemplated by this proceeding, although reasonable and appropriate in the administration of the office of grand master workman, necessarily rests in the discretion of that officer, and the exercise of his discretion in that regard is not the subject of judicial control.

It is also assigned as error that the peremptory writ of *mandamus* does not follow the petition, which, under

the practice tolerated in this state, has usurped the office of the alternative writ. The relief sought, as we have seen, is a writ of *mandamus* requiring the respondent Tate, as grand master workman, to promulgate a particular notice directed to the subordinate lodges, while the writ awarded commands the officer named to inspect the proceedings of the several subordinate lodges touching the postponement of the grand lodge, and to require such proceedings to conform to the general rules and regulations of the supreme lodge of the order and the grand lodge of this state. The peremptory writ of *mandamus*, which has been likened to an execution, should conform strictly to the command of the alternative writ, and clearly indicate a particular duty to be performed. (2 Kinkead, Code Pleading, sec. 814; *People v. Supervisors*, 1 Hill [N. Y.], 50; *Chance v. Temple*, 1 Ia., 179; *People v. Brooks*, 57 Ill., 142; *State v. County Judge*, 12 Ia., 237; *State v. Union Township*, 43 N. J. Law, 518; *School District v. Lauderbaugh*, 80 Mo., 194.) According to the contention of relators, the judgment is responsive to the following allegations of the petition: "The fifth article of the constitution of said order requires the grand master workman to preside in the grand lodge, and to require conformity to the general laws, rules, and regulations of the supreme lodge and of the grand lodge." By the article of the constitution above mentioned it is made the duty of the officer named to inspect the proceedings of subordinate lodges and require conformity with the general laws, rules, and regulations of the supreme lodge of the order and of the grand lodge of the state; but the order, as shown by exhibits accompanying the petition, is governed by a comprehensive system or code of laws, embracing numerous distinct and separate provisions binding upon the various subordinate lodges, and to which the grand master workman is required to exact obedience. The writ awarded, in general terms, commands the discharge by the plaintiff in error, as acting grand master workman, of the duties with which he is charged by the constitution

and laws of the order respecting the proceedings of the subordinate lodges, and is, therefore, a wide departure from the precise duty alleged as the basis of the proceeding.

JUDGMENT REVERSED.

STERLING MANUFACTURING COMPANY V. FRANK HOUGH.

FILED NOVEMBER 18, 1896. No. 6873.

1. **Attachment:** MOTION TO DISSOLVE: NOTICE. A reasonable notice of the hearing of a motion to discharge an attachment is such notice as is meet and fair in view of the circumstances and conditions existent at the time in the matter to be presented.

2. ———: RULING ON MOTION: REVIEW. In a hearing of a motion to discharge an attachment, one of the grounds of which is the untruth of the allegations of the affidavit for attachment, where the evidence used at the hearing is conflicting, the conclusions of the judge who heard the matters, announced from such evidence, will not be disturbed unless manifestly wrong.

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

M. McLaughlin, for plaintiff in error.

C. C. McNish, contra.

HARRISON, J.

In this action, instituted in the district court of Cuming county, an order of attachment was procured to issue and was levied on personal property. A motion to discharge the attachment was filed for defendant, and on hearing before a judge at chambers the attachment was discharged. The order then made is the burden of the complaint in the error proceedings prosecuted to this court. The certificate of the clerk of the district court attached to the record is to the effect that the affidavit

for attachment is a part of the transcript filed here. We have searched the record and do not find the affidavit or a copy of it, but counsel for defendant in error makes no complaint of this. On the contrary he states in his brief that the grounds of the affidavit were as follows: "That the defendant, Frank Hough, is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors, and that he has assigned or disposed of his property, or a part thereof, with intent to defraud his creditors;" and we will accept these as the material allegations of the affidavit in our consideration of the questions presented.

It is urged that there was not sufficient notice given of the hearing on the motion to dissolve the attachment. In section 235 of our Code of Civil Procedure, in regard to notice of a motion to discharge an attachment, it is provided: "The defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment, as to the whole or a part of the property attached;" and under the general head of "Motions and Orders," in section 574 of the Code, it is said, in relation to notice: "Where notice of a motion is required, * * * it shall be served a reasonable time before the hearing." The contention here is, that notice of the motion was not given "a reasonable time before the hearing." If we were to be governed by the statements of the record as to this point, we would feel constrained to hold that it establishes that the plaintiff was represented at the hearing. The journal entry of the order made contains the following: "To all of which the said plaintiff then and there duly excepted, and asked and obtained twenty days in which to prepare and file in the supreme court of the state of Nebraska its petition in error upon executing an undertaking as required by law;" and in the bill of exceptions it appears: "Be it remembered that on the trial and hearing of the cause, * * * on the motion to dissolve the attachment, * * * the plaintiff, to maintain the issues on his part, read in evi-

dence the affidavits of [here followed a list of affidavits], all of which said affidavits are hereto attached and made a part hereof. Whereupon the plaintiff rested." But it appears from statements of counsel, in the briefs filed in this court, that the plaintiff was not present at the hearing, either by counsel or any other person. Affidavits were filed in support of the motion, and also to sustain the allegations of the original affidavit filed to obtain the issuance of the writ. The case was commenced September 30, 1893. The writ of attachment was levied October 2, 1893. On December 4, 1893, notice was duly served on the plaintiff that on the 5th day of December, 1893, or as soon thereafter as he could be heard, the defendant would apply to the district court for an order discharging the attachment, and that affidavits would be filed in an effort to disprove the allegations of that filed to procure the writ. Acknowledgment of the receipt of a copy of this notice by attorney for plaintiff was indorsed on the original. It appears that no hearing was had pursuant to this first notice, and on the 20th day of March, 1894, at ten minutes past three o'clock P. M., a notice was served on attorney for plaintiff, of a hearing of the motion before the judge at chambers at Ponca, on March 22, 1894, at 9 o'clock A. M., at which time the matter was presented, with the result we have hereinbefore stated.

It is asserted by counsel for plaintiff, in his brief, that he was, at the time the last mentioned notice was served, engaged in the trial of causes in the county court of Cuming county, and had other trials set for the succeeding day, which would fully occupy his time and attention up to, and including, the day on which the hearing was had on the motion; that he notified the judge before whom the attachment matter was to be presented of the facts in respect to counsel's business engagements and consequent inability to attend the hearing on the motion, also that he further called attention to the fact that a regular term of district court for Cuming county was fixed for

April 23, 1894. These statements are all in reference to matters which do not appear in the record and we cannot consider them. If there was time to make a protest to the judge informally, there must have been time to make it in the regular manner and thus have it appear in the record. As it was presented, it is not available in this proceeding at this time. The affidavits, quite a number of them on behalf of plaintiff, as well as those favorable to the contention of defendant in his motion and used at the hearing, had all been filed long prior to such hearing, and counsel for plaintiff does not claim that he desired to prepare or file any other or further evidence, nor does he complain that there was not sufficient time for him to go or to send some one to the place of hearing designated in the notice. The record before us fails to disclose that the plaintiff did not receive reasonable notice of the time of the hearing of the motion in view of all the circumstances and conditions existent in the matter at the time. Reasonable notice is defined to be "Such notice or information of a fact as may fairly and properly be expected or required in the particular circumstances." (Black's Law Dictionary, 998.) In Nash's Pleading & Practice [4th ed.], page 1228, in reference to the requirement that notice of a motion shall be served a reasonable time before the hearing, it is observed: "A reasonable time is such that the party notified will have ample time to prepare himself and be able to be present at the time and place of hearing. If it is a motion on which affidavits are to be used, time must be allowed for obtaining them. If the motion is predicated on the record or papers on file, then the time must be such as to enable him to be present, providing for ordinary contingencies."

One of the grounds of the motion to dissolve the attachment was that the allegations of the affidavit were untrue. It is contended by plaintiff that the finding and judgment on this point were contrary to the weight of the evidence. A careful perusal of the evidence discloses that it was conflicting as to the facts involved, but also

that there was sufficient to sustain the finding of the trier of these facts. This being true, the conclusions reached and the resulting judgment will not be disturbed.

It was also of the grounds of the motion that the action was based on claims of which some considerable sums were not due, and that no application had been made, and an order for the issuance of the writ obtained in the manner prescribed by law. Inasmuch as the determination of the correctness of the findings of the judge, who presided at the hearing, in relation to the truth of the statements of the affidavit for attachment effectually disposes of the whole matter, a discussion of this further point in the case is rendered unnecessary. The order and judgment is

AFFIRMED.

DAYTON SPICE-MILLS COMPANY V. WILLIAM G. SLOAN ET AL.

FILED NOVEMBER 18, 1896. No. 6406.

1. **Continuance for Purpose of Procuring Incompetent Evidence:** ATTACHMENT. The action of the trial court in denying an application for the continuance of a hearing on a motion to dissolve an attachment, examined and affirmed.

2. **Review:** ISSUES. A question which, apparently, was not presented to the trial court, but is raised for the first time in this court, need not be considered. (*Dunham v. Courtnay*, 24 Neb., 627.)

3. **Fraudulent Conveyances:** VALUE OF MORTGAGED CHATTELS. "The disproportion, if one exists, between the value of chattels mortgaged and the amount thereby secured affords no basis for a presumption of law. It is a matter of evidence, to be accorded such weight as, in the light of surrounding circumstances, it is entitled to receive in the determination of a question of fact." (*Grand Island Banking Co. v. Costello*, 45 Neb., 119.)

4. **Husband and Wife:** GIFTS. A gift of chattels from the husband to the wife, during coverture, *inter vivos*, could not be made and was of none effect at common law. The husband and wife were considered as but one person, and she was incompetent to receive the gift.

5. ———: COMMON-LAW RIGHTS. "The common law in respect to the rights of husband and wife is in force in this state, except so far as it has been modified by statute." (*Aultman v. Obermeyer*, 6 Neb., 260.)

6. **Married Women:** GIFT FROM HUSBAND TO WIFE. The married woman's act being for the purpose of extending, and not contracting or limiting, the rights of married women in this state, will not be held to have abrogated the equitable rule which upheld gifts from husbands to wives made when the husband was solvent, and which did not impair the existing rights of creditors.

7. ———: ———. "A husband may lawfully give his wife a deed or mortgage to secure a pre-existing *bona fide* debt owing to her, and such conveyance is not fraudulent as to his other creditors, if taken in good faith and without any fraudulent purpose." (*Ward v. Parlin*, 30 Neb., 376.)

8. **Limitation of Actions:** HUSBAND AND WIFE. The statute of limitations will not run in favor of strangers to a transaction against a claim due from a husband to his wife arising out of such transaction.

9. **Attachment:** ESTOPPEL. A plaintiff who has attached property as the property of defendants and obtained writs of garnishment to issue on allegations that the garnishee named has in his possession property, etc., owned by or belonging to the defendants, will not be heard to assert that defendants have not sufficient interest to be allowed to defend against the attachments.

10. ———: ORDER OF DISSOLUTION: DISMISSAL. The dissolution of an attachment issued on a claim before due terminates the action; and that a judge, at chambers, after dissolving such an attachment, made an order of dismissal of the main action, if without jurisdiction, and error (which we do not decide), was not prejudicial.

11. ———: ———. The evidence examined, and *held* sufficient to support the finding and order of the lower court.

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

The opinion contains a statement of the facts and issues.

Horton & Blackburn, for plaintiff in error:

The court erred in sustaining the motion of defendants to dissolve the attachment. (*Gans v. Thompson*, 11 O. St., 580; *Harrison v. King*, 9 O. St., 388; *Seidentopf v. Annabil*,

6 Neb., 524; *Monteith v. Bax*, 4 Neb., 171; *Weir v. Bell*, 3 Ex. Div. [Eng.], 238.)

References as to invalidity of the gifts: 8 Am. & Eng. Ency. of Law, 1320; *Flanders v. Blandy*, 12 N. E. Rep. [O.], 321; *Jackson v. Twenty-Third Street R. Co.*, 88 N. Y., 520; *Matthews v. Hoagland*, 21 Atl. Rep. [N. J.], 1054; *Brittain v. Crowther*, 54 Fed. Rep., 295; *Seitz v. Mitchell*, 94 U. S., 580; *McAnally v. O'Neal*, 56 Ala., 299; *Clinton Station General Merchandise & Mfg. Co. v. Hummell*, 25 N. J. Eq., 45; *Cramer v. Reford*, 17 N. J. Eq., 367; *Hamill v. Henry*, 69 Ia., 752; *Triplett v. Graham*, 58 Ia., 135; *Goldsmith v. Fuller*, 30 Neb., 569; *Swartz v. McClelland*, 31 Neb., 646.

The security given was so excessive as to constitute a ground of attachment. (*Morse v. Steinrod*, 29 Neb., 108; *Brown v. Work*, 30 Neb., 800; *Hershiser v. Higman*, 31 Neb., 531; *Thompson v. Richardson Drug Co.*, 33 Neb., 714; *Grimes v. Farrington*, 19 Neb., 44.)

The attachment affidavit was not properly traversed. (*Hanson v. Doherty*, 25 Pac. Rep. [Wash.], 297; Bliss, Code Pleading, secs. 315, 332.)

A gift from husband to wife is subject to the debts of the former, though the debts were contracted subsequent to the making of the gift. (*May v. May*, 9 Neb., 19; *Gamber v. Gamber*, 18 Pa. St., 363; *Keeny v. Good*, 21 Pa. St., 349; *Walker v. Reamy*, 36 Pa. St., 410; *Bradford's Appeal*, 5 Casey [Pa.], 513; *Aurand v. Schaffer*, 7 Wright [Pa.], 363; *Robinson v. Wallace*, 3 Wright [Pa.], 129; *Switzer v. Valentine*, 4 Duer [N. Y.], 96; *Glann v. Younglove*, 27 Barb. [N. Y.], 480; *Woodbeck v. Havens*, 42 Barb. [N. Y.], 66; *Ryder v. Hulse*, 24 N. Y., 372; *Connors v. Connors*, 4 Wis., 112; *Elliott v. Bently*, 17 Wis., 591; *Edison v. Hayden*, 20 Wis., 715; *Duncan v. Roselle*, 15 Ia., 501; *Cramer v. Reford*, 17 N. J. Eq., 367; *Bergey's Appeal*, 60 Pa. St., 408; *Paine v. Mason*, 7 O. St., 207; *Day v. Munson*, 14 O. St., 491; *Atchison, T. & S. F. R. Co. v. Franklin*, 23 Kan., 74; *Rawson v. Pennsylvania R. Co.*, 2 Abb. Pr., n. s. [N. Y.], 220; *Knapp v. Smith*, 27 N. Y., 279; *Darby v. Callaghan*, 16 N. Y., 71.)

Breckenridge & Breckenridge, contra:

Plaintiff did not establish a ground of attachment. An action can be maintained on a claim not due only in the exceptional cases enumerated in section 237 of the Code. (*Caulfield v. Bittenger*, 37 Neb., 542; *Seidentopf v. Annabil*, 6 Neb., 524; *Harrison v. King*, 9 O. St., 393; *Heidenheimer v. Ogborn*, 1 Dis. [O.], 351.)

The attachment cannot be sustained because of excessive security. (*Whitney v. Levon*, 34 Neb., 443; *First Nat. Bank of Denver v. Lowrey*, 36 Neb., 290; *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800; *Jones v. Loree*, 37 Neb., 816.)

The gifts were executed at a time when the donors were solvent, and they had the right to make provision for their wives. (*Sexton v. Wheaton*, 8 Wheat. [U. S.], 227; *Kehr v. Smith*, 20 Wall. [U. S.], 31; *Jones v. Clifton*, 101 U. S., 225; *Morse v. Raben*, 27 Neb., 145; *Second Nat. Bank v. Merrill v. Houston Iron Works Co.*, 50 N. W. Rep. [Wis.], 505.)

The gifts were perfected by actual delivery. (*Flanders v. Blandy*, 12 N. E. Rep. [O.], 321; *Matthews v. Hoagland*, 21 Atl. Rep. [N. J.], 1054; *Camp's Appeal*, 36 Conn., 88; *Davis v. Ney*, 125 Mass., 590; *Crittenden v. Phœnix Mutual Life Ins. Co.*, 41 Mich., 442.)

The notes were not barred by the statute of limitations. (*Barnett v. Harsbarger*, 105 Ind., 410; *Dice v. Irvin*, 110 Ind., 561.)

The indebtedness to the wives was valid, and they had a right to security. (*Ward v. Parlin*, 30 Neb., 376; *Hill v. Bowman*, 35 Mich., 191.)

A voluntary settlement in favor of a wife and children is not to be impeached by subsequent creditors on the ground of its being voluntary. (*Webb v. Roff*, 9 O. St., 430; *Fullington v. Northwestern Breeders' Ass'n*, 51 N. W. Rep. [Minn.], 475.)

Reference was also made to the following cases: *Cox v. Peoria Mfg. Co.*, 42 Neb., 660; *First Nat. Bank of Omaha v.*

Bartlett, 8 Neb., 319; *Sommermeyer v. Sommermeyer*, 61 N. W. Rep. [Wis.], 311; *Oberfelder v. Kavanaugh*, 29 Neb., 427; *Farwell v. Cramer*, 38 Neb., 61; *Melick v. Varney*, 41 Neb., 105; *McCord v. Krause*, 36 Neb., 764; *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb., 863.

HARRISON, J.

This action was commenced by plaintiff in the district court of Douglas county against the defendants, on a claim not due. It also filed an affidavit setting forth the statutory grounds authorizing the issuance of an attachment in such action. A writ of attachment was ordered, and was issued and served. Motion to dissolve the attachment was presented and, on hearing, sustained. The attachment was dissolved and the cause dismissed. The plaintiff has prosecuted an error proceeding to this court.

At the time of the hearing of the motion to dissolve the attachment, or immediately prior thereto, the plaintiff filed an application for a continuance of such hearing, supported by affidavit. The application was denied, and this action is made the subject of one of the assignments of error. The main tendency of the evidence which it was asserted might be produced, if a continuance was granted, would have been to prove that the defendants had fraudulently contracted the debt in suit; and it would have been incompetent in the present proceeding, this being an action instituted upon a claim before it was due. (*Caulfield v. Bittenger*, 37 Neb., 542.) An examination of the record convinces us that there was no error in the refusal to grant a continuance, of which the plaintiff has any just complaint.

It is urged that the statements of the affidavit in attachment were not sufficiently traversed or denied. Whether this was true or not, the question does not appear to have been raised on the hearing in the trial court, and hence will not be considered here. (*Dunham v. Courtnay*, 24 Neb., 627.)

The defendants had given, at or about the time of the

attachment, certain mortgages to some of their creditors, as security for the payment of their indebtedness to such creditors, which it is claimed was excessive security, and furnished, as a matter of law, ground for sustaining the attachment. The prevailing doctrine of this court on the subject of excessive security is as follows: "The disproportion, if one exists, between the value of chattels mortgaged and the amount thereby secured affords no basis for a presumption of law. It is a matter of evidence to be accorded such weight as in the light of surrounding circumstances it is entitled to receive in the determination of a question of fact." (*Grand Island Banking Co. v. Costello*, 45 Neb., 119.) If the evidence had established that excessive security had been given, a point as to which it was conflicting, it would have been but evidence to be considered with the other facts and circumstances bearing on the question of fraud, as a matter of fact. It appears from the evidence that the defendants, on June 21, 1893, and during a number of years prior thereto, were conducting a wholesale grocery business in the city of Omaha, as partners, under the firm name of Sloan, Johnson & Co. On the date mentioned the firm was heavily indebted to various creditors, and, as security for the payment of existing liabilities, executed and delivered to the First National Bank of Omaha a chattel mortgage, the amount which it was given to secure being stated therein as $49,576.60; also a similar instrument in favor of the Colorado National Bank of Denver, in the stated sum of $30,000; the property included in the two mortgages being all the stock of merchandise belonging to the firm. On the same date there was also assigned to the second of the banks named book accounts of the firm amounting to the sum of $15,000, and subsequently more of the book accounts were assigned and parcelled out or delivered to others of the firm's creditors.

On the same date that the said chattel mortgages were executed to the banks, one member of the firm, William G. Sloan, executed and delivered to his wife, Ruth Anna

Sloan, a mortgage on his residence property to secure a stated indebtedness in the sum of $6,432.81, and the other member of the firm, Jonas P. Johnson, gave his wife, Ella G. Johnson, a mortgage on his residence property in the sum of $9,861.31. It appears that the property mortgaged to Mrs. Sloan was worth or valued then at about $15,000, and Mr. Johnson's residence at about $14,000. It appears that some years prior to the time that the firm embarked in business in Omaha, William G. Sloan had two endowment policies of insurance on his life, which matured and were paid, one May 20, 1886, and the other June 1, 1889. The amount received in payment of the two policies was, in the aggregate, $3,087.46. These sums were paid to Mrs. Sloan on the dates we have mentioned, and immediately given to Mr. Sloan, who executed and delivered to his wife promissory notes, payable to her, in sums corresponding to the cash received by him. It was testified that Mrs. Sloan had received from some relatives $1,000, which she had loaned to Mr. Sloan. None of the principal or interest of the notes given by Mr. Sloan to his wife had ever been paid, and the whole amount claimed to be due for both principal and interest was the consideration stated in the mortgage given by Mr. Sloan to his wife. It further appeared that Mr. Johnson had an endowment policy of insurance on his life, payable to himself, which was, when paid at its maturity, paid at his request to his wife, kept by her until the next day, when it was by her turned over to him, and he gave his wife a promissory note in a like amount, signed by himself and William G. Sloan. None of the principal or interest had ever been paid, and their aggregate amount constituted the consideration stated in the mortgage to Mrs. Johnson, of date June 1, 1893. All the premiums on the policy of William G. Sloan had been paid by the assured and the premiums on Johnson's had been paid by him. These transactions between the husbands and wives were gifts or attempted transfers of the money to them as gifts, and subsequent and immediate

loans thereof to the donors, the husbands. The husbands, at the dates of the several occurrences, were solvent and amply able to make the presents to their wives. It appears that one was then estimated to be worth $40,000 and the other $80,000. One question which arises is, could the husbands make gifts of money or personal property to the wives, and it become the separate property of the wives and not subject to the disposal of the husbands, or liable for their debts? This is not a direct proceeding to annul the gifts from the husbands to the wives, but the validity of the gifts is drawn into question in the determination of the good faith or fraudulent character of the mortgages from the husbands to the wives to secure the payment of the debts which, if they existed, were created when the husband gave to the wives the money derived from the life insurance policies, and received it from them again as loans, which were then evidenced by promissory notes. Some of the transactions took place in another state than this, but the law of the state in which they occurred, in regard to the rights of married women to acquire and own property, was not introduced in evidence, is not contended to be different from that of our own state, and must be presumed to be the same on the subject involved. Our statutory law as it existed at the dates referred to, and now exists, is as follows: "The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts," etc. (Compiled Statutes, ch. 53, sec. 1.)

"At common law a married woman was not allowed to possess personal property independent of her husband." (2 Kent's Commentaries [13th ed.], p. 163.)

"At common law there cannot be a gift of chattels *inter vivos* from the husband to the wife during coverture; for, being but one person in law, she cannot take independently of him. (*Neufville v. Thomson*, 3 Edw. Ch. [N. Y.], 92.) But equity has always sustained such gifts whenever made without the intervention of a trustee when the claims of creditors were not affected, and when the gifts were clearly proved. If in fact made, equity will sustain and enforce the gift." (3 Wait, Actions & Defenses, 498, and cases cited.)

The case of *Sexton v. Wheaton*, 21 U. S., 229, an appeal from the circuit court of the District of Columbia, the object of the action being to subject a house and lot in Washington city, to which Sally Wheaton held the legal title, to the payment of a judgment debt against her husband, held: "A voluntary post-nuptial settlement, made by a man who is not indebted at the time, upon his wife is valid against subsequent creditors." And it was remarked in the body of the opinion: "It would seem to be a consequence of that absolute power which a man possesses over his own property that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition, if it be fair and real, will be valid. The limitations on this power are those only which are prescribed by law."

It may be said that at common law a direct gift of chattels from husband to wife could not be made, because she was incompetent to receive it; that courts of equity have upheld and will uphold such gifts. A number of states have statutes by which the common law rule has been abrogated, and gifts from the husband to the wife are valid and the property thereby transferred becomes her separate property.

We will now turn our attention to some of the sayings and decisions of this court bearing either generally or directly on the subject at present before us.

In the opinion in *Webb v. Hoselton*, 4 Neb., 308, it was stated: "At common law the husband and wife are

treated as one person, that is, the legal existence of the wife is suspended during marriage, and she becomes incapable of making a valid contract to bind either herself or her estate. Equity, however, following the rules of the civil law, treats the husband and wife as distinct persons, capable of having separate estates, debts, and interests, and regards a married woman, as to her separate property, as a *feme-sole.*"

In *May v. May*, 9 Neb., 16, after a review of the decisions in a number of cases from the courts of different states on the subject of contracts between husband and wife, and their enforcement in the courts by suit, it was observed in the opinion, written by COBB., J.: "In none of the above mentioned states has the legislature passed any act which in terms changes the common law in regard to the nature and character of the marriage relation, or the unity of the persons of husband and wife, and the above cases must of necessity have gone upon the theory that the statutes of the said states respectively, defining the rights of women in the marriage relation, in respect to the ownership, control, and disposition of property, have, in effect, done away with the technical unity of husband and wife as formerly existing at common law. At least such is my opinion."

In the decision in the case of *Smith v. Dean*, 15 Neb., 432, MAXWELL, J., who wrote the opinion, referring to the common law doctrine, that certain rights of a woman were suspended during coverture, observed: "The doctrine evidently originated at a time when a wife was regarded as little better than a slave, and has but little application to our state of society, and will not be extended beyond the strict requirements of the law." For a further and more extended expression of righteous indignation upon the subject, and in much the same strain, the reader is referred to the opinion in *Good v. Good*, 19 S. E. Rep. [W. Va.], 382.

In *Aultman v. Obermeyer*, 6 Neb., 260, it was held: "The common law in respect to the rights of husband and

wife is in force in this state, except so far as it has been modified by statute."

But it is also established that when it is apparent that a deed from the husband to the wife was made in pursuance of a valid antenuptial agreement, or upon a sufficient consideration, it may be sustained in equity.

In regard to this last proposition it was said in *Wanzer v. Lucas*, 44 Neb., 759: "The doctrine has been freely asserted by this court that the deed of a husband to his wife, although void at common law, will be upheld whenever equitable grounds exist therefor, such, for instance, as a valuable consideration;" citing *Smith v. Dean*, 15 Neb., 432; *Johnson v. Vandervort*, 16 Neb., 144; *Furrow v. Athey*, 21 Neb., 671; *Ward v. Parlin*, 30 Neb., 376; *Hill v. Fouse*, 32 Neb., 637.

In the case of *Davis v. First Nat. Bank of Cheyenne*, 5 Neb., 242, in which an action had been commenced by the bank against Elizabeth Davis, a married woman, upon a promissory note executed by her in settlement of an amount that she had overdrawn her account with J. H. Rogers & Co., the note was payable to J. H. Rogers & Co., and was sold to the First National Bank of Cheyenne. In reference to the deposits to her account with J. H. Rogers & Co. it was stated in the opinion: "A large portion of these deposits were made by the husband of the plaintiff; but he says that they were made for her separate use, on her account, and to her credit. * * * It seems very clear from the testimony in the case that the deposits made by the husband were for the separate use of the plaintiff, and became her separate property, and were controlled, drawn out of the bank, and disposed of by her for her own use."

In the opinion in the case of *Furrow v. Athey, supra*, it was stated for the court by REESE, J., after having decided that money which the husband had received from the wife for her separate estate was a sufficient consideration for a deed of lands to her by him: "But aside from this we can see no reason why the decree of the

district court is not correct. It appears that in 1868 Charles Furrow, the husband, now deceased, purchased the land in question from the United States. At that time he, with defendant, his wife, settled upon it, and they resided there together until his death which occurred in 1880. In 1879, while in poor health, he conveyed the premises to her. It was their home. They had a family of children, the plaintiffs, and the deed was evidently executed to her in order that she might be enabled to rear and educate the family in which she was as much interested as the husband, and which he fully understood at the time he made the conveyance. If it had been made to a third party as trustee, and by him conveyed to defendant, it perhaps would never have been questioned. It is just as good without such intervention."

In the case of *Callender v. Horner*, 26 Neb., 689, the first paragraph of the syllabus is as follows: "In an action by attachment against a husband the wife brought an action of replevin and recovered possession of the goods and had judgment in the court below. It appears that the parties had formerly lived in Iowa and were possessed of a valuable farm and considerable personal property; that there was a first mortgage on the farm of from $8,000 to $9,000, also a second mortgage for more than $2,000, and chattel mortgages to the latter party on the personal property. The land was sold under the first mortgage and redeemed by the second mortgagee, who thereupon foreclosed his chattel mortgages and purchased the property, and after satisfying his own claim, delivered the surplus to the wife. Held, no fraud being charged or proved in the premises, that the wife took a good title as against the creditors of her husband." It appears that in the trial of the case to which we have just referred, the wife testified that she received the surplus of the property as her "divide." It is said in the body of the opinion: "The examination fails to make clear what was meant by the 'divide' she speaks of. We are left to infer,

however, that the land mortgaged was the homestead, and that by surrendering that, she was promised the surplus after paying the mortgage debts; or perhaps Mr. Coan may have turned over the surplus to her as the equitable owner after paying his claim. Mr. Coan's testimony was not taken. No fraud is charged against him or against the defendant in error in that transaction and we cannot infer it. The presumption is that she obtained the property honestly, and there must be some proof offered to overcome this presumption, to authorize a court to declare the transaction fraudulent. So far as the testimony shows, the property had been transferred to Coan to pay the debts of the husband, and the return of the part of the property to the wife was either in consideration of the surrender of some right, as that of a homestead, or from a sense of justice on the part of Coan. In addition to this, most of these transactions seem to have taken place before the debt to McCormick had been incurred."

In the case of *Morse v. Raben*, 27 Neb., 145, the right of husband to make a gift to the wife at a time when he was solvent and the gift did not interfere with the rights of creditors was considered and it was held: "In an action in the nature of a creditor's bill, to set aside a deed made to the wife of a judgment debtor by the vendor of real estate, in order that the real estate might be applied to the payment of the plaintiff's judgment, there was sufficient evidence presented to the trial court to sustain the finding that the husband, while in a prosperous financial condition, caused to be conveyed to his wife one hundred and sixty acres of land in the county of B., which conveyance was made in the year 1883. In the year 1886 it appears that the wife sold the real estate, realizing by such sale a large increase upon the amount invested at the time of the purchase; that she permitted the husband to take the money received from the sale and apply it to the payment of the indebtedness of a partnership of which the husband was a member; that soon after the partner-

ship failed and became insolvent, when the husband repaid to his wife out of the partnership assets the money which he had received from her, and which had been devoted to the use of the partnership; that with this money, by direction of the wife, the husband purchased the real estate in controversy, and that they had borrowed a large sum of money upon the real estate, which, together with the money received from the husband, was applied to the construction of the house thereon, rendering the property valuable; that the money expended in purchasing the property and in constructing the building thereon, was equal to the amount borrowed upon the credit of the property added to the amount formerly loaned by the husband to the wife. In such case, the decree of the district court dismissing the creditor's bill was affirmed." And in the body of the opinion appears the following: "Since Mrs. Raben became the owner of the real estate in Butler county at a time when the solvency of her husband could not be questioned, and perhaps for value actually paid by her, although we do not think this a material matter, there is no doubt but that she could retain the money arising from the sale of that real estate. This would be thirteen hundred dollars."

From a review of the decisions of this court upon the rights of married women, we think it a fair conclusion that the equitable rule in respect to gifts by husbands to their wives has at all times been recognized, and that it has been applied and enforced since the enactment in 1871, of what is known as the "Married Woman's Act." From which it is fair to say that the equitable rule by which what was or would be held valid as a gift prior to such act was not destroyed or rendered nugatory by such act, and this is a reasonable and true view, for the true intent and purpose of the "Married Woman's Act" are apparent from its terms and the circumstances and conditions existent at the time of its passage. The rules of the common law in regard to the rights of a married woman were to be largely abrogated, set aside, and new rights con-

ferred upon her, the law as to her and her rights in relation to property, contracts, etc., liberalized, her rights and powers were to be extended, and in no sense or particular restricted, limited, or made less than they had theretofore been. This being true, the act did not annul the rule in equity by which gifts by a husband, when solvent, to his wife will be upheld; did not operate to render invalid what was before held to be valid. (*Whitney v. Wheeler*, 116 Mass., 490.) We conclude that the gifts from the husbands to their wives were valid. There was ample evidence to sustain a finding that the gifts were actually and fully consummated.

It being determined that the debts to the wives were true, existing debts, the mortgages to the wives, if taken in good faith, were not fraudulent. "A husband may lawfully give his wife a deed or mortgage to secure a pre-existing *bona fide* debt owing to her, and such conveyance is not fraudulent as to other creditors if taken in good faith and without any fraudulent purpose." (*Ward v. Parlin*, 30 Neb., 376; *Hill v. Bowman*, 35 Mich., 191; *Dice v. Irwin*, 11 N. E. Rep. [Ind.], 488, and cases cited.)

It is contended that the alleged debts from the husbands to the wives were, at the time of the renewals and execution of the mortgages, barred by the statute of limitations, and should not be recognized for this reason. The statute of limitations would not run in favor of the plaintiffs, strangers to the transaction between the husbands and wives.

The point is raised that the defendants had no interest in the property attached which entitled them to be heard on motion to discharge the attachment. A levy of the writ was made on the property mortgaged to the wives, as the property of the defendants, and the banks were made garnishees in an effort to reach the property mortgaged to them, the ground being that the mortgagees had property of defendants in their possession or under their control. The plaintiff had the writ levied upon the property as belonging to defendants, and claims a lien

on other of the property by virtue of a garnishment based on allegations that the garnishees had in their possession property which belonged to defendants, and they cannot now successfully urge that the defendants have not interests in the property such as would permit them to attack the attachment. (*Grimes v. Farrington*, 19 Neb., 44; *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb., 863.)

At the hearing on the motion to discharge the attachment before the judge of the district court, at chambers, after the order dissolving the attachment the judge made this additional order: "And it further appearing that the suit herein is based upon a claim not due at the time it was brought, and not yet due, said cause is hereby dismissed." It is insisted that it was error for the judge to finally dismiss the cause; that his jurisdiction at chambers did not extend to such an order. In section 239 of the Code of Civil Procedure, under the head of "Attachment in Certain Actions," it is provided that when application for the issuance of a writ is presented: "If the court or judge refuse to grant an order of attachment, the action shall be dismissed, but without prejudice to a future action," etc. "Where the attachment is not necessary to give the court jurisdiction of the cause, the dissolution of the attachment defeats that particular writ and does not touch the merits of the action or dismiss the cause. They are independent proceedings. But where the attachment is not a mere incident to the main action, and is the foundation of the suit and necessary to the jurisdiction of the court, an order setting aside the attachment will terminate the action unless the proceeding is taken up for review. * * * Where, also, a statute permits an attachment to issue upon a debt not due, a dissolution of the attachment proceedings will be a termination thereof, because in no proceeding but by attachment can an action be maintained before the demand has matured." (1 Shinn, Attachment & Garnishment, sec. 354. See, also, *Voorhis v. Michaelis*, 45 Kan., 255; *Gowan v. Hansen*, 55 Wis., 341; *Moore v. Corley*, 16 S. W. Rep.

[Tex.], 787; *Wingo v. Purdy*, 87 Va., 472.) "If the order of attachment is granted, but should afterwards be set aside for the reason that the grounds therefor were not true, then the action should be dismissed." (*Pierce v. Meyers*, 28 Kan., 364.) "The right, however, to maintain the action on a claim before it is due depends altogether upon the attachment, for, as said in *Harrison v. King*, 9 O. St., 395, 'If the attachment fails, the action falls with it.'" (*Seidentopf v. Annabil*, 6 Neb., 524.) The action terminated with the dissolution of the attachment in the present case, as it was discharged for the reason that the statements of the affidavit in attachment were not true. And whether the judge had jurisdiction to dismiss the main suit or not, that he did so could not prejudice the rights of the plaintiff; hence, this assignment presents no available error.

It is urged that the evidence was insufficient to sustain the findings and order of the trial court. A careful review of the evidence convinces us that this argument must be overruled; that the conclusions of the trial court were supported by the evidence. It follows from the foregoing conclusions that the order of the district court will be

AFFIRMED.

GEDNEY PICKLE COMPANY V. SLOAN, JOHNSON & COMPANY.

FILED NOVEMBER 18, 1896. No. 6417.

Attachment: HUSBAND AND WIFE: GIFTS: RIGHTS OF MARRIED WOMEN.

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

Saunders, Macfarland & Dickey, for plaintiff in error.

Breckenridge & Breckenridge, *contra*.

HARRISON, J.

This is a companion case and submitted with that of *Dayton Spice-Mills Co. v. Sloan*, 49 Neb., 622, under an agreement that the decision in the last mentioned case should govern the determination of this. The decision of the lower court is therefore

AFFIRMED.

MARY O. RICHARDS, APPELLANT, V. JOHN WALLER ET AL., IMPLEADED WITH L. C. GILBERT, APPELLEE.

FILED NOVEMBER 18, 1896. No. 6816.

1. **Principal and Agent:** PROOF OF AUTHORITY TO RECEIVE PAYMENT. One who makes payment to a second person, not the owner of a note and not in possession of it, of money to be applied in payment of the debt thereby evidenced, assumes the burden of proving that the party to whom payment was made was empowered to collect the money.

2. ——: ——. The fact that a person, or company, is authorized to receive the installments of interest which became due on a mortgage note or bond is not sufficient ground from which to infer that the authority also exists to collect or receive the principal sum, if the evidences of the indebtedness are not and have not been in the possession of such person or company.

3. **Mortgages:** NOTES: AUTHORITY TO RECEIVE PAYMENT. "Where payment of a negotiable note secured by mortgage was made to an investment company, * * * and such payment was never forwarded to the party to whom such note had been transferred, *held*, that the mere fact that antecedent payments [of interest] 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 [investment company] as his agent." (*Bull v. Mitchell*, 47 Neb., 647.)

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

James McNeny, for appellant.

J. S. Gilham and *Case & McNitt, contra.*

HARRISON, J.

This action was commenced in the district court of Webster county by Mary O. Richards against John Waller and others to foreclose a mortgage on a quarter section of land situate in Webster county. One of the defendants, L. C. Gilbert, who had purchased the land of Waller after the execution of the mortgage in suit, answered as a defense the payment of the amount secured by the mortgage and his consequent right to its cancellation. As a result of a trial in the district court the answering defendant was awarded a favorable decree, from which the plaintiff appealed to this court.

It appears that on October 20, 1885, John Waller, then owner of the quarter section of land involved in this suit, obtained a loan of $300 from one James H. Tallman, through the agency of the Nebraska & Kansas Farm Loan Company, doing business at Red Cloud, this state, and evidencing the indebtedness thus created, executed and delivered a promissory note or bond for the principal sum of $300, due October 1, 1890, and the ten interest coupons thereto attached, providing for the payment of the interest on the principal sum semi-annually during the expressed life of the loan. All the instruments mentioned were by their terms payable at the Mechanics Savings Bank, Hartford, Connecticut, and to secure the payment of the bond and its accompanying coupons the mortgage in suit was duly executed and delivered. It was also stated in the mortgage that the payments of the moneys which it was given to secure were to be made at the bank designated, as we have hereinbefore set forth. The payee named in the instruments was James H. Tallman, who resided in Hartford, Connecticut, to whom they were immediately forwarded and by whom they were, a very few days after he received them, sold and assigned to the plaintiff in this suit; and we will state here that the assignment of the mortgage

was never recorded in Webster county. James H. Tallman was an active, working member of the firm of George W. Moore & Co., loan brokers, doing business in Hartford, Connecticut, and this firm received, approved, and filled a large number of applications for loans, sent to them by the Nebraska & Kansas Farm Loan Company of Red Cloud, the notes and mortgages evidencing and securing these loans being taken in the name of James H. Tallman as payee. Of these was the Waller loan, the one involved herein. On the 1st of September, 1886, Waller sold the mortgaged land to L. C. Gilbert, the answering defendant. Waller paid one or two interest coupons during the time he retained the ownership of the farm, paid the money to the Nebraska & Kansas Farm Loan Company, and he received the coupon from it. He was not sure whether at the time he paid the money, or after it had been sent east and the coupon forwarded to the company at Red Cloud. Gilbert, after his purchase of the farm, made the payments of interest coupons, and finally the principal, to the loan company at Red Cloud, and the interest money was sent to George W. Moore & Co. at Hartford and the coupons forwarded by the eastern firm to the loan company at Red Cloud and by it delivered to Gilbert. The principal was deposited by the western company in the bank to its credit, and was never sent east or paid to the owner of the note and mortgage, and the question to be determined in this case is upon whom must the loss fall, Gilbert, the grantee of the borrower, or the owner of the note and mortgage.

There was evidence introduced on the part of the defense, some of it incompetent, but such as was competent, tended to show the general course of dealing in respect to loans by and between the eastern, or Hartford firm, and the western loan company; that interest on loans which had been made through it by the eastern firm was collected by the Nebraska & Kansas Farm Loan Company and forwarded to the firm at Hartford; and, when necessary, or probably in all cases prior to the time the

interest on any loan was due, notice of the fact was sent to the borrower by the western company, which was in the shape of a dun and which urged payment at the office of the western company, and when paid to it and it was sent to and received by the Hartford firm, it was paid to the owner of the note and mortgage in each particular case, the interest coupon obtained and sent to the western company, and by it delivered to the borrower. It was in evidence that generally the taxes and insurance on property included in any of the loans were looked after by the western company, and the owners urged to renew the insurance at the proper time and to pay taxes promptly. From this general showing of the business relations and manner of the conduct of loan transactions by and between the Hartford firm and the western company, it was and is urged that the inference arose, or should be or have been drawn, that both had authority to make collections of interest and principal of all the loans negotiated through their instrumentality, and that this obtained as to the one held by plaintiff, inasmuch as it had been proved that collections of interest had been made by the western company, forwarded to the eastern firm, and received by plaintiff from the Hartford firm in payment of interest due. But on behalf of plaintiff it was in evidence that she purchased the note and mortgage of Tallman and received them, together with the proper assignment, and had ever since retained possession of them until they were given to the eastern firm to be foreclosed, and that she never had any knowledge that the Nebraska & Kansas Farm Loan Company had received any of the payments,—in fact, that she was not aware of the existence of the company. The note was negotiable, which fact was notice to its maker and all parties concerned that its ownership might be changed at any time. All payments, by the terms of the instrument, were to be made at a specifically designated place, the Mechanics Savings Bank of Hartford, Connecticut. This court has held: "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 the payment is made to receive the money." (*South Branch Lumber Co. v. Littlejohn*, 31 Neb., 606; *First Nat. Bank of Omaha v. Chilson*, 45 Neb., 257; *Bull v. Mitchell*, 47 Neb., 647.)

There was no evidence which it can be claimed tended to prove that either the Hartford firm or the western company had any authority to collect the amount of the principal of this loan at the time it was received by the loan company. "Authority of an agent to receive interest * * * on a mortgage * * * does not afford ground for inferring authority to collect the principal, where the agent is not entrusted with the possession of the securities." (Jones, Mortgages, sec. 964, and cases cited.) The defendant stated that he received notices from the western company in regard to interest installments, but does not say that he was notified by it to pay the principal when due, but that he, apparently of his own motion, procured a draft for the amount of the principal of the loan, at or about the time it was to be paid, and sent it to the secretary of the Nebraska & Kansas Farm Loan Company, and afterwards received from him a letter in which the receipt of the draft was acknowledged, and it was stated that the release of the mortgage would be sent to him (Gilbert, the defendant) as soon as received from the east. In the opinion in the case of *Bull v. Mitchell, supra*, which case, in its facts, was somewhat similar to the one at bar, differing only in some details unimportant or not controlling in their character, it was announced: "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 evi-

dence that such holder had never in any way held out or recognized the mortgagee as his agent."

The cases* cited by counsel, in the Federal Reporter, are, we think, not applicable or governing, for the reason that in them the authority of the agent or party to whom the money was paid to collect it clearly appeared from the facts proved, while in this case the contrary is true. Under the facts and circumstances developed in evidence in this case, and the rules of law applicable thereto, the findings and decree of the district court were clearly wrong, were not sustained by the evidence, and must be reversed and a decree entered in this court finding the amount due on the note and mortgage in suit and awarding a foreclosure of the mortgage.

JUDGMENT ACCORDINGLY.

MARY THOMSON, APPELLANT, V. THEODORE M. SHELTON ET AL., APPELLEES.

FILED NOVEMBER 18, 1896. No. 6947.

1. **Principal and Agent:** APPARENT AUTHORITY. Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency.

2. ——: EVIDENCE OF AUTHORITY TO RECEIVE PAYMENT. That the party to whom money due another is paid is not in possession of the instruments by which the indebtedness is evidenced is not conclusive of the question of the authority, or lack of it, in the party receiving the money to collect it, but is a circumstance or fact to be considered in the determination of such question.

3. **Conflicting Evidence:** QUESTIONS OF FACT. If differing, fair inferences may be drawn by candid, impartial minds from undisputed facts in evidence, the question to be determined is not one of law for the court, but one of fact, to be solved by the trier of the facts.

Security Co. v. Richardson, 33 Fed. Rep., 16; *Security Co. v. Christy*, 33 Fed. Rep., 22; *Kent v. Congdon*, 33 Fed. Rep., 228.

4. **Principal and Agent:** EVIDENCE. The evidence *held* sufficient to sustain the findings of the trial court.

APPEAL from the district court of Franklin county. Heard below before BEALL, J.

H. Whitmore, for appellant.

M. A. Hartigan and *George W. Prather*, *contra.*

HARRISON, J.

During the month of October, 1886, Theodore M. Shelton, then the owner of a quarter section of land in Franklin county, obtained a loan of $1,500 of the Western Farm Mortgage Trust Company, of Lawrence, Kansas, and evidencing such loan executed and delivered a real estate mortgage bond in the principal sum of the loan, also ten interest coupons attached thereto, and a mortgage securing their payment, covering the aforementioned land. The payee named in the bond and coupons, and also party mortgagee was W. J. Neill. The place of payment named in each instrument, including the mortgage, was at the Third National Bank in the city of New York. The papers were sent east and were sold through a firm of brokers, Winslow & Co., at Troy, New York, to the plaintiff, to whom the mortgage was duly assigned. This assignment was never put upon record in Franklin county. On December 6, 1888, the land was sold by Shelton to George W. Skiles, who is of the parties defendant herein, he assuming and agreeing to pay the indebtedness evidenced by the mortgage. The company notified the owner of the land of the maturity of the installments of interest, and all of them, excepting the last, were paid, as they became due, to the Western Farm Mortgage Trust Company. The money was by it sent east, and the coupons procured, if they had not been forwarded prior to payment, for collection, but in either event they were delivered or sent to the debtor by the Western Farm Mortgage Trust Company. This company,

at some time during the life of the loan, changed its place of business from Lawrence, Kansas, to Denver, Colorado. At or about the time of the maturity of the loan the company urged the renewal of the loan with it or through its interposition as agent, but for reasons which to the debtor were sufficient he did not do so. Instead, he procured a loan of $1,200 of the Eastern Banking Company, to secure the payment of which a mortgage was executed and delivered conveying the land to which we have before referred. To the money thus obtained he added a sum which he then possessed, and with it a draft was purchased for him by the Eastern Banking Company, payable to W. J. Neill, in accordance with a notice sent by the Western Farm Mortgage Trust Company to the debtor, and the draft was forwarded to the last named company at Denver. The draft was there deposited in a bank and its amount credited to the Western Farm Mortgage Trust Company, which, soon afterward, and before the money was remitted to the plaintiff in payment of the mortgage debt, failed. The plaintiff instituted this action in the district court of Franklin county to foreclose the mortgage held by her, and the Eastern Banking Company defended on the ground of payment of the amount of such mortgage to plaintiff by and through her agent and collector, the Western Farm Mortgage Trust Company. The owner of the land admitted the mortgages and pleaded the delivery of the money to the Eastern Banking Company, to be paid to plaintiff in discharge of the bond and mortgage held by her, and prayed that if it was determined that plaintiff's claim and mortgage were still existent, the mortgage and other evidences of indebtedness that he had executed in favor of the Eastern Banking Company might be canceled and held for naught, and that he be awarded a judgment for the sum he gave to the last mentioned company in excess of the amount of the mortgage to it. The Eastern Banking Company also asked a foreclosure of its mortgage lien. The trial court solved the questions presented there

for adjudication in favor of defendants, against plaintiff's alleged rights in the premises, and that her bond and mortgage had been paid and discharged. From the resulting decree the plaintiff has appealed to this court.

The question urged on behalf of appellant is that the findings and decree of the district court were not supported by sufficient evidence. Findings numbered 2 and 4 were as follows:

"2. The court finds generally in favor of all of the defendants, Theodore M. Shelton, Lizzie M. Shelton, George W. Skiles, Emily P. Skiles, and the Eastern Banking Company and against the plaintiff upon the issues joined in said action."

"4. The court further finds that the money arising out of and from the giving of the said note and mortgage by George W. Skiles and Emily P. Skiles to the Eastern Banking Company was paid to the plaintiff, Mary Thomson and her agents, and that the said Eastern Banking Company, by reason of the premises aforesaid, is subrogated to all the rights, interest, and estate of every name and nature by virtue of the giving of the mortgage by Theodore M. Shelton and Lizzie M. Shelton to the said Mary Thomson and her assignors, and the said mortgage so given by Theodore M. Shelton and Lizzie M. Shelton to said Mary Thomson and her assignors has been fully paid, and in all things discharged, by reason of the facts hereinbefore found.

It may be truly said that the facts in the case relative to the branch of it drawn into consideration by this appeal were undisputed or not conflicting, but it is also true that they were of such a nature that honest, impartial minds might fairly draw from them differing inferences or conclusions. Where such a condition is presented the question to be determined is not one of law for the court, but one of fact for the examination and determination of the trier of the facts. (*Reid v. Kellogg*, 67 N. W. Rep. [S. Dak.], 687.) The question herein was not whether the Western Farm Mortgage Trust Company

was the agent in fact of the plaintiff for the collection of the amount due on the bond and mortgage, but did it have ostensible authority to collect the money? "Ostensible authority is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess." (*Quinn v. Dresbach*, 16 Pac. Rep. [Cal.], 762; citing 1 Parsons, Contracts, sec. 44; *Kasson v. Noltner*, 43 Wis., 650.) We think a fair deduction might be made from the evidence that, relatively to the rights of the plaintiff and the other parties herein concerned in respect to the collection of the sum due on the bond and mortgage, the Western Farm Mortgage Trust Company had ostensible authority to receive the money. This being true, it was a matter of fact to be settled by the judge who tried the case, and as there is sufficient evidence to sustain the finding on this point it will not be disturbed.

We have not ignored the fact that the bond and mortgage were not in the possession of the Western Farm Mortgage Trust Company at the time it received the money, nor have we forgotten the rule that "a party who pays money to another to be applied on a note which such person has not in his possession, assumes the burden of proof to show the authority of the person to whom payment is made to receive the money." (*South Branch Lumber Co. v. Littlejohn*, 31 Neb., 606; *Bull v. Mitchell*, 47 Neb., 647; *Richards v. Waller*, 49 Neb., 639.) That the bond and mortgage were not in the hands of the mortgage and trust company when it collected the amount due on them, was not conclusive of the question of agency, but was a matter of evidence to be weighed and considered in connection with all the facts and circumstances in evidence. (*Quinn v. Dresbach, supra.*) It follows that the decree of the district court will be, and is,

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY WILLIAM M. MCGINNIS.

FILED NOVEMBER 18, 1896. No. 6576.

1. **Master and Servant:** RISKS OF EMPLOYMENT. An employe assumes the ordinary risks of his employment.

2. ———: ———. An employe assumes the risks arising from the unsafe condition of premises where his labor, or a portion of it, is to be performed, when the risks and conditions are known to him, or are apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment, or, after commencing, makes no complaint or objection in respect to the hazards.

3. **General Verdict:** SPECIAL FINDINGS: JUDGMENT. "When the special finding of facts is inconsistent with the general verdict the former controls the latter, and the court may give judgment accordingly." (*Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb., 68; *Lynch v. Chicago, St. L. & P. R. Co.*, 36 N. E. Rep. [Ind.], 44.)

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

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

Sullivan & Gutterson, contra:

The servant did not assume the risk of injury from apparent defects caused by the master's negligence. (Buswell, Law of Personal Injuries, secs. 192, 207; *Kane v. Northern C. R. Co.*, 128 U. S., 91; *Jones v. East Tennessee, V. & G. R. Co.*, 128 U. S., 443; *Lawless v. Connecticut R. R. Co.*, 136 Mass., 1; *Meloy v. Chicago & N. W. R. Co.*, 77 Ia., 743; *Thorpe v. Missouri P. R. Co.*, 89 Mo., 650; *Baltimore & O. & C. R. Co. v. Rowan*, 104 Ind., 88; *Louisville, N. A. & C. R. Co. v. Wright*, 115 Ind., 378; *Filbert v. Delaware & Hudson Canal Co.*, 56 N. Y. Super. Ct., 170; *Patterson v. Pittsburgh & C. R. Co.*, 76 Pa. St., 389; *Porter v. Hannibal & St. J. R. Co.*, 60 Mo., 160; *St. Louis, F. S. & W. R. Co. v.*

Irwin, 37 Kan., 701; *Rolseth v. Smith*, 38 Minn., 14; *Bonner v. La None*, 80 Tex., 117; *Sweet v. Michigan C. R. Co.*, 87 Mich., 559; *Kelleher v. Milwaukee & N. R. Co.*, 80 Wis., 584; *Boss v. Northern P. R. Co.*, 2 N. Dak., 128; *Nadau v. White River Lumber Co.*, 76 Wis., 120.)

HARRISON, J.

This action was instituted in the district court of Custer county by the plaintiff against the defendant company, to recover the amount of damages alleged to have resulted from injuries to plaintiff by the negligence of the company. There was a trial of the issues presented, to the court and a jury, and a verdict and judgment in favor of plaintiff. The company brings the case to this court by error proceedings. The plaintiff, on December 16, 1891, the date of the occurrence upon which this action is founded, was, and had been during some thirteen and one-half or fourteen months immediately prior thereto, continuously in the employ of the defendant railway company as a brakeman on freight trains running between Ravenna, as the eastern end of the run, and Seneca, as the western end. The trip between the two stations was made by trains on which the plaintiff was in the performance of his duties, during some days from Ravenna to Seneca and return, more frequently only the one way, either east or west in a day, and again less frequently with longer time intervening between the trips. Broken Bow is a station situated on the line of railway included in the trips made by trains on which plaintiff was employed. In the railroad yards at Broken Bow there was what is called a "spur,"—a track which was connected at its easterly end with the main track, or with a switch or sidetrack. The spur extended in a westerly direction to and beyond some coal sheds and lumber yards. At a short distance from the easterly end of the spur, and to the north of it, there stood a shed or "oil-house," placed there by parties, patrons of the road. This oil-house was distant from the nearest rail of the spur

about four feet and five inches, some witnesses stated; others gave the distance as three feet and eleven inches. The trains on which plaintiff worked passed through Broken Bow during the day,—the one from the west usually about noon,—and when the train reached Broken Bow, if there were cars to be shifted or switching to be done, the eastern-bound train and the men in charge must do it. On the particular day in question the freight train from the west arrived in Broken Bow about 1 o'clock P. M., and as a part of the switching to be done, was a car loaded with coal, to be taken from a sidetrack on the south side of the main track and placed on the spur and beyond the oil-house. This car was pulled up on the main line to a point east of either spur connection, and everything was prepared to "kick" it off on the spur, or to make what is also called a "running switch" of it to the place where it was to be left for unloading. As a part of this work the car must be uncoupled or disconnected from the engine or car to which it was attached. This the conductor attempted to do just as the car left the main line, and did not succeed. The plaintiff, who was standing on the ground near the spur, took up the task and was successful. He pulled the coupling pin and severed the connection of the coal-car with the train. On the end of the coal-car on which the plaintiff did the work there was a narrow platform, on a level with the floor of the car and extending across it, except a space of some twelve or fourteen inches in the center, where was situated the draw-bar. The plaintiff, by reason of the existence of this platform, was unable to uncouple the car while standing on the ground, but was obliged to get upon the platform and uncouple it from there. After doing this the plaintiff swung himself around the corner of the car from which he had just uncoupled the car of coal, to and upon a ladder on the north side and end thereof, with the intention of going on top the car, and while standing on the ladder, the train being still moving in a westerly direction, he was carried against the south-

east corner of the oil-house and was thereby knocked from the ladder to the ground, and fell so that he was caught by some part of a car of the moving train and finally thrown or rolled into such a position that his arm and hand were across the rail and were run over by the wheel or wheels of the train and crushed. The negligence of the company was alleged to consist in permitting the oil-house to be placed where it stood relatively to the spur, and allowing it to be continued or to remain there.

One of the questions presented for consideration and determination is whether, under the state of facts developed by the evidence in respect to the conditions existing in the yard of the company where plaintiff was at work when injured, and his knowledge of such conditions, the plaintiff, under the rules of law applicable, was entitled to a recovery. A list of questions was submitted to the jury and they returned what is known as a special verdict, as follows:

"The jury are directed to answer in writing each of the following questions:

"First. Q. How long had the plaintiff been in the employ of the defendant as a brakeman on its freight train prior to the accident?

"A. About thirteen and one-half or fourteen months.

"Second. Q. Had the plaintiff passed the oil-house in question, while switching trains, prior to the time of the accident, and if so, how frequently?

"A. Yes."

The crew of which the plaintiff was a member switched on this spur-track about three times a week, and passed over a portion of this spur-track from two to six times a day that they switched thereon. There is no testimony definitely stated how frequently plaintiff passed said oil-house.

"Third. Q. Was the work which plaintiff had done as a switchman in the yard at Broken Bow, and over the track in question, prior to the accident, done in daylight or at night?

"A. Daylight.

"Fourth. Q. Did the plaintiff know, or could he have known by ordinary care and observation, of the existence and location of the oil-house prior to the accident, and if so, how long prior thereto?

"A. Plaintiff did know of the existence and location of the oil-house prior to the accident; and could have known of its existence and location from the early part of his service as brakeman.

"Fifth. Q. Did the plaintiff, after attempting to ascend the ladder, look to see if he was approaching the oil-house or any other structure located near the track?

"A. He did not.

"Sixth. Q. If you find that the plaintiff did not look to see if he was approaching the oil-house, then state why he did not look.

"A. The evidence does not definitely disclose the reason why he did not look, further than it appears that his attention was given to the uncoupling of the car and giving the signal that separation had been effected."

The plaintiff testified that he knew of the oil-house and its location, and that it was there when he commenced work for defendant as a brakeman. One of the witnesses for defendant testified that while working for the company as brakeman on the same train with the plaintiff, prior to plaintiff's injury, and on the spur or track where the injury occurred, witness sat down on the end of a car and let his feet hang over, and plaintiff called to him: "Look out for the shed," referring to the oil-house. The plaintiff denies that he had any such conversation with the witness. It is clear, from an examination of all the facts and circumstances adduced in evidence on the point of the knowledge of the plaintiff of the location of the oil-house, that the special findings of the jury in respect thereto embodied a correct conclusion. This being true, the special findings of facts were inconsistent with the general verdict, and when such a condition exists the former controls. (Code of Civil Procedure, sec. 294; *Ogg v. Shehan*,

17 Neb., 323; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb., 68; *Lynch v. Chicago, St. L. & P. R. Co.*, 36 N. E. Rep. [Ind.], 44.) It is also clear that the nearness of the oil-house to the spur rendered it probably dangerous to any one performing the services and doing what plaintiff did at the place and the time of his injury. Under the operation of familiar and natural laws, injury would probably result. These facts were all open, obvious, and apparent to an ordinarily observant person. This being true, the plaintiff had knowledge of them, or must be charged with knowledge, and also with knowledge of the risk necessarily or probably incident to the existing conditions, and with its assumption. Hence he was not entitled to recover for the injury, notwithstanding the fact, which is undoubtedly true, that the situation of the oil-house, relatively to the spur, might have been made such that no injury would or could have resulted to plaintiff at the time in question. Of the duties to the employe which, by virtue of the contract of employment, devolve upon the employer is the one that the premises where the labor is to be performed shall be reasonably safe; but equally operative and governing the rights of the parties, it may be said that when a party becomes the employe of another to perform certain labor he assumes all risks ordinarily incident to the business. It will be presumed that he made the contract with reference to the risks ordinarily appertaining to the particular employment, and that he had notice of all risks which were open and obvious, or ought to have been to a person of his experience and understanding; and if he continues in the employment after full knowledge of defects in, or lack of, appliances, or risks to which he is exposed, which may be dangerous, and makes no complaint, but voluntarily accepts the risks, if subsequently injured by reason thereof there can be no recovery. (Cooley, Torts, p. 552*; Wood, Master & Servant, secs. 326, 335; 2 Thompson, Negligence, 1008, note 15; McKinney, Fellow-Servants, sec. 30; *Moulton v. Gage*, 138 Mass., 390; *Sweet v. Ohio*

Coal Co., 47 N. W. Rep. [Wis.], 182; *Gibson v. Erie R. Co.*, 63 N. Y., 449; *Yates v. McCullough Iron Co.*, 16 Atl. Rep. [Md.], 280; *Casey v. Chicago, St. P., M. & O. R. Co.*, 62 N. W. Rep. [Wis.], 624; Bailey, Master's Liability for Injuries to Servant, pp. 169, 170, 171; *Missouri P. R. Co. v. Baxter*, 42 Neb., 793; *Dehning v. Detroit Bridge & Iron Works*, 46 Neb., 556; *Lynch v. Chicago, St. L. & P. R. Co.*, 36 N. E. Rep. [Ind.], 44; *Wilson v. Louisville & N. R. Co.*, 4 So. Rep. [Ala.], 701; *Perigo v. Chicago, R. I. & P. R. Co.*, 52 Ia., 276; *Gaffney v. New York & N. E. R. Co.*, 31 Am. & Eng. R. Cas. [R. I.], 265; *Fisk v. Fitchburg R. Co.*, 33 N. E. Rep. [Mass.], 510; *Kelly v. Baltimore & O. R. Co.*, 11 Atl. Rep. [Pa.], 659.) It follows from the views herein expressed that the judgment of the district court was wrong, and it must be reversed.

REVERSED AND REMANDED.

JAMES FORRESTER & COMPANY, APPELLEE, V. KEARNEY NATIONAL BANK ET AL., APPELLANTS.

FILED NOVEMBER 18, 1896. No. 6700.

1. **Statutes:** ADOPTION: CONSTRUCTION. Where the legislature adopts the statute of another state, it likewise adopts the judicial construction which it had already received by the highest court in such state.

2. **Chattel Mortgages:** REGISTRATION: ATTACHMENT. Where a mortgagee of personal property, without any intention to defraud, has delayed filing his mortgage and taking possession of the property, but the instrument is in fact filed, or the mortgagee obtains and holds actual possession of the property under the mortgage before the rights or lien of any third party attaches, the lien of the mortgage is good against a creditor of the mortgagor who subsequently causes the property to be seized upon attachment or execution.

3. ———: ———. *Farmers & Merchants Bank of York v. Anthony*, 39 Neb., 343, and *Spaulding v. Johnson*, 48 Neb., 830, distinguished.

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

Dryden & Main, Marston & Nevius, and *John E. Decker,* for appellants.

Calkins & Pratt and *R. A. Moore,* for appellee.

NORVAL, J.

The record discloses that on the 4th day of June, 1890, one F. M. Harter, being indebted to the Kearney National Bank, executed to it a chattel mortgage on his stock of merchandise to secure the payment of said indebtedness. The mortgage was filed for record on the 5th day of July, 1890, and Harter's debt being unpaid, on the same day the bank took possession of the property under the mortgage. Two days later James Forrester & Co. commenced an action against said Harter for the recovery of the sum of $1,839.88 and caused an attachment to be issued and levied upon the property mentioned in the mortgage, although the same was at the time in the actual possession of the bank. Shortly thereafter the bank replevied the property from the sheriff, and subsequently disposed of the same under the mortgage. James Forrester & Co., after having obtained judgment in their action and an order for the sale of the attached property, instituted this action against the bank in the nature of a creditors' bill to have the mortgage to the bank declared void, and for an accounting to them for the value of the said goods taken possession of by the bank. Numerous other judgment creditors of Harter intervened in the action and filed cross-petitions. None of the judgments were recovered, nor was there any attachment proceedings commenced, until after the bank had filed its mortgage and was in possession of the property. The *bona fides* of the debt secured by the mortgage is conceded. The court below rendered a decree in favor of Forrester & Co., and dismissed the action as to all the intervenors. The bank and the intervenors prosecute separate appeals.

It is argued by the creditors of Harter that the mort-

gage in question is void under the provisions of section 14, chapter 32, Compiled Statutes, by reason of the delay of the bank in filing the instrument for record and in taking possession of the property. The statute invoked is in the following language:

"Sec. 14. 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 creditor of the mortgager, and as against subsequent purchasers and mortgagers 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 mortgager executing the same resides, or in case he is a non-resident of the state, then in the office of the clerk of the county where the property mortgaged may be at the time of executing such mortgage, and such clerk shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or instrument may be so filed, although not acknowledged, and shall be valid, as if the same were fully spread at large upon the records of the county."

By force of the foregoing statute a chattel mortgage in this state is fraudulent and void as to three classes of persons, viz., creditors of the mortgagor, subsequent purchasers and mortgagees in good faith, where the mortgage or a copy thereof has not been filed in the manner prescribed by law, and the mortgagor has possession of the mortgaged chattels. Neither plaintiffs nor the intervenors are either mortgagees or purchasers of the property in dispute, but are creditors of Harter; and the question presented is whether, under the section of the statute copied above, and the undisputed facts, the mortgage to the bank is void as to such creditors. The precise point involved has been frequently adjudicated by the courts, but the decisions are not harmonious. We shall adopt

that construction of the section which gives effect to the intention of the legislature.

It is disclosed that the mortgage to the bank was given to secure a *bona fide* indebtedness; hence, as between the parties to the instrument, a valid lien was thereby created which continues so long as such debt subsists, notwithstanding the mortgage, or a copy thereof, was not forthwith filed, and the bank did not immediately take possession of the mortgaged chattels. (*Sanford v. Munford*, 31 Neb., 792.) But under the statute it could be made a valid and subsisting lien as to other creditors of the mortgagor in one of two ways,—by depositing the instrument, or a copy thereof, in the office of the county clerk of the proper county, or by the delivery of the mortgaged property to the mortgagee. It could be made valid at any time as to creditors who had not already acquired any rights or interests in the mortgaged property, by the proper filing of the mortgage. The statute does not limit the time in which it must be filed. A chattel mortgage becomes valid as to creditors as of the date of the filing of the same or the taking of actual possession of the property by the mortgagee.

In Jones, Chattel Mortgages, section 178, the rule is stated thus: "If a mortgagee take possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, if it was previously valid between the parties, although it be not acknowledged and recorded, or the record be ineffectual by reason of any irregularity. The subsequent delivery cures all such defects. * * * Delivery of possession under a mortgage, before rights have been acquired by others, will cure any invalidity there may be in the instrument, whether arising from an insufficient description of the property, an insufficient execution of the instrument, the omission to record it or from its containing a provision which makes it void except as between the parties. * * * But, on the other hand, if a creditor of the mortgagor levies upon the property be-

fore the mortgage is recorded, and before the mortgagee has taken possession, the attachment lien is prior to the mortgage."

Cameron v. Martin, 26 Kan., 612, was an action of replevin to recover certain chattels. Plaintiffs claimed the property by virtue of four chattel mortgages, which were never recorded, and they did not take possession of the property until a long time after the mortgages were executed. Nine days after such possession was taken the defendant sued out an attachment against the mortgagor and levied it upon the property. It was held, under a statute precisely like ours, that the mortgages were valid from the time the mortgagees acquired possession of the property, covered by the mortgages. Valentine, J., in delivering the opinion of the court, observed: "We now come to the question, Did the mortgage become valid when the plaintiffs took possession of the property under them? We think we must answer this question in the affirmative. (*Dayton v. Savings Bank*, 23 Kan., 421; *Savings Bank v. Sargent*, 20 Kan., 576; *Nash v. Norment*, 5 Mo. App., 545; *Eastman v. Water Power Co.*, 24 Minn., 437; *Read v. Wilson*, 22 Ill., 377; *Frank v. Miner*, 50 Ill., 444; *Chipron v. Feikert*, 68 Ill., 284; *McTaggart v. Rose*, 14 Ind., 230; *Brown v. Platt*, 8 Bosw. [N. Y.], 324; *Brown v. Webb*, 20 O., 389; *Chapman v. Weimer*, 4 O. St., 481; *Field v. Baker*, 12 Blatch. [U. S.], 438.)" After quoting section 178, Jones, Chattel Mortgages, the opinion continues: "This statement of the law is undoubtedly in accordance with the great weight of authority. * * * Of course, a chattel mortgage not recorded of property not delivered is void as against all creditors who have no notice of the mortgage, but they have no right to, or interest in, any specific property until they have obtained this right or interest by some legal process. They have no more right to the property than the mortgagee has whose mortgage is void. They all have an equal right to the property,—that is, they all have a right to procure a lien upon it or an interest in it, by virtue of legal process, or chattel

mortgage, or purchase; and the one who first acts will obtain the prior right in and to the property. If one of the creditors already has a chattel mortgage upon the property, he may file his mortgage or procure possession of the property; and if he has done this with the consent of the mortgagor, he has certainly obtained the prior right to the property. The mortgagor has a continuing right to mortgage his property to secure his debts so long as he acts in good faith and does not mortgage property already mortgaged to others. He has a right to prefer one creditor over another; and he may prefer any one of his creditors over any of the others. And if the mortgagee, whose mortgage is not recorded, and who does not have possession of the property, records his mortgage with the consent of the mortgagor, or takes possession of the property with the consent of the mortgagor, his mortgage then has the force and effect of a mortgage executed on the day on which it is filed for record, or on which the property is delivered. It is the same then as though a new mortgage had been executed by the parties and recorded. The old mortgage is then given life and force and effect by the joint action of both the parties, and hence must be held to be valid from that time on, against all persons."

McVay v. English, 30 Kan., 368, was a controversy between a mortgagor of chattels and an attachment creditor. The mortgagor retained possession of the mortgaged property, and the mortgage was filed without the consent of the mortgagor eighteen days after its execution. Two days later defendant levied an attachment on the property, and plaintiff instituted replevin. The court sustained the mortgage and held that the right of the mortgagee to the possession of the mortgaged property was paramount to that of the attaching creditor. (See cases cited in the opinion of *Cameron v. Marvin*, *supra*, also *Corbin v. Kincaid*, 33 Kan., 649; *Dolan v. Van Dermark*, 35 Kan., 304; *Isenberg v. Fansler*, 36 Kan., 402; *Stuart v. Smith*, 14 N. W. Rep. [Ia.], 310; *Barton v. Sitlington*, 30

S. W. Rep. [Mo.], 514; *Trimble v. Keer*, 56 Mo. App., 683; *Blumenthal v. Lynch*, 11 N. Y. Supp., 382; *Applewhite v. Harrell Mill Co.*, 49 Ark., 279; *Garner v. Wright*, 52 Ark., 385; *Petring v. Heer Dry Goods Co.*, 3 S. W. Rep. [Mo.], 405.)

The statute of Ohio of 1846 declared: "That every mortgage or conveyance intended to operate as mortgage of goods and chattels, hereafter made, which shall not be accompanied by 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 mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be forthwith deposited as directed in the succeeding section of this act." (Laws of Ohio, ch. 339, sec. 1.) The foregoing was under consideration in *Wilson v. Leslie*, 20 O., 161, and the court said: "A fair construction of this statute will not make the instrument inoperative as between the parties (mortgagor and mortgagee), although it be not forthwith deposited with the recorder. It will not be permitted to stand in the way of an execution issued at the instance of a judgment creditor until after it shall have been deposited in the proper office. And in certain cases, undoubtedly, an execution may hold the chattels mortgaged, even after the instrument has been placed on file in the office; as where the delay has been so great as to taint the transaction with fraud. But the mere fact that the mortgagee omitted, for several days or weeks, to deposit his mortgage with the clerk of the township or recorder of the county, as the case might require, would by no means render his security void. It would not be void against that class of creditors who were equally remiss with the mortgagee, and took no steps to fasten upon the property for the payment of their debts. Until placed in the proper office, a mortgage of the chattels, in our state, would be void as against other creditors of the mortgagor and subsequent purchasers and mortgagees, whose rights

then attach. But when filed with the clerk or recorded, the instrument becomes valid and effective against all men except those whose rights have thus previously attached."

The rule deducible from the foregoing authorities is that where the mortgagee of personal property has delayed filing his mortgage and taking possession of the property, but the instrument is in fact filed, or the mortgagee obtains and holds actual possession of the property under the mortgage before the right or lien of any third party attaches, the lien of the mortgage is good against a creditor of the mortgagor who subsequently seized the property upon attachment or execution.

There is another line of decisions which hold that the unnecessary delay in filing a chattel mortgage and obtaining possession of the property by the mortgagee renders such mortgage void, not only as to creditors of the mortgagor who became such after the giving of the mortgage, but also to those whose debts were contracted before that time, notwithstanding they did not reduce their claims to judgments and seize the mortgaged chattels under executions or attachments until after the mortgage was placed upon record and possession of the property was obtained by the mortgagee. (See *Karst v. Gane*, 32 N. E. Rep. [N. Y.], 1073, and cases there cited.) This interpretation is reached by giving the word "creditors" in the statute its widest significance. That such was not the intention of the legislature is manifest. To give the word "creditors" in the statute its broad, comprehensive meaning, would make the statute available to creditors of the mortgagor who become such after the filing of the mortgage where there had been a delay in filing, which result was never contemplated by the legislature. Evidently the word was used in some qualified or restricted sense. For an able discussion of that question reference is made to the opinion of Corliss, C. J., in *Union Nat. Bank of Oshkosh v. Oium*, 54 N. W. Rep. [N. Dak.], 1034.

