Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/04/2026 06:40 AM CST

FAYETTE I. FOSS V. EMMA M. STREATOR.

FILED JANUARY 5, 1899. No. 8559.

1. **Conflicting Evidence:** REVIEW. The verdict of a jury on an issue of fact will not be disturbed where the evidence was substantially conflicting.

2. **Estoppel.** A lent money to B & C, partners. Certain moneys were thereafter paid by B to A. A receiver was appointed to wind up the partnership, and B, without authority from A and without her knowledge, proved her whole claim against the firm and secured its allowance without deduction of the moneys paid by B. A dividend was paid A on the claim, but she did not know when she received it that her claim had been so presented and allowed, and the payment made was, together with the moneys paid by B, less than the debt to her. In a suit by B to recover the moneys paid by him as moneys lent, *held* that A was not by the foregoing facts estopped to assert that such moneys had been paid by B to her as partial payments of the firm debt and not as a loan.

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

F. I. Foss and *W. R. Matson*, for plaintiff in error.

J. H. Grimm, contra.

IRVINE, C.

Foss sued Mrs. Streator for $425 alleged to have been by Foss lent to the defendant. The answer was in effect that prior to the transactions sued on Foss had been a partner with James W. Dawes, their business consisting in part in the lending of money; that defendant had placed with them for use in that manner about $2,000, and that the payments relied on by plaintiff as constituting loans were in fact partial repayments to her of the moneys so advanced. She had a verdict and judgment, and the plaintiff brings the case here by petition in error.

So far as the case in its essential merits is concerned it may be briefly disposed of by saying that the nature of.

the transaction in dispute depended solely on a question of fact resolved by the jury, on conflicting evidence, in favor of the defendant. The finding on that issue cannot be disturbed.

There is much discussion in the briefs as to election of remedies. This seems to be directed to the fact that the proof shows that defendant originally lent her money to the firm of Dawes & Foss, that firm passed into the hands of a receiver, and that the claim of defendant for the whole amount remaining due her, apparently without deduction of the moneys here sued for, was allowed as a claim against the firm. A dividend was paid to defendant and by her accepted; hence it is argued that she elected to pursue a joint remedy against the firm and cannot proceed against Foss alone. She is not suing Foss. She merely interposes the facts as a defense to Foss' assertion that he advanced money as a loan to her. If the order and payment in the receivership case have a bearing, it must be as evidence in support of plaintiff's theory. Perhaps even the proving up of the whole debt against the firm might ordinarily operate as an estoppel to assert that this money was a part payment thereon. But the proof here tends to show that the claim was presented against the firm by Foss himself without defendant's knowledge and without authority so to do, and further, that when she accepted the dividend she did not know of the presenting and allowance of the claim for the whole amount. The payment was made to her by a check signed by the receiver, but otherwise it did not disclose its nature, and was handed to her by Foss' bookkeeper. She cannot be held estopped by legal proceedings which she did not authorize, or by unwittingly availing herself of their fruits, and this more especially because the dividend paid her, together with the sums here in dispute, did not satisfy the debt.

Complaint is made of certain instructions. Of these the only one assigned as erroneous in the motion for a new trial, and consequently the only one open for re-

view, is one given at request of defendant. The portion complained of is as follows: "If the jury shall find from the evidence that the money sued for in this case was paid by the plaintiff to the defendant to apply on an indebtedness then existing from Dawes & Foss to the defendant, and that the defendant at the time so understood it and took the money as such payment in part of the indebtedness of Dawes & Foss to her, then the plaintiff cannot recover in this action." The objection urged is that this instruction made the transaction depend on defendant's understanding and made a contract without a concurrence of minds. Without considering the correctness of the criticism from a legal standpoint, it suffices to say that the instruction is not, we think, susceptible of the construction indicated. It requires the jury to first find that the plaintiff paid the money to apply on the debt, and also to find that the defendant understood that it was so paid,—in other words, to find a consensus on that point.

AFFIRMED.

WILLIAM H. GREEN, APPELLANT, V. ISABELLA E. MORSE ET AL., APPELLEES.

FILED JANUARY 5, 1899. No. 10439.

1. **Courts:** EFFECT OF ADJOURNMENT. An adjournment of court to a subsequent day in the term is merely an intermission, and neither adjourns the term nor deprives the judges of control of the proceedings.

2. ———: ———: POWER TO RECONVENE. Notwithstanding such an order the court may revoke it and reconvene before the time fixed in the order of adjournment.

3. ———: ———: RECONVENTION. Where the record shows an order adjourning to a future day in the term, and judicial proceedings carried on in the interval, it will be presumed, in favor of regularity, that there has been a reconvention and an express or implied vacation of the order of adjournment.

4. ———: ———: ———: RIGHTS OF LITIGANTS. The rights of litigants under such circumstances, who have been prejudiced by reliance upon the order of adjournment, present questions not involved in this case.

5. **Forcible Entry and Detainer:** PURCHASER AT JUDICIAL SALE. An action in forcible entry and detainer lies in favor of a purchaser at judicial sale to recover possession of the premises purchased, when the judgment debtor was in possession at the time the judgment or decree was rendered whereunder the sale was made.

6. ———: WRIT OF ASSISTANCE: INJUNCTION. The remedy by forcible entry and detainer and by writ of assistance in the original case are concurrent, and an injunction will not be allowed to restrain the prosecution of a case in forcible detainer merely because the district court might proceed by writ of assistance.

7. ———: JURISDICTION OF JUSTICE OF THE PEACE. A justice of the peace or county court is not ousted of jurisdiction in a forcible entry and detainer case by the mere averment in that case or elsewhere that it involves the question of title. It has jurisdiction to proceed until the evidence discloses such fact.

8. **Sheriff's Deed:** TIME OF EXECUTION AND DELIVERY. A sheriff's or master's deed, executed after confirmation of sale and before supersedeas of that order, and delivered after judgment of affirmance and filing of a mandate, is regular.

9. **Pleading as Evidence.** A pleading is not competent evidence, in favor of the party whose pleading it is, of the facts averred therein.

APPEAL from the district court of Douglas county. Heard below before SCOTT, J. *Reversed.*

George E. Pritchett, for appellant.

Wright & Thomas, contra.

IRVINE, C.

In this case, an appeal from an order granting a perpetual injunction, there is a motion to dismiss the appeal, based on the ground that the order appealed from was made in vacation and is therefore void. It is said that the October term of the district court of Douglas county was adjourned October 3, 1898, until November 1, 1898, and that the decree was rendered October 4, during the

intermission. At the bar the question argued was whether, where there are seven judges in a district, concurrently holding the district court of a county, six may make an order of adjournment which will preclude the seventh from thereafter holding court during the allotted period of the term. An inspection of the record discloses no state of affairs raising precisely that question. What does appear is that the October term was begun and held October 3; that on that day an order apparently regular, made "by the court" and signed by six judges, was entered, adjourning the term until the first day of November. It then appears that the decree appealed from was entered October 4 by the one judge who did not sign the order of adjournment. The record does not disclose that it contains all the orders affecting the adjournment and holding of the court. There is a marked distinction between an adjournment *sine die* of a term of court, and those intermissions which inevitably occur during a term. A court has the inherent power during the term of suspending business, as occasion may require, from one hour or one day to another. In this respect there is no difference between an adjournment from one day to the next, and an adjournment to a more distant day. In either case the term continues, and while during the intermission the functions of the court are for some purposes suspended, still the court remains in existence and it is still term time. The judges do not by such an order lose all power of control over the sessions, and may revoke the order of adjournment and reconvene before the time first fixed. (*Bowen v. Stewart*, 128 Ind. 507; *Wharton v. Sims*, 88 Ga. 617; *Cole County v. Dallmeyer*, 101 Mo. 57.) While this record discloses an apparently regular order of adjournment until November 1, it also discloses the conduct of judicial business October 4, and it must be presumed that there had been a reconvention of the court and a rescission of the order of adjournment, whether by regular order vacating the former or by action equivalent thereto is not material. (*Clough v. State*,

7 Neb. 320.) The motion to dismiss the appeal must therefore be overruled.

In what has been said it has not been the intention to convey any inference whatever as to what would be the rights of litigants who, relying on the order of adjournment, had absented themselves for want of notice of the reconvention of the court, or of those who might, although with notice, be unprepared for a trial thus brought on prior to the time on which they might perhaps rely as the earliest when trial could be demanded. This record does not disclose that there was any surprise. Both parties were present and no objection appears to going to trial at the time trial was had.

We are thus brought to the merits of the appeal. The case was a proceeding in foreclosure. A decree was rendered, a stay taken, the land then sold, the sale confirmed, and an appeal taken by the defendant from the order of confirmation. By this court the order of confirmation was affirmed. A mandate was sent to the district court commanding the enforcement of the order. A deed was issued to the purchaser, who demanded possession, and possession was refused. The purchaser then instituted an action in forcible entry and detainer for the recovery of possession of the property. The defendant then filed in the original case a supplemental petition, asking an injunction to restrain the purchaser from prosecuting the forcible entry and detainer case and from interfering with defendant's possession. It is the order making a temporary injunction of that character perpetual that is appealed from.

We are not favored with a brief in defense of the order of the district court, and we are decidedly of the opinion that it is entirely indefensible. The supplemental petition, aside from reciting the proceedings in the case, alleges that the cause is still pending in the district court to carry out the mandate; that the plaintiff has filed "a pretended deed," dated and executed while the order of confirmation was superseded by the former appeal; that

the property is defendant's homestead; that the forcible entry and detainer case will necessarily raise the question of title; and that the court where that is depending is therefore without jurisdiction. These averments show no right to relief by injunction. The Code of Civil Procedure, section 1020, expressly makes the remedy of forcible entry and detainer available "in sales of real estate on executions, orders, or other judicial process, when the judgment debtor was in possession at the time of the rendition of the judgment or decree, by virtue of which such sale was made." It was shown that such was the case here. Where that remedy is given, that and a writ of assistance are concurrent remedies. (*Kessinger v. Whittaker*, 82 Ill. 22.) The pursuit of the former did not oust the district court of whatever jurisdiction it had retained, and was not an usurpation of that jurisdiction. Nor were the forcible entry and detainer proceedings without jurisdiction because of the averment in the supplemental petition here that they would require an inquiry into the title of land. Even an answer to that effect in the forcible entry suit would not oust the jurisdiction. The court might still proceed until the evidence should disclose that the question involved was one of title. (*Pettit v. Black*, 13 Neb. 142; *Lipp v. Hunt*, 25 Neb. 91.) The averment that the deed to plaintiff was executed while the order of confirmation stood superseded, even if it could give or contribute to the right of an injunction, was not sustained. The answer averred that the deed had been executed before the supersedeas was effected, and that it had not been delivered until after affirmance and the receipt of the mandate. There was no reply, and this averment therefore stood admitted. Moreover, it was proved at the trial. The deed was therefore both executed and delivered while the judgment was enforceable. Of course the averment in the supplemental petition that the premises constituted a homestead was of no force whatever to prevent the carrying into effect of a decree unappealed from ordering the

sale of the property, and of an order of confirmation following such sale.

It may further be remarked that the only evidence the defendant offered to prove the averments of the supplemental petition was that somewhat remarkable document itself. A pleading in a cause is not competent evidence to prove the facts therein averred.

The judgment of the district court is reversed, the perpetual and the temporary injunctions both dissolved, and the supplemental petition dismissed.

REVERSED.

BURWELL & ORD IRRIGATION & POWER COMPANY V. JAMES WILSON.

FILED JANUARY 5, 1899. No. 8578.

1. **Action on Contract:** PLEADING: TENDER OF PERFORMANCE. In suing on a contract consisting of reciprocal promises, to be concurrently performed, the plaintiff must allege either performance on his part or a tender of performance before suit brought.
2. **Contracts:** SEVERABLE UNDERTAKINGS: ACTIONS: PLEADING. Where in a contract there are several undertakings, each supported by a distinct consideration, the contract is generally severable, and suit may be brought on one undertaking without showing plaintiff's compliance with the whole contract.

ERROR from the district court of Valley county. Tried below before KENDALL, J. *Affirmed upon filing of remittitur.*

A. M. Robbins, for plaintiff in error.

Charles A. Munn and *Coffin & Stone, contra.*

IRVINE, C.

This was a suit by Wilson against the Burwell & Ord Irrigation and Power Company, a corporation. The

petition alleged that Wilson, who is a civil engineer, made surveys for a ditch or canal for irrigation and power purposes, contemplating the diversion of water from the Loup river, and the canal passing through the towns of Ord and Burwell; that he made plans, maps, and profiles, and also estimates of the character and expense of the work of construction; that he then contracted with two men named that these data be made the basis of a corporation to be formed for constructing and operating the canal, Wilson to turn them in to the company at the price of $1,000 in money, capital stock, or credit as Wilson might elect, and that Wilson was to be employed by the company at a salary of $125 per month to assist in organization, and to superintend construction. It is alleged that the corporation was duly organized, and that Wilson had devoted his services for one month to the corporation. Acts are pleaded as constituting a ratification by the corporation of the contract of its promoters. A refusal to pay is alleged, and judgment sought for $1,125. It is not necessary to state at this point the nature of the answer beyond saying that it put in issue nearly the whole petition. The case was tried without a jury, and resulted in a finding for the plaintiff for $500. The company brings the case here for review.

The judgment is assailed as not sustained by the pleadings, and we think this contention is in part correct. So far as the claim for $1,000 is concerned it is based on a contract for the sale at that price of the plans, maps, profiles, estimates, and engineering data already prepared by the plaintiff. A refusal to pay is alleged, but there is in no place in the petition any allegation that plaintiff had delivered these things to defendant, that he had tendered them, or that he was willing to do so. The answer specifically charges that he had not delivered or tendered them, and that he still retained them in his possession. The reply meets this averment as follows: "Plaintiff admits that the said survey, maps, profiles,

and estimates are still in his possession, but says that the same are the property of the defendant and are held by him for the defendant and are subject to the order, control, and use of the defendant and belong to the defendant, as hereinbefore alleged." In suing on a contract consisting of reciprocal promises, to be concurrently performed, the plaintiff must either allege a performance of his part or a tender of performance. This was not done in the petition, and even assuming that an issue on this point might be made by answer and reply, the averment in the reply is insufficient. The reply was filed, of course, a considerable time after the suit was begun, and the averment is in the present tense, that the papers referred to were, when the reply was filed, the property of the defendant and subject to its control. This does not show a performance by the plaintiff or a tender of performance before suit brought. Reliance in meeting this objection is placed upon averments that the plans were actually used, but these averments refer to their use merely in the work of organizing the company. Furthermore, the suit is on a contract for the sale of the plans, etc. It is not a suit for their use. Plaintiff might have permitted such a use to be made of them as would entitle him to compensation for their use, without at the same time placing them absolutely at the disposal of the company so as to constitute a permanent delivery to carry out a sale.

As to the claim of $125 for services performed, there is the averment of performance after the corporation was organized, and to this extent certainly a ratification of the promoters' contract. The evidence, while conflicting, supports a finding of that character. The contract is severable. Generally speaking, the test is that where there are several undertakings, each supported by a distinct consideration, the contract is severable. (*Keeler v. Clifford*, 165 Ill. 544; *Pierson v. Crooks*, 115 N. Y. 539; *McDaniels v. Witney*, 38 Ia. 60.) The rule is here applicable. There was pleaded a sale of the engineering data

for $1,000 and a contract of employment at $125 per month, followed by the rendition of one month's services. The plaintiff will be permitted to, within forty days, remit from the judgment $375 as of the time of its rendition. If he do so, the judgment will be affirmed for the remainder; otherwise it will be reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

JOHN W. POLLOCK v. STANTON COUNTY.

FILED JANUARY 19, 1899. No. 8625.

1. **Action on County Warrants: PLEADING: ALLEGATION OF OWNERSHIP.** A petition framed to meet the requirements of section 129 of the Code of Civil Procedure is sufficient whether the plaintiff be the original owner of the claim declared upon, or another, without any statement of extrinsic facts in regard to the claim of title or ownership.

2. ———: **SUFFICIENCY OF PETITION.** County warrants in suit disclosed that they were for road district funds. They were in terms in favor of private individuals and by law should have been to road supervisors. A petition which contained no statement that they were issued to road supervisors *held* defective and open to attack by general demurrer.

ERROR from the district court of Stanton county. Tried below before EVANS, J. *Affirmed.*

J. C. Crawford, for plaintiff in error.

John A. Ehrhardt, contra.

HARRISON, C. J.

This action was instituted by the plaintiff to recover an amount which he alleged to be his due on eight county warrants, each drawn against the district road fund of a designated road district in Stanton county. The petition was framed to meet the requirements of section 129

of the Code of Civil Procedure in regard to statement of a cause of action. The first count of the petition was as follows:

"1. His first cause of action is founded upon a county warrant, of which the following is a copy, with all the indorsements thereon:

"'$10.00. State of Nebraska, Levy of 1874.

"'Amount levied, $566.00.

"'Amount issued, 315.75.

"'STANTON COUNTY, STANTON, Aug. 2, 1875.

"'Stanton County, Treasurer of said County: Pay to H. Tibler, or order, ten & 00-100 dollars, and charge to account of land road fund, Dist. No. 5.

"'[SEAL NEBRASKA.] R. OBERG,

"'*Chairman County Commissioners.*

"'No. 34. C. L. LAMB, *County Clerk.*'

Indorsed as follows:

"'Presented Aug. 13, 1875, and not paid for want of funds. E. S. BUTLER, *Co. Treasurer.*

"'No. 17. Reg. for payment Aug. 13, 1875.

"'E. S. BUTLER, *Trs.*

"'Tax R., $2.39. May 3, '76, balance.'

"2. There is now due from the defendant to the plaintiff on said warrant the sum of $8.12, which he claims, with interest from May 3, 1876."

As to each of the other seven warrants declared upon there were similar allegations, with some differences in matters of which notice need not be taken in this proceeding, except that it appeared that each of two of the warrants had the name of its payee indorsed on the back.

The general allegations of the pleading were as follows: "The defendant refused, and still refuses, to pay said warrants, or any part thereof, although often requested so to do by the plaintiff. (18.) The plaintiff further says that the defendant has long since collected the taxes levied for the payment of all the aforesaid war-

rants, against which levy they were drawn, as shown upon the face thereof, and which several funds and levies aforesaid, as shown upon the face of the warrants, copies of which are set out in the above eight causes of action, were more than sufficient to pay the warrants aforesaid, after paying all prior warrants drawn against said several funds." There was filed for defendant a general demurrer to the petition, which on hearing was sustained, and the plaintiff electing to stand on his petition and plead no further, judgment was entered for the defendant. The plaintiff presents the case to this court by a proceeding in error.

One objection to the petition was that the instruments therein declared upon were non-negotiable, and there was no statement in the pleading of the transfer of the title to them to the plaintiff, and no allegation of his ownership. As we have before said, the petition was framed to fulfill as a pleading the provisions of section 129 of the Code of Civil Procedure, which reads as follows: "In an action, counter-claim, or set-off, founded upon an account, promissory note, bill of exchange, or other instrument, for the unconditional payment of money only, it shall be sufficient for the party to give a copy of the account or instrument, with all credits and indorsements thereon, and to state that there is due to him on such account or instrument, from the adverse party, a specified sum, which he claims with interest. When others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties in the action, it shall be necessary to state also the kind of liability of the several parties, and the facts, as they may be, which fix their liability." This section of our Code is an exact copy of a section of the Code of the state of Ohio, and very similar to one in the New York Code. The provision has been the subject of construction in each of the states to which we have just referred, and it has been determined that a petition drawn as prescribed by the corresponding section of the Code of the state of

the decision, to the one of our state under consideration, by the original party to the instrument in suit, or its owner by assignment or indorsement, is sufficient without any averment of extrinsic facts to show the right or title to it. (*Sargent v. Steubenville & I. R. Co.*, 32 O. St. 449; *Myer v. Miller*, 2 W. L. M. [O.] 420; *Ohio Life Ins. & Trust Co. v. Goodin*, 1 Handy [O.] 31; *Prindle v. Carruthers*, 15 N. Y. 425; *Butchers & Drovers Bank v. Jacobson*, 15 Abb. Pr. [N. Y.] 218; Swann, Pleading & Precedents 181-189; Kinkead, Code Pleading, secs. 296, 301.) After an examination of the subject we feel satisfied to follow the construction given to the section in the states to which we have referred.

A second point raised under the demurrer was that the warrants were drawn for the payment from the treasury of the road district funds, and within the provisions of the law such moneys could only be drawn by road supervisors and by warrants of the commissioners; further. the warrants in suit were not drawn in terms in favor of road supervisors, or it was not stated in them that the parties payees were road supervisors. The law in force at the time the warrants in suit were drawn provided that district road funds should be expended by the road supervisors of the road districts (see General Statutes 1873, ch. 67, secs. 12-14), and the money to be obtained from the county treasury must be as follows: "It shall be the duty of the county treasurer, upon the order of the county commissioners, to pay to the supervisor of each road district the funds that may be in the treasury, belonging to said road district; and it shall be the duty of the supervisor to expend the money to the best advantage to his road district for special purposes, as by law provided." (General Statutes 1873, ch. 67, sec. 35; Session Laws 1867, p. 46, sec. 5.) The warrants upon which a recovery was herein sought were drawn in terms at least to individuals, and not to road supervisors. It is true that such instruments are *prima facie* correct and legal if signed by the proper officers, and the officers will

be presumed to have done their duty, and if illegal the impeachment much come from the defendant (1 Dillon, Municipal Corporations sec. 502); but here it is a direct question of the sufficiency of the pleading, and on its face the petition disclosed the issuance of the warrants to persons to whom by law they could not be issued. (*Burlington & M. R. R. Co. v. Lancaster County*, 4 Neb. 307; *Burlington & M. R. R. Co. v. York County*, 7 Neb. 487; *Burlington & M. R. R. Co. v. Kearney County*, 17 Neb. 511.) This constituted the pleading bad "and open to attack by demurrer." The judgment of the district court must be

AFFIRMED.

SULLIVAN, J., concurring.

I agree to the judgment of affirmance on the ground that, under the section of the statute quoted in the opinion of the chief justice, neither the road supervisor, nor any other person, could acquire title to the warrants in suit. Such warrants could have been lawfully issued only to the supervisor, and the extent of his authority, in connection with them, was to obtain from the county treasurer the money for which they called, and expend it in improving the roads. Holding the warrants in his official capacity, and for a specific purpose, he could neither sue the county upon them, nor transfer his trust title to a stranger.

NORVAL, J., dissenting.

I dissent from so much of the doctrine as is stated in the second division of the syllabus. The petition stated a cause of action. Conceding that an order or warrant on the district road fund can be drawn only in favor of the supervisor of such district, there is no provision of law which requires that such warrant shall disclose on its face that it was issued in the name of the supervior. The presumption will be indulged that public officers have discharged their duties and that their acts are regu-

lar, unless the contrary is made to appear. Applying this principle to the case at bar, the writer is of the opinion that it should be held that the warrants upon which suit was brought were regularly issued and to the person entitled thereto.

The petition is sufficient for another reason. It is alleged therein, after each warrant is set out, that there is now due from the defendant to plaintiff on said warrant a sum certain, claimed to be unpaid. Unless the warrant or order was properly issued, and to the person entitled to receive the money therein named, nothing could be due the plaintiff. This is very evident. For the reasons stated the judgment should be reversed and the cause remanded.

FIRST NATIONAL BANK OF COBLESKILL, NEW YORK, V. L. A. PENNINGTON ET AL.

FILED JANUARY 19, 1899. No. 8640.

1. **Pleading:** DEMURRER TO ANSWER. Upon a demurrer *ore tenus* to an answer during the trial the latter should be liberally construed.

2. ——: ——: USURY. An answer or plea, in defense, of the usurious nature of the contract evidenced by the note in suit *held* sufficient against an attack by demurrer *ore tenus* during trial.

3. **Negotiable Instruments:** BONA FIDE PURCHASERS. One who purchases negotiable paper before maturity in the usual course of trade and for a valuable consideration and in ignorance of facts which would affect its force as between the original parties to it is an innocent purchaser. (*Dobbins v. Oberman*, 17 Neb. 163.)

4. ——: ——: EVIDENCE. To defeat his recovery thereon it does not suffice to prove that the purchase was with knowledge of circumstances which should have excited suspicion in the mind of a prudent person; the proof must go to the extent that the purchase was with knowledge of such circumstances or facts as show want of honesty or bad faith on his part. (*Dobbins v. Oberman, supra.*)

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

Gilbert Bros., for plaintiff in error.

Harlan & Taylor and *George B. France, contra.*

HARRISON, C. J.

Action was instituted to recover an amount alleged to be due the bank as indorsee from the adverse parties herein upon a promissory note. In the answer filed there was what was presented for a plea of usury in the inception of a stated number of transactions between the State Bank of Lushton and the defendants, in each of which there was given and taken a promissory note, each subsequent to the first, being but a renewal of the prior indebtedness and, as was the first, tainted with usury. The reply was a general denial of the new matter of the answer. A trial of the issues resulted in a verdict for the defendants, and the plaintiff has prosecuted an error proceeding to this court. At the inception of the introduction of evidence there was a demurrer *ore tenus* to the answer, which was overruled, and it is now urged that the answer did not contain a plea of usury, and the court erred in its ruling on the demurrer.

The answer was probably not as specific and complete a plea, or connected set of pleas, of the usury sought to be interposed as a defense in the action as might have been framed, but liberally construed, as it must be against an attack by demurrer of the stage of proceedings in a cause that the one herein was, the answer contained a sufficient plea of the usurious nature of each transaction to which it referred, also of them considered connectedly, or as a whole.