A third construction, adopted by many of the courts,

is that a chattel mortgage is void as to creditors of the mortgagor who become such after the execution of the mortgage and before its filing or the taking of possession of the property by the mortgagee and to such pre-existing creditors who have done anything on the basis of the non-existence of the mortgage, as extending the time of payment. (*Root v. Harl*, 62 Mich., 420; *Cutler v. Steele*, 85 Mich., 627; *Union Nat. Bank of Oshkosh v. Oium*, 54 N. W. Rep. [N. Dak.], 1034, and cases there cited; *First Nat. Bank of Canton v. North*, 51 N. W. Rep. [S. Dak.], 99; *Black Hills Mercantile Co. v. Gardiner*, 58 N. W. Rep. [S. Dak.], 557.) The construction last above stated is supported by numerous well reasoned cases and we might feel inclined to place the same interpretation upon our statute were we at liberty to do so. But we are not. The statute under consideration was borrowed from Ohio, and prior to its adoption by our legislature it had been judicially construed in such state. (*Wilson v. Leslie*, 20 O., 161.) The presumption arises that our legislature intended to adopt the statute with that settled construction. (*Coffield v. State*, 44 Neb., 417.) It therefore follows that the lien acquired by the bank under and by virtue of its mortgage, is superior to the rights of the plaintiffs and the intervenors.

The conclusion reached is not in conflict with *Farmers & Merchants Bank of York v. Anthony*, 39 Neb., 343, and *Spaulding v. Johnson*, 48 Neb., 830. In each of those cases an execution had been levied upon the mortgaged chattels before the filing of the mortgage, while in the case at bar the bank had not only filed its mortgage, but had obtained actual possession of the property before the rights of other creditors attached to the property.

Since the above was written the writer has ascertained that this court, in *Fitzgerald v. Andrews*, 15 Neb., 52, has construed section 14 of chapter 32, Compiled Statutes, and held as an original proposition that the neglect to file a bill of sale in the nature of a chattel mortgage, although making it void as to creditors of the vendor, is

available alone to such creditors as by lawful seizure acquire a lien on the property while in his possession. In that case Dennis O'Leary gave a bill of sale of certain household goods to John Fitzgerald on August 27, 1881, to secure the payment of $50. The instrument was not filed for record, and O'Leary continued to hold possession of the property until the 7th day of October following, when plaintiff took possession of the goods. A few hours afterwards one Andrews caused them to be seized under an execution issued on a judgment which he obtained against O' Leary, and Fitzgerald brought replevin to recover possession of the property. The district court held that the lien of the execution was superior to the right of the plaintiff under his bill of sale, which judgment, on a review of the case by this court, was reversed. LAKE, C. J., speaking for the court, says: "The defendant's judgment, however, was not of itself a lien on the property, nor could it become such except by the levy of an execution issued upon it. But before the defendant's execution was levied, and a lien thus obtained, the plaintiff had perfected his own by taking possession of the property, and thereby obviated the necessity of giving the statutory notice to O'Leary's creditors, by filing his bill of sale, of what his interest in the property was. With the property in the plaintiff's possession, or in that of his agent, his right to it as a security, which before was in peril of seizure by creditors, was made secure; for actual possession of personal property is notice to the world of the possessor's right to it. The controversy between the parties respecting this property is, therefore, really one of priority of lien, in which the evidence shows beyond all doubt that the plaintiff has the advantage of a few hours. The filing of a chattel mortgage is required only where possession of the property is retained by the mortgagor; and, to enable a creditor to take advantage of the neglect to file, he must, by a lawful seizure, acquire a lien on the property while it is in possession of the mortgagor." (See *Kay v. Noll*, 20 Neb., 380; *Sherwin v. Gaghagen*, 39 Neb., 250.)

The decree is affirmed as to the intervenors and reversed as to the plaintiffs. A decree will be entered in this court in favor of the bank.

DECREE ACCORDINGLY.

JOSEPH A. DERSE V. ABE STRAUS ET AL.

FILED NOVEMBER 18, 1896. No. 6825.

A bill of exceptions will not be considered unless authenticated by the certificate of the clerk of the trial court.

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

John H. Ames and *E. F. Pettis*, for plaintiff in error.

Coffin & Stone, contra.

NORVAL, J.

This was an action instituted in the district court of Saline county, aided by attachment, to recover $277 for goods sold and delivered. The defendant filed a motion to dissolve the attachment, which was overruled, and judgment was rendered in favor of the plaintiff. This is a proceeding to review the decision of the court below in sustaining the attachment.

The petition in error alleges three grounds for a reversal, only one of which is argued in the brief, viz.: The order of the court is not sustained by sufficient evidence. This assignment cannot be considered by us, since the bill of exceptions is not authenticated by the clerk of the district court. The order is

AFFIRMED.

JESSE G. HODGES, APPELLANT, V. BOARD OF SUPERVISORS OF SEWARD COUNTY ET AL., APPELLEES.

FILED NOVEMBER 18, 1896. No. 6776.

1. **Eminent Domain:** MUNICIPAL CORPORATIONS. In this state, private property cannot be taken or damaged for public use without compensation therefor, and this rule applies to municipalities and counties exercising the right of eminent domain.

2. ———: HIGHWAYS: INJUNCTION. An action will lie at the suit of a land owner to enjoin the opening of a public road across his premises, where the damages resulting from the appropriation have not been ascertained, and no provision has been made for the payment thereof.

3. ———: ———: ———: PARTIES. A county board is not a proper party defendant in an action to enjoin the opening of a highway.

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

J. D. Pope and *F. I. Foss*, for appellant.

J. J. Thomas and *R. P. Anderson*, *contra*.

NORVAL, J.

Jesse G. Hodges instituted this action in the court below against the board of supervisors of Seward county and William Morford, the overseer of road district No. 30 of said county, to enjoin the defendants from opening a highway over and across plaintiff's lands. A temporary injunction was allowed by the county judge. A motion to dissolve the same was made and overruled, and a general demurrer to the petition on behalf of the county board was likewise overruled. Subsequently, answers were filed by the defendants, to which the plaintiff filed replies. Upon the trial the court found the issues in favor of the defendants, and a decree was entered dismissing the action. Plaintiff appeals.

Several grounds are relied upon for a reversal,—among

others, that the proceedings for the location of the road are defective and void; that the highway was established through plaintiff's orchard and fish pond, without his consent; that the damages sustained by the land owner caused by the opening of the highway in question have never been appraised nor paid, and that the county board is not a proper party defendant. The last two objections alone will be considered, as the others, in view of the record, are without merit.

The record shows that after the filing of the report of the commissioner appointed to view the proposed road and to examine into its expediency, the county clerk caused a notice to be published for five weeks in a newspaper published and of general circulation in Seward county, to the effect that said commissioner had reported in favor of the establishment of the road over the lands described, and that all objections thereto or claims for damages must be filed in the office of the county clerk on or before noon of the 24th day of September, 1892. No actual notice appears to have been served upon the plaintiff or the occupant of his land. No claim for damages was filed by plaintiff until a day or two subsequent to the time specified in the above notice, yet, after such claim was so filed, the county board made an order locating the road without appraising the damages sustained by plaintiff or making any provision for the payment of the same. He has received no compensation or remuneration whatever for the appropriation of his property. The question presented is whether, in view of the facts above set out, the road in question can be opened. Section 21, article 1, of the constitution declares that "the property of no person shall be taken or damaged for public use without just compensation therefor." It requires that where private property is taken or damaged for public use, just compensation must be ascertained and paid before the appropriation. That this rule applies to counties and municipalities exercising the right of eminent domain has been frequently asserted by this court, and is too

well settled to require discussion. (*Schaller v. City of Omaha*, 23 Neb., 325; *Harmon v. City of Omaha*, 17 Neb., 548; *Hammond v. City of Harvard*, 31 Neb., 635; *Wagner v. Gage County*, 3 Neb., 237; *Zimmerman v. Kearney County*, 33 Neb., 620; *Pawnee County v. Storm*, 34 Neb., 735; *Welton v. Dickson*, 38 Neb., 767; *Livingston v. Commissioners of Johnson County*, 42 Neb., 277.)

But it is argued that plaintiff is not entitled to damages, since he filed no claim therefor with the county clerk until after the date specified in the published notice mentioned above. The precise question was determined adversely to this contention, after this case was decided in the court below, in *Livingston v. Commissioners of Johnson County, supra.* RYAN, C., in delivering the opinion in that case, says: "It is argued by the appellee that the failure of the appellant to file his claim for damages within the time fixed by the notice for that purpose barred him of any right to insist upon compensation for the taking of his property as a condition precedent to opening the road in question. Probably our statute on this subject is open to this construction, and yet it seems to us that to sustain the contention of the appellee would be to ignore entirely the provisions of section 21, article 1, of our constitution, which is in the following language: 'The property of no person shall be taken or damaged for public use without just compensation therefor.' It has uniformly been held, when railroad corporations have attempted to exercise the right of eminent domain, that the provision of the section of the constitution just quoted requires that they must institute proceedings, ascertain the probable damages, and make payment of them, as a condition precedent to entering upon the property to be appropriated. The inference that the same rule should be applied to counties is justified by the opinion in the case of *Zimmerman v. Kearney County*, 33 Neb., 620." After quoting from the opinion and syllabus of that case, the opinion continues: "To give section 21 of article 1 of the constitution full effect, it is necessary that a corporation which pro-

poses to appropriate private property to public use shall take such steps as may be necessary to determine the amount of damages resulting from such appropriation, and provide payment therefor. This duty should be in no way dependent upon whether or not a claim for damages has been filed by the person whose property is to be taken. If the amount of damages assessed for the taking of the property is deemed by the property owner inadequate, he may make a showing of that inadequacy before the county commissioners, who are authorized by section 26, chapter 78, Compiled Statutes, to increase the amount allowed by the appraisers, and thereafter may exercise his right of appeal; but in the first instance he is not required to take affirmative action as a condition upon which depends his right to compensation for taking his property for public use."

It is argued that the foregoing conflicts with the rule stated in *Pawnee County v. Storm*, 37 Neb., 735. We do not think so. In that case it was merely decided that where the land owner has no actual notice of the proceedings to locate a highway, the only notice being by publication in a newspaper, he may recover compensation for the taking of his land within a reasonable time after he receives actual notice of the appropriation. In that case the road had been opened, while here it was not. It was the duty of the county board of Seward county to have ascertained the damages sustained by plaintiff by reason of the location and opening of the highway over his land, and to have made provision for the payment of the same, even though plaintiff did not file a claim for compensation as required by statute. The damages not having been ascertained, the plaintiff's land cannot be appropriated, and the defendant road overseer had no right to open the road. To hold otherwise would be to sanction the taking of private property for public use without compensation, in violation of the constitution. That injunction is the appropriate remedy, see *Zimmerman v. Kearney County*, 33 Neb., 620; *Welton v. Dickson*, 38 Neb., 767.

It is insisted that the motion to dissolve the temporary injunction should have been sustained. This ruling cannot be reviewed, inasmuch as the error, if any, in overruling the motion was cured by the vacation of the injunctional order upon the rendering of the final decree.

The action cannot be maintained as against the county board. It was not a proper party to the controversy, as it threatened to commit no act. After the county board had located and established the highway in question, it had no further act or duty to perform in the premises, other than making provision for the payment of damages. The authority to open and work this road did not devolve upon it, but upon the road overseer of the proper district. (Compiled Statutes, ch. 78, sec. 31; *Everett v. Board of Supervisors*, 61 N. W. Rep. [Ia.], 1062.) Similar actions have been successfully prosecuted in this state against county boards, as the reported decisions of this court will disclose, but in none of the cases was the question here raised passed upon, but it was assumed that the county board was a proper party defendant in an action to determine the validity of the establishment of a highway. The decree is affirmed as to the defendant, the board of supervisors, and reversed as to the defendant Morford, with directions to the district court to enter a decree enjoining him from opening the road until plaintiff's damages have been ascertained and provision made for the payment thereof.

JUDGMENT ACCORDINGLY.

BARRITT S. KING & COMPANY ET AL. V. M. T. MURPHY ET AL.

FILED NOVEMBER 18, 1896. No. 6823.

1. **Review:** INCOMPETENT EVIDENCE. The admission of incompetent testimony is not sufficient ground for reversal in a case tried to the court without a jury.

2. **Builders' Bonds:** LIABILITY OF SURETIES. The bond of a building contractor to pay for all labor performed and materials furnished under a contract with a county renders the sureties liable to a subcontractor for materials furnished.

3. ———: ———. A surety on a contractor's bond is not relieved from liability for the payment of claims for material-men because the contractor was paid at an earlier date than fixed by the contract.

4. **Review:** CONFLICTING EVIDENCE. A judgment rendered upon conflicting evidence will not be disturbed by the supreme court.

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

Hugh J. Dobbs, for plaintiffs in error.

Byron G. Burbank, *L. M. Pemberton*, and *F. M. Davis*, *contra*.

NORVAL, J.

M. T. Murphy, on the 29th day of March, 1890, entered into a written contract with Gage county for the construction of a court house, according to the plans and specifications furnished by Gum & Curtis, architects. By the terms of the contract Murphy was to furnish all the materials and perform all the labor for the erection of the building. For the faithful performance of the contract he gave a bond to the county in the sum of $20,000, signed by himself as principal; and the names of Gottlieb Storz, Henry P. Drexel, and Albert Foll were attached thereto as sureties. The bond, among other things, contained a stipulation that Murphy should pay for all labor and materials furnished in the construction of the court house. The contractor, Murphy, having failed to pay Barritt S. King & Co., and Bishop C. Beed for certain materials purchased from them and used in the erection of said building, they brought an action against the principal and sureties upon said bond. The defendants Murphy, Storz, and Foll did not answer. Drexel for answer denied all the allegations contained in the petition and alleged he did not sign, execute, or deliver said bond, and that his

name attached thereto was a forgery. Ellis, who was also one of the sureties upon the bond, set up in his answer an alteration or change in said contract between Murphy and the county, whereby he claims to be released as surety on the bond. Plaintiffs replied by a general denial. Upon the issues joined, a trial was had to the court, which resulted in a judgment in favor of the plaintiffs for the amount claimed in the petition against the non-answering defendants, and the cause of action was dismissed as to Drexel and Ellis. For the purpose of reversing the judgment of dismissal plaintiffs prosecute error to this court.

By the terms of the contract payments were to be made by the county to the contractor upon monthly estimates furnished by the architects, less fifteen per cent of the amount of such estimates, which was to be retained and not to become due and payable until the expiration of sixty days from the completion and acceptance of the building by the county and the architects, and then to be due and payable only in the event that there should be no lien and incumbrances upon the property for labor performed or materials furnished by or through the contractor. The defendant Ellis upon the trial introduced in evidence, over the objection of the plaintiffs, the record of the county board of Gage county for the purpose of showing the waiver by the county of the right to retain the reserve fifteen per cent of the contract price. At the close of the testimony plaintiff asked that said testimony be stricken out, which motion was overruled by the court. These rulings are complained of here. Even though the testimony mentioned above was improperly received, its admission was not reversible error, since the cause was tried to the court without a jury. (*Viergutz v. Aultman*, 46 Neb., 141; *Pollock v. Whipple*, 45 Neb., 844, and cases there cited.) It follows that the refusal to eliminate the objectionable testimony from the record was, likewise, not reversible error. It is the settled law of this state that the sureties on a contractor's bond, like the one under

consideration, are liable to a subcontractor for materials furnished to the principal. (*Sample v. Hale*, 34 Neb., 220; *Habig v. Lane*, 38 Neb., 743; *Lyman v. City of Lincoln*, 38 Neb., 794; *Doll v. Crume*, 41 Neb., 655; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb., 649; *Kaufmann v. Cooper*, 46 Neb., 644; *Hickman v. Lane*, 47 Neb., 177; *Fitzgerald v. McClay*, 47 Neb., 816.)

It remains to be determined whether the affirmative defenses interposed by Ellis and Drexel were sufficient to defeat the action as to either of them. The defense of Ellis, as already adverted to, consisted in the county waiving the provision in the contract relative to the retention of the fifteen per cent until sixty days after the completion of the work, and paying the same over before the expiration of that time. The precise point has been adjudicated by this court, and determined adversely to the validity of such defense. (*Doll v. Crume*, 41 Neb., 655; *Kaufmann v. Cooper*, 46 Neb., 644.) The first case was an action upon a contractor's bond given to the city of South Omaha, conditioned similarly to the one in the case at bar. The city extended the time for the completion of the improvement and paid the contractor ninety per cent of the estimated cost of the work at the time, when under the contract he was entitled to but forty-five per cent. It was held that the sureties were not released. This case was followed in *Kaufmann v. Cooper*, *supra*. The principle underlying these decisions is sound and will be adhered to. It follows that the court erred in releasing Ellis, and the judgment in his favor must be reversed.

The defense of Drexel that his name was forged to the bond in question finds support in the evidence. He testified positively that he did not sign the bond, that it was never presented to him for execution, and that as soon as he ascertained that his name was attached to the instrument, he caused the county board of Gage county to be notified that it was a forgery. Drexel's genuine signatures, written in the presence of the trial court, were placed in evidence. Besides Edward C. Smith, S. B.

Henry, and B. G. Burbank each testified on the trial that he was familiar with the handwriting of the defendant, Drexel, had frequently seen him write his name and that the signature of "Henry Drexel" upon the bond was not the genuine signature of the defendant. Opposed to the foregoing is the testimony of M. T. Murphy and Albert Foll, which was not of a convincing character. The clear preponderance of the evidence is to the effect that the defendant Drexel did not sign the bond. The judgment as to him is affirmed, and the judgment in favor of Ellis is reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

KANSAS CITY TERRA-COTTA LUMBER COMPANY V. M. T. MURPHY ET AL.

FILED NOVEMBER 18, 1896. No. 6822.

Principal and Surety: FORGERY. Where the name of one of two sureties in a bond has been forged, the other co-surety is not released, though he signed in the belief that the forged signature was genuine, if the forgery was unknown to the obligee when the instrument was delivered and accepted.

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

Hugh J. Dobbs, for plaintiff in error.

Byron G. Burbank, *L. M. Pemberton*, and *F. M. Davis*, *contra*.

NORVAL, J.

This was an action on the same bond declared on in *King v. Murphy*, 49 Neb., 670. Plaintiff had judgment in the lower court for the amount of its claim against all the defendants except Ellis and Drexel, as to whom the action was dismissed. The issues and facts in the two

cases are alike, with the exception that in this case Ellis, in his answer, sets up that he signed the bond upon the condition that his co-defendant Drexel should also sign the same before delivery; that at the time he executed said bond he was informed by Murphy, the principal thereon, that Drexel's name appended thereto was genuine; that, relying thereon, he was induced to sign the same; and that since the commencement of this action he has discovered, and alleges the fact to be, that the defendant Drexel never signed said bond, nor authorized any one else to do so for him. The fact that Ellis was induced to sign the bond under the belief that the signature of Drexel attached to the instrument as a co-surety was genuine, when in fact it was forged, is insufficient to constitute a defense, especially as it is not alleged that the obligee was aware of the forgery at the time the bond was accepted. (*Lombard v. Mayberry*, 24 Neb., 674, and authorities there cited.) The court erred in releasing Ellis, and the judgment in favor of Drexel is affirmed and that in favor of Ellis is reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

THORN & HUNKINS LIME & CEMENT COMPANY V. M. T. MURPHY ET AL.

FILED NOVEMBER 18, 1896. No. 6824.

Builders' Bonds: LIABILITY OF SURETIES. The case of *King v. Murphy*, 49 Neb., 670, followed.

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

Hugh J. Dobbs, for plaintiff in error.

Byron G. Burbank, *L. M. Pemberton*, and *F. M. Davis*, *contra*.

NORVAL, J.

This is a companion case to *King v. Murphy*, 49 Neb., 670. The facts are alike and the questions involved are the same, and the same judgment will be entered herein as in that case.

JUDGMENT ACCORDINGLY.

MILTON ROGERS ET AL. V. CENTRAL LOAN & TRUST COMPANY ET AL., APPELLANTS, AND WILLIAM R. HOMAN ET AL., APPELLEES.

FILED NOVEMBER 18, 1896. No. 6954.

1. **Mechanics' Liens:** MORTGAGES: PRIORITIES. Where a party agreed, in consideration of real property being placed in the hands of his agent, that the rents and profits therefrom arising were to be collected and paid out as stipulated to certain holders of liens on such property, among whom was the aforesaid party to said agreement, such agreement will be enforced according to its terms, though thereby the otherwise existing rights of said party are modified or impaired.

2. ——: ——: ——. The mere fact that a loan company, as a condition upon which it would make a loan for the erection of buildings on real property offered as security, required that the contemplated improvements should be conformably to plans submitted with the application for such loan, did not, for the amount paid by it out of the loan on a mortgage paramount to the liens of all parties concerned, subject the company to a direct liability to the holders of mechanics' liens created by reason of such improvements.

3. **Review.** On appeal to this court, relief can only be obtained by such parties as are appellants.

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

Wharton & Baird, for appellants.

Kennedy & Learned, Warren Switzler, Isaac Adams, W. H. De France, J. Q. Burgner, Parke Godwin, B. F. Thomas,

Will H. Thompson, Elmer E. Thomas, George W. Shields, Curtis & Shields, Lysle I. Abbott, George E. Turkington, Jr., Tiffany & Vinsonhaler, George E. Pritchett, H. L. Day, and *Montgomery, Charlton & Hall,* for appellees.

RYAN, C.

There was in the district court of Douglas county a decree in this case, whereby numerous holders of mechanics' liens were adjudged first in priority as against the Central Loan & Trust Company and Clarence A. Starr with respect to certain real property in Omaha. In argument it was suggested that one of these preferred lien-holders was not entitled to relief, because there had been no compliance with the statute for the establishment of a lien by the original claimant before he assigned to the Nebraska Coal & Lime Company, the present claimant. This argument is urged by one who has not appealed, and, therefore, must be disregarded.

Americus Overton, one of the above preferred lienors, was allowed only $319. The amount for which his claim was filed was a balance of $895.77. We have not been able to find any testimony or proofs that would justify the allowance of but $319, and in this search we have not been assisted by any suggestions of counsel for either of the other parties. The real property was owned by W. R. Homan. The contract for the erection of six buildings was made by Mr. Homan with the firm of R. Stevens & Son. One of the members of this firm, W. J. Stevens, testified that several bids were made on the lumber and that Mr. Overton's was the lowest; that a fair price for the bill of lumber furnished by Mr. Overton was $1,100 or $1,200, and that the firm of R. Stevens & Co. received the said lumber at the buildings on the lots whereon they were erected. There had been paid $213.73, which amount, deducted from $1,100, left $886.27, for which, according to this testimony, Mr. Overton was entitled to a lien, instead of $319. We are aware that Mr. Nelson, a carpenter, estimated the amount of lumber which would

be required for the erection of the six buildings like those erected by R. Stevens & Son, and that his estimate was 55,622 feet; but there was no attempt to show the value of the lumber upon which he figured; and this essential being omitted, we cannot say that the testimony of Mr. Nelson was at variance with that of Mr. Stevens. This is not a matter wherein the evidence is merely conflicting, but it is one wherein the proof is sufficient and is practically uncontradicted. There should be established a lien in favor of Mr. Overton for the sum of $886.27, with interest as provided by law. With this correction the mechanics' liens, in view of the fact that the right to neither of them is questioned by any appellant, must be for the several amounts fixed by the district court. The remaining questions arise between the lienors on the one side and the Central Loan & Trust Company and Clarence A. Starr on the other, and these we shall now consider.

Clarence A. Starr was the agent of the Central Loan & Trust Company in making a loan of $16,000 to Mr. Homan, secured by three mortgages on the naked land upon which, afterward, the six houses in question in this case were erected. As Mr. Starr acted for the loan company, his status and that of the company are the same with reference to the propositions hereinafter discussed. There exists no reason, therefore, for separately naming each of these parties in every instance, and only where necessary shall we refer to Mr. Starr by name. In the answer and cross-petition of the Central Loan & Trust Company there were descriptions of the mortgages on the property above described and of the three notes, of which each of two was for $5,000 and the third was for $5,600. In addition to the above three there was a note for $400, making the aggregate amount of $16,000 secured by the mortgages of William R. Homan and Agatha Homan, his wife, to the loan and trust company. Following the averments of the making of the above notes, and the execution and recording of the mortgages

securing the same, there was this language: "This defendant further represents that at the time said Homan applied for the loan, and at the time of the execution of the said notes and mortgages, the said premises were subject to a mortgage for the principal sum of $8,200, bearing date February 6, 1891, and recorded in book 161, at page 129, of mortgages in the register of deeds' office of Douglas county, Nebraska, executed by the said William R. and Agatha H. Homan to one Eugene C. Bates; that for the purpose of protecting and securing this defendant in case the said Homan should fail to complete said buildings in accordance with the said agreement, and it should become necessary for this defendant to advance any additional sums of money for the completion thereof, this defendant paid the said Bates the amount of principal and interest due on said mortgage, and caused the same to be assigned to the defendant Clarence A. Starr and held by said Starr in trust for the protection of this defendant as aforesaid in case said Homan should make default or fail in the completion of the said buildings in accordance with the said agreement." In the answer and cross-petition of Clarence A. Starr he alleged that the Bates mortgage was paid by the loan and trust company out of the proceeds of the amount borrowed of it by Mr. Homan. This qualification of the language of the answer and cross-petition of the loan and trust company was received and acted upon as an established fact throughout, so that it may be assumed, for the purposes of this case, that with a part of the proceeds of the loan of $16,000 the Bates mortgage was paid off by the loan and trust company.

Immediately following the language above quoted from the answer and cross-petition of the loan and trust company there were these averments by the said company: "This defendant further represents that in consideration of this defendant's advancing to the said Homan a part of the proceeds of the said loan prior to the completion of the said buildings, the said William R. and

Agatha H. Homan executed and delivered to this defendant their contract bearing date of July 28, 1891, whereby said William R. and Agatha H. Homan agreed, among other things, to leave in the hands of this defendant at all times a sum of money sufficient to complete said buildings, and that no liens should be allowed to be filed against said premises, and that the mortgages aforesaid should be additional security in any amount that this defendant might be required to pay in addition to the proceeds of said loan in case of the failure of said Homan to comply with said agreement." Following the above quotations there were in the answer and cross-petition of the loan and trust company averments that Homan failed to complete the buildings in accordance with his agreement, and that the contractors, material furnishers, and mechanics, about August 1, 1891, refused to proceed with the erection of the buildings on account of the failure of the said Homan to furnish the means wherewith they might be paid; that thereupon, in consideration of previous advances made and those which afterward would be required, William R. Homan and his wife conveyed the premises whereon were the unfinished buildings to Clarence A. Starr, and, contemporaneously with making said conveyance, the said William R. Homan assigned to said Starr all rents, issues, and profits of said premises, it being understood and agreed that Starr should enter into possession and complete the buildings in accordance with the agreement between Homan and the Central Loan & Trust Company. It was further averred by said company that on or about August 1, 1891, Starr entered into possession of the premises and purchased the necessary materials and employed the necessary mechanics, who completed the erection of the buildings upon which work had been suspended at the cost of $9,752.06; that at the time Starr took charge of said buildings there was unexpended of the $16,000 borrowed the sum of $3,979.50; and that after deducting the last named sum of $3,979.50 from the $9,752.06 expended by

Starr in completing the buildings there was still due the company for which Starr was acting a balance of $5,772.56. This company, in its answer and cross-petition, alleged that it had received from Starr of the rents of the completed buildings the sum of $3,006.03, which, deducted from the above sum of $5,772.56, left still due the company the sum of $2,766.53, for the security of which sum the company alleged that it held the Bates mortgage. It was further alleged by this company that it had assigned the two notes of $5,000 each and the note for $5,600 to individuals named who were not made parties to this action, and that under its contract of assignment the said company had guarantied the payment of principal and interest on said three notes. It was averred by the company in this connection that it had been compelled to pay various sums of interest on its said guaranty, and, to preserve the mortgage security, had been compelled to pay various described sums of taxes, and that it held one note of $400 and another of $960, secured by mortgages on the aforesaid real property, each of which sums was due it, and, under the terms of the mortgages, they were subject to foreclosure. There was a prayer in this answer and cross-petition for an accounting of the amount of principal, interest moneys advanced and interest thereon, and expenses due the aforesaid company; that in default of payment the mortgaged premises might be sold, and the proceeds of such sale be applied in payment of the amount found due said company; and "that the defendant Clarence A. Starr be ordered and decreed by the court to retain possession of said premises and collect the rents and profits thereof, and apply the same upon indebtedness which may be found due this defendant, during the pendency of this suit and until the sale of said premises and confirmation thereof," etc. From this condition of the answer and cross-petition of the Central Loan & Trust Company it is evident that if Mr. Starr has remained in possession of the premises referred to, he has done so as

trustee under the terms of the written agreement between Mr. Homan and himself, acting for the Central Loan & Trust Company, and that, therefore, in any event, this cause must be remanded for the accounting thereby necessitated, and for which the company has prayed. This agreement is on many accounts an important factor in this investigation, and to it we shall now turn our attention. Having recited the facts leading up to and requiring the execution of it, it closed with the following provisions: "Now, therefore, this agreement is to evidence the fact that the said deed and assignment of even date herewith are not intended as absolute conveyances, but for the purposes of security only, to-wit, first, to secure the completion of the uncompleted buildings being erected on a portion of said premises, and the payment of all claims and liens for material and labor entering into the construction of said buildings which might be enforced against said premises; the sum of money now remaining in the hands of the Central Loan & Trust Company on said mortgage loan to be first applied in the completion of said buildings and the payment of said claims; second, to secure the payment of all taxes or assessments due or to become due against said premises, except assessments not delinquent prior to the fulfillment of the purposes of the said conveyance; to make all necessary repairs on the buildings on said premises, and to pay all interest which may mature upon the mortgages held by said Central Loan & Trust Company, as well as the principal of said mortgages, should the same become due and payable prior to the fulfillment of the purposes of said conveyance and this agreement; also, to pay all necessary insurance premiums for the purposes of keeping the improvements on said premises and property insured; third, to protect the Central Loan & Trust Company against all liens and incumbrances which are or might be prior in point of time or right to the mortgages of said company." It may be true that the Central Loan & Trust Company originally held the first claim against the real property

mortgaged, under the rule laid down in *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb., 207; but that question we are not now considering. By virtue of the provisions above quoted the money in the hands of the Central Loan & Trust Company at the date of this agreement, and such rents as should afterward be collected, were to be applied in payment of all claims and liens for material and labor entering into the construction of said buildings which might be enforced against said buildings, and it is therefore proper to decree that the liens thus provided for shall take precedence of the right of the Central Loan & Trust Company to withhold the balance of the loan still remaining in its possession, and that the laborers and material-men are entitled to exhaust the fund derived from rents before the said company shall be permitted out of them to reimburse itself in respect to interest, taxes, or assessments paid by it. This subordination of its own right to those of others was by virtue of the terms of the agreement referred to, and, of course, is circumscribed thereby.

There is another branch of this case, which for the most part is thus described by one of the findings of the district court: "The court further finds that William R. Homan, one of the defendants herein, applied to one C. A. Starr, a co-defendant and general manager of the defendant, the Central Loan & Trust Company, for a loan on the premises described in the first finding hereof, for the purpose of erecting buildings on said property, and that said William R. Homan submitted to said C. A. Starr and the Central Loan & Trust Company plans for said buildings, and that said loan was made for the purpose of enabling said defendant Homan to erect buildings in accordance with the plans submitted to the Central Loan & Trust Company on said premises, and that said loan to Homan was a building loan, and that one of the conditions of said loan required Homan to erect buildings in accordance with the plans submitted to the Central Loan & Trust Company, the said plans being for the

buildings which were erected upon said premises, and the fact that said loan was a building loan was known to defendants Archer Eke and R. Stevens & Son and their co-defendant subcontractors, and that said Eke and Stevens & Son entered into their contracts with said Homan, relying upon said sums of money so loaned to said Homan by said Central Loan & Trust Company for the erection of said buildings, and that said Stevens & Son waived all rights to file a lien on said premises against said Homan and said Central Loan & Trust Company, upon the faith and credit of said sums of money so loaned to said Homan being applied in the payment for labor and material going into said buildings, and that the said Archer Eke waived his right to a lien against the defendant, the Central Loan & Trust Company, upon the faith and in consideration of said money so loaned being applied and paid upon the labor and material used in the construction and erection of the buildings on the said premises in controversy. And the court finds that the said loan and trust company knew that the defendants Eke and Stevens & Son and their co-defendants, the subcontractors, depended upon said sums of money so loaned to said William R. Homan being used for the payment of the labor and material used in the erection of and construction of said buildings, and that they, the said Eke and R. Stevens & Son, released their respective rights to mechanics' liens as above in consideration thereof. The court further finds that at the time of the negotiation of the said loan from said Central Loan & Trust Company by William R. Homan there were no buildings upon said premises in dispute, and that said loan was procured by said Homan for the sole purpose of erecting the buildings that were thereafter erected thereon, and in the construction of which the said mechanics' lienors and the said Archer Eke and Stevens & Son, and each of them, furnished said labor and material, and the Central Loan & Trust Company was cognizant that this was the sole purpose for which

said loan was made, and that said Central Loan & Trust Company diverted from the said purpose and failed to apply in payment of the said labor and material so used in construction and erection of the buildings on said premises the sum of $8,415, and that the same was applied for other purposes. The court further finds that the mechanics' lienors herein, and each and all of them, and the said defendants Archer Eke and R. Stevens & Son, were entitled to have said sum of $8,415 applied to the payment of labor and material furnished for said buildings, and that said Central Loan & Trust Company is liable to the mechanics' lienors herein, and each and all of them, and to the defendants Eke and H. L. Day, assignee of R. Stevens & Son, for said sum of $8,415 so diverted." In conformity with the above finding, H. L. Day was properly denied relief, because of the waiver of the right of lien above noted. There was a judgment rendered in favor of each of the holders of a valid mechanic's or material-man's lien, for the amount of his claim, against C. A. Starr and the Central Loan & Trust Company, in so far as he was entitled thereto, upon the apportionment of the above $8,415. This latter aggregate sum was what was paid on the Bates mortgage of $8,200, which originally was paramount to the claims of all parties to this action. The appellees strenuously urge that this judgment was justified by the rule announced in *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719. There are some facts stated in the above finding which possibly might properly be stated in a petition for equitable relief in a proper case, but in this there were no such facts pleaded by either of the appellees. Their pleadings were framed only with a view to the foreclosure of a mechanic's lien. It admits of very grave doubt whether, under such a condition of the pleadings, in any event there could properly have been granted the relief which was administered by the rendition of a personal judgment against C. A. Starr and the Central Loan & Trust Company, respectively. In *Bohn Mfg. Co. v. Kountze*, *supra*, this court went

no further than to hold that a vendor of real property, who, in the contract of sale, required the vendee to construct buildings of a certain description on the property sold, and himself retained control of the funds necessary for the erection contemplated and required that his assent should accompany orders for payments, so far constituted himself a promoter of the proposed improvements that his lien should be declared inferior to the claims of mechanics and material-men who contributed to the erection proposed. The case at bar was decided before attention had been called to the distinguishing features above noted, as they have been in *Pickens v. Plattsmouth Investment Co.*, 37 Neb., 272, *Holmes v. Hutchins*, 38 Neb., 601, *Sheehy v. Fulton*, 38 Neb., 691, *Hoagland v. Lowe*, 39 Neb., 412, *Patrick Land Co. v. Leavenworth*, 42 Neb., 715, and *Cummings v. Emslie*, 49 Neb., 485. In view of these repeated expressions of the views of this court, it is unnecessary to enter into details for the purpose of showing that the case of *Bohn Mfg. Co. v. Kountze* does not sustain the proposition that Starr and the loan and trust company were liable to each of the lienors, as was held in this case, and the several personal judgments against C. A. Starr and the Central Loan & Trust Company are therefore reversed.

It is proper, and perhaps necessary, to say that while we have considered the rights of various parties with reference to the application of the balance retained by the Central Loan & Trust Company, and the disposition to be made of the rents which have been or may be collected by Starr, it has not been deemed necessary to discuss the rights of the Central Loan & Trust Company to a foreclosure against the real property improved for the amount of its payment of taxes and interest as it accrued. By the arrangement whereby Starr was put in possession this company did not qualify its right to a lien on the said real property, and as the order in which priorities should be decreed in a case of this kind was clearly stated in *Henry & Coatsworth Co. v. Fisherdick*,

supra, there exists no necessity that by a restatement the same ground should be covered. To the extent hereinbefore indicated, the judgment of the district court is reversed, and this cause is remanded for further proceedings in accordance with the views already expressed.

REVERSED AND REMANDED.

ALMA JACKSON ET AL., APPELLANTS, V. SOUTH OMAHA LIVE STOCK EXCHANGE ET AL., APPELLEES.

FILED NOVEMBER 18, 1896. No. 6922.

1. Associations: MEMBERS: FINES: INJUNCTION: REVIEW. In an action to enjoin the collection of a fine assessed against members of a voluntary association for the violation of its rules, disputed questions of fact cannot, as by a reviewing court, be examined, there being no proper proof of the nature of such evidence.

2. ———: BY-LAWS: PUNISHMENT. The articles of incorporation of a voluntary association provided that its affairs should be managed by its board of directors and by its by-laws, and such board was clothed with power to inquire into and punish infractions of its by-laws. *Held*, That the regulations were as binding on the members of the association in the form of by-laws as though embodied in and constituting part of its articles of incorporation.

3. ———: ———: ———: FINDINGS: QUALIFICATION OF DIRECTOR: REVIEW. The mere fact that a director had a special interest in the infliction of punishment upon a member of a voluntary association for the violation of its regulations did not, in the absence of objection on the ground of disqualification of such director to act as a trier of the accused, so far invalidate the findings and order of the board of directors, acting within the scope of its powers, that such findings and order, in a collateral proceeding in the district court, ought to be treated as of no force or validity.

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

The opinion contains a statement of the case.

John T. Cathers, for appellants:

The exchange has no authority to fine, suspend, or expel a member. Its charter confers no such authority. The charter of a corporation is the measure of its powers, and the enumeration of those powers implies the exclusion of all others. Such powers cannot, therefore, be extended by by-laws. A by-law is void where it is contrary to the common law, to a legislative enactment, or to the state or federal constitution. (*State v. Atchison & N. R. Co.*, 24 Neb., 144; *People v. Chicago Gas Trust Co.*, 130 Ill., 268; *Hood v. New York & N. H. R. Co.*, 22 Conn., 502; *Franklin Co. v. Lewiston Savings Bank*, 68 Me., 43; *Commonwealth v. St. Patrick Benevolent Society*, 2 Bin. [Pa.], 441; *Evans v. Philadelphia Club*, 50 Pa. St., 107; *Fuller v. Trustees of Academic School in Plainfield*, 6 Conn., 532; *Gray v. Medical Society of Erie County*, 24 Barb. [N. Y.], 570; *Butchers Beneficial Association*, 35 Pa. St., 151; *Butchers Beneficial Association No. 1*, 38 Pa. St., 298; *Commonwealth v. Worcester*, 3 Pick. [Mass.], 462; *In re Long Island R. Co.*, 19 Wend. [N. Y.], 37; *People v. Throop*, 12 Wend. [N. Y.], 184; *Hibernia Fire Engine Co. v. Harrison*, 93 Pa. St., 264; *Thomas v. West Jersey R. Co.*, 101 U. S., 71; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S., 290; *Taylor v. Porter*, 4 Hill [N. Y.], 140; *City of St. Louis v. Weber*, 44 Mo., 547; *City of Ottawa v. Carey*, 108 U. S., 110; *Farmers & Traders Bank v. Harrison*, 57 Mo., 503; *Matthews v. Skinker*, 62 Mo., 329; *Browing v. Board of Commissioners of Owen County*, 44 Ind., 11; *Bank of Chillicothe v. Swayne*, 8 O., 258; *Miller v. Ewer*, 27 Me., 509; *Kennebec & P. R. Co. v. Kendall*, 31 Me., 471; *Westcott v. Minnesota Mining Co.*, 23 Mich., 145; *Sayre v. Louisville Union Benevolent Ass'n*, 1 Duval [Ky.], 143; *Dunham v. Trustees of Village of Rochester*, 5 Cow. [N. Y.], 462; *Brewster v. Hartley*, 37 Cal., 15; *Andrews v. Union Mutual Fire Ins. Co.*, 37 Me., 256; *Murdock v. Trustees of Phillips Academy*, 12 Pick. [Mass.], 244; *Mobile & O. R. Co. v. Franks*, 41 Miss., 494; *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St., 339; *Wolf v. Goddard*, 9

Watts [Pa.], 550; *McIntyre v. Ingraham*, 35 Miss., 26; *Diligent Fire Co. v. Commonwealth*, 75 Pa. St., 291; *Fertilizing Co. v. Village of Hyde Park*, 97 U. S., 660; *Downing v. Mount Washington Road Co.*, 40 N. H., 230; *People v. Fire Department of the City of Detroit*, 31 Mich., 458; *State v. Chamber of Commerce of the City of Milwaukee*, 20 Wis., 63; *Williams v. Lowe*, 4 Neb., 382; *Phillips v. Allen*, 41 Pa. St., 481; *Barter v. Commonwealth*, 3 Pen. & W. [Pa.], 253; *Benson v. Mayor of the City of New York*, 10 Barb. [N. Y.], 224; *State v. Doherty*, 60 Me., 509; *Wally v. Kennedy*, 10 Tenn., 554; *Atchison & N. R. Co. v. Baty*, 6 Neb., 37; *Moore v. Bank of Commerce*, 52 Mo., 377.)

Charles Offutt and *Charles S. Lobingier*, *contra:*

The South Omaha Live Stock Exchange is a voluntary association not subject to the rules of the ordinary trading corporation. (*People v. Chicago Board of Trade*, 80 Ill., 134; *Anacosta Tribe v. Murbach*, 13 Md., 91, 71 Am. Dec., 625; *Black & White Smiths' Society v. Vandyke*, 2 Wharf. [Pa.], 309, 30 Am. Dec., 263; *White v. Brownell*, 2 Daly [N. Y.], 329.)

The power to make and enforce rule 9 is inherent in such an association, and need not be conferred by its charter (*Rex v. Richardson*, 1 Burr. [Eng.], 539; *Lord Bruce's Case*, 2 Strange [Eng.], 819; *Rex v. Liverpool*, 2 Burr. [Eng., 1759], 723; *Otto v. Journeyman Tailor's Protective & Benevolent Union*, 75 Cal., 308; *Leech v. Harris*, 2 Brewst. [Pa.], 571; *White v. Brownell*, 2 Daly [N. Y.], 329); but in this case such power is conferred both by the general incorporation law (Compiled Statutes, ch. 16, sec. 124), and by the articles of the incorporation. (*Pitcher v. Board of Trade*, 13 N. E. Rep. [Ill.], 188; *Commonwealth v. Union League*, 19 Atl. Rep. [Pa.], 1030.)

The rules were violated in this case by the acts of appellants' agent, and such rules are enforceable. (*Martin v. State*, 30 Neb., 507; *State v. Denoon*, 5 S. E. Rep. [W. Va.], 315; 1 Wharton, Criminal Law, sec. 247; *People v. Blake*, 52 Mich., 566; *People v. Roby*, 18 N. W. Rep. [Mich.],

365; *Riley v. State*, 43 Miss., 397; *Commonwealth v. Kelley*, 140 Mass., 441; *Dudley v. Sautbine*, 49 Ia., 650; *Faircloth v. State*, 73 Ga., 426; *Commonwealth v. Emmons*, 98 Mass., 6; *Halsted v. State*, 41 N. J. Law, 552; *State v. Hartfiel*, 24 Wis., 60; *Jamison v. Burton*, 43 Ia., 282; *Stern v. State*, 53 Ga., 229; *Houston v. Gran*, 38 Neb., 687; *Brown v. Foot*, 35 Cent. L. J. [Eng.], 181.)

Courts will only inquire in cases like this whether the proceedings were regular, and they were so in this case. (*Pitcher v. Board of Trade*, 13 N. E. Rep. [Ill.], 188; *Appeal of Sperry*, 9 Atl. Rep. [Pa.], 478; *Commonwealth v. Pike Benevolent Society*, 8 W. & S. [Pa.], 249; *Commonwealth v. Union League*, 19 Atl. Rep. [Pa.], 1035; *Commonwealth v. German Society*, 15 Pa. St., 251; *Black & White Smiths' Society v. Vandyke*, 2 Whart. [Pa.], 308; *Vaughn v. Herndon*, 17 S. W. Rep. [Tenn.], 793; *Lewis v. Wilson*, 121 N. Y., 284, 24 N. E. Rep., 474; *Bigelow v. Benedict*, 70 N. Y., 204; *White v. Brownell*, 2 Daly [N. Y.], 329; *Lambert v. Addison*, 46 Law T. [Eng.] n. s., 20; *Dawkins v. Antrobus*, 17 Ch. Div. [Eng.], 615; *Gregg v. Massachusetts Medical Society*, 15 Am. Rep. [Mass.], 24; *Austin v. Searing*, 69 Am. Dec., 677; *Hiss v. Bartlett*, 63 Am. Dec. [Mass.], 776.)

Even had appellants not been served with a copy of the charges, their appearance would have constituted a waiver of that omission. (*Sperry's Appeal*, 8 Cent. Rep. [Pa.], 219, 9 Atl. Rep., 478; *Burton v. St. George's Society*, 28 Mich., 261; *Commonwealth v. Pennsylvania Beneficial Society*, 2 S. & R. [Pa.], 140; *Loubat v. Leroy*, 65 How. Pr. [N. Y.], 138, 15 Abb., New Cases [N. Y.], 1.)

Mahoney, Minahan & Smyth, also for appellees.

RYAN, C.

Plaintiffs, who constitute the firm of Jackson, Higgins & Co., brought this action in the district court of Douglas county against the South Omaha Live Stock Exchange, a corporation, which, with its officers, were made defendants, to enjoin the collection of a fine of $250 assessed

against said Jackson, Higgins & Co. for the violation of certain rules of said corporation, of which corporation the individuals composing the firm of Jackson, Higgins & Co. were members. There was a decree denying the injunction prayed, and plaintiffs in this action have appealed.

The grounds on which relief was sought in the district court were irregularities in the action of the board of directors of the South Omaha Live Stock Exchange in the progress of the hearing pursuant to which the plaintiffs were fined, as well as improper proceedings before the trial, and an entire lack of authority in said board to fine and in default of payment thereof to suspend plaintiffs' rights as members of said corporation. In the petition was first alleged the existence of the corporation above referred to. Defendants were then described as officers of said corporation, and plaintiffs' relation to it was then stated. It was averred that on May 19, 1892, plaintiffs received a notice signed by A. L. Lott (who was secretary of the association), by which plaintiffs were required to appear at the rooms of the above described exchange on May 23, 1892, to show cause why they should not be dealt with for a violation of rule 9 of said corporation. Accompanying this notice there was given the plaintiffs a written statement in this language:

"SOUTH OMAHA, NEB., May 19, 1892.

"*Jackson, Higgins & Co., South Omaha, Neb.*—GENTLEMEN: You are hereby charged with violating rule 9 of this exchange, in this, that on or about the 12th day of April, 1892, you did, through one J. J. Raymaker, your authorized agent, pay one George F. Burke, of Bradshaw, Nebraska, the sum of $3.20 (three and twenty-hundredths dollars) as consideration and for the purpose of inducing said Burke to bill a car of cattle to the firm of Jackson, Higgins & Co. J. A. HAKE,

"*Pres. and Chairman of Board of Directors.*"

It was alleged in the petition that on May 23, 1892, the board of directors of the exchange met, and after repeated

adjournments ordered that the appellants herein pay a fine of $250 and be suspended until such fine should be paid. There was in the petition a statement of the facts, which, as plaintiffs claim, the evidence introduced on these hearings established. Even if the district court, by an injunction proceeding, could act as a court reviewing the findings of fact of the board of directors complained of, it could only do so upon evidence embodied in a bill of exceptions, duly settled. The evidence before the board, as described in the district court by the several witnesses, was contradictory in its nature, and this would constitute another and sufficient ground for the court's refusal to set aside or disregard such findings. Thus considered, this case presents but few important features, and these shall now be considered in detail.

It was alleged in the petition that no notice of the proposed hearing had been served before the hearing, as required by the rules of the exchange. As has been already shown, there was a notice, accompanied by a written statement signed by the president and chairman of the exchange, by which, in general terms, the firm of Jackson, Higgins & Co. was notified of the time and place of the proposed hearing, as well as of the general nature of the charges preferred. At the time so designated there was filed by Jackson, Higgins & Co. a paper which put in issue all the matters as to which evidence was afterwards introduced. It is true there was on the hearing an objection to the sufficiency of the notice, because it failed to disclose who had instigated the proceedings which had assumed form in the complaint to which Jackson, Higgins & Co. were required to answer. It was shown on the hearing before the board of directors that the complaint was signed by the members of a standing committee charged with the duty of investigating the rumors of infractions of the rules of the exchange, and with formulating complaints when such rumors seemed justified by the existing facts. Appellants insist, however, that W. E. Wood, a member of the committee,

should not have served, because of his personal interest in the matter under consideration. To render intelligible this claim it is necessary to state that on April 12, 1892, G. F. Burke was shipping a car of stock from Bradshaw, Nebraska, to the live stock commission firm of Wood Bros., of South Omaha, and that by the payment of $3.20 by the soliciting agent of Jackson, Higgins & Co., Burke was induced to change the shipment so that it was made to Jackson, Higgins & Co. Walter E. Wood was a member of the firm of Wood Bros., and for that reason was personally interested in the infliction of punishment upon Jackson, Higgins & Co. In preferring charges against the offending firm there was, it is true, a personal interest involved, and yet even in criminal prosecutions it has never been held that the party aggrieved was disqualified to make such complaint as forms the basis of a preliminary examination as to alleged felonies or such as present for trial alleged misdemeanors. It is not so clear, however, that there was no impropriety in Walter E. Wood sitting as one of the triers of the alleged offense. Section 8 of rule 4 adopted by the exchange provides: "When any member of the association shall violate any of the rules, regulations, or by-laws of the association he shall be censured, suspended, or expelled by the board of directors, as they may determine from the nature and gravity of the offense committed." Walter E. Wood was a member of the board of directors above indicated. The offense was against the rules of the association. There was an incidental loss sustained by Wood Bros. by reason of the misconduct of Jackson, Higgins & Co., and to the extent of avenging this injury to themselves the members of the firm of Wood Bros. were interested in the punishment of Jackson, Higgins & Co. There was, however, no objection to Mr. Wood interposed by Jackson, Higgins & Co. It is provided by the rules of the exchange that three members of the board of directors, together with the president and vice president, shall constitute a quorum for the transaction of business, and if objection to

director Wood had been made the board could have proceeded without his participation in the hearing. It is possible even if seasonable objection had been made as to Mr. Wood, and nevertheless he had acted, that this irregularity could not be inquired into in a collateral proceeding; most certainly in the absence of objection it cannot.

The appellants insist that neither under the articles of incorporation of the exchange nor under the laws of this state was there any power to fine them, and, until payment of such firm, suspend their relations with the association. The third paragraph of the articles of incorporation of the South Omaha Live Stock Exchange is in this language: "The general nature of the business to be transacted by this company is to create and maintain an organization among dealers in live stock; to provide rules for conducting such business with order, safety, and security, and to enforce such rules and regulations by proper provisions; to generally protect and foster the interests of the dealers in live stock, and to promote and advance the same." No question is made by appellants that certain rules had been adopted for the government of the exchange, and that among its rules was one prohibiting the payment of money for the purpose of influencing shippers to patronize one live stock commission firm rather than another. It is urged, however, that the power of enforcing such a rule by the suspension or expulsion of an offender should not be based upon a mere rule, but if exercised, it should be by virtue of the articles of incorporation. The argument in favor of this contention is that while the association is purely voluntary, yet the right of membership has a pecuniary value, and that if this harsh provision was made public by the recorded articles of incorporation disclosing this regulation it would deter persons from becoming members of the association. If this consideration was urged by one who had been deceived, to his injury, by the non-appearance of this provision in the articles of incorporation, it might

possibly be entitled to some weight in a proper proceeding. But there is no claim that appellants, in a trial under this regulation as a part of the articles of incorporation, would have been exonerated. If we are to act on the result reached by the board of directors, Jackson, Higgins & Co. violated this rule while voluntarily an integral part of the association, protected by the very regulations of which this was one. By the membership of the individual partners constituting the firm of Jackson, Higgins & Co. that firm was as much contractually bound as though the substance of the rules had been incorporated in the recorded articles of incorporation, for the rights and liabilities of the members of the exchange are dependent upon contract. The fact that these rights and liabilities were not described in the articles of incorporation might possibly concern the public dealing with the association, but no cause has been suggested, and none occurs to us, illustrative of a possible danger from holding the members bound in a proceeding of this kind by its rules, whether adopted as parts of its articles of incorporation, or as by-laws or rules voluntarily assented to by all parties concerned in this litigation. This view of the relations of members of voluntary associations is not entirely without the sanction of precedent in this state, as will be seen by a reference to the cases of *Pounder v. Ashe*, 44 Neb., 672, and *Powers v. Budy*, 45 Neb., 208. The judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

JOSEPH H. TAYLOR V. JOSEPH AINSWORTH, EXECUTOR.

FILED NOVEMBER 18, 1896. No. 6901.

1. **Equity:** JURISDICTION. As a general rule, a court of equity will not interpose an objection to its own jurisdiction on the ground that the plaintiff has an adequate remedy at law, but will retain the cause and award the relief to which the parties would have been entitled in a court of law. Following *Sherwin v. Gaghagen*, 39 Neb., 238.

2. **Witnesses:** TRANSACTIONS WITH DECEASED PERSON: EVIDENCE. It was alleged by plaintiff, an executor of a person deceased, that the defendant had received from the deceased, during her lifetime, the sum of $1,000, which he undertook to loan for her at advantageous rates, and which he falsely and fraudulently pretended to her he had so loaned, and that he had refused to pay the same, or any part thereof. On trial of the issues as properly involving the performance of a trust, certain letters of the defendant were introduced in evidence by plaintiff, which defendant was required to identify as a witness, and as a witness he was required by plaintiff to state simply that he had received from the deceased $1,000. *Held*, That the transaction between the deceased and the witness was an entirety, and that the proofs above made authorized the defendant to testify as to how little, if anything, remained unpaid to the estate of the testatrix.

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

C. A. Baldwin, for plaintiff in error.

G. W. Shields and *Curtis & Shields*, *contra*.

RYAN, C.

The defendant in error, in his petition in the district court of Douglas county, alleged that he had qualified as executor of the estate of Mary E. Johnson, who had died in Monroe county, Michigan, and that the plaintiff in error was in possession of $1,000 of the property of the testatrix. As grounds for equitable relief it was alleged by the executor in his petition that Joseph H. Taylor had possessed the implicit confidence of Mary E. Johnson;

that by a promise to loan the above sum at a rate of interest of eight or nine per cent per annum on good security, as her agent, the said Taylor prevailed upon her, the said Mary E. Johnson, to permit the said money to remain in his hands for the purpose indicated. Following the above averments it was charged in the petition that by various letters of Taylor, each containing a remittance of eighty dollars, to the deceased, he had admitted that such remittances represented the annual interest on the above sum of $1,000 at eight per cent for one year; that no part of said one thousand dollars ($1,000) had ever been paid to the deceased; that no part of said money had been loaned by Taylor, but that he had fraudulently concealed from said Mary E. Johnson this fact; wherefore the said Taylor had held said money as her agent in trust for her and that he still holds the same in trust for said estate. These averments were supplemented with a prayer for disclosure by Taylor as to what had been done with said money; that an account might be taken of the amount still in his hands as agent and trustee of the deceased; that the executor might have judgment for the said sum of $1,000 and any further sum which the defendant might thereon have realized, and for general equitable relief. It is very doubtful whether there is stated in the petition any sufficient grounds to justify an appeal for relief to a court of equity. In the answer, however, there were averments showing that Mrs. Johnson, who had no home, was taken into the family of Taylor at her request in the spring of 1871, and provided for until the summer of 1872, when she went to California, where she remained one year, and then came back and made her home in Taylor's family for the period of one year; that in the fall of 1874, Mrs. Johnson went to Monroe, Michigan, and returned to Omaha and remained in Taylor's family for about two months, after the lapse of which time she again went to California with means furnished by Taylor, and returned to the family of Mr. Taylor in April, 1882, and there remained until the fall of 1883, when she left the family of Mr. Taylor by

whom she has never since been seen. In respect to the arrangement under which the money was held by Mr. Taylor, he, in his answer, made the following averments: "That at the time defendant so took the money in 1872, he gave her his note therefor, due from him one year from date, as evidence that he had the money. She kept that note until 1885, upon which defendant had paid interest and a part of the principal, and in the year last named she gave up to defendant the note fully canceled, since which time there has existed between them no written evidence of any liability on the part of the defendant to said Mrs. Johnson. Defendant says that the fact is that from the long residence of Mrs. Johnson in the family of the defendant and her apparent frail and helpless condition she had come to be regarded by defendant and his family as one thereof and dependent upon them to a great extent for her maintenance, and defendant had treated her as such; that she was anxious to retain as long as she lived the idea that she had $1,000 intact so that she, in her helplessness, might have some apparent source of maintenance and an income by way of interest thereon while she lived, and it was again and again talked over between her and this defendant and his family, and it was promised and agreed between them, that while she lived the defendant was to pay her an amount each year equal to the interest on a thousand dollars at the usual rate of interest. And it was further agreed by them then and there that if by reason of sickness or other cause she needed more money than would accrue by way of such interest, defendant promised, at her request, to provide it for her. It was further agreed between said Mary E. Johnson and this defendant, and in consideration of the promise of this defendant she agreed and promised defendant that after her decease, that if any portion of the thousand dollars remained, this defendant should have what did so remain for the years of care, board, maintenance, and home he had so as aforesaid provided and furnished for her." Defendant alleged that he, at all

times, when she wanted money and asked him for it, gave it to her; that he could not now state what the payments amounted to, but that they exceeded the sum of two thousand dollars ($2,000); that the amounts of these payments are not material because of the aforesaid agreement that whatever remained at the death of Mrs. Johnson should be the property of the defendant. From the above quotation and statements of a portion of the answer, it is quite apparent that there was between the deceased and the defendant a relation of trust, and it is by the answer made much more apparent than by the petition alone, why there was a propriety in the adjustment by a court of equity of the disputed matters between the litigants. We shall therefore treat the case as it was treated by the district court, as being of equitable cognizance. (*Sherwin v. Gaghagen*, 39 Neb., 238.) There was a reply which put in issue all the averments of new matter contained in the answer. Upon a trial of the issues presented there was a judgment in favor of the executor for the sum of $1,000, with interest. To reverse this judgment, proceedings in error have been prosecuted to this court.

By the motion for a new trial and petition there is presented but one question which we can consider, and that involves the correctness of the ruling of the district court with reference to certain evidence. On the trial there was offered no proof that Mrs. Johnson had at all been dissatisfied with the performance of his agreement by Taylor so long as she lived. The first requirement, that Mr. Taylor should pay the entire sum, was made by Mrs. Johnson's executor, and was founded upon certain letters written by Mr. Taylor to the testatrix. In the petition such parts of these letters as were deemed material were copied, and therefore we assume that we shall justly state the proofs upon which reliance is placed by copying this portion of said pleadings, which was as follows:

"That on the 10th day of November, 1885, defendant wrote to the deceased as follows:

"'I might have loaned your money out at eight per cent, with good security. I might have got nine per cent by waiting, but thought I had better let it out at the first chance I got to loan the even $1,000, for I might not have a second chance for some time. It is in two notes of $500 each, due in one and two years, but if you want the last five hundred before it is due it can be sold at about the face any time. It draws interest since about the 1st of November. I will keep the notes here and see about collecting and sending you the interest as it becomes due.

"'Yours truly, J. H. TAYLOR.'

"That on November 8, 1886, the defendant paid to deceased the sum of $80, and in writing said to her:

"'Enclosed is a draft of eighty dollars, the interest on one thousand dollars for one year at eight per cent—will keep the five hundred dollars just placed at interest at the best rate that I can get.'

"December 3, 1888, defendant paid to the deceased the sum of eighty dollars, being interest for one year on said one thousand dollars. On December 24, 1889, defendant paid to the deceased the sum of eighty dollars, enclosing the same in a letter in which he said:

"'Enclosed is a draft for eighty dollars interest which I have just received, and which should have been paid November 1, but I did not get it until now. I will try to get your money in this next spring or next summer and send it all to you, so that you can have it under your own control. J. H. TAYLOR.'

"On the 16th of February, 1891, the defendant paid the deceased the sum of eighty dollars, enclosing the same in a letter to her in which he said:

"'Enclosed is a draft for $80, which you ought to have had before, but for the last few months it has been almost impossible to collect anything, and entirely out of the question to borrow any money out of the banks.'

"On the 29th day of October, 1891, the defendant paid to the deceased the sum of $80, enclosing the same in a letter to her in which he said:

"'Enclosed is a draft for eighty dollars, and a receipt, which you will please sign and return to me. As regards sending your money to you, I could not do so if I wished, nor do I think it advisable to do so.'"

On the trial Mr. Taylor was called by the plaintiff as a witness and simply required to state that he had received from the deceased $1,000. On cross-examination he testified, subject to objection as to incompetency as a witness in relation to a transaction with a person now deceased, whose personal representative is an adverse party, that he still retained in his hands only the sum of $365. There was no evidence in contradiction of this as to payment, so that we are bound to assume that the district court disregarded the proof of payment, and held the defendant bound by his letters and his testimony. If the explanatory testimony was competent, the amount of the recovery was certainly too great, and to this extent we may properly consider the ruling of the trial court.

The assignments in the petition in error are too broad to admit of a specific examination of any ruling with respect to the several questions asked, for the language is that there "was error in refusing to permit the defendant to testify below and make answer to the several questions propounded to him while on the witness stand," etc.

In section 329 of the Code of Civil Procedure there is this language: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, * * * unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by * * * such witness, but shall not be permitted to further testify in regard to such transaction or conversation." In this case the defendant was required by the plaintiff to testify that the letters

introduced in evidence had been written by him, and that he had received from the deceased the sum of $1,000. Both the letters and the admission of the receipt of the money were evidences of a transaction between the deceased and the defendant in error, Mr. Taylor. It is true the testimony as to how much was still owing was elicited on cross-examination, but no objection was made on that ground. The record shows that the only objection made was because "the witness is incompetent, he having a direct legal interest in the result of the controversy." This objection was overruled, and the witness answered that he still held in his hands $365. In our view the transaction contemplated by the statute was the entire transaction, and among its elements were the amount with which Mr. Taylor was entrusted, the terms on which he received it, and what sum was still unaccounted for. The fact that he was the witness called by the executor did not the less make him a witness who, in the language of the statute, had testified in regard to such transaction. The construction which regards each letter as a transaction, and the receipt of the money as a transaction, each independently of the other, and of every other fact, is one which would enable the representative of a deceased person to use as an offensive weapon the shield which the law has provided against the possible perjury of one party when death has sealed the lips of the other party to a transaction. The court should have considered the testimony of Mr. Taylor as to the amount still unpaid, and had this been done the judgment must have been for a less sum than that rendered. The judgment of the district court is therefore reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

JOHN H. STEVENSON V. OLOF BRODAHL.

FILED NOVEMBER 18, 1896. No. 6899.

Forcible Entry and Detainer: LANDLORD AND TENANT: AGREEMENT TO MORTGAGE CROP. In an action for the possession of real property alleged to be withheld in violation of a lease between the parties the breach alleged was the failure to give a chattel mortgage on demand about the 1st of November, 1891. The first unpaid payment of rent to become due was February 1, 1892. *Held*, That a provision that the lessee must give a chattel mortgage on the crop each year to secure said note, though supplemented in the lease with another stipulation that the non-fulfillment of any of its terms would, at the election of the lessor, end the lease, did not entitle the lessor to prosecute an action of forcible entry and detainer.

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

David Van Etten, for plaintiff in error.

Simpson & Sornborger, *contra*.

RYAN, C.

The transcript in this case begins with the recitation that on December 18, 1891, there was filed in the office of the clerk of the district court of Saunders county a complaint, "among other papers from the justice court." There is in the transcript no means afforded by which we can ascertain the nature of these "other papers from the justice court." In the trial afterwards had there was offered in evidence the transcript from a justice of the peace of Saunders county of the record of an action between the litigants who are parties to this suit, but this last referred to transcript was of an action begun March 16, 1892, and ended April 9, immediately thereafter. It is therefore evident that there is no inference possible that one of these actions is the continuation of the other in the higher court. We can go no further back than December 18, 1891, in this investigation, and shall therefore commence

with this date as our initial point of inquiry. The complaint was filed by Olof Brodahl against John H. Stevenson, to obtain possession of certain real property alleged to be withheld by Stevenson, contrary to the terms of the lease made between the plaintiff and the defendant. This lease was for three years from its commencement, which was March 19, 1890. The rent stipulated yearly was $333.33, payable, respectively, on the 1st days of February, 1891, 1892, and 1893, and for each payment a promissory note was given. There was a provision in this lease that Mr. Stevenson "agrees to give a chattel mortgage on the crops each year to secure the said note due for that year." On a trial to a jury of the issues presented in the defendant's plea of "not guilty" to the complaint it was shown that at the proper time the first note which became due was paid. The breach relied on as furnishing grounds for the prosecution of an action of forcible entry and detainer were, first, that no mortgage had been made on the crop of 1891, though demanded about October 31 of that year, to secure the note due February 1, 1892, and second, the lease provided that upon "the non-fulfillment of any of the conditions herein the said party of the first part may, at his election, either distrain for said rent due or declare the lease at an end and recover possession as if the same was held by forcible detainer." The remedy is summary and is intended merely to terminate a wrongful possession. Its provisions are, therefore, to be strictly construed. There was nothing in the proofs offered which tended to show that by the use of the word "year" the parties understood any other than the ordinary acceptation of the term. The rent due on February 1, 1891, had been paid, when, in the latter part of October or perhaps in the fore part of November of 1891 a chattel mortgage on the growing crop was demanded, and upon refusal of compliance a notice to quit was given Stevenson. The next payment of rent was due February 1, 1892, and we can see in the provisions of the lease no support for the contention that the lessee was required,

at his peril, to give a chattel mortgage at the particular time it was demanded. The district court, however, seems otherwise to have construed the provision as to making a mortgage, and accordingly refused to permit the introduction of evidence to show that on February 1, 1892, the lessee tendered to the lessor the amount which fell due on that day. Moreover, on apparently the same theory the court peremptorily instructed the jury to find for the defendant. In this ruling as to the proffered payment on February 1, 1892, and in giving the peremptory instructions indicated, we think the district court erred. Its judgment is therefore reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

GEORGE R. GREER V. PHIL E. WINTER.

FILED NOVEMBER 18, 1896. No. 6908.

Review: CONFLICTING EVIDENCE. Where the evidence is fairly conflicting, the judgment will not be reversed merely because in this court the preponderance seems probably to have been in favor of the unsuccessful party in the district court.

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

Rickards & Prout, for plaintiff in error.

Covell, Churchill & Winter, contra.

RYAN, C.

This action in the district court of Red Willow county was on a breach of warranty in the sale of a horse. The defendant, by way of counter-claim, alleged that the horse was by him traded as part of the consideration

for a tract of land in relation to which there was a warranty of quality which was untrue. The prayer of the plaintiff was for judgment in the sum of $200; that of the defendant was for judgment in the sum of $270. On a trial of the issues joined as to these claims there was a verdict and judgment in favor of the plaintiff in the sum of $100. The judgment debtor brings the record for review into this court upon his petition in error. This record is in such condition that there is open to our consideration but one question, and that is the sufficiency of the evidence to sustain the verdict. It may be possible, as asserted by the plaintiff in error, that the jury took into consideration facts not proper for them to have in mind, but of this there is no proof. As disclosed by the bill of exceptions, the evidence was merely conflicting, and it might appear to us to preponderate in favor of the plaintiff in error, but this does not justify a reversal of the judgment. This has been so often announced that it now should be received as a firmly settled rule, without the necessity of citing authorities to sustain it. The judgment of the district court is

AFFIRMED.

EDWARD C. HOCKENBERGER V. STATE OF NEBRASKA.

FILED NOVEMBER 18, 1896. No. 8276.

1. **Information:** COMPLAINT: VARIANCE: EMBEZZLEMENT. The plaintiff in error was arrested on a complaint charging him with having embezzled certain money belonging to "the school district of the city of Grand Island, Hall county, Nebraska." The information on which he was tried charged him with having embezzled certain money belonging to "the school district of the city of Grand Island, of the county of Hall, in the state of Nebraska." *Held*, No material variance between the complaint and the information.

2. ———: ———: ———. The complaint on which plaintiff in error was arrested described him as "secretary of the school board." The information on which he was tried described him as "secretary of the

board of education." *Held*, No substantial variance between the complaint and the information.

3. ——: ——: ——: PRELIMINARY EXAMINATION. When it appears that the charge in the complaint is substantially the same as that set forth in the information, a plea of a want of preliminary examination, or a variance between the complaint and the information, is unavailing.

4. **Embezzlement**: COUNTY TREASURER: RECEIPTS: EVIDENCE: INSTRUCTIONS. On the 18th of September, 1891, the plaintiff in error was county treasurer of Hall county, and at the same time secretary of the board of education of the city of Grand Island. He was indicted for having on said date, as secretary of said "board of education," embezzled $1,000 belonging to the school district of Grand Island. The state offered evidence which tended to show that the plaintiff in error, on said date, as secretary of the board of education, received from himself as county treasurer $3,000 of money belonging to said school district. The court instructed the jury that the records of the county treasurer's office, showing that the plaintiff in error, as secretary of the school board, had on said date receipted to himself as county treasurer for $3,000 of money belonging to said school district, were competent evidence for them to consider in determining whether plaintiff in error, as county treasurer, had on said date paid to himself as secretary of the school board said sum of money; but refused to instruct the jury that such receipts were only *prima facie* evidence that plaintiff in error, as secretary of the board, had actually received said sum of money from himself as county treasurer, and that such receipts might be explained and the truth shown. *Held*, That the refusal to instruct as requested was error.

5. ——: ——: ——: ——: ——. The defense of the defendant in error was, and the evidence offered in his behalf tended to establish it, that on said date, while secretary of the board of education, he receipted to himself as county treasurer for $3,000; that as a matter of fact on said date he, as secretary of the school board, only received from himself as county treasurer $2,000, which sum, on said date, he paid over to the city treasurer. The court refused to submit, by an instruction, this defense to the jury. *Held*, Error.

ERROR to the district court for Hall county. Tried below before THOMPSON, J.

R. R. Horth and *W. H. Thompson*, for plaintiff in error.

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

RAGAN, C.

Edward C. Hockenberger, in the district court of Hall county, was convicted of the crime of embezzlement. He brings the judgment pronounced against him upon such conviction here for review.

On the 7th of February, 1894, a complaint was filed with the county judge of Hall county charging Hockenberger with embezzlement. He was arrested, pleaded not guilty, and waived a preliminary examination. This complaint charged that Hockenberger, as "secretary of the school board in and for the school district of the city of Grand Island, Hall county, Nebraska," had embezzled certain of the moneys belonging to said school district. The information on which Hockenberger was tried charged that he, as "secretary of the board of education in and for the school district of the city of Grand Island, in the county of Hall, in the state of Nebraska," had embezzled certain money belonging to said school district. To this information the plaintiff in error filed a plea in abatement, to which the state demurred. The demurrer was sustained and the plea dismissed. This action of the court is assigned as error. The plea in abatement alleged that the plaintiff in error had not been accorded a preliminary examination upon the charge in the information, and averred a variance between the complaint on which the plaintiff in error was arrested and the information filed against him. The alleged variance between the charge in the complaint and that in the information will be made apparent when the two are stated thus:

Complaint: "The school district of the city of Grand Island, Hall county, Nebraska."

Information: "The school district of the city of Grand Island, in the county of Hall, in the state of Nebraska."

We know of no better argument for disposing of this alleged variance than that of the attorney general, which is as follows: "This difference between the com-

plaint and the information does not constitute a variance which the law will recognize, and is a technicality not to be tolerated. At one time, when the dotting of an 'i' or the crossing of a 't' was considered essential, such a proposition might have been considered of importance, but in this enlightened age of jurisprudence the law discards mere subterfuge and looks to the substance of the matter in the determination of the rights of the parties."

Another argument insisted on in this connection is a variance between the complaint and the information, in this: The complaint describes Hockenberger as "secretary of the school board," whereas the information describes Hockenberger as "secretary of the board of education." The law (Compiled Statutes, ch. 79, subdiv. 14) places all schools organized within the limits of cities such as Grand Island under the direction and control of a board of education, and provides that such board shall elect one of their number secretary. The complaint and the information should charge the same offense, and charge it so specifically that the person accused may know for what offense he is to be tried. In the case at bar the offense charged to Hockenberger is the embezzlement of the money of the school district of Grand Island while he was secretary of the school board, or board of education, of said school district. There is no substantial difference in charging that Hockenberger was the secretary of the school board of the city of Grand Island and charging that he was secretary of the board of education of the city of Grand Island. When it appears that the charge in the complaint is substantially the same as that set forth in the information, the plea of a want of preliminary examination or a variance between the complaint and the information is unavailing. (*Cowan v. State*, 22 Neb., 519.) We think there is no substantial variance between the charge in the complaint and the information either as to what school district the money alleged to have been embezzled belonged, or in

Hockenberger's official designation, and the court did not err in sustaining the demurrer to the plea in abatement.