One of the questions raised by the answer and litigated as an issue was the character of the ownership of the plaintiff of the note in suit,—whether it was an innocent

or *bona fide* purchaser of the same. On this subject there was given by request of the defendants the following instruction: "An innocent purchaser of negotiable paper entitled to protection as such is one who has acquired the paper in good faith for value, without notice of usury, or any facts or circumstances which, if inquired into, would reveal the fact that the contract was usurious." This embodied a wrong statement. The plaintiff might have possessed knowledge of some circumstance which, if inquired into, would have revealed that the notes it was purchasing of the State Bank of Lushton were usurious. It might have known facts which created a suspicion of the nature of the contracts evidenced by the notes, and yet have been a good-faith or innocent purchaser. Its knowledge of facts and circumstances, to deprive it of the protection of the rule, must have been of a kind and quality to show bad faith, want of good faith and honesty, in the purchase. (See 4 Am. & Eng. Ency. of Law [2d ed.] 300, 301 and note 1; *Rublee v. Davis*, 33 Neb. 779; *Martin v. Johnston*, 34 Neb. 797; *Dobbins v. Oberman*, 17 Neb. 163; Tiedeman, Commercial Paper sec. 289; 2 Daniel, Negotiable Instruments 767-773.) The instruction quoted stated the rule too broadly and should not have been given; and in view of the evidence in the case we cannot say that it was without prejudice to the rights of the complainant. The judgment must therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

LYDIA BROADWATER V. JEFFERSON H. FOXWORTHY ET AL.

FILED JANUARY 19, 1899. No. 8638

1. Review: RECORD: TESTIMONY: TRIAL. An objection that no testimony was received on the hearing in the trial court must be overruled where the record shows the hearing was in the nature

of a trial, and that evidence, and all that was offered, was received.

2. ———: QUESTIONS NOT RAISED BELOW. The general rule is that objections not made in the trial court, but raised for the first time in the appellate court, will not be considered.

3. ———: ———. Certain objections in the present case made for the first time in this court *held* to be within the general rule just stated.

4. **Order Refusing to Satisfy Judgment: REVIVOR: RES JUDICATA.** A motion was made to discharge of record a judgment, for the reason it had been satisfied, and the motion on hearing was overruled. To a subsequent application to revive the judgment which had become dormant the satisfaction was interposed as a cause why the revivor should not be ordered. *Held*, That its adjudication on the hearing of the former motion was conclusive, and not open to further litigation.

5. **Review: PROCEEDINGS DURING TRIAL: MOTION FOR NEW TRIAL.** A petition in error does not present to this court for review the proceedings during a trial in a district court, if in the trial court there was no motion for a new trial and a ruling thereon.

ERROR from the district court of Lancaster county. Tried below before HOLMES, J. *Affirmed.*

Burr & Burr, for plaintiff in error.

Webster, Rose & Fisherdick, contra.

HARRISON, C. J.

On March 12, 1884, there was rendered in the district court of Lancaster county a judgment for the defendants in a replevin action as follows: "It is now by the court considered and adjudged that said defendants have a return of the property taken by said plaintiff on the writ of replevin herein named in the verdict of the jury herein, to-wit, one brown mare, one two-horse wagon, and one double harness, and that in case a return of said property cannot be had, that the defendants have and recover of and from the said plaintiff Lydia Broadwater the sum of $140, the value of defendants' possession of said property as found by said jury." On May 8, 1889, a motion was

filed for the plaintiff that defendants be required to show cause why the judgment should not be discharged of record. The parties appeared and proofs by affidavit were made, and on hearing the motion to discharge the judgment was denied. This was of date June 24, 1889. In the affidavit filed by plaintiff appeared the following statement as the reason for the requested discharge of the judgment: "And this affiant further says that afterward and on or about 12th day of March, 1884, one Al Masterman, then a duly authorized and acting deputy to the sheriff of said county of Lancaster, did, by virtue of said judgment entered in said case, take from this plaintiff the above described property, to-wit, one brown mare, one two-horse wagon, and one double harness, and that afterwards said Al Masterman, in his official capacity, did turn over to the defendants herein the above described property, thereby fully satisfying and paying the above named judgment." March 4, 1896, Jefferson H. Foxworthy filed a petition, the object and purpose of which was to obtain a revivor of the judgment. The petition was in part as follows: "Comes now Jefferson H. Foxworthy, one of the defendants herein, and shows the court that the judgment in favor of said defendants and against plaintiff rendered in this court on March 12, 1884, for the sum of $140, interest, and costs taxed at $34.20, that the judgment and costs is wholly unpaid, except the sum of $5.30 costs paid December 24, 1890. No execution has ever been issued on said judgment and the same has become dormant." An answer was filed, of a portion of which the following is a copy: "And this respondent and plaintiff further alleges that afterwards, and on or about the 12th day of March, 1884, one Al Masterman, then a duly authorized and acting constable of said county of Lancaster and also duly authorized and acting for and on behalf of said defendants and their mortgagor, the husband of plaintiff, did, by virtue of said judgment rendered in said action and said employment aforesaid, take from the plaintiff the above de-

scribed property, to-wit, one brown mare, one two-horse wagon, and one double harness, and that afterwards the said Al Masterman, as constable aforesaid, and by virtue of his employment aforesaid, did turn over and return to said defendants herein the above described property, and thereby the said defendants did have a return of the property taken on said writ of replevin, and said judgment was thereby fully satisfied and complied with. And this respondent and plaintiff further says that the real owner or mortgagor of said property, to-wit, one brown mare, one two-horse wagon, and one double set of harness, at said time, was the husband of this plaintiff and respondent, Henry Broadwater. And the said Foxworthy & Son were his attorneys, and said property was turned over to the said husband by the said Foxworthy & Son, and the said husband as mortgagor took said property and moved out of the state of Nebraska, with the same, with the knowledge and consent and agreement of the said Foxworthy & Son, attorneys for said husband, as aforesaid. And the said defendants then and at that time did have a return of said property, and a return of said property was had in said action and judgment in accordance with the terms of said judgment, and the said judgment is fully paid, satisfied, and should be discharged, together with all costs thereof as taxed therein against this respondent and plaintiff." There was a reply in which it was alleged: "The matters averred by plaintiff have been heard, determined, and concluded by the former adjudication of this court in this cause, and plaintiff is barred from further asserting or agitating the same because for that May 8, 1889, plaintiff in writing filed in this cause her certain motion to satisfy and discharge the judgment herein upon the same identical grounds set up and averred in her present answer herein filed March 22, 1896, and these defendants joined issue thereon and the same was fully heard before this court, the Honorable Allen W. Field, then judge of this court, presiding, and after argument and full con-

sideration of all the facts and evidence the issues so joined were found in favor of these defendants and against the plaintiff, and in consideration and judgment of this court the said motion was denied, to which finding and judgment plaintiff at the time excepted,—all of which matters appear of record in this cause and said judgment yet remains in this court, in nowise modified, appealed from, or reversed, as by the files of this cause, the dockets, and journal 'R' of this court, at pages 133, 290, and 380, will at large and more fully appear. (2.) And for further ground of defense herein, but not waiving the aforesaid bar of former adjudication, and insisting thereon, defendants deny that on or about March 12, 1884, or yet that at any time, said Al Masterman, or any other person, acting as constable, or as agent of these defendants or in any other capacity, did, by virtue of said judgment or otherwise, take said property from plaintiffs and return the same to defendants herein, or that defendants had return of said property, or that these defendants turned the same over to said Henry Broadwater, or yet that said Henry Broadwater removed the same from this state by or with consent of defendants." On the day of hearing, April 14, 1896, the plaintiff in error filed a demand for a jury. The court received such evidence as was offered, all in form of affidavits, and made the following findings and order: "This cause now comes on to be heard upon the petition of the defendant Jefferson H. Foxworthy to revive the judgment entered in this action on the 12th day of March, 1884, the answer of the plaintiff Lydia Broadwater to said petition and conditional order of revivor heretofore made, and the reply thereto, and is submitted to the court, on due consideration whereof, and the court being fully advised in the premises finds in favor of the defendants and against the plaintiff, and finds that the question of the satisfaction and payment of the judgment, as raised by the answer of the plaintiff upon the order to show cause herein, has been heretofore by this

court fully adjudicated and determined, and the motion of plaintiff to satisfy said judgment of record being denied by the court and adjudicated adversely to the plaintiff, and said order of the court standing unreversed and unappealed from, plaintiff cannot again be heard upon the questions of fact as raised by the answer herein, and it is by the court ordered that the demand of the plaintiff for a jury trial herein be, and the same hereby is, denied. It is therefore considered, ordered, and adjudged by the court that said judgment in favor of the defendants and against the said plaintiff stand revived for the sum of $140, with interest thereon at the rate of seven per cent per annum from the 12th day of March, 1884, together with the costs of said action as taxed against the plaintiff, and the accrued costs herein, taxed at $——. To all of which the plaintiff duly excepts." The matter is presented in this court for review.

It is argued that the court erred in not hearing evidence on the issues raised. To this it must be answered that it appears that evidence, and all that was offered, was received; hence this objection is of no avail.

Another point made in argument is that the application for revivor should have been by motion supported by affidavit and not by petition. This objection was not made in the trial court and cannot be for the first time raised in this. (*Eckland v. Willis*, 42 Neb. 737.) Furthermore, the petition was verified positively and would fill the requirements of an affidavit, and other affidavits, in which were embodied statements of the facts, were filed. There was nothing in the manner of procedure which, when attacked for the first time in this court, was a fatal defect. (*Wright v. Sweet*, 10 Neb. 190.)

It is also claimed that there was error in the proceedings, in that one of the defendants in the original action did not join or was not joined in the application to revive the judgment. This objection is made for the first time in this court. It was not presented in the trial court and will not be considered. (*Eckland v. Willis, supra.*)

A comparison of the statements of the affidavit, quoted herein and filed at the time of the motion to discharge the judgment of record, with the statements which we have copied of the answer filed to the application to revive, will disclose that the main and material fact alleged in each was the same,—*i. e.* that the property had been received, or taken from the one party and given to or returned to the others. Whether it was by "Al Masterman," as constable, as deputy sheriff, or as agent or employé of the parties, could make no difference. This being true, the material fact at issue was litigated and adjudicated on the hearing and determination of the motion to discharge the judgment, and could not be again placed in litigation between the same parties and in the same action. (*Reeves v. Plough*, 41 Ind. 204; *Mabry v. Henry*, 83 N. Car. 298; *Dwight v. St. John*, 25 N. Y. 203; *Furgeson v. Millender*, 32 W. Va. 30; *Greer v. Jones*, 54 Ga. 154; *Commissioners of Wilson County v. McIntosh*, 30 Kan. 234.)

There was, as we have before stated, a demand on behalf of plaintiff in error for a jury, and the refusal of this request is assigned as error. The application in this state for the revivor of a dormant judgment is to be by motion. (See Code of Civil Procedure, secs. 456-473.) And where on an order to show cause the debtor files affidavit in which it is stated that the judgment sought to be revived has been paid or satisfied, it raises an issue for hearing. (*Garrison v. Aultman*, 20 Neb. 311; *Reeves v. Plough, supra.*) The motion provided for by our Code and by statutory enactment in some other states is a substitute for the writ of *scire facias* to revive dormant judgments, and under the former the same relief may be obtained as under the latter. (Freeman, Executions sec. 95.) To a writ of *scire facias* for the revival of a dormant judgment a plea of payment or satisfaction of the judgment may be interposed, and the issue raised should be submitted to a jury (*Hartman v. Alden*, 34 N. J. Law 518; 5 Field's Lawyers' Briefs p. 277); but if it be conceded—and we do not decide the question—that there

should have been a regular trial of the issue of satisfaction of the judgment sought to be revived in this present proceeding, and not a mere summary hearing as upon other motions, then the question of the right of trial to a jury is not presented, for the reason there was no motion for a new trial in the district court; and if the proceeding is to be given the character contended for by the plaintiff in error, to obtain a review by petition in error to this court of proceedings in the trial court there must have been a motion for a new trial in that court and a ruling thereon. (*Jones v. Hayes*, 36 Neb. 526; *Koehler v. Summers*, 42 Neb. 330; *In re Van Sceiver*, 42 Neb. 772.) The order of the district court must be

AFFIRMED.

JAMES C. HONAKER V. WILLIAM L. VESEY ET AL.

FILED JANUARY 19, 1899. No. 8666.

1. **Replevin:** ACTION BY JOINT OWNERS. It is proper for joint owners of chattel property to join in an action for the recovery of its possession.

2. **Assignments of Error:** CROSS-EXAMINATION. To obtain review of alleged error in the denial of the cross-examination, if the complaint is directed against a denial of answer to a single or separate question, the assignment must be specific.

3. **Conflicting Evidence:** REVIEW. Findings of a trial court based upon conflicting evidence, of which there is a sufficiency in their support, will not be disturbed in this court.

4. **Replevin:** FAILURE TO GIVE BOND: PLAINTIFF'S DAMAGES. If the plaintiff in an action of replevin fails to give the undertaking required by law and the property is returned to the defendant, the action may proceed as one for damages only, and if the plaintiff prevails, his measure of damages is the market value of the property and the lawful interest thereon. (*Baum Iron Co. v. Union Savings Bank*, 50 Neb. 387.)

5. **Chattel Mortgages:** INDEMNITY. A mortgage in terms to secure the payment of a debt evidenced by a promissory note may be shown to be one of indemnity only.

6. ———: ———: FORECLOSURE. An indemnity mortgage may not be foreclosed by the original mortgagee or an assignee after maturity until the damages have been suffered, against or for which the indemnity was sought to be provided.

ERROR from the district court of Logan county. Tried below before NEVILLE, J. *Affirmed upon filing of remittitur.*

Wilcox & Halligan, for plaintiff in error.

Hoagland & Hoagland, contra.

HARRISON, C. J.

Possession of a number of different articles, principally household furniture, was taken for the plaintiff in error, his claim thereto arising under the provisions of a chattel mortgage. The defendants instituted this, in its inception a replevin action, to obtain possession of the property, but did not furnish the undertaking required by law, and the property was returned to the plaintiff in error and the action proceeded as one for damages only. A trial to the court, a jury being waived, resulted in a judgment for the defendants in error.

In an error proceeding to this court it is complained for the plaintiff that the defendants in error were not joint owners of the property which was replevied, but were owners of separate and distinct portions or articles of it; hence could not join in the suit, and their doing so constituted a fatal misjoinder. If the facts had been as contended by counsel for plaintiff in error, there was the misjoinder. On the subject of the ownership of the property a finding that the parties were not joint owners of the property would have been warranted by the evidence, but a contrary finding, or that they were joint owners, had sufficient of the evidence in its support. The latter was the one adopted and enforced by the trial court, and we will not disturb it, and must conclude that there was no misjoinder of parties.

It is also urged that the court erred in denying the plaintiff in error the right to cross-examine a witness on a stated subject. There was not an entire denial of such right, and the assignment of error is not specific enough to call for the examination of any single or separate denial of a question in cross-examination.

The findings and judgment were as follows: "The court finds that the right of property and right of possession of said property described in the replevin affidavit and petitions of plaintiffs, when this action was commenced, were in the plaintiffs; that the value of said property was the sum of $124.55. The court also finds that the plaintiffs failed to give an undertaking as required by law, and said property was retained by the defendant. The court also finds that the plaintiffs have been damaged by reason of the wrongful taking of said property by defendant in the sum of $160, in addition to the value of said property as found herein. It is therefore considered by the court that the plaintiffs recover from the defendant the sum of $284.55, their damages, and the value of the property so found by the court, and their costs herein expended, taxed at $160.82." The articles of which possession was taken under the mortgage were in use at the time by the defendants in error in a hotel in which they were then catering to the wants and wishes of any of the public who might apply for their services, and the damages allowed were for stoppage to and inconvenience in conducting the business alleged to have been caused by the seizure of the furniture, etc. These damages, it is contended, should not have been allowed; that the true measure of damages herein was the value of the property and interest thereon from the time it was taken. "In replevin, where the property has been returned to the defendant for the failure of the plaintiff to give the statutory undertaking, and the action proceeds as one for conversion, the measure of his damages, in case the right of property and right of possession are found in his favor, is the market value of the prop-

erty, with lawful interest thereon." (*Baum Iron Co. v. Union Savings Bank*, 50 Neb. 387; *Hainer v. Lee*, 12 Neb. 452.) Counsel for defendants in error strenuously insist that the above rule is wrong, and not applicable in the present case, but after an examination and consideration of the arguments presented and authorities cited we must again approve the doctrine and as pertinent to the facts herein.

It was established by the evidence that certain parties had signed as sureties a bond that the defendants in error (they were husband and wife) should do and perform certain acts in a business transaction, and a note and the mortgage, under which the plaintiff in error asserted the right of possession of the property, had been given to indemnify the sureties for any loss they might suffer in such capacity; and a closely contested point, and relative to which the evidence was directly in conflict, was in regard to whether any damages had at the time it was sought to foreclose the mortgage been suffered by the sureties. The note and mortgage had been after maturity transferred to the plaintiff in error by the original party or parties to them. A mortgage which in terms purports to secure the payment of a debt evidenced by a described note may be shown to be one of indemnity only. (Wiltsie, Mortgage Foreclosures sec. 299.) An indemnity mortgage may not be foreclosed until the event against which it was to be effectual has occurred, nor until the mortgagee has suffered the damages for which the indemnity was provided. (*Forbes v. McCoy*, 15 Neb. 632; *Gregory v. Hartley*, 6 Neb. 356.) The trial court concluded, upon conflicting evidence, that the parties to be indemnified had suffered no damages. The conclusion was supported by the evidence and will not be changed.

The amount of damages, as we have before seen, was too large. The defendants in error should have recovered no more as damages than interest at seven per cent per annum on the value of the property from its taking, September 17, 1894, to the term of court at which it was

tried. This is $8.35. The defendants in error may within twenty days remit from the amount of the judgment rendered the sum of $151.65, as of the date of its rendition. If this is done, the judgment may stand affirmed; if not done, the judgment is reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

JAMES WOOLWORTH ET AL., APPELLEES, V. EDWIN PARKER ET AL., APPELLANTS.

FILED JANUARY 19, 1899. No. 8665.

1. **Testimony:** EVIDENCE. The words "testimony" and "evidence" are not synonymous. The latter is the generic term. The former imports a kind of evidence. (*Columbia Nat. Bank of Lincoln v. German Nat. Bank*, 56 Neb. 803.)

2. **Bill of Exceptions:** ALLOWANCE AND AUTHENTICATION. The statute requires that a bill of exceptions be presented to the trial judge for settlement, and when settled that it be signed by the judge, with his certificate to the effect that it is allowed. (Code of Civil Procedure, sec. 311.)

3. ———: ———. The settlement and allowance are of the bill as a whole, inclusive of the statements of the heading and the body relative to what it contains; and where, from an inspection of the entire bill, it is obvious that the word "testimony" was used with reference to the evidence, and as synonymous with "evidence," it may be accorded such extended signification.

4. **Judgment:** LIEN. A judgment affords no lien upon an equitable interest in real estate.

5. **Homestead:** EVIDENCE. Findings of the trial court relative to an alleged homestead right in real estate *held* not contrary to the evidence.

6. **Review:** THEORY BELOW: ARGUMENTS. Parties in their presentment of a cause having rested their rights of priorities of liens on the determination of a definite stated question, this court will not extend the discussion, or settle them in accordance with other conditions or facts existent in the case.

APPEAL from the district court of Lancaster county. Heard below before HOLMES, J. *Affirmed.*

Lamb & Adams, for appellants.

Abbott, Selleck & Lane and *Mockett & Polk, contra.*

HARRISON, C. J.

In the petition filed in this action for James Woolworth, of appellees, it was pleaded that on June 20, 1894, he obtained a judgment in the district court of Lancaster county against George Thompson, of appellants, in the sum of $437; that an execution had been issued for the enforcement of said judgment and returned, by the officer to whom it was addressed and delivered, unsatisfied for want of property of the debtor on which to levy; that the judgment was still existing and unpaid; also, that George Thompson was then the owner of lot 1, in block 19, in Kinney's O Street Addition to the city of Lincoln, and to prevent the enforcement of said judgment had caused the title to said real estate to be conveyed by Edwin Parker, a party to this action, to one A. Hill, also a party to the action, without consideration moving from the last named person, and for the purpose of concealing the ownership of the property from the creditors of George Thompson, and especially from the plaintiff, now appellee; that George Thompson was the owner of the property and the title was held in trust for him by said A. Hill; "that the record title to the said lot rests, as shown by the records of said county, in the name of the defendant Ernest Parker, but plaintiff alleges that said Parker and —— Parker, his wife, have executed and delivered a deed of the said lot to the defendant A. Hill, and have thereby conveyed the legal title to the same to said Hill, and that the said defendants Thompson and Hill have kept the same from the records of the county register of deeds so as to conceal the fact of the said transfer from this plaintiff and thereby prevent the enforcement of the said judgment against the said lot. Wherefore plaintiff prays that the deed executed and

delivered by the defendants Parker and Parker to the defendant Hill may be held to be a conveyance of the said property to said George Thompson, and that he may be decreed to have the legal and equitable title to the same, and that the said deed to said A. Hill may be decreed to be for the use and the benefit of the said George Thompson; and that said judgment may be deemed to be a first and valid lien upon said property and the said property may be decreed to be subject to the execution of the plaintiff upon the said judgment heretofore recited and set out; that said property be sold as upon execution, and out of the proceeds of sale the plaintiff be first paid the amount of his said judgment, and for such other and further relief as to the court shall seem just and equitable under all of the facts as they may be proved at the trial hereof; and for the costs of this action."

There was an answer or cross-petition for Milton L. Trester, in which it was stated that he obtained a judgment against George Thompson and Elsie Thompson, the wife of George Thompson, in the county court of Lancaster county for a named sum, April 3, 1895, of which a transcript was duly filed and docketed in the office of the clerk of the district court of said county on April 10, 1895, and an execution issued thereon September 23, 1895, then delivered to the sheriff, and, after unsuccessful search for personal property, levied on the real estate involved in the controversy. There were further allegations in this cross-petition which followed in the main the statements in the original petition in the action. The cross-petition also denied the existence of the judgment pleaded for James Woolworth. The prayer was that the property be subjected to the satisfaction of cross-petitioner's asserted judgment. In the answers filed for the Thompsons there were denials of the existence of either the judgment of the petitioner or the cross-petitioner. The ownership of the real estate was admitted, and that the legal title had been placed in the name of A. Hill, but without any purpose to defraud either of the com-

plainants or to hinder or delay them, or either of them, in the collection of any judgment or claim. There was also pleaded a homestead right in the property. There were also filed cross-petitions for six parties, each of whom asserted in plea a mechanic's lien on the premises, the subject of the suit.

Replies were filed, and of the issues joined there was a trial; and of the findings embodied in the decree were the following:

"This cause came on to be heard upon the petition of the plaintiff, the answers and cross-petitions of the defendants Milton L. Trester, the Rudge & Morris Company, the S. K. Martin Lumber Company, William A. Ecker, W. Jacobs, Nelson Taylor, and Amasa Hill, the answers of the defendants George Thompson, Elise Thompson, and Amasa Hill, and the replies of the plaintiff and the defendant Milton L. Trester, and the evidence, and was submitted to the court, on consideration whereof the court finds:

"1. That the defendant Edwin Parker is in default for want of pleadings in the said cause, and that said default was duly taken.

"2. That on the 20th day of June, 1894, the plaintiff recovered a judgment against the defendant George Thompson in the district court of said county in the sum of $437, and that said judgment bears interest at the rate of seven per cent from said 20th day of June, 1894; that afterwards an execution was duly issued out of the said court upon said judgment and was thereafter returned unsatisfied for want of property of the said defendant George Thompson on which to make a levy.

"3. That on the 3d day of April, 1895, the defendant Milton L. Trester recovered a judgment against the defendants George Thompson and Elise Thompson in the county court of said county for the sum of $793.80, and cost of suit, taxed at $5.40, and interest at ten per cent and that on the 10th day of April, 1895, the said Milton L. Trester duly caused a transcript of the said judgment

to be filed in the district court of said county, and caused execution to be issued thereon, which said execution was thereafter returned unsatisfied for want of property of the said George and Elise Thompson, found in said county, on which to make a levy.

"4. That on the 1st day of March, 1895, defendant Edwin Parker made, executed, and delivered a deed of lot 1, block 19, in Kinney's O Street Addition to the city of Lincoln, Nebraska, and thereby conveyed the said lot to the defendant A. Hill; that the legal title to the said lot remained in the said defendant A. Hill till on the 26th day of June 1895, when the said defendant A. Hill made, executed, and delivered to the defendant George Thompson a deed and thereby conveyed the legal title of the same to the said George Thompson; that the defendant A. Hill held the legal title to the said lot 1, block 19, aforesaid, in trust for the defendant George Thompson, and that the said A. Hill had at no time any right of ownership in or to the said lot other than as in trust for the said George Thompson, and that the said George Thompson was the real owner of the said lot from and after the 1st day of March, 1895, aforesaid. The court further finds that the equitable title to the said lot was in the defendant George Thompson during all of the time from and after said 1st day of March, 1895, and that the legal title to the same was put in the name of the defendant A. Hill, for the purpose of concealing the same from the plaintiff herein, and in fraud of the rights of the plaintiff herein, and that the plaintiff was entitled to a lien thereon from the said 1st day of March, 1895; that the deed from said Edwin Parker to said A. Hill, and the deed from the said A. Hill to the said George Thompson, have neither of them been recorded, and that the record title to the said lot remains in the defendant Edwin Parker, but that by the execution and delivery of the said deed the defendant Edwin Parker parted with all interest in and to the said lot, and has not now, and has not had since the said 1st day of March, 1895, any interest in or to the said lot.

"10. That the defendant A. Hill is not entitled to a lien on the said lot.

"11. That the lien of the plaintiff is a first lien on the said lot 1, block 19, in Kinney's O Street Addition to the city of Lincoln.

"12. That the lien of the defendant Milton L. Trester is a second lien on the said lot, subject only to the lien of the plaintiff's said judgment.

"13. That the liens herein found in favor of the defendants the S. K. Martin Lumber Company, William A. Ecker, the Rudge & Morris Company, William Jacobs, Nelson Taylor are of equal priority, and together formed the third lien on the said lot, subject only to the liens herein found in favor of the plaintiff and the defendant Milton L. Trester.

"14. That the defendants George Thompson and Elise Thompson did not have a right of homestead in the said lot at the time of the bringing of the suit and at the time when the lien of the plaintiff and the defendant Milton L. Trester attached to the said lot."

There were other findings, which we have not quoted, of the sums due the several mechanic's lien holders. There was a decree for a sale of the property, the proceeds to be brought into court to be applied in satisfaction of the liens.

It is urged for one of appellees that there can be no review of the evidence, for the reason that it must appear affirmatively that a bill of exceptions contains all the evidence given at the trial; and it is asserted that the bill in this case does not even purport to contain all the evidence. This assertion is based upon the fact that in the heading to the bill, and in the certificate of the trial judge, the word "testimony" was used, and nowhere is it stated in terms that the bill contains all the evidence. It was in every reference to the subject the "testimony" and not "evidence." "'Testimony' and 'evidence' are not synonymous terms. The latter is the generic term, and the former applicable to a species or kind of evidence."

(*Columbia Nat. Bank of Lincoln v. German Nat. Bank*, 56 Neb. 803.) This bill of exceptions was presented to the adverse parties by the appellants and returned without amendments proposed, although there was no indorsement to such effect. It was presented to the trial judge for settlement and allowance, and by him settled and allowed, and he signed a certificate that it was allowed, in which certificate there appeared the statement that the bill contained all the "testimony" adduced or offered by either party. It is provided in the Code: "When settled, the bill must be signed by the judge with his certificate to the effect that the same is allowed." (Sec Code of Civil Procedure, sec. 311.) And we must conclude that this includes the entire bill,—all its statements. In the bill the word "testimony" was used generally to designate or refer to the evidence, and in such connections that it clearly meant "evidence;" from all of which we must conclude to herein allow the word an extended meaning or as employed in the stead of the proper term, "evidence." The meaning was obvious. Evidence was intended, and the bill is not for the reasons advanced inoperative. (*Columbia Nat. Bank of Lincoln v. German Nat. Bank, supra.*)

The attorneys for appellants state in their brief that "there is no controversy between George Thompson, the owner of the premises, and the several lien-holders. He concedes they are all valid liens for the amounts respectively found due them under the decree. The lien-holders join him in this appeal, as the title and priority of their liens depend upon the homestead title of the defendant George Thompson." The argument is, in effect, that the findings and decree of the district court are not sustained by the evidence, or are contrary to the evidence. A careful examination of the record convinces us that while a finding for the main appellants would possibly have sufficient of evidence to support it, the findings made on the principal questions are not contrary to the evidence or not unwarranted by it, and we will not disturb them.

It is true, as contended by counsel for appellants, that at the time these judgments became of effect George Thompson had but an equitable title to the property, which in this suit it is sought to subject to their satisfaction, and the judgments were not liens on the equitable title (*Nessler v. Neher*, 18 Neb. 649; *First Nat. Bank of Plattsmouth v. Tighe*, 49 Neb. 299); but on June 26, 1895, the legal title was conveyed by Hill to Thompson, and the liens of the judgments attached; and, as we have before determined, the decision of the district court that the homestead right was not shown must stand.

For the appellants, the mechanic's lien holders, it was conceded in argument—see quotation herein from the brief—that the questions of their liens and priorities, relative to the judgments, depended entirely upon the existence or non-existence of the homestead right of George Thompson and his wife; and since this question must be disposed of adversely to them, we need not further discuss or adjudicate in regard to the rights of the mechanic's lien holders. The decree of the district court must be

AFFIRMED.

F. M. SACKETT V. CARROLL S. MONTGOMERY ET AL., EXECUTORS.

FILED JANUARY 19, 1899. No. 8634.

1. **Note: TRANSFER.** A note payable to a party or order may be transferred by the payee, without a commercial indorsement, by either an oral or a separate, distinct, written assignment thereof, followed by delivery, which would render the transferee liable to any defenses against the original payee.
2. **Action on Note: VOID JUDGMENT: RES JUDICATA.** A former judgment on a note is not a defense to a subsequent action on the same note, where the judgment was void for want of jurisdiction over the person of the defendant.

ERROR from the district court of Boone county. Tried below before KENDALL, J. *Affirmed.*

Spear & Mack, for plaintiff in error.

James S. Armstrong, H. C. Vail, and *Montgomery & Hall*, *contra.*

NORVAL, J.

Milton Montgomery sued F. M. Sackett, and obtained judgment against him on a promissory note executed by the defendant and one John Dickenson, and payable to Montgomery & Jaycox, or order. Two defenses were presented, namely, that plaintiff was not the owner of the note, and that the payees had already obtained judgment against both makers for the full amount due thereon. Since the docketing of the cause in this court the death of the plaintiff below was suggested, and by agreement of parties an order was duly entered reviving the action in the name of his executors

As to the ownership of the note the evidence, without contradiction, shows that at the date of the institution of suit said Milton Montgomery was the owner of the paper, and on his behalf it was produced and introduced in evidence on the trial. The note was payable to the order of the payees, but did not contain their indorsement. This fact, however, did not prevent an equitable assignment of the paper to the decedent. A note payable to a party or order may be transferred by the payee, without a commercial indorsement, by either an oral or a separate, distinct, written assignment thereof, followed by delivery, which would render the transferee liable to any defenses against the original payee. (*Doll v. Hollenbeck*, 19 Neb. 639; *Colby v. Parker*, 34 Neb. 510; *Gaylord v. Nebraska Savings & Exchange Bank*, 54 Neb. 104; *Marskey v. Turner*, 81 Mich. 62; *Benson v. Abbott*, 22 S. E. Rep. [Ga.] 127; *Thomson-Houston Electric Co. v. Capitol Electric Co.*, 56 Fed. Rep. 849.)

As to the plea of estoppel by reason of a former judgment, the record discloses the following facts: On June

15, 1894, which was prior to the bringing of this action, Montgomery & Jaycox caused to be docketed a suit on the note in question against both makers before H. C. Vail, as a justice of the peace of Boone county. Summons was issued returnable on June 20. The day preceding the time fixed for the return of the writ John Dickenson, one of the makers of the note, appeared before the justice, waived process, and confessed that he was indebted to the plaintiffs in the sum of $84.02 upon said note. The justice inadvertently rendered judgment against both Dickenson and Sackett for said sum. Nearly a year afterward, at the request of the latter, and for the purpose of correcting a clerical error merely, the docket entry was changed to show a judgment against Dickenson only. There is considerable discussion in the brief of the power and authority to amend or change the judgment entry, but in our view it is wholly unnecessary to consider or pass upon the question. It was shown that Justice Vail never acquired jurisdiction over the person of Sackett; hence the judgment as against him was a nullity, and constituted no bar to the present action. (*Colby v. Parker*, 34 Neb. 510.) No reversible error appearing upon the face of the record the judgment is

AFFIRMED.

JESSIE L. COWHERD ET AL., APPELLANTS, V. JAMES B. KITCHEN, EXECUTOR, ET AL., APPELLEES.

FILED JANUARY 19, 1899. No. 8542.

1. **Will**: CONSTRUCTION: DISCRETION OF EXECUTOR: PAYMENT OF BEQUESTS: MORTGAGE: RESIDUARY LEGATEE. A testator made certain specific bequests in money, providing that the same should be paid by the executor, in his discretion, either in cash, or in shares in the capital stock of the Kitchen Brothers Hotel Company at their par value, or part in cash and part in such shares of stock at their par value, having regard to the condition of the estate and the circumstances of the legatees, or any of them.

The rest and residue of the estate was bequeathed to J. B. K., stipulating in the will that "the said J. B. K. out of said residue of my estate to pay all the indebtedness of the Kitchen Brothers Hotel Company, including a certain mortgage for $90,000." *Held*, The executor had the right to pay the specific bequests in stock at its face value in lieu of cash, and that the duty was not placed on the executor, but upon the residuary legatee, to pay the indebtedness and mortgage of said company.

2. ———: RESIDUARY ESTATE: LIEN OF MORTGAGE. The residuum passed to the residuary legatee charged with the payment of such indebtedness and mortgage.

3. ———: ———: ———. Whether the residuary legatee became personally liable for said mortgage debt by procuring an extension of time of its payment, or by the acceptance of the bequest, is not decided.

4. **Executors:** FINAL ACCOUNT: DISCHARGE. The final account of an executor should not be approved, and he be discharged, until the trust has been fully executed.

5. ———: DISCHARGE: PARTIES TO APPEAL. One cannot prosecute an appeal from an order discharging an executor where he is not prejudiced by the decision.

APPEAL from the district court of Douglas county. Heard below before AMBROSE, J. *Affirmed.*

Herbert J. Davis and *Kennedy & Learned*, for appellants.

John C. Cowin, *W. D. McHugh*, and *George E. Pritchett*, *contra.*

NORVAL, J.

Richard Kitchen and his brother, James B. Kitchen, were the equal owners, on November 20, 1889, of the entire capital stock in the Kitchen Brothers Hotel Company, consisting of 500 shares each of the par value of $1,000. The Paxton Hotel property in the city of Omaha constituted the assets of the company. On that day Richard Kitchen executed his last will and testament, which contained, among others, the following provisions:

"Ninth. I give and bequeath to my brother Charles W. Kitchen, of Leadville, Colorado, twenty-five thousand dollars ($25,000).

"Tenth. I give and bequeath to each of his sons, my nephews, Ralph Kitchen and Charles W. Kitchen, Junior, five thousand dollars ($5,000), and to my niece, his daughter, Jessie Cowherd, wife of W. S. Cowherd, of Kansas City, Missouri, five thousand dollars ($5,000)."

"Any or all of said legacies described in paragraphs of this will numbered second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth may be paid by my executor, in his discretion, either in cash or in shares in the capital stock of the Kitchen Brothers Hotel Company at their par value, or part in cash and part in such shares of stock at their par value, having regard to the condition of my estate, and the circumstances of the legatees, or any of them; said legacies shall be paid as soon as it can be properly done without embarrassment to my estate, within three years after my death. My executor is hereby duly authorized to assign and transfer, or cause or authorize the transfer of any of my shares in the capital stock of said company, to carry out the provisions of this will."

* * * * * * * * * *

"Lastly. I give, devise, and bequeath to my brother James B. Kitchen all of the rest, residue, and remainder of my estate of every name and nature, real and personal, the said James B. Kitchen out of said residue of my estate to pay all the indebtedness of the Kitchen Brothers Hotel Company, including that certain mortgage for ninety thousand ($90,000) dollars, held by George Warren Smith, upon lots one (1) and two (2), block 138, in the city of Omaha. In case of the death of said James B. Kitchen before my decease, the rest, remainder, and residue of my estate shall be disposed of as follows:

"First. For the payment and satisfaction of all debts and liabilities of every name and nature of the Kitchen Brothers Hotel Company, including the said mortgage to George Warren Smith for ninety thousand dollars ($90,000) and all taxes, assessments, or other incumbrances upon its property.

"Second. The residue, after satisfying said indebtedness and liabilities, shall be divided equally, share and share alike, among all the other legatees in the will named who shall survive me.

"I hereby constitute and appoint my brother James B. Kitchen to be the executor of this my last will and testament, no official bond as such, or other bond, to be required of him. In case of his death before my decease, or before the final settlement of my estate, then said Ralph Kitchen to be such executor, no official bond as such, or other bonds, to be required of him."

On June 27, 1890, the testator died. His said will was duly admitted to probate in the county court of Douglas county, and James B. Kitchen qualified as executor and entered upon the performance of the duties of his trust. The assets belonging to the estate, and which came into the hands of the executor, consisted of a farm, two diamond shirt-studs, and the 250 shares of stock in the Kitchen Brothers Hotel Company. At the time of the death of the testator the mortgage of $90,000 upon the property of the company mentioned in the will remained unpaid. The indebtedness secured by said mortgage was not to become due until 1896, and prior to the maturity thereof an extension of the time of payment for the period of ten years was obtained by the directors of the Kitchen Brothers Hotel Company, at the instance of James B. Kitchen, and as yet said mortgage has not been paid. The diamonds and farm were distributed according to the provisions of the will. The executor also determined and elected to pay the legatees the amount of their several bequests in the shares of stock of the Kitchen Brothers Hotel Company at the par value thereof in lieu of cash, as the will permitted him so to do. He accordingly, within three years from the death of the testator, delivered to each legatee, excepting certain minors, the requisite number of shares of said stock, which at their face value equaled the amount of his or her legacy, although two of them—Jessie L. Cowherd

and Charles Kitchen, Jr.—declined to receipt in full therefor. Certain minors, whose bequests aggregated $25,000, have been paid nothing under the will. The executor, on February 26, 1894, filed in the county court his final account, accompanied by a petition for final settlement and discharge. In said account it was stated, in effect, that there were in the hands of the executor, belonging to the legatees to whom distribution had not been made on account of their being minors, twenty-five shares of stock in the Kitchen Brothers Hotel Company of the par value of $25,000 and a "balance on hand going to residuary legatee, 137 shares at par, $137,000." Subsequently said Jessie L. Cowherd and Charles Kitchen, Jr., legatees named in the tenth paragraph of the will, filed objections to the allowance of the final report or account of the executor and to his discharge, alleging, in substance and effect, that the residuary bequest was by the will charged with the payment of said mortgage, and was made upon the express condition that James B. Kitchen, out of the residuum, should pay all the indebtedness of the Kitchen Brothers Hotel Company, including said mortgage; that the same had not been paid, but on the contrary James B. Kitchen, as executor and as the owner of one-half of the shares of stock of said company, in 1893, procured an extension of the time of payment of said mortgage until the year 1906; that after such extension he sent to the objecting legatees each five shares of stock in said company as payment of their legacies under the will; that they, upon receipt thereof, object to the satisfaction of the legacies in that manner, for the reason the indebtedness of the company, and especially said mortgage debt, had not been paid or secured by James B. Kitchen, whereby, they assert, they were entitled to have the bequests paid in cash, unless said mortgage indebtedness should be secured to be paid out of the residuary bequests; and that notwithstanding all the indebtedness of said company, by the terms of the will, was to have been paid out of the residuum, James B. Kitchen

has paid the interest on the mortgage out of the assets and funds of the corporation. The objecting legatees brought the ten certificates for the shares of stock into the county court and offered to deliver up the same.

Upon the hearing of the matter the county court did not sustain the said objections, but affirmed the final report of the executor, except as to the item of delivery of stock to Jessie L. Cowherd and Charles Kitchen, Jr.; ordered the executor to pay their bequests in the stock of said company at its par value, provided that the same shall be transferred to, and held by, them free from the $90,000 mortgage; appointed James B. Kitchen trustee of the stock bequeathed to him as residuary legatee, and, upon taking the proper oath of office and the giving of a bond for $35,000, conditioned to pay said mortgage debt and interest out of the shares of stock bequeathed to him as residuary legatee, the executor was directed to transfer all of the shares of stock left as a residuum to James B. Kitchen, as trustee, taking his receipt therefor; and that upon the compliance with said order and decree by the executor, and the presentation of proper vouchers and report of his doings in the premises, he be discharged. Jessie L. Cowherd and Charles Kitchen, Jr., prosecuted an appeal to the district court, where pleadings were filed by the appellants, the minor legatees and the executor, which it will be here unnecessary to summarize. At the hearing that court allowed and approved the final account of the executor, adjudged and decreed that the delivery of the ten shares of the stock to Jessie L. Cowherd and Charles Kitchen, Jr., by the executor was in full payment and satisfaction of their respective legacies; that the executor assign and transfer to Ralph Kitchen, as guardian of the minor legatees, twenty-five shares of stock of said company in full payment of the legacies due his wards; that the shares of stock left as a residuum under the will be transferred by the executor to James B. Kitchen, as trustee without bond, to be applied and appropriated first toward the payment of the

indebtedness of the Kitchen Brothers Hotel Company, as provided in the will, and the residue to the residuary legatee; and that Jessie L. Cowherd and Charles Kitchen, Jr., pay the costs of the appeal. They bring the cause to this court for review on appeal. Numerous reasons are presented why the trust has not been executed so as to entitle the executor to be discharged.

The first argument of counsel for appellants is that the primary intention of the testator was that the bequests should be paid in cash. Doubtless, Richard Kitchen when he made his will supposed that the legatees to whom specific sums were bequeathed would receive their respective shares in money; and not absolutely in shares of stock in the Kitchen Brothers Hotel Company, else stock would have been specially bequeathed unconditionally, instead of giving a certain number of dollars to each legatee, as was in the first instance plainly expressed in the will. But it is also manifest from the reading of the entire provisions of the will that the testator at the time he executed the instrument foresaw or contemplated that a contingency might arise when the shares of stock in said company, and which constituted his chief assets, would not be worth their face value, and the payment of the bequests in cash would embarrass his estate, or would not be so advantageous to the several legatees, so that a discretion or option was given the executor by the tenth paragraph of the will to pay any or all legatees, to whom money was bequeathed, either in cash or in shares in the capital stock of said company at their par value, or part in cash and part in such shares. From the reading of the will it is clear that the testator also contemplated that there would not only be sufficient assets to meet all special bequests, but there would be a residuum to go to the residuary legatee more than sufficient to pay the entire indebtedness of the Kitchen Brothers Hotel Company, including the mortgage of $90,000 on the real estate. The proofs show that at no time since the death of the

testator, had the assets of the estate been converted into cash, could a sufficient amount of money have been realized to pay the special bequests dollar for dollar, and there would have been nothing left for the residuary legatee. The executor, being the residuary legatee, naturally elected to pay the bequests in shares of stock, as by the will he was given the right to do, because by that mode of payment there would remain of the assets of the estate 137 shares of the stock of said company to go to himself as the residuary legatee, subject to the indebtedness of the company, while a settlement with the other legatees on a cash basis would have exhausted the entire assets, and the residuary legatee would have been deprived of any benefits under the will. It is clear, and we so hold, that the executor was not as a matter of absolute right required by the will to pay the several bequests in cash.

It is next contended, if the legatees cannot demand that they be paid in money, they were entitled to receive stock in the condition in which the testator left it, with the burden of the mortgage indebtedness removed. In a qualified sense this is true. The residuum, or the balance of the estate after satisfying the special bequests, the testator charged with the payment of the said mortgage, but if the residuum should prove insufficient to lift the debt thereby secured, then, to that extent, the stock received by the legatees would necessarily be impaired or depreciated in value. As we read and construe the provisions of the will, it was not the intention of the testator that the mortgage indebtedness of the Kitchen Brothers Hotel Company should be first paid by the executor before the legatees could be compelled to accept stock in payment of their bequests, because, by the terms of the will, the legatees were to be paid within three years from the death of the testator, and the mortgage debt, without the consent of the owner thereof, was not payable within that period, as it was not to mature until 1896. This is true for another and better reason: The

mortgage and other indebtedness of the company were required to be paid, not by James B. Kitchen as executor, but by him as residuary legatee out of the residuum or portions of the estate left to him. The language of the will is explicit on that point. It reads: "I give, devise, and bequeath to my brother James B. Kitchen all of the rest, residue, and remainder of my estate of every name and nature, real and personal, the said James B. Kitchen out of said residue of my estate to pay all the indebtedness of the Kitchen Brothers Hotel Company," etc. It is plain that the duty and obligation of paying the mortgage in question was not placed on the executor, but upon the residuary legatee, unless the residuary legatee declined to accept the residuum under the provisions of the will. In that event, of course, it would be the duty of the executor to apply the residue of the estate first towards the liquidation of the indebtedness of the company. The confusion arises from the fact that the residuary legatee was named in the will as executor. Had James B. Kitchen declined the appointment as executor, and Ralph Kitchen been designated by the county court to execute the will, it would do violence to the provision of the will last above quoted to say that the said Ralph Kitchen as executor was required out of the residuum to pay said mortgage. The fact that the residuary legatee and executor is one and the same person is no valid reason for placing a construction on the will different from that which would obtain if the executor were not the residuary legatee. It is manifest that the testator had the utmost confidence in the integrity of his brother James B. Kitchen, inasmuch as the latter was named in the will as the executor, with the express stipulation that no bond should be required of him as such. And it is believed that the same confidence prompted the testator to give the residuum of his estate to James B. Kitchen and authorized and required him out of the same to discharge the indebtedness of the Kitchen Brothers Hotel Company. There is no provision in the will which

makes it the duty of the executor to see that the residuary legatee discharged the mortgage in question before the residue of the estate is turned over to him. On the contrary, it is very evident that such was not the intention of the testator. James B. Kitchen, by the residuary clause of the will, was required out of the residue of the estate to pay the mortgage. He could not pay it out of the residue of the estate before the same had come into his hands. Manifestly this is so. And there could be no residuum ascertained until all the legatees, other than the residuary legatee, had received their portions of the estate, especially in case the executor paid in cash, and until the costs and expenses of executing the trust had been met. This is too clear to require discussion; and it logically follows that the executor, at any time within the three years designated in the will, was authorized to pay each specific bequest in stock without having first satisfied the mortgage in question.

Another argument of counsel for appellants is that the time of the payment of the mortgage having been extended ten years, the executor was thereafter powerless to pay the legatees in stock, and by such extension he became obligated to pay the bequests in cash. Counsel for the executor, in reply to this contention, suggest that the extension of the mortgage debt was not obtained by James B. Kitchen, but by the directors of the Kitchen Brothers Hotel Company. It is true it was their act, but they were moved to do so by the insistence of James B. Kitchen. Doubtless, it was the intention of the testator that the residuary legatee should pay off this mortgage at its maturity, but neither his failure so to do nor the extension of the time for the payment of mortgage debt deprived the executor of the right to pay the bequests in the shares of stock owned by the testator in lieu of money, because it was not the duty of James B. Kitchen as executor to pay the mortgage, nor did he as executor obtain the extension. If the appellants suffered loss by such extension or by the omission to

pay the mortgage at its maturity, the courts are open to afford them relief, but those matters are not sufficient causes to prevent the settlement of the estate and the discharge of the executor.

It is urged that James B. Kitchen having accepted the residue is personally liable for the mortgage debt. There is no room to doubt that the 137 shares of stock received by him as residuary legatee is charged with the payment of the mortgage, but whether by accepting the devise he became individually bound to satisfy the mortgage, principal and interest, we are not called upon to decide, since if the contention of appellants on this point is well founded, it would not prevent a discharge of the executor. They could enforce the payment of the mortgage by a suit in equity against the stock or by an action at law against the residuary legatee upon the implied promise to pay it, if such a promise can be implied from the acceptance of the residue of the estate.

We quite agree with counsel that the executor could not properly be discharged until the trust has been fully executed. The debts of the estate of Richard Kitchen and the expenses of administration have been paid. All specific legacies have been paid, except certain bequests to minors, for whom at the time of the discharge of the executor no guardian has been appointed. The residue of the estate has been turned over to James B. Kitchen as residuary legatee. The mortgage of the Kitchen Brothers Hotel Company was not a debt of the deceased, nor one, as we have already shown, which it was the duty of the executor to pay. The will had been fully executed, so far as it was within the power of the executor to discharge the trust, save and except the legatees who were minors have not been paid their bequest, and a discharge of the executor should not have been made until they were paid. But these appellants were not prejudiced by the order of discharge, and it is elementary that one cannot appeal from a decision, however erroneous, which does not affect his substantial rights. (*Burlington*

& M. R. R. Co. v. Martin, 47 Neb. 56.) A judgment of affirmance will be entered.

AFFIRMED.

IRVINE, C., not sitting.

NATIONAL MASONIC ACCIDENT ASSOCIATION V. GEORGE F. BURR.

FILED JANUARY 19, 1899. No. 8647.

1. **Letters:** PRESUMPTION OF DELIVERY. A letter duly addressed, stamped, and mailed is presumed to have reached the addressee in the usual course of the mails.
2. ———: ———: EVIDENCE. This presumption is not conclusive, but may be overcome by proper evidence showing that the sendee did not receive the letter.
3. ———: DELIVERY: QUESTION OF FACT. Whether a letter mailed, with the postage thereon prepaid, reached its destination in the usual course of the mails is a question of fact to be determined from all the evidence adduced.
4. **Conflicting Evidence:** REVIEW. A finding and judgment based upon conflicting evidence will not be disturbed on review unless manifestly wrong.
5. **Assignment of Error:** MOTION FOR NEW TRIAL. An assignment in a petition in error that there was error in overruling the motion for a new trial is unavailing where such motion is based on more than one ground.
6. **Trial to Court:** ERRONEOUS ADMISSION OF EVIDENCE: REVIEW. A judgment will not be reversed merely for the admission of incompetent or irrelevant evidence in a cause tried to a court without a jury.
7. **Costs in Appellate Court:** COSTS BELOW. Where, in an error proceeding, a judgment of reversal is entered in this court, the plaintiff in error is entitled to recover his costs made in said court from the defeated party. Those which accrued in the district court abide the final determination of the cause.

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

Merton Meeker and *O. B. Ayres*, for plaintiff in error.

F. C. Power and *George B. France*, *contra*.

NORVAL, J.