On the 18th day of September, 1891, prior and subsequent thereto, Hockenberger was county treasurer of Hall county, and at the same time secretary of the board of education of the school district of the city of Grand Island in said county.

Another error assigned is that the court erred in refusing to give instructions four and five asked by Hockenberger. These instructions are as follows:

"4. If you find from the evidence beyond a reasonable doubt that on the 18th of September, 1891, that the defendant was the duly elected and acting secretary of the board of education of the school district of the city of Grand Island, and further find that on said date he receipted to the county treasurer of Hall county, Nebraska, for the sum of $3,000; but should further find that in truth and in fact he only received the sum of $2,000 and that he paid the $2,000 over to the treasurer of said city, who was then, by virtue of his office, the treasurer of said school district, then it is your duty to find the defendant not guilty.

"5. The receipts of the county treasurer's records introduced in evidence in this case are only *prima facie* evidence of the receipt of the money, and are not conclusive, and may be qualified and explained by other competent evidence and the truth shown."

The state showed, from the records of the county treasurer's office, that on the 18th of September, 1891, Hockenberger credited himself in his account, as county treasurer of Hall county, with having paid to himself, as secretary of the board of education of the Grand Island school district, on that date, $3,000, and it appeared from Hockenberger's evidence that on that date he only paid to the city treasurer of Hall county $2,000. The theory of the state was that the jury were justified in inferring from Hockenberger's actions that he had on said date,

as treasurer of Hall county, paid over to himself as secretary of the board of education $3,000 of the moneys belonging to the school district; and the court, on its own motion, instructed the jury that if they found that Hockenberger on said date credited his accounts, as county treasurer, with $3,000 that that was evidence of a delivery to himself as secretary of the board of education on that date of that amount of money belonging to the school district. Hockenberger's defense was, and his evidence tended to establish it, that on the 18th of September, 1891, he was short in his accounts as county treasurer, and, to cover up that shortage, he credited himself, as county treasurer, in his accounts with the county with $3,000, when in truth and in fact as secretary of the board of education he only received from himself, as county treasurer, $2,000, which sum on that date he paid to the city treasurer. Instruction No. 4, asked by Hockenberger, was intended to submit his theory of the case to the jury, and we think the court erred in not giving the instruction asked.

We think, also, that the court erred in not giving instruction 5 as asked, because the records of the county treasurer's office introduced in evidence were only *prima facie* evidence that Hockenberger, as secretary of the board of education, had received the sum of $3,000 from the county treasurer. These records were not conclusive evidence that he had actually received $3,000, and Hockenberger was entitled to have the jury so instructed. (*Morse v. Rice*, 36 Neb., 212.) As already stated, the court had told the jury that the county treasurer's records were evidence from which they might infer that Hockenberger, as secretary of the board of education, had received from himself, as county treasurer, the full sum of $3,000. This instruction standing alone left the jury at liberty to conclude that these records in the county treasurer's office—the receipts from Hockenberger as secretary of the board of education to himself as county treasurer for $3,000—were conclusive evidence that as

secretary of the board of education he had received that sum. The fact that Hockenberger at the time of the alleged embezzlement was both county treasurer and secretary of the board of education, has a tendency to confuse. But suppose that Jones had been county treasurer and that on the 18th of September, 1891, he had paid to Hockenberger, as secretary of the board of education, $2,000 and that Hockenberger had receipted for $3,000. Does it follow that on the trial of Hockenberger for embezzling the difference between the $2,000 and the $3,000 that his receipt to Jones would be conclusive evidence that on that date he had received from Jones $3,000? We think not. Suppose this was a civil action by the school district of Grand Island against Hockenberger and the sureties on his official bond as secretary of the board of education to recover this $1,000, would the receipt that Hockenberger gave to Jones, as county treasurer, be conclusive evidence that Hockenberger actually received on that date $3,000 instead of $2,000? We think not. To secure a conviction in this case the state was obliged to prove that on the 18th of September, 1891, Hockenberger, as secretary of the board of education, actually received from the county treasurer of Hall county $3,000. That, in fact, was the only point really litigated in this case. Hockenberger testified that he did receipt to the county treasurer for $3,000, but that as a matter of fact he received only $2,000, which sum he, on that date, had paid over to the city treasurer. That was his defense. He was a competent witness in his own behalf. The jury, of course, were at liberty to weigh his testimony with caution by reason of the interest he had in the result of the suit, and they were so instructed, but he was entitled to have his theory of the case, as disclosed by the evidence, submitted to the jury under proper instructions; and the court should have told the jury that, if they found that Hockenberger as secretary of the board of education on the 18th of September, 1891, received from the county treasurer only $2,000 and paid

that over to the city treasurer he should go acquitted. His conduct as county treasurer may have been criminal, but he was not on trial for embezzling money as county treasurer. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

AMERICAN EXCHANGE NATIONAL BANK, APPELLANT, V. EMELINE H. FOCKLER ET AL., IMPLEADED WITH COLUMBIA NATIONAL BANK, APPELLEE.

FILED NOVEMBER 18, 1896. No. 6861.

1. **Mortgages:** FAILURE TO REGISTER: ACTION BY PURCHASER TO QUIET TITLE: PLEADING. Appellant brought suit to foreclose a real estate mortgage. The appellee answered by cross-petition, that it was the owner of the real estate by virtue of a conveyance from the mortgagor, duly recorded before the recording of the mortgage of the appellant. Appellee further alleged that it took its conveyance without any notice of appellant's mortgage, and prayed that it might be decreed the owner of the real estate, free from the lien of the mortgage of appellant. *Held*, (1) That to enable the court to pronounce the decree prayed for it was incumbent upon the appellee to plead and prove that it was a purchaser of the real estate, not a gratuitous donee thereof; that it purchased the real estate without notice, either actual or constructive, of the mortgage of the appellant; that for the property it parted with or paid a valuable consideration; what that consideration was, and that it paid or parted with such consideration before receiving notice of the mortgage of the appellant; (2) that as the cross-petition of the appellee did not aver that it was a purchaser of the real estate, nor the consideration parted with or paid therefor, nor that it paid or parted with any consideration for the property, it did not state a cause of action.

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

Sawyer, Snell & Frost, for appellant.

Atkinson & Doty, contra.

RAGAN, C.

The American Exchange National Bank (hereinafter called the "Exchange Bank") brought this suit in the district court of Lancaster county to foreclose a mortgage upon certain real estate. Emeline H. Fockler and her husband, the mortgagors, and the Columbia National Bank (hereinafter called the "Columbia Bank") were made defendants to the action. The mortgage of the Exchange Bank was dated October 21, 1891, but not filed for record in the office of the register of deeds until the 1st day of July, 1892. The Columbia Bank interposed, in its answer to the petition of the Exchange Bank, first, a general denial; and as a second defense averred that it was then the owner and in possession of the mortgaged real estate by virtue of a deed of conveyance therefor executed and delivered to it by Fockler and wife; and that the deed had been filed for record in the office of the register of deeds prior to the filing of the Exchange Bank's mortgage, and that it had become the owner of said lots and taken possession thereof without any knowledge of the existence of the Exchange Bank's mortgage. The district court entered a decree quieting and confirming the title of the real estate in the Columbia Bank and dismissing the petition of the Exchange Bank, and it has appealed.

When the case came on for trial counsel for the Exchange Bank objected to the introduction of any evidence on behalf of the Columbia Bank, for the reason that its answer did not state facts sufficient to constitute a defense to the action. This objection was overruled and it is now argued that the decree must be reversed, because the answer of the Columbia Bank does not state facts sufficient to constitute a defense to the action of the Exchange Bank, or facts sufficient to entitle it to the decree prayed for and awarded. Aside from a general denial, the answer of the Columbia Bank was an attempted cross-bill or cross-petition asking affirmative re-

lief, and, so far as the same is material here, was in the following language: "This defendant, further answering, says: That it is the owner and in possession of said lots, * * * and that it became said owner of said lots by virtue of a deed executed and delivered to it by the said * * * Fockler, * * * and which deed was recorded in the office of the register of deeds of said county on the 29th day of June, 1892. And this defendant says that it became the owner of said lots and took possession thereof without any knowledge that the said plaintiff had any interest in or claim of any kind to said lots," etc. The prayer of this cross-petition was that the mortgage of the Exchange Bank might be decreed not a lien upon said real estate and canceled, and that the Columbia Bank might be decreed the owner of such real estate, free from the lien of the Exchange Bank's mortgage. By this cross-petition the Columbia Bank attempted to plead that it was a good-faith purchaser for a valuable consideration of the real estate in question, without notice of the lien of the Exchange Bank. But it is to be observed that the Columbia Bank does not aver in its cross-petition that it ever purchased this property; nor does it aver what consideration it paid therefor; nor does it aver that it paid any consideration for the property, valuable or otherwise.

A pleader who is asking affirmative relief must state the facts, the existence of which he claims entitles him to the relief prayed for. Here the Columbia Bank was asking the court to decree that it was a good-faith purchaser without notice, for a valuable consideration, of the real estate in question, and to enable the court to pronounce this decree it was incumbent upon the Columbia Bank to plead and prove that it was a purchaser of this real estate, not that it was a gratuitous donee thereof; that it purchased it without notice, either actual or constructive, of the lien of the Exchange Bank; that for the property it parted with or paid some valuable consideration; what that consideration was; and that it

had paid or parted with that consideration before it received notice of the lien of the Exchange Bank. See the rule stated and the authorities collated in 16 Am. & Eng. Ency. of Law, 834, 836. See, also, *Makepeace v. Davis*, 27 Ind., 352, where it was held: "In a suit to enforce an equitable title to lands it is not necessary that the complaint should charge the defendant with notice of the plaintiff's equity. If the defendant claims as a purchaser without notice he should set up, by way of answer, the facts which entitle him to protection as such."

In *Long v. Dollarhide*, 24 Cal., 218, it was ruled: "The burden of showing that he is a purchaser in good faith and for a valuable consideration is cast upon the one claiming under a second deed, but recorded first in point of time, and the deed itself is not evidence of these facts, but they must be shown by other testimony." The court said: "It is next contended by counsel for the defendant that inasmuch as defendant's deed was first recorded, he is a subsequent purchaser in good faith and for a valuable consideration, and that as against him the plaintiff's title, although prior in point of time, must fail. * * * Had the defendant, however, shown a deed from Vaca recorded before that of the plaintiffs, he would have failed in making out this defense; for, aside from the recitals contained in his deed, he offered no evidence showing himself a subsequent purchaser in good faith and for a valuable consideration. The burden of proving this rested upon him, and the recitals of the deed are not, as he contends, *prima facie* proof of a valuable consideration. Such recitals are but the declarations of the grantor, and it has never been held that the declarations of a vendor or assignor made after the sale or assignment can be received to defeat the title of the vendee or assignee. A party seeking to bring himself within the statute cannot rely upon the recitals of his deed, but must prove the payment of the purchase money *aliunde*." (*Bowman v. Griffith*, 35 Neb., 361, and cases cited; Compiled Statutes, ch. 73, sec. 45.)

In the case at bar, since it was necessary, to entitle the Columbia Bank to the relief for which it prayed, and which was awarded, to prove what consideration it parted with or paid for the real estate, and that it had parted with or paid such consideration before it received notice of the Exchange Bank's claim, therefore it was essential that these facts should be pleaded. The cross-petition of the Columbia Bank did not state a cause of action. The court erred in admitting any evidence under the same. Its decree is reversed and the cause remanded, with instructions to the district court to permit the Columbia Bank, if it desires, to file an amended cross-petition upon the payment by it of all costs made in this proceeding up to the day of filing such amended cross-complaint.

REVERSED AND REMANDED.

CAROLINE F. ROBERTS V. CORNELIUS N. ROBINSON ET AL., APPELLEES, IMPLEADED WITH WILLIAM DEERING & COMPANY, APPELLANTS.

FILED NOVEMBER 18, 1896. No. 6874.

1. **Homestead:** CONVEYANCE TO WIFE: LIEN OF JUDGMENT. A judgment debtor owned and occupied, with his family, sixty acres of land in Webster county of less value than $2,000. He and his wife conveyed this land to one R. for the purpose of having the latter convey the land to the wife of the judgment debtor. This was done. The judgment against the homestead owner was also against R. In a suit to subject said land to the payment of said judgment, *held*, (1) that the motive which influenced the homestead owner in having the title of this land conveyed to his wife was an immaterial inquiry, as the property was not susceptible of a fraudulent alienation; (2) that R. did not own the real estate, but held the legal title in trust for the wife, and that the latter, by the conveyance from R., did not take the land burdened with the judgment.

2. **Acknowledgment:** MISTAKE IN CERTIFICATE. The deed to R. was actually acknowledged in Nuckolls county, before a notary public thereof, but by mistake he certified that he was a notary public of

Webster county, where the deed was recorded. *Held*, (1) That the rights of the judgment creditor were not affected by this mistake of the notary public; (2) that the deed having been actually signed, acknowledged, and delivered, conveyed the legal title to R.

3. **Lien of Judgment.** Where the legal title to real estate is in the name of the judgment debtor, nevertheless the lien of a judgment against him attaches only to the actual interest which he has in the real estate.

4. **Judicial Sales:** POWER OF COURT TO VACATE. If there has been fraud or unfairness, irregularity, or disregard of the statute in making a judicial sale, the district court is invested with the discretion to set such sale aside.

5. ———: ———. But when such sale has been fairly conducted and made, when all the provisions of the statute have been complied with, when the property has been sold for two-thirds of its appraised value, and the sale has been duly reported to the court and no objections are interposed to its confirmation, the district court has not the discretion to arbitrarily set such sale aside, but should confirm it.

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

Capps & Stevens and *Lewis C. Spooner*, for appellants.

J. S. Gilham, contra.

RAGAN, C.

In a justice court of Webster county William Deering & Co., in February, 1888, recovered a judgment against C. N., J. Q., and A. L. Robinson. A transcript of this judgment was at once filed and docketed in the office of the clerk of the district court of said county. In November, 1888, C. N. Robinson and his wife, Mary, conveyed by warranty deed a tract of land in Webster county to the said A. L. Robinson. In December, 1888, A. L. Robinson conveyed this real estate to the said Mary A. Robinson. Something like a year after this last conveyance C. N. Robinson and wife removed to the state of Missouri, it seems, with the intention of making that their future home; and while there, in September, 1891, sold and conveyed the real estate mentioned above to

one W. B. Guthrie, who took possession of the same. While C. N. Robinson owned the real estate he mortgaged it to one Roberts, and the latter brought this suit in the district court of Webster county to foreclose the mortgage. C. N. Robinson and his wife, Mary, W. B. Guthrie, the owner of the equity of redemption, and William Deering & Co. were made parties defendant. Service was obtained upon Deering & Co. by publication, and they having failed to appear, their default was entered and a decree of foreclosure rendered as prayed. In due time the land was sold by the sheriff and purchased by Deering & Co. and the sale reported to the court. After this was done Deering & Co. made application to the court to set aside the default entered against them, alleging *inter alia* that their said judgment against the Robinsons was a lien upon this land, subject only to the lien of the mortgage foreclosed. The court seems to have vacated the default. Pleadings were filed and the issue made up and tried as to whether the judgment of Deering & Co. was or had ever been a lien upon the real estate. The court found and decreed that the judgment of Deering & Co. was not a lien, and had never been a lien upon the real estate involved in the foreclosure suit. Upon the court's decreeing that Deering & Co. had no lien upon the real estate, they moved the court to confirm the sale of the real estate made to them by the sheriff. This the court overruled and upon its own motion set aside the sale. Deering & Co. have appealed from the decree of the court denying them a lien upon the real estate and from the order setting aside the sale.

1. The evidence shows without contradiction that the tract of land owned by C. N. Robinson in 1888, when the judgment of Deering & Co. was rendered, consisted of about sixty acres, was of less value than $2,000, and was then occupied by himself and wife as a homestead; that in November, 1888, Robinson and his wife conveyed the land to A. L. Robinson for the sole purpose of having the latter convey it to Mary Robinson, the wife of C. N.,

and that in December, 1888, A. L. Robinson did convey the title to C. N.'s wife. Since this real estate was the homestead of C. N. Robinson and his wife, the judgment of Deering & Co. was not a lien upon it. The land, being a homestead, was exempt from sale on execution, and while the judgment of Deering & Co. was an apparent lien, the homestead was not liable to be taken and sold to satisfy it. It is immaterial what the motive of C. N. Robinson was in having the title to this land vested in his wife, as that motive could not affect the conveyance. Being a homestead, it was not susceptible of fraudulent alienation (*Schribar v. Platt*, 19 Neb., 625); and C. N. Robinson and wife might sell and convey or give this homestead to whom they pleased, and no creditor of either one of them could complain of it.

But it is insisted that C. N. Robinson and wife removed to the state of Missouri after the title to the real estate was vested in the wife, with the intention of making their home in that state, and that such removal was an abandonment of the homestead, and that the land at once became liable for the judgment of Deering & Co. The fallacy of this argument is that the real estate was then the property of Mrs. Robinson, and Deering & Co. had no judgment against her and her property was not liable for her husband's debt.

Another argument is that the judgment of Deering & Co. was also against A. L. Robinson, and as the legal title to this land was conveyed to him on the 24th day of November, 1888, that the judgment from that instant became a lien upon it; that it was not A. L. Robinson's homestead, and that Mrs. Robinson, by the subsequent conveyance from A. L. Robinson, took the legal title to the land incumbered with the lien of the Deering judgment. But A. L. Robinson was a trustee for Mrs. Robinson. The legal title to the land was conveyed to him for the express purpose of having him convey it to Mrs. Robinson. A. L. Robinson had, to be sure, the legal title for a few days, but he was not the owner of the land.

During all the time that A. L. Robinson held the legal title, C. N. Robinson and wife were in possession. By section 477 of the Code of Civil Procedure a judgment is made a lien upon the land of the judgment debtor; that is, the land owned by him. True enough, if the record shows the legal title to land to be in the debtor, the judgment is an apparent lien upon that land, but the fact that the record shows the legal title to land to be in a debtor is not conclusive evidence that the debtor actually owns the real estate. The rule is that where the legal title to real estate is in the name of the judgment debtor, nevertheless the lien of the judgment against him attaches only to the actual interest which he has in the real estate. (*Uhl v. May*, 5 Neb., 157; *Metz v. State Bank of Brownville*, 7 Neb., 165; *Galway v. Malchow*, 7 Neb., 285; *Dorsey v. Hall*, 7 Neb., 460; *Mansfield v. Gregory*, 8 Neb., 432; *Berkley v. Lamb*, 8 Neb., 392; *Harral v. Gray*, 10 Neb., 186; *Dewey v. Walton*, 31 Neb., 819; *Mundt v. Hagedorn*, 49 Neb., 409.) The title conveyed to Mrs. Robinson by A. L. Robinson was not, therefore, subject to the judgment of Deering & Co. The deed made by C. N. Robinson and wife to A. L. Robinson was executed and acknowledged in Nuckolls county, Nebraska, before a notary public of that county. The certificate to this acknowledgment was as follows: "State of Nebraska, Webster County, ss. On this 24th day of November, A. D. 1888, before me, Gilbert Mott, a notary public duly commissioned and qualified for and residing in said county, personally appeared," etc. It seems that writing "Webster" county instead of "Nuckolls" in the notary's certificate was a mistake, and it is now argued that the court erred in considering this deed as evidence, because the notary public did not live in Webster county, as he certified. The evidence is uncontradicted that C. N. Robinson and wife actually executed and delivered this deed and actually acknowledged it before Mott in Nuckolls county, and that he was then and there a notary public of said county. This deed, then, conveyed the legal title of these lands to A. L. Rob-

inson. The mistake in the certificate may have been such as not to entitle the deed to record, but the title which A. L. Robinson took to these lands or the validity of the conveyance made in no manner depended upon whether the deed was recorded. It was signed, witnessed, acknowledged, and delivered. This was all the grantors were required to do to vest a legal title to the real estate in their grantee. The object of recording a deed is to perpetuate it as evidence. Since the real estate was a homestead, the conveyance, to be valid, was obliged to be acknowledged by both husband and wife, and it was, and was therefore valid. The appellants' rights were not affected by this mistake of the notary public in the least, as it could not possibly make any difference to them whether the deed was ever recorded. The court did not err in considering the deed as evidence in the case, and its decree denying the appellants a lien upon the land in question is affirmed.

2. The sale made of this land was regular in all respects. It was made in conformity to all the provisions of the statute. The appellants' bid for the property was more than two-thirds of its appraised value, and no one moved to set aside the sale or objected to its confirmation. We are wholly unable to understand for what reason the district court vacated the sale. Of course, if there has been any fraud or unfairness, irregularity, or disregard of the statute in making a sale, doubtless the court is invested with the authority to set it aside; but when a sale has been fairly conducted and made, when all the provisions of the statute have been complied with, when the property has been sold for two-thirds of its appraised value, when the sale has been duly reported to the court and when no objections are interposed to its confirmation, the district court has not the discretion to arbitrarily set the sale aside, but should confirm it. The decree of the court setting aside the sale is reversed. This cause is remanded, with instructions to the district court to confirm the sale made of the real estate in question to the ap-

pellants on the 13th day of May, 1893; to order the sheriff of said county to execute to the appellants a deed of conveyance therefor; to enter an order that the sheriff of said county, out of the proceeds of said sale, shall pay (1) the costs of the foreclosure suit and this proceeding; (2) to the plaintiff in the foreclosure suit the amount of his decree and interest; and (3) the surplus to be paid to W. B. Guthrie, the owner of the equity of redemption of said real estate.

DECREE ACCORDINGLY.

THOMAS BURKE V. J. D. BROWN ET AL.

FILED NOVEMBER 18, 1896. No. 6904.

Rulings on Evidence: ASSIGNMENTS OF ERROR: REVIEW. Where no complaint is made in the motion for a new trial as to the ruling of the court in admitting or excluding evidence, either specifically or in the language of the statute, namely, "Error of law occurring at the trial" (Code, sec. 314), this court will not review an assignment in a petition in error that the district court erred in admitting or excluding certain evidence on the trial.

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

J. Warren Gardiner and *A. S. Moon*, for plaintiff in error.

Sullivan & Gutterson and *E. H. Rigg*, *contra*.

RAGAN, C.

Thomas Burke brought this suit in the district court of Blaine county against J. D. and F. E. Brown. There was a verdict and judgment for the defendants and Burke prosecutes here a petition in error. The action was based upon a promissory note made by the Browns to one Northup, which Brown alleged he had purchased before due for a valuable consideration. The defense was a material alteration of the note after its delivery, in this: That the note when delivered did not provide for

interest, but that subsequently the payee had inserted in the note, "Interest at ten per cent from date."

1. The first argument in the brief is that the court erred in excluding certain evidence offered by the plaintiff in error. The petition in error is that "the court erred in excluding testimony material to the issue." This assignment is too indefinite for review. In addition to this it is to be remarked that the plaintiff in error, in his motion for a new trial, makes only three complaints, namely, that the verdict is contrary to law, not sustained by sufficient evidence, and that the court erred in giving certain instructions. It seems almost superfluous to remark, in view of the repeated decisions of this court, that it is not necessary in a motion for a new trial to assign specifically that the court erred in admitting or excluding certain evidence, but in that motion it is sufficient to use the language of the statute, viz., for "Error of law occurring at the trial" (Code, sec. 314); and under such an assignment in a motion for a new trial the plaintiff in error here may review the action of the court in admitting or excluding evidence by specifically assigning in his petition in error what particular evidence the court admitted or excluded, but where no complaint is made in the motion for a new trial as to the ruling of the court in admitting or excluding evidence, either specifically or in the language of the statute, then this court will not review an assignment of error in a petition in error directed to the action of the court in admitting or excluding evidence on the trial.

2. A second assignment is that the court erred in giving instruction No. 6. On looking into the record we discover that the plaintiff in error took no exception to the action of the court in giving this instruction, and we cannot therefore review this assignment.

3. The third assignment is that the verdict is not supported by sufficient evidence. We think it is. The judgment of the district court is

AFFIRMED.

HARRISON, J., not sitting.

EMMA L. VAN ETTEN V. EDWARD F. TEST.

FILED NOVEMBER 18, 1896. No. 6900.

1. **Review:** PRESUMPTIONS: BILL OF EXCEPTIONS. When a bill of exceptions has been quashed, this court will conclusively presume that evidence was introduced on the trial which sustained the judgment rendered.

2. **Judgment Nunc Pro Tunc:** COURTS. The authority of courts, both of law and equity, to enter a judgment or decree *nunc pro tunc* does not depend upon statute. It is an inherent power lodged in the courts.

3. ———: ———. If a judgment in fact was rendered, if an order in fact was made, and such judgment or order not recorded, then the court, at any time afterwards, in a proper proceeding and upon a proper showing, is invested with the power to render *nunc pro tunc* such judgment or make such order.

4. ———: BILL OF EXCEPTIONS: REVIEW. Eleven months after overruling a motion for a new trial the court, on motion, entered judgment *nunc pro tunc* on the verdict. The motion was resisted and a bill of exceptions settled. The judge certified that the bill of exceptions consisted of fourteen pages, numbered from one to fourteen, both inclusive. He did not certify that it contained any of the evidence used on hearing of the motion. From the bill of exceptions brought here the first eight pages were missing. *Held,* (1) That such bill of exceptions would not be considered for any purpose; (2) that the supreme court would presume that the district court, on the hearing of said motion, had before it evidence showing that a judgment had in fact been rendered or ordered at the time the motion for a new trial was overruled.

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

David Van Etten, for plaintiff in error.

I. R. Andrews, contra.

RAGAN, C.

This is an action in ejectment brought in the district court of Douglas county by Emma L. Van Etten against Edward F. Test. From a judgment dismissing Mrs. Van Etten's petition she prosecutes to this court a petition in error.

1. The bill of exceptions preserving the evidence given on the trial has been quashed. We must therefore conclusively presume that the evidence sustained all the defenses interposed to the action. The pleadings support the judgment rendered.

2. The trial occurred in May, 1892. The jury returned a verdict in favor of the defendant in error and plaintiff in error filed a motion for a new trial. This motion was overruled on the 28th of that month, and for some reason not disclosed by the record, the judgment dismissing Mrs. Van Etten's action was not at that time entered. Subsequently, in April, 1893, on motion of the defendant in error, the district court entered a judgment on the verdict of the jury *nunc pro tunc* dismissing Mrs. Van Etten's petition. It is now insisted that the court was without jurisdiction to make this order. We do not know whether the court, on overruling the motion of Mrs. Van Etten for a new trial, made a minute on its docket that judgment should be entered on the journal dismissing the action, or whether the court announced orally that such a judgment would be entered. For aught the record shows the failure to enter the judgment may have been the neglect of the clerk of the court or a failure of the judge to make or announce an order in the premises. But in this action, after the motion for a new trial had been overruled there was nothing left for the court to do but to enter judgment on the jury's verdict dismissing the action, and it was its duty to do so; and since the court, at a subsequent term, entered the judgment *nunc pro tunc* we must presume that this *nunc pro tunc* order was made for the purpose of having the records of the court speak the truth; that is, show what actually occurred on the 28th of May, 1892. There is nothing in the argument of plaintiff in error that the court was without jurisdiction or authority to enter this judgment *nunc pro tunc*. The authority of courts, both of law and equity, to enter a judgment or decree *nunc pro tunc* in a proper case and in furtherance of justice

is one that does not depend upon statute; it is an inherent power lodged in the courts; and this power rests upon the principle that the courts have the authority, and it is their duty, to make their records say what actually occurred,—to speak the truth. If a judgment in fact was rendered, if an order in fact was made, and such judgment or such order not recorded, then that court, at any time afterwards, in a proper proceeding and upon a proper showing, is invested with the power to render *nunc pro tunc* such judgment or make such order. (See *Belkin v. Rhodes*, 76 Mo., 643; *Gibson v. Chouteau's Heirs*, 45 Mo., 171; *Howell v. Morlan*, 78 Ill., 162; *Wachsmuth v. Orient Ins. Co.*, 49 Neb., 590.) We have said that we are not advised by the record as to why this judgment was not entered at the time of overruling the motion for a new trial. On the 21st of October, 1892, the judge who tried the action settled a bill of exceptions of the evidence offered on the trial. This was the bill of exceptions quashed. On the 17th day of June, 1893, the judge who entered the *nunc pro tunc* order settled a bill of exceptions as to matters which occurred in the case subsequent to the settlement of the bill of exceptions of the evidence used on the trial. The certificate of the judge who entered the *nunc pro tunc* order to the bill of exceptions settled by him is as follows:

"Presented to me for settlement and allowance as to matters subsequent to the alleged settlement made by Hon. Judge Doane, on October 21, 1892, included in the fourteen prefixed pages as numbered and by me this 17th day of June, 1893, settled and allowed accordingly.

"CHARLES OGDEN, *Judge*."

The first eight pages from this bill of exceptions are missing. The ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth pages only are found therein. We do not know what the eight pages contained. It is to be observed also that the district judge does not certify that the fourteen pages in the bill of exceptions contain all the evidence used on the hearing of the motion for the

nunc pro tunc order, nor does he even certify that it contains any evidence used on the hearing of that motion. We know from the record that a motion was made for the *nunc pro tunc* order; that this motion was heard and that it was sustained; and we know from the partial bill of exceptions before us that affidavits were filed resisting this motion, on the alleged ground that the verdict of the jury was procured by fraud and was a "perversion of justice." But what affidavits, if any, were used in support of the motion, or what evidence was before the court in support of the motion, we do not know. We cannot and will not presume that the court sustained this motion without some evidence before it showing that a judgment was in fact rendered or ordered dismissing the action on the 28th of May, when the motion for a new trial was overruled. We do not mean by anything we have said to reflect upon the integrity or conduct of any one. We simply state the facts from the record before us; and because the bill of exceptions brought here shows on its face that it is not the one settled by the judge who made the *nunc pro tunc* order, and because the certificate of that bill of exceptions does not recite that it contains any evidence used on the hearing of the motion we will not look into said bill of exceptions for any purpose, and we will presume that the judge had before him competent evidence on which to base his finding sustaining said motion, and the judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

PATRICK W. O'BRIEN V. FRED PARSONS.

FILED NOVEMBER 18, 1896. No. 6868.

Review: ASSUMPSIT: EVIDENCE. No question of law is presented by this record. Instructions examined, and *held* to properly state the issues; and evidence examined and *held* to sustain the verdict.

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

G. W. Fox, for plaintiff in error.

George C. Gillan and *Warrington & Stewart*, *contra.*

IRVINE, C.

Parsons recovered a judgment against O'Brien in the sum of $221.42 for personal services rendered. It stood admitted upon the pleadings that Parsons had been in the employ of O'Brien, and the only issues made were as to the time devoted to such employment and the reasonable value of the services. Some complaint is made of the instructions on the ground that they do not properly submit the former issue, and call the attention of the jury only to the question of the value of services. We need not set out the instructions at length. In the third the jury was told that the burden was upon the plaintiff to establish the services rendered and the reasonable value of the same; and in the fourth, to ascertain from the evidence what services were performed, and then the reasonable and fair value of the services rendered. This was sufficiently explicit, and no more definite instructions were requested. It is also claimed that the use of the word "fair" in the direction to the jury to find the reasonable and fair value was misleading, but we cannot see in what respect. The phrase is one frequently used in such cases.

In the brief, objection is made to one ruling on the evi-

dence. The propriety of this ruling is not, however, presented by any assignment in the petition in error.

It is assigned that the verdict is not sustained by the evidence. The evidence was conflicting on both issues. It was sufficient to sustain a verdict for a larger amount. Indeed, the argument is that if plaintiff's witnesses were believed the verdict should have been larger, and if defendant's witnesses were believed it should have been less; and that, therefore, the jury did not base its verdict upon the evidence. The verdict may in this respect have been something of a compromise; but the defendant cannot complain because the finding was too low. We think it was one fairly warranted by the evidence.

AFFIRMED.

J. E. SEELEY, APPELLEE, V. ANDREW WICKSTROM ET AL., IMPLEADED WITH BANK OF WILCOX, APPELLANT.

FILED NOVEMBER 18, 1896. No. 6911.

1. **Mortgage:** EVIDENCE OF PAYMENT. Evidence examined, and *held* to sustain a finding that a mortgage in controversy had not been paid and thereafter delivered to a stranger as security to a new debt.
2. **Pledges:** NOTES. Where a note valid between the parties has been pledged, the pledgee may recover from the maker the whole amount of the note.
3. ———: ———: ACTION BY PLEDGEE. The pledgee of a note may, upon its maturity, maintain an action thereon or enforce security thereto, although the debt for which it is pledged is not yet due.
4. **Mortgages:** RIGHTS OF JUNIOR MORTGAGEE: PLEADING. A junior mortgagee in a foreclosure case who does not pray for a foreclosure is entitled only to a decree fixing his priority and directing distribution, in case of sale, accordingly.

APPEAL from the district court of Phelps county. Heard below before BEALL, J.

G. Norberg and *John M. Stewart*, for appellant.

Rhea Bros., *A. J. Shafer*, *W. P. Hall*, and *S. A. Dravo*, *contra*.

IRVINE, C.

This action was brought by Seeley to foreclose a mortgage executed by Wickstrom and wife. N. D. Blackwell & Co. and the Bank of Wilcox were made defendants, they claiming liens on the mortgaged premises. Blackwell & Co. answered, alleging the execution by the Wickstroms to them on the 30th of September, 1890, of a mortgage to secure a note for $1,916.80. The Bank of Wilcox answered alleging the execution of a mortgage to it by the Wickstroms November 24, 1891. The Bank of Wilcox prayed for foreclosure of its mortgage. Blackwell & Co. merely prayed that the amount of their mortgage might be ascertained, and that all other liens be adjudged inferior thereto. On the trial the First National Bank of Holdrege was, on motion, substituted for Blackwell & Co., and Blackwell & Co.'s answer amended by substituting the name of the bank and interlining an averment that the note and mortgage of Blackwell & Co. belonged to the First National Bank. No exception was taken to this order. The court, by its decree, found that the plaintiff had a first lien, and found the lien in favor of the First National Bank of Holdrege superior to that of the Bank of Wilcox, and awarded a decree of foreclosure. The decree contained numerous findings establishing judgment liens in favor of others, but the Bank of Wilcox is the only appellant, and the priority as between it and the First National Bank of Holdrege is the only question presented for consideration.

The Bank of Wilcox claims that the proof shows that the Wickstroms, after having made the mortgage to Blackwell & Co., paid and thereby discharged the same, and thereafter delivered the same note and mortgage to the First National Bank as collateral security to another debt owed by the Wickstroms to that bank. It is therefore urged that this mortgage had served its purpose, and that such a transaction did not preserve the lien of that mortgage in favor of the First National Bank. An

examination of the evidence convinces us that it does not establish this state of facts. The note and mortgage were produced by the First National Bank, and an officer of that bank testified that the firm of Blackwell & Co., while in form a partnership, consisted merely of Mr. Updike, the former president of the First National Bank, and that it was the custom of that bank to have mortgages to secure debts owing to it made to Blackwell & Co. and turned over to the bank. It is true that on cross-examination it developed that this witness' testimony was largely hearsay; but he was the only witness in the case. The evidence went in without objection, and the only foundation for the claim of the appellant is an answer of this same witness, which is subject to the same criticism as the testimony just referred to. While this witness several times states that the note and mortgage are held by his bank as collateral security to a debt of Wickstrom's, and while he produces the note and the mortgage and shows that they are in the possession of the bank, the inference is just as strong that the original debt for which the mortgage was executed was to the bank as that it was to Blackwell & Co.; while the only evidence that it was to Blackwell & Co., and was paid, is clearly hearsay and a general statement, without specific facts.

It is further contended that the decree cannot, in any event, be sustained, because of the absence of any evidence as to the amount due the bank for which the mortgage stood as collateral. But where a note is valid as between the parties, and has been pledged, the pledgee may recover against the maker the whole amount due, retaining any surplus for the benefit of the beneficiary entitled. (*Haas v. Bank of Commerce*, 41 Neb., 754; *Barmby v. Wolfe*, 44 Neb., 77.) The note in evidence renders the amount due only a matter of computation.

It is also contended that as the note was held as collateral security, and the debt for which it was pledged was not due, there could be no foreclosure. In the whole case the argument turns too much upon the unexplained

use by the sole witness of the term "collateral." As we have indicated, the evidence would sustain a finding that the original debt was to the bank, and the bank held the note as principal and not as collateral security. Conceding that it was held as collateral security, it was overdue, and the pledgee might enforce this security even before the principal debt to the pledgee became due, holding the proceeds as continuing security for the debt. This line of argument, however, raises one point which requires a modification of the decree. The First National Bank did not ask a foreclosure. It merely asked a decree adjudging its priority. The plaintiff having been found to have the first lien and to be entitled to foreclosure, and the First National Bank not asking foreclosure, the decree should not have awarded foreclosure unless both debts should be paid within the period fixed. It should permit a redemption by the payment of those liens which were sought to be foreclosed, and should merely have decreed distribution, in case of sale, of the surplus in satisfaction of the lien of the First National Bank. Instead of taking this course the district court entered a decree providing for a sale of the premises unless all the adjudged liens should be paid. The judgment of the district court is reversed for this reason and the cause remanded, with directions to so modify the decree as to order a sale only in case the debts due to the plaintiff and the Bank of Wilcox be not paid within twenty days from the modification of the decree. In case there be a redemption within that period from the plaintiff's mortgage, and not from that of the Bank of Wilcox, then the land to be sold subject to the mortgage of the First National Bank. In case there be no redemption, then the land should be sold and the proceeds applied to the payment of the liens in the order of their priority as fixed by the present decree. The record disclosing that there have been redemptions from various judgment liens, the decree in this respect is left to the settlement of the district court.

REVERSED AND REMANDED.

S. BERNSTEIN ET AL. V. WILLIAM COBURN, ASSIGNEE.

FILED NOVEMBER 18, 1896. No. 6893.

Set-Off: INSOLVENT BANKS: ACTION BY ASSIGNEE. The defendant in an action by the assignee to recover money due to an insolvent banking corporation may set off against the amount owing by him to the bank an indebtedness of the latter to him. *Salladin v. Mitchell*, 42 Neb., 859, followed.

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

Lake, Hamilton & Maxwell, for plaintiffs in error.

IRVINE, C.

William Coburn, as assignee of the Bank of Omaha, brought this action to recover on two promissory notes alleged to have been executed by S. Bernstein and J. Kline in favor of that bank. The defendants answered separately, each in addition to other matter pleading as a set-off deposits in the bank at the time of its failure in their favor. Demurrers were interposed to these portions of the answers and were by the district court sustained. The defendants bring the case here for review, assigning as error the sustaining of the demurrers.

It will be observed that the question presented is as to the right of the defendant, in an action by the assignee to recover money due to an insolvent bank, to set-off against the amount owing by him an indebtedness of the bank to himself. Since this case was decided in the district court this question has been decided by this court in favor of the right of set-off. (*Salladin v. Mitchell*, 42 Neb., 859.) The case cited governs that before us.

REVERSED AND REMANDED.

EMIL LINDNER V. ADAMS COUNTY BANK ET AL.

FILED NOVEMBER 18, 1896. No. 6940.

1. **Partnership:** DISSOLUTION: ASSETS. On the dissolution of a partnership by the death of one of its members, the possession and control of the partnership assets vest in the surviving partner, who has power to dispose of the same.

2. ——: ——:——. Such surviving partner may sell and pass title to a chose in action belonging to the partnership.

3. ——: ——: ——: RIGHTS OF SURVIVING PARTNER. The rule applied to a case where partnership property had been sold under decree of foreclosure, leaving a surplus in court, which the surviving partner had assigned to a stranger. *Held*, That such stranger was entitled thereto as against the administrator of the deceased partner, the *bona fides* and consideration of the transfer being unimpeached.

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

The facts are stated by the commissioner.

J. E. Kelley and *W. S. Morlan*, for plaintiff in error:

The court erred in denying the application of the administrator without hearing any evidence and in holding that the question as to who was entitled to the partnership funds could not be inquired into in this proceeding. (Code, secs. 854, 855; Wiltsie, Mortgage Foreclosure, secs. 750, 758; *Union Ins. Co. v. Van Rensselaer*, 4 Paige Ch. [N. Y.], 84.)

The partnership was dissolved by the death of a partner. The surviving partner thereupon became the sole owner of all the personalty belonging to the partnership, as a trustee for the benefit of all its creditors, and of the estate of his deceased partner. (17 Am. & Eng. Ency. of Law, 1154; *Nelson v. Hayner*, 66 Ill., 487; *Ames v. Downing*, 1 Bradf. [N. Y.], 321; *Case v. Abeel*, 1 Paige Ch. [N. Y.], 393; *Brown v. Watson*, 66 Mich., 223; *Washburn v. Goodman*, 17 Pick. [Mass.], 518; *Philips v.*

Atkinson, 2 Bro. Ch. [Eng.], 272*; *Burden v. Burden*, 1 Ves. & B. [Eng.], 170; *Hartz v. Schrader*, 8 Ves. [Eng.], 317; *Buchan v. Sumner*, 2 Barb. Ch. [N. Y.], 199; *Andrews v. Brown*, 21 Ala., 437.)

The surviving partner's share of the property was one-half of the surplus remaining after payment of all partnership creditors, and the settlement of all accounts between the partners. (*Sage v. Sherman*, 2 N. Y., 428; *Hiscock v. Phelps*, 49 N. Y., 103; *Doner v. Stauffer*, 1 Pen. & W. [Pa.], 198; *Dyer v. Clark*, 5 Met. [Mass.], 562; *Divine v. Mitchum*, 4 B. Mon. [Ky.], 488; *Lake v. Craddock*, 3 P. Wms. [Eng.], 158; *Foster v. Hale*, 3 Ves., Jr. [Eng.], 696; *Bell v. Phyn*, 7 Ves., Jr. [Eng.], 453; *Gilmore v. North American Land Co.*, 1 Pet. [U. S. C. C.], 460; *Winslow v. Chiffille*, Harp. Eq. [S. Car.], 25; *Robinson v. Crowder*, 4 McCord [S. Car.], 519; *Sigourney v. Munn*, 7 Conn., 11.)

The surviving partner may assign only his share in the surplus after all partnership debts are paid, and all claims in favor of his deceased partner have been satisfied. (*Taylor v. Fields*, 4 Ves. [Eng.], 396; *Ex parte King*, 17 Ves. [Eng.], 115; *Christian v. Ellis*, 1 Gratt. [Va.], 396; *Nicoll v. Mumford*, 4 Johns. Ch. [N. Y.], 522; *Davis v. Grove*, 2 Rob. [N. Y.], 136; *Sumner v. Hampton*, 8 O., 328; *Winston v. Ewing*, 1 Ala., 129; *White v. Dougherty*, 1 M. & Y. [Tenn.], 309; *Pearson v. Keedy*, 6 B. Mon. [Ky.], 128.)

References as to interest acquired by assignee: *Williams v. Love*, 73 Am. Dec. [Tenn.], 191; *Craig v. Leiper*, 2 Yerg. [Tenn.], 193.

Capps & Stevens, contra:

A surviving partner is the owner of the partnership assets, and has a legal title to the property. (*Stanford v. Lockwood*, 95 N. Y., 582; *Hoyt v. Sprague*, 103 U. S., 613; *Shanks v. Klein*, 104 U. S., 18.)

IRVINE, C.

The record in this case discloses that the Adams County Bank brought the action against Abraham Loeb and

wife, Lindner, the administrator, Rosa Hirsch, the widow, and Benjamin and Jacob Hirsch, the heirs of Samuel Hirsch, deceased, to foreclose a mortgage executed by Loeb and Samuel Hirsch in favor of the bank. The case proceeded to foreclosure and sale, and after satisfying the bank's debt there remained a large surplus, one-half of which was afterwards by the court ordered paid to the guardian of the heirs of Samuel Hirsch. The present controversy relates to the disposition of the remainder of the surplus, it being claimed on one hand by an assignee of Loeb, and on the other hand by the administrator of Hirsch. The district court made an order directing its payment to William Kerr, the assignee of Loeb. This order was made on consideration of the application and the record in the case, without evidence, and the question presented for review is substantially, therefore, whether the administrator's application, taken in connection with facts established by the record, was sufficient, if the allegations contained in the application were true, to entitle him to the unpaid surplus. The application alleges, in brief, that Loeb and Samuel Hirsch were, in the latter's lifetime, partners, and that the real estate sold under the decree of foreclosure was partnership property; that after the death of Hirsch, Loeb collected the rents and profits of the real estate, and continued to carry on the business and collect debts due the partnership; but failed to pay the debts of the partnership and had refused to apply moneys coming into his hands for the purpose of discharging such debts, but had converted the partnership property to his own use; that the partnership owned property largely in excess of its liabilities; that Loeb is insolvent; that on an accounting between Loeb and Hirsch's administrator, Loeb would be indebted to the latter in at least $3,000.

In the briefs many questions are discussed with regard to the rights of surviving partners, and the propriety of an examination into their transactions and an accounting in a proceeding of this character. We think, however, a

single principle controls the decision of the case. The assignment of the surplus arising from the sale, from Loeb to Kerr, was made before the sale was confirmed. It recites a consideration of $1,250 paid by Kerr to Loeb. Its legal effect was as an assignment of a chose in action belonging to a partnership by the surviving partner to a stranger. Neither by any averment in the administrator's application for the surplus, nor elsewhere in the record, is the *bona fides* or consideration of this assignment attacked. On the dissolution of a partnership by the death of one of the partners, the partnership property vests in the survivor, in trust, it is true, for the settlement and winding up of the partnership business, but nevertheless with power of disposition for that purpose, and the surviving partner may, in such case, convey or transfer the property to a stranger, who will take title by virtue of such conveyance or transfer. (*Fitzpatrick v. Flannagan*, 106 U. S., 648.) Not only may tangible property be so transferred by a surviving partner, but also choses in action. (*Johnson v. Berlizheimer*, 84 Ill., 54; *Roys v. Vilas*, 18 Wis., 169*; *Daby v. Ericsson*, 45 N. Y., 786; *Bohler v. Tappan*, 1 Fed. Rep., 469.) It follows from this principle that the assignment by Loeb, the surviving partner, to Kerr of any surplus that might remain after satisfying the decree in favor of the bank, such assignment being unimpeached, operated to transfer the right of the partnership to such fund to Kerr, and it remained no longer a partnership asset, so that the question as to whether, in the absence of such an assignment, an accounting might be had in this action between the surviving partner and the personal representative of the deceased partner, and the surplus distributed in accordance with the result of such accounting, is not material to the present case. A case much in point is *Willson v. Nicholson*, 61 Ind., 241. That was an action on a promissory note made to a partnership which had been assigned by delivery to the plaintiff by the surviving partner. Certain creditors of the partnership had filed counter-claims, al-

leging insolvency of the firm and of all its members; and that the note in suit constituted the firm's only assets, and that the plaintiff had purchased it with full knowledge of the facts. They prayed that the proceeds of the instrument should be applied to the payment of their claims. The supreme court affirmed the action of the trial court in striking out the counter-claims, on the ground that the surviving partner succeeded to the assets and had the right to dispose thereof, and that in the absence of any allegation to the contrary it would be presumed that the assignment to the plaintiff was *bona fide* and for a valuable consideration.

AFFIRMED.

RAGAN, C., not sitting.

STATE OF NEBRASKA, EX REL. CHARLES HEINZELMAN ET AL., V. JOHN S. STULL, DISTRICT JUDGE.

FILED DECEMBER 2, 1896. No. 8870.

Appointment of Receiver: APPEAL: SUPERSEDEAS: MANDAMUS. An order appointing a receiver *pendente lite* cannot be superseded as a matter of right during the pendency of an appeal therefrom to this court. (*Home Fire Ins. Co. v. Dutcher*, 48 Neb., 755.)

ORIGINAL application for *mandamus* to compel respondent, as judge of the first judicial district, to fix the amount of a supersedeas bond upon appeal from an order appointing a receiver. *Writ denied.*

C. Gillespie and *E. Falloon*, for relators.

E. W. Thomas and *F. Martin*, *contra.*

POST, C. J.

The object of this proceeding is to require the respondent, as judge of the first judicial district, to fix the

amount of a supersedeas bond upon the appeal to this court from an order appointing a receiver to take charge of and preserve the property of the Verdon Milling Company, a corporation impleaded with relators as a defendant in an action pending in the district court for Richardson county, in which W. O. Howland and others are plaintiffs. It is sufficient, without examining the other questions argued, that the writ must be denied upon the ground that the allowance by the district court of a supersedeas upon appeal from an order appointing a receiver *pendente lite* rests in the discretion of that court, and its discretion in that regard will not be controlled by means of the writ of *mandamus*. The question here involved was recently considered in *Home Fire Ins. Co. v. Dutcher*, 48 Neb., 755, resulting in a determination adverse to the claim of the relators, and which is necessarily decisive of this controversy.

WRIT DENIED.

CONNECTICUT FIRE INSURANCE COMPANY OF HARTFORD V. WILLIAM O'FALLON.

FILED DECEMBER 2, 1896. No. 6719.

1. **Arbitration and Award:** IMPEACHMENT: BURDEN OF PROOF. An award, whether at common law or under the statute, when regularly made and published is, in the absence of fraud or mistake, *prima facie* binding upon the parties thereto, and the burden of alleging and proving the contrary is upon the party seeking to impeach it.

2. ———: ———: PLEADING: EVIDENCE. Evidence tending to impeach an award actually made and published, in accordance with the agreement of submission, is inadmissible under a general denial.

3. ———: RIGHT TO REVOKE SUBMISSION: TIME. The right to revoke a submission to arbitration, at common law, must be exercised before the making and publication of the award, otherwise it will be considered as avoided.

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

Charles Offutt and *Charles S. Lobingier*, for plaintiff in error.

References as to the validity of the arbitration clause and the conclusiveness of the award: *Scott v. Avery*, 5 H. L. Cas. [Eng.], 811; *Viney v. Bignold*, 20 Q. B. Div. [Eng.], 172; *Wolff v. Liverpool & London & Globe Ins. Co.*, 21 Vroom [N. J.], 453; *Hall v. Norwalk Fire Ins. Co.*, 57 Conn., 105-114; *Adams v. South British Ins. Co.*, 70 Cal., 198; *Carroll v. Girard Fire Ins. Co.*, 72 Cal., 297; *Gauche v. London & Lancashire Ins. Co.*, 10 Fed. Rep., 347, 4 Woods [U. S. C. C.], 102; *Hamilton v. Liverpool, London & Globe Ins. Co.*, 136 U. S., 242; *Tynan v. Tate*, 3 Neb., 388; *McDowell v. Thomas*, 4 Neb., 542; *Boston Water Power Co. v. Gray*, 6 Met. [Mass.], 131; *Pierce v. Empire Ins. Co.*, 62 Barb. [N. Y.], 636; *Mutual Hail Ins. Co. v. Wilde*, 8 Neb., 427.

Edwin F. Warren and *John C. Watson*, *contra*.

In an argument in reply to the contention that defendant in error was bound by an arbitration and award, reference was made to the following cases: *Thompson v. St. Louis Ins. Co.*, 43 Wis., 459; *Thompson v. Citizens Ins. Co.*, 45 Wis., 388; *German Ins. Co. of Freeport v. Eddy*, 36 Neb., 461; *Bartlett v. Union Mutual Fire Ins. Co.*, 46 Me., 500; *Reichards v. Manhattan Life Ins. Co.*, 31 Mo., 518; *Amesbury v. Bowditch Mutual Fire Ins. Co.*, 6 Gray [Mass.], 596; *Indiana Mutual Fire Ins. Co. v. Routledge*, 7 Ind., 25; *Wall v. Equitable Life Assurance Society*, 32 Fed. Rep., 273; *Nute v. Hamilton Mutual Ins. Co.*, 6 Gray [Mass.], 174; *Vore v. Hawkeye Ins. Co.*, 41 N. W. Rep. [Ia.], 309; *Day v. Dwelling-House Ins. Co.*, 16 Atl. Rep. [Me.], 894; *Reiner v. Dwelling-House Ins. Co.*, 42 N. W. Rep. [Wis.], 208; *Sly v. Ottawa Agricultural Ins. Co.*, 29 U. C. C. P., 28; *Goring v. London Mutual Fire Ins. Co.*, 11 Ont. Rep. [Can.], 82; *Sawyer v. Isolated Risk & Farmers Fire Ins. Co.*, 44 U. C. Q. B., 23; *Birmingham Fire Ins. Co. v. Pulver*, 18 N. E. Rep. [Ill.], 804; *Gere v. Council Bluffs Ins. Co.*, 67 Ia., 272; *Reed v. Washington Fire & Marine Ins. Co.*, 138 Mass., 572; *Williams*

v. Hartford Fire Ins. Co., 54 Cal., 442; *German-American Ins. Co. v. Steiger*, 109 Ill., 254; *Mark v. National Fire Ins. Co.*, 24 Hun [N. Y.], 565; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis., 419; *Liverpool & London & Globe Ins. Co. v. Creighton*, 51 Ga., 95; *Schollenberger v. Phœnix Ins. Co.*, 7 Ins. L. J. [Pa.], 697; *Case v. Manufacturers' Fire & Marine Ins. Co.*, 21 Pac. Rep. [Cal.], 843; *Crossley v. Connecticut Fire Ins. Co.*, 27 Fed. Rep., 30; *Lasher v. Northwestern National Ins. Co.*, 18 Hun [N. Y.], 98; *Mentz v. Armenia Fire Ins. Co.*, 79 Pa. St., 478; *Trott v. City Ins. Co.*, 1 Cliff. [U. S. C. C.], 439; *Cobb v. New England Mutual Marine Ins. Co.*, 6 Gray [Mass.], 193; *Stephenson v. Piscataqua Fire & Marine Ins. Co.*, 54 Me., 55; *Allegre v. Maryland Ins. Co.*, 2 G. & J. [Md.], 136; *Rosenwald v. Phenix Ins. Co.*, 3 N. Y. Supp., 215; *Nurney v. Fireman's Fund Ins. Co.*, 30 N.W.Rep. [Mich.], 350; *Phœnix Ins. Co. v. Badger*, 53 Wis., 283; *Millandon v. Atlantic Ins. Co.*, 8 La., 561.

POST, C. J.

The defendant in error (hereafter referred to as the "plaintiff") recovered judgment in the district court for Otoe county against the Connecticut Fire Insurance Company (hereafter called the "defendant") upon a certain policy of insurance covering a dwelling house situated in said county, together with the furniture and wearing apparel of the insured, and which is presented for review by means of a petition in error addressed to this court. Of the numerous assignments of error we shall notice a single one, viz., that the verdict and judgment are not sustained by sufficient evidence. In the policy, which is set out in the petition, is found the following: "7. * * * Loss or damage to property partially or totally destroyed, unless the amount of said loss or damage is agreed upon between the assured and the company, shall be appraised by disinterested and competent persons, one to be selected by the company and one by the assured, and, where either party demand it, the two so chosen may select an umpire to act with them in case of disagreement, and if

the said appraisers fail to agree they shall refer the differences to such umpire, each party to pay their own appraisers and one-half of the umpire's fees, and the award of any two, in writing, shall be binding and conclusive as to the amount of such loss or damage." The petition, which is otherwise in the usual form, contains an allegation that subsequent to the loss charged the defendant's agent and adjuster agreed to supply the plaintiff with blank forms to be used in making the proof of damage contemplated by the policy, and that afterwards, "during the month of July, the said agent and adjuster submitted to said plaintiff what they claimed were proofs of loss of said fire; that plaintiff, relying upon their said statement, signed the alleged proof of loss by mark, said plaintiff not being able to write or read writing, but that plaintiff afterward learned that the paper he had signed, supposing it to be a proof of loss, was an agreement to have said property appraised as provided in section 7 of said policy; that said plaintiff afterward learning that said paper signed by him was the instrument stated, to-wit, as required by section 7 of said policy, he immediately notified said company of his ignorance of the nature of the instrument signed by him, and that he would not stand to or be bound by such instrument." The defendant company, after a denial which puts in issue the foregoing allegations, charges that on the 14th day of July, 1892, in consequence of a disagreement respecting the amount of the plaintiff's damage, it was in writing agreed that all questions of difference between the parties should be submitted to arbitrators therein named, whose finding and decision should be conclusive upon the respective parties. The agreement aforesaid, which is set out at length, is specific in all of its provisions, and is *prima facie* a valid common law submission. (*Tynan v. Tate*, 3 Neb., 388; *Greer v. Canfield*, 38 Neb., 169.) It appears further from the answer that the arbitrators thus mutually chosen were, on the 18th day of July, sworn to faithfully and impartially discharge their duties as such in accord-

ance with the terms of the written submission, and that on the 29th day of July said appraisers, pursuant to the authority conferred upon them by their said appointment, made and published their finding and decision, as follows.

"To the Parties in Interest: We, H. Wales and Louis Prue, the appraisers named in the foregoing agreement, having estimated and carefully appraised at its true cash value, the sound value, and the direct or immediate damage caused by fire which occurred on the 30th day of June, A. D. 1892, to the property described in the foregoing agreement, and having taken into consideration the age, condition, and location of said property previous to the fire, and also the value of the walls, materials, and any portion of the building saved, and after making an estimate of the cost of replacing said building and making proper deductions for depreciation and other causes, in accordance with the stipulations of the foregoing agreement, do hereby, under oath, find, determine, and award the sum of six hundred and ninety-one and 4-100 dollars as the amount of said damage to the property therein described, and more particularly described as follows: $691.04, on ———

"Witness our hands and seals at Nebraska City, Nebraska, this 29th day of July, A. D. 1892.

"HARRY WALES. [SEAL.]
"LOUIS PRUE. [SEAL.]"

It is by the defendant further alleged that it has at all times since the date of said award been ready and willing to pay the same, and has tendered to the plaintiff the full amount thereof, which, upon the refusal of the latter, is brought into court for his use and benefit, in order that said tender may be kept good. The reply is a general denial. It should in this connection be observed that no reference is made by counsel to the statement of the petition respecting plaintiff's agreement to arbitrate and his alleged subsequent revocation thereof; but that allegation cannot at this time be regarded as material, since

the vital issue is tendered by the answer, which charges a particular agreement for submission to arbitrators, and an award rendered pursuant thereto.

We may concede, as charged by the plaintiff that he was, through the fraud of defendant's adjuster, induced to execute an agreement submitting to arbitrators the question of his damage, and which submission was by him in due season revoked upon the discovery of the fraud so practiced. Such facts do not of themselves, however, amount to a denial or an avoidance of the new matter pleaded as a defense, and would, if alleged in the reply, have been adjudged insufficient upon demurrer or motion to strike: 1. Because it cannot be presumed from the allegations of the petition and answer that they refer to the same agreement. 2. An award, whether under the statute or at common law, is, in the absence of fraud or mistake, binding upon the parties thereto, and the burden of alleging and proving its invalidity rests upon the party seeking to impeach it. (*McDowell v. Thomas*, 4 Neb., 542; *Bentley v. Davis*, 21 Neb., 685; *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N. Y., 392; *Camplin v. Eads*, 24 S. W. Rep. [Ky.], 1068; *Bowden v. Crow*, 21 S. W. Rep. [Tex.], 612; *Merritt v. Thompson*, 27 N. Y., 225.)

The foregoing authorities fully sustain the propositions stated, and render unnecessary an extended reference to the evidence. It is sufficient that the execution of the agreement alleged in the answer is established beyond dispute, while the making and publishing of the award as charged was not controverted at the trial below. There was, it is true, evidence by the plaintiff tending to prove a revocation by him of the agreement to arbitrate. But the plea of no award was at common law not allowed in an action of debt on an award actually made and published. (2 Chitty, Pleading, 308.) It is also a recognized rule of the common law that the right of revocation must be exercised before the publication of the award, otherwise it will be regarded as waived. (*Milne v. Gratrix*, 7 East [Eng.], 608; *Green v. Pole*, 6 Bing.

[Eng.], 443; *Bank of Monroe v. Widner*, 11 Paige Ch. [N. Y.], 529; *Hunt v. Wilson*, 6 N. H., 36; *Clement v. Hadlock*, 13 N. H., 185; *Haskell v. Whitney*, 12 Mass., 47; Kinkead, Code Pleading, sec. 205; 2 Ency. of Pleading & Practice, 597, and note.)

It is argued in defense of the judgment that the admission of evidence in the nature of a confession and avoidance under a general denial should be objected to at the time and specially assigned as error. That proposition is undoubtedly sound as a statement of the general rule, but it can for obvious reasons have no application where, as in the case at bar, there is an entire failure of proof to sustain the finding or verdict complained of. A judgment based upon such a finding is not only unsupported by the evidence, but is contrary to law within the meaning of the Code. The case of *Omaha Fire Ins. Co. v. Dierks*, 43 Neb., 473, relied upon by the defendant in error, in nowise conflicts with the views here expressed. It follows that the judgment must be reversed and the cause remanded for trial *de novo*.

REVERSED.

MILTON H. BROWN ET AL. V. OZIAL W. HOGAN.

FILED DECEMBER 2, 1896. No. 6907.

1. **Chattel Mortgages:** RIGHT OF POSSESSION. The discretion conferred upon a mortgagee by a stipulation authorizing him to take possession of the mortgaged chattels at any time he feels himself insecure is not an arbitrary one, but depends upon some act of the mortgagor, done or threatened, which tends to impair the security.
2. **Replevin:** ISSUE. The question for determination in an action of replevin, under the practice in this state, is that of the rights of the parties with respect to the possession of the property at the time of the commencement of the action.

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

C. W. McNamar and *G. W. Fox*, for plaintiffs in error.

George C. Gillan and *E. A. Cook*, *contra*.

POST, C. J.

This was an action of replevin by the defendant in error, Ozial W. Hogan, who sued to recover possession of three horses, a wagon, and harness, and which resulted in the judgment in his favor in the district court for Dawson county, now before us for review.

It appears from the pleadings below that the plaintiff therein, on the 18th day of August, 1891, mortgaged the property in controversy to one Boyer as security for a note of even date therewith for $165, payable December 18, 1891, with interest from date at the rate of ten per cent per annum. By the terms of said mortgage, Hogan was authorized to retain possession of the property in controversy until the maturity of the note above described, said condition being accompanied by the following proviso: "In case the mortgagee shall at any time deem himself unsafe, then, and in that case, it shall be lawful for the said mortgagee, or his assigns, by himself or agent, to take immediate possession of said goods and chattels wherever found, the possession of these presents being his sufficient authority therefor." The note and mortgage aforesaid were, prior to the maturity thereof, assigned by Boyer, the mortgagee named, to the plaintiffs in error, Brown and Bleekman, who thereafter, on the 8th day of October, 1891, claiming that their security was being impaired by reason of Hogan's neglect to properly care for the property in controversy, took possession of said property and were proceeding to sell the same in satisfaction of the mortgage debt, when it was taken from them in obedience to the writ in this action. The alleged negligence on his part is, in terms, denied by the defendant in error, who in substance charges that the claim in that regard is not made in good faith, but is on

the contrary a mere pretense, under which it is sought unlawfully to deprive him of the possession of his property. We find in the record abundant evidence to sustain the contention that there was, when the property was taken by the plaintiffs in error, and at the date of the commencement of the action, no threatened impairment of their security. The case is, therefore, clearly within the rule asserted in *Newlean v. Olson*, 22 Neb., 717, *Lichtenberger v. Johnson*, 32 Neb., 185, and *Case Plow Works v. Marr*, 33 Neb., 215, viz., that the discretion conferred upon the mortgagee by a condition like that quoted is not an arbitrary one, authorizing him, at his pleasure, to seize and sell the mortgaged property, but depends upon some act of the mortgagor, done or threatened, which tends to impair the value of his security. It follows that the defendant in error was entitled to the possession of the property at the date of the commencement of the action, and that the judgment in his favor is right, unless, as contended by plaintiffs in error, a different result should have been reached by reason of the maturity of the mortgage debt pending the trial of the cause upon its merits.

We have been referred to cases from other courts which appear to sustain the proposition here contended for upon the ground that it is permissible for the court in actions of this character to determine the rights of the parties as they exist at the time of the trial; but the cases cited, although doubtless sound as expositions of the statutes by which they are controlled, cannot be accepted as authority in this state, in view of the peculiar language of our statute, which prescribes the form of verdict and judgment in actions of replevin. It is by section 191, Code of Civil Procedure, provided that in all cases where the property has been delivered to the plaintiff and the jury shall find upon issue joined for the defendant, they shall find whether the defendant had the right of property or right of possession only at the commencement of the suit, and if they find either in his

favor, they shall assess such damages against the plaintiff as they may deem right and proper, for which, with costs of suit, the court shall render judgment. Section 191*a*, in substance, provides that the judgment in case of a failure of the plaintiff to prosecute, or in case of a verdict for the defendant upon the merits when the property has been delivered to the plaintiff, shall be for the return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and damages for withholding the property, and costs of suit, while section 192 declares that where the property has been delivered to the plaintiff and the jury shall find for the plaintiff, on issue joined, or on inquiry of damage upon a judgment by default, they shall assess adequate damages in his favor for the illegal detention of the property, for which, with costs of suit, the court shall enter judgment. These requirements have, as a rule, been held mandatory, and a compliance therewith essential in order to sustain judgments rendered in actions of replevin. (*Manker v. Sine*, 35 Neb., 746; *Garber v. Palmer*, 47 Neb., 699.) They also, as has been frequently said by this court, contemplate that the question to be determined in a controversy of this character is that of the rights of the parties with respect to the possession of the property at the time the action was commenced. (*Gillespie v. Brown*, 16 Neb., 457; *Blue Valley Bank v. Bane*, 20 Neb., 295; *Kay v. Noll*, 20 Neb., 380; *Fischer v. Burchall*, 27 Neb., 245; *Shackleford v. Hargreaves*, 42 Neb., 680; *Kilpatrick-Koch Dry Goods Co. v. Strauss*, 45 Neb., 793.) The cases here cited are, it is believed, decisive of the case at bar, and render unnecessary an examination of the other questions discussed by counsel.

JUDGMENT AFFIRMED.

JACOB C. DENISE V. CITY OF OMAHA.

FILED DECEMBER 2, 1896. No. 6886.

1. **Instructions:** ASSIGNMENTS OF ERROR: REVIEW. Where an assignment of error refers in gross to a series of propositions embodied in separate paragraphs of the charge to the jury, it need be examined no further than to ascertain that any one of the series excepted to is sound.

2. ———: ———: ———. Where alleged errors in the refusals to give several proffered instructions are grouped in the assignment, it does not require any further attention after it is ascertained that one of the propositions to which complaint is urged is correct.

3. ———: MODIFICATION: OBJECTIONS: REVIEW. To secure review of the action of a trial court in modifying a requested instruction to a jury it is necessary to note an exception to such modification.

4. ———: REPETITIONS. It is not ground for the reversal of a case that the trial court repeated a proposition of law in the instructions each time in proper connection with facts or other principles involved, or where it does not appear that the effect was to perplex or mislead the jury. (*Gran v. Houston*, 45 Neb., 813.)

5. ———: OBJECTIONS: NEW TRIAL. Objections to instructions, to be available on review, must be specifically pointed out in a motion for new trial.

6. **Review:** RULINGS ON OBJECTIONS: OFFER OF PROOF. "The ruling of the trial court in sustaining an objection to a question put to one's own witness cannot be reviewed where the complaining party has failed to make an offer of the testimony, indicating what he expects to prove by the witness, in response to the question propounded and overruled." (*Barr v. City of Omaha*, 42 Neb., 341.)

7. ———: OBJECTIONS. Alleged errors in the admission of evidence cannot be reviewed where no objection to its reception was interposed in the trial court

8. ———: EVIDENCE: HARMLESS ERROR. The exclusion of offered evidence is not prejudicial error where the witness has previously given or subsequently gives the evidence sought to be introduced, or that of like character and to the same effect. (*Halbert v. Rosenbalm*, 49 Neb., 498.)

9. ———: ———: ASSIGNMENTS OF ERROR. The action of a trial court in the admission of evidence will not be reviewed in the absence of any assignment in reference thereto.

10. ———: ———: ———. Assignment in relation to the admission of certain testimony of the value of a lot, without considering in the

estimate the improvements thereon, *held*, that the evidence was competent and the assignment unavailable.

11. ———: ———. The action of the trial court in sustaining objections to certain questions put to a witness for defendant on cross-examination examined, and *held* not erroneous.

12. **Action to Recover Damages Resulting From Grading a Street:** VERDICT FOR DEFENDANT. *Held*, That there was sufficient evidence to support the verdict rendered.

13. **Review:** BILL OF EXCEPTIONS. Where it is sought to present to this court alleged errors occurring at the trial in a district court, to determine which involves an examination of matters which can only properly be presented by a bill of exceptions, such bill, settled and signed as prescribed by law, is indispensably necessary. (*Scott v. Spencer*, 42 Neb., 632.)

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

Warren Switzler, for plaintiff in error.

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

HARRISON, J.

The plaintiff commenced this action in the district court of Douglas county, against the city of Omaha, to recover damages which he alleged in his petition were caused by the grading, by or under the directions and authority of defendant, of certain streets in the city and adjacent to residence property owned by plaintiff, and on which he had a tenement house or houses. Issues were joined and tried, and the trial resulted in a verdict and judgment adverse to the plaintiff; hence the presentation of the case, on his part, to this court for a review of the proceedings in the district court.

One assignment of error was as follows: "The court erred in giving instructions on its own behalf, numbered as follows: Two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8)." Nos. 3 and 5 of the instructions, to which reference was therein made, were without error, and as there was no separate and specific assignment, it

needs no further examination. (*Pollock v. Whipple*, 45 Neb., 844; *Ripp v. Hale*, 45 Neb., 567.)

It is urged that the court erred in refusing to give instructions asked on behalf of the plaintiff, numbered as follows: "Three (3), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), and twelve (12), and in changing number four (4) and giving it as changed." This assignment is not directed against the refusal to give any particular one of the instructions, but refers to all. Some of them were unobjectionable, and the proposition embodied in at least one of them had been fully covered by a paragraph of the charge given. Under such conditions, the assignment need not be further considered. (*Pollock v. Whipple, supra; Ripp v. Hale, supra.*) In regard to the portion of the assignment which relates to the modification of the instruction numbered 4, requested by plaintiff, no exception was noted to the modification in the trial court; hence the objection is not available here.

It is argued that undue prominence was given by the repetition in certain paragraphs of the instructions of the proposition that in order to recover, the plaintiff must produce a preponderance of the testimony. The idea expressed was entirely proper in the connection in which it appeared in the instructions, and from a careful review of the record of the whole proceedings during the hearing in the trial court, we are constrained to believe that the portions of the instructions attacked were not open to the objection that they tended to mislead the jury. If they did not, there was no available error. (*Gran v. Houston*, 45 Neb., 813; *Hill v. State*, 42 Neb., 503; *Carstens v. McDonald*, 38 Neb., 858; *Seebrock v. Fedawa*, 30 Neb., 424.) Furthermore, the motion for new trial contained no specific complaint in respect to these instructions on the ground now urged, which would preclude an examination of the objection here. (*Barr v. City of Omaha*, 42 Neb., 342.)

There are several assignments which point to alleged errors in the exclusion of designated portions of the testi-

mony. In respect to the majority of them it suffices to say that no offer to prove the facts sought to be elicited by the questions to which objections were sustained followed such action, which renders the alleged errors unavailable. (*Barr v. City of Omaha*, 42 Neb., 342.) One of the questions as to which the above mentioned objection was urged was numbered 444. To this, it appears by the record, no objection was interposed.

A hypothetical question was asked one of the witnesses for plaintiff, and was "objected to as assuming facts not proven." The objection was sustained, and to this action an exception was noted. The question was not open to the objection made and sustained, but immediately following this the witness was further interrogated on the same line, and the information expected in reply to the rejected interrogatory was thereby elicited, hence there was no prejudicial error. (*Halbert v. Rosenbalm*, 49 Neb., 498.)

It is urged in the brief filed for plaintiff that there was error in overruling an objection made for plaintiff to question numbered 533 propounded to a witness for defendant. There was no assignment of error in respect to this, hence it will not be considered.

It is contended that the trial court erred "in admitting the testimony of any of the real estate men called by defendant, as they did not take into account, in giving their opinions, the improvements on the property. See, for instance, Mr. Hascall's testimony, questions 679 and 696, and Mr. Ames' No. 745. Others were to the same effect." No objection was made to the introduction of a large portion of the testimony of the character here indicated. The particular question is not alluded to in the assignment quoted, but there was an objection made to a question of the overruling of which error is assigned, and by which the point urged may be said to have been presented. The value of the house or houses separately from that of the lot had been shown by a number of witnesses, and it was certainly not objectionable to prove

the value of the lot, or land, separately from the improvements. It was competent, in view of the condition of the evidence. The jury, by a comparison and combination of the values shown of the lot alone and the improvements in themselves, or the two together, could form a correct conclusion as to their values either before or after the grading which was claimed to have reduced the value and caused the damages.

The city engineer was called as a witness and some drawings or "profiles" were identified by him as showing the streets at or near the plaintiff's property, and also their original surface lines, established grades, and changes of grade, etc., and from these drawings and his own knowledge of the matters, he gave testimony in relation to the work done at the time the streets were graded, and of the condition of the plaintiff's property, or the lot, after the work was done. On cross-examination he was asked certain questions, to which objections were interposed and sustained. It is claimed that the questions to which we have just referred were for the purpose of ascertaining the knowledge of the witness on the subject, about which he was testifying, and further, to test his capacity as an expert witness. The questions had no relevancy, nor could the testimony which it was sought to draw out by them have any, to the subjects embraced in the testimony of the witness, nor do we think it would have tended in the least to assist in an investigation in regard to the ability of the witness as an engineer, and we are unable to see wherein the plaintiff was prejudiced by the exclusion of the testimony.

It is urged that the verdict was not sustained by sufficient evidence. We are not prepared to say, after a careful perusal of the evidence, that we would have reached the same conclusion as did the jury, but there was sufficient evidence to support the verdict rendered, hence it will not be disturbed. (*Converse v. Meyer*, 14 Neb., 190; *Durrell v. Hart*, 25 Neb., 610.) Moreover, we will add here that we need not have examined into the sufficiency of the evi-

dence to warrant the verdict, nor into the questions mooted in regard to the exclusion or improper reception of evidence, nor, indeed, any point to determine which a resort to the bill of exceptions became necessary, for what appears in the record as the bill of exceptions has not been settled or signed by either the trial judge or the clerk of the district court in which the case was tried. The following stipulation, signed by the attorneys in the case, is of the record, to-wit: "It is hereby stipulated and agreed that the within is a complete transcript of the evidence and all exhibits introduced in the above entitled cause, and that the same may be filed as the bill of exceptions in said cause and made a part of the record therein." But this is not sufficient to entitle the matters so attempted to be made of record to examination. "Where it is sought to present to this court alleged errors occurring at the trial in a district court, a bill of exceptions settled and signed as required by law is indispensably necessary." (*Scott v. Spencer*, 42 Neb., 632; *Reynolds v. Deitz*, 39 Neb., 180; *Edwards v. Kearney*, 14 Neb., 83.)

AFFIRMED.

STATE OF NEBRASKA, EX REL. P. T. LEWELLEN ET AL., V. SAMUEL SMITH ET AL.

FILED DECEMBER 2, 1896. No. 8811.

1. **Mandamus:** TITLE TO OFFICE. The title to an office cannot be tried and adjudicated in an action of *mandamus*. (*State v. Plambeck*, 36 Neb., 401.)

2. **Schools and School Districts:** TEACHERS: CONTRACTS. A contract to teach in one of the free schools of the ordinary districts is one of employment. The district, represented by the board, is an employer, and the teacher an employe.

3. ———: ———: OFFICERS. The teacher in such schools is not a public officer.

4. ———: ———: ———. To the state and county superintendents and

the school district boards is by law given the general care and supervision of the free schools of this state.

5. **Mandamus:** SCHOOLS: EMPLOYMENT OF TEACHER. The employment of teachers for the free schools is of the duties cast by law upon the district boards, and the discretion and decision of the officers composing such a district board, as to whom they will employ as a teacher, cannot be controlled by writ of *mandamus* issued at the instance of taxpayers and voters of the district.

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

The opinion contains a statement of the case.

L. M. Pemberton and *S. D. Killen*, for plaintiffs in error:

The board had authority to enter into the written contract to employ H. W. Killen as teacher. He was qualified to teach. The contract is binding on the district. *Mandamus* is the proper remedy. (*Montgomery v. State*, 35 Neb., 655; *Russell v. State*, 13 Neb., 68; *McGuiness v. School District*, 39 Minn., 499; *Place v. Township of Colfax*, 56 Ia., 573; *Farrell v. School District*, 98 Mich., 43; *Tripp v. School District*, 50 Wis., 651; *Hull v. Independent District*, 82 Ia., 686; *Morley v. Power*, 5 Lea [Tenn.], 692; *State v. Dodson*, 21 Neb., 218; *State v. Jaynes*, 19 Neb., 161; *State v. Callahan*, 61 N. W. Rep. [N. Dak.], 1025; *Cleveland v. Amy*, 88 Mich., 374; *Reubelt v. School Town of Noblesville*, 106 Ind., 478; *Gates v. School District*, 14 S. W. Rep. [Ark.], 656; *Caldwell v. School District*, 55 Fed. Rep., 372; *Attorney General v. City of Boston*, 123 Mass., 460; *State v. Wrightson*, 56 N. J. Law, 126.)

Citizens and taxpayers of the district and patrons of the school had the right to bring the action as relators. (*State v. Shropshire*, 4 Neb., 411; *State v. Stearns*, 11 Neb., 106; *State v. City of Kearney*, 25 Neb., 262; *State v. Studheit*, 11 Neb., 360; *Atkinson v. Hutchinson*, 68 Ia., 161; *School District v. Cowee*, 9 Neb., 53; *Frans v. Young*, 30 Neb., 360; *American Water-Works Co. v. State*, 31 Neb., 445.)

Hazlett & Jack, contra:

Mandamus is not the proper remedy. (*State v. Rising*, 15 Nev., 164; *People v. Hyde Park*, 117 Ill., 462; *Meredith v. Supervisors of County of Sacramento*, 50 Cal., 433; *State v. Plambeck*, 36 Neb., 401; *State v. Palmer*, 10 Neb., 203; *State v. Jaynes*, 19 Neb., 164; *People v. Goetting*, 30 N. E. Rep. [N. Y.], 968; *People v. Stevens*, 5 Hill [N. Y.], 616; *People v. Fletcher*, 2 Scam. [Ill.], 487; *Bonner v. State*, 7 Ga., 473; *People v. Kip*, 4 Cow. [N. Y.], 382; *St. Louis County Court v. Sparks*, 10 Mo., 117; *State v. Thompson, Auditor*, 36 Mo., 70.)

There is an adequate remedy at law. (*Bays v. State*, 6 Neb., 173; *Kennedy v. Board of Education*, 22 Pac. Rep. [Cal.], 1042.)

HARRISON, J.

On August 28, 1896, the relators filed a petition in the district court of Gage county, in which it was alleged that they were residents of the village of Filley, in said county, and voters and taxpayers of school district No. 9, Gage county; that the respondents, Samuel Smith and John F. Kees, were members of the school board of said district,—Smith, the director, and Kees, the moderator,—and that Elijah H. Filley was the treasurer of the district; that on the 27th day of June, 1896, the then moderator and treasurer of the school district entered into a contract with H. W. Killen, a legally authorized school teacher, to teach the school in said district during the ensuing school year; that the date of the commencement of the performance of the contract was fixed, by its terms, of date August 31, 1896; that the director and moderator of respondents had asserted that the teacher, H. W. Killen, could not teach the school or have access to the school building for the purpose of teaching, but one Charles H. Kindig, also made a respondent, with whom the district officers claimed to have made a contract for such purpose, would take charge of the school

during the school year; that such action would deprive H. W. Killen of his rights as teacher under his contract, render the district liable to him in damages by reason of such infringement of his rights, and would also deprive the patrons of the school of his services as teacher. The prayer of the petition was as follows: "Relators therefore pray that a writ or order of *mandamus* may issue commanding said defendants, Samuel Smith and John F. Kees, to open the school-house in said district No. 9 of Gage county, Nebraska, to said H. W. Killen on the said 31st day of August, 1896, or as soon thereafter as possible, and to put said H. W. Killen in possession of said school-house and in charge of the school therein as teacher and to recognize said Killen as the duly employed teacher of the school in said district and accept him as such and to permit him to teach the school in said district as by said contract he is employed to do, and to grant such other relief to relator as he may justly be entitled to by reason of the premises, and to require the said Charles H. Kindig to permit said H. W. Killen to take possession of said school-house and teach said school as provided in said contract." The respondents answered, and to the answer a reply was filed, and of the issues raised a trial to the court resulted in a dismissal of the cause. The relators present the case here for review by error proceedings.

It was and is contended for relators that the position of teacher is an office, or such a right to a place as to constitute a franchise. If, for the sake of argument, this be conceded, then it further appeared that there was a person other than the one whose right or title to the office or place was asserted by relators, who was occupying it under claim of right of title—a *de facto* incumbent,—and this was not the proper action in which to test the question of title. The title to an office cannot be tried and adjudicated in an action of *mandamus*. (*State v. Plambeck*, 36 Neb., 401; *State v. Jaynes*, 19 Neb., 164; *State v. Palmer*, 10 Neb., 203; *People v. Goetting*, 30 N. E. Rep. [N. Y.],

968; *People v. Harvey*, 62 Cal., 508; *Kelly v. Edwards*, 69 Cal., 460.) The contract to teach in the common or free schools of the grade of the one in the district in which this controversy arose is one of employment, and the relative positions occupied by the district represented by the board and the teacher are those of employer and employe. A teacher in the schools of the ordinary district is not a public officer, nor is his position an office. (*Bays v. State*, 6 Neb., 167; *Heath v. Johnson*, 15 S. E. Rep. [W. Va.], 980.) This being true, for any violation of the rights of a teacher under an existing contract there would be an adequate remedy in an action to recover damages for a breach of the contract, and *mandamus* would not lie.

It will doubtless be remembered that the relators in this case did not include the teacher; but the right to appear and demand that a certain person be allowed to occupy the position of teacher in the school of the district, under an alleged contract to do so, was based on the facts that the relators were residents, voters, and taxpayers of the district, and one of them had children to attend the school. The care and supervision of the free schools of the state is committed by law to a state superintendent, a county superintendent, and the district boards. Of the duties of the last mentioned it is said in section 3, chapter 79, subdivision 5, Compiled Statutes, 1895: "The district board shall have the general care of the school, and shall have power to classify and grade the scholars in their district and cause them to be taught in such schools and departments as they may deem expedient; to provide a course of study, which may include all studies necessary for a first grade certificate; and to make such rules and regulations as they may think necessary for the government and health of the scholars." And in section 11, in subdivision 4, same chapter, the boards, or certain of the members, are given the power and duty of hiring teachers by contract, in writing and with prescribed formalities, and it has been determined: "The district school board is specially invested by statute

with the general care and management of the school and the employment of the teachers, and, as an incident to these powers, has a right to discharge a teacher for incompetence, or for any other sufficient cause, at the will and pleasure of a majority of its members." (*Bays v. State, supra; Vallery v. State*, 42 Neb., 127.) The matter of hiring a teacher for the school, and who should be employed, was committed by law to the judgment and discretion of the district board; and the action of the board or its proper members in regard to hiring a teacher, with whom a contract should be completed, or the question of with whom the board had made a contract, cannot be controlled by *mandamus* issued at the instance of a taxpayer of the district or parties who have children to attend or in attendance upon the school. It follows that the judgment of the district court was right and will be

AFFIRMED.

JOHN W. ARGABRIGHT V. STATE OF NEBRASKA.

FILED DECEMBER 2, 1896. No. 8148.

Witnesses: INSTRUCTIONS. The jury are the sole judges of the credibility of witnesses, and it is error for a trial court, in a criminal case, to single out a particular witness for the defense, by name, and give to the jury a cautionary instruction which applies directly to his testimony the rule of "*falsus in uno, falsus in omnibus.*"

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

W. H. Kelligar and *John S. Stull*, for plaintiff in error.

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

HARRISON, J.

The plaintiff in error was, by an indictment filed in the district court of Nemaha county, charged with the crime of murder, and after a plea of "not guilty" was placed on trial. As a result of the trial he was convicted of manslaughter, and after motion for new trial was heard and overruled, he was sentenced to imprisonment in the penitentiary for a term of ten years. To obtain a review of the proceedings had during the trial, the case is presented to this court by petition in error.

No bill of exceptions has been filed in the case by plaintiff in error, for reasons which we need not here recount or notice, having been unable to obtain one; hence we can consider no other or further of the errors assigned than such as are fully apparent in the transcript prepared by the clerk of the district court. Of these one is that the court erred in giving instruction numbered thirteen of those requested to be given by the state. The instruction attacked is as follows: "If the jury believe from the evidence that the witnesses Lewis Morris, Hilton Stanley, and Perry Waltz have willfully sworn falsely on this trial as to any matter or thing material to the issue in the case, then the jury are at liberty to disregard their entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts and circumstances proved on the trial." It is contended that this portion of the charge of the court is erroneous, in that it singled out certain individuals of the witnesses and directs especial attention to them and their testimony, respectively. That such action of the trial court was well calculated to induce a belief or an impression in the minds of the jury, or in the mind of any one or more of them, of the court's disbelief of the testimony of the witness or witnesses specifically named, or at least that the court viewed it with suspicion and felt inclined to discredit it.

One of the governing principles of the question in-

volved is that it is for the jury, and not the court, to pass upon the credibility of witnesses and to determine the weight to be accorded their testimony (*Hedman v. Anderson*, 6 Neb., 392; *Heldt v. State*, 20 Neb., 492; *State v. Cushing*, 29 Mo., 215; *Shellabarger v. Nafius*, 15 Kan., 547; *State v. Stout*, 31 Mo., 406); and extending this doctrine and applying it to an instruction on the maxim, *Falsus in uno, falsus in omnibus*, "the credibility of a witness who knowingly testifies falsely as to one or more material facts is wholly a matter for the jury." (*Schuek v. Hagar*, 24 Minn., 339.) "It is error to single out a particular witness and to direct such a cautionary instruction, although couched in proper terms against his testimony. The reason is that such a course tends to convey to the minds of the jury the impression that the testimony of the particular witness is disbelieved by the judge and is to be disregarded,—a question which it is their province to determine, and not his." (2 Thompson, Trials, sec. 2423, p. 1772.) "It is not usual for a court to point out a particular witness and tell the jury to disregard his testimony if they think he has testified falsely in any material particular; and when this is done, and all instructions upon the defense which this witness' testimony tends to establish are refused, the jury must understand the court to be of opinion that no case of self-defense is made out; in other words, that the testimony of the suspected witness is entirely unworthy of credit. This conclusion may be correct, but it is the province of the jury, and not of the court, to pass upon the credibility of witnesses." (*State v. Stout*, 31 Mo., 406.) "It is improper for the court to instruct the jury as to the weight they should give to particular testimony, or to the testimony of a particular witness, or to put a particular witness into undue prominence by charging the jury to find according to their belief in his evidence, if such charge tends to ignore other testimony; citing *Chase v. Buhl Iron Works*, 55 Mich., 139; *Springett v. Colerick*, 67 Mich., 362. On the other hand, a trial judge has no right so to instruct the

jury as manifestly to reflect upon a particular witness; citing *Grand Rapids & I. R. Co. v. Martin*, 41 Mich., 667, 672; *Wheeler v. Wallace*, 53 Mich., 355." "An instruction that if the jury find that any witness has testified falsely as to any material fact in the case, they are at liberty to reject and disbelieve all of his testimony, clearly and sufficiently states the law on the subject, and it is not error for the court to refuse to give a request applying such rule to a particular witness and challenging the attention of the jury to particular portions of his testimony, which the request assumes as false." (*Fraser v. Gates*, 86 Mich., 521.) "It is not proper for the court, in a criminal case, to designate the evidence of a witness who is not an acknowledged accomplice, and caution the jury against giving credence to it. Casting the influence of the court against the testimony of a particular witness, or the character of the evidence he gives, is not the usual way of either affecting the credibility of witnesses or the weight of testimony." (*Rafferty v. People*, 72 Ill., 37.) In the case of *State v. Kellerman*, 14 Kan., 135, it was said: "Where an instruction is asked that if a particular witness, naming him, has willfully testified falsely, etc., the justice should disregard his entire testimony, it is not error for the court to refuse such instruction and substitute one that if any witness has willfully testified falsely," etc.; and it was further observed on the same subject: "With reference to the first we have little difficulty. The rulings of the court were unquestionably correct. For instance, the appellant asked the court to instruct the jury that if one witness, naming him, testified willfully, falsely, etc., they must disregard his entire testimony. Instead of this the court charged that if any witness testified willfully, falsely, etc. The latter is the proper way. To single out a witness and by name give such an instruction in reference to him suggests a suspicion, if it does not imply a belief, on the part of the court of the witness' perjury." (See, also, *Cline v. Lindsey*, 9 West. Rep. [Ind.], 218, s. c., 11 N. E. Rep., 441.) It is error to

single out and instruct upon the evidence of a particular witness. (*Muely v. State*, 19 S. W. Rep. [Tex.], 915.) In the opinion in *Housh v. State*, 43 Neb., 163, in considering an objection alleged against an instruction it was stated by POST, J.: "Exception was taken to the following paragraph of the instructions: 'Under the law of this state the accused is a competent witness in his own behalf, and you are bound to consider his testimony; but in determining what weight to give to his testimony you may weigh it as you would the testimony of any other witness, and you may take into consideration his interest in the result of the trial, his manner, and the probability or improbability of his testimony, and giving to his testimony such weight as, under all the circumstances, you think it entitled to.' Were the question an open one at this time the writer would with reluctance sanction a practice which permits any reference by the court to the subject of the prisoner's credibility as a witness. There is on principle no more reason to call the attention of the jury to him, and to caution them to consider his interest as affecting his credibility, than for like caution with respect to any other witness; but that question has been fully settled in this court by decisions in conformity with the practice in this case, which we are constrained to follow. (See *St. Louis v. State*, 8 Neb., 405; *Murphy v. State*, 15 Neb., 383.)" In the opinion in the case of *Watson v. Roode*, 30 Neb., 264, one of the matters under consideration was the refusal of the trial court to give an instruction to the jury worded as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff, Orange A. Roode, is a person of bad reputation for truth and veracity in the neighborhood where he resides, then, as a matter of law, this fact tends to discredit his testimony, and the jury may entirely disregard it, except in so far as he is corroborated by other credible testimony, or by facts and circumstances proved on the trial," and of this action it was said: "The defendant introduced several witnesses who testified that the plaint-

iff's reputation for truth and veracity in the neighborhood where he lived was bad. In view of this testimony the jury should have been told what weight should be given to the plaintiff's testimony. The request contained a correct statement of law, and as it was not covered by the instructions given it was error to refuse it;" and in the syllabus of the opinion it was stated: "When the general reputation of a witness for truth and veracity, in the neighborhood where he resides, is proven bad, the jury may entirely disregard the testimony of such witness, except in so far as he is corroborated by other credible testimony."

Of the question presented in the last mentioned case it may be said that in an effort to impeach a witness on the ground that his reputation for truth and veracity is bad, the witness is necessarily, as a part of the attempted impeachment, singled out by name in the questions propounded and the evidence directed specifically against him and his reputation for speaking the truth. Hence there is no impropriety in the trial court reading, as a portion of a charge to the jury, an instruction in which the witness sought to be impeached is named and the jury told to apply the proper tests and rules. In the application of the rule invoked in the case at bar, that of "*falsus in uno, falsus in omnibus*," the question of whether any one of the witnesses has willfully given false testimony on any material point, and, if so, which of the witnesses has so testified, must be determined from a view and comparison of all the evidence adduced, which witness or set of witnesses, if any, has so sworn falsely being as much a fact to be determined as any other portion of the inquiry, and its settlement, as in all points of fact, is one peculiarly and exclusively within the province of the jury.

Believing, as we do, that to single out a witness or witnesses by name and instruct the jury with regard to him or them and the weight or credibility to be accorded his or their testimony is subject to the infirmity that it may

mislead the jury, or some members thereof, to believe that the presiding judge doubts the integrity and truthfulness of such witnesses or witness, and discredit be thus cast upon testimony when the entire question should have been solved by the jury, and, moreover, that all difficulty may in all cases be avoided and the purpose sought be subserved and effectually and properly attained by giving a general instruction on the subject, applicable to any and all witnesses, we do not think it wise or best to extend the approval of this court to a doctrine or rule under which trial courts may designate witnesses by name in instructions upon the weight and credibility which may be given the testimony, beyond what has already been announced on the subject; hence we must disapprove the instruction given in the case at bar as improper and erroneous. The judgment and sentence of the district court will be reversed and the case remanded.

REVERSED AND REMANDED.

CHARLES W. SANFORD V. IVER JENSEN.

FILED DECEMBER 2, 1896. No. 6831.

1. **Chattel Mortgages:** RETENTION OF POSSESSION: BONA FIDE PURCHASERS. The retention of possession of mortgaged chattels by the mortgagor is, under section 11, chapter 32, Compiled Statutes, *prima facie* fraudulent as to his creditors, or subsequent good-faith purchasers, in case the mortgage had been duly filed. This presumption may be entirely rebutted by proof.

2. ——: ——: ——: BURDEN OF PROOF. The legal presumption of fraud arising by virtue of said statute can be invoked only by a creditor or purchaser, and the latter cannot do so until he has first established his own good faith. When this is shown, and not until then, the burden is cast upon the person claiming under the mortgage to show that it was made in good faith and without any intention to defraud.

3. ——: ——: ——. Essential element of "good faith," as that term is used in the above section, is that the subsequent pur-

chaser must have acquired the mortgaged chattels for a valid consideration, and without actual knowledge of the existence of the mortgage, or notice of such facts as would put an ordinarily prudent man on inquiry.

4. **Conversion:** PLEADING. In an action for conversion, a general allegation that the defendant unlawfully and wrongfully converted the property is sufficient.

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

Clark & Allen, for plaintiff in error.

Simpson & Sornborger, *contra*.

NORVAL, J.

This action was instituted by Charles W. Sanford to recover the value of a span of mules, which it is claimed the defendant converted. The answer is a general denial. At the close of plaintiff's testimony, the jury, in obedience to a peremptory instruction of the court, returned a verdict for the defendant, upon which judgment was subsequently rendered. Plaintiff prosecutes error.

The question involved is whether, under uncontradicted testimony, the court erred in not submitting the cause to the jury, and in directing a verdict for the defendant. On the 14th day of November, 1887, one J. R. Eddy, a resident of Saunders county, and being the owner of the mules in question, executed and delivered his negotiable promissory note to George A. Crafts for the sum of $680, payable ninety days after date, with interest at ten per cent, and at the same time secured the payment of said note by a chattel mortgage upon said mules, together with other property. The mortgaged chattels were left in the possession of Eddy, and the mortgage was duly filed in the office of the county clerk of said county, the county in which the mortgagor then resided, on December 31, 1887. Plaintiff purchased the note and mortgage before maturity, in the usual course of business, for an adequate consideration, and he has ever since been

the owner and holder thereof. The note secured by the mortgage has not been paid nor any part thereof. The defendant bought the mules from Eddy long after the filing of the mortgage, and sold them, without the authority or consent of plaintiff, to John Hudkins, and received the purchase price. What consideration, if any, Jensen paid for the mules, or whether he at the time had actual notice of the mortgage, the record does not show, nor does it appear that the mortgage was made in good faith and for a valuable consideration. No testimony having been adduced as to these matters, counsel for the defendant argues that the proper verdict was returned, claiming that the burden was upon the plaintiff to establish either the *bona fides* of the mortgage, or that the defendant is not a purchaser in good faith without notice. This proposition we shall now consider.

Section 11, chapter 32, Compiled Statutes, declares: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers." The foregoing provisions have been frequently before the court for consideration, and it has been decided repeatedly that the retention of possession of mortgaged chattels by the mortgagor renders the mortgage, although duly filed, *prima facie* fraudulent as to creditors of the mortgagor and subsequent good-faith purchasers, but that this presumption may be rebutted by evi-

dence; that in such case the mortgage is conclusively fraudulent unless it be shown that it was made in good faith and without any intent to defraud, and that the burden is upon the person claiming under such mortgage to establish its *bona fides*. (*Pyle v. Warren*, 2 Neb., 252; *Robison v. Uhl*, 6 Neb., 328; *Miller v. Morgan*, 11 Neb., 121; *Densmore v. Tomer*, 11 Neb., 118; *Marsh v. Burley*, 13 Neb., 261; *Turner v. Killian*, 12 Neb., 580; *Severance v. Leavitt*, 16 Neb., 439; *Lorton v. Fowler*, 18 Neb., 224; *Davis v. Scott*, 22 Neb., 154.) The rule deducible from these decisions is that in a suit between the holder of a mortgage of chattels and the creditors of the mortgagors or good-faith purchasers, the burden is upon the person claiming under such mortgage to show that it was made in good faith. Plaintiff contends that this rule is not applicable in this case, inasmuch as it was not established on the trial that the defendant purchased the mules in good faith. Only two classes of persons, creditors and purchasers in good faith, are entitled to the benefits of the section of the statute already quoted. As between the parties to a chattel mortgage, there is no presumption that the instrument was made to defraud creditors, nor does the presumption of fraud arise in a controversy between a person claiming under a chattel mortgage and a mere trespasser, or one who has taken possession of the mortgaged property without a semblance of right or authority. The presumption of fraud cast upon a chattel mortgage by the statute, by reason of the mortgagor retaining possession of the chattels therein described, can be invoked only in a suit between a person claiming under the mortgage and either a creditor or purchaser in good faith. Manifestly such was the intention of the legislature. Plaintiff, therefore, in order to recover was not required to make it appear that the mortgage was made in good faith, unless the defendant is embraced or included in one or the other of the classes entitled to invoke the aid of the statute. There is no claim that Jensen is a creditor of the mortgagor, but it is

insisted that he purchased the mules. There is in the record the mere bald statement of two witnesses that he "bought" them, but no consideration was proved, nor was it attempted to be shown that he purchased without actual notice of the existence of the mortgage. To constitute a *bona fide* purchaser within the meaning of the statute, he must have bought without actual knowledge of the existence of the mortgage or notice of facts sufficient to have put an ordinarily prudent person on inquiry. There is no presumption that the defendant was such a purchaser, but the burden was upon him to prove it by competent evidence, and until this was done, plaintiff was not required to introduce testimony to show the *bona fides* of the mortgagor. (*Pyle v. Warren*, 2 Neb., 241; *Ransom v. Schmela*, 13 Neb., 73.)

In the first case LAKE, J., in construing the statute which we have just quoted, uses this language: "In the case at bar, it is undoubtedly true that the property described in the mortgage, and which is the subject of the action, was left in the possession of the mortgagor; and that, under the section of the statute just quoted, as to certain persons, the transaction would be declared fraudulent. But who is entitled to invoke the aid of this provision? Not every person, most certainly. It is expressly limited by unequivocal language to creditors of the persons making the sale or assignment, and subsequent purchasers in good faith. Before a purchaser can invoke the aid of this statute, he must establish his own *bona fides*. If, at the time of his purchase, he knew of the existence of the mortgage, he will take the property charged with the just claims of the mortgagee, or in case of an assignment of the assignee of the mortgagee under the mortgage." If the defendant was aware of the mortgage when he acquired the property, he has not been defrauded by reason of the possession of the property being retained by the mortgagor, since it constituted no inducement to his purchasing. If he knew of the outstanding mortgage, he cannot invoke the statutory presumption of

fraud to defeat a recovery. It was for him to show that he was a good-faith purchaser. Had he done this, there could be no recovery by the plaintiff, unless he proved the *bona fides* of his mortgage.

Counsel for defendant rely upon *Norton v. Pilger*, 30 Neb., 860, to sustain their contention that it was essential to a recovery by plaintiff that he should prove the *bona fides* of the mortgage and the *mala fides* of the defendant's possession. The views we have expressed do not conflict with that case. The first clause of the syllabus of the opinion reads thus: "A chattel mortgage or bill of sale of personal property, not accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold, mortgaged, or assigned, is presumed to be fraudulent and void as against subsequent purchasers in good faith; and when offered in evidence in an action between the person claiming under it and a subsequent purchaser in good faith, and for value, to be effective it must be accompanied by evidence on the part of the person claiming under such chattel mortgage, or bill of sale, that the same was made in good faith and without intent to defraud creditors or purchasers. A prior recording of the instrument will not supersede the necessity of such proof." The principle enunciated in the foregoing is in entire harmony with not only the prior decisions of this court, but in accord with the rule which we have announced as controlling this case. Had Jensen shown that he was a good-faith purchaser, the case of *Norton v. Pilger, supra*, would have been in point, and it would have been necessary for this plaintiff to prove the good faith of the mortgage.

It is urged that the petition fails to show a cause of action, because it does not allege that there was any consideration for the execution of the note and mortgage, or that the defendant's possession or purchase was *mala fides*. This argument has already been met by the foregoing discussion. Moreover, there is no averment in the petition that the defendant was a purchaser of the prop-

erty; hence it was not essential that the plaintiff should have pleaded the good faith in the execution of the mortgage. It is averred in the petition that the defendant obtained possession of the property and unlawfully and wrongfully converted the same to his own use. This was a sufficient allegation of conversion of the property by the defendant. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

L. H. FORT ET AL. V. R. B. THOMPSON.

FILED DECEMBER 2, 1896. No. 8449.

Injunction: QUO WARRANTO. A court of equity will not at the suit of a private individual enjoin the county clerk, treasurer, and county judge from appointing county commissioners under section 68, article 4, chapter 18, Compiled Statutes, 1895, the remedy being complete at law, by *quo warranto* against the persons appointed.

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

James McNeny, for plaintiffs in error.

J. S. Gilham, contra.

NORVAL, J.

At the general election held in November, 1894, there was submitted to the electors of Webster county the proposition whether township organization should be discontinued. The vote was returned to the county clerk and canvassed, which showed that there were cast at said election in said county 2,500 votes, of which 995 were in favor of discontinuing township organization and 985 against the proposition. On the 4th day of January, 1895, R. B. Thompson, an elector and taxpayer of Web-

ster county, instituted this action in the district court to restrain the defendants, who are, respectively, the county clerk, county judge, and treasurer of said county, from perfecting the newly adopted system of county government by appointing county commissioners in pursuance of the provisions of section 68, article 4, chapter 18, Compiled Statutes, 1895. The grounds set up in the petition for relief are that the petition for submitting the question of the discontinuance of township organization was not signed by the requisite number of electors of the county; that, excluding the legal votes cast in favor of the proposition, it was not carried at the election, but was defeated; certain irregularities and misconduct on the part of the election officers in specified polling places; and that the board of canvassers who canvassed the returns of said election did not declare the result, or that the proposition to discontinue township organization had been carried. The defendants demurred to the petition upon the ground, among others, that it failed to state sufficient facts to constitute a cause of action, which demurrer was overruled, and a perpetual injunction was granted as prayed. The defendants have prosecuted error therefrom to this court.

The question presented for review is whether the petition states any sufficient ground for the equitable interference of the court, or for relief by injunction. Authority is conferred by the statute upon any county under township organization to discontinue such form of government whenever the majority of the electors of the county voting upon the question shall have so decided, at an election legally called for that purpose. (Compiled Statutes, ch. 18, art. 4, secs. 63, 70.) Section 64 of said article provides for the submission of the question of the discontinuance of township organization to the voters of the county, and the next section prescribes the forms of the ballots.

"Sec. 66. If it shall appear from the returns of said election that a majority of the votes cast on the question

are against the continuance of township organization, then such organization shall cease to exist as soon as a board of county commissioners are appointed and qualified, as hereafter provided.

"Sec. 67. When township organization shall cease in any county, as provided by this act, the office of county commissioner, which became vacant by reason of its adoption, is hereby restored, and such county is hereby divided into commissioner districts, with the same boundaries and comprising the same territory as such districts had when township organization was adopted.

"Sec. 68. On the first Saturday after the first Tuesday of January following the election at which township organization shall be voted to be discontinued the county commissioners of such county, for the purpose of temporary organization under this act, shall be appointed by the county clerk, treasurer, and county judge of said county, and their successors shall be elected at the next general election, in the manner provided by law in cases of the first election of a board of commissioners in any county."

The legislature has made ample provisions for any county abandoning township organization and returning to the commissioner system of county government. The record discloses that the question of changing the form of government of Webster county was voted upon by the electors of the county, and that upon the face of the returns a majority of the votes cast was in favor of the proposition. It is sought by this action to restrain the appointment of commissioners in accordance with section 68 above quoted, and thereby thwart the effecting of a temporary county organization in the mode contemplated by statute. We do not think the petition presents a case for equitable cognizance. The plaintiff seeks to have it judicially determined, in advance of any appointment being made, that the proposed or threatened appointment of commissioners by the defendants will be void. The powers of a court of equity cannot be successfully invoked

for such a purpose. The action is not to protect some private right of the plaintiff, or to prevent a private wrong from being inflicted. If for any cause the election in Webster county for the discontinuance of township organization is illegal and invalid, and the defendants should make the threatened appointment, yet the plaintiff or the public may never be injured thereby, since the persons so selected as commissioners might decline to qualify as such. Should they accept and attempt to discharge the duties of county commissioners redress could be obtained by *quo warranto* proceedings. (*Judd v. Town of Fox Lake*, 28 Wis., 583; *Jones v. Black*, 48 Ala., 540; *Seager v. Kankakee County*, 102 Ill., 669; *Delahanty v. Warner*, 75 Ill., 185; *Holmes v. Oldham*, 1 Hughes [U.S.C.C.], 76; *People v. City of Galesburg*, 48 Ill., 485; *Brown v. Reding*, 50 N. H., 336; 2 High, Injunctions, sec. 1312; *Reemelin v. Mosby*, 47 O. St., 570.) The last was an action to enjoin the mayor of Cincinnati from appointing members of the board of city affairs, on the ground that the law providing for their appointment is unconstitutional. It was held that injunction was not the appropriate remedy. The court in passing upon the question say: "There is yet no person setting up any claim to the offices held by plaintiffs, and, according to the petition, there can be none until the defendant shall exercise his power of appointment. There is no averment that the defendant is attempting to interfere with the possession of the plaintiffs, or that he threatens to do so. The averment is that he threatens to appoint the members of the board of city affairs in pursuance of the act passed at the special session of the legislature, and that 'such members, if appointed, will attempt to take possession of the offices now held by plaintiffs and to exercise and perform the duties lawfully incumbent upon the plaintiffs, and that they will endeavor to intrude into said offices and seize upon the records and property therein situated.' Such attempted interference on the part of those who shall be appointed may, as we have seen, afford grounds for an in-

junction against them. The present action, however, has no other purpose than to prevent the mayor from exercising his appointing power under the statute referred to, because it is feared that the persons whom he may appoint to fill the offices thereby created may attempt to deprive the plaintiffs of those claimed by them. The only interest the plaintiffs now have, in seeking to test the constitutionality of the statute, is to have it determined, in advance of any appointments under it, that persons so appointed will acquire no valid title to the offices they may be selected to fill; and to have it adjudged that by reason of the unconstitutionality of the act the offices held by the plaintiffs have not been abolished, and, therefore, their continuing title to them is unassailable, notwithstanding the act. The petition presents no questions for adjudication except those relating to the title of the plaintiffs to the offices they claim to hold, and the authority of the mayor to perform the official act of appointing other officers under the provisions of the statute. For the settlement of these questions injunction is not the proper remedy. An adequate remedy at law is provided." In *Osborn v. Village of Oakland*, 49 Neb., 340, decided at the present term, it was held that the holding of an election by the municipality for city officers would not be enjoined upon the alleged ground that the corporation had no legal existence as a city. The principle which controlled the decision in that case governs this. The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

JOHN NICHOLS V. STATE OF NEBRASKA.

FILED DECEMBER 2, 1896. No. 8447.

1. **Intoxicating Liquors:** SALE OR GIFT WITHOUT LICENSE. Under the provisions of section 11, chapter 50, Compiled Statutes, 1895, each act of selling or giving away any of the liquors therein named, without a license so to do, constitutes a misdemeanor punishable by fine or imprisonment.

2. ———: ———: INFORMATION: SENTENCE. In prosecutions under said section several distinct offenses may be charged in one information or indictment in different counts, and a separate sentence should be imposed for each offense of which the accused has been convicted.

3. ———: ———: ———: COUNTS: SENTENCE. Where an information contains different counts, each charging the defendant with the sale of intoxicating liquors in violation of section 11, chapter 50, Compiled Statutes, and he is found guilty under several counts, the punishment is not to be aggregated so as to make a single or entire punishment for all of the offenses, but a separate sentence is to be imposed for each conviction, the same as though all such offenses were charged in separate informations and at different times. (*State v. Chandler*, 31 Kan., 201; *State v. Carlyle*, 33 Kan., 716.)

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

H. Wade Gillis and *C. A. Baldwin*, for plaintiff in error.

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

NORVAL, J.

This was a prosecution for selling intoxicating liquors without a license. The information contained three separate counts, and upon the trial the jury found the defendant guilty as charged in each count, and the court imposed as sentence upon the accused a fine of $300 for each offense, or count, set out in the information, and to pay the costs of prosecution. The defendant has brought the record to this court for review.

But a single point is relied upon for reversal, which we shall now consider, viz., that the fines assessed exceed the limit fixed by law. The information was framed under section 11, chapter 50, Compiled Statutes, 1895, which declares that "all persons who shall sell, or give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks, without having first complied with the provisions of this act, and obtained a license as herein set forth, shall for each offense be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned not to exceed one month in the county jail, and shall be liable in all respects to the public and to individuals, the same as he would have been had he given bonds and obtained license as herein provided," etc. This court has held, and we think rightly, that the foregoing statute makes each and every act of selling or giving away of any of the liquors therein named, without license so to do, a misdemeanor. (*State v. Pischel*, 16 Neb., 490; *Smith v. State*, 32 Neb., 105.) The information charges the defendant with the commission of three several and distinct misdemeanors, and the offenses being of the same general character, they were properly joined in the same information. (*Burrell v. State*, 25 Neb., 581; *Martin v. State*, 30 Neb., 507.) It is the settled doctrine in this state that in prosecutions for misdemeanors, a separate sentence should be imposed on each count of the information or indictment upon which the accused has been convicted. (*Burrell v. State, supra; Martin v. State, supra.*) And where more than one sentence of imprisonment is passed, the judgment should not fix the day on which each successive term of imprisonment should be given, but should direct that each successive term should commence at the expiration of the one imposed by the previous sentence. (*In re Walsh*, 37 Neb., 454.) In the case at bar, as already stated, a separate fine of $300 was adjudged against the defendant under each count of the information, which was less than

the maximum sum fixed by the statute. But it is argued that the court did not possess the power, under the law, to assess a fine in this case aggregating more than $500. That is the maximum fine that can be imposed for any violation of said section 11, and had the defendant been convicted of but a single offense, a fine in excess of $500 could not be inflicted. He was, however, charged with, and convicted of, three distinct crimes, and the court could properly fine him for each offense not exceeding the maximum sum prescribed by law, to-wit, $500. The aggregate amount of the fines is not limited to that sum. Had a separate information been filed for each of the three offenses, and had convictions followed, there could be no doubt a fine of $500 in each case might have been inflicted. That the crimes were joined in the same information does not change the rule. There were, in effect, three prosecutions, the offenses, for the purposes of trial, being merely joined in one information. (*State v. Faber*, 28 Neb., 803.) In that case the defendant was convicted on seven counts in an information for selling intoxicating liquors without a license, and a fine imposed of $100 for each offense, being seven hundred dollars, was sustained. To the same effect are *State v. Chandler*, 31 Kan., 201; *State v. Carlyle*, 33 Kan., 716; *State v. Hodges*, 45 Kan., 389; *City of El Dorado v. Beardsley*, 36 Pac. Rep. [Kan.], 746. There being no error in the record, the judgment is

AFFIRMED.

JOHN J. GILLILAN ET AL., APPELLANTS, V. SIDNEY V. MURPHY ET AL., APPELLEES.

FILED DECEMBER 2, 1896. No. 6951.

Deficiency Judgment: COLLATERAL ATTACK: EVIDENCE. In a collateral proceeding by which is attacked a deficiency judgment as having been entered without notice of the pendency of the motion

therefor, evidence cannot be considered which in its nature is merely contradictory of satisfactory proof of service submitted to the court by which the deficiency judgment was entered.

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

W. B. Comstock and *John P. Maule*, for appellants.

Daniel F. Osgood, contra.

RYAN, C.

Mary J. Canfield executed two notes to A. D. Kitchen and John J. Gillilan. By indorsement in blank, Kitchen and Gillilan transferred these notes to Sidney V. Murphy. In a proceeding for the foreclosure of a mortgage securing said notes the indorsers as such were made defendants in the district court of Lancaster county. There was a decree which, by Mary J. Canfield, was stayed conformably to the provisions of section 477*b* of the Code of Civil Procedure. After the expiration of the period of stay there was a sale of the mortgaged premises, followed by a deficiency judgment against Kitchen and Gillilan and Mary Canfield for the amount of the balance owing to Murphy. For the collection of this deficiency judgment an execution was issued and placed in the hands of the sheriff of Lancaster county. As sole plaintiffs, Gillilan and Kitchen began this action, in which Murphy and Sheriff McClay were made defendants. Its object is perhaps most accurately stated by quoting the prayer of the petition, which was in this language: "The plaintiffs therefore pray that said defendants be enjoined from levying said execution upon the property of the plaintiffs or from in any way acting upon the same, and that, upon the final hearing of this case, said judgment may be set aside and held for naught, and for such other and further relief as equity may require." If this prayer had been granted the deficiency judgment would have been in effect vacated as well against Mary J. Canfield

as against Gillilan and Kitchen. It is probable that the fact that Mary J. Canfield had availed herself of the benefit of a stay influenced the action of counsel in omitting to make her a party plaintiff. Whatever may be the reason for this omission, it is clear that it must operate to prevent an inquiry into the merits of the original decree. The alleged errors in the rendition of a deficiency judgment cannot be reviewed in this a purely collateral proceeding, and this observation is applicable to that with which it is sought to affect the original decree. This leaves but a question of fact for our consideration, and that is as to whether or not notice of the pendency of the motion for a deficiency judgment was served on Mr. Gillilan and Mr. Kitchen. In presenting this question counsel on both sides comment on the evidence elicited in this case as though that alone should govern. It is perhaps unnecessary to repeat that by this action it is sought collaterally to question the validity of the deficiency judgment. In the record of the confirmation and of the entry of a deficiency judgment we find that there was an affidavit of service of the notice of the pendency of a motion for a deficiency judgment in this language: "John B. Cunningham, being by me first duly sworn, deposes and says that he served a copy of the above notice to A. D. Kitchen and J. J. Gillilan by their attorney, John P. Maule, and on Mary J. Canfield by leaving at her usual place of residence, and was served on each and all of the parties on the 26th day of June, 1893." This was such proof of service as justified the district court in acting on the motion to which it referred. In this collateral proceeding we certainly cannot inquire into the sufficiency of the evidence to sustain the judgment assailed. Even in the same action the sufficiency of this evidence would be presumed in support of the ruling of the court, and in a collateral action this presumption is conclusive under the circumstances of this case. The judgment of the district court is

AFFIRMED.

OMAHA STREET RAILWAY COMPANY V. LILLIE LEIGH, ADMINISTRATRIX.

FILED DECEMBER 2, 1896. NO. 7010.

Master and Servant: DEATH OF STREET-CAR DRIVER: VICIOUS ANIMALS: ACTION AGAINST STREET RAILWAY COMPANY: VERDICT FOR PLAINTIFF. The evidence in this case examined, and *held* insufficient to sustain the verdict of the jury.

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

John L. Webster and *Breckenridge & Breckenridge*, for plaintiff in error.

Cowin & McHugh, contra.

RYAN, C.

An opinion in this case was reported in 36 Neb., 131. Subsequently, upon being remanded, there was a verdict for the plaintiff in the district court of Douglas county in the sum of $3,000, upon which a judgment was duly rendered. The street railway company, by its petition in error, seeks a reversal of this judgment.

We have found in the record no question of importance other than that to which counsel have for the most part directed their attention, and that is whether or not the verdict was sustained by sufficient evidence. The railway company was charged in the petition with having furnished for use on one of its lines a horse of known vicious disposition, by which Elmer Leigh was, on September 5, 1889, kicked so severely that he died shortly afterward. There is no sufficient evidence to sustain this verdict, unless it appeared that a certain horse owned by the company was the one furnished Leigh to drive. The street railway at the time of the accident had two horses, each of which was known by the name of "Dude." It is conceded that one of these, a very black animal, was ordi-

narily of a gentle disposition, and by the company it is insisted that this was the animal which kicked Leigh, being thereto provoked by his negligent conduct in repeatedly striking it under the flank with the lines. The other animal was of such a dark brown or dark bay color that when it had first shed its coat it might be properly described as black. The defendant in error insists that there was such evidence as justified the jury in assuming that the horse that kicked Leigh was the dark brown one, as to which, without question, the proofs were satisfactory that it was of a vicious disposition, of which disposition the company was sufficiently aware.

Mr. Leverton was foreman of the barn of the company on Twenty-sixth and Lake streets, and testified, upon being called as a witness by the defendant in error, that the horse that kicked Mr. Leigh was called by the name of "Dude." Daniel Martin, another witness for the defendant in error, then testified that he had been in the employ of the company and knew the horse called "Dude," and that this horse was one that would kick while being driven, and that on account of his bad disposition it was usual to work this horse only when there was little travel on the streets. This witness described the horse to which he was referring as dark brown, and not coal black, though at some times of the year he would be called a black horse, and said that this horse was kept for three years at the barn of the company on Twenty-first and Cuming streets, from whence he was transferred to the Lake street barn. This witness further testified that he quit the service of the company in January of the year 1889, and that the above transfer was after that time, some time in the winter or fall. Frank Merritt, another witness of the defendant in error, testified that on September 5, 1889, he was working for the street railway company; that he remembered but one horse known by the name of "Dude" owned by the company; that said horse would kick if he got over the tug, or if whipped, and that this horse, during most of the six years that

witness was in the employ of the company, was kept at the Cuming street barn. This witness fixed the time he quit the employ of the street railway company as three and one-half years before the date of the trial in the district court, which ended on May 14, 1894. He said the horse that he referred to was transferred to the Lake street stable before he quit working for the street railway company, but how long before he could not say. This horse was dark brown. E. B. Seidner, another witness for the defendant in error, testified that he left the employment of the street railway company about four years before the trial at which he was testifying; that he knew a dark brown horse named "Dude" which was kept at the Cuming street barn, and that this horse would not work when first purchased, as witness supposed, and was therefore used as a saddle horse to some extent. M. V. Wilbourn testified on behalf of the defendant in error that he saw Leigh stop his team to take on a passenger; that when he tried to start his horses they would not go; that Leigh thereupon struck the nigh horse with the line, but it reared up and Leigh struck him again; then the horse kicked Leigh twice, whereby was inflicted the injury of which he afterward died. The car at the time was loaded full in front. This witness testified that subsequently he saw, if he was not greatly mistaken, the same horse on the same line at Twentieth and Lake streets, and it was rearing and charging. If it was not the same horse, he said, on cross-examination, it was very much like it.

It was clearly shown, and not contradicted, that the team Leigh was driving when he was injured had been kept at the Lake street barn, and not at the Cuming street barn. This fact illustrates the purpose of the evidence, which was directed toward proving that the vicious horse was taken from the Cuming street barn to the barn on Lake street before Leigh was hurt. While it is possible that this transfer might have been effected before September 5, 1889, it is quite as likely that it was after the

date just mentioned, and if the latter suggestion is correct, it could not have been the dark brown horse which Leigh was required to drive. The testimony last above referred to, as to the actions of the horse at Twentieth and Lake streets, refers to a time subsequent to the time of the accident, hence it had no bearing as affecting the company with notice of the disposition of the horse then seen by the witness, even if it was the black one. There had been no such disposition manifested by the black horse before Leigh was hurt, and this single subsequent instance was therefore unimportant. This witness did not undertake to describe by its color the horse Leigh was driving, so that his testimony in no degree tended to establish the fact that the brown horse was the one which Leigh struck. The car on which Leigh was a driver was, on September 5, 1889, loaded with passengers on their way to the fair grounds. It was attempted to show by the evidence that on such extraordinary occasions there was a necessity for a temporary transfer of horses from one line to another, from which, it is claimed, the inference might be drawn that the dark brown horse had been, on September 5, 1889, taken to the Lake street stable. This, however, if found by the jury, must have been purely a matter of inference, for there was no evidence of it as a fact. In *Kilpatrick v. Richardson*, 37 Neb., 731, it was held that to sustain a verdict for damages on account of an injury suffered by alleged negligence of the defendants there must be evidence that such injury resulted from the negligence charged, and that such causation could not be left to the mere conjecture of the jury. The same principle, in substance, was stated and applied in *Omaha & R. V. R. Co. v. Clarke*, 39 Neb., 65, and in *Kilpatrick v. Richardson*, 40 Neb., 478. A very careful examination of the evidence adduced to show that the plaintiff in error was guilty of negligence, in furnishing the horse for Mr. Leigh to drive, has failed to satisfy us that there was such evidence submitted as enabled the jury to do more than merely conjecture that the dark brown horse

might have inflicted the injuries which resulted in the death of Mr. Leigh. There is found no evidence from which it could be fairly inferred that there was negligence in requiring him to drive the black horse; indeed, the docility of this animal is strongly commented upon by counsel for the defendant in error as affording satisfactory evidence that the injury to Leigh must have been inflicted by the other horse. As the proofs failed to do more than to furnish grounds for mere conjecture that Leigh when injured was driving the dark brown horse, there was a failure to show the existence of such negligence as would render the company liable. There was direct testimony that the horse which kicked Mr. Leigh was taken from the Lake street stable and was the black horse. We would not feel justified in acting upon this alone if there had been any satisfactory proof to the contrary, for we recognize the applicability of the rule that where the evidence is such as to afford grounds for different conclusions among reasonable men, the verdict of the jury should not be disturbed. The judgment of the district court is

REVERSED.

IRVINE, C., not sitting.

CAPITAL NATIONAL BANK AND KENT K. HAYDEN, RECEIVER, V. COLDWATER NATIONAL BANK ET AL.

FILED DECEMBER 2, 1896. No. 7346.

1. **Banks and Banking:** RECEIVERS: TRUST FUNDS. A fund which comes into the possession of a bank with respect to which the bank has but a single duty to perform, and that is to deliver it to the party thereto entitled, is a trust fund and is therefore incapable of being commingled with the general assets of such bank subsequently transferred to its receiver.

2. ——: ——: ——. Under the circumstances above indicated the receiver of the bank is merely substituted as trustee, and its funds in his hands should be devoted to discharging such trust before distribution thereof is made to the general creditors of the bank.

3. **Interest:** TRUST FUNDS. Under the provisions of chapter 44, Compiled Statutes, the *cestui que trust* is entitled to seven per cent interest per annum on the trust fund above considered.

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

See opinion for cases referred to by counsel.

Cobb & Harvey and *G. M. Lambertson*, for plaintiff in error.

Pound & Burr, *Darnall & Kirkpatrick*, and *Charles O. Whedon*, *contra*.

RYAN, C.

There were submitted with this case on the oral argument four others which involved the same question. These were the Coldwater National Bank v. Charles E. Magoon et al., Capital National Bank v. First National Bank of Cadiz, Hayden, receiver of the Capital National Bank, v. Genesee Fruit Co., and Hayden, Receiver, v. Samuel Cupples Woodenware Co. All five of the cases had been determined adversely to the receiver of the Capital National Bank, in the district court of Lancaster county, and were in this court presented upon as many records. It is not necessary to state the facts involved in each, for the sole question presented is fully illustrated by the facts of this particular case.

The Coldwater National Bank, in October, 1892, was doing a banking business at Coldwater, Michigan. At that time the Capital National Bank was engaged in a like business in Lincoln, Nebraska. On the 22d of said month the Hemingford Bank and Job Hathaway executed their promissory note to the Capital National Bank for the sum of $4,000, due in ninety days from its date. On the same day this note was indorsed, without recourse, by the payee, Charles W. Mosher, its president, and R. C. Outcalt, its cashier, and sold to the Coldwater

National Bank. The Hemingford Bank had with the Capital National Bank a sufficient current account to cover all the payments which it attempted to make as hereinafter described, and was not aware that the aforesaid note had been sold. On December 7, 1892, the cashier of the Hemingford Bank sent his check on the Hemingford Bank to the Capital National Bank with instructions that the same should be indorsed on the said note. This note was received by the Capital National Bank from the Coldwater National Bank for collection on January 10, 1893, and on the 20th of said month, having received $2,500, the balance due thereon, the Capital National Bank returned said note, duly canceled, to the Hemingford Bank. The Capital National Bank ceased to do business on January 21, 1893, and on the next day was taken possession of by a national bank examiner, by whom its assets were soon afterwards turned over to a receiver of said bank duly appointed by federal authority. It was insolvent when the examiner went into possession, and had never remitted the above $4,000, or any part of it, to the Coldwater National Bank. This action was brought in equity for a judgment requiring full payment of the above $4,000, with interest, out of the funds of the Capital National Bank in the hands of the receiver. On the trial it was shown that when the Capital National Bank was taken possession of by the receiver it had on hand $11,000 in cash. The district court, by its judgment, required the receiver to pay in full the said sum of $4,000, with interest as prayed, on the theory that this amount was a trust fund which, as such, had come into the hands of the receiver.

It is conceded by the plaintiff in error that the relief granted by the district court was in conformity with the views expressed more or less directly by this court in *Wilson v. Coburn*, 35 Neb., 530, *Anheuser-Busch Brewing Association v. Morris*, 36 Neb., 31, *Griffin v. Chase*, 36 Neb., 328, and *State v. State Bank of Wahoo*, 42 Neb., 896, but it is urged that a re-examination of the principles involved

should satisfy us that these cases proceeded upon an erroneous view of the law as now settled. A very careful examination has been made of all cases cited in respect to the pivotal question which has already been sufficiently indicated as having been acted upon by the district court. Of those cited by the defendant in error the following are more or less directly in point, to-wit: *Peak v. Ellicott*, 30 Kan., 156; *Myers v. Board of Education*, 51 Kan., 87; *Van Allen v. American Nat. Bank*, 52 N. Y., 1; *People v. City Bank of Rochester*, 96 N. Y., 32; *Baker v. New York Exchange Bank*, 100 N. Y., 31; *Cragie v. Hadley*, 99 N. Y., 131; *Importers & Traders Nat. Bank of New York v. Peters*, 123 N. Y., 272; *Elmira Savings Bank v. Davis*, 142 N. Y., 590; *Farmers & Mechanics Nat. Bank v. King*, 57 Pa. St., 202; *Harrison v. Smith*, 83 Mo., 210; *Stoller v. Coates*, 88 Mo., 514; *Third Nat. Bank of St. Paul v. Stillwater Gas Co.*, 36 Minn., 75; *Davenport Plow Co. v. Lamp*, 80 Ia., 722; *Independent District of Boyer v. King*, 80 Ia., 497; *Nurse v. Satterlee*, 81 Ia., 491; *Continental Nat. Bank v. Weems*, 69 Tex., 489; *Smith v. Combs*, 49 N. J. Eq., 420; *Jones v. Kilbreth*, 49 O. St., 401; *First Nat. Bank of Central City v. Hummel*, 14 Colo., 259; *In re Johnson*, 61 N. W. Rep. [Mich.], 352; *Howard v. Walker*, 21 S. W. Rep. [Tenn.], 897; *San Diego County v. California Nat. Bank*, 52 Fed. Rep., 59; *Massey v. Fisher*, 62 Fed. Rep., 958; *First Nat. Bank of Montgomery v. Armstrong*, 36 Fed. Rep., 59; *Foster v. Rincker*, 35 Pac. Rep. [Wyo.], 470; *Central Nat. Bank v. Connecticut Mutual Life Ins. Co.*, 104 U. S., 54; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S., 566; *Peters v. Bain*, 133 U. S., 670; *Knatchbull v. Hallett*, 13 Ch. Div. [Eng.], 696.

In the cases cited in this controversy there are two classes, one of which proceeds upon the theory that a lien may be enforced against the specific deposit so long as it can be actually identified, or should be held segregated by implication of law on account of a fraudulent concealment by the officers of the bank of its insolvent condition when receiving a very recent deposit, whereby the depositor was induced to make such deposit. The other

treats the deposit as in its essence a trust fund, incapable in its very nature of being commingled with other funds. In argument it was insisted, on behalf of the plaintiff in error, that in any event there must be an identification of the fund proposed to be charged as being composed, in part at least, of the very money which had come into the hands of the receiver. In support of this contention there were cited *Wasson v. Hawkins*, 59 Fed. Rep., 233, *Boone County Nat. Bank v. Latimer*, 67 Fed. Rep., 27, *Lake Erie & W. R. Co. v. Indianapolis Nat. Bank*, 65 Fed. Rep., 690, *Northern Dakota Elevator Co. v. Clark*, 53 N. W. Rep. [N. Dak.], 175, *Standard Oil Co. v. Hawkins*, 74 Fed. Rep., 395, and *Spokane County v. Clark*, 61 Fed. Rep., 538. These adjudications insisted upon a specific identification to entitle to equitable relief, but they are of little value in this case, because they belong in the first of the two classes above indicated. They furnish no light as to the principle applicable to the second class, and it is with that class that we are at present concerned. As illustrative of the confusion into which it is easy to fall in this matter, we refer to *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep., 172, cited by the plaintiff in error. In this case it was sought to impress upon a fund in the receiver's hands a trust, because as such it had been deposited in the bank, the relation of debtor and creditor being expressly disclaimed. The judge of the federal court who heard and determined this case ignored the distinction, which should have been recognized, and enforced the rule applicable where it is sought to reclaim the money actually deposited, and, a specific deposit not having been traced into the hands of the receiver, there was a denial of equitable relief. For this reason we cannot see that the *Philadelphia Nat. Bank v. Dowd, supra*, should have any special weight in the determination of the question with which we are now concerned, and in this view we are in accord with the conclusions reached in *Massey v. Fisher*, 62 Fed. Rep., 958, as to the value of this very case.

Another adjudication in which there seems to have

been misapprehended an opinion of the supreme court of the United States was *Anheuser-Busch Brewing Association v. Clayton*, 6 U. S. C. C., 108. The opinion of the supreme court referred to was announced by Brewer, J., and held simply that where current collections had been entrusted to a bank under an agreement that on the 1st, 11th, and 21st of each month remittances of the aggregate amounts meantime collected should be made, that as to these accumulations there existed merely the relation of debtor and creditor between the bank and the party for whom such collections had been made, and that therefore no trust relation existed. (*Commercial Bank of Pennsylvania v. Armstrong*, 148 U. S., 50.) It is possible that the court of appeals, which announced its opinion on May 22, 1893, may not have noted that the supreme court, in its opinion announced on March 6, 1893, while it affirmed the opinion of the inferior court, did so upon a distinctly different ground from that upon which the inferior court had proceeded. Whether or not there was the oversight indicated, one thing is very clear to our minds, in view of the history of *Commercial Bank of Pennsylvania v. Armstrong*, and that is that the case of *Anheuser-Busch Brewing Association v. Clayton* is not entitled to the weight claimed for it by the plaintiff in error.

In *People v. Merchants & Mechanics Bank*, 78 N. Y., 269, cited by the plaintiff in error, there was charged on the books of the bank the amount of a draft drawn through the bank upon one of its customers, but the drawer was not accordingly credited, and this omission was held of controlling force in determining that there existed between the bank and drawee the relation of debtor and creditor, and that as between the bank and the drawer there was no such relation. It seems to us that this was rather a strained statement of the relation of the parties concerned, for the bank issued and sent to the drawer above indicated its draft for the amount of the collection charged against its customer, and any entry it might have made in its books could not have more unequivocally

manifested its relation of trustee towards the party by whom it had been trusted to make such collection.

In *Frank v. Bingham*, 58 Hun [N. Y.], 580, it was held that as the proceeds of a note entrusted to the bank for collection had not been actually traced into the hands of the receiver of the bank, there existed no right to have declared a special lien upon the assets of such bank in favor of the payee of this note. Substantially the same rule was acted upon in *Bank of Commerce v. Russell*, 2 Dill. [U. S. C. C.], 215, and we cannot but think that in thus denying the right to equitable relief for the reason indicated these courts too much restricted the rights of the plaintiff to equitable relief, for in each of them the relation of trustee and *cestui que trust*, and their incidental liabilities and rights, were completely ignored.

This completes a review of all the cases cited by the plaintiff in error which we find in any degree applicable to the question urged, and these certainly are not so convincing in their reasoning, nor so clearly in point, that, in the face of the great array of judicial determinations cited by defendant in error, we should feel bound to recede from the line indicated by the cases already decided by this court. It seems, however, to be assumed that this line has been adopted by reason of the ruling of the supreme court of Wisconsin in *McLeod v. Evans*, 66 Wis., 401, cited with approval in some of our cases, and that the subsequent change of front by that court in *Nonotuck Silk Co. v. Flanders*, 58 N. W. Rep. [Wis.], 383, necessitates a corresponding tactical movement on the part of this court. In neither of these cases did the supreme court of Wisconsin act with the unanimous assent of all its members. The reasoning of the majority of the court found in *McLeod v. Evans* seemed to us very satisfactory, and it is none the less so because it is now merely questioned by another majority of that court entertaining other views. If the supreme court of Wisconsin had been a unit in either opinion it would have been valuable only as a precedent. In no sense would it have constituted

an authority. The later reasoning of a majority of the members of that court has been carefully considered, and in it we find no sufficient argument to convince us that we should recede from the line of our former opinions.

The judgment of the district court required the payment of interest on the sum which the receiver was thereby adjudged to pay to the defendant in error. It is argued that as its claim is for specific moneys deposited, the relief must be limited to that sum, and that therefore no interest was allowable. It is probably true that this result would follow in the absence of a controlling statute, but this we need not consider, for it is provided in chapter 44 of the Compiled Statutes that interest shall be at the rate of seven dollars for each one hundred dollars, annually, "on money received to the use of another and retained without the owner's consent, express or implied." The rate of interest fixed by the district court was conformable to this legislative enactment and was, therefore, proper. The judgment of the district court is

AFFIRMED.

CAPITAL NATIONAL BANK ET AL. V. GENESEE FRUIT COMPANY.

FILED DECEMBER 2, 1896. No. 6977.

Banks and Banking: RECEIVERS: TRUST FUNDS.

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

Cobb & Harvey, for plaintiffs in error.

Mockett, Rainbolt & Polk, contra.

RYAN, C.

Governed by the result reached in *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb., 786, with which it was argued, the judgment of the district court in this case is

AFFIRMED.

CAPITAL NATIONAL BANK ET AL. V. SAMUEL CUPPLES WOODENWARE COMPANY.

FILED DECEMBER 2, 1896. No. 6978.

Banks and Banking: RECEIVERS: TRUST FUNDS.

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

Cobb & Harvey, for plaintiffs in error.

Mockett, Rainbolt & Polk, contra.

RYAN, C.

In conformity with the views expressed in *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb., 786, which are necessarily determinative of the result of this case, the judgment of the district court is

AFFIRMED.

COLDWATER NATIONAL BANK, APPELLEE, V. CHARLES E. MAGOON ET AL., APPELLANTS.

FILED DECEMBER 2, 1896. No. 7198.

Banks and Banking: RECEIVERS: TRUST FUNDS.

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

Cobb & Harvey, *G. M. Lambertson*, and *Charles E. Magoon*, for appellants.

Pound & Burr, *contra.*

RYAN, C.

This case involves the same question decided in *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb., 786, and, following the determination of that case, is

AFFIRMED.

CAPITAL NATIONAL BANK ET AL. V. FIRST NATIONAL BANK OF CADIZ, OHIO.

FILED DECEMBER 2, 1896. No. 7345.

Banks and Banking: RECEIVERS: TRUST FUNDS.

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

Cobb & Harvey and *G. M. Lambertson*, for plaintiffs in error.

John B. Cunningham and *Abbott, Selleck & Lane*, *contra.*

RYAN, C.

This case is of the same general nature as *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb., 786. It was submitted upon the same argument, and, governed by the result reached in that case, this is

AFFIRMED.

RED WILLOW COUNTY V. B. B. DAVIS.

FILED DECEMBER 2, 1896. No. 6914.

1. **Paupers:** LIABILITY OF COUNTY FOR SERVICES OF PHYSICIAN: JUSTICE OF THE PEACE. In counties where no poorhouse has been established and opened for the reception of the paupers, the justices of the peace of the various precincts of such county are vested with entire and exclusive superintendence of the paupers in their precincts; and such a county is not liable for services rendered by a physician to a pauper, unless it appears that such physician had been employed by some of the overseers of the poor.

2. ———: MAINTENANCE: LIABILITY OF COUNTY. When the county board of a county has established and opened a poorhouse for the reception of paupers, and spread such fact upon its records, the jurisdiction and authority of the various justices of the peace of the county over the paupers therein cease, and the superintendence, care, and maintenance of the paupers devolve upon the county board.

3. ———: ———: ———: PHYSICIANS. When a county board has established and opened a poorhouse for the reception of its paupers, the board may either employ a physician by the year to furnish such medical services as may be necessary to the paupers of the county, or may employ a physician to attend each case as it arises.

4. ———: ———: ———: ———: PLEADING. When a petition alleges and a demurrer admits that the plaintiff was employed by the county board to render professional services as a physician for a pauper, the presumption will be indulged that the county board kept within the law in employing the physician, and that a poorhouse had, prior to that time, been established and opened in said county for the reception of its paupers.

5. ———. Chapter 67, Compiled Statutes, construed.

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

Sidney Dodge, for plaintiff in error.

W. S. Morlan, contra.

RAGAN, C.

B. B. Davis sued Red Willow county in the district court thereof. The county interposed a general demurrer to the petition, which was overruled, and, the county refusing to plead further, judgment was rendered in favor of Davis, to reverse which the county prosecutes error.

Davis alleged in his petition that he was a duly licensed practicing physician, residing in said county; that on the 2d of April, 1893, he "was employed by Red Willow county as said physician and surgeon" to render professional medical services for a pauper; that he rendered such medical attendance and services for said pauper; that the services rendered were reasonably worth the sum of $——; that on the 12th of July, 1893, he presented to the county commissioners of said county his claim against it for the services rendered, and that such claim was rejected. The question presented by the record is whether a county is liable for professional services rendered by a physician to a pauper in pursuance of a contract made with its board of commissioners or supervisors. Chapter 67, Compiled Statutes, deals with the subject of paupers. Section 1 of the chapter provides that certain relatives of a pauper shall be liable for his support, section 2 prescribes what relatives shall first be called upon for the support of a pauper, and section 3 provides that when a pauper shall not have any relatives in this state liable for his support, or, having relatives, they shall be unable or refuse to maintain him, that "then the said pauper shall receive such relief as his or her case may require, out of the county treasury, in the manner hereinafter provided." Section 4 of said act provides: "The justices of the peace in each precinct

shall be, and they are hereby made, overseers of the poor, and are vested with the entire and exclusive superintendence of the poor in their respective precincts, excepting in cases of corporate towns or cities," etc. Section 6 provides that the overseers of the poor shall, at stated times, make report of their actions as such officers to the county board, and section 7 provides that upon the making of such report it shall be the duty of the county commissioners of the county to issue their warrants on the treasurer for the payment of the expenses necessarily incurred by the overseers of the poor. Section 17 provides that the county commissioners in each county are authorized, whenever they see fit to do so, to establish a poorhouse, and by section 21 of the act it is provided that whenever the county commissioners of any county shall enter upon their records that they have established a poorhouse, and that such poorhouse is ready for the reception of the poor in said county, then the authority conferred upon the overseers shall cease to be in force in said county.

In *Gage County v. Fulton*, 16 Neb., 5, it was held that a county was liable for the value of services rendered by a physician to a pauper in pursuance of a contract between the physician and the overseers of the poor of the precinct where the pauper resided.

In *Hamilton County v. Meyers*, 23 Neb., 718, it was held that the county was not liable for professional services rendered by a physician to a non-resident pauper temporarily in said county, the physician not having been employed to render such services either by the county board of the county or any overseer of the poor therein.

In the case at bar the petition alleges, and the demurrer admits, that the physician was employed by the county. This is equivalent to an allegation that the physician was employed by the board of supervisors or the board of commissioners to render the services for which he sues. We think a fair construction of the chapter under consideration is this: That in counties

where no poorhouse has been established and opened for the reception of paupers, then the justices of the peace of the various precincts of the county are vested with entire and exclusive superintendence of the paupers in their precincts, and that such county would not be liable for services rendered by a physician to a pauper unless it appeared that such physician had been employed by some of the overseers of the poor. But when the county board of a county has established and opened a poorhouse for the reception of paupers, and spread such fact upon their records, from that moment the jurisdiction and authority of the various justices of the peace of the county over the paupers therein cease, and the superintendence, care, and maintenance of the paupers of the county devolve upon the county commissioners or board of supervisors; and such board may either employ a physician by the year to furnish such medical services as may be necessary to the paupers of their county, as provided by section 4 of the chapter quoted above, or they may employ a physician to attend each case as it arises. If this construction of the chapter be correct, it follows that unless Red Willow county had established and opened a poorhouse for the reception of its paupers it would not be liable for the services rendered by Davis, unless he had been employed to render such services by some of the overseers of the poor in said county. The petition does not allege that Davis was employed by any of the overseers of the poor in said county to render the services for which he sues; nor does the petition allege that, prior to the time Davis was employed by the county, it had established and opened a poorhouse for the care of its paupers. But since the county authorities of Red Willow county would have been without jurisdiction or authority to make the contract on behalf of the county made the basis of this action, unless a poorhouse had been prior to that time established and opened for paupers, we must indulge the presumption that the county board kept within the law in employing this physician;

that a poorhouse had prior to that time been established and opened in said county for the reception of paupers, and that the jurisdiction and authority of the various justices of the peace as overseers of the poor had ceased. The judgment of the district court is

AFFIRMED.

H. T. CLARKE V. NEBRASKA NATIONAL BANK.

FILED DECEMBER 2, 1896. No. 8590.

Review: FINAL JUDGMENT: PROCEEDING IN AID OF EXECUTION: ORDER FOR EXAMINATION OF DEFENDANT. An *ex parte* order, made by a judge or court in a proceeding in aid of execution, based on sections 534 and 538 of the Code of Civil Procedure, requiring a defendant, against whom a judgment has been rendered, to appear at a time and place specified and answer, under oath, all such questions concerning his property as may be propounded to him, is an order affecting a substantial right, made in a special proceeding, made upon a summary application in an action after judgment, and is a final order within the meaning of section 581 of the Code of Civil Procedure.

MOTION by defendant in error to dismiss proceeding in error. *Motion overruled.*

Cases cited by counsel are referred to in the opinions.

Warren Switzler, for the motion.

John L. Webster, *contra*.

RAGAN, C.

In the district court of Douglas county the Nebraska National Bank obtained a judgment against Henry T. Clarke and others for $——. Some time after this an affidavit was filed in that court which recited the obtaining of the judgment; that an execution had been issued thereon and returned wholly unsatisfied; that an alias execution had been issued and was then in the hands of

the sheriff; that the defendants Clarke and others had property which they unjustly refused to apply upon the judgment; that they had no personal or real property subject to levy on execution, and that certain named persons and corporations within Douglas county were indebted to Clarke and others. Thereupon the court made an order requiring the defendant Henry T. Clarke to appear before it at a time and place named and answer under oath all such questions concerning his property as might be propounded to him. Clarke appeared and moved to vacate this order. This motion the court overruled, to which Clarke took an exception, and to reverse this action of the district court has prosecuted here a petition in error.

The defendant in error has filed a motion to dismiss the error proceeding, on the ground that the order made by the district court overruling Clarke's motion to vacate its first order is not appealable. The proceedings of the bank against Clarke are based on sections 534 and 538 of the Code of Civil Procedure.

1. It is obvious that Clarke could not take an exception to, nor prosecute error from, the order made by the court for him to appear and submit to examination, as that order was made *ex parte* and without notice. Clarke, therefore, has pursued the proper practice in filing a motion to vacate the order requiring him to appear for examination, and taking an exception to and prosecuting error from the order of the court overruling his motion to vacate the order for examination. (See *Palen v. Bushnell*, 68 Hun [N. Y.], 554.)

2. Is the order made by the district court overruling Clarke's motion to vacate the order for his appearance and examination an appealable order? Section 581 of the Code of Civil Procedure provides: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an

action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title." The order under consideration was made in a special proceeding. The order was made upon a summary application in an action after judgment therein. The remaining inquiry, then, is, did the order affect a substantial right? A substantial right is an essential legal right, not a mere technical one. The object of this proceeding is to compel the defendant, against whom a judgment has been rendered, to make a disclosure of his private affairs, of his business, of his property, credits, and of his business relations and dealings with others. Section 7, article 1, of the constitution of this state provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated," etc. And it seems that an order of a court or judge compelling the citizen to disclose his private affairs, to make an exemplification of his credits and effects and papers, and to disclose his secret business relations and dealings with others, is, on the face of it, an order affecting a substantial right. Since the citizen is guarantied the right of security for his papers and effects against unreasonable searches and seizures, he has the right to keep the existence of these papers and effects secret from the world, unless required by due process of law to make disclosures concerning them. But the requirement of the law that he shall make disclosures concerning his papers and effects and his private business affects his substantial rights.

Section 581 of our Code seems to have been taken from the Code of Ohio, but we have not been able to find any case in which the supreme court of that state has passed upon the question under consideration here. The Code of New York is substantially like ours. And in *Francis v. Porter*, 88 Hun [N. Y.], 325, it was held that an order directing a reference to ascertain what books and papers defendant had the power to produce for inspection affects a substantial right and is reviewable.

In *Re Slingerland*, 36 Hun [N. Y.], 575, an order had been issued by an inferior court requiring the appellant to appear and be examined as to certain articles of personal property alleged to be in his possession belonging to an estate in controversy in that court. The order, like the one here, was a mere order to appear and be examined. The party against whom the order was made appealed therefrom to the supreme court, and the point was there made that the order was not appealable. The court said: "That the order for examination affects a substantial right can hardly be doubted. If the appellant shows that it should not have been granted, then the refusal to set it aside affects a substantial right. The motion to set the order aside is not analogous to a motion to dismiss a complaint on the trial. Here an order of the court has been granted. If improperly, it should not stand. To require the appellant to go through with the examination and then appeal would be to deny him any redress. He claims that on the facts shown he should not be examined. * * * It could never be held that, under such an order, the party must submit to the examination and afterwards appeal."

In *Lamonte v. Pierce*, 34 Wis., 483, the defendant was ordered to appear and make disclosure in proceedings supplemental to execution. He refused to appear and the court attached him for contempt. After he was arrested he moved the court to set aside its former order. This was overruled and he took an appeal from the order of the court overruling his motion. The court said: "It is objected that the order appealed from is not appealable under the statute. But we think this objection clearly untenable. The order belongs to the second class of appealable orders specified in section * * * being a final order affecting a substantial right made in special proceedings, or upon a summary application in an action after judgment. * * * It is said that the order appealed from is not final, within the meaning of the statute, since it does not adjudge the defendant guilty of a

contempt, but merely refuses to set aside an interlocutory order previously made. But it is very obvious that the practical effect of the order is to continue in force the attachment, and that the defendant is liable to be punished for his contempt unless he can purge himself of the charge on the hearing. The fact that further proceedings will necessarily be taken does not render the order which was made any the less final and conclusive upon the question decided."