This is the second appearance of the case before the court. The judgment of the district court therein was reversed on the former hearing. (*National Masonic Accident Ass'n v. Burr*, 44 Neb. 256.) On a new trial in the court below the plaintiff again obtained a judgment, which the defendant by this proceeding seeks to reverse. A full statement of the facts need not be now given, as they may be found in the former report of the case. Suffice it to say that the action was upon a certificate of membership issued by the defendant association to Burr, indemnifying him against damage resulting from accidents. The defense interposed was that the certificate was not in force at the time the injury was received, for the reason plaintiff was then in default in the payment of a certain assessment of $3 due and payable in accordance with the terms of the certificate and the by-laws of the association. The by-laws provided, substantially, that it was the duty of each member, on the receipt of notice of an assessment, to pay the amount thereof on or before the time of maturity to the secretary of the association at his office in Des Moines, Iowa, and in the event of the failure so to do the certificate should cease to be of any force until revived by payment thereof. The association made an assessment of $3 upon each member, maturing April 1, 1891, of which fact Burr was duly notified. He received the injury which is the basis of the action not earlier than noon on the 27th day of said month. Plaintiff asserted on the former trial in the court below, and introduced evidence therein conducing to show, that the assessment was duly paid prior to the accident, while the association introduced evidence to establish that the amount was not received by it until subsequent to the

injury. It was the failure to submit this disputed issue to the jury which wrought the reversal of the first judgment. On the retrial evidence was introduced by the respective parties covering this question, and the finding of the court thereon is now assailed as being unsupported by the evidence. In fact this is the principal ground relied upon by counsel for defendant below for securing a reversal. Burr testified positively that he remitted the amount of his assessment by check inclosed in a letter properly addressed to the secretary of the association, with the postage thereon prepaid, and deposited in the post office at York on April 25, the Saturday preceding the injury, and he is to some extent corroborated by the testimony of Dr. J. B. Conway and John Huffman, who stated under oath that they were present on that date and saw Mr. Burr prepare the remittance in question. That the check was subsequently received by Mr. Wingate, the secretary of the association, and accepted by him as payment, is an admitted fact; but the testimony of Mr. Wingate and Miss Ella Frame is relied upon to show, and each so testified, that it was not received at the office of the defendant in Des Moines before the morning of April 29, which was subsequent to the accident. Not only by the testimony of disinterested witnesses, but by admissions contained in letters written by the secretary of the asssociation, it was established beyond controversy that a letter deposited in the post office at York, this state, on a Saturday evening, or a Sunday morning, properly addressed to a person in Des Moines, Iowa, would, by the usual and ordinary course of mail, reach its destination on the same Sunday evening or not later than the following Monday morning at 8:30. The rule is that a letter addressed, stamped, and mailed is presumed to have reached the addressee in the usual course of the mails. (*Melby v. Osborne*, 33 Minn. 492; *McDermott v. Jackson*, 72 N. W. Rep. [Wis.] 375; *Perry v. German-American Bank*, 53 Neb. 89; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446; *Stockton Combined Harvester & Agricultural*

Works v. Houser, 109 Cal. 1; *Ripley Nat. Bank v. Latimer*, 64 Mo. App. 321; *Gaar v. Stark*, 36 S. W. Rep. [Tenn.] 149; *East Texas Fire Ins. Co. v. Perky*, 35 S. W. Rep. [Tex.] 1050.) This presumption, however, is not conclusive, but may be overthrown by proper evidence showing that the sendee did not so receive the letter. It is argued that the proofs adduced upon behalf of the defendant were ample to rebut the *prima facie* case made out by the plaintiff. We cannot so determine as a matter of law. It was a question of fact for the trial court to decide whether Burr's remittance arrived at the office of the secretary of the association in time to revive or reinstate the certificate prior to the happening of the injury. It has been held that testimony positively denying the receipt of a written demand shown to have been properly mailed, stamped, and addressed does not overcome the presumption of law that it was received, but presents a question of fact for the jury. (*Moran v. Abbott*, 50 N. Y. Supp. 337. See *London Assurance Corporation v. Russell*, 1 Pa. Super. Ct. 320; *Kingsland v. Newman*, 36 N. Y. Supp. 960; *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149.) The trial court was justified in holding that Burr's assessment was remitted to, and received by, the defendant prior to the injury. It is true Wingate and Miss Frame testified positively that the letter inclosing the check did not reach Des Moines until April 29, yet plaintiff introduced in evidence a receipt signed by this same Wingate, bearing date April 28, acknowledging the payment of the assessment in question, and there was likewise introduced a letter written by Wingate to Burr under date of December 30, 1891, in which it was stated with reference to the payment of said assessment: "Your check was received at this office on the morning of April 28." These statements do not harmonize with the testimony given by Wingate when upon the witness stand, and it was for the trial judge to determine from a consideration of the entire evidence whether the explanation given by him and Miss Frame relating to said

matter was reasonable, and whether they had or had not truthfully testified. If the court regarded their testimony as unreliable, which evidently it did, then the plaintiff was entitled to recover. A finding for either party would not be without evidence to support it. A judgment based upon conflicting evidence will not be set aside as lacking support in the proofs solely because the reviewing court might have reached a different conclusion. (*Central Neb. Nat. Bank v. Cline*, 51 Neb. 63; *McGinnis v. Kyd*, 51 Neb. 282; *Hamer v. McKinley*, 51 Neb. 496; *South Park Improvement Co. v. Baker*, 51 Neb. 392.)

The assignment in the petition in error that the court erred in overruling the motion for a new trial is unavailing, since said motion was based upon ten distinct grounds. (*Glaze v. Parcel*, 40 Neb. 732; *Stein v. Vannice*, 44 Neb. 132; *Wax v. State*, 43 Neb. 19; *McCord Brady Co. v. Hamel*, 52 Neb. 286.)

Error is assigned for the overruling of defendant's objection to questions propounded by plaintiff to the witness Conway. This assignment is not well taken, for the reason that the cause was tried to the court without the assistance of a jury. (*Sharmer v. McIntosh*, 43 Neb. 509; *Stabler v. Gund*, 35 Neb. 648; *Whipple v. Fowler*, 41 Neb. 675; *Tolerton v. McClure*, 45 Neb. 368; *Stover v. Hough*, 47 Neb. 789.)

The defendants filed a motion in the court below to tax against plaintiff all the costs made therein on the first trial, on the ground that the judgment had been reversed by this court, which motion was denied, and the ruling thereon is presented for review. No statute or decision is cited to show that the ruling was erroneous. Section 595 of the Code of Civil Procedure declares: "When a judgment or final order is reversed, the plaintiff in error shall recover his costs, and when reversed in part, and affirmed in part, costs shall be equally divided between the parties." Section 620 of the same Code provides as follows: "Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the

plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property." Under the last section quoted, were it not for the provisions of section 595, plaintiff below would be entitled to his costs in the case in both courts. But the two sections must be considered together, and when thus construed, it is obvious that the association should recover its costs made in this court on the former hearing. (*Republican Valley R. Co. v. Fink*, 28 Neb. 397.) But it was not entitled to costs which accrued in the district court prior to the rendition herein of the judgment of reversal. The association was awarded its costs made on the first hearing in this court, while plaintiff's costs in the court below were properly taxed against the defendant. No reversible error appearing on the record the judgment is

AFFIRMED.

ATLEE HART V. GUS WEBER ET AL.

FILED JANUARY 19, 1899. NO. 8659.

1. **Assignments of Error.** An assignment in a petition in error, "errors of law occurring at the trial," presents nothing for review.
2. ———: NEW TRIAL. An assignment in a petition in error that there was error in overruling the motion for a new trial is too indefinite for consideration where such motion is based upon several different grounds.
3. **Conflicting Evidence:** REVIEW. A verdict based upon conflicting evidence will not be disturbed on review, unless clearly wrong.
4. **Errors in Verdict:** REVIEW. Alleged error in the verdict will not be considered on review when not raised either in the motion for a new trial or petition in error.

ERROR from the district court of Dakota county. Tried below before KEYSOR, J. *Affirmed.*

Jay & Welty, for plaintiff in error.

Lohr, Gardiner & Lohr and *William P. Warner, contra.*

NORVAL, J.

Atlee Hart instituted an action of replevin to obtain possession of 125 bushels of corn and 75 bushels of oats. The jury found the right of property and the right of possession in the defendants. Plaintiff has prosecuted error from the judgment entered thereon, alleging in the petition in error: (1) the verdict is not sustained by sufficient evidence; (2) verdict is contrary to law; (3) errors of law occurring at the trial; (4) the court erred in overruling the motion for a new trial.

The third assignment above set forth is insufficient to present any question for review by this court. (*Murphy v. Gould*, 40 Neb. 728; *Houston v. City of Omaha*, 44 Neb. 63; *Mullen v. Morris*, 43 Neb. 596; *Wanzer v. State*, 41 Neb. 238; *Imhoff v. Richards*, 48 Neb. 590; *Boyd v. Mains*, 52 Neb. 314; *McCord v. Hamel*, 52 Neb. 286.)

The fourth assignment is too indefinite for consideration, since the motion for a new trial presented several different grounds therefor. (*Glaze v. Parcel*, 40 Neb. 732; *Stein v. Vannice*, 44 Neb. 132; *Sigler v. McConnell*, 45 Neb. 598; *Conger v. Dodd*, 45 Neb. 36; *Wax v. State*, 43 Neb. 19; *McCord v. Hamel*, 52 Neb. 286.)

It is not insisted here that the verdict is contrary to law, but it is argued that the evidence is insufficient to sustain the verdict. Plaintiff claimed the possession of the property by virtue of a chattel mortgage given by the defendants on "40 acres of wheat, * * 60 acres of corn, * * situated on S. W. N. E. and W. ½ S. E. and S. E. S. W. sec. 31, twp. 28, range 1," to secure the payment of two promissory notes,—one for $200 and the other in the sum of $225. The defendants insist that both notes have been paid in full. A perusal of the evidence preserved in the bill of exceptions satisfies us that the same supports the finding of the jury for two reasons: In the first place there is not a scintilla of evidence to show that the property replevied is embraced in plaintiff's mortgage. Mr. Hart, the plaintiff, was his only witness,

and when interrogated by his counsel upon that subject he frankly stated that he did not know whether the grain seized by the writ of replevin was the same as covered by his mortgage. Again, the evidence introduced by the defendants, if true, established that the mortgage debt had been paid in full prior to the commencement of the action. Plaintiff admits that the $200 note had been paid, but he asserts, and his evidence tended to prove, that a balance remained unpaid on the second note. The evidence on the subject of payment was conflicting, and the jury having determined that issue for the defendant upon sufficient proof the verdict will not be molested.

It is finally insisted that the judgment should be reversed, because the verdict contains no assessment of damages. As this question is not raised in the motion for a new trial, nor in the petition in error, the objection will be dismissed without further comment. (*Frey v. Drahos*, 7 Neb. 194.)

The conclusion reached leads to an affirmance of the judgment.

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. GEORGE ENGLEHART.

FILED JANUARY 19, 1899. NO. 8667.

1. **Eminent Domain**: RIGHT OF WAY: PUBLIC LANDS: DAMAGES. No provision of the constitution makes compensation for the easement a precedent condition to the right of the state to permit a railroad company to construct and operate a line of road over the saline or other public lands.

2. ———: ———: ———. Whether it is within the competency of the legislature to donate to a railroad company a right of way over the saline or other lands under the control of the state, *quære*.

3. ———: ———: EJECTMENT. The owner cannot maintain ejectment for land upon which a corporation has, with his prior assent or subsequent acquiescence, constructed and put in operation

a railroad used by it in its business as a common carrier of freight or passengers.

4. ———: ———: RAILROADS: COMPENSATION. A railroad constructed upon land with the permission or acquiescence of the owner becomes a permanent structure, and the resulting right to compensation is a mere personal claim which will not pass to a purchaser of the land, except under the terms of an express grant.

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

J. W. Deweese and *F. E. Bishop*, for plaintiff in error.

Frank A. Boehmer and *N. Rummons, contra.*

SULLIVAN, J.

This was an action of ejectment brought by George Englehart against the Chicago, Burlington & Quincy Railroad Company. The real estate in dispute is a strip 200 feet wide extending across forty acres of the saline lands in Lancaster county. Continuously since 1879 this property has been occupied and used by the defendant and its predecessors in right as a roadway for their trains.

The plaintiff's claim to possession is based on a contract of purchase of the forty acres aforesaid obtained from the state in 1894. Section 105 of chapter 16, Compiled Statutes 1897, declares: "Any railroad corporation shall be authorized to pass over, occupy, and enjoy any of the school, university, saline, or other lands of this state." By the same section the right of way is limited to a width of 100 feet on either side of the center of the track, and it is provided that upon filing with the secretary of state, and with the county clerk of the county in which the land is situated, a duly certified and acknowledged plat of the line of the road, any such corporation may enter upon the lands selected and construct its roadway. For two years from the filing of such plat the railroad company is given a vested right in the land

selected, surveyed, and platted, and is entitled to receive from the state a patent therefor upon making proof to the satisfaction of the governor that its road has been completed. It is further provided that "no subsequent grant from the state to any other person or corporation of any tract of land including such right of way * * * so platted, and the plat thereof filed as aforesaid, though not excepted in such grant, shall divest said railroad corporation of their rights in the same under this act." The defendant's road was constructed and in operation nearly a year before the plat contemplated by the statute was filed with the secretary of state, or with the county clerk of Lancaster county. No patent has ever been obtained. Plaintiff contends that the original entry upon the land was unlawful and that the company's occupancy of the property is that of a mere trespasser. The obvious purpose of the legislature was to encourage railroad building by donating necessary easements over the public lands. The state might insist on a strict compliance with the methods prescribed for the acquisition of a right of way, or it might waive them. In this case they were waived. The substantial thing upon which the right to a free easement depended was the construction of the road. The other formalities appointed by the legislature were technical, non-essential, and concerned only the corporation and the state. The company and its predecessors were in undisputed occupancy of the property for more than fourteen years before the plaintiff obtained his contract of purchase. He had actual and constructive notice of the defendant's rights. The state has never questioned, and does not now deny, the lawfulness of defendant's possession. It has, for nearly twenty years, affirmed the company's ownership by receiving taxes charged against the property as part of the Burlington system in this state. The plaintiff cannot now predicate a substantial claim upon the state's waiver of a technical right.

The doctrine is now settled by overwhelming authority

that the owner cannot maintain ejectment for land upon which a corporation has, with his prior assent or subsequent acquiescence, constructed and put in operation a railroad used by it in its business as a common carrier of freight or passengers. Public policy forbids the dismemberment of the road, and restricts the landowner to the remedy provided by the statute for the assessment of his damages. Discussing a question quite similar to the one here under consideration Mr. Justice Shiras, in *Roberts v. Northern P. R. Co.*, 158 U. S. 1, said: "The conclusion, therefore, seems warranted that, as to those portions of the lands in question which are occupied and used by the railroad company, the county, having stood by for years and permitted the company to proceed in the construction of its road and appurtenances at a vast expense, and having accepted large sums as taxes, would be estopped from interfering with the possession of the railroad company." In the same opinion the author says: "It has frequently been held that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, * * * remains inactive and permits it to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein." The same principle is declared in 7 Ency. Pl. & Pr. 703, in the following language: "If the landowner, with knowledge of the facts, expressly or impliedly consents to the otherwise unauthorized entry upon and occupation of his land, or acquiesces therein, or stands by and fails to object to or forbid such entry and occupation, until the railroad is in operation, and public interests are involved, and large amounts of money have been expended, he will be estopped from maintaining ejectment for the land." From an examination of a large number of the authorities cited we are fully satisfied that the text-writer quoted accurately reflects the decisions of the courts. The reason for the

rule, to the extent that it rests upon considerations of public policy, is well and forcibly stated in a comparatively recent utterance of the supreme court of Indiana. Elliot, J., delivering the opinion in *Indiana B. & W. R. Co. v. Allen*, 113 Ind. 581, said: "Vast interests are often involved in the maintenance of railroads. They are charged with a public service, and a public character is so strongly impressed upon them that courts exercise a control over them much beyond that assumed over individual citizens. They are recognized as instruments of interstate commerce, and, as such, are within the control of the federal congress. * * * They may exercise rights under the power of eminent domain, because of their public character. Towns spring into existence along their lines. Factories, elevators, and warehouses are built upon them. The mails of the nation are carried by them. They are common carriers of freight and passengers. All these interests, and more, combine in demanding that a citizen who has stood by until after the completion of a line of road has involved public interests shall not be allowed to sever the line, and destroy its efficiency, by wresting possession of part of it from the company. The case does not stand upon the ordinary doctrine of estoppel. The great principle of public policy enters as an important factor and controls the judgment of the court." Among the numerous cases sustaining the conclusion reached that ejectment cannot be maintained we cite: *Taylor v. Chicago, M. & St. P. R. Co.*, 63 Wis. 327; *Kittell v. Missisquoi R. Co.*, 56 Vt. 109; *South & N. A. R. Co. v. Alabama & G. S. R. Co.*, 102 Ala. 236; *Scarritt v. Kansas City & S. R. Co.*, 127 Mo. 298; *Louisville, N. A. & C. R. Co. v. Beck*, 119 Ind. 124.

There is another reason why plaintiff cannot succeed in this case, nor in any other form of action. At the time he obtained his contract of purchase the railroad was being operated and was a permanent structure. If the state had any claim against the company, it was a claim for compensation. The easement was gone. The land

was damaged, and any right to compensation resulting from the injury accrued as a personal claim to the owner of the fee. Such claim, irrespective of the statute above quoted, would not pass to a purchaser except under the terms of an express grant. (*McFadden v. Johnson*, 72 Pa. St. 335; *Schuylkill & Susquehanna Navigation Co. v. Decker*, 2 Watts [Pa.] 343; 2 Wood, Railroads 994; *Roberts v. Northern P. R. Co., supra.*) In the last mentioned case the rule is stated as follows: "It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession."

Considerable space is devoted in the briefs of counsel to a discussion of the constitutional inhibition against donations of the public lands to railroad companies, private corporations, or individuals; but, for the purposes of this case, it is unnecessary to decide whether the grant of a free right of way is within the scope and purpose of the provision, and so forbidden. The right of the state to permit a railroad company to go upon its lands and construct and operate a line of road thereon cannot be seriously questioned. It is possible that the right to compensation for such privilege cannot be waived or abandoned, but if it cannot, then the state may enforce such right whenever it chooses to do so. But, certainly, one purchasing from the state a portion of the public land incumbered with a railroad is not commissioned to act in its behalf, nor substituted to its right. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

WILLIAM TACKABERRY & COMPANY ET AL. V. GILMORE & RUHL ET AL.

FILED JANUARY 19, 1899. No. 8605.

1. **Fraudulent Conveyances:** INSOLVENCY: PREFERRING CREDITORS. The right of a debtor in failing circumstances to prefer some of his creditors is subject only to the limitation that the transaction resulting in the preference must be an honest one, and not designed to hinder, delay, or defraud other creditors.

2. ———: INTENT. The character of a transaction by which a creditor obtains security from an insolvent debtor depends upon the motives of the parties thereto.

3. ———: ———: EVIDENCE. Fraudulent intent is not deduced, in such case, as an indisputable presumption from the taking of excessive security. The question is one of fact, and mere disparity between the value of the security and the debt secured is a circumstance to be considered by the court or jury and given such weight as it may deserve.

4. **Replevin:** ISSUES: EVIDENCE. In actions of replevin the vital question for decision is the right of possession of the property in dispute at the time the action was commenced; and, ordinarily, the issue is to be determined on the facts as they existed when the suit was instituted.

5. **Chattel Mortgage:** LIEN: FORECLOSURE. The lien of a chattel mortgage is not divested, nor the mortgagee's right of possession impaired, by any mere irregularity in the manner of conducting the foreclosure sale.

6. **Replevin:** AMENDMENT OF PETITION: REFEREE. A petition in an action of replevin may be amended by alleging a special instead of a general ownership of the property in litigation. Such an amendment may be permitted by a referee to whom the case is, by consent, referred with power to pass upon all questions of law and fact involved in the action.

7. ———: AMENDMENT OF AFFIDAVIT. The replevin affidavit may be amended to conform to the allegation of ownership contained in the petition. Such amendment may be allowed by the court while the issues formed by the pleadings are being tried before a referee.

ERROR from the district court of Dakota county. Tried below before NORRIS, J. *Affirmed.*

W. E. Gantt, for plaintiffs in error.

John T. Spencer, George Conway, and *Jay & Welty, contra.*

SULLIVAN, J.

On November 22, 1892, Joseph Smith, a retail merchant of Dakota county, made and delivered to Gilmore & Ruhl a chattel mortgage on his entire stock of merchandise to secure an antecedent indebtedness amounting to $1,150. Afterwards, on the same day, he executed other mortgages covering the same property, one being to the Homer State Bank to secure a claim of $100, one to Arthur Sherlock for $250, and one to S. A. Combs for $275. On the following day another mortgage was given by Smith to H. A. Jandt to secure a pre-existing indebtedness amounting to $1,525. These several mortgages were filed in the office of the county clerk of the proper county, and the mortgagees, by John E. Kavanaugh, their duly constituted representative, took immediate possession of the mortgaged property and, pursuant to an agreement with the mortgagor, proceeded to sell the same at private sale. Each mortgage, except the one to Gilmore & Ruhl, was, in express terms, subject to prior liens. On November 25, 1892, the whole of the property in possession of Kavanaugh, as agent of the mortgagees, was seized by W. H. Ryan, as sheriff of said county, under an order of attachment issued in an action brought by William Tackaberry & Co. against Smith in the district court. Gilmore & Ruhl thereupon commenced this action of replevin and, under an order of delivery issued therein, again obtained possession of the mortgaged property. The subsequent mortgagees became parties to the suit by intervention. By agreement between the litigants the cause was tried to a referee, upon whose findings judgment was rendered against the defendants. The petition in error contains thirty-four assignments, but we will notice only those relied on in the brief of counsel for defendants.

The first contention is that the disproportion between the amount of plaintiffs' claim and the value of the property covered by their mortgage is so great as to render the mortgage fraudulent and void. According to the finding of the referee, which is amply sustained by the evidence, the value of Smith's stock of merchandise on November 22 was $2,370.15, or about twice the amount of plaintiffs' claim. This disparity between the security and the debt secured was not of itself sufficient to invalidate the mortgage. The right of a debtor in failing circumstances to pay or secure some of his creditors to the exclusion and prejudice of others cannot be doubted. The right is, of course, subject to the limitation that the transaction must be an honest one, and not designed to hinder, delay, or defraud other creditors. The motive of the parties is in all such cases the controlling consideration. Fraudulent intent does not result as an indisputable presumption from the taking of excessive security. It is a conclusion of fact to be deduced from the evidence given on the trial. Section 20, chapter 32, Compiled Statutes 1897, declares: "The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law." In the case of *Kilpatrick-Koch Dry Goods Co. v. McPheeley*, 37 Neb. 800, it was said: "We are not prepared to say that a mortgage would be fraudulent solely because the value of the property mortgaged was two, or even three, times greater than the debt. Whether it would be, would be a question of fact for the jury or trial court." Other cases in which it was held that excessive security is not conclusive evidence of fraud, but only a circumstance to be considered for what it may be worth by the trier of fact, are: *Sherwin v. Gaghagen*, 39 Neb. 238; *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb. 863; *Grand Island Banking Co. v. Costello*, 45 Neb. 119; *Kilpatrick-Koch Dry Goods Co. v. Strauss*, 45 Neb. 793. As it is not claimed that there was any evidence of fraud other than the fact of excessive security, we think

the referee was clearly right in his conclusion that the mortgage to Gilmore & Ruhl was a valid instrument.

It is next insisted that all the proceedings in the foreclosure of the mortgages were void for want of conformity with the provision of the statute requiring a notice of the sale to be published or posted for a period of twenty days. We neither perceive the relevancy of this proposition nor concede its soundness. It must be remembered that this was an action of replevin. The main question to be decided—the question to which all others were subordinate and incidental—was the right of possession of the property at the time the action was commenced. That issue was to be determined on the facts as they existed at the beginning of the suit. (*Gillespie v. Brown*, 16 Neb. 457; *Kay v. Noll*, 20 Neb. 380; *Fischer v. Burchall*, 27 Neb. 245; *Kilpatrick-Koch Dry Goods Co. v. Strauss, supra.*) The mortgages being valid, they vested in the plaintiffs and interveners a right of possession which could not be lost by any mere irregularity in the manner of conducting the sale. Besides, the defendants, having no lien on the property at the time the agreement was made to waive the statutory notice of sale, are not in a position to question the validity and effectiveness of that agreement. As general creditors of Smith they could not assert a right in the property which he had previously, and in good faith, surrendered to other creditors.

Another complaint of the defendants is based on the action of the referee in permitting the plaintiffs to amend their petition by alleging a special instead of a general ownership of the property. That such an amendment was proper is settled by the cases of *Swain v. Savage*, 55 Neb. 687, and *Weich v. Milliken*, 57 Neb. 86; and that the referee had power to authorize it appears from the fact shown by the record that he was, with defendants' consent, "empowered to pass upon the questions of fact and of law, and to pass upon all questions involved in said case the same as though said case was tried by the court."