Martin v. Windsor Hotel Co., 70 N. Y., 101, was an action on account for professional services. The court made an order referring the case, upon an affidavit being filed that the trial involved the examination of an account. From this order Martin appealed. The question was whether the order of reference was an appealable order. The court of appeals decided that it was, saying: "An order of reference is an order affecting a substantial right, as the mode of trial of an action, whether by jury or by referee, is a matter of substance, and such an order is appealable," etc. The decision of the court was based on section 349 of the Code of New York, which provides: "An order is appealable * * * when it involves the merits of the action or some part thereof, or affects a substantial right."

In *Barber v. Briscoe*, 23 Pac. Rep., 726, the supreme court of Montana held: "An order refusing to set aside an order of examination of a judgment debtor in proceedings supplementary to execution is appealable."

A statute of the state of Oregon provides: "When the governor is informed, or has reason to believe, that any banking institution holds funds of any kind which have escheated to the state, he shall direct the proper district attorney to file a bill of discovery, with proper interrogatories to be answered by such bank." The state of Oregon filed such a bill against the Security Savings & Trust Company, alleging that the trust company was a corporation existing under the laws of the state and engaged in banking business, and had been for some years; that

during the time it had been in business sundry persons had made deposits of money in said bank and died intestate, without heirs, leaving said moneys on deposit in said bank; that these sums of money had escheated to the state of Oregon; that in order to recover such escheated property it was necessary to bring and maintain an action at law; and that in order to enable the state to do so it was necessary for it to learn from the trust company the names of such depositors and the amount of money deposited by each; that the state intended and proposed, as directed by the governor, to commence an action at law to recover the said deposits which had escheated; that the state was unable to bring and maintain this law action without full discovery from the bank. The prayer of the bill was for an order of the court directing the bank and its officers to appear at a certain time and place and answer under oath certain interrogatories set out in the bill, giving the names of such persons as had deposited money in the bank and had died intestate, without heirs, and the amount of such deposits. The trust company interposed a general demurrer to this bill, which was overruled, and thereupon it appealed from the order overruling the said demurrer to the supreme court of the state, and that tribunal, in *State v. Security Savings & Trust Co.*, 43 Pac. Rep. [Ore.], 162, held that the overruling of the demurrer to the bill was a final order determining the rights of the parties. The court said: "On this appeal two questions have been presented for consideration: First, whether the order overruling the defendant's demurrer and requiring it to answer the information and interrogatories as prayed for in the bill is an appealable order. * * * The right of appeal is purely statutory, and, unless the order from which the defendant's appeal is taken is a final order, judgment, or decree within the meaning of the statute, the appeal, of course, cannot be entertained. The law, as we understand it, is that an order or decree is final for the purposes of an appeal when it determines the rights of the parties;

and no further questions can arise before the court rendering it except such as are necessary to be determined in carrying it into effect." The court then cites Freeman, Judgments, sec. 36, and *St. Louis, I. M. & S. R. Co. v. Southern Express Co.*, 108 U. S., 24, and continues thus: "Within this principle we think the present order or decree is final. The suit was brought for the sole and only purpose of obtaining from the defendant an answer under oath to the several interrogatories, and for no other relief. The information is a pure bill of discovery, in aid of a contemplated action at law, asking no relief; and the only litigated question in the case is the right of the informant to the discovery sought. When, therefore, the demurrer was overruled, and the court held that the plaintiff was entitled to the relief demanded, and ordered and directed the defendant to answer the interrogatories, it effectually determined all the issues in the case, and ended the controversy between the parties so far as it could do so, leaving nothing to be done but to enforce its determination as made. No subsequent question could arise in the case except as to the form or sufficiency of the defendant's answers, and therefore, in our opinion, it was a final order or decree within the meaning of the statute, and consequently appealable; otherwise the defendant would be without remedy by an appeal, though it should be admitted that the order complained of was in violation of its clear legal rights. If, as contended by the plaintiff, before it can appeal it must comply with the order of the court, and answer fully the information and interrogatories, an appeal would be a vain and useless proceeding, for the sole object of the suit would have been accomplished and the defendant's appeal could avail it nothing."

The principle upon which the case just cited rests is the principle which controls the question under consideration here. The object of chapter 2 of the Code of Civil Procedure, being sections 532 to 549, both inclusive, of said Code, was to provide a remedy in aid of execution.

The object of the proceeding in which the order under consideration was made was to compel the judgment debtor to answer under oath as to his property and effects,—to make a disclosure for the benefit of the judgment creditor, in order that the latter might use that information to institute a creditor's bill or garnishee process. In other words, the design of the statute was that this provisional remedy, this proceeding in aid of execution, should take the place of the old bill of discovery. It must be borne in mind that we are not discussing the validity of this chapter 2 of the Code of Civil Procedure, nor must anything said here be taken as an intimation of an opinion upon our part that the courts, by virtue of the provisions of this statute, may not compel a judgment debtor to make full and complete disclosures of all his property and effects. But what we do decide is that a legal order which requires a debtor to make such a disclosure affects a substantial right of such debtor. The question is not whether the citizen may be lawfully compelled to make a disclosure of his private affairs and of his property and effects, but does an order compelling him to do this affect his substantial legal rights? If it does, the order is appealable. Neither the answer the party summoned in a special proceeding after judgment may make, nor what order the judge or court summoning him may make, can be taken into consideration in determining the legal question whether the order for him to appear and be examined is appealable. The order made by the district court in this case was an order affecting a substantial right, and, therefore, an appealable order, and the motion to dismiss the proceeding in error is overruled.

MOTION OVERRULED.

RYAN, C., dissenting.

I cannot concur in the opinion herein filed, and the grounds of my dissent are as follows: The Nebraska National Bank obtained a judgment against Henry T.

Clarke in the district court of Douglas county. After the return of one execution *nulla bona*, and while an *alias* execution was in the hands of the sheriff, an order was made by said court directing that Henry T. Clarke and certain of his debtors appear before the court at a date specified and submit to an examination with reference to his property subject to execution which it was alleged by affidavit the said Clarke was unjustly refusing to apply to the satisfaction of such judgment. Thereupon Henry T. Clarke filed his motion to set aside said order on the following grounds: "First, the affidavit upon which the order was made was insufficient in law to justify the court in making the order; second, the said affidavit was insufficient in manner and form to confer jurisdiction upon the court to make such order." This motion was overruled, and upon application the penal sum and conditions of a supersedeas bond were fixed by the district court. This bond was given and approved and this case was docketed in this court as a proceeding in error upon a petition in error which presented for review the same grounds as the motion above recited. Afterward, on due notice, there was presented by the defendant in error a motion to dismiss the proceedings in this court for the reason that the order sought to be reviewed was not final in its nature. Section 581 of the Code of Civil Procedure is in this language: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title." Plaintiff in error insists that the order whereby the district court refused to set aside the order for the examination of Henry T. Clarke was an order affecting a substantial right under the conditions provided in the above quoted section and that, therefore, the present motion should be overruled. This motion must, therefore,

be decided by determining whether or not the order sought to be reviewed was one affecting a substantial right. To aid us in reaching a conclusion on this point there have been submitted several adjudicated cases which I shall now consider.

The first case cited is *Barber v. Briscoe*, 9 Mont., 341, in which the third paragraph of the syllabus is in this language: "An order denying a motion to set aside an order for an examination of a judgment debtor upon proceedings supplementary to execution is an appealable order." An examination of the facts, however, in this case discloses that when the order was made there was not in existence a judgment and that the motion was based on this fact as showing that the district court had no jurisdiction to enter the order complained of. There was no discussion of the question as to whether or not there had been an order affecting a substantial right. The case of *National Bank of Westminster v. Burns*, 13 S. E. Rep. [N. Car.], 871, cited by the plaintiff in error, did not involve the determination of what is implied by the words "affecting a substantial right," hence it does not aid us in this investigation. In *Robens v. Sweet*, 48 Hun [N. Y.], 436, it had been shown that the judgment sought to be enforced by proceedings supplemental to execution had been discharged before such proceedings had been instituted, but the county court had permitted this discharge to be impeached as fraudulent. This the supreme court held could not properly be done, and that, therefore, the order denying the motion to dismiss the supplementary proceedings should have been sustained. In this view it was accordingly held that the order complained of was appealable, as it affected a substantial right. In *Palen v. Bushnell*, 68 Hun [N. Y.], 554, it was merely held that an appeal would not lie from an order for the examination of a judgment defendant made by a judge, but it was said that an appeal would lie from a ruling denying a motion to set aside such an order. What is properly implied by the words "affecting a substantial right" was

not involved or discussed. In *Francis v. Porter*, 88 Hun [N. Y.], 325, the order appealed from was one directing a reference to take proofs of what books and papers the defendant had power to produce for inspection and authorizing his cross-examination by plaintiff, and it was held that as the application for a discovery had been overruled there was no power to order a reference. In *Lamonte v. Pierce*, 34 Wis., 483, the refusal of the court to set aside a previous order granting an attachment against defendant as for contempt for refusing to appear in proceedings supplemental to a judgment, was held appealable. There could be no question that this affected a substantial right, but the mere fact that this contempt was with reference to the supplemental proceedings, in no way aids us in our present inquiry. These are all the cases cited by the plaintiff in error. We also refer to language of REESE, J., in *Hollingsworth v. Fitzgerald*, 16 Neb., 496.

By the defendant in error in support of its motion to dismiss there were cited *Bruce v. Crabtree*, 21 S. E. Rep. [N. Car.], 194, *Milliken v. Thompson*, 54 Jones & S. [N. Y.], 393, and *Joyce v. Holbrook*, 2 Hil. [N. Y.], 94. In the first of these three cited cases the supreme court of North Carolina held that an appeal would not lie from an order of the nature of that sought to be reviewed in this case; in the second the same ruling was made, and in the third it was held that from an order refusing to permit the examination of a judgment defendant an appeal could not be taken. In no case which has been brought to my notice, or that I have been able to find, has it been held that a mere order requiring a judgment defendant to submit to an examination touching the condition of his property was an order affecting a substantial right. It is argued that if Mr. Clarke is compelled to show the condition of his property the harm will have been accomplished and an appeal thereafter will afford him no protection. We have not been informed what matter of importance it is necessary should be withheld from pub-

licity, and until it is so shown, the probable sacrifice of a substantial right must rest wholly upon conjecture. In my opinion the motion to dismiss should therefore be sustained.

NORVAL, J.

I concur in the opinion of RYAN, C.

ÆTNA INSURANCE COMPANY v. W. A. SIMMONS.

FILED DECEMBER 2, 1896. No. 6880.

1. **Instructions**: REVIEW: ASSIGNMENTS OF ERROR. Where it is assigned for error that the district court gave or refused to give certain specified instructions, if an examination discloses that the court did not err in giving or refusing to give all of the instructions named the assignment will be overruled.

2. ———: ———: ———. An assignment that a verdict is "contrary to the instructions of the court" will be overruled if it appears that the verdict is in accordance with any one of the instructions.

3. **Assignments of Error**: BRIEFS: PRACTICE. The rule of practice of this court requires a litigant who brings a judgment here for review on error to specifically state in his petition in error of what action or omission of the court he complains; and in his brief,—in addition to a concise statement of the facts of the case,—under appropriate headings, to allege what particular thing the district court did, or refused to do, which it is claimed was error, collating under such headings the arguments and citing the authorities which he deems sustain his contention.

4. **Review**: ASSIGNMENTS OF ERROR. Only the actions or omissions of a district court which are so specifically assigned, both in the petition in error and in the brief filed here, can be considered.

5. ———: RECORDS: ERRORS: BRIEFS. Every judgment brought to this court for review comes surrounded with the presumption of correctness, and this court will not search a record for the purpose of ascertaining if it contains error. The burden is upon the party complaining of the action of the district court to specifically point out what is complained of and show that it was probably prejudicially erroneous.

6. **Insurance**: VALUE OF INSURED PROPERTY. In a suit upon an insurance policy to recover the value of insured real estate wholly de-

stroyed by fire, the sum for which said property is insured is conclusive evidence of its value. (Compiled Statutes, ch. 43, sec. 43.)

7. **Review:** HARMLESS ERROR: INCONSISTENCY BETWEEN VERDICT AND FINDING. Insurance was written upon personal property to the amount of $1,150. In a suit upon the policy the jury returned a general verdict in favor of the assured for $800, and a special finding that the value of the property was $1,600. Judgment was rendered on the general verdict. *Held*, That the inconsistency between the general and special verdicts was not one of which the insurer could complain.

8. **Insurance:** WAIVER OF PROOFS OF LOSS. An insurance policy contained a provision that in case of a fire the insured, within sixty days thereafter, should furnish to the insurer proofs of loss. After being notified of the loss the insurer's adjuster went to the farm of the assured, examined and inquired into the loss, cause of the fire, etc. The assured submitted to the adjuster a written memorandum of the items of property destroyed and their value. Some negotiations took place between the adjuster and the assured, which resulted in the adjuster offering the assured $900 in full settlement of the loss. In a suit upon the policy the insurer interposed a defense that the policy had been procured by fraud and was void from its inception. *Held*, (1) That the conduct of the insurance company after being advised of the loss justified the finding of the jury that it had refused to pay the loss and waived the furnishing of proofs thereof; (2) that the insurance company waived the proofs of loss required by the policy by defending the action on the grounds that the policy had never been in force.

9. ———: WAIVER OF ARBITRATION. An insurance company by denying its liability on the ground of a forfeiture of the policy, by reason of a breach of warranty of the insured, waives whatever right it may have had to insist upon arbitration as a means of determining the amount of the loss. *Home Fire Ins. Co. v. Kennedy*, 47 Neb., 138, followed.

10. ———: LOSS: EXAMINATION OF INSURED: VALIDITY OF REQUIREMENT: TIME AND PLACE. A fire insurance policy contained the following clause: "The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations, under oath, by any person named by this company, and subscribe the same, and as often as required shall produce for examination all books of account, bills, etc., * * * at such reasonable place as may be designated by this company or its representative," etc. A suit upon the policy was defended upon the ground that the insured had refused to submit to an examination under oath. *Held*, (1) Whether the refusal of the insured to submit to an examination, under oath, at the request of the insurer constituted a defense to the action not decided; (2) that a fair construction of the clause only required the assured to submit to an examination at such reasonable time and

place as might be designated by the company or its representative; (3) that for such refusal of the insured to constitute a defense to the action it was incumbent upon the insurance company to fix a time and place, and to designate some person authorized by law to administer oaths, before whom such examination could be had; (4) that the time fixed for such an examination must have been within a reasonable date after notice of the fire; the place of examination must have been a reasonably convenient one within the county where the assured resided.

11. ———: WARRANTIES IN APPLICATION: CONSTRUCTION: FALSE STATEMENTS: PLEADING AND PROOF. An insured made application in writing for insurance on certain buildings and personal property on his farm, in which he valued his dwelling at $700, his barn at $500, his milk house at $100, his household furniture at $500, butter and cheese apparatus and stock at $600, and hay and grain at $500. The application also contained the following: "Q. State the actual amount paid for the land. A. Sixteen hundred dollars. Q. State terms of sale. A. Cash." The application also recited: "The said applicant hereby warrants, covenants, and agrees * * * that the foregoing is a full, just, and true exposition of all the facts and circumstances, condition, situation, and value of and title to the property to be insured, and is offered as a basis of the insurance requested, and is made a special warranty, the same as if written on the face of the policy." The application was made a part of the policy issued, and the latter contained this clause: "This entire policy shall be void if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof." A suit on the policy was defended on the grounds (*a*) that the statements of the assured in the application were warranties; (*b*) that the valuation placed by the assured on the insured property and his answers that he had paid sixteen hundred dollars cash for his land were false. *Held*, (1) That the application and the policy should be construed together; (2) that the statements and answers made were representations, and not warranties; (3) that in order for such representations to constitute a defense to the action it was incumbent upon the insurance company to plead and prove that the statements and answers were made as written in the application; that they were false; that they were false in some particular material to the insurance risk; and that the insurance company relied and acted upon such statements.

12. ———: WARRANTY. A warranty, in insurance law, is the assertion by the assured of some fact on the literal truth of which the validity of the policy depends, without regard to the materiality of such fact or the motive which prompted the assertion.

13. ———: REPRESENTATION. A representation, in insurance law, is also the assertion by the insured of some fact, but the validity of the policy does not depend upon the literal truth of the assertion.

14. ———: ———: WARRANTY. Whether an assertion made by the insured of the existence of a fact is a warranty or representation is a question of law.

15. ———: ———: ———. If a doubt exists as to whether a statement made is a warranty or representation, it will be *held* a representation.

16. ———: WARRANTIES. Warranties are not to be created nor extended by construction.

17. ———: ———: REPRESENTATIONS: CONSTRUCTION. In construing a contract, for the purpose of determining whether the statements made therein were intended by the parties thereto to be warranties or representations, the court will take into consideration the situation of the parties, the subject-matter, and the language employed, and will construe a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties; that the mind of each party consciously intended and consented that such should be the interpretation of his statements.

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

Sylvester G. Williams and *George T. H. Babcock*, for plaintiff in error.

C. H. Bane and *D. B. Jenckes*, *contra*.

RAGAN, C.

This is a suit on a fire insurance policy brought in the district court of Dawes county by W. A. Simmons against the Ætna Insurance Company, hereinafter called the "insurance company." Simmons had a verdict and judgment. The insurance company prosecutes a petition in error.

1. The insurance company in the motion filed by it for a new trial assigned among others the following grounds: "The verdict is contrary to the instructions given by the court on its own motion. The court erred in refusing to give the instructions asked for by the defendant. The court erred in refusing to give the third, eighth, eleventh, thirteenth, fourteenth, sixteenth, seventeenth, nineteenth, and twenty-first instructions asked for by defendant. The court erred in giving the fifth, sixth,

seventh, twelfth, and sixteenth instructions asked for by defendant." We have examined the instructions given and refused, and ascertained that the district court did not err in giving all the instructions given, nor in refusing to give all the instructions refused, nor is the verdict contrary to all the instructions given by the court on its own motion. We cannot, therefore, further consider the assignments in the petition in error directed to the action of the court in giving and refusing to give certain instructions, nor to the assignment that the verdict is contrary to the instructions given by the court upon its own motion.

2. Counsel for plaintiff in error content themselves with a somewhat lengthy and desultory argument upon certain branches of insurance law, and then say: "The other errors referred to appear *seriatim* upon the record at pages 1, 5, 6, 7, 10, 11, 12, 14, 21, 27, 33, 34, 48, 49, 52, 53, 59, 66, 90, 102, 108, 109, 116, 119, 124, 135, and 137. A reference to the record we think a sufficient presentation of these various assignments, to which we ask the attention of the court without further argument." The rule of practice in this court is a very simple one. It requires of a litigant who brings a judgment of a district court here for review on error to specifically state in his petition in error of what action or omission of the district court he complains; and the brief filed should,—in addition to a concise statement of the facts of the case,—under appropriate headings, allege what particular thing the district court did, or refused to do, which the litigant claims was erroneous; and collated under such headings the litigant should state such arguments and cite such authorities as he deems sustain his contentions. Every judgment brought to this court for review comes surrounded with the presumption of correctness. It is not the duty of this court to search through a record for the purpose of ascertaining if it can find something which the court below did, or omitted to do, which is error; but the burden is upon the party complaining of the ac-

tion of the *nisi prius* court to specifically point out the alleged act complained of and show that it was probably prejudicially erroneous. Only the actions or omissions of the district court which are so specifically assigned, both in the petition in error and in the brief filed here, can be considered. There remain, then, in this case to be considered only two questions, namely: Is the finding of the jury supported by sufficient evidence? Is the judgment rendered the one that should have been pronounced under the evidence in the case and the law applicable thereto?

3. Is the value fixed by the jury on the property destroyed by fire sustained by sufficient evidence? The policy in suit covered both real and personal property. The real property consisted of a frame dwelling and additions thereto insured for $500, a barn insured for $300, and a milk house insured for $50. The general verdict of the jury fixed the value of these buildings at the time of their destruction at $850. The undisputed evidence is that these buildings were totally destroyed. Now, section 43, chapter 43, Compiled Statutes, provides: "Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, * * * and the property insured shall be wholly destroyed without criminal fault on the part of the insured or his assigns, the amount of insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages." Under the issues of the case the verdict of the jury includes a finding that the destruction of the property by fire was without criminal fault on the part of the insured or his assigns. In *Home Fire Ins. Co. v. Bean*, 42 Neb., 537, it was ruled: "Where real property is wholly destroyed by fire, any provision of a policy of insurance covering such property which in any manner attempts to limit the amount of the loss to less than the sum written in the policy is in conflict with the statutory rule, invalid, and will not be enforced."

To the same effect see *German Ins. Co. v. Penrod*, 35 Neb., 273; *German Ins. Co. v. Eddy*, 36 Neb., 461; *Insurance Co. of North America v. Bachler*, 44 Neb., 550. The contract in evidence, upon which this suit is based, the statute quoted above, and the authorities just cited conclusively establish the correctness of the finding of the jury as to the value of the buildings destroyed.

4. By the policy in suit Simmons was insured against loss or damage by fire upon hay and grain, in barns or in stacks, to the amount of $300; household and kitchen furniture, both useful and ornamental, $500; butter and cheese apparatus and stock on hand in milk house, $350, or a total insurance of $1,150 on personal property. The jury by its general verdict found the value of the insured personal property destroyed to be $800. Simmons testified that at the time of the fire the butter and cheese apparatus and butter and cheese insured were in the milk house on his farm and were totally destroyed; that the value of the butter and cheese apparatus was $650; that there were on hand in the milk house at the time of the fire 300 pounds of butter, worth 25 cents per pound, or $75, which was also destroyed; that there were destroyed 45 tons of hay, worth $5 a ton, $225; 500 bushels of wheat in the stack, worth 55 cents per bushel, $275. His attention was next challenged to the articles of household and kitchen furniture destroyed by fire, and he was compelled, at great length, to enumerate the numerous articles and their value. Among the articles and their value which he testified were destroyed were the following: A cook stove, $25; cooking utensils, $30; two bedsteads, $14; two bedsprings, $5; two mattresses, $10; two feather beds, $20; bedding, such as quilts, etc., $20; forty yards of carpet, $10; one "catskin" overcoat, $28; two suits of clothes, $60; a miscellaneous lot of underwear, $15; boys' clothes and underclothing, $12; eight woolen dresses belonging to his wife, $80; a lady's coat, $24; his wife's underclothing, shoes, hats, shawls, $50; twenty or thirty books, $15; sewing machine, $28;

three or four mirrors, $5; a number of pictures in frames, $2; set of silverware, $50; silver knives, forks, etc., $25; a hotel outfit of china, tableware, cups, saucers, etc., $150 to $200; potatoes on hand, $2.50; four hundred pounds salted pork, $40; twenty gallons fruits and jellies, $50; cupboard, $10; center table, $5; a bureau filled with underclothing, etc., $30; a commode, wash bowl, and pitcher, $6; fourteen chairs, $7; a clock, $7; a watch, $10,—making a total of $2,096. It will thus be seen that the finding of the jury that the value of the personal property destroyed was $800 does not lack evidence to support it. To be sure, the evidence was conflicting as to the value of some of this property, but the weight of evidence was for the jury. They saw the witnesses. They heard them testify. They have considered the testimony and have reached a conclusion; and since there is in the record evidence to support this conclusion, we are not at liberty to disturb it.

5. The jury, at the request of the insurance company, returned special findings as well as a general verdict, and it is said that the two are inconsistent. By their special findings the jury said that the value of the butter and cheese apparatus and stock at the time of the fire was $300; that the value of the household and kitchen furniture destroyed was $900; that the value of the hay and grain destroyed by the fire was $400, or a total of $1,600. But this is not an inconsistency of which the insurance company can complain. It was not prejudiced by it. Since the general verdict fixed the value of the personal property at $800 and a judgment was rendered against it for that amount, it has no cause of complaint because the special finding of the jury fixed the value of this same property at $1,600.

6. It is also said that the value placed upon the personal property by the special findings of the jury has no support in the evidence. This argument is untenable. We conclude, therefore, that the general verdict of the jury, on which the judgment complained of was ren-

dered, is supported by sufficient evidence so far as the same relates to the value of the insured personal property destroyed.

7. The policy in suit provided that the insured within sixty days after the occurrence of a fire should furnish to the insurance company proofs of loss. The insured neglected to furnish the proofs of loss within sixty days after the fire, and it is now insisted that for this reason the judgment is erroneous. One of the issues made by the pleadings and litigated on the trial was whether the in-insurance company had waived formal proofs of loss, and the jury found that it had. The evidence tends to show that the fire occurred on the 8th day of November, 1892; that the insured at once gave notice of this to the insurance company, and that within a few days thereafter the adjuster of the company came to the farm of the assured, examined and inquired into the loss, the cause of the fire, etc.; that the assured stated to the adjuster the particulars of the fire, submitted to him a written memorandum of the items of property destroyed, and their value. Some conversations and negotiations took place between the adjuster and the assured, which resulted in the adjuster finally offering the assured $900 in full settlement of the loss. This offer was declined by the assured, whereupon the adjuster departed. We think the conduct of the adjuster justified the conclusion of the jury that the insurance company had refused to pay the loss. In *Home Fire Ins. Co. v. Hammang*, 44 Neb., 566, it was held that an insurance company had waived proof of loss because its adjusting agent, with a knowledge of the fire, went upon the ground, examined into the circumstances, took possession of books and invoices of the insured, and with his help made an estimate of the amount of the loss. But the insurance company defends this action upon the ground, as we shall presently see, that the policy was void from its inception. If this was a fact, then there was no necessity for proofs of loss. In *Dwelling-House Ins. Co. v. Brewster*, 43 Neb., 528, it was held

that proofs of loss required by a condition of an insurance policy are waived when the insurance company denies any liability for the loss on the ground that the policy was not in force at the date of the loss. (See, also, *German Ins. Co. v. Kline*, 44 Neb., 395; *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb., 537; *Home Fire Ins. Co. v. Hammang*, 44 Neb., 566.) We reach the conclusion, therefore, that the failure of the insured to furnish formal proofs of loss to the insurance company within sixty days after the fire afforded the insurance company in this case no defense to this action.

8. The policy in suit also provided that in case of a disagreement between the insured and the insurer as to the amount of loss or damage occasioned to the insured property by fire the amount of such loss should be determined by arbitration. It is now said that the insured refused to submit the amount of the loss to arbitration and for that reason the judgment must be reversed. But the doctrine of this court is that if parties to a contract agree that if a dispute arise between them such dispute shall be submitted to arbitration, then refusal to arbitrate, or no arbitration, is not a defense to an action brought on such contract by one of the parties thereto. (*National Masonic Accident Association v. Burr*, 44 Neb., 256, and cases there cited.) And in *Home Fire Ins. Co. v. Kennedy*, 47 Neb., 138, it was held: "An insurance company, by denying its liability on the ground of a forfeiture of the policy by reason of a breach of warranty by the insured, waives whatever right it may have had to insist upon arbitration as a means of determining the amount of the plaintiff's damage." The judgment under consideration was, therefore, not erroneous, because the insured refused to submit the question of the amount of his loss to arbitration.

9. The policy in suit contained a clause in the following language: "The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to

examinations under oath by any person named by this company and subscribe the same; and as often as required shall produce for examination all books of account, bills, invoices, and other vouchers or certified copies thereof if originals be lost at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made." The insured resided near Chadron, Nebraska. The adjuster and managing agents of the insurance company appear to have resided at Denver, Colorado. More than sixty days after the fire occurred, and long after the insurance company had been notified thereof, and after the adjuster of the insurance company had visited Nebraska and inquired into the circumstances of the fire, as already stated, he wrote a letter to the insured, posted at Denver, Colorado, dated January 27, 1893, in which he said: "The company desires that you will submit to examination under oath. Please name to me a convenient date at which you will be prepared to submit to examination, and oblige." It is now said that the insurer requested the insured to submit to an examination under oath and that the latter refused, and that therefore the judgment is erroneous. Whether the refusal of an insured to comply with such a provision in an insurance contract is a defense to an action upon the policy we do not decide. The writer, speaking for himself only, does not think it is. If the insured had submitted to an examination and sworn falsely he could not have been prosecuted for perjury, as the oath would not have been taken in any proceeding where the law required him to take an oath. The effect of such a clause in the policy therefore amounts to no more than a promise upon the part of the assured to furnish to the insurer, on request, such information as may be in his possession. In *Clement v. British-American Assurance Co.*, 141 Mass., 298, it seems to have been held that where an insurance policy provided that in case of loss or damage to insured goods the insurer should separate the damaged portion of the stock from the undam-

aged and furnish to the insurer a total statement of damages claimed on each item, the refusal of the insurer to comply with this provision of the policy afforded no defense to an action thereon. But if the clause in the policy under consideration be one with which the insured must comply in order to recover, then it was incumbent upon the insurance company to fix a time and a place and to name some person authorized by law to administer oaths before whom the examination of the insured should be had. The insurance company did none of these things. Doubtless the time fixed for the examination must have been within a reasonable date after the company received notice of the fire. Doubtless the place of the examination would have been at a reasonably convenient place in the county where the assured resided. It remains to be said of the question under consideration that a fair construction of the clause of the policy is that the insured shall submit to examination under oath at such reasonable place as may be designated by the company or its representative. We reach the conclusion that the insurance company, by failing to demand this examination within a reasonable time after the fire, and by failing to designate a time and place and an officer before whom such examination should occur, has not put itself in a position to urge the refusal of the insured to submit to an examination as a defense to this action.

10. Simmons, at the time of the issuance of the policy in suit, resided on the southeast quarter of section 17, township 33 north, and range 49 west, in Dawes county. At the time he applied for the insurance he signed an application in writing, which, so far as material here, was in the following language:

"Application of W. A. Simmons, of Chadron, Nebraska, for insurance against loss or damage by fire by the Ætna Insurance Company, in the sum of two thousand dollars, for the period of three years, * * * on property specified below: Frame dwelling-house, cash valuation, $700; amount to be insured, $500. Household

furniture therein, cash valuation, $1,000; amount to be insured, $500. Barn, cash valuation, $500; amount to be insured, $300. Milk house, cash valuation, $100; amount to be insured, $50. Fixtures and stock therein,—that is, milk house,—cash valuation, $600; amount to be insured, $350. Hay and grain, cash valuation, $500; amount to be insured, $300.

* * * * * * *

"The applicant will answer the following questions and sign the same as a description of the premises on which the insurance will be predicated:

"Building: When built? 1886-7.

"What size? About 16x24 and additions.

"Is it stone, brick, or wood? Wood.

"Are foundations wood, brick, or stone? Wood.

"Is it in good repair? Yes.

"How many stories high? Two.

"Have premises ever been on fire? No.

* * * * * * *

"How many chimneys? One.

"Are they brick? Yes.

"Are all built from the ground? No.

"Any tile or terra cotta flues in building? No.

"Are pipes in good order? Yes.

"How near to wood? Ten inches.

"Do pipes pass through wood partitions or floors? Yes.

"If so, how secured? Zinc protection.

"Do any stove-pipes pass through the roof or sides of the building? Yes, through summer kitchen.

* * * * * * *

"What is it covered with? Shingles.

"Is there a scuttle and stairs to it? Stairs.

"Are the gutters stone, metal, or wood? None.

"Are premises occupied entirely by applicant? Yes.

* * * * * * *

"For farm dwelling only? Yes.

"For farm barns only? Yes."

"What is the present cash value of property to be insured? $3,000.

"How many acres of land in the farm? 160.

"State average value per acre. $10.

"How recently has the property changed hands? Yes; no.

"State the actual amount paid for it. $1,600 for land.

"State terms of sale. Cash.

"Is the property profitable as an investment? Yes.

* * * * * * *

"And the said applicant hereby warrants, covenants, and agrees to and with said company that the foregoing is a full, just, and true exposition of all the facts and circumstances, condition, situation, and value of and title to the property to be insured, and is offered as a basis of the insurance requested and is made a special warranty, the same as if written on the face of the policy."

This application was made a part of the policy issued and now in suit. The policy refers to the application and declares that it is made a part thereof. Among other things, the policy provides: "This entire policy shall be void if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof." It is now insisted that each and every one of the statements and answers to questions made by Simmons in this application were and are warranties; that some of said statements or answers were false, and that, therefore, the policy has never been in force and was void from its inception. Are the statements in this application warranties?

Campbell v. New England Mutual Life Ins. Co., 98 Mass., 381, was a suit on a life insurance policy. The policy was issued in pursuance of a written application therefor, which application declared that the statements therein were made as a basis for the insurance, and that they were full, fair, and true answers to the questions pro-

pounded. The application further recited that the applicant had read the questions and answers and was aware that any fraudulent or untrue answers, or a concealment of facts or a non-compliance with the terms of the policy would vitiate the insurance. The application was made a part of the policy and the latter provided: "If the statements made by the assured should be found in any respect untrue, that the policy should be void." In the application the assured was asked whether he was or had been subject to or at all affected by bronchitis, consumption, prolonged coughs, or spitting of blood. To all these questions he answered no. The suit upon the policy was defended upon the ground that the answers to these questions were false; that the answers were warranties, and that, therefore, the policy was void from its inception. But the court held that the answers were not warranties, but representations, which need not be complied with literally. The court said: "The remaining exceptions mostly depend upon the question whether the statements made in the application, by way of answers to interrogatories, are to have the effect of warranties, or to be regarded as representations only. * * A warranty in insurance enters into and forms a part of the contract itself. It defines, by way of particular stipulation, description, condition, or otherwise, the precise limits of the obligation which the insurers undertake to assume. No liability can arise except within those limits. In order to charge the insurers, therefore, every one of the terms which define their obligation must be satisfied by the facts which appear in proof. From the very nature of the case the party seeking his indemnity, or payment under the contract, must bring his claim within the provisions of the instrument he is undertaking to enforce. The burden of proof is upon the plaintiff to present a case in all respects conforming to the terms under which the risk was assumed. It must be not merely a substantial conformity, but exact and literal; not only in material particulars, but in those that are immaterial

as well. A representation is, on the other hand, in its nature, no part of the contract of insurance. Its relation to the contract is usually described by the term 'collateral.' * * * It is sufficient for the plaintiff to show fulfillment of all the conditions of recovery which are made such by the contract itself. The burden is then thrown upon the defendant to set forth and prove the collateral matters upon which he relies. * * * In considering the question whether a statement forming a part of the contract is a warranty, it must be borne in mind, as an established maxim, that warranties are not to be created nor extended by construction. They must arise, if at all, from the fair interpretation and clear intendment of the words used by the parties. * * * When, therefore, from the designation of such statements as 'statements' or as 'representations,' or from the form in which they are expressed there appears to be no intention to give them the force and effect of warranties, they will not be so construed."

Daniels v. Hudson River Fire Ins. Co., 12 Cush. [Mass.], 416, was a suit upon a fire insurance policy. The policy was based upon a written application, which contained, among others, the following questions:

"Q. Is there a good forcing-pump in the factory, designed expressly for putting out fire, and at all times in condition for use?

"A. A small force-pump for filling barrels, and with hose to reach each room.

"Q. Are there casks in each loft, constantly supplied with water?

"A. There is in each room casks of forty-two gallons each, kept full constantly; also twenty-four buckets in mill."

The policy provided that it was made in conformity with the terms and conditions of the application, and further provided that if the insured had made any misrepresentation or concealment the policy should be void. There was a covenant in the application that the assured

had made a full, just, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured. The suit on the policy was defended upon the ground that the answers to the questions in the application were warranties; that they were false, or not literally true, at the time of the application, and that, therefore, the policy was void. The *nisi prius* court instructed the jury that the statements in the application were not warranties requiring an exact and literal compliance, but that they were representations, and as such must have been substantially true and correct as to things done or existing at the time the policy was issued. The supreme court of Massachusetts, discussing this instruction, said: "The court are of opinion that, looking at the policy and the application, this instruction was correct. There is undoubtedly some difficulty in determining by any simple and certain test what propositions in a contract of insurance constitute warranties, and what representations. One general rule is that a warranty must be embraced in the policy itself. If, by any words of reference, the stipulation in another instrument, such as the proposal or application, can be construed a warranty, it must be such as make it in legal effect a part of the policy. * * * If any statement of fact, however unimportant it may have been regarded by both parties to the contract, is a warranty, and it happens to be untrue, it avoids the policy. If it be construed a representation and is untrue it does not avoid the contract if not willful or if not material. To illustrate this: The application in answer to an interrogatory is this: 'Ashes are taken up and removed in iron hods;' whereas it should turn out in evidence that ashes were taken up and removed in copper hods. * * If this was a warranty the policy is gone; but if a representation it would not, we presume, affect the policy, because not willful or designed to deceive; but more especially because it would be utterly immaterial and would not have influenced the mind of either party in

making the contract or fixing its terms. Hence it is, we suppose, that the leaning of all courts is to hold such a stipulation to be a representation, rather than a warranty, in all cases where there is any room for construction, because such construction will, in general, best carry into effect the real intent and purpose which the parties have in view in making their contract."

Supreme Lodge, Knights of Pythias of the World, v. Edwards, 41 N. E. Rep. [Ind.], 850, was a suit upon a life insurance policy or certificate, based on a written application made therefor. The defense was that the answers to questions or statements made in the application were warranties; that they were false or not literally true, and, therefore, that the policy was void from its inception. The court said: "The policy and application in this case must be read together, as together evidencing the contract. In the application appears the terse, plain, and emphatic statement, referring directly to the answers in question, that they are warranted to be true and are offered to the Endowment Rank as a consideration of the contract. There is also contained in the application proper * * * this statement: 'I declare, furthermore, that all the above statements are true, to the best of my knowledge and belief, and that I have not concealed or omitted to state anything regarding my health, past or present, affecting the expectancy of my life, and that I hereby consent and agree that any untrue statement made in this application, or to the medical examiner, touching my health or expectancy of life, shall work a forfeiture to all my rights.' In the certificate itself there is no mention of any warranties, but it is expressly said that it is issued in consideration of the 'representations and declarations made in the application' and the payment of the entrance fees, dues, etc. Thus we have these statements of the insured referred to as 'warranties' at one time, and as 'representations' at another. Under such circumstances they must, upon the authorities, be construed to be representations only. * * * 'By rea-

son of their stringent character, warranties in insurance policies are not favored in law. The court will construe as a warranty that only which the parties have plainly and unequivocally declared to be such.' * * * When, considering both policy and application together, it is left uncertain or ambiguous whether statements are to be taken as warranties or representations, the construction most favorable to the policy holder is to be adopted."

Northwestern Mutual Life Ins. Co. v. Woods, 39 Pac. Rep. [Kan.], 189, was a suit upon a life insurance policy based upon a written application. In the latter the assured was asked and answered, among others, the following question: "Q. Is there anything, or has there ever been anything, in your physical condition, family or personal history, or habits, tending to shorten your life, which is not distinctly set forth above? A. No." The application recited that all statements therein were declared by the assured to be warranties. The policy provided that if any statement made in the application for the policy should be found incorrect, the policy should be void. The action was defended upon the ground that all the statements made in the application were warranties; that the answer of the assured to the question quoted above was false when made; and that, therefore, the policy had never been in force. The supreme court of Kansas refused to sustain this contention of the insurance company, and summed up its conclusions in the syllabus of the case as follows: "The statements contained in an application for a policy of life insurance will not be construed as warranties, which, if untrue in any particular, would avoid the policy, unless the provisions of the application and policy, taken together, leave no room for any other construction. While in the application for the policy in this case it is declared that all the statements written on the application are warranted to be true, inasmuch as the policy refers to the answers to the questions contained in the application as statements, and not as warranties, the court will construe them merely as

statements; and therefore holds that the insured was bound only to the exercise of good faith, and to answer truthfully as to all matters within his knowledge, and an omission to state a fact which he honestly deemed immaterial will not vitiate the policy."

Miller v. Mutual Benefit Life Ins. Co., 31 Ia., 216, was a suit upon a life insurance policy based upon a written application in which the assured was asked and answered, among others, the following questions:

"Q. Is the party sober and temperate?

"A. Yes.

"Q. Has he always been so?

"A. Yes."

The application was made a part of the insurance policy and the action was defended upon the ground that the answers to the questions quoted above were warranties; that they were false when made; and that, therefore, the policy had never been in force. After a very exhaustive and learned examination of the question the supreme court declared that the answers of the assured to the questions propounded to him were mere representations, and summed up its conclusion as follows: "Matters of warranty constitute a part of the contract, and it is necessary that they should be exactly and literally complied with; but matters of representation are but collateral to the contract, and it is sufficient if they are substantially complied with. Warranties will not be created nor extended by construction. They must arise from the fair interpretation and clear intendment of the language used. The application is, in itself, merely collateral to the contract of insurance, and its statements are to be classified * * * as representations, unless, by force of a reference in the policy, they are converted into warranties, and the purpose is clearly manifest, from the papers thus connected, that the whole shall form one entire contract."

Anders v. Supreme Lodge, Knights of Honor, 17 Atl. Rep. [N. J.], 119, was a suit upon a life insurance contract.

The contract was based upon a written application and recited that it was issued upon condition that the statements made by the insured in his application should be made a part of the policy. In the application the assured certified that the answers made by him to questions propounded were true; that there were no misrepresentations or suppression of known facts, and he acknowledged and agreed that these statements should form the basis of the insurance contract and constitute warranties. The assured further stated in the application that the above questions had been answered to the best of his knowledge and belief. The action was defended upon the ground that the answers of the assured in his application were warranties; that one of such answers was false and that the policy was therefore void. The supreme court of New Jersey, in discussing the question, said: "At the trial it was proved that one of the statements attached to the application was not true, and Mr. Justice De Pue, who presided at the circuit, instructed the jury that such fact did not, *proprio vigore*, avoid the policy, but that to produce that result it must have been false to the knowledge of the applicant. This is the proposition the correctness of which is now challenged. But this court is of opinion that the construction adopted is the proper one. In the interpretation of warranties of this class the judicial leaning is invariably against a literal rendering of the stipulation, and in favor of construing the clause according to its spirit and purpose. It is to be presumed that the parties dealt with each other in this particular in good faith, intending to lay a reasonable basis for the promise to insure, and consequently it requires plain and unambiguous terms to induce the court to conclude that it was the conventional purpose that the policy should be a nullity in case the assured had in his application unintentionally misstated a fact. Indeed, the conditions of the present case appear to repudiate the hypothesis that it was the intention of these contractors to make the life of the

policy dependent upon the absolute and exact verity of the truth of each of the statements in question. For example, the assured, when asked at what age his father died, answered, at the age of seventy-five years. Now, on the theory that absolute truth is required, if it should be shown that the parent died a day or an hour before or after he had reached such designated age, the contract of insurance would be entirely void; and assuredly it is scarcely conceivable that such an agreement was either consciously offered on the one side, or consciously accepted on the other. There is nothing in the law that forbids persons from entering into such preposterous agreements if they see fit so to do; but fortunately the principles of jurisprudence forbid the court from constructing them out of uncertain phraseology. And this we would do in the present instance by adopting the theory of the defense, for the language of the stipulation in question is plainly ambiguous. The words are: 'I certify that the answers made by me,' etc., 'are true, in which there are no misrepresentations or suppression of known facts.' Upon the interpretation as contended for by the defense, that the allegation that the answers are true, means that they are absolutely true, it is obvious that the subjoined certification, that in such absolutely true answers there are no misrepresentations, becomes entirely nugatory. To give a consistent effect to both branches of the clause, it is necessary to read it in the sense that the answers are true to the extent of not being consciously false." To the same effect see *American Popular Life Ins. Co. v. Day*, 39 N. J. Law, 89, *Northwestern Benevolent & Mutual Aid Association v. Cain*, 21 Ill. App., 471, *Price v. Phœnix Mutual Life Ins. Co.*, 17 Minn., 473, and *Hanover Fire Ins. Co. v. Gustin*, 40 Neb., 828.

In *Mulville v. Adams*, 19 Fed. Rep., 887, it was held that "conditions that work a forfeiture are not to be extended by construction. Being put into the policy for the benefit of the insurer, they will be construed most liberally for the assured."

First National Bank v. Hartford Fire Ins. Co., 95 U. S., 673, was a suit upon a fire insurance policy. The policy was based upon a written application made by the assured. In the application the assured was directed to answer certain questions and sign the same "as a description of the premises on which the insurance will be predicated." He was asked and answered, among others, the following questions:

"Q. What is the cash value of the buildings aside from hand and water power?

"A. Fifteen thousand dollars.

"Q. What is the cash value of the machinery?

"A. Fifteen thousand dollars."

The application also recited that the assured hereby covenants and agrees that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk. The application was made a part of the insurance policy and the policy recited not only that the application should be considered a part of it, but that the application should be considered a warranty by the assured, and that if he, in such application, had made any erroneous representations or omitted to make known any fact material to the risk, that the policy should be void. The policy was defended upon the ground that the answers of the assured as to the value of his building and the value of his machinery were warranties; that such answers were false, and that, therefore, the policy was void. The circuit court found that the value of the building, represented to be worth $15,000, was $8,000; that the value of the machinery, represented to be worth $15,000, was $12,000; and the circuit court concluded that the answers of the assured were warranties and that the policy was void. The bank then sued out a writ of error to the supreme court of the United States. That court held that the statements made by the insured were representations, and

not warranties, and reversed the judgment of the circuit court. The supreme court said: "The entire application having been made, by express words, a part of the policy, it is entitled to the same consideration as if it had been inserted at large in that instrument. The policy and application together, therefore, constitute the written agreement of insurance; and in ascertaining the intention of the parties full effect must be given to the conditions, clauses, and stipulations contained in both instruments. Looking first into the application, we find no language which, by fair construction, was notice to the assured that in answering questions he was assuming, or was expected to assume, the strict obligations which the law attaches to a warranty. * * * But the difficulty in the case arises from the peculiar wording of the policy, considering the application as a part thereof. While the assured in one part of the written agreement is made to stipulate for a warranty, and in another the policy is declared to be void if the assured 'makes any erroneous representation, or omits to make known any fact material to the risk,' in still another part of the same agreement [the application] he covenants that, as to all material facts within his knowledge respecting the condition, situation, value, and risk of the property, he has made a full, just, and true exposition. If the purpose of the company was to secure a warranty of the correctness of each statement in the application, and if the court should adopt that construction of the contract, there could be no recovery on the policy if any one of these statements were proven to be untrue; and this although such statement may have been wholly immaterial to the risk and was made without any intent to mislead or defraud. Such a construction, according to established doctrine, might defeat the recovery, even if the overvaluation had been so slight as not to have influenced the company in accepting the risk. But if such was the purpose of the company, why did it not stop with the express declaration of a warranty? Why did it go further and incor-

porate into the policy a provision for its annulment in the event the assured should make an 'erroneous representation or omit to make known any fact material to the risk'? * * * Still further, why did the company make the application a part of the policy, and thereby import into the contract the covenant of the assured, not that he had stated every fact material to the risk, or that his statements were literally true, but only that he had made a just, true, and full exposition of all material facts, so far as known to him?" The court announced the rule of construction in the syllabus as follows: "When a policy contains contradictory provisions, or is so framed as to render it doubtful whether the parties intended that the exact truth of the applicant's statements should be a condition precedent to any binding contract, that construction which imposes upon the assured the obligations of a warranty should not be favored. The policy having been prepared by the insurers, it should be construed most strongly against them." This rule of construction was followed and reaffirmed by the supreme court of the United States in *Moulor v. American Life Ins. Co.*, 111 U. S., 335.

From the foregoing authorities we deduce the following: (*a.*) A warranty in insurance law is the assertion by the assured of some fact on the literal truth of which the validity of the policy depends, without regard to the materiality of such fact or the motive which prompted the assertion. (*b.*) A representation in insurance law is also the assertion by the insured of some fact, but the validity of the policy does not depend upon the literal truth of the assertion. (*c.*) The falsity of a representation is a defense to a suit on the policy only when made of a fact material to the risk, and with a sinister motive. (*d.*) Whether an assertion made by the insured of the existence of a fact is a warranty or representation is a question of law. (*e.*) Where an application for insurance is made a part of the insurance policy, the two are to be construed together for the purpose of ascertaining

whether the contracting parties intended that statements and assertions made by the insured should be regarded as warranties or representations. (*f.*) If a doubt exists whether a statement made is a warranty or representation, it will be held a representation. (*g.*) Warranties are not to be created nor extended by construction. (*h.*) In construing a contract for the purpose of determining whether the statements made therein were intended by the parties thereto to be warranties or representations, the court will take into consideration the situation of the parties, the subject-matter of the contract, the language employed, and will construe a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties; that the mind of each party consciously intended and consented that such should be the interpretation of his statements.

In the case at bar the application and the policy issued in pursuance thereof must be read and construed together; and since the application recites that every statement made therein by the assured is a warranty, and the policy provides that it should be void if the assured had concealed or misrepresented any material fact concerning the insurance, we conclude that, at least, a doubt exists as to whether the contracting parties intended that each statement made by the insured in his application should be a warranty, and accordingly hold that the statements made by the insured in his application were representations, and not warranties. If it had been the intention of the parties that every statement made by the insured in his application should be a warranty, then it was wholly unnecessary to provide in the policy that it should be void if the assured made any false representation as to a fact material to the insurance; because if the statements made in the application were warranties, then the policy was void unless each of said statements were literally true, no matter how immaterial they may have been.

11. Were the representations made by the assured in

his application untrue? It was pleaded as a defense to this action that Simmons falsely overvalued the property insured. This question was submitted by proper instructions to the jury and its finding for the insured must be taken as a finding in his favor that he had not falsely overvalued the insured property. We have already quoted at length from the evidence and it must suffice to say that we think there is sufficient evidence in the record to sustain a special finding, had one been made, that the insured property at the time it was insured was of the value placed thereon by Simmons. The evidence on behalf of the insurance company tends very strongly to show that this insured property was of less value than Simmons, at the time he made his application, represented it to be. For instance, Simmons represented the value of his house to be $700, and the evidence of the insurance company tends to show that it was probably not worth over $300. But assuming that the value placed by Simmons upon the insured property was an overvaluation, we would still be unable to reverse this judgment for that reason. It has not been suggested by the insurance company in this case, either by pleading or evidence, that the overvaluation—if it was one—made by Simmons was intentionally made; nor made with the intention to deceive the insurance company; nor that the insurance company relied upon such valuation and was induced thereby to enter into the contract in suit.

Fitch v. American Popular Life Ins. Co., 59 N. Y., 557, was a suit upon a life insurance contract. This policy was based upon a written application therefor. In the application the assured was asked the question if he had ever had any illness, local disease, or injury in any organ, to which he answered, "No." The policy was defended upon the ground that this answer was false. The evidence showed that the insured, six years before, had had inflammation of the eyes caused by sand thrown into them. The New York court of appeals held that this evidence did not establish the defense; that the omission

to mention the injury was not conclusive evidence of fraud sufficient to avoid the policy, but at most was evidence to be submitted to the jury, and that in order to sustain the defense it was necessary for the insurance company to show not only that the statement was untrue, but that it was known to be untrue by the assured at the time made, and made with a fraudulent purpose.

Franklin Fire Ins. Co. v. Vaughan, 92 U. S., 516, was a suit upon a fire insurance policy. In his application for insurance the assured put a valuation of $12,000 upon his stock of goods. The action was defended on the ground that this was an overvaluation; that the goods were in fact not worth to exceed the sum of $6,000. The jury found the value of the insured property to be $7,857. In discussing the question as to whether this evidence and finding amounted to a defense to the policy the court said: "The value of the goods was to be estimated by the applicant. He gave this estimate at $12,000, and there is not the slightest evidence that such was not his honest estimate of their value. Insurance agents, as well as other persons, know with what partiality most men estimate their property, and how much more valuable they esteem it when their own than when it is their neighbor's. They do not object to this principle when the premiums are received for issuing policies. It is only when losses occur that they seek to apply the more rigid test of actual value. * * * The law exacts the utmost good faith in contracts of insurance, both on the part of the insured and the insurer, and a knowing and willful overvaluation of property by the insured, with a view and purpose of obtaining insurance thereon for a greater sum than could otherwise be obtained, is a fraud upon the insurance company that avoids the policy. It is a question of good faith and honest intention on the part of the insured, and though he may have put a value on his property greatly in excess of its cash value in the market, yet if he did so in the honest belief that the property was worth the valuation put upon it, and the excessive valuation was made

in good faith, and not intended to mislead or defraud the insurance company, then such overvaluation is not a fraudulent overvaluation that will defeat a recovery."

First Nat. Bank of Kansas City v. Hartford Fire Ins. Co., 95 U. S., 673, was also a suit upon an insurance policy. In that case the insured, in his application, placed a valuation upon his building of $15,000 and upon his machinery of $15,000. One of the defenses was that this was an overvaluation. The circuit court found that the building was worth $8,000, and no more; and the machinery was worth $12,000, and no more. The court further found that the representations as to value were made without any intention on the part of the assured to commit a fraud upon the insurance company. In discussing the question as to whether this overvaluation was a defense to the action, the supreme court of the United States said: "But his situation and duty were wholly different when required to state the cash value of his property. He was required to give its 'estimated value.' His answers concerning such value were, in one sense, and, perhaps, in every just sense, only the expression of an opinion. The ordinary test of the value of property is the price it will command in the market if offered for sale. But that test cannot, in the very nature of the case, be applied at the time application is made for insurance. Men may honestly differ about the value of property, or as to what it will bring in the market; and such differences are often very marked among those whose special business it is to buy and sell property of all kinds. The assured could do no more than estimate such value; and that, it seems, was all that he was required to do in this case. His duty was to deal fairly with the company in making such estimate. The special finding shows that he discharged that duty and observed good faith." The court summed up its conclusion upon the question under consideration in the syllabus as follows: "When a party states in his application for an insurance that he has made a just, full, and true expo-

sition of all material facts and circumstances in regard to the condition, situation, value, and risk of the property, so far as known to him, and the application is expressly made a part of the policy, should it afterwards appear that he overestimated the value of the property the policy would not be vitiated, unless it be shown that the estimate was intentionally excessive." The defense of overvaluation interposed to this action by the insurance company cannot be sustained, assuming that there was an overvaluation made by Simmons.

12. In the application made by Simmons for insurance he was asked these two questions:

"Q. State the actual amount paid for it—that is, the farm.

"A. Sixteen hundred dollars.

"Q. State terms of sale.

"A. Cash."

A final contention is that the answers of Simmons to these two questions were false. As to the first question and answer the evidence on behalf of Simmons tends to show the following: At the time he made application to the agent of the insurance company for this insurance the agent read the question in the application: "State the actual value paid for it." Simmons thereupon answered by saying that the consideration expressed in his deed was $1,600, and thereupon the insurance agent responded: "That is what goes," and wrote "sixteen hundred" in the application. As to the second question the evidence shows that Simmons did not pay cash for the land; that is, that he did not pay money for it. The consideration he paid for it was the transfer of a promissory note that he owned, some hay, and the assumption of a mortgage upon the land. We have already seen that these statements were not warranties. We have already seen that the insurance company has not pleaded nor attempted to prove that these statements were made with any sinister motive. In its answer the insurance company pleaded that these statements, in addition to being

false, were material to the risk. The jury was not required by any special finding to answer that question, and since the general finding of the jury is against the insurance company, we must presume that they considered the issues made by the pleadings as to whether these representations were false and as to whether they were material and resolved them against the insurance company. If the verdict of the jury is to be taken as a finding that the representations were true when made, then the evidence would probably not support that finding. If the verdict of the jury is to be taken as a finding that the representations made were not material to the risk, we think that finding is supported by the evidence. Indeed, we think no evidence was required to show that those questions and the answers to them were utterly immaterial. The farm—the land—was not the subject of the insurance contract about to be made, and in the application itself the assured was made to warrant the truth of his statements in regard to the insured property only,—the buildings and personalty. In *Campbell v. New England Mutual Life Ins. Co.*, 98 Mass., 381, already quoted, the court said: "The answers contained in the application being in the nature of representations only, the question is of their substantial and not of their literal truth. To defeat the policy they must be shown to be materially untrue or untrue in some particular material to the risk. * * * We understand it to be a question for the jury to determine, whether the facts which appear in evidence are so far inconsistent with the answers relied on in the application as to establish a material misrepresentation." To the same effect see *Houghton v. Manufacturers Mutual Fire Ins. Co.*, 8 Met. [Mass.], 114. In *Mulville v. Adams*, 19 Fed. Rep., 887, it was held that the materiality of a representation is a question of fact and that the test is the probable effect of the representation upon the judgment of the insurer. To the same effect see *Hardman v. Fireman's Ins. Co.*, 20 Fed. Rep., 594. In *Levie v. Metropolitan Life Ins. Co.*, 39 N. E. Rep. [Mass.], 792, it was held

that whether answers made by an assured in his application were false and made with an intent to deceive were questions of fact for the jury. We reach the conclusion, therefore, that in order that the answers under consideration—made by the assured—constitute a defense to this action, it was incumbent upon the insurance company to plead and prove not only that the answers were made as written in the application, but that they were false; that they were false in some particular material to the insurance risk; and that the insurance company relied and acted upon these answers. Since the pleading and the proof establish only that the answers were made and were false, the defense was not made out. The judgment of the district court is

AFFIRMED.

FRANK W. KETTENBACH, ADMINISTRATOR, V. OMAHA LIFE ASSOCIATION.

FILED DECEMBER 2, 1896. No. 6956.

1. **Life Insurance:** TIME ACTION ON POLICY ACCRUES. A life insurance policy provided that no action should be maintained thereon unless commenced within one year from the date of the death of the assured. The assured died on the 9th day of September. The policy also provided that the death loss should be payable within ninety days after the first periodical mortuary premium paying day next ensuing the date of acceptance by the insurance company of satisfactory evidence of the death of the assured. *Held*, (1) That a cause of action on the policy did not accrue earlier than ninety days after September 9; (2) that the time fixed by the policy in which an action thereon might be brought did not begin to run until the right of action accrued.

2. ———: WARRANTIES: CONSTRUCTION. Statements contained in an application for a policy of insurance will not be construed as warranties unless the provisions of the application and policy, taken together, leave no room for any other construction.

3. ———: ———: ———. In construing a contract, for the purpose of determining whether the statements made therein were intended by the parties thereto to be warranties or representations, the court will take into consideration the situation of the parties, the

subject-matter of the contract, and the language employed, and will consider a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties; that the mind of each party consciously intended and consented that such should be the interpretation of his statements.

4. ———: ———: ———: PLEADING AND PROOF. Certain statements and answers made by an assured in an application for a life insurance policy set out in the opinion and *held* (1) not to be warranties, but representations; (2) that in order for such representations to constitute a defense to an action on the policy it is incumbent upon the insurance company to plead and prove that the statements and answers were made as written in the application; that they were false; that they were false in some particular material to the insurance risk; that they were made intentionally by the assured; and that the insurance company relied and acted upon such statements.

5. ———: ———. *Ætna Ins. Co. v. Simmons*, 49 Neb., 811, followed.

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

Saunders, Macfarland & Dickey, for plaintiff in error.

Greene & Breckenridge, contra:

Where the statements warranted by the assured are untrue, he cannot recover. (*Ætna Life Ins. Co. v. France*, 91 U. S., 510; *Connecticut Mutual Life Ins. Co. v. Pyle*, 44 O. St., 19; *Baumgart v. Modern Woodmen of America*, 85 Wis., 546; *Cobb v. Covenant Mutual Benefit Ass'n*, 153 Mass., 176; *Fitzrandolph v. Mutual Relief Society*, 17 Can. S. C., 338; *Jeffries v. Economical Life Ins. Co.*, 22 Wall. [U. S.], 47; *Morgan v. Mutual Life Benefit Ass'n*, 32 Ill. App., 79; *Johnson v. Maine & New Brunswick Ins. Co.*, 83 Me., 183; *Alabama Gold Life Ins. Co. v. Garner*, 77 Ala., 210; *Hartwell v. Alabama Life Ins. Co.*, 33 La. Ann., 1354; *Byers v. Farmers Ins. Co.*, 35 O. St., 606; *Stensgaard v. St. Paul Real Estate Ins. Co.*, 50 Minn., 429.)

The materiality of an express warranty will not be inquired into. (*Brooks v. Standard Fire Ins. Co.*, 11 Mo. App., 349; *Lochner v. Home Mutual Ins. Co.*, 17 Mo., 255; *Mers v. Franklin Ins. Co.*, 68 Mo., 131; *Glendale Mfg. Co. v. Protection Ins. Co.*, 21 Conn., 19.)

The terms of the contract govern. (*Gilbert v. Phœnix Ins. Co.*, 36 Barb. [N. Y.], 372; *Healey v. Imperial Fire Ins. Co.*, 5 Nev., 268.)

If the agents of the company knew of the diseased condition of assured when they filled out the application and made the examination, they perpetrated a fraud upon their principal in the interest of the assured with the latter's knowledge, and the company would not be bound by the agent's acts. (*New York Life Ins. Co. v. Fletcher*, 117 U. S., 519; *Johnson v. Dakota Fire & Marine Ins. Co.*, 1 N. Dak., 167; *Centennial Mutual Life Ass'n v. Parham*, 80 Tex., 518; *Smith v. Cash Mutual Ins. Co.*, 24 Pa. St., 324.)

Jacob Fawcett and *B. G. Burbank*, also for defendant in error.

RAGAN, C.

This is a suit upon a life insurance policy brought in the district court of Douglas county by Frank W. Kettenbach, administrator of the estate of William F. Kettenbach, deceased, against the Omaha Life Association, the successor of the Pythian Life Association, hereinafter called the "insurance company." At the close of the evidence the insurance company moved the court for a direction to the jury to return a verdict in favor of the administrator for the sum of $90.15, the amount of the premium paid by the deceased to the insurance company for the policy in suit. This motion was sustained, a verdict returned as directed, upon which judgment was entered for the administrator, and to reverse which he prosecutes to this court a petition in error. Two arguments are relied upon here to sustain this judgment.

1. The policy in suit provided that no action should be maintained thereon unless commenced within one year from the date of the death of the assured. The assured died on the 9th day of September, 1891, and the present suit was brought on the 24th of October, 1892. The policy provided that the death loss should be payable

within ninety days after the first periodical mortuary premium paying day next ensuing the date of acceptance by the insurance company of satisfactory evidence of the death of the assured. The argument is that the action was not brought within the time prescribed by the policy. The administrator's cause of action could not possibly have accrued earlier than ninety days after September 9, 1891, the date of the death of the insured. *German Ins. Co. v. Fairbank*, 32 Neb., 750, was a suit upon a fire insurance policy which provided that no action on the policy should be maintained unless commenced within six months after the loss sued for occurred. One of the defenses interposed to the action was that it was barred by the provisions of the policy. NORVAL, J., speaking to the point, said: "The petition alleges and the proofs show that the loss occurred January 12, 1888. The suit was begun * * * eight months and a half after the cow was killed. If the condition of the policy above quoted stood alone, and was within the contemplation of the parties when the contract was entered into, then, doubtless, the failure of the plaintiff to commence his action within six months after the loss would operate as a bar to the action. But a contract of insurance, like all other contracts, must be construed so as to give effect, if possible, to all its provisions. This policy provides that written notice of the loss or damage must be immediately given and within thirty days the claimant must furnish proofs thereof. It is also stipulated that 'the amount of loss or damage, to be estimated according to the actual cash value of the property at the time of the loss and to be paid ninety days after notice and due and satisfactory proofs of the same shall have been made by the assured and received at the company's home office at Freeport, Illinois.' It will be observed that by the above condition of the policy the plaintiff in error did not become liable to pay the loss until ninety days after the making of the proofs of loss. The money was not due and the holder of the policy could not have lawfully demanded payment

until that time had elapsed. No suit, therefore, could have been commenced prior to the expiration of ninety days after the loss, and it is well settled that the period of limitation of six months did not begin to run from the date of loss, but from the time the suit could have been brought." The time fixed by the policy in suit in which an action thereon might be brought did not begin to run until the right of action of the administrator accrued, and that action did not accrue more than a year prior to the time this action was brought. The argument then of the insurance company that the action was barred by the terms of the policy when brought is untenable.

2. The policy in suit was based upon a written application made therefor by the assured. In this application he was asked and answered, among others, the following questions:

"Name and residence of your usual medical attendant? Dr. Morris.

"For what diseases have you required his advice or attendance? None.

"Have you consulted or obtained advice of any other medical man within the last ten years? No.

"Are you in good health? Yes.

"Give character, date, and duration of last illness, trivial or otherwise? Not for years.

"Have you at present, or have you ever had since childhood, any of the following disorders or diseases: Apoplexy, asthma, Bright's disease, bronchitis, cancer, chronic diarrhœa, colic (renal or hepatic), constipation (habitual), consumption, cough (protracted), delirium tremens, difficulty or increased frequency in urinating, diphtheria, disease of the heart, disease of genital or urinary organs, disease of liver, disease of lungs, disease of kidneys, disease of bladder, disease of stomach, bowels, discharge from ear, dropsy, dysentery, dyspepsia, enlarged glands, eruptions or any skin diseases, or fistula in ano, or fits or convulsions, gout, gravel, headache (severe or frequent), impaired sight, hearing, insanity, jaundice, neu-

ralgia, palpitation, paralysis, piles, pleurisy, pneumonia, rheumatism (state whether articular, or muscular, acute or chronic), shortness of breath, small-pox, sore throat (persistent), or spinal disease, spitting or coughing of blood, swelling of hands, feet, or eyelids, syphilis, tumors of any kind, ulcers, open sores, or vertigo? No."

"Have you had any diseases other than those above named, or malformation or injury? No."

The application also contained the following: "I do hereby declare * * * that I am now in good health and do ordinarily enjoy good health, and that in the above application I have not withheld any circumstances or information touching the past or present state of my health or habits of life with which the Pythian Life Association ought to be made acquainted. * * * And I do hereby declare and agree that each and every statement and answer contained in this application is material to the risk, and I hereby warrant all the answers and statements and each and every one of them contained herein * * * to be full, complete, and true, and it is agreed that this warranty shall form the basis and shall be a part of the contract between me and said association. * * * I do further agree that if any of the answers or statements made and contained herein are not full and complete, or that if the same or any of them, whether made in good faith or otherwise, are in any respect untrue, then said policy and this contract shall be null and void. * * * If any statement made in the application for this policy of insurance is in any respect untrue, then and in each and every such case the consideration of this contract shall be deemed to have failed and this policy of insurance shall be null and void."

The application was made a part of the policy, and the latter recited that it was issued in consideration of the application, which was made a part of the contract, and of the statements made therein, which statements every person accepting or acquiring an interest in the policy adopted as his own and warranted to be full, complete,

and true. It is now insisted in support of the judgment that each and every of the statements and answers quoted above made by the assured in his application for the policy in suit were and are warranties; that some of said statements or answers were untrue, and that therefore the policy has never been in force.

Were the statements and answers quoted above made by the assured warranties or representations? In *Ætna Ins. Co. v. Simmons*, 49 Neb., 811, we had occasion, this term, to consider the question whether the answers made by the insured in an application for insurance were warranties or representations. We there examined the question and reviewed the authorities at some length and reached the conclusion that the weight of modern authority establishes the following rules: That the statements contained in an application for a policy of insurance will not be construed as warranties which, if untrue in any particular, would avoid the policy, unless the provisions of the application and policy, taken together, leave no room for any other construction. And in construing a contract for the purpose of determining whether the statements made therein were intended by the parties thereto to be warranties or representations the court will take into consideration the situation of the parties, the subject-matter of the contract, and the language employed, and will construe a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties; that the mind of each party consciously intended and consented that such should be the interpretation of his statements. Applying the rule announced in that case to the question here, we cannot say that it clearly appears from the contract in suit that it was the intention of the contracting parties that every statement and answer quoted above made by the assured in his application should be a warranty as that term is understood in insurance law; that every statement and answer made should be literally true, or that the policy should be void. If the answers and state-

ments made in this application were warranties, then no matter how immaterial any statement or answer was, nor how little the fact varied from the statement or answer made, the policy was never in force. When we read this entire application and policy together; when we consider the subject-matter of the contract and the language employed, the parties sometimes using the word "statements" and sometimes the word "warranties," we cannot say that the mind of the contracting parties met and consciously consented that the validity of the policy in this contract should depend upon the literal truth of every answer and statement made in the application. In this application the assured was asked if he had then or had ever had since childhood any of fifty-seven named diseases. What sane man would consciously warrant that ever since his childhood he had not had any disease of the heart, liver, lungs, kidneys, bladder, stomach, or bowels? No sane man would consciously consent that on the literal truth of his negative answer to such a question should depend the validity of a life insurance policy. It might require a post-mortem examination to enable medical experts to determine whether any of such organs of the assured had since his childhood been diseased, and yet if these answers were warranties and such an examination revealed a diseased organ, the policy would be void. The language of the lamented Justice Miller in *Piedmont & Arlington Life Ins. Co. v. Ewing*, 92 U. S., 377, is applicable here: "How can a man who has lived forty or fifty years prove that he never had dyspepsia or a diarrhœa or any disease of the heart or bowels? And how can he prove that his habits of life have always been correct and that he never drank ardent spirits to the extent of intemperance? While it may be easy enough to prove the affirmative of one of these questions it is next to impossible to prove the negative. The number of the questions now asked of the insured in every application for a policy, and the variety of subjects, and length of time which they cover are such that it may be safely said that

no sane man would ever take a policy if proof to the satisfaction of a jury of the truth of every answer were made known to him to be an indispensable prerequisite to payment of the sum secured, that proof to be made only after he was dead, and could render no assistance in furnishing it." In this case, if we are to consider each of these statements and answers of the assured to be warranties, in order to do so we are compelled to adopt one of two assumptions: We must either presume that the insured was insane or a man of such colossal ignorance as to render his contracts voidable, or that the insurance company, aware of the technical legal meaning of the term "warranty,"—and the assured being ignorant thereof,—purposely used it so that in case the assured died before the premiums he paid equalled the amount of the risk they might use that term to defeat his representatives. We do not think it fair or just either to the insurance company or to the insured to indulge either of these presumptions, but prefer to rest our decision on the proposition that the conduct and language of the contracting parties lead us to the conclusion that the mind of the assured never consciously intended and consented that the answers he made to the questions propounded to him should be deemed and taken to be warranties as that term is understood in insurance law; and we accordingly hold that the statements and the answers made by the insured in his application for the policy in this suit were not warranties, but representations. (See *Ætna Life Ins. Co. v. Simmons*, *supra*, and cases there cited.) And that in order for such representations to constitute a defense to this action it is incumbent upon the insurance company to plead and prove that the statements and answers were made as written in the application; that they were false; that they were false in some particular material to the insurance risk; that they were made intentionally by the insured; and that the insurance company relied and acted upon such statements;—and these are questions of fact and not questions of law. The court erred in taking the case

from the jury, and its judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN A. HORBACH, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED DECEMBER 2, 1896. No. 8712.

1. **Bill of Exceptions:** SUBMISSION TO ADVERSE PARTY: EXTENSION OF TIME. Section 311 of the Code of Civil Procedure fixes and limits the time within which proposed bills of exceptions may be submitted to the adverse party. In the absence of any order, the party excepting has for this purpose fifteen days from the adjournment *sine die* of the term at which judgment is rendered or at which a motion for a new trial is ruled on. The court may in its discretion allow additional time, not exceeding forty days from such adjournment. Upon due showing of diligence, and not otherwise, the judge who tried the cause may further extend the time, but not beyond forty days additional.

2. ———: DELAY OF STENOGRAPHER: EXTENSION OF TIME. The fact that the party excepting has been diligent, and the delay was caused by the default of the reporter in preparing a transcript, does not authorize the submission of a bill after the expiration of eighty days from the adjournment of the term.

3. ———: ———: ———. *Richards v. State*, 22 Neb., 145, overruled on the point stated in the first paragraph of the syllabus thereof.

APPEAL from the district court of Douglas county. Heard below before KEYSOR, J. Submitted to supreme court on motion by appellee Edward B. Baer to quash the bill of exceptions. *Motion sustained.*

Saunders & Macfarland and *W. J. Connell*, for the motion.

Charles A. Goss, contra.

IRVINE, C.

This case is presented on the motion of appellee Baer to quash the bill of exceptions, the principal ground of

the motion being that the proposed bill was not submitted to the appellee within the time provided by law. The record discloses that the decree appealed from was rendered at the February, 1896, term of the district court for Douglas county, which adjourned May 2. At the time the decree was rendered forty days from the rising of court was allowed in which to prepare and submit the bill. On June 10 a further order was made by the trial judge whereby an additional forty days was allowed. The bill was not submitted until July 25, which was several days after the expiration of the time limited. When submitted to Baer's counsel no amendments were proposed, but they objected to the allowance of the bill for the reason indicated. The judge, however, undertook to allow the bill on quite satisfactory evidence that the delay in submitting the same was due to no fault of the plaintiff or his attorney, but was occasioned solely by the failure of the official stenographer to sooner prepare a transcript of the evidence. The question is thus presented as to whether a proposed bill of exceptions may be submitted to the adverse party after the expiration of the extreme time permitted by statute and by the judge's order in pursuance thereof, where the plaintiff shows himself to have been diligent.

This question calls for a consideration of section 311 of the Code of Civil Procedure, which, so far as it relates to the time of presenting the bill, now stands as follows: "When the decision is not entered on the record or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing within fifteen days, or in such time as the court may direct, not exceeding forty days from the adjournment *sine die* of the term of court at which judgment is rendered or at which the motion for a new trial is ruled on, and submit the same to the adverse party or his attorney of record for examination and amendment if desired. * * * In cases where a party seeking to obtain the allowance of a bill of exceptions has used due

diligence in that behalf, but has failed to secure the settlement and allowance of the same as herein required, it shall be competent for the judge who tried the cause, upon due showing of diligence and not otherwise, to extend the time herein allowed, but not beyond forty days additional to that herein provided, making such specific directions in that behalf as shall seem just to all parties."

In *Richards v. State*, 22 Neb., 145, a similar question arose and the following language was used: "This being the case, the plaintiff was not at fault. So far as appears, he has done all that he could to procure the bill within the time stated. In the absence of a showing to the contrary, all presumptions of diligence are in favor of the plaintiff in error. The law relating to the preparation of bills of exception should be liberally construed, as being in furtherance of justice. The motion must therefore be overruled." This decision is open to criticism on several grounds. The court makes no reference to the terms of the statute nor to any of the somewhat numerous decisions which had preceded the case under consideration. The case involved a number of important questions, and it is inferable from the detailed treatment of other questions in the opinion and the summary disposition of this one, that this was treated by both counsel and the court as of minor importance and did not receive as careful an examination as it would have received had the motion to quash been presented as a distinct matter. The decision is based on two propositions: First, that in the absence of a showing to the contrary, diligence in procuring the settlement of the bill would be presumed; and secondly, that if the plaintiff in error was diligent, delay was not fatal. The court in announcing these propositions evidently overlooked the fact that the statute, instead of presuming diligence on the part of the plaintiff, provides that the second forty days may be allowed "upon due showing of diligence and not otherwise;" and also overlooked the further provision that when such diligence is shown time may be extended,

"but not beyond forty days additional." Further, it appears from the opinion that the objection made by the attorney general to the bill was that it was not signed within eighty days from the time the court adjourned. The eighty-day period refers to the submission of the bill to the adverse party. Under proper circumstances it need not be presented for signature by the judge until twenty days thereafter, and then the judge may retain the bill for examination and sign it still later. (*Leighton v. Stuart*, 8 Neb., 96; *Parker v. Kuhn*, 19 Neb., 394.) Therefore, the case did not properly present the question which the court undertook to pass upon. For the reasons stated we do not think that *Richards v. State* should be deemed as conclusively settling the question before us.

Prior to 1877 it was necessary to settle the bill of exceptions within the trial term. Under this practice terms were kept open for long and indefinite periods to permit the settlement of bills, and the legislature, therefore, in 1877 (Session Laws, p. 11), amended section 311 in such manner that it was made to contain the provision in the present section whereby the party excepting is required to submit the proposed bill within fifteen days or in such time as the court may direct, not exceeding forty days from the rising of the court. The section then did not contain any provision for a further extension of time. Construing the act of 1877 the court said (*First Nat. Bank v. Bartlett*, 8 Neb., 319): "The party excepting has fifteen days from the rising of the court in which to reduce his exceptions to writing, and submit the same to the adverse party without an order of the court. If he desires a longer period of time in which to prepare and submit the same to the adverse party, the court may extend the time, not to exceed forty days from the rising of the court. In such case, the bill must be submitted to the adverse party within the period prescribed in the order." In *Jefferson County v. Saxon*, 10 Neb., 14, *First Nat. Bank v. Bartlett* was approved, the court saying: "But even with such extension it must not be delayed be-

yond forty days from the end of the term." In *Curran v. Wilcox*, 10 Neb., 449, it was held, on a petition for a new trial, that a party to an action is justified in relying on the official reporter for a transcript of the evidence, and if by reason of the reporter's default he thereby loses the opportunity of presenting a bill of exceptions, a new trial should be granted. The construction of the section was thus made clear. The utmost time permitted for submitting the bill was forty days from the adjournment of the court, and where a party failed to obtain a bill without fault on his part, but through the fault of an officer of the court, the remedy was by petition for a new trial. It was undoubtedly because of these decisions that the legislature was moved in 1881, and very soon after the decision of *Curran v. Wilcox*, to amend section 311 by adding the provision permitting the judge who tried the cause, upon due showing of diligence and not otherwise, to further extend the time, but not beyond forty days additional. (Session Laws, 1881, p. 202, ch. 27.) The right to a bill of exceptions is in all cases the creature of statute and is measured and defined by statute. (*Greenwood v. Craig*, 27 Neb., 669; *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520; *Hanscom v. Lantry*, 48 Neb., 665.)

In the cases just cited, as well as in others, among them *Sherwin v. O'Connor*, 23 Neb., 221, and *State v. Gaslin*, 25 Neb., 71, the court has clearly recognized the statute as defining the authority for settling a bill of exceptions. It cannot be asserted that this court, or the district court, is empowered in exceptional cases, or for the purpose of maintaining any supposed general principle of abstract ethics, to enlarge the statute or to create a right to a bill where the statute confers none. It is true that in *State v. Gaslin*, 32 Neb., 291, *Richards v. State*, 22 Neb., 145, was cited with apparent approval. But in that case the proposed bill had been submitted within the time fixed by the court's order. The question was whether the particular judge who made the order had

authority to make it. The court held that he had such authority, so that the bill was presented within the time fixed by the statute. The language of the statute seems almost too plain to demand construction. A party has of right, and without any order of the court, fifteen days from the rising of the court to present the bill. The court may in its discretion allow further time, not to exceed forty days from the rising of the court. The judge who tried the case may allow additional time, but by the express language of the statute he cannot allow more than forty days additional, and this can only be allowed upon a showing of due diligence. To say that upon a showing of diligence the bill may be presented after the expiration of such second forty days, is to declare the law to be contrary to its perfectly plain language. If the doctrine of *Richards v. State* be sound, then we have this anomalous state of affairs: Forty days having been allowed, no additional time can be allowed except on affirmative showing of due diligence on the part of the party excepting (*Stein v. Vannice*, 44 Neb., 132), and then only forty days more; but if such party fail to present the bill within that time, then, as said in *Richards v. State*, diligence on his part will be presumed and the bill may nevertheless be presented thereafter. No opinion is here expressed as to whether or not time occupied by legal proceedings, having for their object the enforcement of the duties of parties, of the judge, or of court officers, should be computed in ascertaining whether the period has elapsed. The motion to quash the bill of exceptions is

SUSTAINED.

MARY A. LANGAN, APPELLANT, V. ROBERT BINFIELD ET AL., APPELLEES.

FILED DECEMBER 2, 1896. No. 6912.

1. **Lease of School-Lands:** REGISTRATION OF ASSIGNMENT. The statutes relating to the leasing of school-lands provide, among other things, that no assignment of a lease contract shall be valid unless the same be entered of record in the office of the commissioner of public lands and buildings. Other sections provide for the forfeiture of leases for non-payment of rent and the releasing of the land, with a further provision that the owner of any contract of lease so forfeited may redeem the same by paying all delinquencies and costs, at any time before such land is again sold or leased. *Held*, That the provision with regard to assignments is for the protection of the state, and that no assignee obtains any right as against the state until the assignment has been entered of record.

2. ———: ———: RIGHT OF REDEMPTION. An assignee whose assignment has not been so entered of record is not entitled to redeem from a forfeiture of the lease.

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

Abbott & Caldwell, for appellant.

W. H. Thompson, *contra*.

IRVINE, C.

In 1890 William Harnan leased from the state certain school-lands in Hall county. Thereafter he assigned the leases to his daughter, Mrs. Langan, the appellant. The assignments were not entered of record in the office of the commissioner of public lands and buildings. Mrs. Langan, however, entered and made certain improvements. Default having been made in the payments of rent, notice was given of a proposed forfeiture of the lease by sending such notice by means of registered letter to Harnan, and also by newspaper publication. In the view we take of the case, it is not necessary to pass upon the validity of the notice. Payment not having been

made within the prescribed period the board of public lands and buildings declared a forfeiture of the lease. Thereafter Binfield applied in due form for a lease of the land, and paid to the county treasurer of Hall county the requisite rental, the treasurer issuing his receipt therefor. Before the commissioner of public lands and buildings had executed to Binfield a lease Mrs. Langan tendered to the treasurer of Hall county a sufficient sum to cover all delinquencies and costs, for the purpose of redeeming from the said forfeiture. The tender was refused and she instituted this action against Binfield, the county treasurer, and the commissioner of public lands and buildings for the purpose of enforcing her claim for redemption and enjoining the officers from executing any lease to Binfield. The district court found for the defendants and dismissed the case. Mrs. Langan appeals.

The statutes most particularly applicable to the case are sections 14 and 16 of chapter 80, article 1, Compiled Statutes. Section 14 provides for the leasing of unsold school lands and contains the following: "Upon a failure to pay the agreed rental for the period of six months from the time said payments are due, the said lease may be forfeited and fully set aside as provided in section sixteen of this act; and no assignment of such lease contract shall be valid unless the same be entered of record in the office of the commissioner of public lands and buildings." Section 16 provides for the forfeiture of leases, and closes as follows: "The owner of any contract of sale or lease so forfeited may redeem the same by paying all delinquencies and costs at any time before such land is again sold or leased." A question much discussed in the briefs is whether by the receipt of Binfield's money and application the land had been again leased before the execution of a formal contract, within the meaning of the last provision. This question we do not find it necessary to consider. The provision of section 14 quoted requires as essential to the validity of an assignment that it be entered of record in the office of the commissioner of public lands

and buildings. This requirement Mrs. Langan had not complied with. This being true, we think she has not shown any rights as against the state. It is doubtless true that this provision was inserted for the protection of the state, and, therefore, the numerous decisions with reference to assignments of pre-emption and other rights to the public lands of the United States are not applicable. The restrictions upon alienation of such rights are largely founded upon public policy and for the protection of the entryman. They are not merely for the protection of the government. Cases more nearly in point are those relating to the assignment of claims against the United States. An act of congress provides that all transfers and assignments of claims against the United States "shall be absolutely null and void unless the same shall be freely made and executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." (10 Statutes at Large, p. 170, sec. 1.) The title of this act was "An act to prevent frauds upon the treasury of the United States." It is therefore apparent from the title that this provision was for the protection of the government and was not founded upon motives of public policy in any broader sense. It has been held that this statute applies to proceedings in the court of claims, although that court had not been established when the statute was passed; and that assignees of claims against the United States, unless they bring themselves within the exceptions of the act, have no standing to assert against the United States any right whatever. (*The Cote Case*, 3 Ct. Cl., 64; *Trist v. Child*, 21 Wall. [U. S.], 441; *United States v. Gillis*, 95 U. S., 407; *St. Paul & D. R. Co. v. United States*, 112 U. S., 733.) We are fully conscious of the distinction which might be suggested between money claims against a sovereign power enforceable only as that power may permit, and contracts with reference to the public domain. At the same time we believe that the principle which has

actuated the federal courts in enforcing the statute cited is applicable to the case before us. The restriction as to alienation in our statute is connected by grammatical construction with the provisions relating to forfeiture of leases. It was manifestly the intention of the legislature to require all assignments to be entered of record in the office of the commissioner in order that the state might with certainty transact its business with the lessees, and in order that it might protect itself against the claims of unknown assignees. Assignments of school-land leases are not prohibited, but in order to render them effective as against the state, the state must be informed of the assignments and the information must be conveyed by entering the assignments of record in the office of the commissioner. Otherwise the assignment is "not valid," —that is, it is void, or at least voidable at the option of the state. If we held that the assignee under an unrecorded assignment may in any manner enforce his claim against the state, then we should be holding that the assignment is valid, directly contrary to the language of the statute. Whether or not the lease to Binfield had been perfected, so far as to bar a right of redemption by the original lessee, the plaintiff not having entered her assignment of record, has shown no interest as against the state, and no right to redemption which the state or its officers was bound to recognize. The cases of *Hibbeler v. Gutheart*, 12 Neb., 526, and *State v. McPeak*, 31 Neb., 139, by implication, at least, recognize the rights of assignees even as against the state; but the contracts which were there in question were executed prior to the act of 1885 (Session Laws, p. 335, ch. 85), where the provision requiring the recording of assignments first appears. These cases are, therefore, in no manner applicable.

AFFIRMED.

HARRISON, J., not sitting.

FARMERS MUTUAL INSURANCE COMPANY V. DAVID A. MEESE.

FILED DECEMBER 2, 1896. No. 7006.

1. **Corporations:** COMPROMISE. A corporation has power to compromise a doubtful claim against it, although such doubt arises in regard to the power of the corporation to enter into the contract creating the claim.

2. **Insurance:** COMPROMISE: PROMISSORY NOTE: LIABILITY OF INSURER. A mutual insurance company agreed to insure a mare against accident, and at the time of the application received a premium note from the insured. The mare was injured by accident. Thereafter the company issued its policy according to its agreement, with knowledge of the loss, and entered into arbitration to adjust the loss. An award was made, which the company did not pay. The insured, in order to avoid "further trouble and annoyance," accepted the company's promissory note for a less sum than the award, payable at a future date. The company had in the meantime collected the premium note. *Held*, That it was liable for the amount of the note, whether or not it had power under the law to accept such risks.

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

Lamb, Adams & Scott, for plaintiff in error.

J. H. Broady, contra.

IRVINE, C.

The questions presented by this record are the sufficiency of the petition to state a cause of action and the sufficiency of the evidence to sustain the finding. The action was by Meese against the insurance company, a mutual insurance company organized under the laws of this state, to recover on a policy or certificate issued by the company to Meese. The petition sets out that on November 11, 1891, Meese was the owner of a certain mare. On that day the defendant agreed to insure said mare in the sum of $400 against loss or damage by fire,

lightning, wind, tornado, or accident, agreeing to deliver to plaintiff within a reasonable time, its policy, and at the same time showing plaintiff a copy of its by-laws authorizing it to make such insurance. The plaintiff on his part made and delivered to the company his promissory note for $6, payable December 15, 1891. On the 14th of November the mare suffered an injury by accident. On the 16th of November the insurance company, with knowledge of its liability, made and delivered its policy as agreed. The plaintiff gave notice of loss and the defendant proceeded to adjust the loss, and in pursuance of statute selected an arbitrator. The plaintiff also selected an arbitrator and these two selected a third. The three arbitrators so chosen made an award of $300 in favor of plaintiff, and, in the language of the petition, "thereupon, at the persistent importunities of defendant, the plaintiff consented to deduct from said award $50 on condition that defendant would pay without further trouble and annoyance, whereupon, as a final agreement and settlement of the amount of defendant's liability which should be paid by defendant without further trouble to plaintiff, the defendant made to plaintiff its promissory note," whereby it promised to pay to Meese, June 1, 1892, $250, with interest at eight per cent from its date, January 28, 1892. On the 18th of December, 1891, the plaintiff had paid in full his premium note and the defendant accepted such payment. The plaintiff prayed judgment accordingly. The defendant, by its answer, denied the authority of its agent to write the insurance and pleaded that it was not authorized by law to insure property against loss by accident. It also denied certain other allegations of the petition, but on the trial there was an express admission made of the truth of all the averments of the petition, so that the only question presented was that of *ultra vires*. A jury was waived and the court found for the plaintiff.

We do not think we are called upon to enter into any consideration of the powers of mutual insurance com-

panies as regards the nature of risks they may assume, nor are we even called upon to determine whether under the facts admitted the defendant was estopped to plead *ultra vires*. From the standpoint of the insurance company the claim of Meese had certainly sufficient merit to raise a contention, the result of which was doubtful. We may assume that to insure live stock against accidents was wholly beyond the powers conferred by statute on such companies. Nevertheless, this company, according to the admitted facts, had agreed to insure this property against accident. It had received the note for the premium. After the loss, and with knowledge thereof, it had issued its policy. It had entered into arbitration and an award had been made. It had received payment of the premium note. There was certainly a fair ground of contention, not only from all these facts, but from any part of them, that the company had estopped itself from repudiating the contract. Indeed, it is not too much to say that it would shock the conscience of lawyer and layman alike were he to learn that an insurance company might write unauthorized risks, receive the premiums, and retain them if no loss resulted, but in cases where loss arose repudiate them on the ground of want of authority. Such a business might be profitable for a time to the insurance company, but its pursuit would not be creditable to the men engaged therein. The defendant's liability under the circumstances being doubtful, after the award was made, it induced the plaintiff, in consideration of settlement "without further trouble and annoyance," to accept its note for a less amount than the award, payable at a future date. Whether or not we accept in full the argument of counsel for the defendant in error, that "a corporation always has power to be honest," we are sure of its power to effect the compromise of a doubtful claim, even though it involve the company's honesty or its corporate powers. This being true, its obligation to pay the amount agreed on by way of compromise was in any event valid and en-

forceable, and the judgment of the district court was right.

AFFIRMED.

WILLIAM A. POLLOCK, APPELLANT, V. LEVI SMITH ET AL., APPELLEES.

FILED DECEMBER 16, 1896. No. 6946.

1. **Contracts:** RESCISSION: TIME: AFFIRMANCE. The right to rescind a contract on account of fraud must be promptly exercised upon the discovery of the ground therefor. The continued use or employment of property will, in such case, be deemed an election to affirm the contract under which it is received. (*American Building & Loan Association v. Rainbolt*, 48 Neb., 434.)

2. ———: FRAUD: ELECTION OF REMEDIES. One who is deceived by means of the fraudulent representations of another may elect to rescind the contract and reclaim the property parted with, or to affirm the agreement and pursue his ordinary remedy by an action thereon. Such remedies are, however, not concurrent, but inconsistent, and by electing to pursue one with a knowledge of the facts he waives his right to the other. (*First Nat. Bank of Chadron v. McKinney*, 47 Neb., 149.)

3. ———: ———: AFFIRMANCE. Evidence examined, and *held* to establish an affirmance by the plaintiff of the contract sought to be rescinded on the ground of fraud.

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

Wilbur F. Bryant and *Barnes & Tyler*, for appellant.

Jay & Beck, contra.

POST, C. J.

This is an appeal from a decree of the district court for Cedar county dismissing the petition of the plaintiff, who alleges a rescission of the following agreement and seeks to recover the title of certain real estate conveyed pursuant thereto:

"Agreement made and entered into this 31st day of July, 1891, between W. A. Pollock, of South Sioux City, Nebraska, of the first part, and Levi Smith, of same place, party of the second part, witnesseth:

"That W. A. Pollock of the first part, for and in consideration of $4,800.00 and $1,200.00 ($6,000.00), or of a conveyance of property hereinafter described, does hereby covenant and agree with said party of the second part to deed said party of the second part the following described real estate, to-wit: The S. E. quarter of section 22, in township 30, range 2 east, in Cedar county, Nebraska, and lot ten (10), in block eleven (11), in the village of Coleridge. Said party of the first part also agrees to deliver to said party of the second part, as part of consideration before mentioned, one black mare named 'Dollie,' one black three-year-old colt now in pasture on Thos. L. Griffy's farm, one Orchard City wagon, complete, and one set of double harness, and provided that said party of the first part hereby reserve one set of large Victor scales now on said farm, and provided that there is an incumbrance of $1,275 of mortgage and taxes on said above described farm to be assumed by the party of the second part; and party of the first part further agrees that if any further claims than above described be brought against said premises, he will pay and settle the same, also furnish abstract complete.

"Levi Smith, party of the second part, in and for the consideration hereinbefore mentioned, agrees to sell to party of the first part and convey, by good warranty deed, the south forty-four feet of lots one (1), two (2), and three (3), in block twelve (12), in First Add. to South Sioux City, Nebraska, including all building and appurtenances now thereon, together with all furniture and fixtures now in the hall of said building, except one organ, for the sum or consideration of $6,000, or a conveyance of said premises of party of the first part hereinbefore described, except incumbrances as follows, to-wit: $800 mortgage to National Building & Loan Association of Minneapolis;

$1,000 mortgage to R. Orham; $227.78 mchs. lien, Edwards & McCullough & Co., and $55 mortgage on scenery and fixtures to M. O. Ayers.

"Party of the second part also agrees to furnish a complete abstract to the above described premises; and provided also, that in the event of any liens or claims other than above described shall appear against said premises and property, said Smith agrees to pay off and discharge the same at once; also agrees to assign eleven (11) shares of stock in the National Building & Loan Association of Minneapolis, Minn., to said party of the first part; also agrees to assign all his interest in and to his insurance policies, affecting said property, free of charge, provided that said party of the second part reserves the right to occupy all the building upon said premises, except the hall, until the 1st day of September, 1891, also provided that if said Smith shall vacate before September 1, 1891, that Pollock agrees to vacate his property at Coleridge at once for said Smith.

"In witness whereof, we hereunto set our hands this 31st day of July, 1891. W. A. POLLOCK. [SEAL.]
"LEVI SMITH. [SEAL.]"

The grounds upon which the right of rescission is asserted are: (1.) That the eleven shares of stock of the National Building & Loan Association described in the foregoing agreement were by the defendant Levi Smith, falsely represented as fully paid up and of the value of $900, whereas they had been forfeited on account of the non-payment of assessments previously made against them amounting to the sum of $47. (2.) The defendant above named falsely represented that he was possessed of an absolute title in fee-simple of the real estate which he had by said agreement covenanted to convey, whereas he had in fact no title whatever to the east twelve feet of lots 1, 2, and 3, in block 12, of the First Addition to the village of South Sioux City. (3.) There were against the real estate which the defendant so covenanted to convey, incumbrances amounting to the sum of $1,370.22 in ex-

cess of the amount represented by him as an inducement to the exchange of property contemplated by said agreement.

The defendants answered, admitting the execution of the agreement above set out and the conveyance by the plaintiff as charged, and denying the other material allegations of the petition. They allege also that the plaintiff accepted a deed from the said Levi Smith of the property which the latter had undertaken to convey, with full knowledge of the fact that he was not seized of the east twelve feet of lots 1, 2, and 3, above described, whereby he, plaintiff, elected to affirm said agreement and the conveyances made pursuant thereto. It is further alleged that the plaintiff, at and before the execution of said contract and deeds, was fully advised respecting the incumbrances existing against the property conveyed by the said Levi Smith. The finding of the district court was, in effect, that the plaintiff, by the acceptance of the deed of the lots described, knowing the infirmity of the defendant's title to a fractional part thereof, elected to affirm the agreement, and the conveyances made pursuant thereto, and that he must, as a consequence thereof, seek redress in damage by means of an action upon the said contract.

The evidence upon which the above finding is predicated tends strongly to prove that during the time, about three hours, which intervened between the signing of said agreement and the execution and delivery of the deed by Smith, the latter's title was the subject of a general discussion by the parties present, including the plaintiff, who expressed his satisfaction with the explanation given, viz., that the twelve feet in question had been previously dedicated to the use of the public as an alley, and it is certain that he accepted and caused to be recorded the deed with full knowledge of the exception therein expressly made with respect to the strip of ground to which such representation applied and with knowledge of the liens against the property so conveyed.

It is further shown that the plaintiff, on the 12th day of December, 1891, contracted in writing with one Wakeley for the lease by the latter of the property conveyed by Smith for the period of one year from and after December 15, and that he received from the lessee above named the sum of $10, being the rent reserved for one month at the stipulated rate. There appears to have existed, almost from the first, controversies between the parties relating to the execution of the contract, which resulted in mutual charges of fraud. There was, however, so far as the record discloses, no election, either express or implied, by the plaintiff to rescind, and no attempt by him to place the defendant *in statu quo* until the commencement of this action in the district court, March 10, 1892. It was said by this court in *American Building & Loan Ass'n v. Rainbolt*, 48 Neb., 434: "There is no rule more firmly established, or resting upon more just and equitable principles, than the right of rescission on account of fraud must be promptly exercised on the discovery of the ground therefor, and that the continued use or employment of property will in such case be construed as an election to affirm the contract under which it is received." The party defrauded, as said in the case above cited, has his election of remedies, viz., compensation in damages, or to be restored to the position in which he stood before the consummation of the contract. Such remedies are, however, not concurrent but inconsistent, and one who has, with a knowledge of the facts, made his election, must be satisfied to abide thereby. (See, also, *First Nat. Bank of Chadron v. McKinney*, 47 Neb., 149.) The case at bar is, we think, clearly within the principle there recognized, and the plaintiff, however meritorious his claim, having elected to affirm the agreement now assailed, should be content with the relief obtainable in an action thereon.

DECREE AFFIRMED.

MOLINE, MILBURN & STODDARD COMPANY V. WALTER A. WOOD MOWING & REAPING MACHINE COMPANY.

FILED DECEMBER 16, 1896. No. 6864.

1. **Reference:** AUTHORITY OF REFEREE: TRIAL: ESTOPPEL. A party who appears before a referee at the time fixed for trial and treats the order of reference as embracing all the issues of the case, and requests findings upon all controverted questions, will not, upon the coming in of the report, be permitted to assail the findings on the ground that they are unauthorized by the order of reference.

2. **Lien of Bailee:** POSSESSION. Exclusive possession of chattels by the claimant, whether a factor, warehouseman, or other bailee, is indispensable to the existence or continuance of a lien thereon at common law, or the usage of trade.

3. ———: ———. A lien does not exist at common law, or by custom, in favor of one who holds property in subordination to the will or control of another.

4. ———: ———. A lien does not attach in favor of a bailee of goods if inconsistent with the terms of the agreement, express or implied, under which his possession was obtained.

5. ———: CONTRACTS FOR STORAGE. A contract for the storage and forwarding of goods by which the consignor reserves the right to withdraw, at pleasure, for reshipment the goods stored thereunder, and by which each party reserves the right to draw at sight upon the other for any balance in his favor, the consignee relying upon the personal credit of the consignor, does not create in favor of such consignee a lien for charges pursuant thereto.

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

The opinion contains a statement of the case.

James H. McIntosh, for plaintiff in error:

By failure to terminate the contract by giving thirty days' notice, and by the acts of the parties thereto on and subsequent to December 1, 1891, the contract was renewed for the year 1892, and was in full force and effect at the commencement of this action. (*Brady v. Flint*, 23 Neb., 785; *Yates v. Kinney*, 19 Neb., 275; *Schuyler v. Smith*,

51 N. Y., 309; *Critchfield v. Remaley*, 21 Neb., 178; *Laughran v. Smith*, 75 N. Y., 205; *Haynes v. Aldrich*, 133 N. Y., 287; *Providence County Savings Bank v. Hall*, 16 R. I., 154; *Coomler v. Hefner*, 86 Ind., 108; *Bollenbacker v. Fritts*, 98 Ind., 50; *Harry v. Harry*, 127 Ind., 91; *Smith v. Bell*, 44 Minn., 524; *Zippar v. Reppy*, 15 Colo., 260; *Wolffe v. Wolff*, 69 Ala., 549; *Adams v. Fitzpatrick*, 125 N. Y., 124; *Wallace v. Devlin*, 36 Hun [N. Y.], 275; *Vail v. Jersey Little Falls Mfg. Co.*, 32 Barb. [N. Y.], 564; *Tatterson v. Suffolk Mfg. Co.*, 106 Mass., 56; *Grover v. Bulkley*, 48 Ill., 189; *Moline Plow Co. v. Booth*, 17 Ill. App., 574; *Alba v. Moriarty*, 36 La. Ann., 680; *Towne v. Grand Portage Copper Co.*, 55 Mich., 147; *Standard Oil Co. v. Gilbert*, 84 Ga., 714.)

Defendant below had a right to retain the possession of the goods in controversy herein until the balance due it under said contract was paid. (1 Parsons, Contracts [8th ed.], 96, 146; *Garside v. Trent & Mersey Navigation*, 4 Term Rep. [Eng.], 581; *Barron v. Eldredge*, 100 Mass., 455; Edwards, Bailment [2d ed.], 243; *Stevens v. Biller*, 25 Ch. Div. [Eng.], 31; *Stevens v. Robins*, 12 Mass., 179; *Matthews v. Menedger*, 2 McLean [U. S.], 145; Mechem, Agency, sec. 1032; *Naylor v. Mangles*, 1 Esp. [Eng.], 109; *Moet v. Pickering*, 8 Ch. Div. [Eng.], 372; *Lowe v. Martin*, 18 Ill., 286; *Deveren v. Fleming*, 53 Fed. Rep., 401; *Stallman v. Kimberly*, 121 N. Y., 393; *Schmidt v. Blood*, 9 Wend. [N. Y.], 267; *Steinman v. Wilkins*, 7 W. & S. [Pa.], 466; *Morgan v. Congdon*, 4 N. Y., 552.)

The parties recognized the existence of defendant's lien until late in the trial. It is therefore too late for plaintiff to dispute defendant's right to the lien. (*Nunn v. Home Ins. Co.*, 31 Neb., 39; *Ohio & M. R. Co. v. McCarthy*, 96 U. S., 267; *School District v. Estes*, 13 Neb., 52; *Harbach v. Miller*, 14 Neb., 9; *Rathbun v. McConnell*, 27 Neb., 239.)

If this lien existed, defendant was, at the commencement of suit, entitled to possession of the goods, unless the tender which the plaintiff claims to have made divested the lien. (*Tompkins v. Batie*, 11 Neb., 147; *Mc-*

Pherson v. Wiswell, 16 Neb., 625; *Knox v. Williams*, 24 Neb., 630; *Joyce v. Whitney*, 57 Ind., 550.)

The referee had no jurisdiction to pass upon questions outside of those embraced in the order of reference. (Code, sec. 298; *Mills v. Miller*, 3 Neb., 94; *Lamaster v. Scofield*, 5 Neb., 148; *Kinkaid v. Hiatt*, 24 Neb., 562; *Grim v. Norris*, 19 Cal., 140; *Smith v. Pollock*, 2 Cal., 92; *Robinson v. O'Conner*, 12 Neb., 405; *Littlefield v. Waterhouse*, 83 Me., 307; *Henderson v. Huey*, 45 Ala., 275; *Delong v. Stahl*, 13 Kan., 559; *Brondberg v. Babbott*, 14 Neb., 517; *Blin v. Campbell*, 14 Johns. [N. Y.], 432; *Hoagland v. Creed*, 81 Ill., 506; *Bishop v. Nelson*, 83 Ill., 601; *Meredeth v. People*, 84 Ill., 479; *Gordon v. Hobart*, 2 Story [U. S.], 243; *Bell v. Sampey*, 80 Ala., 372; *Dudley v. Farris*, 79 Ala., 187.)

E. T. Farnsworth and *Wharton & Baird, contra.*

References as to renewal of contract: *Capps v. Adams County*, 27 Neb., 360; *Cooper v. Chittenden*, 33 Neb., 313; *Lapp v. Ryan*, 23 Mo. App., 436; *Belch v. Belch*, 32 Mo. App., 387.

References as to defendant's right to a lien: *Fieldings v. Mills*, 2 Bos. [N. Y.], 489; *Wiles Laundering Co. v. Hahlo*, 105 N. Y., 234; *Chase v. Westmore*, 5 M. & S. [Eng.], 180; *Cowell v. Simpson*, 16 Ves. [Eng.], 276; *Bass v. Upton*, 1 Minn., 292; *Farguson v. Winslow*, 34 Minn., 384; *Coit v. Waples*, 1 Minn., 134; *Stoddard Mfg. Co. v. Huntly*, 8 N. H., 441; *Chandler v. Belden*, 18 Johns. [N. Y.], 157; *Cummings v. Harris*, 3 Vt., 244; *Stickney v. Allen*, 76 Mass., 352; *Stillings v. Gibson*, 63 N. H., 1; *Union Slate Co. v. Tilton*, 73 Me., 207.

In reply to the contention that plaintiff below had recognized defendant's lien reference was made to the following cases: *McCullough v. Hellweg*, 66 Md., 269; *Hoxsie v. The Reuben Doud*, 46 Fed. Rep., 803; *Macky v. Dillinger*, 73 Pa. St., 86; *Hayes v. Campbell*, 63 Cal., 143; *Adams v. Clark*, 9 Cush. [Mass.], 215; *Staat v. Evans*, 35 Ill., 456; *Chinn v. Bretches*, 42 Kan., 316; *Carlson v. Beckman*, 35 Neb., 395; *Mattocks v. Young*, 66 Me., 459.

Defendant having submitted the disputed questions to the referee, is estopped from denying the authority of the referee to pass upon those questions. (*Baird v. City of New York*, 74 N. Y., 382; *Quinn v. Lloyd*, 7 Rob. [N. Y.], 157; *Porter v. Parmly*, 6 J. & S. [N. Y.], 490; *McShane v. Gray*, 13 Ia., 504; *Hewitt v. Egbert*, 34 Ia., 485; *Armstrong v. Percy*, 5 Wend. [N. Y.], 536; *Bloore v. Potter*, 9 Wend. [N. Y.], 480; *Cowenhoven v. Ball*, 118 N. Y., 231; *Vose v. Cockroft*, 44 N. Y., 415; *Waterman v. Connecticut & P. R. R. Co.*, 30 Vt., 610; *Burt v. Oneida Community*, 33 N. E. Rep. [N. Y.], 307; *Taylor v. First Congregational Church*, 34 N. E. Rep. [Ind.], 655; *Hatch v. Watkins*, 1 Martin, n. s. [La.], 154; *Hosford v. Stone*, 6 Neb., 378; *Shain v. Peterson*, 33 Pac. Rep. [Cal.], 1085; *Huffman v. Beever*, 69 Hun [N. Y.], 557.)

POST, C. J.

This was an action of replevin in the district court for Douglas county by the Walter A. Wood Mowing & Reaping Machine Company, a corporation (hereafter called the "plaintiff"), against the Moline, Milburn & Stoddard Company (hereafter called the "defendant") to recover possession of certain farm machinery and extras and attachments thereto, together with a quantity of binding twine, of the alleged value of $28,626.50, and which was, as claimed, wrongfully detained by the defendant. An answer was filed alleging that on the 1st day of October, 1888, the parties hereto entered into a written contract, to which reference will hereafter be made, whereby the defendant agreed to receive all goods of the character described in the petition which might be consigned to it by the plaintiff, to store said goods in its warehouse in the city of Omaha, and to reship the same upon the order of the plaintiff, on terms therein specified; that said agreement had been renewed from year to year and was in full force and effect at the time of the commencement of the action; that pursuant thereto the defendant company received from the plaintiff large quantities of

machinery, binding twine, etc., including the property described in the petition, and which, with the exception of the property so described, has been sold or reshipped by order of the plaintiff; that a settlement was had between the parties, of the storage account, at the close of the year 1891, showing a balance in favor of the defendant under said contract of $3,482.09, which is still due and owing to it, and that there is due from the plaintiff in addition thereto, as charges for storing the property in controversy, the further sum of $2,571.55. The defendant was, it is alleged, entitled to the possession of the property in controversy at the time of the commencement of the action, by virtue of a lien thereon to the amount of its charges as aforesaid, in the aggregate sum of $6,053.64. It also claims damage for the wrongful detention of said property by the plaintiff in the sum of $5,000. There was a reply admitting the execution of the agreement set out and the receipt by the defendant of the property in controversy thereunder, but denying that said agreement was renewed, as charged, for the year 1892, or subsequent years. It is admitted therein that there was a settlement in 1891 of the storage account for that year, by which a balance was shown in plaintiff's favor of $3,482.09. It is, however, alleged that there was at the same time a settlement of the plaintiff's account for goods unaccounted for in the years 1890 and 1891, showing a balance in its favor of $581.89. The issues thus joined were, by agreement of parties, submitted to a referee "for an accounting of the amount due the defendant, and of the amount of goods, if any, not taken by the sheriff, * * * and the value thereof, and to report his findings," etc. The referee subsequently submitted his findings and conclusions of law, which, so far as material in our view of the questions presented, are as follows:

"That on October 1, 1888, the Walter A. Wood Mowing & Reaping Machine Company, plaintiff herein, and the Moline, Milburn & Stoddard Company, defendant herein,

entered into and executed in writing a contract in words and figures following, to-wit:

" 'This contract and agreement, entered into this 1st day of October, A. D. 1888, by and between Moline, Milburn & Stoddard Company, a corporation organized under the laws of the state of Ohio, and doing business at Omaha, Nebraska, and Des Moines, Iowa, party of the first part, and Walter A. Wood Mowing & Reaping Company, of Hoosick Falls, New York, and St. Louis, state of Missouri, party of the second part, witnesseth:

" 'The party of the first part agrees to receive all goods of the different kinds mentioned in this contract which may be consigned to them by the said party of the second part and store same in their warehouse, and to reship any such goods, or parts of same, on orders of said party of the second part or their authorized agents, at the following prices, viz.: * * * Party of the second part agrees to furnish one competent man to assist in shipping extras from July 1 to September 1, 1889, free of charge to party of first part; also agrees to allow party of the first part a commission of 33 1-3 per cent on list price of extras for all sold for cash, shipped C. O. D., or sold on their own account. * * * The said party of the first part agrees to pay freight on all goods consigned to them under the contract by the party of the second part, on arrival of same in Omaha, Nebraska, the party of the second part agreeing to remit same in New York or St. Louis exchange, payable to the order of Moline, Milburn & Stoddard Company, immediately upon receipt of expense in bill of same. All goods and repairs to be delivered at the warehouse of Moline, Milburn & Stoddard Company in Omaha, Nebraska, by the party of the second part (and any charges for drayage or extra handling that may occur by inability to get cars on Moline, Milburn & Stoddard Company's switch, caused by labor troubles or strikes, to be paid by said party of the second part). * * * The said party of first part agrees, where practicable, when so requested by the said

party of the second part, to collect as advance charges their charges for transfer, together with such amounts as the party of the second part requests, said advance charges to be credited to the said party of the second part. The said party of the first part agrees to make statement of account to said party of the second part on the 1st of September, or later, or at any time requested, and to remit any amount due said party of the second part at such time, and in case a balance is due Moline, Milburn & Stoddard Company, the said party of the second part agrees to remit same promptly on receipt of statement. The party of the first part reserves the right to make sight drafts on said party of the second part at any time for any balance which may be due for any freight, storage, or transfer charges, said draft to be accompanied by a statement of the same, and the said party of the second part hereby agrees to promptly honor any and all such drafts.

"'The said party of the second part agrees to transfer all their goods for supplying their trade tributary to Omaha, Nebraska, except car loads, from Hoosick Falls or St. Louis, direct to local agents only, through Moline, Milburn & Stoddard Company, during the term of this agreement. All orders for reshipment to be clear and definite as to goods wanted, and the said party of the first part reserves the right to promptly return any incomplete orders for further explanation before filling the same, and are not to be held responsible for any losses or damages that may arise from such action. The said party of the second part agrees to carry in store with said party of the first part a sufficient quantity of such repairs as may be needed by their patrons; any orders for repairs not in store are to be repeated to the said party of the second part for direct shipment to the party ordering the same. On all such repeated orders for repairs the said party of the first part is to receive 10 per cent on list price at time of settlement. All goods in store with the said party of the first part are to be carried

at the risk of the party of the second part as to fire and the action of the elements. * * * The said party of the second part agrees to pay all freight, drayage, and charges on any goods which may be returned by their agents, and also agrees to pay the said party of the first part full transfer charge for receiving and handling same.

"'Either party may, by giving thirty days' notice in writing to the other party, cancel this contract. In case this contract is not renewed at its termination, party of the first part agrees to transfer all machines and extras at one-third of the regular transfer charges as designated in this contract.'"

"That in pursuance and fulfillment of said contract the plaintiff shipped to the defendant goods of the different kinds mentioned in said contract, and the defendant received and stored the same, and reshipped said goods as requested by the plaintiff as provided by said contract. * * *

"7. That the plaintiff did not ship goods to the defendant or transact any business with the defendant after December 1, 1891, and the defendant did not reship any goods belonging to the plaintiff after said date upon any order or instruction from the plaintiff. There was no attempt, by letter, indorsement, or otherwise, on the part of the plaintiff or defendant to renew or extend the contract for any period after December 1, 1891.

"8. That on December 18, 1891, a settlement was had between the plaintiff and the defendant of the business transactions had under said contract for the year 1891, and it was agreed by and between the plaintiff and the defendant that there was at that time due and owing to the defendant, of and from the plaintiff, the sum of $3,495.79 for and on account of goods received, stored, and transferred under said contract for the year 1891 and down to December 1, 1891. This settlement did not take into consideration and include certain extras short in the year 1890, amounting to $380.22, and the extras short in 1891, amounting to $165.67; that upon the extras

short in 1890 the defendant was entitled to a commission of 33 1-3 per cent, amounting to $126.74; that upon the extras short in the year 1891 the defendant was entitled to a commission of 33 1-3 per cent, amounting to $55.22; that on the 18th day of December, 1891, the defendant was entitled to credits as follows:

Amount of the settlement for 1891	$3,495 79	
Commission on extras short in 1890	126 74	
Commission on extras short in 1891	55 22	
		$3,677 75
"And defendant should be charged with—		
Extras in 1890	$380 22	
Extras short in 1891	165 67	
		545 89
Balance		$3,131 86

"There was due to the defendant from the plaintiff on the 18th day of December, 1891, the sum of $3,131.86, and is the entire amount now due to the defendant from the plaintiff, with interest at seven per cent from December 18, 1891.

"9. That at the time of the commencement of this action the plaintiff was entitled to the possession of the goods which had been received by the defendants of the plaintiff and by the defendant stored under said contract.

"10. That one-third of the transfer charges upon the goods held by the defendant under said contract was the sum of $856.68.

"11. The defendant did not transfer the goods to the plaintiff.

"12. That on the 2d day of February, 1892, the plaintiff herein offered to the defendant a certified check for the sum of $3,952.54, being the amount then admitted by the defendant to be due from the plaintiff to the defendant, including one-third transfer charges, namely, the sum of $856.68.

"13. That on the said 2d day of February, 1892, and on previous occasions, the plaintiff, through its agents, demanded from the defendant the goods herein replevied. The defendant refused to transfer or deliver the goods to the plaintiff.

"14. That the sheriff of Douglas county, Nebraska, by virtue of the writ of replevin issued herein, took from the defendant all the goods held by the defendant belonging to the plaintiff.

"15. That the goods taken herein by the sheriff were all the goods received by the defendant of and from the plaintiff under the contract aforesaid, except such goods as had been shipped or transferred by the defendant at the request of the plaintiff to various parties, and duly settled and accounted for in the settlement of 1891 and in the account showing extras short in 1890 and extras short in 1891.

"FINDINGS OF LAW.

"1. That the contract between the plaintiff and defendant was renewed by the parties hereto for the year 1890, and was again extended by the parties for one year from December 1, 1890, and that it terminated on the 1st day of December, 1891.

"2. That the clause in said contract relative to the transfer of goods at the termination thereof was renewed with the contract for the year 1890, and was again renewed and extended by the parties for one year from December 1, 1890, and was in full force and effect at the termination of the contract on December 1, 1891, and the defendant would have been entitled to one-third transfer charges if the transfer had been made.

"3. That the plaintiff, on the 2d day of February, 1892, made a lawful tender to the defendant of $3,952.54.

"Respectfully submitted, this 28th day of October, 1893.

"CHAS. E. CLAPP, *Referee.*"

To the foregoing report exceptions were interposed, as was also a motion for a new trial, which were in turn overruled, whereupon the court found that the right of

possession of the property in controversy was in the plaintiff at the time the action was commenced, and that it was entitled to damage for wrongful detention thereof in the sum of $0.05, for which judgment was awarded, and which has, by means of the petition in error of the unsuccessful party, been removed into this court for review.

We will first notice the last proposition argued by counsel, viz., that the findings of the referee are broader than the order of submission, and therefore void for want of jurisdiction. The district court, in disposing of that objection, found that "the defendant, by requesting findings upon all the questions of fact and law involved in said litigation, is now estopped to call in question the jurisdiction of the referee." It is quite apparent from an inspection of the record that the duty of the referee to pass upon all questions material to the controversy was not only conceded by both parties at the trial, but expressly asserted by the defendant. The question presented is not like that of a verdict or judgment wholly unsupported by the pleadings, since the findings assailed are clearly within the issues made by the pleadings and tried before the referee. The defendant having voluntarily submitted the issues to the referee under the order of the court, and invoked a decision thereof favorable to its own contention, should not, after an adverse holding, be heard to question his authority in the premises. The defendant's attitude, as we view it, resembles that of a suitor seeking in a proceeding by petition in error to abandon the theory upon which the cause was prosecuted or defended by him in the court of original jurisdiction,—a practice expressly condemned by this court in *Smith v. Spaulding*, 40 Neb., 339. (See, also, 2 Ency. of Pleading & Practice, 516, and cases cited.) The objection is clearly without merit and was rightly disregarded by the court below.

The next and most important subject of inquiry is whether, by the terms of the contract relied upon, a

lien existed in favor of the defendant company for the amount of its charges thereunder. It is a fundamental rule, distinctly recognized by the authorities hereafter cited, that exclusive possession by the claimant, whether a factor, a broker, or warehouseman, is essential to the existence or continuance of a lien thereon, and that a lien does not, at common law, exist in favor of one who holds property in subordination to the will or control of another. It is also true that no lien attaches if inconsistent with the terms, express or implied, of the contract under which possession was obtained.

We will now, with these elementary principles in view, proceed to an examination of some of the salient features of the contract. It will be observed, first, that the defendant company thereby undertakes to receive all of the goods consigned to it by the plaintiff, to store the same in its warehouse, and "to reship any said goods, or parts of the same," on the order of the plaintiff or its agents; second, the defendant is required to make a statement of the account at any time on request of the plaintiff, and remit any balance due the latter; third, the plaintiff is required at any time to remit any balance due the defendant upon receipt of statement, the latter reserving the right to make sight drafts at any time, accompanied by a statement, for any balance due for freight, storage, or transfer charges. These conditions we interpret as reserving to the plaintiff the right, at pleasure, to sell and deliver the goods consigned to the defendant, and as imposing upon defendant the corresponding duty to yield possession thereof upon the plaintiff's order, relying upon the personal credit of the latter for the amount of its charge—a relation irreconcilably in conflict with the construction now contended for. We do not question the proposition that a general lien may exist at common law, or by custom, in favor of a factor, warehouseman, or other bailee for a balance due on account, although, as remarked by Chancellor Kent, such liens are not favorites of the law. (2 Kent, Commentaries, 634-637.) That sub-

ject is, however, not presented by this record, for the reason, as we have seen, that the turning point of the controversy is the construction to be given the contract of bailment here involved.

Our further examination will accordingly be confined to the authorities tending to elucidate the particular question involved, and which, as will be observed, are in harmony with the views above expressed. In *Trust v. Pirsson*, 1 Hilt. [N. Y.], 292, one party was by agreement authorized to store pianos in the warehouse of the other, with the privilege of repairing and selling at pleasure the property thus stored, for the consideration of $25 per month, payable at the end of each month, which agreement was held a waiver of a lien for the bailee's charges thereunder. "The distinction," said Daly, J., "that there can be no lien where the day or time of payment is regulated and fixed by the parties is as old as the Year Books, and it is manifest that the law could not be otherwise. The right to detain all the property to which the lien attaches until the charge upon it is paid is incident to the right of lien. When, then, did the lien in this case attach? Certainly not when the possession commenced, for no payment was to be made until a month after. During that time Pirsson had a right, under the agreement, to sell any of his pianos that might be there, and, of course, to deliver them to the buyers. * * * The contract, therefore, went into operation with a recognition of rights on the part of Pirsson wholly inconsistent with a reservation of a right of lien." In *Dunham v. Pettee*, 1 Daly [N. Y.], 112, it was held, after a careful review of the authorities, that where, by the custom of warehousemen, goods are delivered by the latter without immediate payment of storage charges, in reliance upon the personal credit of the owner, there is no lien, such a course of dealing being inconsistent with the theory of an implied understanding, at the time of the deposit, that the goods so deposited may be retained as security for their storage. In *Fieldings v. Mills*, 2 Bosw. [N. Y.], 489,

it was held that a mechanic who, in the course of his business, makes repairs upon an agreement to give credit for a stipulated time thereby waives his lien upon the property so repaired. In *Stoddard Woolen Manufactory v. Huntley*, 8 N. H., 441, an agreement by a clothier to dress flannel furnished by the other party, for a year, and to receive pay therefor quarterly, was held not to create a lien in favor of the former upon cloth remaining in his hands at the end of the quarter. *Wiles Laundering Co. v. Hahlo*, 105 N. Y., 234, arose out of a state of facts substantially similar to the case last cited. It was held that when a time of payment is fixed by contract which is, or may be, subsequent to the time when the owner is entitled to a return of the property, there can be no lien. The court, by Rapallo, J., in the course of the opinion, say: "The same principle is applicable to liens of warehousemen, carriers, and other bailees. If, by the terms of the contract, possession of the property is to be surrendered before payment, no right of lien exists." In *McMaster v. Merrick*, 41 Mich., 505, a sawmill was leased without rent, the lessee being required to saw all logs furnished by the lessor, and to season and ship the lumber manufactured therefrom, during the continuance of the lease. It was held that the contract was inconsistent with the theory of a lien by the lessee upon the lumber manufactured by him, since, among other reasons assigned, the obligation to ship was without limitation and applied to the entire product of the logs furnished by the lessor. In *Cowell v. Simpson*, 16 Ves. [Eng.], 275, it was asserted by Lord Eldon as the doctrine of previous cases that the lien of a factor is lost by reason of a special contract for a particular mode of payment of his charges. Like views are also expressed in the following cases: *Chandler v. Belden*, 18 Johns. [N. Y.], 157; *Raitt v. Mitchell*, 4 Campb. [Eng.], 146; *Crawshay v. Homfray*, 4 B. & Ald. [Eng.], 50; *Chase v. Westmore*, 5 Maule & Sel. [Eng.], 180. See, also, 1 Jones, Liens, sec. 1002 *et seq.;* Mechem, Agency, secs. 676, 680; Edwards, Bailments [3d ed.], sec. 432.

To pursue the subject by a review of the cases to which we are referred by the defendant company would result in the unnecessary prolonging of this opinion, without corresponding profit to any one concerned. It is sufficient that they do not, in our judgment, support the claim of a lien by virtue of the contract upon which the defendant relies, while in some of them the principle which controlled the cases above cited is distinctly recognized. We do not doubt, from a consideration of the subject in the light of authority, that the stipulation authorizing a removal of the property at the pleasure of the plaintiff, and the defendant's evident reliance upon the personal credit of the plaintiff, is a waiver of the right which the latter might otherwise have asserted to a lien upon such property for the amount of its charges. It follows that since the defendant's sole reliance is its alleged lien by reason of the facts stated, the plaintiff was entitled to the possession of the property in controversy when the action was commenced, and that the judgment of the district court must be

AFFIRMED.

GEORGE W. SMITH ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

FILED DECEMBER 16, 1896. No. 7990.

1. **Municipal Corporations:** SPECIAL ASSESSMENTS. It is a rule of construction peculiarly applicable to special assessments authorized by section 6, article 9, of the constitution that the record must show affirmatively a compliance with all the conditions essential to a valid exercise of the taxing power, and that the omission of such facts will not be supplied by presumptions.

2. ———: ———: AWARD OF DAMAGES. An award of damage pursuant to provision of section 116, charter of the city of Omaha (Compiled Statutes, ch. 12*a*), upon the change of an established grade, should show affirmatively that the appraisers appointed for such purpose took into consideration the benefits thereby accruing to the prop-

erty in question and that the award or finding so made represents the difference or balance in favor of the property owner.

3. ———: ———. Both section 6, article 9, constitution, 1875, and the charter of the city of Omaha by implication limit the amount of assessment for local improvements to the special benefits severally accruing to the lots or parcels of land thereby affected. (*Cain v. City of Omaha*, 42 Neb., 120.)

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

E. W. Simeral and *George W. Doane*, for appellants.

W. J. Connell, *contra*.

POST, C. J.

This was an action in the district court for Douglas county by George W. Smith, John A. Creighton, Alvin Saunders, James Neville, James J. Brown, Abraham Martin, Eliza A. Towle, David T. Mount, Samuel R. Johnson, Nathan B. Falconer, Mary C. Denise, Gilbert M. Hitchcock, Leah Rosewater, and Emily J. Briggs, the purpose of which was to perpetually enjoin the collection by the city of Omaha of certain special assessments hereafter more particularly described. William Bushman and Charles G. Davidge, who claim an interest in the subject of the controversy in common with the plaintiffs, were, on motion, permitted to intervene and join in the prosecution of the cause, which resulted in a decree for Saunders, Rosewater, and Falconer as prayed, and a dismissal of the several bills for want of equity, so far as they concern the other plaintiffs and intervenors, and from which an appeal has by the unsuccessful parties been prosecuted to this court. The material facts disclosed by the pleadings and proofs are as follows: The council of the city of Omaha, in the year 1890, by ordinance, provided for a change of the grade of Douglas street, between Sixteenth and Twentieth streets, pursuant to which the mayor, with the consent of the city council, in due form appointed three disinterested free-

holders, to determine and assess the damage to property owners on account of such change of grade. The appraisers mentioned, having qualified by taking and subscribing an oath to faithfully and impartially discharge the duties of their said offices, proceeded from a personal examination of the property affected by such change of grade to find and award damages resulting therefrom to twenty separate lots, in the aggregate sum of $32,012, but without reference of any character to the other lots or subdivisions thereof so affected. The council, upon the approval of the return or award aforesaid, and while sitting as a board of equalization as provided by the city's charter, proceeded to apportion the damages thus awarded to the several lots and parcels of land adjudged to be benefited by said improvement. An ordinance was subsequently adopted by which, after a recital of the facts herein stated, it is provided: "The cost of damages for the change of grade of Douglas street, in the city of Omaha, from Sixteenth street to Twentieth street, said damages being the sum of $32,057, be, and the same is hereby, levied according to special benefits by reason of said change of grade upon the following lots" found to be benefited by the proposed improvement, some two hundred in number, with the amount assessed against each thereof. There was, as already intimated, except as to Saunders, Rosewater, and Falconer, no finding of damage in favor of any of the plaintiffs, nor is there any finding, unless by implication, respecting special benefits to the lots found to be damaged by such change of grade. The report of the appraisers, to which reference has been made and which is the basis of the subsequent action by the city council, is as follows: "The undersigned, three disinterested freeholders of the city of Omaha, having been duly appointed by the mayor, with the approval of the council, to assess the damage to the owners, respectively, of property and land affected by the change of grade declared to be necessary by ordinance No. 136, on Douglas street from Sixteenth to Twentieth street, having duly

accepted said appointment, and qualified as required by law, do hereby certify and report that we have faithfully and impartially discharged the duties of our appointment, and after careful personal examination of said property and land, and consideration of the damage to said owners, respectively, by reason of such change of grade, we have and do assess as the damage to said owners respectively the sums set opposite each of said owner's names as shown by schedule B hereto attached, and which we refer to as part of this our assessment and report."

The form of the exhibit mentioned in the foregoing report is sufficiently illustrated by the first entry appearing thereon, viz.: "Lillian Jacobs, lot 7, block 108, $690.00." The ascertainment of damage in the manner here indicated, upon the establishment or change of grade of streets, avenues, or alleys, is authorized by section 116 of the charter of the city of Omaha (Compiled Statutes, ch. 12*a*, entitled "Cities of the Metropolitan Class"), viz.: "The mayor and council of any city governed by this act shall have power by ordinance to establish the grade of any street, avenue or alley in the city, and when the grade of any street, avenue or alley shall have been heretofore established, or when the grade of any street, avenue or alley shall be established and approved as herein provided the grade of no street or part of a street shall be changed unless the consent in writing is first obtained of the owners of lots or lands abutting upon the street or part of street where such change of grade is to be made, who represent a majority of the feet front thereon, and not then until the damages to property owners which may be caused by such change of grade shall have been assessed and determined by three disinterested freeholders who shall be appointed by the mayor and council for that purpose, who shall make such appraisement, taking into consideration the benefits, if any, to such property, and file their report with the city clerk; and the amount of damages so assessed shall be tendered to such property

owners or their agents as soon as the funds for that purpose are obtained from the assessments of such damages upon property benefited by reason of such change of grade, or otherwise realized; *Provided*, That no street, avenue or alley shall be worked to such change of grade until the damages so assessed shall be tendered to such property owners or their agents." Authority to assess the damage occasioned by improvements of the character here involved against the property specially benefited thereby, is conferred upon the city council by section 119 of the chapter above cited, viz.: "The council shall have power and is hereby authorized to assess the damages awarded or recovered for grading, change of grade, or for the appropriation of private property, upon the lots and lands benefited, which shall abut or be adjacent to the street, avenue or alley graded, or for the opening, extending or widening of which private property shall be appropriated, or on which the grade shall be changed, and in the case of appropriation of land for widening of a street, avenue or alley, the council may consider, for the purpose of determining benefits and equalizing such assessment, whether any portion of the street, avenue or alley had been previously donated from any lot or piece of land abutting or adjacent thereto."

The primary question suggested by the record and arguments of this cause is the sufficiency of the findings of damages and benefits as the basis of the subsequent proceedings which resulted in the assessments complained of,—in brief, the jurisdiction of the city council to assess against the property of appellants the amount of the alleged special benefits. It is a recognized rule of construction, especially applicable to actions of this character, that those things which the law regards as the substance of the proceeding cannot by the courts be treated as immaterial, that the record must show affirmatively a compliance with all the conditions essential to a valid exercise of the taxing power, and that their omission will not be supplied by presumptions. The following, among

the many cases in point, sufficiently illustrate the principle above stated: In *State v. Mayor of Paterson*, 37 N. J. Law, 380, the mayor and aldermen were, upon the grading of any street, required to appoint three impartial assessors to assess the cost thereof against the property fronting upon such street, "in proportion to the benefit received." In holding the assessment void for the failure to show affirmatively that the appraisers had taken into consideration special benefits to the property involved, the supreme court say: "But if these persons had been duly appointed and qualified to act in the premises, there is such infirmity in the assessment itself that it cannot be sustained. The assessors do not in their report certify that they imposed the burden in proportion to the benefits received, nor does it in anywise appear that they were governed by a correct principle. On the contrary, their return shows that they arbitrarily assessed each lineal foot of frontage in an equal amount." In *Village of Passaic v. State*, 37 N. J. Law, 538, the court of errors and appeals, in construing the same statute, say: "It follows that it is essential to the validity of any assessment under this provision of the charter that it affirmatively and unequivocally appear that the assessment does not exceed the benefit. The intendment made in favor of the statute will not, on established principle, be extended to the report of the assessment. In this case it does not appear that the assessment upon the railroad company was not in excess of the benefits." (See, also, *State v. Inhabitants of West Orange*, 39 N. J. Law, 453.) In *Merritt v. Village of Portchester*, 71 N. Y., 309, an oath by the appraisers to discharge their duties according "to the best of their ability" was held not a compliance with the statute requiring them to be sworn "to faithfully and fairly discharge their duties," etc., and which ruling is cited with approval in *Stebbins v. Kay*, 123 N. Y., 31. In *Chamberlain v. City of Cleveland*, 34 O. St., 551, the assessment upon "property benefited" was held void on the ground that it failed to show that the special benefits

were valued at all, or if valued, that they were assessed in proportion to the benefit which each lot received. In the case last cited we find the rule thus stated by Gilmore, C. J.: "It is essential to the validity of the assessment that the proceedings by which it is made must show upon their face that the requirements of the law have been substantially complied with, and that the restrictions imposed by law upon the exercise of the power have been observed in such a way that the owner of the lot assessed has had the benefit of the protection they are intended to give. * * * Presumption, if permitted in favor of the validity of any part of the proceedings, cannot be permitted to supply the essential elements of a valid assessment that are wanting here." In *Lieberman v. City of Milwaukee*, 89 Wis., 336, it was by statute made the duty of the board of public works, before ordering any work to be done by abutting owners upon the establishment of a grade, to "view the premises and consider the amount proposed to be made chargeable against said several lots or pieces of land, and the benefits which, in their opinion, will actually accrue to the owners of the same in consequence of such improvement," and to assess against the same "the amount of benefits which those lots or pieces will severally, in the opinion of the board, derive, * * * taking into consideration in each case any injury which, in the opinion of the board, may result to each lot, * * * and in case the benefits, in their opinion, amount to less than the cost of the improvement, the balance shall be paid out of the ward funds of the ward or wards in which such improvement is made; and said board shall indorse their decision and assessment in every case on the estimate of the cost of such improvement filed in their office." By the following section it was made the duty of the board of public works, upon the change of an established grade, "at the time of making their assessment as provided in the preceding section, to consider, determine, and assess against the lots which they may deem benefited by the proposed improvements,

to the amount of such benefits, the damages, costs, and charges, including the cost of such improvement, arising from such alteration of grade, to the owner of any lot * * * which may be affected or injured in consequence thereof, taking into consideration in each case any advantages and benefits which may be conferred thereby upon such lot, * * * in common with the other property on the street affected by such grade, and the excess of said damages, costs, and expenses over the benefits assessed, as provided in the preceding section, shall be paid out of the ward funds." The court, by Pinney, J., construing the foregoing provisions, say: "The law proceeds upon the basis that assessments for such improvements are to be limited to the benefits conferred on the property, to be modified and affected by a proper allowance or award of damages, costs, and charges arising from the change of grade, by way of compensation therefor, and the particular provisions of the section must be construed with reference to this manifest purpose. It is plain that there are two assessments provided for in a case like the present, though both may be well combined in the same document. It is essential to the validity of any such assessment that it shall clearly appear upon its face that the provisions of law for the benefit of the lot owner have been observed, * * * not only the question of benefits and injury, but the question of damages, costs, and charges by way of compensation for the alteration of the grade."

There is one apparent difference between the requirements of the city's charter in this case and the statutes involved in the cases cited, since the legislature appears, whether wisely or unwisely we are not called upon to determine, to have provided for the ascertainment of damage to private property by appraisers selected for that purpose, and for the apportionment by the city council of the damage so awarded to the several lots adjudged to be benefited by the contemplated improvement. In addition to the provisions quoted from section

119, section 85, among other things, declares that "in all cases before any special taxes that may be levied, except for constructing wood sidewalks, shall be finally levied, it shall be the duty of the council to sit as a board of equalization for the purpose of equalizing any such proposed levy of special taxes or assessments, * * * and at such session it shall hear all complaints that the owners of property so to be assessed and taxed may make, and it shall be its duty to equalize any such assessment by correcting any errors therein, and thereupon such assessments and special taxes shall be finally made." But whatever may be the true interpretation of sections 85 and 119, it should affirmatively appear from the return contemplated by section 116 that the appraisers in making the award submitted by them took into consideration both the damage to the property described and such special benefits, if any, resulting from the establishment or change of grade as tend to increase the value of the property in question, and that the award so made represents the difference or balance in favor of the property owner. Such is the rule sanctioned by the weight of authority,—if indeed there can be said to exist a diversity of opinion on the subject,—and is clearly implied from the language employed. The statute thus interpreted prescribes a constitutional basis for the ascertainment of the damage in favor of property owners, and is in strict accord with the rule often recognized by this court in the assessment of damage when property is taken by railroad companies or other public agencies in the exercise of the right of eminent domain. (*Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb., 542; *Chicago, B. & Q. R. Co. v. Shafer*, 49 Neb., 25.)

It has been suggested that inasmuch as there was no finding of damage in favor of the appellants or any of them, they should not in this proceeding be heard to complain of the award in favor of the successful claimants. But the fallacy of that argument becomes apparent when we remember that the city council in the ap-

portionment of the damage evidently acted upon the assumption that the entire amount awarded by the appraisers was chargeable against the property specially benefited in proportion to the benefits accruing to the several lots or parcels of land affected. It is obvious, therefore, that the effect of the failure to take into consideration benefits accruing to the twenty separate lots and fractions of lots enumerated in the appraisers' return was to increase by the amount of such benefits the total sum assessed against the two hundred lots adjudged to have been beneficially affected by such improvement. We must not, however, be understood as assenting to the proposition that the total sum rightly awarded as damages in cases of this character is chargeable against the lots benefited by the improvement in question without regard to the amount or value of the benefits severally accruing thereto. The legislature has on the contrary, by the qualification with respect to special benefits, not only provided a ratio of assessment, but has also, by plain implication, limited the amount of such assessment to benefits accruing to the particular lot or parcel of land affected. The legislature may confer upon cities, towns, and villages "power to make local improvements by special assessment or special taxation of property benefited." (Constitution, 1875, art. 9, sec. 6.) That provision has been construed as limiting the assessments there contemplated to the property specially benefited and to the amount of the benefits so conferred. (*Hanscom v. City of Omaha*, 11 Neb., 37; *Cain v. City of Omaha*, 42 Neb., 120.) And, as said in *Village of Passaic v. State*, *supra*, "The act must be construed as if it contained an express limitation of the assessment to the land benefited and the further limitation of the amount of the assessment to the benefit received." It follows without further elaboration that the proceedings antecedent to the action complained of were insufficient to invest the city council with jurisdiction and that assessment of appellants' property is accordingly without authority and

void. The decree is accordingly reversed and the cause remanded with instruction to enter a decree in conformity with this opinion.

REVERSED.

THOMAS O'SHEA, APPELLANT, V. SAMUEL H. RICE, APPELLEE.

FILED DECEMBER 16, 1896. No. 6919.

1. **Statute of Frauds:** SALE OF LAND: AGENCY. The contract of an agent in the name of his principal for the sale of lands in this state is void under the provision of our statute of frauds, unless the authority of the latter is evidenced in writing. (*Morgan v. Bergen*, 3 Neb., 209.)

2. **Principal and Agent:** RATIFICATION. Knowledge by the principal of the material facts is an essential element of an effective ratification by him of the unauthorized act of his agent.

3. ———: STATUTE OF FRAUDS. *Held*, From an examination of the evidence, (1) that the agreement sought to be enforced is void under the provisions of the statute of frauds; (2) that the law will not from the facts disclosed imply a ratification thereof by the defendant.

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

Allen, Reed & Ellis, for appellant.

Wigton & Whitham, contra.

POST, C. J.

This is an appeal from a decree of the district court for Madison county dismissing the petition of the plaintiff for specific performance of an alleged agreement for the conveyance by the defendant of certain real estate in said county. The agreement alleged as the basis of the action is as follows:

"AGREEMENT TO SELL AND CONVEY REAL ESTATE.

"S. H. Rice with Thomas O'Shea. Memorandum of agreement made this 13th day of January, 1891, between S. H. Rice, of Milford, Neb., of the one part, and Thomas O'Shea, of the other part, witnesseth: That in consideration of $25.00 paid by Thomas O'Shea, the receipt of which is hereby acknowledged, the said party, S. H. Rice, agrees to sell and convey to said Thomas O'Shea, for the sum of $600.00, the following described property, situated in Madison county, Neb., to-wit: The W. ½ of S. E. ¼ of section 30, township 22 north, of range 4 west of the 6th P. M. The said Rice agrees to furnish to said O'Shea an abstract of title showing land clear of all incumbrances or irregularities, of whatever nature, and also give a warranty deed of covenants for said land, within thirty days from this date. The balance of purchase money, $575.00, to be paid upon receipt of such abstract and warranty deed for the premises. S. H. RICE,

"By WILLIS MCBRIDE,

"*His Agent.*

"THOMAS O'SHEA."

It appears from the evidence in the bill of exceptions that the defendant, who resides in the county of Seward, was desirous of selling the property in controversy, and had by letter solicited McBride, a resident of Madison, who executed the foregoing agreement in his name, to procure a purchaser therefor. In a letter under date of January 9, 1891, he was advised by McBride of an offer of $600 for the property mentioned, without any reference to conditions of sale or terms of payment, to which he replied as follows:

"MILFORD, Jany. 10, 1891.

"DEAR SIR: Yours rec'd. $600 is less than I will take; however, if your man will pay your commission, I will sell at $600; not otherwise.

"Yours truly, S. H. RICE."

On January 14 McBride addressed the defendant as follows:

"*S. H. Rice, Milford, Neb.*—SIR: Your postal of 10th inst. saying you would take $600 net to you for W. ½ S. E. 30, 22, 4, received. I have sold the farm to Thomas O'Shea and received a payment of $25 to bind bargain, giving him contract of sale. You are to furnish abstract showing land clear from all incumbrances and title perfect, and give good and sufficient warranty deed for premises within thirty days. Please complete enclosed deed and return to First National Bank of Madison with instructions, and upon receipt of deed and abstract money will be paid at bank. Please attend to this at once.

"Yours truly, WILLIS MCBRIDE.

"I will be pleased to receive your order for abstract, which will cost $4."

The defendant, on January 16, enclosed a warranty deed for the premises, with the usual covenant, to the bank designated by Mr. McBride, accompanied by the following letter:

"MILFORD, Jan. 16, 1891.

"*First Nat. Bank, Madison*—GENTLEMEN: By request of Mr. Willis McBride, I enclose deed, which please hand to Mr. McBride on receipt of $600. Please pay Mr. McBride, of said $600, $4 for abstract, and remit bal. to my address, less exchange, and oblige,

"Yours truly, S. H. RICE."

January 26 Mr. McBride addressed the defendant as follows:

"*S. H. Rice, Esq., Milford, Neb.*—DEAR SIR: I enclose your abstract made on W. ½ S. E. 30, 22, 4, and call your attention to the following liens and clouds: 1st, patent not recorded; 2d, taxes 1890 not paid; 3d, quitclaim deed Henry M. Brown to William V. Allen; 4th, suit to set aside certain instruments (Henry M. Brown v. S. H. Rice et al.), which was decided in favor of plaintiff in district court, carried to supreme court, and no mandate rec'd

here to show decision. I have showed the abstract to Mr. O'Shea and he refuses to pay over balance of money until title is made good as per agreement January 13. Kindly advise me what is to be done at once.

"Yours truly, WILLIS MCBRIDE."

On January 29 defendant answered, explaining the apparent defects in his title, and closing as follows: "However, Cunningham's warranty deed is good enough for me, and if my warranty deed is not good enough for Mr. O'Shea he had better take his money and buy elsewhere." On February 5 the deed mentioned was returned to the defendant who, upon demands subsequently made, refused to convey. The first question presented in the argument, and the only one which demands notice at this time, is whether the agreement relied upon sufficiently answers the requirement of the statute of frauds.

Section 3, chapter 32, Compiled Statutes, provides that "no estate or interest in land * * * shall hereafter be created, granted, assigned, or surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the same." Section 5 thereof declares that "every contract for the leasing for a longer period than one year, or for the sale of any lands or interest in lands shall be void unless the contract, or some note or memorandum thereof, be in writing and signed by the party by whom the lease or sale is made." Section 25 of the same chapter provides that "every instrument required by any of the provisions of this chapter to be subscribed by any party may be subscribed by his agent thereunto authorized by writing." It was held, construing the foregoing provisions, in *Morgan v. Bergen*, 3 Neb., 209, that the contract of an agent in the name of his principal for the sale, or leasing of lands in this state for a period exceeding one year, is void unless the authority of the former is evidenced in writing, and the views there expressed were subsequently approved in *Stadleman v. Fitzgerald*, 14 Neb., 290, *Bigler*

v. Baker, 40 Neb., 325, and *Morrow v. Jones*, 41 Neb., 867. It is not seriously claimed that McBride could, by reason of the written correspondence, bind the defendant by means of the agreement executed in his name. It is, however, contended that a ratification thereof by the latter should be implied from his alleged partial execution of said agreement. But in that view we cannot concur. It is elementary law that knowledge by the principal of the material facts is an essential element of an effective ratification of the unauthorized acts of his agent. (See *Dietz v. City Nat. Bank*, 42 Neb., 584; *Holm v. Bennett*, 43 Neb., 808.) The first intimation conveyed to the defendant of the execution in his name of a written agreement for the conveyance of the property in controversy, was by letter from McBride, bearing date of February 3,—two days previous to his repudiation of the transaction by directing a return of the deed. We agree with the district court that the agreement relied upon is void under the provisions of the statute of frauds, and that the evidence fails to establish a ratification thereof by the defendant. The decree will, therefore, be

AFFIRMED.

OZIAS HERMANCE V. DENNIS CUNNINGHAM.

FILED DECEMBER 16, 1896. No. 7000.

Practice: DEFAULT: AMENDMENT OF ANSWER: MOTION TO VACATE JUDGMENT FOR DEFENDANT. In a county where there were several judges of the district court, who presided over sessions of the court in separate rooms, a cause was, pursuant to the established rules of practice, set for trial before one of the judges, on a fixed date, and notice thereof given in the manner prescribed by the rules. On the day assigned for trial the plaintiff was not present nor were his attorneys. The defendant, in accordance with leave therefor obtained, amended his answer by interlineation and thereby introduced therein new matter of defense. A trial was immediately had and judgment rendered favorable to defendant, based on a finding of the truth of the new matter pleaded in the

amended answer. The plaintiff, a few days subsequent to the trial and during the same term of court, filed a motion to set aside the judgment, to be allowed to plead to the amended answer, and be given a trial of the issues. This motion was supported by affidavits and was overruled. *Held*, That the record and affidavits disclosed a state of facts sufficient to entitle the plaintiff to the relief asked; hence the motion should have been sustained.

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

Gregory, Day & Day, for plaintiff in error.

William E. Healey, contra.

HARRISON, J.

It appears that an action on an account was instituted in the district court of Douglas county; that there was an answer on the part of defendant, consisting of a general denial of the allegations of the petition filed by plaintiff. There were several judges of the district court in Douglas county, each of whom held court in a separate room of the court house, or some of them in rooms provided in another building in Omaha. Of the rules of practice adopted by the judges and then in existence in the district court of Douglas county was the following: "At the close of business each day the clerk, under the directions of the judges, shall prepare a list of the civil cases subject to be tried on the next day in each branch of the court engaged in the trial of such cases, which list shall be posted for the information of the bar. The list will comprise such number of causes on the equity and jury dockets not beyond the assignment on the general docket as may be deemed expedient, and no others will be called for trial on that day." This cause was placed on the list of those to be tried in one of the court rooms on March 3, 1893. On the date fixed the cause was called for trial, and the plaintiff was not there and his attorneys did not appear. Counsel for defendant asked and were granted leave to amend the answer by interlineation, which was

done by inserting a statement, in effect, that the account in suit, declared by plaintiff, was barred by the statute of limitations. In regard to the further proceedings the journal entry is as follows: "This cause coming on to be heard on the petition and amended answer and the evidence, the court finds that the cause of action set forth in the petition was barred by the statute of limitations at the time said action was begun. It is therefore considered by the court that the defendant go hence without day, at the plaintiff's cost, taxed at $——." A few days subsequent to the entry of judgment, attorneys for plaintiff filed a motion, supported by affidavits, to set aside the judgment, and that they be allowed to plead to defendant's amended answer and be accorded a trial of the cause, which, on hearing, was overruled. The plaintiff asks a reversal of the action of the trial court in overruling the motion.