A final objection to the judgment is grounded on the fact that the court permitted an amendment of the affidavit in replevin while the cause was pending before the referee. The first report of the referee was not confirmed, and a second reference was ordered to try the issues presented by the pleadings then on file. Afterwards the court permitted an amendment of the affidavit to conform to the allegation of ownership contained in the amended petition. The propriety of the amendment cannot be doubted, and neither can there be any serious question touching the authority of the court to permit it to be made. The referee under the second order of reference was only given power to determine the issues presented by the pleadings. He had nothing to do with the affidavit, and it did not concern him whether one had ever been filed. The case was before the court for all purposes not included in the order of reference. It had, therefore, the right to grant leave to amend the affidavit. How the amendment operated against defendants has not been suggested by counsel, and does not, upon reflection, occur to us. The case was tried upon the averments of the petition and not upon those of the affidavit. The judgment is

AFFIRMED.

FIRST NATIONAL BANK OF CRETE V. BENJAMIN A. SMITH.

FILED JANUARY 19, 1899. No. 8618.

Review: AFFIRMANCE. Where the conclusion reached by the jury was the only one permissible under the evidence, the judgment rendered on the verdict will be affirmed.

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

F. I. Foss and *W. R. Matson*, for plaintiff in error.

E. S. Abbott, contra.

SULLIVAN, J.

This action was brought by Benjamin A. Smith in the district court of Saline county to recover of the plaintiff in error the penalty imposed by the federal statute upon national banks for charging and receiving for the loan of money interest in excess of the authorized contract rate. The law of the case was settled in a former opinion reversing a judgment in favor of the bank. (*Smith v. First Nat. Bank of Crete*, 42 Neb. 687.) On a second trial of the cause the jury found specially that the plaintiff had paid the defendant illegal interest in the sum of $486.64, and returned a verdict for double that amount. A motion for a new trial was overruled and judgment rendered in favor of Smith for $973.28.

We will not specifically notice the several errors upon which a reversal is claimed. That the special finding of the jury is correct, and that the usurious transactions in question occurred within two years before the commencement of the action, is shown by the undisputed testimony of Mr. Denison, the cashier of the bank. No other conclusion than the one reached by the jury was, under the evidence, permissible. The judgment is

AFFIRMED.

JACOB J. WELLER V. PETER NOFFSINGER ET AL.

FILED JANUARY 19, 1899. No. 8622.

1. **Wills**: RIGHTS CONFERRED BY LAW: ELECTION. If the rights given by a will are inconsistent with those conferred by the law, the acceptance of the former is, by necessary implication, an abandonment of the latter.

2. ——: CONDITIONAL DEVISE: TRUSTS: TITLE OF EXECUTOR. A devise, subject to a condition that the executor shall hold the property in trust for a number of years and collect rents, pay taxes, charges, and expenses incident to the proper care of the estate, and account annually to the beneficiary for the balance, vests the legal title to the property in the executor.

3. ———: ———: ———: ALIENATION. In such case a condition that the devised property shall not be aliened or incumbered by the beneficiary, or liable for his debts, during the existence of the trust estate, is valid and enforceable.

ERROR from the district court of Richardson county. Tried below before STULL, J. *Affirmed.*

Reavis & Reavis, for plaintiff in error.

References: *Kelley v. Kelley*, 50 N. W. Rep. [Wis.] 334; *Roberts v. Executors*, 1 Disn. [O.] 180; *Allen v. Craft*, 109 Ind. 476; *Stivers v. Gardner*, 55 N. W. Rep. [Ia.] 516; *Van Osdell v. Champion*, 62 N. W. Rep. [Wis.] 539; *Jordan v. Woodin*, 61 N. W. Rep. [Ia.] 950; *Little v. Giles*, 25 Neb. 313; *Ingersoll's Appeal*, 86 Pa. St. 240; *Doebler's Appeal*, 64 Pa. St. 9; *Nichols v. Eaton*, 91 U. S. 716; *Page v. Way*, 3 Beav. [Eng.] 20; *Piercy v. Roberts*, 1 Mylne & K. [Eng.] 4; *Rippon v. Norton*, 2 Beav. [Eng.] 63; *Cropley v. Cooper*, 19 Wall. [U. S.] 167; *Hart's Trusts*, 3 De Gex & J. [Eng.] 202; *Hanson v. Graham*, 6 Ves. Jr. [Eng.] 239; *Hammond v. Maule*, 1 Coll. [Eng.] 281; *Burrill v. Sheil*, 2 Barb. [N. Y.] 471; *Bayard v. Atkins*, 10 Pa. St. 20; *Provenchere's Appeal*, 67 Pa. St. 463; *Hanson v. Brawner*, 2 Md. 102; *Nixon v. Robbins*, 24 Ala. 669; *Goodtitle v. Whitby*, 1 Bur. [Eng.] 234; *Boraston's Case*, 3 Coke Rep. [Eng.] 21; *Mandlebaum v. McDonell*, 29 Mich. 78.

F. Martin and *C. Gillespie, contra.*

SULLIVAN, J.

This was an action of ejectment by Jacob J. Weller against Peter Noffsinger and Robert Williamson. Both parties claim under the will of Calista Blakeney, deceased, which was admitted to probate in the county court of Richardson county in 1891. The plaintiff relies on a title derived from an execution sale of the interest of Daniel H. Blakeney and Frank L. Blakeney in the property in controversy. The defendant Williamson claims to hold the title to the property in trust, and the

other defendant is his tenant in possession. The rights of the litigants depend upon a construction of the will by which, in the first clause, the testatrix devised and bequeathed to her husband, Daniel H. Blakeney, and to her son, Frank L. Blakeney, all her real and personal property, subject to the following conditions: "I wish all my just debts and taxes to be paid. I wish, and it is my will, that Robert Williamson, of said Nemaha precinct, hold said property in trust, and as trustee for my said husband and my said son, until my son, the said Frank L. Blakeney, shall arrive at the age of thirty (30) years. And then the said property, all the real and personal property belonging to my said estate, shall be divided equally between my said husband, Daniel Blakeney, and my said son, Frank L. Blakeney, each to share equally and alike in the division of the same, and the same to be theirs, their heirs and assigns, forever. In the interval of time intervening between my death and the date when my said son, Frank L. Blakeney, shall reach the age of thirty (30) years, as above, it is my will that the said trustees shall collect the rents, issues, and profits of my said estate and divide the sum remaining, after paying all taxes, charges, and expenses incident to the proper care of said estate, equally between my said husband, Daniel Blakeney, and my said son, Frank L. Blakeney. But neither my husband nor son shall be permitted or allowed to further incumber said estate, or put any charge or lien upon the said estate during said interval of time that shall intervene between my death and the period when my son Frank shall reach the age of thirty (30) years, as aforesaid. Nor shall said estate be subject to any debts contracted by either my said husband or son, other than the said balance in the hands of said trustee after paying said charges and expenses, taxes, etc." The will also declares that the testatrix intended thereby "to put said property in trust as above" until her son should reach the age of thirty years, at which time it is provided the entire estate "shall be

and vest" in the husband and son and be divided equally between them.

The first proposition for which plaintiff contends is that, as purchaser at the execution sale, he acquired the title of Daniel Blakeney, as tenant by the curtesy, of the property in dispute. We do not think he did. By a written indorsement on the will Daniel H. Blakeney consented to its provisions, and by his subsequent conduct he very clearly renounced the rights secured to him by the statute. In *McBride's Estate*, 81 Pa. St. 305, it is held that the husband's right of curtesy is lost by joining in, or consenting to, a will made by his wife. And in *Tobias v. Ketchum*, 32 N. Y. 324, it was decided that if the rights given by the will are inconsistent with those conferred by the law, the acceptance of one is, by necessary implication, an abandonment of the other. While the provisions of the will in favor of Mr. Blakeney are not expressly declared to be in lieu of curtesy, yet there is such manifest repugnance between his testamentary and his statutory rights that both cannot possibly co-exist. By accepting the benefits of the will he elected to surrender his rights under the statute. To hold otherwise would defeat the obvious purpose of the testatrix in disposing of her property. The trust in favor of Williamson and an estate by curtesy in Blakeney could not stand together. To the claim that Blakeney could not release his estate by curtesy to the prejudice of creditors, it is only necessary to remark that the record before us does not disclose that he had any creditors at the time the release became effective.

The next contention, and the one upon which plaintiff mainly relies for a reversal of the judgment against him, is that the Blakeneys, the execution defendants, were invested with the legal title to the land in question, and that Williamson, as trustee, took nothing more than a right to collect the rents, pay taxes, make repairs, and account annually for any surplus remaining in his hands. To this proposition we cannot assent. It is true Mrs.

Blakeney did not, in express terms, grant the legal title to Williamson, but her intention that he should possess it is shown in the most unmistakable manner. "No rule of law is better settled, or more in accord with good sense, than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No particular words, no conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property. The court, without much regard to canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it." The devise to the husband and son is declared to be subject to the condition that Williamson shall "hold said property in trust and as trustee" until Frank shall reach the age of thirty years. The trustee is to collect the rents, pay the taxes, charges, and expenses incident to the proper care of the estate, and account for the balance. The trust is to continue until 1901, and then "vest absolutely." The declaration that the property is to vest absolutely at a fixed date denotes with moral certainty the intention of the testatrix that it should not so vest before that time, and is alone sufficient to warrant us in holding that the execution defendants never possessed the legal title to the land in controversy. But there is another imperative reason for the conclusion, and that is, that Williamson could not effectively discharge the duties imposed on him by the will without being invested with the legal title. In *Tobias v. Ketchum*, *supra*, it is said: "The authority to rent and lease, to repair, and to insure, by necessary implication, vests the trustees with the legal title. They must not only execute leases, but enforce them; put in tenants and dispossess them, the proper performance of which requires the title of the estate. So to repair there must be such a right of entry and control in the trustees as to give them complete dominion; and to insure involves the necessity of ownership, for the policy must be

taken in the name of the trustees." Speaking of cases in which the whole estate is apparently given to the beneficiary and there is no direct devise to the executors, Mr. Pomeroy, in his work on Equity Jurisprudence, says: "The doctrine is settled that, in dispositions of such a nature, although there is no devise in terms to them, the authority conferred by the will upon the executors to lease, rent, repair, insure, pay taxes, assessments, and interest, and otherwise manage the trust property, and to pay over the net income to the devisees or legatees, necessarily carries the legal title to the executors, and creates an express active trust in them. It is a familiar doctrine that where land is conveyed or devised to trustees, and they have active duties to perform, they take the legal estate. The converse is also generally true, that where active duties are prescribed for executors, which could not be performed unless the legal estate is vested in them, they are in fact made trustees and necessarily take the legal estate for the purposes of the trust." (2 Pomeroy, Equity Jurisprudence sec. 1011. See, also, *Brewster v. Stryker*, 2 N. Y. 19; *Leggett v. Perkins*, 2 N. Y. 297; *Meek v. Bliss*, 87 Ia. 610.)

But it is strenuously insisted in the brief filed for the plaintiff that, if the legal title vested in Williamson, the purpose of the devise, and of the inhibitions against alienation, being to keep creditors at bay, contravenes public policy and is absolutely null. Again we feel constrained to differ with the learned counsel. It has long been the settled doctrine of the English courts that one to whom real estate has been devised cannot enjoy its beneficial use freed from the claims of his creditors. But it is also a well established rule of the same courts that a devise of land in trust with a condition that the estate of the beneficiary shall be divested by an attempt to convey it, or an attempt by creditors to seize it for the satisfaction of their claims, is valid and will be enforced. The doctrine is grounded upon the idea that the right of alienation is a necessary incident of a freehold estate,

and that public policy forbids that one should enjoy even the fruits of a benefaction to the exclusion of his creditors. "A disposition to a man until he shall become bankrupt," says Lord Eldon, "and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it." (*Brandon v. Robinson*, 18 Ves. Jr. [Eng.] 433*.) It is accordingly held in England that the beneficial interest of the *cestui que trust* is liable for the payment of his debts, and that testamentary restrictions intended to secure to him the enjoyment of an estate with immunity from his creditors are ineffective. To this rule a considerable number of the American state courts are committed, and it is supported by a dictum of Mr. Justice Swayne in the case of *Nichols v. Levy*, 5 Wall. [U. S.] 433. It is clear, however, that the current of modern decisions in this country does not follow the English rule. The right of alienation is no longer regarded as an inseparable incident of a life estate, and the distinction pointed out by Lord Eldon is deemed a mere refinement which forbids by direct means the accomplishment of a purpose which is permitted by circuity and indirection. In Pennsylvania, Missouri, and Tennessee the rule has been distinctly repudiated, notwithstanding it had been either adopted or countenanced by earlier decisions in those states. And in the case of *Nichols v. Eaton*, 91 U. S. 716, Mr. Justice Miller delivering the opinion of the court said: "But the doctrine that the owner of the property, in the free exercise of his will in disposing of it cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court. * * * Nor do we see any reason in the recognized nature and tenure of property and its transfer by will why a testator, who gives without any

pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift during the life of the donee. Why a parent, or one who loves another and wishes to use his own property in securing the object of his affection as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence or incapacity for self-protection, should not be permitted to do so is not readily perceived." In *Shankland's Appeal*, 47 Pa. St. 113, it was held that a trust to collect rents and pay over the same to the son of the testatrix during the term of his life, without being subject to his debts, was an active trust; that the legal estate was vested in the trustee and that no act of the *cestui que trust*, or of his creditors, could deprive him of the income. Other decisions affirming the validity of trusts like the one here in question are: *Hyde v. Woods*, 94 U. S. 523; *Smith v. Towers*, 69 Md. 77; *Lampert v. Haydel*, 96 Mo. 439; *Barnett's Appeal*, 46 Pa. St. 392; *Broadway Nat. Bank v. Adams*, 133 Mass. 170; *Nickell v. Handly*, 10 Gratt. [Va.] 336; *Leavitt v. Beirne*, 21 Conn. 1; *Pope v. Elliott*, 8 B. Mon. [Ky.] 56; *Campbell v. Foster*, 35 N. Y. 361; *Jourolmon v. Massengill*, 86 Tenn. 81; *Barnes v. Dow*, 59 Vt. 530; *Thackara v. Mintzer*, 100 Pa. St. 151.

Our conclusions are that the devise to Williamson vested in him the legal title to the real estate described in the will; that the inhibitions against aliening and incumbering the property are effective; that the provision of the will excluding creditors neither trenches upon their legal rights nor infringes any principle of public policy; that the judgment under which plaintiff claims was not a lien on the land and that the sheriff's deed to him conveyed no title. The judgment of the district court is

AFFIRMED.

WILLIAM FELLERS V. SERENA PENROD.

FILED JANUARY 19, 1899. NO. 8662.

1. **Note:** WANT OF CONSIDERATION. Except as against a *bona fide* purchaser for value before maturity, want of consideration is a good defense to an action on a negotiable promissory note.
2. **Note of Decedent:** LIABILITY OF WIDOW. A widow does not become personally liable upon the note of her deceased husband by making a voluntary partial payment thereon.
3. **Conflicting Evidence:** REVIEW. A verdict rendered upon substantially conflicting evidence will not be disturbed.

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

E. A. Tucker, for plaintiff in error.

John B. Raper and *H. C. Lindsay, contra.*

SULLIVAN, J.

This action was brought by William Fellers against Serena Penrod in the county court of Pawnee county, and thence appealed to the district court, where, upon a trial to a jury, a verdict was returned and judgment rendered in favor of the defendant. By this proceeding in error Fellers brings the record here for review, alleging various reasons why the judgment should be reversed, but relying mainly on the proposition that the verdict is not supported by sufficient evidence. The purpose of the suit was to recover on two promissory notes executed by the defendant to the plaintiff. The answer alleged a want of consideration and that the notes were given to take up other notes executed by James Dobson, a former husband of the defendant. It appears from the evidence that James Dobson died in 1887, and that at the time of his death he was indebted to the plaintiff upon two promissory notes; that these notes were not filed as claims against the estate of the deceased; that the defendant

voluntarily made small payments upon them; that they were barred by the statute of limitations and could not be enforced as claims against the estate of Mr. Dobson at the time the notes in suit were given. It is perfectly clear that the partial payments made by the defendant upon the old notes would not be alone sufficient to render her liable to Fellers for the payment of the balance due thereon. And it is equally certain that such payments did not operate as an extension of the time for filing the notes as claims against the Dobson estate. Indeed, it seems to have been well understood by both parties that the old notes were not collectible out of the estate of the maker at the time the new notes were given. But it is contended that the plaintiff refrained from pursuing his remedy against the estate, in the county court, in consideration of the defendant's promise that if he would so refrain, she would herself assume the indebtedness and pay it. Defendant expressly denies that any such agreement was ever made, and thus is raised the only material issue of fact in the case. This issue was submitted to the jury upon conflicting evidence, and the jury having spoken the controversy is ended. The judgment is

AFFIRMED.

JAMES BARRY ET AL. V. STATE OF NEBRASKA, EX REL. RODOLPHUS M. HAMPTON, ET AL.

FILED JANUARY 19, 1899. NO. 10187.

Mandamus to County Board: SPECIAL ELECTION: COUNTY SEAT. An action of mandamus may be maintained to require a board of county commissioners to order a special election for the purpose of voting upon the removal of a county seat, if a proper petition for such election has been presented and the refusal of the prayer of the petition is the exercise of an arbitrary or capricious authority.

ERROR from the district court of Box Butte county. Tried below before WESTOVER, J. *Affirmed.*

Francis G. Hamer, *W. M. Iodence*, *Montgomery & Hall*, and *J. E. Porter*, for plaintiffs in error.

N. K. Griggs, *L. A. Berry*, and *R. C. Noleman*, *contra*.

RYAN, C.

By their petition in error two of the three county commissioners of Box Butte county complain of an order of mandamus of the district court of said county whereby the board of county commissioners of said county were required to convene on July 18, 1898, and call a special election to determine whether or not the county seat of said county should be relocated at Alliance. There are various errors alleged, but they all depend upon the force of the last, which is that the said court erred in assuming jurisdiction and in issuing the writ of mandamus.

On March 15, 1898, there was filed in the office of the county clerk of said county a petition asking for the submission above indicated. On this petition were 650 names, and in the petition itself these were described as the names of resident electors of said county, and, except in three instances, the purported place of residence of the petitioner was given. With this petition there was filed the certificate of the county clerk showing that at the November election, 1897, the total number of votes cast in said county was 932. On March 15, 1898, there was filed in the office of said clerk a written objection to the aforesaid petition, in which, in general terms, it was alleged that the petition was not signed by resident electors of said county equal in number to three-fifths of all the voters in said county at the last general election held therein; that the names of many persons appearing on said petition were not signed by said persons and their names were placed thereon without authority; that many petitioners were not electors of the county; that many purported signatures were fictitious; and that many signers were minors, and others disqualified

to vote or sign the petition. This written objection was signed by Alonzo Sherwood and forty-six other persons, and in it there was a prayer for at least sixty days to enable proof to be obtained of the objections urged and to permit of the filing of a definite answer and specific objections. There were objections to this delay. On April 11, 1898, Sherwood and Calvin J. Wildy interposed objections to the jurisdiction and authority of the board to proceed, in which objections were recited the former proceedings; the fact that no notice had been given; the further inability of said parties, by reason of lack of time, to thoroughly investigate the names of petitioners; the allowance of time till May 9, 1898, which the board had given and reciting that the order of the district court requiring the board to meet on April 11, 1898, had been made without notice to Sherwood and Wildy and without giving them an opportunity to be present in said court to contest the application for a writ of mandamus. Sherwood and Wildy also averred in their remonstrance that the said order of the district court was null and void and was without jurisdiction because no error or appeal proceedings had been prosecuted by the relator in said mandamus proceedings from the order of the board postponing the hearing of the petition till May, 1898, and because an appeal from the mandamus order was in course of prosecution to the supreme court, and because the then present sitting of the board was neither a regular nor a special session regularly called. This remonstrance was objected to by the petitioners because it sought to procure the board to violate the order of mandamus made by the district judge. Thereupon, by an affidavit of R. C. Noleman, one of counsel for petitioners, proof was tendered of his residence for more than ten years in the county, and that having examined the petition it was found to contain the names of more than 600 duly qualified electors of said county personally known to said affiant to be duly qualified. On April 12, 1898, there was filed in said county

clerk's office a remonstrance signed by about 500 persons. These parties simply expressed the disfavor with which they regarded the proposed removal of the county seat. On the same day Henry J. Winten and Frank Shimek filed an answer, as it was styled, in which they represented that the petition had not been signed by resident electors equal in number to three-fifths of the voters of the county cast at the preceding general election, and that a remonstrance of more than two-fifths in number had been filed; that some names to the petition had been obtained by bribery and fraud; that some were forgeries; that many who had signed the petition had signed the remonstrance; that many had failed to give their age, the place or duration of residence in the county; that many had signed more than once; that many petitioners were minors and not legal resident voters, and that many signatures were fictitious. There were filed objections to the sufficiency of this showing, followed by the written withdrawals of individual names from the petition. On April 14, 1898, the board of county commissioners convened, heard evidence, and on the next day two of the members of the board concurred in finding as follows: "On consideration of the petition, the answer thereto, and the remonstrance filed herein, and the evidence, the board of county commissioners find that thirty-five of the resident electors who signed said petition afterward signed a remonstrance objecting to the calling of a special election for the purpose of submitting the question of the relocation of the county seat to the voters of this county; that the names of two persons who signed said petition appear twice on said petition; that fifteen other persons who signed said petition and have not signed said remonstrance have entered lands outside of the county under the homestead laws of the United States and now claim their residence on said land; that six other persons who signed said petition have removed from Box Butte county since signing the same; that Christ Hornberg, whose name appears upon said peti-

tion, did not sign the same or authorize his name to be placed thereon; that 110 other persons who signed said petition are not resident electors of Box Butte county and were not when they signed said petition; and that said petition is not signed by resident electors of Box Butte county equal in number to three-fifths of the votes cast herein at the last general election." It was therefore ordered that the prayer of the petition be denied. George W. Duncan, a member of the board of commissioners of Box Butte county, filed what might aptly be styled his minority report or findings, on which he reached the conclusion that the prayer of the petition should have been granted. These were the facts shown by the petition for a mandamus in the district court, of which the transcript in this court covers about sixty-five type-written pages. Necessarily the above abstract of the facts is incomplete, but it shows with sufficient fullness the matters involved. The respondents by their answer asserted the correctness of the findings which had been made by them; assailed the sufficiency of the averments of the petition for a mandamus; denied that jurisdiction of the subject-matter of the action existed in the district court; alleged the pendency of error proceedings to review the order refusing to call a special election and denied the power and jurisdiction of the district court, by mandamus proceedings, to review alleged errors or control the judicial discretion of the board of county commissiones.

On the hearing on June 15, 1898, there were made the following findings: "The court, after hearing the evidence adduced by the respective parties, and being fully advised in the premises, does find that the allegations of the relator's petition are true. The court further finds that the petition presented to the county commissioners of Box Butte county, Nebraska, asking for the calling of the special election for the purpose of voting upon the relocation of the county seat of said county was in due form of law; that the same was signed by more than

three-fifths in number of the votes cast in the said county at the last preceding general election held in said county in November, 1897; that at said election there were cast in said county a total of 952 votes, and no more; that said petition, as presented to said board, contained the names of 638 qualified voters of Box Butte county who had signed the same; that the respondents, without authority of law and without any objection having been made to the said petition or any petitioner named thereon, in manner and form as required by law, did strike from said petition 169 names without any authority therefor." On the above findings the court adjudged that a writ of mandamus should issue to the county board of Box Butte county commanding the restoration of the names rejected from the petition and forthwith the calling of an election as prayed in the said petition. Afterward there was overruled a motion for a new trial, to which order there was due exception taken.

As intimated in the outset, the question which, in our opinion, is the pivotal one in this case is whether the court had jurisdiction to enter the order in this court assailed. In *State v. Crabtree*, 35 Neb. 106, a writ of mandamus issued to compel a board of county commissioners to call a special election for the relocation of a county seat upon a willful refusal to do so after the petition provided by law had been presented. It is urged that in that case the board withdrew its opposition and practically assented to the order, but this is not important, for consent could not confer jurisdiction beyond the powers of the court. In *State v. Smith*, 57 Neb. 41, jurisdiction of the subject-matter of an action is defined as the power to hear and determine the cause. That was an application for a mandamus to compel the respondent, as county clerk of Buffalo county, to print the official and sample ballots for the general election in November, 1898, without the names of J. M. Easterling and Emery Wyman as nominees of the democratic party for representatives of the fifty-eighth district in the legis-

lature. These candidates had not been nominated in a convention, but had been nominated by a managing committee in which the convention had vested the power to supply vacancies in the ticket which might occur after the convention had adjourned. The committee assumed to name the aforesaid candidates in a proper contingency, and the county clerk was about to print their names on the official and sample ballots. The writ of mandamus was asked to prevent this, and was granted on the theory that the members of the committee had not been legally notified to meet to consider the necessity of making the nominations which the county clerk was about to recognize. The reasoning in this case fully justifies the right of the district court to interfere as it did by mandamus in the case at bar. Again, in *Jackson v. State*, 57 Neb. 183, there was by this court recognized the right of a party to a writ of mandamus whereby an order of the faculty denying him the right to attend the State Normal School was held ineffective against the relator's son, and this was upon the theory that the order of exclusion was an arbitrary or capricious exercise of authority. In that case it was very zealously urged that to issue a writ of mandamus was to control judicial discretion and irregularly to review a decision of a board acting within the scope of its authority. This challenge called forth a full and satisfactory consideration of the objections urged, both in the light of principle and of authority. In the conclusion of his opinion HARRISON, C. J., said: "There was herein alleged the deprivation of a valuable right for which the damages could not be estimated with any accuracy or certainty, and for the wrong committed there was no adequate remedy at law. This record discloses no reason for the refusal to allow the relator's son to continue in the school as a pupil. A reason may have existed, but it was not shown. So far as this record discloses, there was an arbitrary exercise of power or authority on the part of the faculty, a rejection of the pupil because the parties willed it should

be so; no exercise of judgment or discretion in the matter, but a mere operation or putting into effect a desire." In view of the full consideration this question received in the cases just referred to it is unnecessary again to elaborate the views of this court upon the same subject. We think the district court was justified in finding from the evidence that the order of the board of county commissioners was an arbitrary or capricious exercise of authority. The writ of mandamus was therefore properly issued and the judgment of the district court is accordingly

AFFIRMED.