The affidavits filed in support of the motion disclosed that the action was commenced for plaintiff by a firm of attorneys, to one member of which was assigned the duty of examining the calendar of causes set for hearing in each court room for each day. That "through some oversight or inadvertence" he failed to notice that this case was on the calendar for trial on the 3d of March. It was also shown that such member of the firm and his brother, another member of the firm, had exclusive charge of this cause; had prepared for and expected to conduct its trial; further, that they were both actively engaged in the trial of another case in another court room during the entire day fixed for the hearing of this. It is true that the fact of the plaintiff not being represented at the trial was caused by the failure of his attorneys to notice that the case was set for trial in a particular court room on a designated day, but in view of the fact that on that day the defendant was allowed to amend his answer and raise a new issue, on which the finding was made which determined the case and served as a basis for the judgment adverse to the plaintiff,

coupled with the showing made in the affidavits filed with the motion, we think the motion, being promptly presented, should have been sustained and the plaintiff given an opportunity to plead to the amended answer and participate in a trial of the issues. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY V. ALLEN ROOT.

FILED DECEMBER 16, 1896. No. 6734.

1. **Review**: ASSIGNMENTS OF ERROR. An assignment, "Errors of law occurring at the trial and duly excepted to at the time," is sufficient in a motion for new trial to raise a question of error in either the admission or exclusion of evidence by the trial court, but is not sufficient in a petition in error to present such questions to this court for review. In the latter the assignment must be specific and particularly designate the evidence in regard to which it is complained the error occurred.

2. **Carriers**: INJURY TO PASSENGER: PROXIMATE CAUSE. The contract between a railroad company, as a carrier, and a passenger, does not contemplate that the passenger shall go into the express car of the train; and if he go there, and while there is injured, if his going or being in such car entered into the injury, as an element thereof, as its proximate cause or rendering its reception more liable to occur, it would be a matter of defense for the carrier; but if not the proximate cause of the injury, or the risk of such particular injury was not increased by the action of the passenger, then that he assumed the position in the express car voluntarily would be no defense to an action for damages resultant from the injury.

3. ———: ———: QUESTION FOR JURY. Whether the party injured had, at the time, ceased to be a passenger of the defendant company, *held*, under the evidence adduced, to be a question of fact for the determination of the jury.

4. ———: ———: DAMAGES. *Held*, That under the allegations of the petition herein a recovery might be had for any injuries proved to have been sustained by the party plaintiff in the character of a

passenger, as a licensee on the company's premises, or as a trespasser thereon.

5. ———: ———: NEGLIGENCE OF CONDUCTOR. The injuries complained of were claimed to have resulted from direct acts of the conductor. *Held*, That there was sufficient evidence to sustain a finding that the conductor was, at the time, acting for the company and within the line of his duties.

6. **Instructions**: ASSIGNMENTS OF ERROR. Where alleged errors in regard to the giving of instructions are assigned in group in the motion for a new trial, and any instruction of the group is determined to be without error, the alleged errors need not be further examined.

7. ———: REVIEW. When it is apparent that an instruction, if read and construed with others of the charge on the same subject or branch of the case, is pertinent and not calculated to confuse or mislead the jury, its giving was not erroneous.

8. **Damages**: INTEREST. Where the rendition of judgment on a verdict for the plaintiff in an action of contract or tort is delayed during the pendency of a motion for a new trial on behalf of defendant, it is not error to render judgment for the amount of the verdict and interest from its date to the date of rendition of judgment.

9. **Personal Injuries**: JUDGMENT FOR DAMAGES. The evidence *held* sufficient to support the verdict.

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

William B. Sterling and *B. T. White*, for plaintiff in error.

M. F. Harrington and *E. W. Adams*, *contra*.

HARRISON, J.

This action was commenced in the district court of Holt county to recover of the defendant company the damages for personal injuries alleged to have been sustained by plaintiff at Emmet, a station on the line of railway of defendant company. The petition contained allegations that the defendant company was a corporation and a common carrier, and, as such, operating a line of railroad from Blair to Emmet, Nebraska; "that on the 25th day of March, 1886, the plaintiff purchased from the defendant a ticket entitling him to a safe pas-

sage over said defendant's road from Blair, in Nebraska, to Emmet, in Holt county, Nebraska, and thereupon, at said Blair, entered and became a passenger on the cars of said defendant on its said railroad; * * * that said plaintiff, on his said ticket, was conveyed by said defendant on its train of cars run on said road from said Blair to said Emmet; that on account of the gross negligence and willful carelessness of said defendant, the said defendant did not stop its train, on board of which this plaintiff was as aforesaid stated, at said Emmet station for a longer time than ten seconds and not a sufficient length of time for said plaintiff to get off said cars safely, at which place said plaintiff intended to leave said cars; that at said Emmet said plaintiff was about to get off, and endeavoring to get off the car of said train on which he then was, in a careful and reasonable manner, and before this plaintiff had got off of said car, said train was, by the employes of defendant operating said train, started up, and plaintiff then carefully and reasonably attempted to get fully back into said car, whereupon plaintiff was seized by the defendant's agent, to-wit, its conductor of said train, and plaintiff was by said defendant's said agent, wrongfully, unlawfully, negligently, and in a rough and violent manner, pulled off said car and thrown down upon the ground a distance of six feet while said train was in motion, at a speed of five miles an hour, by reason whereof said plaintiff was greatly injured, in that he, plaintiff, received a severe shock in his whole system and particularly in his left side, hip, knee, and ankle, which were severely bruised and wounded, and also had two of his front teeth entirely knocked out and lost, and was for a long time confined to his bed, sick, and unable to attend to his business." There were further statements in regard to the permanent character of the alleged injuries, etc., which need no particular or further notice. The company in its answer admitted its existence as a corporation and denied all other allegations of the petition, and pleaded that if the plaintiff had received

any injuries they resulted from his own negligence. There was a reply for the plaintiff, and of the issues joined a trial in which the jury returned a verdict favorable to plaintiff, and judgment was subsequently rendered on the verdict. The company prosecuted error proceedings to this court.

It appears that on March 25, 1886, the plaintiff purchased a ticket at Omaha which entitled him to be transported to Blair by the Chicago, St. Paul, Minneapolis & Omaha Railway Company and thence to Emmet by the defendant company, and pursuant to the purpose for which he had purchased the ticket, became a passenger to Blair on a train of the first named company and to Emmet by a train operated on the line of the defendant company. On the same day the plaintiff delivered to the Wells-Fargo Express Company, at Omaha, two "stands" or "hives" of bees, which were billed to Atkinson, a station on the defendant's line of road, beyond and further distant than Emmet, when considered relatively to Blair as the initial point. The bees were consigned to S. Bowers, Emmet, Nebraska, were so marked as to destination and forwarded on the same train as that on which plaintiff was a passenger. Emmet, though styled a station, had no depot; there was no agent for either the express or railway company, and no facilities for receiving express or freight matter, either from trains or for shipment. The following testimony was given by "the general superintendent of the central department of Wells, Fargo & Co.'s express:"

Q. What is the practice of the express company where there is no agent at depots to deliver express goods to?

A. The practice is, if the train stops where we have no agent, and the owner of the goods calls for them, to hand them out to him. If there is no one there to receive them, we leave them at the next office, to be called for by the owner. * * *

Q. What is the express company's practice where the shipper of express goods is on the train with them?

A. The practice is to deliver the goods at the point to which they are addressed, provided the train stops there and the owner of the goods calls for them if the train stops long enough for us to hand the goods out. * * *

Q. What is done with goods that are carried by or left before if the owner is with them, and he does not receive them and they are not delivered?

A. We usually take them to our office next to the destination of the goods, and generally notify the owner at the place the goods are marked to, that we hold them subject to his order.

As we have before stated, there was no agent for the railroad or express company at Emmet; therefore the delivery of the hives of bees shipped by plaintiff was to be governed, so far as we are informed in this case, by the rule stated in the evidence of the superintendent, from which we have just given quotations. The plaintiff testified: "After we had passed O'Neill, Mr. Hoops, the conductor, came into the car, or passed through the car, and wanted to know if I had some express on, and I said I had, and he said I had better go and look after it or take care of it,—words to that effect." This is emphatically denied by the conductor, who also states that he did not know, prior to the time of arrival at Emmet, or afterwards, until his attention was called to it in such manner as we shall see hereinafter, that there was any express matter to be delivered to plaintiff, or indeed to any other person, at Emmet. Plaintiff testified that he went into the express car immediately after the talk with the conductor, and while in there the train stopped at Emmet and one hive of bees was taken from the car and placed on the station platform; that some delay was occasioned through the inability of the agent in charge of the express to return to plaintiff the proper amount in change after deducting the express charges on the bees from the amount of a ten-dollar bill proffered by plaintiff in payment; that the conductor became impatient and called from the platform that he could not wait; that at, or

prior to this time, the train had been put in motion. Plaintiff states that he was then standing in the doorway inside of the car and thought to get out, but discovered that the part of the train in which he was situated had passed the platform, and that he had concluded to stay in the car; that just then the conductor ran up opposite to the car door, grabbed plaintiff's foot and leg and jerked him from the car, and in his consequent fall to the ground the injuries complained of were sustained. It was of the evidence that the end door of the express car was so closed that plaintiff could not possibly have entered the car while in motion, and further, several witnesses gave testimony to the effect that plaintiff did not go into the express car before the train stopped at Emmet, but stepped from the train, when it stopped, to the platform and walked forward to the express car. The testimony of the news agent, who was on the train the day plaintiff claimed to have been injured, was to the effect that plaintiff came into the baggage car before the train reached Emmet and asked the baggageman for his hives of bees, and was told that perhaps they were in the express car; that plaintiff remained in the baggage car until the train stopped at Emmet, where he alighted from the car. This is corroborated by the baggageman in his testimony. That plaintiff walked along the platform until he reached the side door of the express car, which he entered. While he and the express messenger were transacting the business in regard to the hives of bees, the train was started. The messenger called to the conductor that there was some express matter to be put off and the train was stopped again. After some conversation, in which the plaintiff, the express messenger, and the conductor were all participants, the conductor gave the signal to go ahead and the train was put in motion. The conductor testified that when he had gone a very short distance he discovered the plaintiff sitting in the doorway of the car and apparently about to jump therefrom; that he, the conductor, immediately ran up in

front of the door, put up his hands and caught plaintiff under the arms and assisted him to the ground. The testimony of the conductor in regard to how the plaintiff got out of the car, was corroborated by the testimony of four or five other witnesses, including the express messenger, who further states that he got hold of plaintiff's shoulders and assisted in steadying his descent to the ground. The petition in this case was evidently framed upon the theory that the plaintiff, at the time he alleged he was injured, was a passenger of the defendant company, and that it then owed him the duty, which by law devolves upon a carrier of passengers,—and in the several steps of the trial this feature was prominent,—but we think the allegations of the petition were of such a nature that under them a recovery of damages could be had for any injuries proved to have been sustained, if such injuries were occasioned by the unwarranted or negligent acts of the conductor or other employes of defendant company at a time when the plaintiff had ceased to be or was not a passenger, but lawfully on the company's grounds or premises, to attend to some business matter, or in a car where he had a right to be for business purposes, or on the grounds, or in the car as a trespasser.

The evidence which we have hereinbefore quoted in regard to a conversation between the plaintiff and the conductor was objected to and a motion was made to strike out the answer for the reason that it was incompetent, irrelevant, and immaterial, and it had not been shown that it was of the duties of the conductor, or that he, as conductor, had any authority to exercise any supervision over the express company's business, or give any directions in respect to it. It is argued that the trial court erred in not sustaining the motion to strike this evidence from the record, or erred in not excluding it from the consideration of the jury. The only assignment in the petition in error which can be claimed to have any reference to this alleged error, is the general one of "errors of law occurring at the trial duly excepted to at the time,"

which is, in a motion for new trial, sufficient to raise the question of error in either the admission or exclusion of testimony, but is not so in a petition in error. In the latter the assignments must be specific, and must particularly designate the testimony in respect to which it is complained the error occurred; hence the point argued was not sufficiently presented by the record and cannot be considered.

It is contended for the company that the plaintiff had no right to be in the express car; that by going in such car he placed himself in a position of danger which should prevent his recovery in this case. In the course of the argument on this point counsel cite *Union P. R. Co. v. Sue*, 25 Neb., 772, and quote from pages 779 and 780 thereof as follows: "That passengers have no right to enter the baggage car, and that the law will not protect them in so doing, is a well established law of this country (*Pennsylvania R. Co. v. Langdon*, 92 Pa. St., 21; *Houston & T. C. R. Co. v. Clemmons*, 55 Tex., 88; *Kentucky C. R. Co. v. Thomas*, 79 Ky., 160)," and claims what is undoubtedly true, that the same rule is applicable in respect to what is commonly designated "the express car;" but that a passenger goes into the baggage or express car, affords no defense to an action for injuries received while there, unless the fact of the going or being there entered into the injuries, if any, as an element thereof, as their proximate cause or rendering the passenger more liable to receive such injuries than if in the proper place or car assigned for his accommodation. If the danger or risk of receiving danger was not increased by the position in which the passenger had placed himself, then the fact that he had voluntarily assumed the position affords no matter of defense. (2 Wood, Railroads, note 1, p. 1282, to sec. 304, also text on p. 1290 and note 2 and citations.) It could not be of any avail in an action for injuries received as the result of an assault or unwarranted acts of the conductor, the basis of this action, on the theory of plaintiff and the evidence adduced on this particular point by and for him.

It is argued that the plaintiff had, at the time of the alleged injuries, ceased to be a passenger of the company and it then owed him no duty as a carrier of passengers. This question, in this as it is in most cases, was one of fact, to be determined by the jury, guided by proper instructions from the court, hence it was not the province of the trial judge to settle it, nor need we here, as a matter of law.

Another point argued for the defendant company is: "The act of the conductor, as described by the plaintiff, was willful and malicious and entirely outside of the scope of his authority. Therefore there is no liability on the part of the company." In support of this, attention is called to portions of the evidence in relation to the rights and privileges and duties of the conductor in and about the express car. The general superintendent of the central department of Wells-Fargo & Co.'s express testified as follows in regard to this:

Q. Do any of the train hands have any authority over your express matter on the main line run?

A. They have nothing to do with the express; of course they direct the movements of the car with the balance of the train.

Q. This was so in 1886, I suppose?

A. I was not in charge of our service on the F., E. & M. V. line. I think it was the general rule at that time and to that extent applied to this line at that time. * * *

On cross-examination he stated as follows:

Q. Who does have charge of the train?

A. The conductor.

Q. Does or does not the conductor of the train containing the passenger coaches and express car have absolute and unqualified control of the train while in his charge?

A. Entirely.

And on redirect:

Q. How is it with your express business? Is the messenger supposed to have exclusive charge of that? Have conductors authority to allow strangers or passengers to go into the express car?

A. They have no authority from us to do that under the rules of the express company. Our instructions to messengers are that they must not allow strangers to ride in their car; in fact the instructions read that they must not allow any person to ride in their car without an order from the route agent or the superintendent of the express company.

C. A. Miller, who was the express messenger on the train at the time Root claims to have been injured, testified, and was asked: "Do you allow persons to go into the express car?" To which he answered: "No, sir; there is a strict order against it. In fact one of our men was discharged about that time for permitting a man in there, a friend of his coming to speak with him a few moments at the station."

The conductor stated:

Q. What is your duty with reference to that train?

A. Well I had entire charge of the train, the handling of the train. I had charge of the train so far as the passengers and the handling of the train was concerned. I had no control of the express or mail car. If I saw anyone in the mail car I could not go in there and put them out; all I could do was to ask what they were doing in there from the mail clerk or express messenger, and if I thought they were crooked and did not have transportation I would take it up with our superintendent. I did not have to go in there and exclude them.

From this evidence it is contended it appeared that if any person was discovered by the conductor in the express car, who, in his opinion, was there without right, or riding without a ticket, etc., it was not the duty of the conductor to eject such person from the car; but to report the fact to his superiors would be the sufficient and proper action. It is said in the reply brief filed for defendant company: "No one doubts the right of the conductor to remove a trespasser from any part of the train over which he had control." But it is further stated that as to the inside of the express car he had no control.

To give the evidence on this point the full scope which can fairly be claimed for it is that, if the conductor saw any one in the express car who apparently was there without right, he could obtain such information as might be furnished by the express messenger in answer to the queries propounded to him, and if the conclusion was reached that the party was probably wrongfully appropriating a free ride, report such act to the proper officers of the company. But the facts and circumstances under which the plaintiff appeared in the express car were not such as to present him to the conductor, as one who was probably "stealing a ride," or attempting to do so, and to call for the application of the rule of conduct sought to be established by the evidence, to which we have just alluded,—*i. e.*, not to molest him, but make a report to the superintendent. All the conditions under which plaintiff was occupying the express car were known to the conductor at the time of the occurrence on the alleged result of which this action was predicated. That this was true will be best shown by what was stated in regard thereto by the conductor, who said: "I had three passengers to get off there; a lady was one, Mr. Root was one, and I don't remember who the other one was. The lady was back in the car next to the sleeper. As the train was coming into the station I came from the rear end and was walking through, and about two seconds after the train came to a stop I went out the forward end of the smoking car onto the smoking car steps and stepped onto the station platform. As I did so I saw Mr. Root on the station platform walking toward the engine going west. I wondered then how he got there, because I did not see him while I was walking through the smoking car, and I made up my mind he must have gone out and been standing on the coach steps while the train was pulling into the station. I thought no more of it. I turned my back on him and looked toward the rear end of the train to see the other two get off. I saw the man get off and saw the brakeman help the lady

off. I turned to the baggageman and asked him if everything was all right, and he said 'Yes,' and I called, 'All aboard!' and gave the engineer the signal to go ahead, and they started. Just as the train started,—just as soon as the express messenger felt the motion of the train,—he came to the express car door and said: 'Hold on, Hoops, I've got some express to put off here.' I was then standing on the station platform and the train had already started. I said 'whoap.' Someone pulled the cord. There are two cords in the train. One leads to the signal bell in the engine, and the other to the brakes; by pulling one the engineer would set the brakes, but the other would apply the brakes itself. I don't know who stopped the train, but the train stopped and it had at that time run about a coach length, just about, or probably a trifle more. However, it run far enough so that the express car, being ahead of the baggage car, had gone beyond the station platform, and I ran down the station platform steps and went up to the express car door, and I says: 'Miller, why didn't you put that express off when we first stopped?' As I said that I looked into the car and saw Mr. Root standing over on the north side of the car. This happened on the south side. He was standing on the north side. He must have stood within a foot and a half or two feet, at the outside, from the north side of the car, inside. He was facing east and the express messenger was facing west. Root was right near the express company's safe. Miller says: 'This gentleman has got some express on here and he has got a ten-dollar bill and I can't change it, can you?' With that I hit both pockets and saw that I did not have silver enough to change it, and I said 'No.' I then said to Mr. Root: 'This train stopped twenty-five minutes at Norfolk for dinner. You had lots of time, Mr. Root, to attend to this at Norfolk. Now, sir, when you want your bees you will get them at Atkinson.' Do you remember that, Mr. Root? (Mr. Root: 'No, sir.') Witness: I said, 'Come, get out.' He said: 'No, I want my bee hives.' The train was late, and I had

been trying to make up time all day. I gave the signal to the engineer a second time and he started. Just as soon as Mr. Root felt the motion of the train he said: 'Hold on, I want to get out.'" This discloses that the conductor knew, before he took any action, all the whys and the wherefores of the presence of plaintiff in the door of the express car and fully realized all the circumstances attendant thereon, and that it was something which was an interference with his proper control and management of his train, liable to delay the train, which, as he says, "was late," "and I had been trying to make up time all day," and that he concluded that it was a matter within his duties, requiring and demanding his attention and action, and in this conclusion we think he was correct. What he did, and the results, were questions for the determination of the jurors. We are satisfied that there was evidence to sustain a finding that he was acting at the time within the scope of his duties and for the company as conductor of the train. The foregoing would be equally pertinent and applicable irrespective of whether plaintiff, at the time directly involved, was still a passenger or had ceased to be one.

Objections are specifically alleged in an amended petition in error, of the giving of several paragraphs of the charge to the jury, prepared and read by the court on its own motion, and some of the objections were urged in the argument. In the motion for a new trial the exceptions to the series of consecutively stated and numbered propositions embodied in such charge of the trial court to the jury were assigned in gross, and where the record in this particular is as indicated, and it is ascertained that one or more of the propositions or paragraphs contains a correct statement, which we discover is true in this case, no further examination of the alleged errors need be made, hence the arguments in relation to this branch of the case must be overruled. (*Denise v. City of Omaha*, 49 Neb., 750.)

It is claimed that the trial court should not have given

the first, second, and third instructions prepared and presented in behalf of the plaintiff in this suit. In the paragraph of the motion for a new trial, in reference to these instructions, they were not specifically and separately designated, but were grouped, and, as contended by attorney for plaintiff, if either is without error the assignment must be overruled as to all. (*Spears v. Chicago, B. & Q. R. Co.*, 43 Neb., 720; *Omaha Street R. Co. v. Cameron*, 43 Neb., 297.) The first of these instructions was in the following language: "You are instructed, as a general rule, a passenger who has paid his fare to a certain railroad station is entitled to be delivered at that station and is entitled to the rights of a passenger until he has left the company's depot grounds or has a reasonable time so to do, and the fact that he may have gone into the express car of the company's train, for a lawful temporary purpose, would not authorize an employe of the railroad company to lay hands violently on such passenger and forcibly remove him from such car." The vice which it is claimed attached to this instruction is that it assumes as proven some of the disputed facts, viz.: "That plaintiff went into the car for a lawful purpose; and further, that he was violently and forcibly removed." In this we cannot agree with counsel. As we read the instruction attacked, it contains a statement of an abstract proposition without reference in terms to this particular case or any of its facts, but applicable to some phases of the evidence introduced, and, when viewed and considered in connection with the other instructions given in relation to the facts designated in the argument as disputed, we can discover no impropriety in its giving, nor can we feel convinced that it was, when thus contemplated, calculated to either confuse or mislead the jury, hence it must be approved. This being determined, the complaints of this assignment need not be further examined.

It is insisted that the verdict was not sustained by the evidence. We have carefully read and scanned the evi-

dence and must conclude that, although directly conflicting, there was evidence to submit to the jury on the points at issue and sufficient to support the verdict rendered.

The verdict, in amount $1,500, was returned March 10, 1892, the motion for a new trial was overruled of date November 16, 1893, and judgment was then rendered for the amount of the verdict and interest thereon from its date to the date of judgment, in the aggregate $1,676.75. It is claimed that the amount of the judgment should not have exceeded that of the verdict; that the court erred in allowing and including in the judgment the interest as we have before stated. The delay in the rendition of judgment was caused by the filing and pendency of the defendant's motion for a new trial, and it was but just and right that the plaintiff was in the judgment accorded interest on the verdict from its date to the time of judgment. In the case of *Griffith v. Baltimore & O. R. Co.*, 44 Fed. Rep., 574, an action for damages against the company for injury alleged to have been received at a crossing by collision of a train of the company with a buggy in which the plaintiff was riding, the question of the allowance of interest on the amount of the verdict where judgment was delayed by the pendency of the defendant's motion for a new trial, it was said: "I have conferred with the circuit judge upon this question, and the conclusions in which we concur are as follows: That it is proper to allow interest on the verdict from the date of its rendition up to the entry of judgment. And there also appears the following quotation from *Gunther v. Insurance Co.*, 10 Fed. Rep., 830: 'The item of interest on the judgment from the day of the rendition of the verdict to the day of entry of the judgment, amounting to some $500, may be allowed. The delay was caused by a stay of proceedings during the pendency of a motion for new trial. This delay should not be at the plaintiff's expense. The payment of interest meanwhile may properly be deemed a condition attached to the stay, or, if not,

an entry of the judgment, as of the date of entering the motion for new trial, might, if necessary to avoid damages to the plaintiff, be permitted.'" In *Gibson v. Cincinnati Enquirer Co.*, 5 Cent. Law J., 446, in the United States circuit court, southern district of Ohio, wherein a similar question was considered and determined, it was held: "Where a verdict is rendered in favor of the plaintiff, judgment upon which is delayed by the filing of a motion for a new trial by the defendant, upon the overruling of the motion the plaintiff in entitled to judgment for the amount of the verdict, with interest from the date of its rendition." "The rule applies as well to actions of tort as to those upon contracts." And there appears this statement: "Upon the question of the right of the plaintiff to interest upon the verdict, I can see no difference between a verdict in an action for a tort and a verdict in actions sounding in contract. The verdict in either case fixed the amount due at the time of its rendition, and that amount the party is entitled to have paid him as of that date, and if the payment is delayed by the act of the defendant, he ought to have interest. Such has been the practice of this court and such seems to be the current of authority." (See, also, citations in this and the case of *Griffith v. Baltimore & O. R. Co., supra; Atherton v. Fowler*, 46 Cal., 320; *Shephard v. Brenton*, 20 Ia., 41.) We conclude that there was no error in the allowance of interest on the verdict during the time the rendition of judgment was delayed by the pendency of the motion for new trial. It follows that the judgment of the district court will be

AFFIRMED.

INDEX.

Abandonment. See ATTACHMENT, 5.

Accessories. See CRIMINAL LAW, 1, 2.

Accounting. See BANKS AND BANKING, 2.

Accounts. See EXECUTORS AND ADMINISTRATORS, 11-17.

Acknowledgment. See DEEDS, 6. VOLUNTARY ASSIGNMENTS, 3.
The fact that a notary public, before whom a deed for a homestead was acknowledged, by mistake certified that he was a notary public of a county other than that in which he was authorized to act, did not affect the rights of a judgment creditor, the deed having conveyed the legal title. *Roberts v. Robinson* 717

Actions. See ATTACHMENT, 1, 9. BANKS AND BANKING, 5. CORPORATIONS, 10. EXECUTORS AND ADMINISTRATORS, 18, 19, 20. LIMITATION OF ACTIONS. PARTNERSHIP, 7. PLEDGES, 5. SCHOOLS AND SCHOOL DISTRICTS, 3. SHERIFFS AND CONSTABLES, 3. TROVER AND CONVERSION, 4. VENUE.

Administration of Estates. See EXECUTORS AND ADMINISTRATORS.

Admissions. See SURFACE WATER.

Adverse Possession.

1. Until a tenant surrenders possession of leased premises, or by some unequivocal act notifies the landlord that he no longer holds under the lease, he cannot claim that his possession is adverse. *Schields v. Horbach* 262
2. Where a tenant orally contracts for the purchase of the leased premises, his subsequent possession will be presumed to be under the lease, unless it is clearly shown that he holds under the contract of purchase. *Id.*
3. It is not essential that the claim to land by an adverse occupant should be a valid legal claim in order that the statute may run in his favor. *Lantry v. Wolff* 374
4. Continuous possession, its adverse character, and the claim of the occupant to be the owner of the premises, are the things essential to vest title to realty by occupancy. *Id.*
5. Title to land becomes complete in the adverse occupant when he and his grantors have maintained actual, continued, notorious, and adverse possession thereof, claiming title against all persons, for ten years. *Id.*

Adverse Possession—*concluded.*

6. Where the adverse possession of the occupant is a continuation of the possession of a prior adverse possessor claiming title, and such occupant claims title from such prior possessor, the possession of the occupant may be tacked to that of such prior possessor. *Id.*
7. Evidence *held* sufficient to sustain a finding that plaintiff acquired title to realty by adverse possession. *Id.*

Affidavits. See REVIEW, 21, 22.

Agency. See STATUTE OF FRAUDS. PRINCIPAL AND AGENT.

Alibi. See CRIMINAL LAW, 3, 4, 5.

Alimony. See DIVORCE, 2, 3.

Alteration of Instruments.

1. Whether an alteration apparent upon the face of a note was made at, or subsequent to, the time of its execution is a question of fact for the jury. *Stough v. Ogden* 291
2. Altered note *held* admissible in evidence upon proof by the payee that the alteration was made previous to his receipt of the note, on the day of its date, from one of the joint makers. *Id.*
3. Where an instrument shows upon its face a material alteration, the presumption is that the alteration was made before the instrument was executed and delivered. *Dorsey v. Conrad* 443
4. When, by whom, and with what motive, an apparent alteration was made, are questions for the jury. *Id.*
5. Whether an apparent alteration is material is a question for the court. *Id.*

Amercement. See RES JUDICATA, 2.

Animals. See DAMAGES, 4

Appeal. See REVIEW.

Appearance.

1. Parties who voluntarily appeared and participated in a proceeding cannot complain of the judgment because they did not receive the notice required by law. *Spencer v. Wolfe*.... 9
2. Plea of want of jurisdiction in an answer filed by defendant, *held*, not waived by the subsequent filing of a paper authoring certain attorneys to appear for him and defend the action. *Herbert v. Wortendyke*..... 182

Appraisement. See EXECUTIONS, 1-4.

Arbitration. See INSURANCE, 7.

Arbitration and Award.

1. A party to an arbitration may revoke the submission before an award has been made, though the arbitrators have com-

Arbitration and Award—*concluded.*
municated to strangers their respective views. *Butler v. Greene* 280
2. The right to revoke a submission, at common law, must be exercised before the making and publication of the award. *Connecticut Fire Ins. Co. v. O'Fallon* 740
3. An award regularly made and published is *prima facie* binding upon the parties, and the burden of proof is on the party seeking to impeach it. *Id.*
4. Evidence tending to impeach an award actually made and published in accordance with the agreement of submission is inadmissible under a general denial. *Id.*

Arguments. See BRIEFS.

Assignments. See CHATTEL MORTGAGES, 3. SCHOOL-LANDS. VOLUNTARY ASSIGNMENTS.

Assignments of Error. See NEW TRIAL, 3, 4. REVIEW, 7-19.

Associations.
1. Where articles of incorporation of a voluntary association provided that it should be managed through by-laws and by a board of directors having power to punish infractions of the rules, regulations in the form of by-laws were *held* as binding on members as though constituting part of the articles of incorporation. *Jackson v. South Omaha Live Stock Exchange* 687
2. The mere fact that a director had a special interest in the fining of a member for violating a rule, *held*, in absence of objection that such director was disqualified to act as a trier of accused, not to invalidate the finding and order of the board of directors in imposing the fine. *Id.*
3. In an action to enjoin the collection of a fine assessed against members of a voluntary association for the violation of its rules, disputed questions of fact cannot, as by a reviewing court, be examined, there being no proper proof of the nature of such evidence. *Id.*

Assumpsit. See EVIDENCE, 6. PAUPERS, 5.
In an action by an agent for services and expenses, certain instructions *held* applicable to the evidence. *Aultman v. Martin*, 105

Attachment. See BILL OF EXCEPTIONS, 1. CHATTEL MORTGAGES, 5. CONTINUANCE. PARTIES.

Order of Court.
1. Suing on a claim not due and issuing and levying an attachment without an order of court are defects of which junior attaching creditors may take advantage. *Deere v. Eagle Mfg. Co.* 386

Waiver of Defects.
2. Defendant in attachment cannot, as against junior attaching creditors, waive a substantial departure from the statu-

Attachment—*concluded.*

tory mode of enforcing the attachment, nor waive defects which prejudice their substantive rights. *Id.*

Residence.

3. The question of residence, within the meaning of the statute regulating attachments, is generally one of intention, determinable from the facts of each case. *Johnson v. May*.... 601
4. Absence of a person for the purpose of business or pleasure is not such an abandonment of his place of abode within the state as to authorize the issuance of an attachment against him on the ground of non-residence. *Id.*
5. One who has acquired a residence in a given place, within the meaning of the attachment law, is presumed to have abandoned his former domicile. *Id.*
6. Evidence *held* to sustain a finding that defendants were not non-residents, within the meaning of the attachment law. *Id.*

Dissolution. Estoppel.

7. Reasonable notice of the hearing of a motion to discharge an attachment is such notice as is fair in view of the circumstances. *Sterling Mfg. Co. v. Hough*..... 618
8. The truth of plaintiff's affidavit being in issue on motion to dissolve the attachment, the ruling thereon will not be disturbed where the evidence is conflicting. *Id.*
9. The dissolution of an attachment on a claim not due terminates the action, and a subsequent dismissal of the main action by a judge at chambers is not prejudicial to plaintiff. *Dayton Spice-Mills Co. v. Sloan*..... 623
10. A debtor who had transferred all his interest in property subsequently attached, to one who is not a party to the attachment suit, cannot, in his own name and right, be permitted, on motion for a dissolution of the attachment, to establish the validity of his transfer. *Kountze v. Scott*..... 258
11. A plaintiff who attached property as that of defendants and obtained writs of garnishment on allegations that the garnishee has property belonging to defendants will not be heard to assert that they have not sufficient interest to defend against the attachment. *Dayton Spice-Mills Co. v. Sloan*, 623
Gedney Pickle Co. v. Sloan..... 638
12. Evidence *held* sufficient to sustain an order dissolving an attachment. *Dayton Spice-Mills Co. v. Sloan*..... 623

Attorney and Client. See MALICIOUS PROSECUTION, 1.

Question as to right of plaintiff's attorney in a foreclosure suit to release a sheriff from liability for paying the proceeds of sale to a third person. *Fire Ass'n of Philadelphia v. Ruby*... 584

Auctioneers.

Enforcement of special tax. *Barkley v. Leiter*..... 123

Bailment. See PLEDGES, 1, 2.

1. A special contract of bailment prevails in determining the

Bailment—*concluded.*

liabilities of the parties, as against general principles of law applicable in absence of express agreement. *Butler v. Greene,* 280

2. The hirer of a team is liable to the owner for want of ordinary care. *Purnell v. Minor*..... 555
3. A lien does not attach in favor of a bailee of goods if inconsistent with the terms of the agreement, express or implied, under which he obtained possession. *Moline v. Wood*..... 869
4. A lien does not exist at common law, or by custom, in favor of one who holds property in subordination to the will or control of another. *Id.*
5. Exclusive possession of chattels by the claimant, whether a factor, warehouseman, or other bailee, is indispensable to the existence or continuance of a lien at common law, or the usage of trade. *Id.*
6. A contract for the storage and forwarding of goods by which the consignor reserves the right to withdraw, at pleasure, for reshipment of the goods stored, and by which each party reserves the right to draw at sight upon the other for balances, the consignee relying upon the personal credit of the consignor, does not create in favor of such consignee a lien for charges. *Id.*

Banks and Banking. See CORPORATIONS, 8. SET-OFF AND COUNTER-CLAIM.

1. In an action against a bank for deposits made by plaintiff's agent in his own name, evidence that the money was paid out on defendant's checks is inadmissible under a general denial. *Cady v. South Omaha Nat. Bank*..... 125
2. Where a commission merchant, whose bank account is overdrawn, deposits in his own name funds realized from a sale of live stock consigned to him by his principal, the bank, regardless of the question of notice, is accountable to such principal and cannot apply the funds to the payment of the overdraft. *Id.*
3. The constitutional requirement (Constitution, art. 11, sec. 4, under "Miscellaneous Corporations") that the indebtedness of a corporation shall be ascertained and the corporate assets exhausted before the enforcement of individual liability of stockholders, applies to banking corporations. *Farmers Loan & Trust Co. v. Fink*..... 353
4. The liability of a stockholder in a banking corporation is intended for the creation of a trust fund for the benefit of creditors. *Id.*
5. An action to enforce the liability of the stockholders in a banking corporation must be prosecuted by one creditor for the benefit of all, or by a receiver. *Id.*
6. A fund placed in bank only to be delivered to the person entitled to receive it, is a trust fund incapable of being commingled with general assets subsequently transferred to a

Banks and Banking—*concluded.*
receiver upon failure of the bank. *Capital Nat. Bank v. Coldwater Nat. Bank*..... 786
Capital Nat. Bank v. Genesee Fruit Co..... 793
Capital Nat. Bank v. Cupples Woodenware Co..... 794
Coldwater Nat. Bank v. Magoon..... 795
Capital Nat. Bank v. First Nat. Bank of Cadiz..... 795

7. Upon failure of a bank holding trust funds, the receiver is merely substituted as trustee, and the bank's funds in his hands should be devoted to discharging the trust before distribution is made to the general creditors. *Id.*

Bill of Exceptions. See REVIEW, 20-26, 65.

1. Prior to the enactment of ch. 72, Session Laws of 1895, a county judge had no authority to allow a bill of exceptions embodying the evidence on a motion to dissolve an attachment. *Altschuler v. Snyder*..... 22
Weitz v. Wood Reaping & Mowing Machine Co..... 434
2. Ch. 72, Session Laws of 1895, providing for the allowance of bills of exceptions cannot be so construed as to cure error in a judgment based upon consideration of a bill of exceptions unauthorized when the judgment was rendered *Id.*
3. A bill which has not been authenticated by the clerk of the trial court will be disregarded on review. *Spurck v. Dean*... 66
Derse v. Straus..... 665
4. A proposed bill of exceptions is not submitted to the adverse party or to his attorney by leaving it at the office of the attorney in his absence. *Lancaster County Bank v. Gillilan*.... 165
5. In authenticating a bill of exceptions the clerk must certify that it is either the original or a copy. *Merrill v. Equitable Farm & Stock Improvement Co*..... 198
6. A bill of exceptions must be certified by the clerk as being part of the record below or as being the original bill. *Yankton, N. & S. W. R. Co. v. State*..... 272
7. A clerk may sign a bill under a stipulation clearly showing that the particular bill to which the stipulation is attached is agreed upon by the parties as a correct bill. *Fire Ass'n of Philadelphia v. Ruby*..... 584
8. Where a number of pages authenticated by the trial judge were missing, and he failed to certify that the bill contained evidence used on the hearing, it was *held* that such a bill would not be considered for any purpose. *Van Etten v. Test* 725
9. It is only upon due showing of diligence that a judge can extend the time for submission of a proposed bill of exceptions beyond forty days from the adjournment of the term. *Horbach v. City of Omaha*..... 851
10. The fact that a party excepting has been diligent, and delay was caused by default of the stenographer in preparing a transcript, does not authorize the submission of a bill of ex-

Bill of Exceptions—*concluded.*
ceptions after the expiration of eighty days from the adjournment of the term. *Id.*

Bills and Notes. See NEGOTIABLE INSTRUMENTS.

Bonds. See PRINCIPAL AND SURETY.
The bond of a building contractor to pay for all labor performed and materials furnished under a contract with a county renders the sureties liable to a subcontractor for materials furnished. *King v. Murphy* 671
Thorn v. Murphy 675

Boundaries.
Evidence as to location of monument. *Bartram v. Sherman* 181

Briefs.
In addition to a concise statement of the facts of the case, plaintiff in error, under an appropriate heading, should state in his brief each particular thing the district court did, or refused to do, of which error is alleged, collating under such heading the arguments and authorities sustaining his contention. *Ætna Ins. Co. v. Simmons* 811

Building Contracts. See PRINCIPAL AND SURETY, 1.

Building and Loan Associations.
1. Under the act of 1873 (Gen. Stats., p. 207), *held* that interest may be reserved at the highest rate permitted by law on the face of the loan, though the premium is deducted from that amount and the difference only paid the borrower. *Livingston Loan & Building Ass'n v. Drummond* 201
2. In ascertaining the amount due on a loan the borrower is entitled to a credit of the present value of the stock at the time of foreclosure, as well as to a fair and reasonable credit on account of unearned premium; and by-laws fixing the terms of ascertaining such credit will be enforced where not unconscionable. *Id.*

Burden of Proof. See ARBITRATION AND AWARD, 3. CHATTEL MORTGAGES, 8. COMPROMISE AND SETTLEMENT, 1. INJUNCTION, 2. PRINCIPAL AND AGENT, 8.

By-Laws. See ASSOCIATIONS, 1.

Carriers. See RAILROAD COMPANIES.
1. A carrier did not by a contract limit its liability for its own negligence which resulted in personal injury to a shipper who traveled on a drover's pass and cared for his cattle in transit. *Missouri P. R. Co. v. Tietken* 130
2. A shipper who cares for his cattle in transit and travels on a drover's pass assumes the risks and inconveniences of thus caring for his stock; and, modified accordingly, the liability of the carrier to him for personal injuries negligently inflicted by the carrier's employes is that of a common carrier for hire. *Id.*

Carriers—*concluded.*

3. Whether person injured at point of destination had ceased to be a passenger, *held*, on evidence adduced, to be a question of fact to be determined by jury. *Fremont, E. & M. V. R. Co. v. Root* 900
4. The fact that a passenger on a train wrongfully enters the express car will not preclude a recovery of damages against a railway company for injury to his person, unless such fact was the proximate cause or increased the risk of such injury. *Id.*
5. Petition in case stated in action for personal injuries against a railway company *held* sufficient to sustain a recovery by plaintiff in the relation of a passenger, a licensee on the company's premises, or a trespasser. *Id.*
6. Railway company *held* liable for wrongful acts of conductor where evidence is sufficient to sustain finding that he was acting within the line of his duties. *Id.* 901

Chattel Mortgages. See FRAUDULENT CONVEYANCES, 4-9. TROVER AND CONVERSION, 2.

1. The holder of an unrecorded mortgage executed by one who subsequently made a voluntary assignment has a right to the chattels superior to that of the assignee, unless the statute confers upon the latter the powers of a creditor. *Lancaster County Bank v. Gillilan* 165
2. Under sec. 14, ch. 32, Comp. Stats., a mortgagee in good faith is one who takes a mortgage to secure a debt actually and justly owing to him, whether pre-existing or not, without actual or constructive notice of prior equities against the chattels. *State Bank of Lushton v. Kelley* 242
3. A transfer of the note secured operates as an assignment of the mortgage. *Tilden v. Stilson* 382
4. After a transfer, the assignee is not bound by subsequent contracts of the original mortgagee with reference to the chattels, in absence of the relationship of principal and agent between them. *Id.*
5. Where mortgagee, without intent to defraud, delayed filing his lien and taking possession of the chattels, the instrument, being in fact filed, or the mortgagee obtaining possession before the rights or lien of any third person attached, the mortgage is good against one of mortgagor's creditors who subsequently seized the property on attachment or execution. *Forrester v. Kearney Nat. Bank* 655
6. The right of mortgagee under a clause authorizing him to take the chattels, when he feels insecure, cannot be exercised arbitrarily, but depends upon some act of mortgagor which tends to impair the security. *Brown v. Hogan* 746
7. Retention of possession by mortgagor is *prima facie* fraudulent as to his creditors, or subsequent good-faith purchasers, in case the mortgage had been duly filed, but this presumption may be rebutted by proof. *Sanford v. Jensen* 766

Chattel Mortgages—*concluded.*

8. The legal presumption of fraud arising from mortgagor's retention of the chattels can be invoked only by a creditor or purchaser, and the latter cannot do so until he has established his own good faith, and not until this has been shown is the burden cast upon one claiming under the mortgage to show that it was made in good faith and without any intention to defraud. *Id.*
9. To constitute one a *bona fide* purchaser within the meaning of sec. 11, ch. 32, Comp. Stats., making mortgagor's retention of possession of the chattels *prima facie* fraudulent as to subsequent good-faith purchasers, he must have acquired the mortgaged chattels for a valid consideration without actual knowledge of the existence of the mortgage or of notice of such facts as would put an ordinarily prudent man on inquiry. *Id.*

Collateral Attack. See EXECUTIONS, 2. JUDGMENTS, 8.

Collateral Security. See PLEDGES.

Commission Merchants. See BANKS AND BANKING, 2.

Compromise and Settlement. See INSURANCE, 17.

1. The burden of showing that a settlement was procured by fraud is on the party alleging the fraud. *Home Fire Ins. Co. v. Bredehoft* 152
2. Acceptance of part of an unliquidated demand in full settlement, is a bar to an action on the demand, unless it is pleaded and proved that the settlement was procured by fraud, mistake, or duress. *Id.*
3. Evidence *held* insufficient to sustain a finding that a compromise was procured by fraud. *Id.*

Constitutional Law. See STATUTES.

1. The act of 1873 (Gen. Stats., p. 207), providing for the incorporation of building and loan associations, does not conflict with sec. 15, art. 3, of the constitution prohibiting special legislation. *Livingston Loan & Building Ass'n v. Drummond*.. 200
2. The reserved powers of the state, including the police power, are inalienable, and cannot be surrendered or bartered away by the legislature. *West Point Water Power & Land Improvement Co. v. State*..... 218
3. The preservation of fish in streams is a proper function of government. *Id.*
4. Secs. 985, 1017, of the Code, denying appeals from judgments of justices of the peace, where the amount claimed does not exceed $20, are not repugnant to the constitution. *Chicago, B. & Q. R. Co. v. Headrick*..... 286
5. The legislature cannot, by law, impair the obligation of contracts. *State v. City of Kearney*..... 326
6. The provision of sec. 7, art. 11, of the constitution, under "Miscellaneous Corporations," fixing the liability of stock-

Constitutional Law—*concluded.*
holders in banking corporations to creditors, is self-executing. *Farmers Loan & Trust Co. v. Funk*..... 353

Construction. See STATUTES.

Contempt.
1. The rules of strict construction applicable to procedure in criminal cases should govern proceedings to punish one for contempt. *Beckett v. State*..... 210
2. Presumptions and intendments should not be indulged in order to sustain a judgment of conviction in proceedings for contempt. *Id.*
3. The accused should be heard in his own defense where the court calls and examines witnesses to prove a contempt, though the alleged contemptuous acts were committed in presence of the court. *Id.*

Continuance. See CRIMINAL LAW, 12.
Refusal to continue the hearing of a motion to dissolve an attachment *held* proper, where the continuance was sought for the purpose of procuring evidence which was incompetent. *Dayton Spice-Mills Co. v. Sloan*..... 622
Gedney Pickle Co. v. Sloan..... 638

Contracts. See ADVERSE POSSESSION, 2. BAILMENT. CARRIERS, 1. CONSTITUTIONAL LAW, 5. DAMAGES, 2. FORCIBLE ENTRY AND DETAINER. GUARANTY. INSURANCE. PLEDGES, 2. PRINCIPAL AND AGENT, 2, 6. SALES. SCHOOLS AND SCHOOL DISTRICTS, 6. VENDOR AND VENDEE.
1. In a suit for wages, where there is a conflict as to the amount agreed upon, evidence of the value of the services at the time of the contract is competent. *Spurck v. Dean*.... 66
2. Where time is of the essence of a contract providing for forfeiture in case of default, acceptance of part of overdue payments is a waiver of the right to declare a forfeiture as to all existing defaults. *White v. Atlas Lumber Co*..... 82
3. Construction of a contract for the sinking of a tubular well, questions relating to the quantity of water, the depth of the well, and the compensation, being involved. *Omaha Consolidated Vinegar Co. v. Burns*..... 229
4. Where one who contracted to sink a tubular well declared on a completed contract after quitting work under orders from the owner, it was *held* that the contractor could recover only the contract price for the number of feet completed. *Id.*
5. The continued use or employment of property received under a fraudulent contract will be construed as an election to affirm the contract *Pollock v. Smith*..... 864
6. The right to rescind a contract on the ground of fraud must be promptly exercised upon discovery of the fraud. *Id.*

Conversion. See TROVER AND CONVERSION.

Conveyances. See DEEDS.

Corporations. See ASSOCIATIONS. BANKS AND BANKING. BUILDING AND LOAN ASSOCIATIONS. INSURANCE, 1.

1. Promissory notes purporting to be executed by a corporation construed to be the obligations of the corporation, and not of the members thereof. *Nebraska Nat. Bank of York v. Ferguson* 109
2. Where one contracts with, sues, and obtains judgment against an imperfectly organized corporation, he is estopped from denying its corporate existence, and is precluded from recovery against individual members. *Id.*
3. Where one enters into a contract with a body acting as a corporation, he is estopped from denying its corporate existence when sued on the contract. *Livingston Loan & Building Ass'n v. Drummond* 200
4. A corporation, by permitting a judgment to go against it, ratified the transaction upon which the judgment was based. *Nebraska Nat. Bank of York v. Ferguson* 113
5. The fact that members of a corporation organized a new one and purchased part of the assets of the former does not raise a conclusive presumption that the debts of the old corporation were assumed by the new one, though both were engaged in the same line of business. *Campbell v. Farmers & Merchants Bank of Elk Creek* 143
6. Evidence *held* to sustain a finding that a corporation did not assume the liabilities of a partnership, part of the assets of which the former purchased. *Id.*
7. Petition *held* not to state a cause of action against a new corporation as successor to an old one. *Austin v. Tecumseh Nat. Bank* 412
8. To render a new corporation liable at common law for debts of an old corporation to whose business and property the former has succeeded, it should, in absence of a special agreement, affirmatively appear that the transfer was fraudulent as to creditors of the old firm, or that the facts warrant a finding that the new corporation is a continuation of the old one. *Id.*
9. Under the facts stated in the opinion a corporation was bound by the terms of a contract authorizing one to sink a tubular well on its premises, regardless of the question whether the contract was binding when made. *Omaha Consolidated Vinegar Co. v. Burns* 236
10. Where a foreign corporation has business transactions in the state with residents thereof, out of which accounts arise against the corporation, the accounts may be enforced in the courts of the state if jurisdiction can be obtained. *Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co* 537
11. A corporation has power to compromise a doubtful claim against it, though the doubt arises in regard to the power

Corporations—*concluded.*

of the corporation to enter into the contract creating the claim. *Farmers Mutual Ins. Co. v. Meese*..... 861

Costs.

1. Motion to retax and a ruling thereon are essential parts of a record to review the taxation of costs. *Yankton, N. & S. W. R. Co. v. State*..... 272
2. In replevin, a defendant who unsuccessfully seeks to establish a right of possession in himself is liable for costs. *Tilden v. Stilson*..... 382
3. Sec. 565 of the Code, requiring plaintiff to pay defendant's costs upon failure to recover a sum greater than that for which defendant offered to confess judgment, contemplates that, where there is only one defendant, all costs from the time of the offer shall, in such case, be taxed against plaintiff. *Wachsmuth v. Orient Ins. Co*..... 590

Counties. See BONDS. EMINENT DOMAIN, 2-4. INJUNCTION, 3. LIMITATION OF ACTIONS, 3, 4. PAUPERS.

1. The action of a county board in disallowing a claim is conclusive, where the claimant appeals and subsequently dismisses the appeal. *State v. Baushausen*..... 558
2. Under sec. 40, art. 1, ch. 18, Comp. Stats., a county board may once reconsider its action in allowing a claim, upon notice to the parties interested, but the notice may be waived. *Id.*
3. The allowance of a writ of *mandamus* to compel a county board to include relator's claim in its estimates of taxes is not necessarily an adjudication that a definite sum is due from the county to relator. *Id.*

County Attorney. See INDICTMENT AND INFORMATION, 1

County Board. See COUNTIES.

County Clerk. See MANDAMUS, 2.

County Court. See JUSTICE OF THE PEACE.

County Judge. See BILL OF EXCEPTIONS, 1.

Courts. See ATTACHMENT, 9. JURY, 5.

Courts of general jurisdiction possess inherent power to make and enforce needful rules for the transaction of business. *Andres v. Kridler*..... 535

Creditors' Bill. See HOMESTEAD, 2, 4.

Criminal Law. See CONTEMPT. INSTRUCTIONS, 11-13. INTOXICATING LIQUORS. PHYSICIANS AND SURGEONS, 2.

Accessories.

1. One charged as a principal only cannot be convicted as an accessory, and one charged as an accessory before the fact cannot be convicted as principal. *Casey v. State*..... 403
2. Sec. 1, Criminal Code, providing for the punishment of one

Criminal Law—*concluded.*

who aids, abets, or procures any other person to commit a felony, does not apply to one who, being present at the commission of a crime, aids or assists therein. *Id.*

Alibi.

3. Where the jury, from a consideration of all the evidence, entertains a reasonable doubt of the presence of defendant at the commission of the crime charged, he is entitled to an acquittal. *Id.* 404
4. An alibi is a legitimate defense to a criminal charge and should not be disparaged by the court. *Id.*
5. It is error to instruct that the accused in a criminal prosecution is required to "prove" an alibi. *Id.*

Rebuttal.

6. Evidence contradictory of the statements of a prosecuting witness may be met by statements in rebuttal, though the names of the witnesses giving the rebutting testimony are not indorsed on the information. *Fager v. State* 440

Sentence.

7. A sentence should not be reduced in an error proceeding, because of apparent undue severity. *Barney v. State* 515

Preliminary Examination.

8. Where the charge in the complaint is substantially the same as that in the information, a plea of want of preliminary examination, or of variance, is unavailing. *Hockenberger v. State* 707

Information. Witnesses.

9. It is within the discretion of the trial judge to permit the names of additional witnesses to be indorsed by the county attorney on the information after it is filed, and before trial. *Fager v. State* 439
10. It will not be presumed that accused was prejudiced by the indorsement on the information of words aptly summarizing the facts stated within, where the indorsement was not called to the attention of the trial court. *Id.* 440
11. Permitting names of witnesses to be indorsed on the information more than twenty-four hours after their discovery, contrary to a rule of court, *held* not ground for reversing a judgment of conviction, where accused was not prejudiced. *Barney v. State* 515
12. Prejudice will not be presumed from the indorsement of names of witnesses on the information after it has been filed, where accused failed to move for postponement of the trial. *Id.*

Custom and Usage.

Held, Under the evidence, that no custom was established as to indorsement of notes. *Graves v. Norfolk Nat. Bank* 437

Damages. See CARRIERS, 1, 2. EMINENT DOMAIN. HIGHWAYS, 1. HUSBAND AND WIFE, 5. INTEREST, 2. MASTER AND SERV-

Damages—*concluded.*

ANT, 7. MUNICIPAL CORPORATIONS, 13. PHYSICIANS AND SURGEONS, 1. PLEDGES, 2. REPLEVIN, 4. SALES, 1. SURFACE WATER. TROVER AND CONVERSION, 2, 4, 5.

1. In an action against a street railway company by one whose husband was fatally injured in attempting to alight from a street car, the evidence was *held* sufficient to sustain a verdict for plaintiff. *Omaha & Council Bluffs R. & Bridge Co. v. Levinston* 17
2. Stipulation in a contract to convey realty *held* not a penalty, but a provision for payment of liquidated damages upon default of promisor. *Lorius v. Abbott* 214
3. In an action against a city, a verdict in favor of plaintiff for $2,850 for the death of a boy ten years old, who was drowned in a pond in a street, *held* not excessive. *City of Omaha v. Richards* 245
4. Under evidence discussed, defendant *held* liable for damages for misusing plaintiff's horses. *Purnell v. Minor* 555
5. Judgment for defendant affirmed as being sustained by the evidence in a suit against a city to recover damages resulting from grading a street. *Denise v. City of Omaha* 751

Death by Wrongful Act. See DAMAGES, 1.

Deceit. See INSURANCE, 16.

Dedication.

1. Acts relied on to prove that one dedicated land to the public must be such as to manifest his intention to dedicate it, and the acts of the public must show an acceptance. *City of Omaha v. Hawver* 1
2. Acts of the owner amounting to a dedication of his land to the public must be such as to indicate his abandonment of the property to the use of the public. *Id.*
3. Certain acts of one owning land which abutted on a street, *held* insufficient to show that he dedicated the land as a part of the street. *Id.*

Deeds. See ACKNOWLEDGMENT. HOMESTEAD. MORTGAGES, 9. VENDOR AND VENDEE, 1. VOLUNTARY ASSIGNMENTS.

1. Evidence *held* sufficient to sustain a finding that a deed was genuine and not a forgery. *Thams v. Sharp* 237
2. A deed executed and acknowledged in Kansas, conveying land in Nebraska, may be recorded in the latter state, though not witnessed. *Schields v. Horbach* 262
3. A deed absolute in form, though in fact a mortgage, vests the legal title in the grantee. *First Nat. Bank of Plattsmouth v. Tighe* 299
4. A reconveyance is necessary in order to reinvest title in one who executed an absolute deed as security for a debt. *Id.*

Deeds—*concluded.*

5. A deed executed within the state and conveying realty situate therein must be witnessed. *Schields v. Horbach*..... 262
Dorsey v. Conrad..... 443
6. A deed to Nebraska land executed in Iowa, and there acknowledged before a notary public who attached his official seal, is presumed to have been executed and acknowledged in conformity with the laws of Iowa, and may be recorded, or read in evidence, in Nebraska without further proof of execution, though it was not witnessed. *Dorsey v. Conrad*... 443

Default. See JUDGMENTS, 10.

Deficiency Judgments. See JUDGMENTS, 8.

Delegation of Trust. See FRAUDULENT CONVEYANCES, 6.

Demand. See MANDAMUS, 8.

Depositions.

1. Under sec. 378 of the Code, notice to take depositions must be served upon the adverse party, his agent, or attorney of record, or left at his usual place of residence. *Atchison, T. & S. F. R. Co. v. Meek*..... 295
2. Service of notice to take depositions, upon a station agent, *held*, not notice to the railroad company. *Id.*
3. The deposition of "G. A. Hollem" cannot be taken under a notice specifying "Gus Hahn" or "Gus Hanlin" as the name of the witness. *Miller v. Frey*..... 472

Description. See TAXATION.

Disaffirmance. See PRINCIPAL AND AGENT, 5, 6, 7.

Divorce.

1. Definition of alimony. *Greene v. Greene*..... 546
2. A husband cannot recover alimony to be paid out of the wife's separate estate. *Id.*
3. A wife may prosecute an action for divorce in her own name without a next friend. *Id.*
4. The right of a husband to receive property, the title to which is in the wife, cannot be predicated upon his claim for alimony and maintenance, but must be derived from such equities as accrued in his favor from the manner of the original purchase, the subsequent improvement thereof, his participation therein, and contributions thereto. *Id.*

Documents. See EVIDENCE, 8-15. REVIEW, 23.

Drainage. See SURFACE WATER.

Drovers. See CARRIERS, 1, 2.

Duress.

Evidence *held* insufficient to show that the satisfaction of a judgment was procured by duress. *Boatright v. Enewold*.... 254

Ejectment.

1. Plaintiff must show a legal estate to the premises for which he sues. *Lantry v. Wolff* 374
2. The evidence of plaintiff's legal estate need not be a perfect legal paper title. *Id.*
3. Plaintiff is not required to prove title as against the world, proof of title good as against defendant being sufficient. *Id.*

Election of Remedies. See VENDOR AND VENDEE, 7.

Embezzlement. See INDICTMENT AND INFORMATION, 2, 3.

Where one who was county treasurer and also secretary of a board of education was tried for having, as such secretary, embezzled $1,000 of school funds, his defense being that, as secretary, he receipted to himself as county treasurer for $3,000, though the actual amount was only $2,000, which sum he turned over to the proper officer, it was *held* error to refuse to instruct that the receipts for $3,000 were only *prima facie* evidence of such payment, and that the receipts might be explained and the truth shown. *Hockenberger v. State* 707

Eminent Domain.

1. Such contingencies as frightening horses and injury to persons and property by passing trains are proper subjects of inquiry in determining to what extent the value of the property has been impaired by the construction and operation of a railroad, but should not be considered as distinct elements of damage. *Chicago, B. & Q. R. Co. v. Shafer* 25
2. A county board is not a proper party defendant in an action by a land owner to enjoin the opening of a highway across his premises. *Hodges v. Board of Supervisors* 666
3. The rule that private property cannot be taken or damaged for public use without compensation applies to counties and municipalities exercising the right of eminent domain. *Id.*
4. A land owner may maintain injunction to prevent the opening of a public road across his premises, where resulting damages have not been ascertained and no provision has been made for payment thereof. *Id.*

Equity. See VENDOR AND VENDEE, 4.

As a general rule, a court of equity will not interpose an objection to its own jurisdiction on the ground that the plaintiff has an adequate remedy at law, but will retain the cause and award the relief to which the parties would have been entitled in a court of law. *Taylor v. Ainsworth* 696

Error. See REVIEW.

Estoppel. See ATTACHMENT, 10, 11. CORPORATIONS, 2, 3, 9. EXECUTIONS, 4. SCHOOLS AND SCHOOL DISTRICTS, 2.

Failure of a city to levy taxes during three years after a plat was vacated *held* not to estop the city from making a subsequent levy. *Kershaw v. Jansen* 467

Evidence. See ALTERATION OF INSTRUMENTS, 2. BANKS AND BANKING, 1. CORPORATIONS, 5. CRIMINAL LAW, 6. DEDICATION. DEEDS, 6. EMBEZZLEMENT. EXECUTORS AND ADMINISTRATORS, 13, 14. FRAUDULENT CONVEYANCES, 2, 4, 9. HUSBAND AND WIFE, 5. INSURANCE, 1. LANDLORD AND TENANT, 2. MALICIOUS PROSECUTION, 2, 3. MASTER AND SERVANT, 7. MUNICIPAL CORPORATIONS, 11. NEW TRIAL, 2. PAUPERS, 5. PRINCIPAL AND AGENT, 9. RAILROAD COMPANIES, 3. RES JUDICATA, 2. REVIEW, 23, 28-35. SURFACE WATER. TROVER AND CONVERSION, 3. WITNESSES, 4.

1. Admissibility of evidence relating to measure of damages for failure of a seller of personalty to make delivery according to the contract of sale. *Graham v. Frazier* 95
2. Where the name of a newspaper indicates that it is a daily, it will not be presumed to be a weekly publication. *Union P. R. Co. v. Montgomery* 429

Expert Evidence.

3. Error in admitting evidence of a witness without a proper foundation may be cured, where a sufficient foundation is laid by means of cross-examination. *Chicago, B. & Q. R. Co. v. Shafer* 26
4. One who has owned and resided upon realty for twenty years, and who is acquainted from hearsay with the recent sales of land in the vicinity and with the prices paid, is competent to testify to the value of his own land. *Id.*
5. Inclination to encourage efforts to eliminate testimony of alleged experts from the consideration of juries. *Johnson v. Wirth* 116

Parol Evidence. Contracts.

6. In a suit for wages, where there is a conflict as to the amount agreed upon, evidence of value, at the time of the contract, is competent. *Spurck v. Dean* 66
7. Where notes are unambiguous, it cannot be shown by extrinsic evidence that their purport is different from that denoted by the language used. *Nebraska Nat. Bank of York v. Ferguson* 112

Documents. Records.

8. Parol evidence is not admissible to prove the contents of a written document until its absence is accounted for. *Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege* 321
9. An instrument showing upon its face a material alteration may be admitted in evidence, the parties being permitted to make such explanation of the alteration as they may choose. *Dorsey v. Conrad* 443
10. An exhibit may be excluded where the proper foundation for its admission has not been laid. *Aultman v. Martin* 108
11. A letter written by plaintiff, which showed his claim to be less than that sued for, was erroneously excluded. *Id.*

Evidence—*concluded.*

12. The constitutional and statutory provisions excluding from the jurisdiction of justices of the peace cases involving title to, and boundaries of, land, do not render inadmissible, in actions within their jurisdiction, deeds, contracts, and other evidences of title. *Lorius v. Abbott* 214
13. A certified transcript of the record of a deed may be read in evidence when the original is lost or not within the control of the party offering the proof. *Thams v. Sharp* 237
14. A deed executed and acknowledged in Kansas, conveying land in Nebraska, *held* admissible in evidence, though not witnessed. *Schields v. Horbach* 262
15. Where a certificate of the city clerk showed that an ordinance was not published for the statutory time, the ordinance was *held* inadmissible. *Union P. R. Co. v. Montgomery*, 429

Exceptions. See BILL OF EXCEPTIONS. INSTRUCTIONS, 5-7. REVIEW, 66.

Executions. See CHATTEL MORTGAGES, 5. JUDGMENTS, 9. REVIEW, 58.

1. Objections that the property is appraised too high, or too low, should be made and filed, with a motion to vacate the appraisement, before sale. *Overall v. McShane* 64
   Creighton University v. Mulvihill 577
2. Appraisers act judicially, and the parties, including the purchaser, are, in collateral proceedings, bound by the appraisement. *Nye v. Fahrenholz* 276
3. A purchaser at a judicial sale is charged with notice of the proceedings leading to the sale, including the appraisement. *Id.*
4. Where the amount of a junior lien was, in foreclosing a superior lien, deducted by the appraisers from the value of the property, a purchaser at the judicial sale, who bid only two-thirds of the value as thus erroneously appraised, cannot be heard to say in a subsequent suit to foreclose the junior lien, that it was inferior to the lien under which he bought the land, the junior lienor not having been a party to the former suit. *Id.*
5. Where a judgment defendant is not in possession of realty, his equitable interest therein cannot be sold under execution issued upon the judgment. *First Nat. Bank of Plattsmouth v. Tighe* 299
6. Unless otherwise ordered, it is the duty of the sheriff to pay the proceeds of sale, upon confirmation, directly to the persons entitled thereto under the decree of foreclosure. *Fire Ass'n of Philadelphia v. Ruby* 584
7. Where there has been fraud, unfairness, irregularity, or disregard of statute in making a judicial sale, the district court may set it aside. *Roberts v. Robinson* 718

Executions—*concluded.*

8. Where a judicial sale has been fairly conducted according to law, the sale duly reported, and no objections to confirmation filed, the court has not discretion to arbitrarily set it aside. *Id.*

Executors and Administrators. See WITNESSES, 4.

Residence. Appointment. Petition.

1. Where an inhabitant of the state dies intestate, letters of administration must be granted in the county of which he was an inhabitant at the time of his death. *Spencer v. Wolfe,* 8
2. Where an intestate resided outside of the state at the time of his death, an administrator may be appointed within the state, in any county in which any of his estate is situate, and the administrator first appointed is entitled to the entire estate within the state, as against administrators subsequently appointed in other counties. *Id.*
3. The judgment of a county court appointing an administrator is not void because the petition therefor does not allege that the intestate was a resident at the time of his death. *Id.*
4. It is not necessary in a petition for letters of administration to set out the description of either the realty or personalty. *Id.* 9
5. A petition for the appointment of an administrator must allege necessary facts to confer jurisdiction on the county court, and if it fails to do so the appointment will be void. *Id.*
6. In a petition by a creditor to be appointed administrator, allegations that intestate died seized of realty and personalty in the county, that the realty was worth $5,600, and that the personalty was estimated to be worth several hundred dollars, were *held* sufficient. *Id.*
7. The county court is not obliged to appoint as administrator one who is unsuitable or incompetent. *Id.*
8. By appearing in a proceeding for the appointment of an administrator, the widow and the heirs who were not minors waived statutory notice. *Id.*
9. A county court is not required to appoint the widow or next of kin of an intestate administrator of the estate. *Id.*

Accounting. Settlement.

10. The law will neither sanction nor condone an administrator's abuse of trust out of which his claim against the estate arises. *Bachelor v. Schmela* 40
11. A final settlement pursuant to notice to persons interested in the estate is in the nature of a judgment and is conclusive until set aside on review or impeached for fraud. *Id.*
12. An interlocutory *ex parte* accounting is only *prima facie* correct and is, therefore, subject to re-examination so long as the administrator's final account remains unsettled. *Id.*..... 37

Executors and Administrators—*concluded.*

13. When an administrator presents in support of his final account receipts of a distributee, the latter may show that they were procured by fraud. *Westover v. Carman*..... 397
14. In the final accounting, beneficiaries of the estate are not bound by the terms of receipts presented by the administrator, but may deny that payments were made as shown by the receipts. *Id.*
15. An administrator who mingled the funds of the estate with his own and used them for his own benefit is chargeable with interest. *Id.*
16. An administrator who mingled the funds of the estate with those of strangers is chargeable with interest, though he did not derive individual benefit from the transaction. *Id.*
17. Evidence *held* sufficient to sustain the action of the trial court in disallowing certain items in the account of an administrator and in charging him with interest on the funds in his hands. *Id*..... 398

Actions.

18. The right of a foreign administrator to bring suit is recognized by sec. 337, ch. 23, Comp. Stats. *Cox v. Yeazel*..... 343
19. Generally, an action to recover a debt payable to one who died intestate, must be brought by the administrator of the estate. *Id.*
20. An action to recover a debt payable to one who died intestate cannot be maintained by the heirs at law unless it is shown that there were no demands against the ancestor and that there has been no administration, or that the administration has been closed. *Id.*

Expert Evidence. See EVIDENCE, 3-5.

Factors and Brokers. See BAILMENT, 5, 6.

False Representations. See INSURANCE, 9, 10, 13, 16. VENDOR AND VENDEE, 7.

Fees. See MANDAMUS, 2. SHERIFFS AND CONSTABLES.

Findings. See REPLEVIN, 8. TRIAL, 13.

Fines. See ASSOCIATIONS, 3.

Fishways. See MILLS AND MILL-DAMS.

Forcible Entry and Detainer.

Under a three-year lease requiring lessee to execute a mortgage on the crop each year to secure the rent and providing for termination of the lease in case of his failure to comply with any of its terms, the refusal to give such mortgage *held* not to justify the lessee in bringing an action of forcible entry and detainer, there being no default in payment of rent. *Stevenson v. Brodahl*..... 703

Foreclosure. See BUILDING AND LOAN ASSOCIATIONS, 2. MORTGAGES.

Foreign Corporations. See CORPORATIONS, 10.

Forfeiture. See CONTRACTS, 2.

Forgery.
Evidence *held* sufficient to show that the signature to a deed was genuine. *Thams v. Sharp* 237

Fraud. See CONTRACTS, 5, 6. LIMITATION OF ACTIONS, 2. STATUTE OF FRAUDS. VENDOR AND VENDEE, 7.
Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced upon him. *Davidson v. Crosby* 63

Fraudulent Conveyances. See CHATTEL MORTGAGES, 5-9. CORPORATIONS, 8. HOMESTEAD, 2. HUSBAND AND WIFE, 9.
1. Creditors, merely as such, have no lien on the property of the insolvent debtor, which prevents him from making a *bona fide* sale. *Crites v. Hart* 53
2. That a firm is heavily indebted, that it sells a large portion of its property and that it accepts in payment the purchaser's notes, are not conclusive evidence of fraud in the transfer. *Id.*
3. The question of fraud as affecting the rights of the seller's creditors is for the jury. *Id.* 54
Campbell v. Farmers & Merchants Bank of Elk Creek 143
4. Note and chattel mortgage attacked as a fraud upon creditors of the maker, *held,* when properly identified, admissible in evidence. *Plummer v. Green* 316
5. A chattel mortgage executed by a guardian to a trustee for the ward to secure a debt, *held,* not fraudulent as to other creditors of the guardian, though the latter had previously given a bond to the proper court. *Id.*
6. Where a guardian executed a chattel mortgage to a trustee to secure a debt due the ward, it was *held* that other creditors of the guardian, who converted the mortgaged chattels, could not complain of the guardian's delegation of trust. *Id.*
7. An insolvent debtor may pay or secure one creditor to the exclusion of others, and the intention to defraud cannot be inferred from the mere fact that such preference was given. *Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege* 321
8. A mortgage securing a pre-existing debt should not be declared void merely because the mortgagee had notice that the mortgagor intended to defraud creditors, mortgagee not participating in the fraudulent purpose. *Grosshans v. Gold* 599
9. The disproportion between the value of mortgaged chattels and the amount secured affords no basis for a presumption of law, but is a matter of evidence to be accorded such weight as in the light of surrounding circumstances it is entitled to receive in the determination of a question of fact.
Dayton Spice-Mills Co. v. Sloan 622
Gedney Pickle Co. v. Sloan 638

Fraudulent Conveyances—*concluded.*

10. The motive of a judgment debtor in having his homestead conveyed to his wife is immaterial, the homestead not being susceptible of fraudulent alienation. *Roberts v. Robinson*.... 717

Garnishment. See ATTACHMENT.

Gifts. See HUSBAND AND WIFE, 6, 8, 9.

Guaranty.

1. Where an agent took purchase-money notes in his own name and indorsed them to his principal without recourse, the latter, by accepting them without objection, waived the agent's guaranty, in the contract of agency, for payment of all purchase-money notes. *Aultman v. Martin*..... 107
2. Neglect to notify guarantor of the default of his principal does not discharge the former, unless the neglect is unreasonable in view of all the circumstances of the case. *Lininger & Metcalf Co. v. Wheat*..... 567
3. One who guarantied that a party would faithfully perform all the obligations imposed upon the latter by a contract, *held* not entitled to notice of acceptance of the guaranty, as a condition precedent to guarantor's liability. *Id.*
4. A consideration sufficient to sustain a guaranty of the faithful performance of the undertakings of the principal exists when the party for whose protection the guaranty was executed has extended credit to the principal on the faith of such guaranty. *Id.*

Guardian and Ward.

A guardian may execute and deliver to his ward, or the latter's trustee, a note and mortgage evidencing an indebtedness of the guardian to the ward's estate. *Plummer v. Green*..... 316

Harmless Error. See REVIEW, 38-41.

Highways. See DEDICATION. EMINENT DOMAIN, 2-4. RES JUDICATA, 1.

1. Section lines are declared by statute to be public roads, but they cannot be opened as such, nor lands appropriated therefor, until the steps provided by statute have been taken for opening such roads and for ascertaining the damages. *Henry v. Ward*..... 392
2. The act of 1873 (Gen. Stats., p. 959), making section lines in certain counties highways, was so far modified by the act of 1879 (Session Laws, p. 120), that section lines not used as roads for five years before the passage of the latter act cannot be opened as such without complying with its requirements. *Id.*

Homestead.

1. Prior to the enactment of the homestead law of 1877, the failure of the wife to join in a conveyance of the homestead,

Homestead—*concluded.*

the title being in the husband, did not render the conveyance void. *Schields v. Horbach* 262

2. A wife, who by *mesne* conveyance from her husband acquires property exempt as the homestead, takes the title unincumbered by judgments against the husband, though the purpose of such conveyance may have been to defraud his creditors. *Mundt v. Hagedorn* 409
3. The homestead exemption (Comp. Stats., sec. 1, ch. 36) is determined not from the value of the fee-simple title, but from the value of the claimant's interest in the premises. *Id.*
4. Where a judgment debtor and his wife conveyed their homestead to a person for the purpose of having it transferred to the wife, the grantee held the title only in trust for her, and, in accepting a deed from the trustee, she did not take the property burdened with the judgment, though it was also entered against the person who was trustee. *Roberts v. Robinson* 717

Husband and Wife. See DIVORCE.