WILLIAM MCVEY V. STATE OF NEBRASKA.

FILED JANUARY 19, 1899. No. 10412.

1. **Information:** CRIMES. In an information the language, "then and there * * * did make an assault upon one William P. Wilcox with a certain pistol loaded with gunpowder and one leaden bullet and then and there him * * * did shoot," in effect charges both the assault and the shooting to have been done with a pistol loaded as described.

2. **Malice.** "Malice," in its legal sense, denotes that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind. Following *Housh v. State*, 43 Neb. 163.

3. **Erroneous Ruling:** RETRACTION: REVIEW. A ruling, if erroneous, cannot be availed of if so seasonably retracted that by such ruling no prejudice could result to the party complaining of it.

4. **Witnesses:** INDORSEMENT OF NAME: INFORMATION. Testimony purely rebuttal in its nature may be given by a witness whose name is not indorsed upon the information.

5. **Instructions:** CONSTRUCTION: REVIEW. Instructions should be considered as an entirety, and where, without conflict, they correctly state the law which should govern the jury in its deliberations, no criticism will be available which counts upon the fact that one instruction covers but a part of the entire ground.

6. ——: ALIBI. Where an alibi and its effect were correctly stated in an instruction, no harm will be presumed from the fact that in

referring to it the court descriptively said that an alibi is a part of the defense.

7. ———: PRESUMPTION OF INNOCENCE: EVIDENCE. Where the court instructed the jury that the presumption of innocence continues with the accused until his guilt is established by the evidence beyond a reasonable doubt, *held* not prejudicially erroneous to refuse to further instruct that such presumption is a matter of evidence. Following *Bartley v. State*, 53 Neb. 310.

ERROR to the district court for Douglas county. Tried below before BAKER, J. *Affirmed.*

W. S. Shoemaker, for plaintiff in error.

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General*, for the state.

RYAN, C.

The information upon which plaintiff in error was tried in the district court of Douglas county contained two counts. These were alike, except that in the first the felonious intent charged was to kill. In the second the intent was to wound. With plaintiff in error there was tried George Bradshaw, who was acquitted, as was also plaintiff in error on the first count, but he was convicted on the second. The offense in this count was thus charged: "That the said Willie McVey and George Bradshaw, on the said 21st day of May, 1897, then and there being in the county and state aforesaid, then and there, unlawfully, feloniously, and maliciously, did make an assault upon one William P. Wilcox with a certain pistol loaded with gunpowder and one leaden bullet and then and there him, the said William P. Wilcox, unlawfully, feloniously, and maliciously, did shoot, with intent then and there and thereby him, the said William P. Wilcox, unlawfully and feloniously to wound, contrary to the form of the statutes," etc.

It is urged on behalf of plaintiff in error that while the above language charges an assault with a certain loaded pistol there is no allegation descriptive of the weapon

with which the shooting was actually done. We think giving a fair construction to the language quoted it is equivalent to charging that with a certain loaded pistol the accused made an assault upon and shot William P. Wilcox. An indictment of the form above quoted may be found sanctioned in Warren's Ohio Criminal Law, page 260, and in Wharton's Precedents of Indictments and Pleas, 4th edition, page 253.

It is next insisted that there should not have been admitted any evidence showing an intent to rob, for, it is urged, section 16 of the Criminal Code does not cover that intent, but requires that the act shall be done maliciously, to constitute a crime. Having laid down these propositions counsel for plaintiff in error argues that there was no malice, for, to use his language: "The testimony of Dr. Wilcox shows that he did not know the plaintiff, had never seen him before, and, of course, had no trouble with him at any time before the alleged shooting." For a definition of the word "malice" as used in criminal codes counsel is referred to *Housh v. State*, 43 Neb. 163, wherein it is said that: "'Malice,' in its legal sense, denotes that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse. It means any willful or corrupt intention of the mind."

On the trial there were efforts to show that subsequent to the time when the assault was made, counsel for plaintiff in error and other persons, under substantially the same conditions as to time and locality, had unsuccessfully attempted to recognize individuals. We shall not determine whether or not this kind of testimony was admissible, nor whether or not the alleged errors were saved by due exceptions, for, later, permission was given to introduce the proffered testimony, and all of it the plaintiff desired was admitted.

In the trial it was developed that when plaintiff in error commanded Wilcox to throw up his hands the latter struck him in the mouth with his fist. When Wil-

cox testified he stated that he found a contusion on the lip of plaintiff in error after his arrest. For the accused it was testified that when Wilcox, for the purpose of identification, made a physical examination of the accused, he did not remark the existence of an abrasion. On rebuttal it was proper to contradict this testimony as was done. Again, on rebuttal it is insisted there was error in permitting Mrs. Beesen, whose name was not on the information, to testify that from her place of business across the street she observed the movements of the accused and of several parties who testified that McVey was at his mother's residence until after the assault took place. To meet the testimony of these parties Mrs. Beesen necessarily described acts of the accused previous to the time of the assault and testified that with the aid of the electric and gas light in the locality she could see these parties with such clearness that afterwards she identified them. It is possible that some of her testimony might have been offered before that of the accused, but clearly the nature of the defense rendered her testimony admissible. Before the examination of Mrs. Beesen began there was a general objection to her testimony, except as to matters in rebuttal, and the court announced that her testimony must in its nature be strictly rebuttal. She did not testify to seeing the shooting, nor to any fact from which it was inferable that the accused did it. The testimony she gave was strictly rebuttal; hence it was not required that her name should have appeared on the information. (*State v. Huckins*, 23 Neb. 309; *Yager v. State*, 49 Neb. 439.)

It is urged that there was error in giving the fifth instruction, for the reason that in said instruction there is no requirement that the shooting be malicious to constitute the offense charged. In the first instruction there is a summary of the second count of the information, and in this summary malice is a very prominent factor. In the third instruction there are the provisions of the statute which McVey was accused of violating, and of

the offense charged, as has already been indicated, malice is an essential ingredient. The fifth instruction expressly requires proof of the wounding being done as charged in the second count of the information,—that is, maliciously. These instructions, taken together, could not have left the jury in doubt as to the necessity of showing "malice" as we have already defined that term, and the rule is that all the instructions should be read together. (*Bartley v. State*, 53 Neb. 310, 73 N. W. Rep. 744.)

In one instruction the court spoke of an alibi as a part of the defense of the accused, and this, it is claimed, left the jury free to infer that an alibi, if successfully established, amounted to but a fraction of a defense. We do not think this is reasonable. The court, in general terms, described the accusation, and in as general a way referred to the defense. The jury could not have understood the criticised reference to an alibi as differing from a statement that the defense was sought to be established by proving an alibi, for, after referring to an alibi the court correctly defined it, and it would be a reflection upon the intelligence of a jury to suppose, if the accused showed when the offense was committed he was absent from that locality, nevertheless, that it was possible for him to have committed it. When to the word "alibi" the court added the definition of that term, it was as though the instruction had stated that, as a part of his defense, the accused has introduced evidence to show that when the offense was committed he was absent and so could not have done that with which he is charged. No juror is so obtuse as to be unable to understand, that, when a person is accused of shooting another on the street, proof that the accused was, at the time, in a house at such distance that he could not have done the act charged, constitutes a complete defense; in other words, that if he could not have done the act, it must be presumed that he did not do it.

There was offered on behalf of the accused an instruc-

tion that if the proof with reference to an alibi left a reasonable doubt in the judgment of the jury as to the guilt of the accused, there should be an acquittal. This instruction was refused, and properly so, for on its own motion the court had given an instruction to the same effect.

It is urged that there was error in the refusal to give the third instruction asked on behalf of the accused. It was as follows: "In the absence of evidence to the contrary, the law presumes every one charged with the commission of a crime to be innocent, and this legal presumption of innocence is a matter of evidence, to the benefit of which the defendants are entitled in this case." In its second instruction the court used this language: "You are instructed that the defendants have been arraigned on said information and have pleaded not guilty, and the plea of not guilty by the defendants casts upon the state the burden of establishing by evidence all the material allegations in said information, as hereinafter explained to you, beyond a reasonable doubt, before you would be warranted in returning a verdict of guilty against them. The law presumes the defendants innocent, and this presumption continues throughout the trial until they are proven guilty beyond a reasonable doubt." In respect to an instruction which embodied the same principle as that found in the one requested and refused this court, in *Bartley v. State*, *supra*, said: "The request is in accord with the holding in *Long v. State*, 23 Neb. 33, 36 N. W. Rep. 310, where it was stated, following *Garrison v. People*, 6 Neb. 285, that the legal presumption of innocence was a matter of evidence to the benefit of which the accused was entitled. The same principle embraced in this request was laid down in the sixth instruction given in the case at bar by the court on its own motion, which reads thus: 'The law raises no presumption against the defendant. On the contrary the presumption of law is in favor of his innocence. This presumption of innocence continues through the trial

until every material allegation in the information is established by the evidence to the exclusion of all reasonable doubt.' (*Garrison v. People, supra.*) The instruction in that case to which the defendant took exception read: 'And if, after you shall have carefully examined the evidence in this case, you shall be able to reconcile it with the innocence of the prisoner, it will be your duty, as no doubt it will be your pleasure, to acquit him.' This court held that the language quoted fully recognized the rule that the legal presumption of innocence is a matter of evidence. The twenty-first instruction in the case at hand is no less favorable to the accused than the one requested by him; hence he was not injuriously affected by the refusal to give the instruction tendered." There is no necessity to further amplify the propositions above stated. In the case at bar the court instructed the jury that the presumption of innocence continued throughout the trial until the accused were proved guilty beyond a reasonable doubt. If the instruction had been given as requested, nothing would thereby have been accomplished, except that the jury would have had the theory given them that this presumption was in the nature of a matter of evidence; in other words, a different name would have been given the presumption, without modifying the weight which the jury were required to accord to it.

It is complained, finally, that the judge did not embody certain affidavits proposed as a part of the bill of exceptions. Without considering whether in any case such a question could be decided by this court it must subserve every present purpose to say that the proposed amendments could have cut no figure in this case, for, in the view which we have taken, the question sought to be presented is immaterial.

There are no other questions argued in the brief, and the judgment of the district court is

AFFIRMED.

NEW LINCOLN HOTEL COMPANY, APPELLEE, V. STUART SHEARS, IMPLEADED WITH JOHN L. CARSON ET AL., APPELLANTS, AND JACOB E. MARKEL, APPELLEE.

FILED JANUARY 19, 1899. NO. 8552.

Landlord and Tenant: LIEN FOR RENT: LIEN OF CHATTEL MORTGAGE. A lease executed October 16, 1890, contained a provision that it should operate as a lien on all the personal property of the lessees at any time in or upon the demised premises, to secure payment of rent. The building leased was in process of erection for use as a hotel and was not completed until January, 1891. The furniture was ordered for the hotel after the lease had been made, and because of delays in finishing the building was not placed in the hotel until in December, 1890, and January, 1891. In January, 1895, there was rent unpaid, and the lessees' successors mortgaged the furniture to secure debts by them owing to other parties who were aware of the above noted provision in the lease. *Held*, That the mortgagees were entitled to the first lien upon the furniture mortgaged.

APPEAL from the district court of Lancaster county. Heard below before HALL, J. *Reversed.*

J. H. Broady and *Harwood, Ames & Pettis*, for appellants.

Pound & Burr, Wharton & Baird, and *A. W. Field, contra.*

RYAN, C.

This action for the foreclosure of an alleged lien by virtue of a provision in the lease hereinafter described was successfully prosecuted in the district court of Lancaster county. The First National Bank of Lincoln and the personal representatives of John L. Carson have appealed from the decree whereby the mortgage to the bank and Carson was found and decreed junior and subject to the lien of the New Lincoln Hotel Company, which has succeeded by assignment to the rights of the Lincoln Hotel Company, the original lessor. From the fact that briefs have been filed only on behalf of the

aforesaid bank and the personal representatives of Carson as appellants, and of the New Lincoln Hotel Company and Jacob E. Markel as appellees, we assume that the controversy is between those parties alone, and hence shall content ourselves with quoting and describing such findings of the district court as affect the interests of these parties in this appeal. These findings were as follows:

"1. On the 16th day of October, 1890, the Lincoln Hotel Company, a corporation, by lease of that date, demised certain premises, to-wit, the Hotel Lincoln, in the city of Lincoln, Nebraska, to Samuel Shears and Jacob E. Markel for a term of ten years from the 1st day of December, 1890, to the 1st day of December, 1900.

"2. The lease contained the following provisions, to-wit: That upon the non-payment of the whole or any part of the said rental at the time when the same as above is promised to be paid, or upon violation or non-fulfillment of any of the covenants of this lease, the said party of the first part may, at its election, either distrain for the rent due and damages sustained and shall have a lien upon all the personal property of the party of the second part at any time in or upon the said premises for the payment of rent and for the security of each and every covenant herein contained, and the party of the first part may also declare this lease at an end and recover possession as if the same were held by forcible detainer. The said party of the second part hereby waives any notice of such election or any demand for the possession of the said premises.

"3. On the 16th day of October, 1890, the building was in process of erection and was not ready for occupancy as a hotel until after January 1, 1891.

"4. By an oral agreement between the parties to said lease, rent did not commence until January 15, 1891, and none of the property of the lessees involved in this suit was placed in said building until after December 1, 1890.

"5. In the latter part of October, 1890, Shears and Markel, the lessees, placed with Dewey & Stone, of Omaha, an order for furniture, amounting to over $11,000 in value, for the Lincoln Hotel, and the same was placed therein by them, mainly in the month of December, 1890. Said lessees, on the 28th of October, 1890, placed with the Union Porcelain Works in Greenport, L. I., an order for chinaware for said hotel, stamped 'The Lincoln,' which chinaware was delivered to said lessees at Brooklyn, N. Y., December 3, 1890, and thereafter placed by them in said hotel. On November 6, 1890, said lessees placed an order with Reed & Barton, of New York and Taunton, Mass., for silverware for the Hotel Lincoln, which, in value nearly $1,600, was delivered to said lessees at Taunton, Mass., and shipped from there to said lessees at Lincoln, December 20, 1890, and January 10, 13, 14, 1891, and was placed in said hotel on arrival at Lincoln. On November 8, 1890, said lessees placed with the John Van Range Company, of Cincinnati, Ohio, an order in value over $1,500 for ranges, boilers, and culinary utensils for the Hotel Lincoln, shipped November 26, 1890, from Cincinnati, and on arrival placed in said hotel, where all said personal property has since remained and now is."

"9. The Lincoln Hotel Company, a corporation, said lessor, on or about the —— day of April, 1893, sold its said hotel property to the plaintiff in this suit and assigned its said lease to the plaintiff.

"10. A copy of the said lease and assignment was by the plaintiff filed in the office of the county clerk of Lancaster county on the 24th day of January, 1895.

"11. Rent to the amount of $10,500, to-wit, from the 1st day of December, 1893, to the 1st day of March, 1895, is due to plaintiff from defendants."

Mary P. Shears and Stuart Shears had succeeded to the rights and liabilities of Samuel Shears and Jacob E. Markel before February 2, 1895, and on that day executed a chattel mortgage on all the personal property

in the Lincoln Hotel to secure a note owing by them to John L. Carson and another note owing by them to the First National Bank of Lincoln. The amounts of these notes are indicated in the conclusions of law hereinafter set forth. This mortgage was filed for record on the day of its execution. It was found by the court that the bank and Carson had actual notice of the provision by which the hotel sought to create a lien for rent before said lease was recorded.

Upon the facts found there were the following conclusions of law:

"First. The plaintiff is entitled to a valid and subsisting and first lien upon all the personal property of Shears and Markel, in the possession of Shears & Shears in the Hotel Lincoln, on the 1st day of March, 1895, for the sum of $10,500 with interest at seven per cent from said 1st day of March, 1895.

"Second. That the defendants the First National Bank and John L. Carson have a valid and subsisting and second lien upon said personal property contained in said hotel,—the said bank for the sum of $4,489.80, with interest at ten per cent from February 14, 1896, and the said Carson for the sum of $3,126.81, with ten per cent from the 15th day of February, 1896.

"Third. That the defendants Hargreaves Brothers have a valid, subsisting, and third lien upon said property for the sum of $1,053.19, with interest at the rate of seven per cent per annum from August 23, 1895.

"Fourth. That said liens are due, unpaid, and plaintiff and said defendants are entitled to have said liens foreclosed and said property sold according to law."

In accordance with the above findings and conclusions the lien of the hotel company was declared paramount to that of the bank and the representatives of Carson, and the question which we feel called upon to determine is whether or not this adjustment of priorities was correct. The appellees insist that the provision of the lease quoted in the second finding of fact operated as though

a lease had been made October 16, 1890, contemporaneously with which there had been executed a chattel mortgage to secure payment of the rent, upon all the personal property of the lessee at any time in or upon the demised premises, and we shall accept this assumption as being correct. While this lease was of date October 16, 1890, it is evident from the findings hereinbefore quoted that not until afterwards was any of the personal property ordered or selected for use in the hotel. All of the property was sent upon orders placed in other cities than Lincoln, and the delivery in Lincoln was delayed by reason of the unfinished condition of the hotel building until in December of 1890 and January of 1891.

The appellees insist that there is no party to the record who can question the validity of the provision for the reservation of a lien in the lease, because the bank and Carson were mortgagees with notice and were not, therefore, mortgagees in good faith. We cannot see that the validity of the provision of the lease is affected by this consideration. Whether or not a chattel mortgage or its equivalent can be made so as to affect future acquired property is a question entirely dependent upon general principles independent of statute.

The case most directly in point for the appellees is *Wright v. Bircher*, 72 Mo. 179. The scope of that opinion is accurately reflected in that portion of the syllabus which is as follows: "The proprietors of a hotel took a lease for a term of years upon an unfinished building to be used when completed as part of their hotel. The rent was payably monthly. The lease was to commence, or take effect, on the first of the month after the completion of the building. It contained a stipulation that all fixtures, furniture, and other improvements should be bound for the rent. When the lease was signed, the house was unfurnished, but before it took effect, certain furniture and fixtures had been placed in the house, Held, that the stipulation created a lien, valid at least in equity; that this lien was for the full amount of the

rent reserved and not simply for any portion that might from time to time become delinquent, and that it had priority of a mortgage given after the lease took effect, but before any rent became delinquent, to a person having knowledge of the existence of the stipulation." While we cannot approve the conclusion reached, there is in the opinion such a fair statement of the attitude of the courts with reference to the validity of a lien in the case stated that we shall borrow the language of Henry, J., premising, however, that we have examined the numerous cases cited by counsel in this case and not noted in the opinion from which we quote, with the result that they serve but to increase the number of citations which might have been made in support of one or the other of two lines of cases. The language which we borrow is as follows: "One of the principal questions discussed by counsel relates to the validity of a sale or mortgage of goods and chattels not *in esse* at the date of the mortgage or sale. One might write a volume, if inclined, to review all of the adjudged cases on the subject. We are not so inclined, and deem it necessary only to state what we regard as the conclusion reached by the best considered cases. It has been frequently and ably discussed, both in English and American courts, and highly respectable authorities might be cited in support of either of the opposite views urged by the respective counsel here. The earlier English and American authorities, we think, sanction the doctrine contended for by the counsel of Nannie M. Wright [the mortgagee]. (*Jones v. Richardson*, 10 Met. [Mass.] 488; *Moody v. Wright*, 13 Met. [Mass.] 17; *Gardner v. McEwen*, 19 N. Y. 125; *Head v. Goodwin*, 37 Me. 187; *Barnard v. Eaton*, 2 Cush. [Mass.] 294; *Winslow v. Merchants Ins. Co.*, 4 Met. [Mass.] 306; *Codman v. Freeman*, 3 Cush. [Mass.] 306; *Otis v. Sill*, 8 Barb. [N. Y.] 108; *Lunn v. Thornton*, 1 Man., Gran. & Scott [Eng.] 379. The doctrine maintained in most of the cases was clearly stated in *Otis v. Sill*, and was, substantially, 'that a grant of goods not in exist-

ence, or which do not belong to the grantor at the time of the execution of the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the goods; that an assignment of property to be acquired in future, if valid in equity, is only valid as a contract to assign when the property shall be acquired, and is not an assignment of a present interest in the property, and if enforced in equity, can only be enforced as a right under the contract, and not as a trust attached to the property as against the creditors of the assignor or mortgagor; that the mortgage of such subsequently acquired property can only be regarded as a mere contract to give further mortgage on such property, binding on the mortgagor personally, and the only remedy of the mortgagee on such contract is as a general creditor.'

"The broadest contrary doctrine was announced by Mr. Justice Story in *Mitchell v. Winslow*, 2 Story [U. S. C. C.] 630, in the following language: 'It seems to me a clear result of all the authorities that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or personal property, * * * whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy.' This has been followed by this court in the case of *Page v. Gardner*, 20 Mo. 508; in New York in the case of *Seymour v. Canandaigua & N. F. R. Co.*, 25 Barb. 305, in which *Otis v. Sill, supra*, was cited and distinctly disapproved; also in *Sillers v. Lester*, 48 Miss. 526; *Benjamin v. Elmira R. Co.*, 49 Barb. [N. Y.] 441; *Brett v. Carter*, United States district court of Massachusetts, reported in 3 Central Law Journal 286; *Morrill v. Noyes*, supreme court of Maine, reported in 3 Am. Law Reg. (n. s.) 18, 56 Me. 458; and in England in *Langton v. Horton*, 1 Hare 549; *Holroyd v. Marshall*, 9 Jur. (n. s.) 213; *Whitworth v. Gau-*

gain, 3 Hare 416; *Douglass v. Russell*, 1 Mylne & K. 488. The opinion of the court in *Morrill v. Noyes*, delivered by Davis, J., is an able review of the authorities, and states the doctrine more clearly and precisely than any other case to which our attention has been called. It does not recognize the validity of mortgages of mere contingencies, or sales or mortgages of property which 'the mortgagors might purchase if they should purchase any,' but the sale or mortgage must relate to property then in contemplation of the parties to be purchased or acquired by the vendor or mortgagor." In line with the adjudicated cases in the class led by *Mitchell v. Winslow* the supreme court of Missouri held the provisions of the lease operated to create a lien for the entire rent and not for installments as they fell due monthly, and gave that lien a precedence over the chattel mortgage made on the personal property after it had been placed in the hotel building.

By the above quotation having pointed out the conflict which exists, it remains now to indicate the group in which this court, by its opinions, has placed itself. In *Lanphere v. Lowe*, 3 Neb. 131, the judgment under consideration had been rendered by the district court over which Chief Justice LAKE was presiding. The opinion in this court was therefore expressed by but two judges, for whom GANTT, J., said: "Can a valid charge be made upon a thing not in existence? I think it cannot. It is a very ancient rule of law that a man cannot grant or charge that which he has not; and in *Jones v. Richardson*, 10 Met. [Mass.] 488, it is said that this 'is a maxim of law too plain to need illustration and which is fully supported by all the authorities.' (4 Bacon, Abridgment of the Law 514, Grants, D, 2; *Codman v. Freeman*, 3 Cush. [Mass.] 309; 2 Kent, Commentaries 703; *Head v. Goodwin*, 37 Me. 187; *Robinson v. Macdonnell*, 5 Maule & Selw. [Eng.] 228; *Chynoweth v. Tenney*, 10 Wis. 400.) This doctrine is applied to mortgages of goods which may be subsequently acquired by the mortgagee; it is equally ap-

plied to sales of personal property and rights of property. (*Chesley v. Josselyn*, 7 Gray [Mass.] 490; *Rice v. Stone*, 1 Allen [Mass.] 569.)"

In *Cole v. Kerr*, 19 Neb. 553, it was held that a mortgage executed, delivered, and properly recorded March 30, 1882, purporting to convey "40 acres of wheat, 30 acres of oats, now growing, 75 acres of corn, to be planted, and 50 acres of broom-corn, to be planted, tended, and delivered in Juniata," conveyed no title or lien upon the corn as against the levy of an execution of date November 25, 1882. The opinion of the court was delivered by COBB, J., who said: "There is, to say the least of it, a great confusion of the authorities on the point being considered, but after a careful examination of those cited on either side in this case I have reached the conclusion that as a question of law the lien of a chattel mortgage of a crop of corn not planted at the time of its execution and delivery will not attach to the corn when it comes into existence until it is seized by the mortgagee, or until, in the language of a member of the court in the case of *Holroyd v. Marshall*, 10 H. of L. Cases 191, 'a new intervening act.' Until then it remains a mere license, and until acted upon it conveys neither a lien nor a right of property which the mortgagee can assert against a purchaser or execution creditor of the mortgagor. Presumptuous as it may seem to say so, I cannot agree to the proposition stated by Lord Hobart in the case cited by counsel for defendant in error, that the owner of the land, though he had not the future crop 'actually in view nor certain, yet he had it potentially.' While it is true, as he adds, that 'the land is the mother and root of all fruits,' the word 'potentially,' as defined by Craig, means 'in possibility, not in act, not positively; in efficacy, not in actuality.' With this definition in view it cannot be said that the mere ownership or possession of the soil carries with it the production of crops potentially. Soil alone does not produce crops of corn in this degenerate age, if it ever

did. It now requires, in addition to soil, seed and labor, both of man and beast, so that the proposition that a sale or mortgage of a crop of corn not yet planted carries with it a property in or lien upon such crop, to attach or come into efficacy without 'a new intervening act,' upon the crops coming into existence, carries with it the proposition that a man may mortgage his labor to be performed,—something which I never heard contended for in this country, but which is a right which, under the name of peonage, is recognized in our sister republic to the south of us. The true distinction, I think, is that indicated in 1 Sheppard's Touchstone, 241, in the enumeration of things which pass by grant, to-wit: 'Leases for years, be they present or future, wardships of tenants *in capita*, or by knight's service, trees, oxen, horses, plate, household stuff, and the like. Also trees, grass, and corn growing and standing upon the ground, fruit upon the trees, wool upon the sheep's back is grantable.' Doubtless the fruit on the trees, the grass in the meadow, and wool on the sheep's back may be granted without regard to the state of their growth or perfection, because in the due course of time nature, without the necessary assistance of new forces, will in the one case develop fruit, etc. But, as we have already seen, the mere soil, except with the assistance of other elements and forces, in the latitude of Nebraska will not develop crops of corn."

In *Johnson v. Walker*, 23 Neb. 736, the case of *Cole v. Kerr, supra*, was cited with approval as to the impossibility of mortgaging a crop of corn before it has been planted. In *Wagner v. Steffin*, 38 Neb. 392, there was under consideration the validity of a mortgage of date May 15, 1888, by the terms of which the mortgagee was to have a lien on all crops grown on certain premises. This mortgage was held valid, but there was no reference in the opinion to the actual or prospective condition of the corn when mortgaged, and in this respect we are not assisted by its date. The opinion was written by

POST, J., and, as he makes no mention of the crop not being planted, it could hardly have been mortgaged before it was *in esse*, for we find that he, in *Steele v. Ashenfelter*, 40 Neb. 770, delivered the opinion of this court in which the doctrine of *Cole v. Kerr, supra*, was recognized and enforced as to personal property attempted to be mortgaged before possession of it had been acquired. Many of the cases attempt to make a distinction between legal and equitable rights under a mortgage of the nature of that just referred to, but this distinction was not recognized in *Steele v. Ashenfelter, supra*, which was an action by a receiver for the possession of property taken under an execution, and it was expressly held that the receiver had no rights which could be enforced by a court of equity.

From this review of cases it is clear that in this action the clause in the lease whereby there was attempted to be provided a lien to become operative against personal property afterward to be brought upon the premises, but which was not yet capable of description because not segregated from stocks of goods of which it was a part, was void as against the rights of appellants hereinbefore designated. As the rights of parties in this court cannot be determined upon the record as it stands, there will be no decree ordered or entered at this time, but the judgment of the district court will be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CLAUDIA ROWE ET AL. V. RICHARD GRIFFITHS ET AL.

FILED JANUARY 19, 1899. No. 8616.

1. **Summons:** SERVICE UPON NON-RESIDENT: AFFIDAVIT. Service of summons upon a non-resident defendant can only be made in cases where service might be made by publication, and the fail-

ure to file the affidavit required before service by publication is as fatal as a jurisdictional defect with respect to personal service upon a non-resident as with respect to service by publication. Overruling a conflicting holding in *Cheney v. Harding*, 21 Neb. 68.

2. **Mortgagees in Possession:** DEFAULT. Facts considered, and *held* not to show that defendants are entitled to protection as mortgagees in possession after default under the provisions contained in the mortgage.

3. **Realty:** RIGHT OF POSSESSION: INFANTS: ESTOPPEL. Where the subject-matter in dispute is the present right of possession of real property, there is no estoppel established as against plaintiffs by merely showing that during their minority their guardian received a portion of the purchase price paid for said property by the defendant and used it for the maintenance and education of such minors.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J. *Reversed.*

L. D. Holmes, for plaintiffs in error.

John D. Howe and *J. J. O'Connor*, *contra.*

RYAN, C.

This was an action for the possession of certain real property in Omaha. The answer consisted of a general denial, coupled with an averment of lawful possession and a plea of the statute of limitations. There was a reply, by which issues were joined on the averments of the answer. From the facts which shall be hereinafter stated it will be evident that the limitation invoked cannot be available, unless the defendants have established successfully certain propositions which would render unnecessary an appeal to that statute. The assertion that the defendants are in rightful possession adds nothing to the issue made up by the general denial which precedes it. This must therefore be treated as an action in which plaintiffs asserted and sought to recover possession, alleged to be wrongfully detained by defendants, who insisted that their possession was rightful.

In argument, counsel have discussed various matters as though in the answer a proper foundation had been laid, and a proper appeal made, for equitable relief. This view of the situation we are precluded by the issues from taking into consideration. (*Franklin v. Kelly*, 2 Neb. 79; *Staley v. Housel*, 35 Neb. 165; *Wanser v. Lucas*, 44 Neb. 759.)

There was a trial to the court, which resulted in a judgment in favor of the defendants, and plaintiffs have prosecuted error proceedings to this court. On the trial it was stipulated that one of the plaintiffs, Joseph Merville, who brought his action by his next friend, was sixteen years of age on July 1, 1894. On May 19, 1894, the testimony of the other plaintiff was taken by deposition, and, at that time, she testified that she was twenty-three years of age. Such transactions, therefore, as took place in 1882 happened while one plaintiff was eleven years of age and the other was but four. There were findings of fact on the trial, and as these give a history of transactions involved they are reproduced in the language of the record, as follows:

"John Merville, in his lifetime, purchased the property in controversy from John A. Creighton, one of the defendants, on or about the 21st day of March, 1882, paying therefor the sum of two thousand eight hundred ($2,800) dollars; one thousand dollars of said sum being secured by a purchase price mortgage on said real estate in favor of defendant Creighton, and on or about the 9th day of August, 1882, said Merville borrowed from said defendant John A. Creighton one thousand ($1,000) dollars, giving a second mortgage on said real estate to secure the same. Shortly after, and on the 1st day of September, 1882, said John Merville died, leaving his wife and two small children occupying said real estate as their homestead. On the 29th day of September, 1882, Peter J. Creedon, on the application of said Frances Merville, the widow of said deceased, was duly appointed administrator of the estate of said deceased by the county

court of this county, and qualified and accepted said trust. The widow of said deceased employed J. P. English, an attorney at law, to look after and protect the interest of herself and two small children in her deceased husband's estate, and secure a speedy settlement of the same; the said estate consisting of said land subject to said mortgages, and a small amount of personal property, to the end that they might return to the state of New York, whence they had recently come, and where their friends resided. About said time, and prior to the commencement of the suit to foreclose herein mentioned, said Frances Merville removed with her two children, the plaintiffs herein, to Albany, New York, and on or about January 5, 1885, said Frances was duly appointed guardian of her minor children, Joseph and Claudia, the plaintiffs, by the surrogate court of Albany county, New York, and duly qualified and assumed the duties of such guardian. Prior to said appointment and after said widow, Frances Merville, and plaintiffs resumed their residence in New York, she was, under the laws of that state, given power to act for her said children and employ an attorney at law in their behalf substantially as was done by her as herein found. John A. Creighton commenced foreclosure proceedings on his said two mortgages at the instance and request of said James P. English, attorney for said widow and children, to settle the estate. A summons was duly served on P. J. Creedon, administrator, in Douglas county, Nebraska, and summons was issued to the sheriff of this county, who deputized the sheriff of said Albany county, New York, to serve the same in New York, and the said summons was served upon said Frances Merville and Claudia and Joseph Merville (the plaintiffs) in said foreclosure proceedings, and due return made thereof. Said Frances Merville, after the same had been served on herself and children, sent the several copies of the summons that were so served to J. P. English, said attorney, and authorized him, in her own behalf and in behalf of said plain-

tiffs, to protect and defend the interest of said plaintiffs and herself in said suit, and said J. P. English did look after and attend to said foreclosure suit, and appeared in said suit in behalf of the plaintiffs and participated therein, but such appearance was not in writing, except the appearance and answer as guardian *ad litem* for these plaintiffs; and also by appearing at the sheriff's sale and bidding on said property in the interest of said minors and widow. Said John A. Creighton purchased said real estate at said sale in said foreclosure suit for its full value, paying therefor the sum of five thousand ($5,000) dollars. He entered into peaceful possession of said property, receiving a sheriff's deed therefor, and has remained in possession since the 7th day of August, 1884, and has paid a large sum of money for taxes, general and special, to-wit, $2,500 and upwards, levied on said real estate. The residue of the proceeds of said sale, after paying the costs and mortgaged indebtedness aforesaid, to-wit, $2,537.16, was paid into this court in said case, and upon the order thereof paid to the administrator of the estate of said John Merville, deceased, and by him accounted for to said county court, and the residue upon final settlement was paid by him under a decree of distribution of the county court of Douglas county, one-third, to-wit, $773.95⅓, to Frances Merville, and one-third, to-wit, $773.95⅓, to each of the plaintiffs by paying the same to their legally appointed guardian, who filed in said county court a duly executed receipt as guardian, and the same was used for the support and maintenance of said minors; and said administrator's account was duly allowed and the administrator discharged. John A. Creighton, in said foreclosure suit, did not make, or cause to be filed, an affidavit showing that the plaintiffs Claudia and Joseph Merville were non-residents of the state of Nebraska, and that summons could not be served upon them within the state of Nebraska, previous to suing out the summons which was served upon the plaintiffs; and for that reason the court

finds that the district court of Douglas county did not have jurisdiction of the plaintiffs Claudia Rowe and Joseph Merville in the suit brought by said John A. Creighton for the purpose of foreclosing his said mortgages, and that the proceedings thereunder, as to the plaintiffs in this suit, is void and of no force or effect. To which finding defendants except. The court finds that the widow, Frances Merville, died December 6, 1893. The court further finds that the plaintiffs have not tendered to said Creighton any sum whatever, or offered to pay him any sum whatever, either before or since the commencement of this suit. The court finds that the said defendant Creighton is entitled to the possession of said real estate. The court further finds that the plaintiffs are estopped to maintain this action. It is therefore considered by the court that the defendants go hence without day, and recover their costs herein expended and taxed at ——, and that execution is awarded therefor."

In these findings there is one that the foreclosure proceedings upon which the title of the defendants is founded was void and of no effect. The facts detailed show with sufficient clearness the respect in which there was a failure to acquire jurisdiction of the guardian of the two minors who are now plaintiffs. The personal service in another state is but a substitute for service by publication. (*Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897.) The property to be affected was situated within this state, and it was competent for the legislature to provide upon proof of what facts courts of this state might entertain the presumption that the owner of such property is bound to know of the pendency of proceedings affecting his rights therein. By sections 77 and 78, Code of Civil Procedure, it is required as a jurisdictional prerequisite that an affidavit be filed disclosing such conditions that the court has power to enter a judgment or decree *in rem*. When this has been done publication of the notice of the pendency of the action may

be made under the provisions of section 79 of the Code of Civil Procedure, or, under the authority of section 81, personal service may be made upon the defendant in another state. Without the affidavit the jurisdiction of the court is not invoked, though the publication may be in strict compliance with the requirements of the statute, and this stringent rule is recognized in several cases passed upon by this court. (*Atkins v. Atkins*, 9 Neb. 191; *Fulton v. Levy*, 21 Neb. 478; *Holmes v. Holmes*, 15 Neb. 615; *McGavock v. Pollock*, 13 Neb. 535; *Bantley v. Finley*, 43 Neb. 794.) As personal service on a non-resident defendant is but a substitute for service by publication, the filing of an affidavit is as necessary to jurisdiction in the one case as in the other. In *Cheney v. Harding*, 21 Neb. 68, it was held that if it appeared from the record that the defendant was a non-resident at the time of personal service upon him, the court would acquire jurisdiction, though no affidavit whatever had been filed. We can see no reason for holding that service by publication is effective only upon the condition that previous thereto the statutory affidavit has been filed and yet that a mere substitute for that service may be good without any affidavit whatever, and accordingly to this extent the holding in *Cheney v. Harding, supra*, is overruled. It follows from the views just expressed that if the district court had no jurisdiction it could not appoint a guardian *ad litem* for the minor defendants. It is urged, however, that the foreclosure proceedings were begun and carried on at the instance of the guardian of these minors and that part of its fruits were expended for their benefit. As already stated, this action is one for the possession of certain real property, and only considerations pertinent to that right are proper and relevant. The correct mode of obtaining a sale of real property of a decedent, either for the payment of his debts or for the benefit of his children, is pointed out by our statute, and it would be a dangerous practice to permit innovations of the character herein attempted to be justified, even though

convinced, as we certainly are, that the foreclosure proceedings under consideration were begun in good faith and at the request of the guardian and, as she believed, for the advantage of her children.

It is, however, insisted that the defendant Creighton should at least be deemed a mortgagee in possession after default, and that under such circumstances he cannot be ejected without tender of the debt. Let us consider whether or not there had been a default when Creighton's possession began. One of the notes secured by the mortgage was of date March 28, 1882. The other was of date August 9, 1882. Each was for $1,000, due five years after date,—one bearing interest at seven per cent per annum until paid, the other at eight per cent per annum until paid. There was no undertaking that interest would be paid annually or at any other time before the principal fell due. The right reserved in the mortgage to take possession was expressly conditioned upon the failure to make any of the payments required, or upon forfeiture of the mortgage. The sole default pleaded as the ground for foreclosure before the maturity of the notes was that the interest had not been paid on March 28, 1883, on one note, and on August 9, 1883, on the other. As these payments had not been stipulated to be so made, the failure to make them did not constitute a default on the part of the mortgagors. The rule contended for by defendants herein need not, therefore, be discussed, for under the facts they could not be within its protection.

It seems, however, that the district court found that the minors were estopped to prosecute this action without first tendering the amount which they had received the benefit of through the foreclosure. If this was an action for the recovery of the money paid, we can imagine that it might be proper for Mr. Creighton to allege and show that the money had been used in the purchase of necessaries, and that under such circumstances a court might refuse to recognize the defense of infancy. But

we are not dealing with such a case. Mr. Creighton began the foreclosure proceedings at the instance of Mrs. Merville. The children had not, and in the nature of things could not have had, any part in the institution of these proceedings. They were carried on until, as defendants now claim, Creighton was vested with title. His right of possession now depends upon the validity of that title, and his title and right of possession are the only questions which can be considered in this action. It is clear upon a moment's reflection that these minors could not be estopped to set up the failure to divest their title by defendant's showing merely that certain money used by their guardian for their benefit had been received by such guardian through the foreclosure proceedings. In the first place, this did not show any conduct of the minors which misled Creighton into foreclosing and attempting thereby to acquire title. In the second place, there was no evidence that they ever knew whence this money was derived. There was, therefore, no estoppel which could operate to create or strengthen Creighton's right to maintain possession, and that right is the sole question involved in this case. We realize that courts, in protecting the rights of helpless infants, are compelled to enforce rules which often operate harshly, and among all the cases of this kind that have come under our observation there has been none which more strongly appealed to our sympathies than does the one at bar. But the same considerations which inspired the opinions in *Meyers v. McGavock*, 39 Neb. 843, *Englebert v. Troxell*, 40 Neb. 195, and others which might be cited, are still imperative, and it is only in obedience to what we conceive to be our duty that we direct that the judgment of the district court be reversed and the cause be remanded for further proceedings.

REVERSED AND REMANDED.

FRANK E. JANDT ET AL. V. LUCIEN DERANLEAU.

FILED JANUARY 19, 1899. No. 8601.

1. **Action on Attachment Bond**: ISSUES: BURDEN OF PROOF. In an action on attachment bond, where the averments of the petition are put in issue by the answer, the burden is upon the plaintiff to establish that the writ was wrongfully obtained; in other words, that the ground stated in the affidavit for attachment did not exist. Following *Storz v. Finklestein*, 48 Neb. 27.

2. ———: ———: EVIDENCE. In an action on an attachment bond the defendants who undertake to make proof of facts justifying a resort to attachment should be permitted to introduce testimony relevant to that issue.

3. ———: ———. Where, in an action on an attachment bond because of an alleged wrongful suing out of the attachment, plaintiff had made no effort to prove the allegation and the court had refused to admit proofs contradictory thereof when offered by defendants, *held*, erroneous to submit that issue as one of fact to be determined by the jury.

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

E. W. Dailey and *Allen G. Fisher*, for plaintiffs in error.

W. H. Fanning, *Alvin T. Clark*, and *Albert W. Crites*, *contra.*

RYAN, C.

This action was brought in the district court of Dawes county for the recovery of damages which it was alleged Lucien Deranleau has sustained by the wrongful suing out of an attachment against, and the levy thereof upon and appropriation of, certain of his property, consisting of cattle, calves, and a horse. George P. Waller and William E. Alexander were joined as defendants because it was alleged that they were sureties on the attachment undertaking. The answer contained a denial, in conjunction with certain affirmative matters of defense, which we shall now describe.

To establish his cause of action Deranleau, among other matters of evidence, introduced the affidavit for the attachment, by which it was disclosed that the ground upon which the attachment was obtained was: "That the defendant is about to remove his property, or a part thereof, with intent to defraud his creditors." This omitted the statutory requirement of the words "out of the jurisdiction of the court," but as this defect was not presented by the motion to dissolve the attachment we shall likewise ignore it. The motion to dissolve the attachment was based on seven distinct grounds, some of which were technical in their nature. This motion was sustained, and in this suit on the bond the proof of the alleged wrongful suing out of the attachment consisted in the introduction in evidence of the order dissolving the attachment, together with the record which led up to its issuance. There was no evidence whatever offered on behalf of Deranleau as to whether or not he was about to remove his property with intent to defraud his creditors when the attachment issued against him. On the other hand, the defendant undertook to show the contemplation of a fraudulent disposition of his property on Deranleau's part such as would justify the issuance of an attachment, and the success of this effort we shall now indicate.

Being asked to state what the circumstances were which led to his swearing out and issuing of the order of attachment Mr. Jandt said: "Mr. Deranleau was owing me a bill of $505.91, besides a mortgage." At this point there was sustained a motion to strike out this testimony because the amount of the bill was immaterial. There was an exception to this ruling, a part of the proceedings which we shall not hereafter note, for heretofore we had never dreamed in our philosophy of the number of objections, motions to strike, and exceptions which, with industry, might be crowded into an average-sized record. Mr. Jandt further testified that he gave Deranleau consent to remove some horses, upon which Jandt had a

chattel mortgage, to Custer county, South Dakota, and that Deranleau, without Jandt's consent, removed these horses on into Wisconsin; that Deranleau paid this mortgage when Jandt threatened to go after him if he did not; that Deranleau, though he acknowledged the correctness of the bill, refused to pay it, and said he would not pay it until he had made money enough to free himself again. Mr. Jandt also testified that he kept on writing to Deranleau, but could get no satisfactory answer from him, and when he found he could do nothing he went to his attorney about it and talked with him in regard to the stock of Deranleau in Nebraska that was being disposed of, and he and his attorney looked it up and his attorney advised him to get out an attachment. On motion there was stricken out from the last answer what the attorney said about it, after which ruling the witness said he thereupon sued out the attachment and attached the property in controversy. At this time, the witness said, there was part of this stock offered for sale by George Le Blanc, a brother-in-law of Deranleau, as his own stock and not that of Deranleau. The witness was then asked: "Where was Deranleau when you attached the stock?" To this question there was sustained the objection that it was incompetent, irrelevant, immaterial, and not set up in the answer, and not pleaded. When objection was thus made there was a tender of proof by an answer to the question, if it should be permitted to be made, that the absence of Deranleau was a part of the fraudulent conduct, he causing his property to be disposed of by others in his absence and placing himself beyond convenient communication with plaintiff, his creditor at the time. A like objection was sustained to the tender of proof. This witness further testified that Le Blanc had the stock in charge, and that there were a few little things out there at the place (presumably Deranleau's former home), but he had moved away the furniture and stove. Upon explaining further, in answer to another question, that what little furniture

Deranleau had taken to his place he took away when his mother left in the fall and she went to Hersey, Wisconsin, where Deranleau was, this evidence as to where his mother went and where he was was stricken out on motion, because, as objected, these facts had not been pleaded and set up in the affidavit for an attachment. On objection Mr. Jandt was prevented from answering as to the condition of Deranleau's place when the attachment was sued out, and as to whether any farming had been done thereon that season, where Deranleau's cattle were. There were also sustained objections of the nature of those above indicated when questions were asked Jandt as to his making demand for payment and his attempts to obtain a settlement. He did, however, in this connection testify that Deranleau wrote him several letters, but this general statement was, on motion, stricken out because it was held incompetent, irrelevant, and immaterial. In like manner was treated Mr. Jandt's statement that he wrote several letters making propositions in answer to the letters of Deranleau. An objection was sustained to a question as to whether the place of Deranleau had been his former home. In answer to another question Mr. Jandt said that there was nothing at Deranleau's place but the cattle that was worth a dollar. Plaintiff moved to strike this out as not stating any facts, whereupon the court said: "The last part of it may go out." When asked if the cattle had any brand on them, Mr. Jandt said they did,—the letters L. D. Whereupon he was asked if Le Blanc put any counter-brand on those he sold when he sold them. This was objected to, for the reasons that it was incompetent, irrelevant, and immaterial, and because it had not been alleged in the affidavit that Deranleau had disposed of, or was about to dispose of, this property. The objection was sustained, the court remarking that it was immaterial. There was propounded to the witness this question: "Did Mr. Le Blanc claim to have the property and be the agent for Mr. Deranleau in handling and control-

ling these cattle and offering them for sale and disposing of them? Objected to, as incompetent, irrelevant, and immaterial, and has no tendency to prove an agency." This objection was sustained.

The above history of the attempt to show that there was justification for resorting to an attachment has been necessitated by the protracted efforts which were made in that direction. From this history it is very clear that Deranleau was owing the bill claimed, but this fact was excluded from the jury's consideration. He had removed, practically, all his property from the state, except his cattle, and these his brother-in-law was selling as his own. Jandt was not permitted to show attempts to procure a settlement of his bill, nor even where Deranleau was residing while a correspondence was held with him to procure such a settlement. His evidence of a consultation with an attorney as to the necessity of resorting to attachment was excluded, as was also the fact that certain mortgaged property which Deranleau had permission to remove to South Dakota he had taken to Wisconsin. Under these conditions the court gave the following instruction: "The plaintiff has introduced evidence showing that by an order of the district court of this county the order of attachment in question was discharged and the attached property ordered returned to the plaintiff herein, and it was contended by counsel that this order was conclusive on the question of the wrongful issuance of the order of attachment; but as the record in evidence fails to show the grounds upon which the order discharging the attachment was made, many reasons therefor having been assigned, the court has seen fit, under the amendment allowed to the answer during this trial, to submit to the jury all the facts and circumstances immediately attending the issuance and levy of the writ and the disposition made of the attached property, and so leave to your determination the question whether the issue and levy of the attachment was wrongful."

As we have already shown, the defendants in the district court were not permitted to disclose facts from which the jury might properly have determined whether or not the attachment was wrongfully sued out and levied. After the exclusion of this evidence, upon consideration of which the jury might have formed a judgment as to whether or not there was a wrongful issuance of the attachment, that question, as one of fact, was submitted for the jury to determine. In *Storz v. Finklestein*, 48 Neb. 27, it was said: "In an action on an attachment bond, where the averments of the petition are put in issue by the answer, the burden is upon the plaintiff to establish that the writ was wrongfully obtained; in other words, that the ground stated in the affidavit for attachment did not exist or was untrue. In case there is a failure to prove such fact the suit must fail. It is not enough that it be shown that the attachment was dissolved, since the writ may have been discharged for omission or irregularities merely. It must further appear that the attachment was wrongfully issued; that is, no valid grounds existed for granting the writ. This is the rule stated by LAKE, C. J., in *Eaton v. Bartscherer*, 5 Neb., 469." From this discussion it must be evident that there were at least three errors during the progress of this trial: First, in requiring no proof on plaintiff's part to establish the wrongful suing out of the attachment except the order dissolving it; second, the defendant having assumed to disprove the wrongful suing out of the attachment, it was erroneous to exclude proper evidence having that tendency; and, third, having excluded the evidence tending to show sufficient grounds for an attachment, it was improper to submit that question to the jury. Because of these errors the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

J. C. CRAWFORD V. WALTER L. SMITH.

FILED JANUARY 19, 1899. No. 8626.

Bill of Exceptions: AUTHENTICATION: REVIEW. Where the pleadings support the judgment rendered, and the correctness of the court's charge depends upon the evidence adduced on the trial, the judgment will be affirmed, unless the bill of exceptions is certified by the clerk of the district court as being either the original or a transcript of the one allowed and ordered made a part of the record of the case.

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

M. McLaughlin and *J. C. Crawford*, for plaintiff in error.

Uriah Brumer, contra.

RAGAN, C.

J. C. Crawford sued Walter L. Smith in the district court of Cuming county. In his petition Crawford alleged that Smith was indebted to him in the sum of $120 for rent for certain buildings. Smith's answer was a general denial. The case was tried to a jury and a verdict rendered in favor of Smith, upon which a judgment dismissing Crawford's action was entered, and he has filed a petition in error here to review that judgment.

The pleadings support the judgment. The correctness of the court's instructions depends upon the evidence adduced on the trial. We cannot review the evidence, because the bill of exceptions found in the record is not certified by the clerk of the trial court as being the original or a true copy of the bill of exceptions allowed in the case. (Code of Civil Procedure, sec. 587*b*; *Groneweg v. Matheuson*, 52 Neb. 591.) It follows that the judgment of the district court must be, and is,

AFFIRMED.

CHARLES BUERSTETTA, ADMINISTRATOR, V. TECUMSEH NATIONAL BANK.