1. A husband whose wife was injured and rendered helpless through the negligence of another, may recover from the latter the expenses necessarily paid for the performance of the wife's household duties. *Riley v. Lidtke* 139
2. The services due to a husband from his wife are such as reasonably devolve upon her by reason of the marriage relation. *Id.*
3. The performance by a wife of laundry work and sewing for persons other than her family are not duties devolving upon her by reason of the marriage relation. *Id.*
4. Earnings acquired by the wife as a laundress and seamstress for persons other than her family do not belong to the husband, but are the separate property of the wife. *Id.* 140
5. In a suit by the husband for loss of services of his wife, earnings acquired by her as laundress and seamstress for persons other than her family should not be considered in estimating plaintiff's damages. *Id.*
6. A gift of chattels from husband to wife during coverture was ineffective at common law. *Dayton Spice-Mills Co. v. Sloan* .. 622
7. The common law in respect to the rights of husband and wife is in force except so far as it has been modified by statute. *Id.* 623
8. The married woman's act does not abrogate the equitable rule upholding gifts made by a husband to his wife during his solvency. *Id.*
9. A husband may give his wife a deed or mortgage to secure a pre-existing debt due her, and such a conveyance is not fraudulent as to his other creditors, if taken in good faith without any fraudulent purpose. *Id.*
Gedney Pickle Co. v. Sloan 638

Improvements. See LANDLORD AND TENANT, 2. MECHANICS' LIENS, 4. MORTGAGES, 2. MUNICIPAL CORPORATIONS, 11.

Indictment and Information. See CRIMINAL LAW. 9-12. INTOXICATING LIQUORS, 2, 3. PHYSICIANS AND SURGEONS, 2.

1. It is within the discretion of the trial judge to permit the names of additional witnesses to be indorsed by the county attorney on the information after it is filed, and before trial. *Fager v. State* 439
Barney v. State 515

2. An information for embezzlement which described defendant as "secretary of the board of education" *held* not at variance with a complaint describing him as "secretary of the school board." *Hockenberger v. State* 706

3. An information charging that accused embezzled certain money belonging to "the school district of the city of Grand Island, of the county of Hall, in the state of Nebraska," *held* not at variance with a complaint charging him with having embezzled money of "the school district of the city of Grand Island, Hall county, Nebraska." *Id.*

Information. See INDICTMENT AND INFORMATION.

Injunction. See ASSOCIATIONS, 3. EMINENT DOMAIN, 2, 4.

1. Injunction is not the appropriate remedy to test the legal existence of a municipal corporation. *Osborn v. Village of Oakland* 340

2. In a suit to restrain county commissioners from removing plaintiff's fences from land alleged by them to be a highway, the burden is on them to establish the existence of the highway, where its existence is denied by plaintiff. *Henry v. Ward* 392

3. A court of equity will not at the suit of a private individual enjoin the county clerk, treasurer, and county judge from appointing county commissioners under sec. 68, art. 4, ch. 18, Comp. Stats., the remedy being complete at law, by *quo warranto* against the appointees. *Fort v. Thompson* 772

Insanity. See WILLS, 3.

Insolvency. See BANKS AND BANKING, 4-7. FRAUDULENT CONVEYANCES, 7. SET-OFF AND COUNTER-CLAIM. VOLUNTARY ASSIGNMENTS.

1. The property of an insolvent is not a trust fund in the debtor's hand for the benefit of creditors. *Crites v. Hart* 53

2. A failing partnership may prefer part of its creditors to the exclusion of others, the question of fraudulent intent being for the jury. *Campbell v. Farmers & Merchants Bank of Elk Creek* 144

Instructions. See CRIMINAL LAW, 4, 5. EMBEZZLEMENT. MASTER AND SERVANT, 4. RAILROAD COMPANIES, 3-5. REVIEW, 7, 8, 66.

1. Where an instruction as a whole states the law correctly as applied to the evidence, it is not erroneous, though a portion taken separately may not have been accurate. *Omaha & Council Bluffs R. & Bridge Co. v. Levinston* 17
2. The court's neglect to file with the clerk the instructions given, to be available as ground of reversal, must be attacked in the motion for a new trial. *Chicago, B. & Q. R. Co. v. Shafer* 25
3. In an action by an agent for services and expenses, the instructions were *held* to be without error. *Aultman v. Martin* .. 105
4. A party cannot complain of an instruction in harmony with one requested by him. *City of Omaha v. Richards* 245
5. An exception to the "giving of instructions 3, 4, 5, 6, 7, 8, and 9, contained in the general charge of the court, and to the giving of each of said instructions," is a separate and specific exception to each of said paragraphs, and is, therefore, sufficient. *Id.* 244
6. An exception to instructions *en masse* is unavailing unless each paragraph is erroneous. *Union P. R. Co. v. Montgomery,* 430
7. A ruling which modifies an instruction requested will not be reviewed in absence of an exception to the modification. *Denise v. City of Omaha* 750
8. Objections to instructions, to be available on review, must be specifically pointed out in a motion for a new trial. *Id.*
9. In charging a jury the repetition of a proposition in proper connection with different facts *held* not ground for reversal. *Id.*
10. In determining whether a particular instruction is erroneous it should be read and construed with others given on the same branch of the case. *Fremont, E. & M. V. R. Co. v. Root* .. 901

Criminal Law.

11. In a criminal case it is not erroneous to direct the jury that its oath imposes upon it no obligation to doubt, where no doubt would have existed if no oath had been administered. *Barney v. State* 515
12. Where the evidence fails to show an offense of a less degree than that charged, the failure to give an instruction defining the lesser offense is not prejudicial error. *Fager v. State* 440
13. It is error for a court, in a criminal case, to single out a particular witness for the defense and give to the jury a cautionary instruction which applies to his testimony the rule, "*Falsus in uno, falsus in omnibus.*" *Argabright v. State,* 760

Insurance. See COMPROMISE AND SETTLEMENT.

Rights of Mortgagee.

1. A representation by two persons that they owned the property, when it belonged to a corporation whose stock they

Insurance—*continued.*

owned, *held* not to avoid the right of a mortgagee to insurance under a mortgage clause attached to the policy, he having no knowledge of the misrepresentation; and in such a case it was not prejudicial error to prevent the insurer from proving the insolvency of the corporation. *North British & Mercantile Ins. Co. v. Bohn*..... 572

Value of Property.

2. In a suit upon an insurance policy to recover the value of insured realty wholly destroyed by fire, the sum for which the property is insured is conclusive evidence of its value. (Comp. Stats., sec. 43, ch. 43.) *Ætna Ins. Co. v. Simmons*..... 812

Examination of Insured.

3. A company failing to demand an examination of insured within a reasonable time after notice of the fire, and failing to designate a time and place for his examination and the officer before whom it shall occur, cannot defend an action on the policy on the ground that insured refused to submit to an examination required by the terms of the contract. *Id.*

4. It is incumbent upon the company to designate a person authorized by law to administer oaths, and to name a convenient place within the county where insured can be examined, when the company relies upon the refusal of insured to submit to an examination as a defense to a suit on the policy. *Id.*

Proofs of Loss.

5. Conduct showing that, after being notified of a fire, the company's adjuster went to the farm of insured and inquired into the loss and the cause of fire, that insured submitted to the adjuster a written memorandum of the property destroyed and of its value, and that negotiations resulted in the latter offering a certain sum in full settlement, *held* to justify the jury in finding that the company had refused to pay the loss and that it had waived proofs thereof. *Id.*

6. By defending an action on a policy on the ground that it was never in force, the company waives proofs of loss. *Id.*

Arbitration.

7. By denying liability on the ground that the policy was forfeited by reason of insured's breach of warranty, the company waives the right to insist on arbitration. *Id.*

Construction.

8. The application and the policy should be construed together. *Id.* 813

Representations. Warranties. Review.

9. A representation is the assertion by the insured of some fact, but the validity of the policy does not depend upon the literal truth of the assertion. *Id.*

Insurance—*continued.*

10. Statements in the application as to the purchase price of the land upon which the insured buildings were situate were *held* representations and not warranties. *Id.*

11. Warranties are not to be created nor extended by construction. *Id.* 814

12. A warranty is the assertion by insured of some fact on the literal truth of which the validity of the policy depends, without regard to the materiality of such fact or the motive which prompted the assertion. *Id.* 813

13. Whether an assertion made by the insured of the existence of a fact is a warranty or a representation is a question of law. *Id.* 814

14. Where a record for review showed that personalty was insured for $1,150, that in a suit upon the policy the jury returned a general verdict in favor of plaintiff for $800, and a special finding fixing the value of the property at $1,600, and that judgment was entered on the general verdict, it was *held* that the inconsistency between the general and special verdicts was not one of which the insured could complain. *Id.* 812

15. The court will construe a statement to be a warranty only when it clearly appears from the situation of the parties, from the subject-matter, and from the language employed, that such was the intention of the contracting parties. *Id.* .. 814
Kettenbach v. Omaha Life Ass'n 842

16. In an action on a policy, where the company relies upon the defense that the representations of insured in the application were false, it is incumbent upon the company to plead and prove that the statements were made as written in the application; that they were false in some particular material to the risk; and that the company relied and acted upon the statements. *Ætna Ins. Co. v. Simmons* 813
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Settlement.

17. Where a mutual insurance company insured a mare against accident, entered into a compromise for a loss, and gave insured its note for a sum less than that fixed by arbitrators, the company was held liable for the amount of the note regardless of whether insurer had power under the law to accept such a risk. *Farmers Mutual Ins. Co. v. Meese* 861

Applications. Limitation of Actions.

18. Statements contained in an application for a policy of insurance will not be construed as warranties unless the provisions of the application and policy leave no room for any other construction. *Kettenbach v. Omaha Life Ass'n* 842

19. Time cause of action accrues on a life insurance policy. *Id.*

20. *Held* that the one-year limitation fixed by a life insurance policy for bringing suit for the death loss did not begin to

Insurance—*concluded.*

run from the date of assured's death but from the time the right of action accrued on the policy. *Id.*

21. Statements and answers made by assured in an application for a life insurance policy *held* not warranties, but representations. *Id.* 843

Interest. See BUILDING AND LOAN ASSOCIATIONS, 1. EXECUTORS AND ADMINISTRATORS, 15, 16.

1. Under ch. 44, Comp. Stats., interest is allowable at the rate of seven per cent on trust funds withheld by the receiver of an insolvent bank. *Capital Nat. Bank v. Coldwater Nat. Bank*.. 786
Capital Nat. Bank v. Genesee Fruit Co 793
Capital Nat. Bank v. Cupples Woodenware Co 794
Coldwater Nat. Bank v. Magoon 795
Capital Nat. Bank v. First Nat. Bank of Cadiz 795
2. Where judgment on verdict is delayed during pendency of motion for new trial, interest may be allowed on the amount of the verdict from its date to date of judgment. *Fremont, E. & M. V. R. Co. v. Root* 901

Intervention. See PARTIES. REVIEW, 51.

Intoxicating Liquors.

1. Under sec. 11, ch. 50, Comp. Stats., each act of selling or of giving away any of the liquors therein named, without a license, is a misdemeanor punishable by fine or imprisonment. *Nichols v. State* 777
2. Under sec. 11, ch. 50, Comp. Stats., several distinct offenses may be charged in one information in different counts. *Id.*
3. Where accused is found guilty under each of several counts of an information which charges him with unlawful sales of liquors, a separate sentence should be imposed for each conviction. *Id.*

Journal Entries. See REVIEW, 67.

Judgments. See APPEARANCE, 1. COSTS, 3. CRIMINAL LAW, 7. DURESS. EXECUTORS AND ADMINISTRATORS, 3, 11. HOMESTEADS, 2. INTEREST, 2. PLEADING, 4, 5. RES JUDICATA. VENDOR AND VENDEE, 5.

1. Judgment attacked as having been rendered in vacation, *held* to have been entered during the term. *Minick v. Minick*, 89
2. An order overruling a motion to dismiss an appeal from a county board to the district court and a finding of the amount due plaintiff, do not constitute a final judgment. *Hall County v. Smith* 274
3. A judgment in the district court is not a lien upon the judgment debtor's equitable interest in realty. *First Nat. Bank of Plattsmouth v. Tighe* 299
4. A court may correct its record so as to disclose what occurred, though the term at which judgment was rendered has expired. *Wachsmuth v. Orient Ins. Co* 590

Judgments—*concluded.*

5. Though the legal title to land is in defendant, the lien of a judgment against him only attaches to his actual interest. *Roberts v. Robinson* 718
6. The power to enter judgments *nunc pro tunc* is inherent in courts both of law and equity. *Van Etten v. Test* 725
7. Where a judgment was in fact rendered but not journalized, the court may, at any time afterward in a proper proceeding and upon a proper showing, direct the judgment to be entered *nunc pro tunc. Id.*
8. In a collateral attack upon a deficiency judgment evidence merely contradicting satisfactory proof of notice of the motion for such judgment cannot be considered. *Gillilan v. Murphy* 779
9. In a proceeding in aid of execution an order requiring a judgment defendant to appear and submit to an examination is a final order from which he may appeal. *Clarke v. Nebraska Nat. Bank* 800
10. Where, on a motion timely made to vacate a judgment rendered in plaintiff's absence, it appears that at time of trial the answer was amended to present a new issue, on which a finding determining the case in defendant's favor was made, and plaintiff's attorneys were at time of entry of judgment engaged in trial of a case before another judge in the same district, and had by oversight failed to notice that this cause was bulletined for trial, the court should open the judgment and grant plaintiff leave to plead to amended answer. *Hermance v. Cunningham* 897

Judicial Sales. See EXECUTIONS.

Jurisdiction. See EQUITY. PLEADING, 2. SUMMONS. VENUE.

Jury.

1. A district judge may, for any lawful cause, discharge a regular panel of the petit jury and direct the sheriff to call other jurors. *Barney v. State* 515
2. The fact that a jury was illegally drawn is a sufficient cause for discharging it from service. *Id.*
3. The fact that nearly all jurors upon the regular panel are disqualified from sitting in any case remaining for trial is a sufficient cause for discharging the panel. *Id.*
4. Where cause for a special venire exists under sec. 465*a*, Criminal Code, the court may, the regular panel being disqualified to sit in cases remaining for trial, discharge that panel and direct a new jury to be drawn under sec. 664, Civil Code. *Id.*
5. In a judicial district where there are two judges, the court may, by special order, direct a jury of less than forty-eight to be drawn, such special order being a "rule" within the meaning of sec. 8, ch. 5, Comp. Stats. *Id.*

Justice of the Peace. See CONSTITUTIONAL LAW, 4. PAUPERS, 1, 4.
A justice of the peace may acquire jurisdiction of an action to recover liquidated damages upon failure of a promisor to convey realty according to the terms of his contract. *Lorius v. Abbott* 214

Laches. See ARBITRATION AND AWARD, 2. BILL OF EXCEPTIONS, 10. CONTRACTS, 6. SCHOOLS AND SCHOOL DISTRICTS, 2.

Landlord and Tenant. See FORCIBLE ENTRY AND DETAINER.
1. A tenant by simply holding over after the expiration of his lease does not hold adversely. *Schields v. Horbach* 262
2. In an action against a landlord by one who made repairs at the instance of the tenant, it was *held* error to reject as evidence a lease requiring the tenant to pay for all improvements. *Davis v. Benedict* 119

Larceny.
Evidence *held* sufficient to sustain a conviction. *Barney v. State,* 515

Lease. See LANDLORD AND TENANT, 2.

Letters. See EVIDENCE, 10, 11.

Liens. See BAILMENT, 3-6. JUDGMENTS. MECHANICS' LIENS. MORTGAGES. PARTIES. REPLEVIN, 4.

Limitation of Actions. See INSURANCE, 20.
1. *Mandamus* is barred at the expiration of four years from the time the right to a writ accrued. *State v. Boyd* 303
2. An action for relief on the ground of fraud may be commenced within four years from discovery of the fraud or of facts sufficient to put a person on inquiry. *Id.*
3. The laws fixing the amount of fees of a county clerk, requiring him to keep a fee book and to report the fees of his office, and his reports and the records showing the services for which he may charge fees, constitute sufficient notice to the county board to set the statute in motion against an action by the county to enforce the duty of a clerk who failed to make a proper report. *Id.*
4. The right of action to compel a county clerk to report his fees for any current year, and to pay the balance due the county into the treasury, accrues at the time the report is due, or made in an incomplete, defective, or fraudulent manner, and the statute begins to run from that time. *Id.*
5. A suit by the owner of the fee to redeem his land from a mortgage which has been foreclosed without notice to him may be brought any time within ten years after his cause of action accrued. *Dorsey v. Conrad* 443
6. A suit by the owner of the fee to redeem his land from a mortgage which has been foreclosed without notice to him is barred in the same time in which the statute would bar the right to foreclose the mortgage. *Id.*

Limitation of Actions—*concluded.*

7. The "concealment" or "absconding," which, under sec. 20 of the Code, suspends the operation of the statute of limitations, must be such as affects the commencement of judicial proceedings in Nebraska, and not those of another state. *Talcott v. Bennett*..... 569
8. The statute does not run in favor of strangers to a transaction against a claim due from a husband to his wife arising out of such transaction. *Dayton Spice-Mills Co. v. Sloan*.... 623
Gedney Pickle Co. v. Sloan..... 638

Malice. See MALICIOUS PROSECUTION.

Malicious Prosecution.

1. A defendant who withheld material facts within his knowledge from his counsel is not protected by the latter's advice, from liability for instituting the criminal prosecution. *Peterson v. Reisdorph*..... 529
2. A jury may infer malice from the fact that the purpose of the prosecution complained of was to collect a debt and not to enforce the laws against crime. *Id.*
3. Evidence *held* to sustain a finding that a criminal prosecution was malicious and without probable cause. *Id*..... 530

Malpractice. See PHYSICIANS AND SURGEONS, 1.

Mandamus. See LIMITATION OF ACTIONS, 1.

1. The duty of the owner of a mill-dam to construct and maintain fishways as required by sec. 87*a* of the Criminal Code may be enforced by *mandamus;* but see Statutes, 2. *West Point Water Power & Land Improvement Co. v. State*..... 218
2. *Mandamus* may issue after the term of a county clerk expires, to compel him to report all the fees of his office and to pay any balance due the county into the treasury. *State v. Boyd*, 303
3. *Mandamus* may issue against the proper city officers to require them to levy a tax to pay rental of hydrants used by the city. *State v. City of Kearney*..... 337
4. The application should be by motion, supported by affidavit stating the facts upon which the application is based. *State v. County Commissioners*..... 51
5. A petition verified as pleadings are ordinarily verified under the Code is insufficient, and a writ should not issue thereon. *Id.*
6. Pleadings in a proceeding in *mandamus* have the same effect as those in an ordinary civil action. *State v. Baushausen*.... 558
7. A material averment in a petition for *mandamus* not denied by the answer will be taken as true. *Id.*
8. As a rule *mandamus* will not issue until there has been a demand for the performance of the act to be enforced, but a formal demand is unnecessary where the conduct of the officer is equivalent to a refusal. *Id.*

Mandamus—*concluded.*

9. The writ should only issue where the duty to be performed is specially enjoined by law or results from the office or station of respondent.' *Laflin v. State* 614
10. The writ was denied on application to require a district judge to fix the amount of a supersedeas upon appeal from an order appointing a receiver *pendente lite. State v. Stull* ... 739
11. The title to an office cannot be tried and adjudicated in *mandamus. State v. Smith* 755
12. The discretion of a school district board in employing teachers will not be controlled by *mandamus* on application of taxpayers. *Id.* 756
13. A peremptory writ must conform strictly to the command of the alternative writ or to the prayer of the petition, and clearly indicate the particular duty to be performed. *Laflin v. State* 614

Master and Servant.

1. A servant generally does not assume risks due to his master's negligence, nor does he, in all cases, assume risks of danger arising from sudden unforeseen circumstances, not ordinarily incident to the employment. *Chicago, R. I. & P. R. Co. v. McCarty* 475
2. A master may be negligent in giving a command which the servant would not be negligent in obeying. *Id.*
3. Where the master's command requires the performance of an act not within the scope of the servant's duty, without opportunity for the servant to deliberate, the latter, in obeying the order, is not chargeable with contributory negligence, though there may have been danger apparent, unless the danger was so patent that a prudent person would not have obeyed. *Id.*
4. In an action for personal injuries, where it was shown that a master's command required the performance of an act without opportunity for the servant to deliberate, an instruction that the servant was not negligent in obeying the order, unless no one but a reckless or foolhardy man would have obeyed, is erroneous. *Id.*
5. An employe assumes the ordinary risks of his employment. *Chicago, B. & Q. R. Co. v. McGinnis* 649
6. A brakeman on the ladder of a moving freight car was injured by colliding with an oil-house of which he had knowledge, and it was *held* that he assumed the risk, and that he could not recover damages from the railroad company for negligence in permitting the oil-house to be erected at the place in question. *Id.*
7. Evidence discussed in opinion *held* insufficient to sustain a judgment against a street-railway company in an action against it to recover damages for the death of a street-car

Master and Servant—*concluded.*

driver who was kicked by a horse furnished by defendant and alleged by plaintiff to be vicious. *Omaha Street R. Co. v. Leigh* 782

Mechanics' Liens.

1. A claim for labor performed and materials furnished in sinking a tubular well affords no foundation for a mechanic's lien on the premises on which the improvement is made. *Omaha Consolidated Vinegar Co. v. Burns* 230
2. A mortgagee who encouraged the improvement of the mortgaged property by an agreement to subordinate his lien to the liens of persons furnishing labor and material will be deemed a promoter of the improvement, and his lien will be held inferior to liens of mechanics who relied upon his promise. *Cummings v. Ensslie* 485
3. Where a party agreed, in consideration of real property being placed in the hands of his agent, that the rents and profits therefrom arising were to be collected and paid out as stipulated to certain holders of liens on such property, among whom was the aforesaid party to said agreement, such agreement will be enforced according to its terms, though thereby the otherwise existing rights of said party are modified or impaired. *Rogers v. Central Loan & Trust Co.*, 676
4. The mere fact that a loan company, as a condition upon which it would make a loan for the erection of buildings on real property offered as security, required that the contemplated improvements should be conformably to plans submitted with the application for such loan, did not, for the amount paid by it out of the loan on a mortgage paramount to the liens of all parties concerned, subject the company to a direct liability to the holders of mechanics' liens created by reason of such improvements. *Id.*

Mills and Mill-Dams.

Persons erecting and maintaining mill-dams in streams do so with the implied obligation of providing adequate fishways; but see Statutes, 2. *West Point Water Power & Land Improvement Co. v. State* 218

Mistake. See ACKNOWLEDGMENT.

Mortgages. See CHATTEL MORTGAGES. DEEDS, 3, 4. EXECUTIONS, 1, 4, 6. INSURANCE, 1. LIMITATION OF ACTIONS, 5, 6. MECHANICS' LIENS, 2-4. VENDOR AND VENDEE, 3.

1. A mortgagee is entitled to be reimbursed for insurance premiums and taxes paid, with interest. *White v. Atlas Lumber Co.* 82
2. A mortgagee in possession before foreclosure is not entitled to credit for permanent improvements made by him, but is liable for the net rents and profits which he received, or might have received by the exercise of reasonable care. *Id.*

Mortgages—*concluded.*

3. Where the amount of a junior lien was, in foreclosing a superior lien, deducted by the appraisers from the value of the property, and a judicial sale made for only two-thirds of the value as thus erroneously appraised, the former owner of the equity, who was liable for both debts, may insist upon the subjection of the property to the payment of the junior lien. *Nye v. Fahrenholz* 276
4. Where the amount of a junior lien was, in foreclosing a superior lien, deducted by the appraisers from the value of the property, and a judicial sale made for only two-thirds of the value as thus erroneously appraised, the junior lienor, who was not a party to the suit, was *held* entitled to a decree of foreclosure in a subsequent suit, without being compelled to redeem. *Id.*
5. Evidence *held* insufficient to show that the person to whom the mortgagor paid the amount of the mortgage debt was the agent of mortgagee. *Richards v. Waller* 639
6. Evidence *held* sufficient to show that the person to whom the mortgagor paid the amount of the mortgage debt was the agent of mortgagee. *Thomson v. Shelton* 644
7. Evidence *held* to sustain a finding that the mortgage in controversy had not been paid. *Seeley v. Wickstrom* 730
8. A junior mortgagee in a foreclosure case, who does not pray for a foreclosure is entitled only to a decree fixing his priority and directing distribution accordingly in case of sale. *Id.*
9. In a foreclosure suit, one answering that he owns the land by virtue of a deed from mortgagor duly recorded before registration of the mortgage, and praying to be decreed the owner of the land free from mortgagee's lien, must plead and prove that he was a purchaser, not a donee; that he purchased without notice of the mortgage; that he parted with or paid a valuable consideration, stating what the consideration was; and that he parted with the consideration before receiving notice of the mortgage. *American Exchange Nat. Bank v. Fockler* 713

Municipal Corporations. See DEDICATION. EMINENT DOMAIN, 3. QUO WARRANTO. SCHOOLS AND SCHOOL DISTRICTS. STATUTES, 11.

Negligence.

1. Whether a child who was drowned in a pond in a street, while at play, was guilty of contributory negligence *held* a question for the jury. *City of Omaha v. Richards* 244
2. A city *held* liable for the death of a child who fell from a piece of sidewalk while using it as a raft upon a pond situate partly in the street and partly upon private property, the accumulation of water being occasioned by the negligence of the city in grading the street and in constructing a sewer. *Id.*

Municipal Corporations—*continued.*

3. Instructions set out in the opinion *held* to correctly state the rule as to liability of a city for failure to keep its streets in safe condition for the use of the public. *Id*..... 245

Taxes. Water.

4. Under subd. 15, sec. 69, Comp. Stats., 1885, a tax not exceeding five mills on the dollar of the assessed valuation could be levied by a city of the second class or village, to pay for water furnished such city or village under contract. *State v. City of Kearney*..... 326
5. A city council cannot by any act of ratification bind the city to levy a tax in excess of the rate provided by law. *Id*..... 336

Ordinances.

6. An ordinance of a city of the second class having over 5,000, and less than 10,000 inhabitants, which carries a penalty for the violation of its provisions, must, before it becomes effective, be published for at least one week in a newspaper published in the city, or in pamphlet form for distribution or sale. *Union P. R. Co. v. Montgomery*..... 429
7. Notice of an ordinance of a city of the second class having over 5,000, and less than 10,000 inhabitants, which carries a penalty for a violation of its provisions, must, if published in a daily paper, be inserted in each issue for a week. *Id.*
8. Ordinances of the city of South Omaha may be proved by the certificate of the city clerk under seal of the corporation. *Id.*

Plats.

9. A land-owner, by vacating his plat of an addition to a city, the land being within the corporate limits, does not *ipso facto* disconnect the land from the city. *Kershaw v. Jansen*..... 467

Water-Meter.

10. A city of the second class having less than 5,000 inhabitants, and owning and maintaining water-works, cannot require an inhabitant, as a condition precedent to his use of water, to purchase and place in position, at his own expense, a water-meter. *Albert v. Davis*..... 579

Improvements. Damages.

11. In an action against a city to recover damages to plaintiff's property caused by the grading of a street, evidence showing the value of lots and houses separately *held* not objectionable. *Denise v. City of Omaha*..... 753

Special Assessments.

12. The record of a special assessment authorized by sec. 6, art. 9, of the constitution must show affirmatively a compliance with all the conditions essential to a valid exercise of the taxing power. *Smith v. City of Omaha*..... 883
13. An award of damage pursuant to sec. 116 of the Omaha charter (Comp. Stats., ch. 12*a*) upon the change of an established grade should show affirmatively that the appraisers

Municipal Corporations—*concluded.*

took into consideration the benefits accruing to the property in question and that the award or finding represents the difference or balance in favor of the property owner. *Id.*

14. Sec. 6, art. 9, of the constitution, and the Omaha charter by implication limit the amount of assessment for local improvements to the special benefits severally accruing to the lots or parcels of land affected. *Id.* 884

Names. See DEPOSITIONS, 3. PARTNERSHIP, 7.

Negligence. See BAILMENT, 2. HUSBAND AND WIFE, 1. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 1, 2. RAILROAD COMPANIES, 3.

1. It is not generally proper to group certain facts and state to the jury that if they are found to exist they constitute negligence, but it is not reversible error to do so, where the facts so stated are such as to induce an inference of negligence in all reasonable minds. *Omaha & Council Bluffs R. & Bridge Co. v. Levinston* 17
2. Where a pleader relies upon one or more specific acts of negligence, evidence of any act not within one of the specifications is irrelevant. *Omaha & R. V. R. Co. v. Wright* 456
3. A general allegation of negligence is good as against a demurrer, and under such an allegation evidence of any fact which contributed to the injury inflicted is competent. *Id.*

Negotiable Instruments. See ALTERATION OF INSTRUMENTS. CHATTEL MORTGAGES, 3. CORPORATIONS, 1. INSURANCE, 17. PLEDGES, 4, 5. PRINCIPAL AND AGENT, 8, 9, 11. TROVER AND CONVERSION, 4, 5.

1. A negotiable promissory note is *prima facie* evidence of a consideration. *Plummer v. Green* 316
2. Evidence *held* insufficient to sustain a verdict against defendants as indorsees of a note. *Graves v. Norfolk Nat. Bank* 437

New Trial. See INSTRUCTIONS, 8. REVIEW, 22, 49-55.

1. In a motion for a new trial errors as to instructions should be separately assigned. *Graham v. Frazier* 90
2. Ordinarily, the discretion of the trial court in refusing to grant a new trial to permit the introduction of cumulative evidence is conclusive. *Johnson v. Wirth* 116
3. Assignment of error in the motion for new trial relating to the giving of instructions *held* sufficient. *City of Omaha v. Richards* 245
4. The assignment in a motion for a new trial that the finding is not sustained by the evidence does not, in an action on a contract, raise the question of error in the assessment of the amount of recovery. *Wachsmuth v. Orient Ins. Co* 590

Notary Public. See ACKNOWLEDGMENT.

Notice. See APPEARANCE, 1. DEPOSITIONS, 2. EXECUTIONS, 3. LIMITATION OF ACTIONS, 3. MUNICIPAL CORPORATIONS, 6, 7. SUMMONS.

Oaths. See INSTRUCTIONS, 11.

Objections. See REVIEW, 56-60. TRIAL, 12, 14.

Office and Officers. See INJUNCTION, 3. MANDAMUS. RES JUDICATA. SCHOOLS AND SCHOOL DISTRICTS, 5, 6, 7. VENUE.

Official Bonds. See RES JUDICATA, 2.

Opinion Evidence. See EVIDENCE, 4.

Ordinances. See MUNICIPAL CORPORATIONS, 6, 7.

Parliamentary Law. See ASSOCIATIONS, 2.

Parties. See BANKS AND BANKING, 5. EMINENT DOMAIN, 2. PARTNERSHIP, 7. PLEADING, 8.

Where two writs of attachment have been levied in different actions on the same property, plaintiff in the later case may intervene in the earlier case to have the priority of the levies adjudicated. *Deere v. Eagle Mfg. Co* 386

Partnership. See PLEADING, 8.

1. A partner cannot, without the consent of his copartners, apply firm property in satisfaction of his individual liabilities. *Cady v. South Omaha Nat. Bank* 125
2. A partnership is a distinct entity, having its own property, debts, and credits; and for the purposes for which it was organized it is a person. *Campbell v. Farmers & Merchants Bank of Elk Creek* 144
3. The fact that members of a firm organized a new one and purchased part of the assets of the former does not raise a conclusive presumption that the debts of the old partnership were assumed by the new one, though both were engaged in the same line of business. *Id* 143
4. A partnership may, in good faith, prefer part of its creditors to the exclusion of others. *Id* 144
5. Evidence *held* to sustain a finding that defendant did not assume the liabilities of a partnership, part of the assets of which the former purchased. *Id.*
6. The provisions of sec. 24 of the Code in relation to bringing a suit in the name of the firm are special in their character, and the prescribed mode of procedure must be followed. *Church v. Callihan* 542
7. Where the petition of a firm fails to state that it was "formed for the purpose of carrying on trade or business, or for the purpose of holding any species of property in this state," the pleading is demurrable on the ground that plaintiff has not legal capacity to sue, though the suit is based on an instrument executed to the partnership in its firm name. *Id.*

Partnership—*concluded.*

8. On dissolution of a partnership by the death of a member the possession and control of the partnership assets vest in the surviving partner. *Lindner v. Adams County Bank*..... 735
9. On dissolution of a partnership by the death of a member the surviving partner may sell and pass title to a chose in action belonging to the partnership. *Id.*
10. Where firm property was sold under a decree, leaving a surplus in court which the surviving partner had assigned in good faith to a stranger, it was *held* that the latter was entitled to such surplus as against the administrator of the deceased partner. *Id.*

Passes. See CARRIERS, 1, 2.

Paupers.

1. In counties without a poorhouse the justices of the peace are overseers of the poor. *Red Willow County v. Davis*..... 796
2. After a county board has opened a poorhouse the board may either employ a physician by the year to treat paupers, or to attend each case as it arises. *Id.*
3. When a county board has opened a poorhouse and spread that fact upon its records, the superintendence, care, and maintenance of the paupers devolve upon the county board. *Id.*
4. A county without a poorhouse is not liable for services rendered by a physician to paupers, unless he was employed by some of the overseers of the poor. *Id.*
5. Where the petition alleges, and the demurrer admits, that plaintiff was employed by the county board as a physician to attend a pauper, it will be presumed that the board kept within the law, and that a poorhouse had been established. *Id.*

Payment. See EMBEZZLEMENT. MORTGAGES, 6. PRINCIPAL AND AGENT, 8, 9, 11. SHERIFFS AND CONSTABLES, 3. TROVER AND CONVERSION, 3.

Evidence *held* to sustain a finding that a mortgage had not been paid. *Richards v. Waller*..... 639
Seeley v. Wickstrom..... 730

Penalties. See DAMAGES, 2.

Personal Injuries. See CARRIERS, 1, 2.

Evidence *held* sufficient to support verdict. *Fremont, E. & M. V. R. Co. v. Root*..... 901

Physicians and Surgeons. See PAUPERS, 2, 4, 5.

1. In a suit for malpractice in setting and treating a broken arm, the measure of damages is the damage accruing to plaintiff in excess of that which would have accrued naturally from the fracture had it been treated with the degree of skill ordinarily possessed by surgeons. *Miller v. Frey*.... 472

Physicians and Surgeons—*concluded.*

2. An information which sufficiently charges accused with the practice of medicine and surgery in a designated county, without first having obtained from the state board of health the certificate prescribed by ch. 55, Comp. Stats., states an offense under that chapter. *Jones v. State*..... 609

Plats. See MUNICIPAL CORPORATIONS, 9.

Pleading. See ARBITRATION AND AWARD, 4. CARRIERS, 5. CONTRACTS, 4. EXECUTORS AND ADMINISTRATORS, 4-6. MANDAMUS, 6, 7. MORTGAGES, 8, 9. NEGLIGENCE, 2, 3. PARTNERSHIP, 7. PAUPERS, 5. TROVER AND CONVERSION, 7.

1. The fact that plaintiff learned, after issue was joined in an action of replevin but before trial, that he had received the fruits of his agent's unauthorized act through which defendant acquired possession of the property, and the fact that the fruits of the act were not returned, may be proved under the original answer of general denial. *Johnston v. Milwaukee & Wyoming Investment Co*..... 63
2. Objections to jurisdiction not arising upon the face of the petition, nor upon the summons, indorsement, or service may be raised by answer in connection with matter in bar. *Herbert v. Wortendyke*..... 182
3. Plea of want of jurisdiction in an answer filed by defendant, *held*, not waived by the subsequent filing of a paper authorizing certain attorneys to appear for him and defend the action. *Id.*
4. When the sufficiency of a petition is not attacked until after judgment, all reasonable intendments should be indulged in support of the judgment. *Merrill v. Equitable Farm & Stock Improvement Co*..... 198
5. A judgment upon demurrer must be against the party whose pleading was first defective in substance. *West Point Water Power & Land Improvement Co. v. State*..... 223
6. A defendant who filed an answer after the court overruled his demurrer did not thereby waive the objection that the petition failed to state a cause of action. *Cox v. Yeazel*..... 350
7. Petition *held* not to state a cause of action against a new corporation as successor to an old one. *Austin v. Tecumseh Nat. Bank*..... 412
8. Failure of plaintiff to allege that it is a firm organized in the state, or failure to state the names of the members, does not render its petition open to attack by general demurrer. *Andrews v. School District*..... 420
9. A general denial puts in issue all the material averments contained in the petition. *Graves v. Norfolk Nat. Bank*..... 437

Pledges.

1. Where chattels are pledged to secure a debt, the pledgee is responsible as bailee, after, as well as before, maturity of the debt. *Butler v. Greene*..... 280

Pledges—*concluded.*

2. A pledgee who agrees to keep the property in a particular place is not released from liability for damages for his failure to do so, though he was compelled by the owner of the place designated, to remove the property. *Id.*
3. A pledgee has no right to use the property unless its character is such as to render its use necessary for its preservation. *Id.* 283
4. Where a note valid between the parties has been pledged, the pledgee may recover from the maker the whole amount of the note. *Seeley v. Wickstrom* 730
5. The pledgee of a note may, upon its maturity, maintain an action thereon or enforce security thereto, though the debt for which it is pledged is not yet due. *Id.*

Police Powers. See CONSTITUTIONAL LAW, 2, 3.

Poorhouse. See PAUPERS.

Practice. See BRIEFS. COSTS, 1, 3. JUDGMENTS, 10. REVIEW, 6, 69.

In a proceeding in aid of execution, a judgment defendant who is aggrieved by an *ex parte* order requiring him to appear and submit to an examination may move to vacate the order and prosecute error from a judgment overruling his motion. *Clarke v. Nebraska Nat. Bank* 800

Prejudice. See ASSOCIATIONS, 2.

Principal and Agent. See GUARANTY, 1. DEPOSITIONS, 2.

1. The ratification by a principal of the unauthorized act of an agent may be either express or implied. *Johnston v. Milwaukee & Wyoming Investment Co.* 68
2. The acceptance by a principal, with knowledge of the facts, of the fruits of an unauthorized contract made by his agent is a ratification of the agent's act, and relates back to the date thereof. *Id.*
3. A principal, by failing to return the fruits of an unauthorized act as soon as he learns the facts, ratifies the act. *Id.*
4. Knowledge by the principal of material facts is an essential element of ratification by him of agent's unauthorized act. *O'Shea v. Rice* 893
5. An agent's unauthorized act must be disaffirmed by the principal within a reasonable time after the act comes to his knowledge, or he will be bound thereby. *Farmers & Merchants Bank of Elk Creek v. Farmers & Merchants Nat. Bank of Auburn* 379
6. A principal will not be permitted to adopt the beneficial part of an unauthorized contract made by his agent, and reject the remainder. *Id.*
7. A principal sued upon an unauthorized contract made by his agent may, on the trial of the case, disaffirm the agent's act, if at that time the act is first brought to the principal's knowledge. *Id.* 379

Principal and Agent—*concluded.*

8. One making payment to a third person not the owner of a note, nor in possession of it, assumes the burden of proving that such person is empowered to collect the money. *Richards v. Waller* 639
9. The fact that one is authorized to receive interest as it matures is not sufficient ground from which to infer that he has authority to collect the principal, the evidences of indebtedness never having been in his possession. *Id.*
10. Ostensible authority is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess. *Thomson v. Shelton* 644
11. The fact that one who collected a debt was not in possession of the note and mortgage *held* not to show conclusively that he was not the agent of the mortgagee. *Id.*

Principal and Surety. See RES JUDICATA, 2.

1. A surety on a contractor's bond is not relieved from liability for the payment of claims of material-men because the contractor was paid at an earlier date than that fixed by the contract. *King v. Murphy* 671
   Thorn v. Murphy 675
2. Though a surety signed a bond in the belief that the signature of another forged as surety was genuine, the former is not released, where the forgery was unknown to the obligee when the bond was delivered and accepted. *Kansas City Terra Cotta Lumber Co. v. Murphy* 674

Priorities. See MECHANICS' LIENS, 2. PARTIES.

Privity. See RES JUDICATA, 1.

Public Lands. See SCHOOL-LANDS.

Publication. See MUNICIPAL CORPORATIONS, 6, 7.

Punctuation. See STATUTES, 13.

Quieting Title. See MORTGAGES, 9.

Evidence *held* to sustain a finding that the holder of a registered quitclaim deed was a *bona fide* purchaser, where the adverse party claimed title through a prior unrecorded conveyance. *Schott v. Dosh* 188

Quitclaim Deeds. See VENDOR AND VENDEE, 1.

Quo Warranto. See INJUNCTION, 3.

An information in the nature of *quo warranto* is the appropriate remedy to test the legal existence of a municipal corporation. *Osborn v. Village of Oakland* 340

Railroad Companies. See CARRIERS. DEPOSITIONS, 2. EMINENT DOMAIN, 1. MASTER AND SERVANT, 6.

1. Under sec. 104, ch. 16, Comp. Stats., a railroad company is required to ring a bell or blow a whistle when its engine ap-

Railroad Companies—*concluded.*

proaches a highway, and the statute fixes a penalty for a violation of its provisions. *Missouri P. R. Co. v. Geist*..... 489

2. In a civil case an instruction that a failure to give a statutory highway signal renders the company criminally liable, was *held* erroneous. *Id.*

3. The failure of a company to give the statutory highway signals is evidence tending to prove negligence, but it is error to instruct a jury that such a failure constitutes negligence and renders the company liable. *Id.*

4. Though sec. 104, ch. 16, Comp. Stats., requires a railroad company to give a highway signal eighty rods from a crossing, it is a sufficient compliance with the statute to ring a bell or to blow a whistle from the time an engine starts until it crosses the highway, where the starting place is less than eighty rods therefrom. *Id.*

5. An instruction that it was the duty of the company to ring a bell or to blow a whistle at a distance of eighty rods from a crossing and to continue the signals until the engine crossed the highway *held* not reversible error, though the starting place was less than eighty rods from the highway. *Id.*

Rape.

Indorsement on the information of the words "rape and incest" *held* not prejudicial to one who was convicted of the crime charged. *Fager v. State*..... 440

Ratification. See CORPORATIONS, 4. MUNICIPAL CORPORATIONS, 5. PRINCIPAL AND AGENT, 1-4, 6.

Receipts. See EMBEZZLEMENT. EXECUTORS AND ADMINISTRATORS. 13, 14.

Receivers. See BANKS AND BANKING. REVIEW, 62.

Held, That the pleadings and proof failed to show error in overruling an application for the appointment of a receiver. *Brown v. Fitzpatrick*..... 575

Records. See EVIDENCE, 13. JUDGMENTS, 4.

Reference.

A party who appears before a referee at the time fixed for trial and treats the reference as embracing all the issues, and requests findings on all controverted questions will not, upon the coming in of the report, be permitted to assail the findings on the ground that they are unauthorized by the order of reference. *Moline v. Wood*..... 869

Registration. See CHATTEL MORTGAGES, 5. DEEDS, 6. SCHOOL-LANDS. VENDOR AND VENDEE, 1.

Rehearing. See REVIEW, 63.

Remittitur.

Where a letter showing plaintiff's claim to be $16 less than that sued for was erroneously excluded from evidence, the filing of a remittitur for that sum in the supreme court was made a condition of affirming the judgment below. *Aultman v. Martin* 103

Rents. See MORTGAGES, 2.

Replevin.

1. In an action of replevin, proof of the ratification of an unauthorized act of plaintiff's agent, through which defendant acquired possession of the property, may be admitted under a general denial. *Johnston v. Milwaukee & Wyoming Investment Co.* 68
2. Where plaintiff in replevin proves that he was in possession under claim of ownership at a time when the property was seized by defendants, the latter, in justifying under a distress warrant, must introduce competent evidence of its existence. *Barkley v. Leiter* 123
3. A defendant who unsuccessfully seeks to establish a right of possession in himself is liable for costs, though no demand was pleaded or proved. *Tilden v. Stilson* 382
4. Where defendant claims a special interest only in the property by virtue of a lien, his measure of damages, in case the property cannot be returned, is the amount of his lien with interest and costs, within the value of the property. *Creighton v. Haythorn* 526
5. Damages assessed in favor of plaintiff for unlawful detention and for loss and injury to the property *held* not excessive. *Rosecrans v. Asay* 512
6. Special damages not pleaded by plaintiff cannot be recovered by him. *Id.*
7. Petition in replevin *held* sufficient, after judgment, to sustain findings for plaintiff. *Id.*
8. A verdict for defendant whose claim arises from a lien, without a finding as to the value of his possession, is not responsive to the issues and is contrary to law, within the meaning of sec. 314 of the Code. *Creighton v. Haythorn* 526
9. Evidence *held* sufficient to sustain a judgment against plaintiff. *Johnson v. Columbus Buggy Co* 611
10. In replevin the question for determination is that of the rights of the parties with respect to the possession of the property at the beginning of the suit. *Brown v. Hogan* 746

Res Judicata. See COUNTIES, 1, 3. EXECUTORS AND ADMINISTRATORS, 11.

1. A judgment against an overseer of highways in a suit against him for trespass for removing a fence *held* a bar to a subsequent action by his successor in office to restrain the obstruction of the alleged highway, where the rights of the

Res Judicata—*concluded.*

parties depend upon the facts in issue in the former case, though defendant in the injunction suit was grantee of plaintiff in the action of trespass. *Holsworth v. O'Chander*.. 42

2. A judgment of amercement in an action against an officer is conclusive as against him in a subsequent suit on his bond and *prima facie* evidence against the sureties. *Fire Ass'n of Philadelphia v. Ruby*..... 584

Residence. See ATTACHMENT, 3-6.

Review. See ASSOCIATIONS, 3. ATTACHMENT, 9. BILL OF EXCEPTIONS. COSTS, 1. CRIMINAL LAW, 7, 10. INSTRUCTIONS. INSURANCE, 14. RAILROAD COMPANIES, 2, 3, 5. REMITTITUR. WITNESSES, 1.

1. A judgment of the district court in an action at law can only be reviewed in the supreme court by a proceeding in error. *Campbell v. Farmers & Merchants Bank of Elk Creek*.. 143
2. Where the character of the proceeding below is ambiguous, a construction imputing to the trial court an orderly disposition of its business according to judicial methods may be adopted in criminal cases, though leading to a reversal of the judgment. *Buckett v. State*..... 213
3. In the absence of a clear abuse of the power of a court to make and enforce rules, its discretion in that regard will not be controlled by a reviewing court. *Andres v. Kridler*..... 535
4. Order denying appointment of receiver *held* to be without error. *Brown v. Fitzpatrick*..... 575
5. One who is not an appellant cannot obtain relief on appeal. *Rogers v. Central Loan & Trust Co*..... 676
6. Defendant's cross-petition having been held insufficient, the cause was remanded with permission to amend it below. *American Exchange Nat. Bank v. Fockler*..... 713

Assignments of Error.

7. An assignment of error relating to a group of instructions, where the ruling as to any one of the group against which the assignment is directed is without error, may be overruled. *Johnston v. Milwaukee & Wyoming Investment Co*..... 68
Graham v. Frazier..... 94
Johnson v. Wirth.....116, 117
Stough v. Ogden..... 291
Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege..... 321
Union P. R. Co. v. Montgomery..... 429
Creighton v. Haythorn..... 526
Denise v. City of Omaha..... 750
Ætna Ins. Co. v. Simmons..... 811
8. Where an assignment of error refers in gross to a series of propositions in separate paragraphs of the charge to the jury, it need not be examined further than to ascertain that one of the series was correct. *Denise v. City of Omaha*..... 750

Review—*continued.*

9. Errors in the admission of evidence, to be reviewable, must be specifically assigned in the petition in error. *Graham v. Frazier* 90
10. An assignment that the verdict is contrary to law does not present for review alleged errors in the instructions. *Drexel v. Daniels* 99
11. An assignment that the verdict is contrary to law raises the question whether the verdict is contrary to the law as contained in the charge given by the court to the jury. *Id.*
12. An assignment that the court erred in admitting testimony is too indefinite. *City of Omaha v. Richards* 245
13. An assignment that "the court erred in excluding testimony material to the issue" is too indefinite. *Burke v. Brown* 724
14. Rulings on evidence will not be reviewed unless assailed by an assignment of error. *Denise v. City of Omaha* 750
15. Plaintiff in error should specifically state in his petition the action, or the omission, of the court of which he complains. *Ætna Ins. Co. v. Simmons* 811
16. Only acts or omissions of a district court which are specifically assigned both in the petition in error and in the brief in support thereof will be considered. *Id.*
17. An assignment of error that a verdict is contrary to the instructions of the court may be overruled where it appears that the verdict is in accordance with any one of the instructions. *Id.*
18. The burden is upon the party complaining of the action of the trial court to specifically point out what is complained of and show that it was prejudicially erroneous. *Id.*
19. An assignment, "Errors of law occurring at the trial and duly excepted to at the time," in a motion for new trial sufficiently raises questions as to admission or exclusion of evidence; but is not sufficient in petition in error to present such questions to supreme court for review, as the latter must designate the evidence, the admission or exclusion of which is assigned for error. *Fremont, E. & M. V. R. Co. v. Root* 900

Bill of Exceptions.

20. The failure of a defeated party, through his own neglect, to secure a true bill of exceptions, presents no ground for reversal. *Blomgren v. Holmquest* 49
21. Affidavits used in the district court cannot be considered in the supreme court unless embodied in the bill of exceptions. *Minick v. Minick* 89
22. Affidavits on motion for a new trial cannot be considered in an error proceeding unless preserved by a bill of exceptions. *Rosecrans v. Asay* 512
23. The exclusion as evidence of a paper or document not subse-

Review—*continued.*

quently embodied in the bill of exceptions cannot be reviewed. *Graham v. Frazier* 90

24. Statements in a bill of exceptions that it does not contain all the evidence must be taken as true, though the certificate to the bill states that it contains all the evidence. *Greene v. Greene* 546
25. Assignments relating to errors occurring at the trial may be disregarded in absence of a bill of exceptions. *Denise v. City of Omaha* 751
26. Errors occurring at the trial cannot be reviewed in absence of a bill of exceptions. *Id.*

Briefs.

27. In addition to a concise statement of the facts of the case, plaintiff in error, under an appropriate heading, should state in his brief each particular thing the district court did, or refused to do, of which error is alleged, collating under such heading the arguments and authorities sustaining his contention. *Ætna Ins. Co. v. Simmons* 811

Evidence.

28. A question of fact determined on conflicting evidence will not be reviewed. *Graham v. Frazier* 90
    Johnson v. Wirth 115
    McCormick Harvesting Machine Co. v. Seeman 312
    Halbert v. Rosenbalm 498
    Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co 537
    Purnell v. Minor 555
    Sterling v. Hough 618
    King v. Murphy 671
29. A finding, where the evidence is conflicting, will not be disturbed unless manifestly wrong. *Crites v. Hart* 54
    Davidson v. Crosby 60
    Spurck v. Dean 66
30. In absence of a bill of exceptions, the judgment may be affirmed, where the sufficiency of the evidence is the only question presented. *Aultman v. Welch* 117
31. Where the only question presented is one of fact, as to which the evidence is conflicting, the judgment may be affirmed. *Bartram v. Sherman* 181
32. On motion to dismiss a proceeding in error because the judgment below had been satisfied the evidence was *held* insufficient to show that the satisfaction was procured by duress. *Boatright v. Enewold* 254
33. The sufficiency of the evidence to support the findings will not be examined where part of the testimony has been omitted from the bill of exceptions. *Greene v. Greene* 546
34. On trial to the court without a jury the admission of incompetent evidence is not ground for reversal. *King v. Murphy* .. 670
35. Where the evidence is conflicting, the judgment will not be

Review—*continued.*

reversed merely because, in the appellate court, the preponderance seems to be in favor of the plaintiff in error. *Greer v. Winter* 705

Final Orders.

36. Proceedings below cannot be reviewed until a final order has been rendered. *Hall County v. Smith* 274
37. In a proceeding in aid of execution an order requiring a judgment defendant to appear and submit to an examination is a final order from which he may appeal. *Clarke v. Nebraska Nat. Bank* 800

Harmless Error.

38. A judgment should not be reversed for the admission of immaterial evidence which did not prejudice the rights of the party complaining. *Graham v. Frazier* 90
39. A defendant against whom judgment has been rendered cannot complain because the court instructed the jury to deduct from the damages recoverable by plaintiff the amount of a set-off not pleaded by defendant. *Butler v. Greene* 280
40. Error in excluding evidence *held* harmless where similar evidence was admitted. *Halbert v. Rosenbalm* 498
41. Error, if any, in overruling a motion to dissolve a temporary injunction *held* cured by vacating such injunction upon rendition of the final decree. *King v. Murphy* 670

Issues.

42. A district judge has no authority to certify a question to the supreme court for decision without having ruled upon it. *Lancaster County Bank v. Gillilan* 169
43. On appeal to the district court the cause must be tried with the issues unchanged, except as to matter arising after the trial in the inferior court. *Halbert v. Rosenbalm* 498
44. A question not presented below may be disregarded on review. *Dayton Spice-Mills Co. v. Sloan* 622
45. No question of law being presented by the record, the judgment may be affirmed, where the instructions properly state the issues and the evidence sustains the verdict. *O'Brien v. Parsons* 729

Jurisdiction.

46. Unless the petition in error is filed within one year after rendition of the judgment below, the supreme court does not acquire jurisdiction to review the proceedings on error. *Campbell v. Farmers & Merchants Bank of Elk Creek* 143
47. In absence of a certified transcript the supreme court does not acquire jurisdiction to review the judgment below. *Wachsmuth v. Orient Ins. Co* 590

Jurisdictional Amount.

48. Secs. 985, 1017, of the Code, denying appeals from judgments of justices of the peace, where the amount claimed does not

Review—*continued.*

exceed $20, are not repugnant to the constitution. *Chicago, B. & Q. R. Co. v. Headrick* 286

New Trial.

49. Errors in instructions should be separately assigned in the motion for a new trial as well as in the petition in error. *Graham v. Frazier* 90
50. In a motion for a new trial an assignment that "the court erred in giving instructions 2, 3, 5, 6, 7, and 8, and each of them asked for by plaintiff," is sufficiently specific for a review of each of the instructions. *Aultman v. Martin* 103
51. A motion for a new trial is not necessary to obtain a review, on error, of an order refusing to permit a third person to intervene in an action. *Deere v. Eagle Mfg. Co* 385
52. A motion for a new trial is not necessary to a review of the decision of the district court in reversing, in an error proceeding, a judgment of the county court. *Weitz v. Wood Reaping & Mowing Machine Co* 434
53. Rulings, except such as are made during the trial of a cause, to be available in an error proceeding, should be specially assigned in the motion for a new trial. *Andres v. Kridler* 535
54. An assignment that the court erred in admitting or excluding certain evidence may be disregarded where no complaint of the rulings on evidence is made in the motion for a new trial. *Burke v. Brown* 723
55. Error assigned in motion for new trial to group of instructions is unavailing where any one thereof is without error. *Fremont, E. & M. V. R. Co. v. Root* 901

Objections.

56. An objection to the admissibility of testimony cannot be raised for the first time in the reviewing court. *Graham v. Frazier* 90
57. In a suit for a divorce, objections not made below to adjudicating the husband's rights in land, the title being in the wife, will be disregarded on review. *Greene v. Greene* 546
58. On appeal from an order confirming a sale the supreme court will consider only the specific objections made below to the confirmation. *Creighton University v. Mulvihill* 577
59. Allegations of error as to admitting evidence not objected to will be disregarded. *Denise v. City of Omaha* 750
60. An order sustaining an objection to a question put by a party to his own witness will not be reviewed, where the party failed to make an offer indicating what he expected to prove. *Id.*

Presumption.

61. Where a bill of exceptions has been quashed it will be presumed that evidence was introduced which sustained the judgment. *Van Etten v. Test* 725

Review—*concluded.*

Supersedeas.

62. An order appointing a receiver *pendente lite* cannot be superseded as a matter of right during the pendency of an appeal from the order. *State v. Stull* 739

Transcripts.

63. A judgment of reversal entered upon an erroneous transcript showing error in the record may be set aside upon rehearing, where a correct, amended transcript shows that the judgment below is without error. *Scarborough v. Myrick,* 32
64. The transcript of the record of the district court imports verity. *Minick v. Minick* 89
65. An agreed statement of facts being a part of the transcript of the proceedings below should not, in the supreme court, be stricken from the files as a bill of exceptions, though the statement cannot be considered upon review. *Aultman v. Welch* 119
66. The giving of an instruction is not reviewable upon a transcript which fails to show that the party complaining excepted to the ruling. *Merrill v. Equitable Farm & Stock Improvement Co.* 198
67. Journal entries of the rulings on pleadings must be taken as true statements. *Church v. Callihan* 542
68. A petition in error filed with an unauthenticated transcript may be dismissed. *Einspahr v. Exchange Nat. Bank of Hastings* 557
69. Several judgments in cases consolidated cannot be reviewed on the transcript of a single judgment. *Wachsmuth v. Orient Ins. Co.* 590
70. Neither a stipulation as to the character of the judgment below nor a recital in the petition in error, will take the place of a certified transcript. *Id.*

Witnesses.

71. That the testimony of a witness is unintelligible to the stenographer affords no ground for reversal. *Blomgren v. Holmquest* 49
72. In absence of an abuse of discretion on part of the trial court, error does not appear in an order denying a request to have witnesses excluded from the court room during the trial. *Halbert v. Rosenbalm* 498

Robbery. See CRIMINAL LAW, 1, 2.

Rules of Court. See BRIEFS. COURTS. JURY, 5.

Sales. See FRAUDULENT CONVEYANCES. GUARANTY, 1. VENDOR AND VENDEE.

1. The measure of damages for the seller's breach of contract in failing to make delivery is, generally, the difference between the contract price and the fair market value of the

Sales—*concluded.*

property at the time and place specified in the agreement. *Graham v. Frazier* 90

2. Verdict for plaintiff in an action for the price of goods sold and shipped to defendant *held* sustained by the evidence. *Drexel v. Daniels* 99

School-Lands.

1. The assignee of a school-land lease obtains no rights as against the state until the assignment has been entered of record. *Langan v. Binfield* 857
2. An assignee of a school-land lease whose assignment has not been entered of record as required by statute is not entitled to redeem from a forfeiture of the lease. *Id.*

Schools and School Districts.

1. Under sec. 9, subd. 1, ch. 79, Comp. Stats., it is the duty of the county superintendent to determine the amount due, on account of public property, to a new district erected from older districts, upon the basis of the taxable property in the respective districts at the time of the division. *School District v. School District* 33
2. The interest of a new school district in the property of the districts of which it was formerly a part should not be defeated through failure of the county superintendent to take action in regard to a division of the corporate property. *Id.*
3. Presentation of a claim to the secretary or committee on claims *held* not a condition precedent to the commencement of an action on the claim. *Andrews v. School District* 420
4. A school district like that of the city of McCook cannot contract an indebtedness for furnishing a schoolhouse, and issue warrants payable in the future, with interest, to the contractor or order. *Id.*
5. The teacher in a district school is not a public officer. *State v. Smith* 755
6. A contract to teach in a district school is one of employment, the district, represented by the school board, being an employer and the teacher an employe. *Id.*
7. The state superintendent, the county superintendents, and the school district boards have the general care and supervision of the free schools. *Id.*

Sentence. See CRIMINAL LAW, 7. INTOXICATING LIQUORS, 3.

Set-Off and Counter-Claim. See REVIEW, 39.

The defendant in an action by the assignee to recover money due to an insolvent banking corporation may set off against the amount owing by him to the bank an indebtedness of the latter to him. *Bernstein v. Coburn* 734

Settlements. See COMPROMISE AND SETTLEMENT.

Sheriffs and Constables.

1. A sheriff is entitled to mileage at the rate of five cents per mile for conveying insane patients to the hospital. *Smith v. Franklin County* 164
2. In a suit on a sheriff's bond for proceeds of a sale the evidence was *held* insufficient to sustain a verdict for defendants. *Fire Ass'n of Philadelphia v. Ruby* 584
3. In a suit against a sheriff for failing to pay the proceeds of a sale to the proper person the officer does not discharge himself from liability by showing that he paid the money which he received to the clerk. *Id.*

Special Assessments. See MUNICIPAL CORPORATIONS, 12, 14.

Special Findings. See TRIAL, 10, 11.

Statute of Frauds.

Contract of an agent in name of principal for sale of lands is void, unless authority of agent is evidenced by writing. *O'Shea v. Rice* 893

Statutes. See BILL OF EXCEPTIONS, 2. CONSTITUTIONAL LAW. PARTNERSHIP, 6. TABLE, *ante*, p. lv.

1. A law is general where it operates alike on all persons or localities of a class, or who are brought within the relations and circumstances provided for, the classification so adopted by the legislature having a basis in reason and not being purely arbitrary. *Livingston Loan & Building Ass'n v. Drummond* 201
2. Ch. 107, Session Laws, 1887 (Criminal Code, sec. 87*a*), requiring persons who erect and maintain mill-dams in streams to provide fishways, is unconstitutional, the subject not being expressed in the title of the act. *West Point Water Power & Land Improvement Co. v. State* 224
3. Where it is sought to amend a legislative enactment the amended law must be set out in the new act and, in addition, contain a provision for the repeal of the old law so amended. *State v. City of Kearney* 325
4. The act to amend subd. 1, sec. 69, ch. 14, Comp. Stats. (Session Laws, 1885, p. 161), providing for tax levies for waterworks and other purposes, does not conflict with sec. 11, art. 3, of the constitution relating to amendments. *Id.*
5. Though there is apparent confusion in the application of an act to an existing statute sought to be amended, the amendatory act will not be declared unconstitutional, where the intention of the legislature is not doubtful and the amendment is consistent with the title and subject-matter of the original law. *Id.*
6. A statute without an emergency clause does not go into effect until three calendar months after the adjournment of the legislature. *Id.*

Statutes—*concluded.*

7. The amendment of a subdivision of a section of a designated statute is not unconstitutional merely because the amendatory act does not contain the entire section as amended. *Id.*
8. The act of March 10, 1885, to amend sec. 69 of an act entitled "'An act to provide for the organization, government, and powers of cities and villages,' approved March 1, 1879" (Session Laws, 1885, p. 162), does not conflict with sec. 11, art. 3, of the constitution, though an act was passed with an emergency clause March 2, 1885, amending a subdivision of said section 69. *Id.*
9. Specific provisions of a statute relating to a particular subject will prevail over general provisions in the same enactment. *Id.* 326
10. A legislative enactment will be construed to operate only prospectively, unless the intent to the contrary is plainly expressed. *Id.* 337
11. That portion of the act of March 31, 1887, entitled "An act to amend sec. 69, art. 1, ch. 14, Comp. Stats., and to repeal said section (Session Laws, 1887, p. 291), providing that a city of the second class or village may pass an ordinance providing for a tax not exceeding seven mills on the assessed valuation to pay water rent, has no retrospective operation. *Id.*
12. Where an act is complete in itself, the legislature may, under the title of an act to amend the former one, substitute another law of similar complete character, and so long as its provisions are germane to the title and subject of the act amended, it may be valid, though operating incidentally to modify other statutes. *Henry v. Ward* 393
13. The comma after the word "acknowledged" in the fourth line of sec. 6, ch. 6, Comp. Stats., is an interpolation. *Sager v. Summers* 459
14. Where the legislature adopts a statute of another state, the judicial construction of the highest court of that state is likewise adopted. *Forrester v. Kearney Nat. Bank* 655

Stenographers. See BILL OF EXCEPTIONS, 10.

Stockholders. See BANKS AND BANKING, 3-5.

Storage. See BAILMENT, 6.

Street Railways. See DAMAGES, 1.

Streets. See DEDICATION.

Summons. See APPEARANCE, 1.

Service made within the state upon the managing agent of a foreign corporation *held* sufficient to confer jurisdiction upon a district court, under sec. 59 of the Code. *Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co* 537

Supersedeas. See REVIEW, 62.

Surface Water.

Plaintiff cannot recover for damages caused by the drainage of water into a ravine on his farm from a pond on defendant's land, where plaintiff admits that the ravine is a natural waterway and that the water generally, from that portion of the country, flows through the ravine. *Rath v. Zembleman*.. 351

Tacking. See ADVERSE POSSESSION, 6.

Taxation. See MORTGAGES, 1. MUNICIPAL CORPORATIONS, 4, 12, 14. REPLEVIN, 2.

1. A description is sufficient if, by reference to generally known plats or otherwise, the land is described with such certainty as to afford notice, and protect the owner's rights. *Kershaw v. Jansen* 467
2. The owner of taxable land cannot avoid payment of taxes because the description of the land on the assessment roll and tax list does not refer to a lawfully existing recorded plat or subdivision. *Id.*

Teachers. See SCHOOLS AND SCHOOL DISTRICTS, 5, 6.

Tender.

A formal tender of money is not required where it is disclosed that it would have been fruitless, if made. *Graham v. Frazier*, 91

Time. See LIMITATION OF ACTIONS. REVIEW, 46. STATUTES, 6.

Transcripts. See REVIEW, 63-70.

Trial. See CRIMINAL LAW, 6. EQUITY. INJUNCTION, 2. INSTRUCTIONS. INSURANCE, 14. JURY. REFERENCE. REVIEW, 14, 23, 56, 60. TROVER AND CONVERSION, 1.

1. That the testimony of a witness was unintelligible to the stenographer affords no ground for reversal of a judgment. *Blomgren v. Holmquest*..... 49
2. It is the duty of parties to assist in preserving the evidence, and the failure of the defeated party, through his own neglect, to secure a bill of exceptions is not ground for reversal of a judgment. *Id.*
3. Where the right of plaintiff to possession has been shown in an action of replevin, the court may direct a verdict in his favor in the absence of proof of the existence of a distress warrant under which alone defendant claims. *Barkley v. Leiter* 123
4. The following remark *held* not prejudicial error: "The court states in the presence of the jury that this line of examination has developed the theory of the plaintiff." *Graham v. Frazier* 98
5. A court is not obliged to submit to the jury evidence not applicable to any issue made by the pleadings. *Schields v. Horbach* 262

Trial—*concluded.*

6. An exception to instructions *en masse* is unavailing unless each paragraph is erroneous. *Union P. R. Co. v. Montgomery,* 429
7. Error in excluding evidence *held* harmless, where similar evidence was admitted. *Halbert v. Rosenbalm* 498
   Denise v. City of Omaha 750
8. The court may, in its discretion, deny a request to have witnesses excluded from the court room during the trial. *Halbert v. Rosenbalm* 498
9. Where impartial minds may draw different conclusions from undisputed facts, the question is one for the determination of the jury. *Thomson v. Shelton* 644
10. Where a special finding of fact is inconsistent with the general verdict, the former controls, and the court may give judgment accordingly. *Johnston v. Milwaukee & Wyoming Investment Co.* 68
    Chicago, B. & Q. R. Co. v. McGinnis 649
11. Where a special finding of fact is a conclusion drawn from other special findings, and is manifestly wrong, it may be disregarded. *Johnston v. Milwaukee & Wyoming Investment Co.* 68
12. After answers to special interrogatories have been returned with the general verdict and received and recorded without objection, it is too late to complain that they were not signed by the foreman of the jury. *Thompson v. Thompson* 157
13. A special finding, made at the request of one party after judgment and without notice to the adverse party, is void. *Wachsmuth v. Orient Ins. Co.* 590
14. Objections to form or terms of a verdict should be made at the time it is rendered. *Yankton, N. & S. W. R. Co. v. State* .. 272

Trover and Conversion.

1. A verdict for a defendant who did not appear, and whose default has been entered, is contrary to law. *Herbert v. Wortendyke* 182
2. The measure of damages in an action by a mortgagee for the conversion of mortgaged chattels is the amount of the mortgage, not exceeding the value of the property converted. *Kasper v. Walla* 288
3. Where a guardian mortgaged his goods to a trustee to secure a claim of the ward, and the trustee sued the guardian's creditors for conversion of the goods, defendants may prove that a portion of the debt secured was paid by the guardian to the estate of the ward. *Plummer v. Green* 316
4. The owner of a note wrongfully in possession of one who collected and appropriated to his own use the installments of interest as they matured may recover from the latter the aggregate interest thus collected. *Halbert v. Rosenbalm* 498
5. The measure of damages for the conversion of a note is its value at the time of the conversion, with interest. *Id.*

Trover and Conversion—*concluded.*

6. In a petition by a firm to recover the value of property in which the firm had a special ownership by virtue of a chattel mortgage executed to the partnership in its firm name, there must be an allegation as to partnership, under sec. 24 of the Code. *Church v. Callihan* 542
7. In an action for conversion, a general allegation that defendant unlawfully and wrongfully converted the property is sufficient. *Sanford v. Jensen* 767

Trusts. See BANKS AND BANKING. FRAUDULENT CONVEYANCES, 6. HOMESTEAD, 4. INSOLVENCY, 1. INTEREST, 1.

1. Trust funds do not lose their character as such by being deposited in bank by the trustee to his own account. *Cady v. South Omaha Nat. Bank* 125
2. So long as trust funds can be traced and distinguished in the hands of the trustee or his assigns, they remain subject to the trust. *Id.*

Ultra Vires. See CORPORATIONS, 11. MUNICIPAL CORPORATIONS, 5.

Usury. See BUILDING AND LOAN ASSOCIATIONS, 1.

Variance. See INDICTMENT AND INFORMATION, 2, 3.

Vendor and Vendee. See ADVERSE POSSESSION, 2. DAMAGES, 2.

1. The holder of a registered quitclaim deed, who purchased in good faith, takes title superior to that acquired under a prior unrecorded deed of which he had no notice. *Schott v. Dosh* 187
2. In an executory contract for the sale of realty the title retained by the vendor is security for the unpaid purchase money. *Hendrix v. Barker* 369
3. In an executory contract for the sale of realty the vendor, upon default of vendee, may treat the contract as a mortgage and foreclose it as such. *Id.*
4. Equity treats the vendor as the trustee of the purchaser and the purchaser as the trustee of the purchase money for the vendor. *Id.*
5. In a suit to foreclose a contract, the character of the decree must be determined by the particular facts and circumstances of the case and the equitable rights of the parties. *Id.*
6. Evidence *held* to establish an affirmance by plaintiff of the contract sought to be rescinded on the ground of fraud. *Pollock v. Smith* 864
7. One who was deceived by fraudulent representations of another may elect to rescind the contract of sale and reclaim the property parted with, or to affirm the contract and sue for damages, but cannot pursue both remedies. *Id.*

Venire. See JURY, 4, 5.

Venue.

Sec. 54 of the Code, providing that a suit against an officer must be brought in the county where the cause of action, or some part thereof, arose, applies to a suit begun after the expiration of the term of office and the removal of the officer from the county. *Herbert v. Wortendyke* 182

Verdict. See TRIAL, 3, 12, 14.

Draws interest to date of judgment rendered thereon. *Fremont, E. & M. V. R. Co. v. Root* 901

Villages. See QUO WARRANTO.

Voluntary Assignments. See SET-OFF AND COUNTER-CLAIM.

1. Except as authorized by statute, the assignee cannot assert rights beyond those possessed by the assignor before the assignment. *Lancaster County Bank v. Gillilan* 165
2. A voluntary assignment is void unless witnessed. *Sager v. Summers* 459
3. In construing sec. 6, ch. 6, Comp. Stats., it was *held* that voluntary assignments must be in writing, and executed and acknowledged, as ordinary conveyances of realty. *Id.*

Voluntary Associations. See ASSOCIATIONS.

Wages. See EVIDENCE, 6.

Waiver. See ATTACHMENT, 2. EXECUTORS AND ADMINISTRATORS, 8. GUARANTY, 1. INSURANCE, 6, 7. PLEADING, 6. REFERENCE.

Warehousemen. See BAILMENT, 5, 6.

Warranties. See INSURANCE, 10-15.

Warrants. See SCHOOLS AND SCHOOL DISTRICTS, 4.

Water Companies. See MUNICIPAL CORPORATIONS, 4, 10.

Water-Courses. See MILLS AND MILL-DAMS.

Wells. See MECHANICS' LIENS, 1.

Wills. See EXECUTORS AND ADMINISTRATORS.

1. Sec. 127, ch. 23, Comp. Stats., does not require the words composing the name of an illiterate testator to be written at the end of his will, his mark intended and adopted as his signature being sufficient. *Thompson v. Thompson* 157
2. Sec. 127, ch. 23, Comp. Stats., does not require the witnesses to subscribe the will at the express request of the testator. *Id.*
3. Evidence *held* to sustain a finding that the testator was of sound mind and that he was not induced by undue influence in the execution of his will. *Id.*

Witnesses. See CRIMINAL LAW, 6, 9, 11. DEPOSITIONS, 3. EVIDENCE, 3, 4. REVIEW, 71, 72. VOLUNTARY ASSIGNMENTS, 2. WILLS, 2.

1. In absence of an abuse of discretion, the action of the trial court in limiting the cross-examination of a witness will not be reviewed in the supreme court. *Stough v. Ogden*..... 291
2. Testimony of a witness should not be disregarded because he made a misstatement, unless it was willfully and intentionally false. *McCormick Harvesting Machine Co. v. Seeman*.... 312
3. Whether the false statement of a witness was intentionally made is a question for the jury. *Id.*
4. In a suit by an executor to recover money given by testatrix to defendant for investment, the latter was *held* competent to testify how little, if anything, remained unpaid to the estate, where he had been previously required, as a witness, to identify letters which he had written to testatrix concerning the transaction and to state only the amount received from her. (See, also, 48 Neb., 691.) *Taylor v. Ainsworth*..... 696
5. Answers to questions on cross-examination as to the capacity of the witness to testify as an expert *held* properly excluded. *Denise v. City of Omaha*..... 751
6. It is error for a court, in a criminal case, to single out a particular witness for the defense and give to the jury a cautionary instruction which applies to his testimony the rule, "*Falsus in uno, falsus in omnibus.*" *Argabright v. State*..... 760

Word.

"Residence." *Johnson v. May*..... 601

Writs. See MANDAMUS, 13. SUMMONS.