FILED JANUARY 19, 1899. No. 10123.

1. **Pleading**: AMENDMENT OF PETITION: SEPARATE CAUSE OF ACTION. The facts incorporated as an amendment into a petition set out in the opinion, and *held* to constitute a separate and independent cause of action from that stated in the original petition.
2. ———: ———: ———: STATUTE OF LIMITATIONS. Where the facts incorporated into a petition by way of amendment constitute a cause of action separate and independent from that stated in the original petition, the statute of limitations against the cause of action pleaded in the amendment runs until the filing of such amended petition.
3. **Limitation of Actions**: FRAUD. An action for relief on the ground of fraud is barred in four years after the discovery of the fraud.

ERROR from the district court of Johnson county. Tried below before STULL, J. *Affirmed.*

L. C. Chapman and *J. W. Deweese*, for plaintiff in error.

C. Gillespie, *F. M. Hall*, and *S. P. Davidson*, *contra.*

RAGAN, C.

Anna B. Saunders, on August 19, 1893, brought this suit in the district court of Johnson county against the Tecumseh National Bank. In her petition filed on that date Mrs. Saunders alleged that in the year 1889 a corporation by the name of Russell & Holmes was conducting a banking business in the city of Tecumseh, Nebraska; that in said year she deposited with said bank, or loaned to it, $400,—$150 at one time, and $250 at another, for each of which sums the said bank issued to her an ordinary certificate of deposit, drawing six per cent interest; that the moneys represented by said certificates of deposit had not been paid to her. To show the liability of the Tecumseh National Bank to her for the moneys represented by said certificates of deposit

Mrs. Saunders in her petition pleaded the following facts:

"Plaintiff further states that afterwards, to-wit, on or about the 13th of April, 1890, the bank of Russell & Holmes went into liquidation and closed its said business, ceased its organization as said bank of Russell & Holmes, and thereupon afterwards, to-wit, on the 14th day of April, 1890, the defendant was duly organized and created a banking corporation under and by virtue of the various banking laws enacted by the congress of the United States, known and designated as the 'National Banking Acts,' and is at the present time carrying on a banking business in Tecumseh, Nebraska, under the name and style of the Tecumseh National Bank. Plaintiff further alleges that this defendant, so organized and created a banking corporation as aforesaid, came into possession of and received as successor to the bank of Russell & Holmes the property, assets, emoluments, business, and good-will of said bank of Russell & Holmes, and also the said sums mentioned in plaintiff's first and second causes of action, and deposited with the said last named bank for this plaintiff, and this defendant thereupon became liable to the plaintiff for said deposits so received, with interest thereon at the rate of six per cent per annum. The plaintiff further alleges that the business of this defendant was and is done and carried on in the same building and same room previously occupied by the bank of Russell & Holmes for the transaction of its business, and that all of the stockholders and officers of the bank of Russell & Holmes became stockholders and officers of this defendant, upon its creation, and, as such officers, managed, controlled, and transacted its business. This plaintiff further alleges that the bank of Russell & Holmes is wholly insolvent and has no money or other property with which to pay those who had formerly made deposits with them."

To this petition the national bank filed an answer. A

trial was had, resulting in a judgment in favor of Mrs. Saunders, and the national bank brought that judgment to this court for review on error, and it was reversed, upon the ground that the verdict upon which the judgment against the bank was based was not supported by sufficient evidence. (*Tecumseh Nat. Bank v. Saunders*, 50 Neb. 521.) A rehearing was subsequently granted in the case and the former decision of the court adhered to, but upon the rehearing it was also ruled that the petition just quoted did not state a cause of action. (*Tecumseh Nat. Bank v. Saunders*, 51 Neb. 801; *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412.) In the opinion written on the rehearing it was stated that the first decision was not put upon the ground that the petition did not state facts sufficient to constitute a cause of action, because counsel for both parties to this case and others of a like character requested the court to pass upon the sufficiency of the evidence to sustain the judgment rendered. When the mandate reached the district court Mrs. Saunders was dead, and the action was revived in the name of her administrator and he, by leave of court, on December 6, 1896, filed an amended petition. This amended petition contained substantially the same allegations as the original petition, and in addition thereto the petition alleged, in substance, that early in 1890, the bank of Russell & Holmes being in straitened circumstances and in a critical condition, the stockholders and officers thereof determined to organize a new bank under the national banking acts; that resolutions were duly acted upon and passed for that purpose, and the necessary certificates and papers were made out and signed by the said stockholders and officers of the bank of Russell & Holmes; that the new articles of incorporation were made, signed, and filed, in pursuance of which the Tecumseh National Bank became a corporation under the banking acts of congress; that said Tecumseh National Bank became and was the successor of the old bank of Russell & Holmes; that said bank of Russell & Holmes was

merged into and absorbed by the Tecumseh National Bank; that the stockholders of the bank of Russell & Holmes became the stockholders in the national bank by exchanging stock and claims held by them in and against the old bank for stock in the national bank; that at the time this occurred the bank of Russell & Holmes was insolvent, and that the stockholders and officers of the bank of Russell & Holmes determined to, and did, reorganize under the name of Tecumseh National Bank for the purpose of defrauding the creditors of the bank of Russell & Holmes, and afterward fraudulently claimed that the national bank was not the bank of Russell & Holmes nor liable for its debts. Among other defenses interposed to this amended petition by the national bank was that of the statute of limitations. The trial resulted in a verdict in favor of the national bank, on which a judgment was rendered dismissing the administrator's action, and he has brought that judgment here for review.

1. We think that the facts pleaded in this amended petition which were not pleaded in the original petition constitute a cause of action against the Tecumseh National Bank separate and distinct from the cause of action attempted to be stated against it in the original petition. The original petition proceeded upon the theory that because the national bank had become possessed of all property and assets of the bank of Russell & Holmes as a matter of law, it became liable for the debts of the bank of Russell & Holmes. The administrator, by the amendment incorporated into the petition, seeks now relief from the national bank on the ground of fraud. In other words, the new cause of action is an action *ex delicto*, while the original cause of action attempted to be pleaded was in the nature of an action *ex contractu*.

In *Phelps v. Illinois C. R. Co.*, 94 Ill. 548, the plaintiff sought damages against the railroad company upon its common-law liability for refusing to receive grain ten-

dered by him to it for transportation. Subsequently he filed an amendment to his action seeking damages from the company for its refusal to carry the grain after its acceptance thereof for carriage, and the court held that the amendment was an additional, separate, and independent cause of action from the first one pleaded, and that the statute of limitations ran in favor of the railroad company against the new cause of action from the time it arose until the time the amendment to the declaration was filed.

Smith v. Missouri P. R. Co., 50 Fed. Rep. 760, was an action against the railroad to recover damages for causing the death of one of its employés. The first petition charged that the company caused the employé's death by negligently employing an engineer known by it to be incompetent. Subsequently the plaintiff amended his petition, seeking to recover damages against the railway company for the employé's death upon the ground that the engineer in charge of the train was guilty of negligence, and the court held that the amendment was a new and an independent cause of action from that first stated.

In *Lumpkin v. Collier*, 69 Mo. 170, a sheriff had in his possession an execution. The plaintiff therein, to induce the sheriff to seize certain personal property, executed to him a bond agreeing to indemnify him from any liability he might incur by reason of seizing and selling the property. The claimant of this property subsequently brought a suit on this bond for damages for a breach of its conditions. Afterward the claimant filed an amendment to his petition, seeking to recover damages from the sheriff for the wrongful sale of the property, and from the obligors on the bond for their instigation and procurement of such sale. The court held that the first cause of action in the petition was *ex contractu;* that the amendment was a cause of action *ex delicto*, and that there were two separate and independent causes of action stated in the petition.

In *People v. Judge*, 35 Mich. 227, the plaintiff in his pe-

tition charged the railroad company, as a common carrier, for loss of goods shipped over its line and destroyed by fire while in its depot waiting delivery to a connecting carrier. Subsequently the plaintiff introduced into his petition an amendment seeking to hold the railroad company liable to him on the grounds of its negligence as a warehouseman, and the court held that the amendment was a separate and independent cause of action from that stated in the original petition. To the same effect see *Hyatt v. Auld*, 11 Kan. 140; *Scovill v. Glasner*, 79 Mo. 449; *Newton v. Allis*, 12 Wis. 421; *People v. Judge*, 27 Mich. 138; *Sims v. Field*, 24 Mo. App. 557; *Wigton v. Smith*, 57 Neb. 299.

The cause of action pleaded by the administrator in his amended petition against the national bank arose more than four years before the amended petition was filed, and the amended petition was filed more than four years after the administrator's intestate was in possession of all the facts which, it was alleged, constituted a fraud upon the part of this national bank which made it liable in this action, and therefore the cause of action stated in the amended petition was barred when that amended petition was filed. (Code of Civil Procedure, sec. 12.) Since the original petition did not state a cause of action against the defendant in error, and since the new cause of action incorporated into the amended petition was barred when that petition was filed, it follows that the judgment of the district court was right and must be affirmed without an examination of the various assignments of error argued by counsel for plaintiffs in their briefs.

JUDGMENT AFFIRMED.

GARRELT WEHMER ET AL., APPELLEES, V. WILM JANNSEN FOKENGA ET AL., APPELLANTS.

FILED JANUARY 19, 1899. No. 8589.

1. **Religious Societies:** CHURCH POLITY: JURISDICTION OF COURT. Whether the tenets of faith, the practice, and church polity of one synod of the German "Evangelical Lutheran church in the United States" differ in essential particulars from the tenets of faith, the practice, and church polity of another synod of such church is purely a question of ecclesiastical law, and not one that the secular courts will assume jurisdiction to investigate and determine as an original question.
2. ———: ———: ECCLESIASTICAL TRIBUNALS: EFFECT OF DECISIONS. When the ecclesiastical tribunals of the church have determined such question, their judgment will be recognized by the secular courts as final and conclusive when the latter are called upon by contending factions of a congregation to determine their rights as members of such church.
3. ———: ———: INJUNCTION: EMPLOYMENT OF PASTOR. A majority of a religious congregation, or the trustees thereof, will not, at the suit of a minority of such congregation, be enjoined from employing as pastor for the congregation a minister, professing and teaching the same organic creed professed by the congregation, on the ground that such minister teaches certain doctrines and practices a certain church polity not taught and practiced by the minority nor by the original founders of the congregation.
4. ———: ———: ECCLESIASTICAL TRIBUNALS: ENFORCEMENT OF DECISIONS. In such a case the minority must appeal to the supervising tribunals of the church, and their judgment the secular courts will take as final in the premises and, if necessary and proper, enforce.
5. **Injunction:** REMEDY AT LAW: POSSESSION OF REALTY. A litigant cannot successfully invoke the extraordinary remedy of injunction to regain possession of real estate wrongfully in the possession of another, in the absence of a showing that the ordinary remedies of the law will not afford him complete and adequate relief.

APPEAL from the district court of Johnson county. Heard below before BABCOCK, J. *Reversed.*

F. A. Boehmer, Nestor Rummons, and *J. Hall Hitchcock,* for appellants.

Hugh La Master and *Clarence Gillespie, contra.*

RAGAN, C.

The Evangelical Lutheran church in the United States is a descendant of the Lutheran church of the sixteenth century,—the first church of the reformation. It takes its name of Lutheran from the great founder and apostle of Protestantism, and seems to have been called "Evangelical" to distinguish it from the Reformed or Calvinistic Lutherans. In the United States there are several families of this Lutheran church,—the Dutch Lutherans, the Swedish Lutherans, and the German Lutherans. The organic or fundamental creed of these various branches of the Lutheran church is the Augsburg Confession. The German Evangelical Lutheran churches in the United States are not all subject to one supreme jurisdiction; that is, no body, council, or conference of German Evangelical Lutherans is invested with the management and general supervision of all the German Evangelical Lutheran congregations in the United States. The congregations in any particular district or state, such as the congregations in the state of Nebraska, hold annually a synod for such district or state. This synod is constituted of ordained ministers and licentiates of the various German Evangelical Lutheran congregations in the district. Just what the jurisdiction of this district synod is does not clearly appear from the record before us, but it seems to be invested with the general supervision and control of the congregations within its district and with authority to determine disputes arising in the various congregations over matters of church discipline and ecclesiastical questions. There are also held at stated times in the United States certain synods. These synods are composed of delegates chosen from the district or state synods; and while the jurisdiction of this last synod does not clearly appear, it seems to be in the nature of an ecclesiastical court of last resort for the various congregations over which it has jurisdiction. There are in the United States several of these synods,

which we call national to distinguish them from the district or state synods already referred to. For instance, there are, among others, the Missouri, the Iowa, and the general synods. Certain German Evangelical Lutheran congregations attach themselves to and acknowledge the jurisdiction of the Iowa synod, make their contributions for missionary purposes through that synod and accept from that synod their pastors or ministers. Certain other German Evangelical Lutheran congregations subject themselves in like manner to the jurisdiction of the Missouri synod, and certain others of such congregations likewise subject themselves to the jurisdiction of the General synod. But the organic and fundamental creed of all these German Evangelical Lutheran congregations is the Augsburg Confession, no matter whether the congregations acknowledge the jurisdiction of the Iowa or the General synod. The congregations of German Evangelical Lutheran churches subject to the Iowa synod and the congregations subject to the General synod differ in some matters of faith; for instance, the congregations in the Iowa synod practice what is called "close communion,"—that is, these congregations do not permit members of other Christian churches to commune with them, while the congregations subject to the General synod admit all Christians to their communion table. The congregations of the Iowa synod believe in the doctrine of Chiliasm, or that Christ will visibly reign upon the earth for a thousand years, while the congregations of the General synod reject this doctrine. In the matters of church discipline or government the congregations of the Iowa synod will not allow a minister belonging to another synod to officiate, while the congregations acknowledging the jurisdiction of the General synod permit ministers of any synod to act as their pastors. The congregations of the Iowa synod do not permit their members to belong to secret societies, while the congregations of the General synod do not control their members in that respect. (See generally upon the subject

Johnson's Universal Cyclopædia, title "Lutheran Churches in the United States," and Encyclopædia Britannica, title "Lutheranism.")

In February, 1883, there resided in a neighborhood in Johnson county, in this state, a number of Germans professing the Lutheran faith, and at that time there came among these people a preacher or evangelist by the name of Grommish, who was a minister of the General synod of the Evangelical Lutheran church in the United States, and acknowledged the jurisdiction of such synod. This evangelist called together at the residence of one of them a number of these German people, preached to them a sermon, and advised them to organize a congregation. A number of these Germans drew up a writing of that date in which they organized themselves into a religious corporation under the laws of this state, to which they gave the name of "The Evangelical Lutheran St. John's Church of West Sterling, Sterling, Johnson county, Nebraska." This writing or article of association was duly filed in the office of the county clerk of said Johnson county. The congregation elected trustees and called the Rev. Julius Wolf, a minister of the General synod, and made him its pastor. The congregation seems to have flourished for a number of years. It increased its membership. It purchased a small tract of land, and erected thereon a building for church and school purposes, and made contributions to the missionary cause through the General synod. About 1894 the Rev. Wolf, by reason of ill-health and old age, tendered his resignation to this congregation as its pastor, and it was accepted. Thereupon a portion—a majority, it seems—of the congregation desired to select a minister from the Iowa synod. Another portion of the congregation—a minority, it seems—insisted that the pastor should come from the General synod, and over this question the congregation was riven into two factions. The theory of the minority was that the church, as originally founded, was organized and made subject to the jurisdic-

tion of the General synod; that the property owned by the congregation had been donated to it to further not only the general fundamental organic doctrine of the Lutheran church, but the peculiar faiths and beliefs and matters of church polity entertained by the congregations belonging to the General synod, and that a majority of the congregation was powerless to transfer this congregation from the jurisdiction of the General synod to another, and was without jurisdiction or authority to select its minister from any jurisdiction except that of the General synod. The theory of the majority of the congregation was that the church, as originally organized and founded, was a free church; that it had, and always had had, authority to select its minister from any synod whose congregations were orthodox Lutherans; that so long as the church property was used to further the teachings and dissemination of the organic and fundamental creed of the Lutheran church it was not being diverted from the purposes for which it was donated; and that the congregation, or majority of it, might select any minister from any of the various synods of the Evangelical Lutheran church in the United States. The minority party of this congregation, in October, 1894, held a meeting and adopted what it called a constitution of the church, in and by which it annexed, or attempted to formally annex, the congregation to and subject it to the jurisdiction of the General synod. The majority party of the congregation also held a meeting, at which it adopted what is called a constitution for the congregation, declared the church to be a free church, and that the majority of the congregation had the right to select its minister from any synod it chose of the various synods of the Evangelical Lutheran church. Each of these factions, it seems, elected certain persons, whom it styled the trustees of the congregation. While things were in this condition Garrelt Wehmer and others, in behalf of themselves and the minority of the General synod faction of the church, brought this suit in equity in the dis-

trict court of Johnson county against Wilm Jannsen Fokenga and others representing the majority faction of this congregation.

Among other things Wehmer and others alleged that the congregation was originally organized and was still subject to the jurisdiction of the General synod; that the parties made defendants and those in sympathy with them were seeking to transfer the jurisdiction of the congregation to the Iowa synod; that they were threatening and about to select as pastor a minister of the Iowa synod; that the parties made defendants had taken forcible possession of the church and church property and had excluded, were excluding, and would continue to exclude Wehmer and others, or the minority faction, therefrom. On the hearing of this case the district court found generally and specially in favor of Wehmer and others; found that the church as originally organized was, and was still, subject to the jurisdiction of the General synod; that Wehmer and others were the legal trustees of the congregation of the church, entitled to the possession, custody, and control of its property; that the Iowa synod of the Lutheran church differed from the General synod of that church in essential matters of government, faith, and belief; that all the acts of the parties defendant hereinbefore stated were illegal; that the majority faction had conspired together to transfer the jurisdiction of the congregation from the General to the Iowa synod; that the majority faction had called in ministers from the Iowa synod to conduct services in the church contrary to the organic law thereof, and had forcibly excluded the minority faction therefrom; and thereupon the court entered a decree restraining the majority faction from keeping the minority faction out of possession of the church property and from selecting a minister for said church from the Iowa synod. From this decree Wilm Jannsen Fokenga and others have appealed.

1. We assume, without deciding, that all the findings

made by the district court are supported by the evidence, and still we think this decree cannot be sustained. The court found that the doctrine and tenets of faith and church polity of the Iowa synod were essentially different from those of the General synod, and on this finding enjoined the majority faction of the congregation from selecting for pastor a minister of the Iowa synod. Whether the religious teachings, faith, and church polity of these synods differed in essential particulars was and is a question for the ecclesiastical tribunals, not the civil courts. It is neither pleaded nor proved that an ecclesiastical tribunal having final jurisdiction to decide this question has determined it in favor of the contention of the appellees; nor is it shown that no such an ecclesiastical tribunal exists having jurisdiction to decide the question. Until such a tribunal—if one exists—shall decide the question, the civil courts will not assume to do so. When some ecclesiastical tribunal having jurisdiction in the premises shall determine that according to the organic law of the church this congregation may or may not subject itself to the jurisdiction of the Iowa synod and select for its pastor a minister of that synod, then the civil courts will recognize this judgment and, if called upon, enforce it. (*Pounder v. Ashe*, 44 Neb. 672.) But it would be an unseemly thing for the secular courts to assume to themselves the right to decide in the first instance whether a certain doctrine or tenet of faith possessed and practiced by one religious organization was contrary to the organic and fundamental doctrines and creed of another religious organization. It may be that because the ministers of the Iowa synod believe in Chiliasm, therefore this congregation would violate the fundamental and organic law of its creation by selecting a minister from the Iowa synod for its pastor; but we think that is a question which the civil courts should not attempt to decide. Suppose a Presbyterian congregation, being without a minister, should by a major vote of all the members of the con-

gregation select for its pastor a Methodist minister. Can it be that the civil courts would enjoin the major part of that Presbyterian congregation at the suit of the minor part of it upon the ground that such action on the part of the majority would violate the organic law of the Presbyterian church? We think not. The remedy of the minority in that case would be the same as it is here,—to appeal to the ecclesiastical tribunals of the Presbyterian church to first determine the question, and if it procured a judgment in its favor, then, if unable to enforce it otherwise, call upon the secular courts for protection.

2. But the district court found that the trustees representing the appellees here were the lawful trustees of the congregation and as such entitled to possession of the church property, and that the appellants were forcibly and wrongfully excluding the appellees therefrom. Assuming all this to be so, it does not follow that the appellees were entitled to the extraordinary remedy of injunction, either to regain possession of this church edifice or to exclude the appellants therefrom. For this relief the appellees had a complete and adequate remedy at law, either by an action in the nature of forcible entry and detainer or by ejectment; and it is neither pleaded nor proved but that either of these remedies would afford the appellees complete and adequate relief. (*Warlier v. Williams*, 53 Neb. 143.)

3. Counsel for the appellees brought this case upon the theory—and the district court seems to have adopted it—that the real estate which belonged to this congregation was donated to it for the purpose of teaching and disseminating, not only the cardinal doctrines of the Lutheran church, the organic creed, to-wit, the Augsburg Confession, but the peculiar tenets of faith, already noticed, held by the congregations of the General synod; and that for this congregation to transfer its allegiance to and become subject to the jurisdiction of the Iowa synod would divert the trust property from the purpose for which it

was donated. We do not think it necessarily follows that if this congregation should transfer its allegiance to the Iowa synod this would be a diversion of the church property from the purposes for which it was donated to the congregation. The deed conveying this property to the congregation or trustees thereof does not recite that it was conveyed to the congregation or the trustees as trust property to be devoted to the teaching and dissemination of the cardinal doctrine of the Lutheran church, much less the peculiar tenets of faith entertained by the congregations of the General or any other synod. Furthermore, no faction of this congregation has threatened or attempted to sell, dispose of, or incumber the church property. The question then as to the power of the majority of this congregation to make a valid sale and conveyance of the congregation's real estate is not presented by this record; and if it was, there is respectable authority for the proposition that the majority of this congregation may sell and dispose of this church property, since its title is not incumbered with an express trust. (*Wilson v. Livingstone*, 58 N. W. Rep. [Mich.] 640; *Schradi v. Dornfeld*, 55 N. W. Rep. [Minn.] 49.) The parties to this suit, if they cannot settle their differences otherwise, must appeal to the ecclesiastical tribunals of their church and have those tribunals determine the rights of these factions according to the organic laws of the church; and when this has been done the civil courts will cheerfully take the judgment of the ecclesiastical tribunal as final in the premises and protect the rights of the congregation as declared by such judgment. (*Watson v. Jones*, 13 Wall. [U. S.] 679; *Pounder v. Ashe*, 44 Neb. 672.) But the courts of the state are but the humble instruments for interpreting human laws which know no heresy, and are committed to the support of no dogma. Religious freedom and religious toleration would not long survive if one member of a religious organization, feeling himself aggrieved in some matter of religious faith or church polity, could successfully appeal to the secular

courts for redress, and have these courts determine that one faction of a religious organization was orthodox, and living and acting in conformity with the organic creed of the church, and another faction was violating and disregarding such organic law. The decree of the district court must be, and is, reversed and the action dismissed.

REVERSED AND DISMISSED.

GEORGE M. MURPHEY V. ILLINOIS TRUST & SAVINGS BANK.

FILED JANUARY 19, 1899. No. 8617.

1. **Note:** CONSIDERATION: THIRD PERSONS: INDEMNITY. If A, as an accommodation to B, and in consideration of his promise of indemnity, gives his note to C for a debt owing to the latter by B, the note of A does not lack consideration. B's promise to A is a sufficient consideration to support A's promise to C.
2. **False Representations:** CANCELLATION OF CONTRACT. To entitle a party to be relieved from his contract on the ground that he was induced to make it by the false representation of the other contracting party, he must plead and prove that the representation was made, that it was false, that he believed it, and acted upon it.
3. **Landlord and Tenant:** REPAIR OF PREMISES. In the absence of an express contract a landlord is not bound to repair leased premises, nor to pay for repairs made thereon by the tenant.
4. **Vendor and Vendee:** RIGHTS OF OCCUPANT. One who purchases real estate then in the actual possession of a third party under a written contract with the vendor thereby assumes the obligations of the contract of his vendor with such third party, in the absence of an express contract to the contrary.
5. ———: ———: IMPROVEMENTS. But where the contract between such occupant and vendor is that the latter would pay for improvements made on the property by the occupant, and such contract rests in parol, such purchaser is not bound thereby if he purchased without notice of such parol agreement.
6. **Mortgages:** RIGHTS OF OCCUPANT: IMPROVEMENTS. In the absence of express agreement to the contrary a mortgagee of real estate is not liable to the occupant thereof for improvements made by him on the premises in pursuance of an agreement with the owner that he would pay the occupant for the improvements so made.

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

F. I. Foss, E. E. McGintie, and *W. R. Watson,* for plaintiff in error.

F. C. Power, contra.

RAGAN, C.

The Illinois Trust & Savings Bank brought this suit in the district court of Saline county against George M. Murphey upon a promissory note given by Murphey to the bank which upon its face purports to have been given for the rent of certain elevators. At the close of the evidence the jury, in obedience to an instruction of the district court, returned a verdict for the plaintiff, upon which the court entered a judgment, to review which Murphey has filed here a petition in error.

1. Murphey, to the action of the bank, interposed four defenses, though the same are not so separately stated and numbered in his answer. The first defense was that there was a want of consideration for the note sued upon. In support of this defense Murphey's evidence showed that in 1891 N. H. Warren & Co., an Illinois copartnership, owned some elevators at Crete, Dorchester, and Friend, Nebraska, and he entered into an agreement with this copartnership in and by which it furnished him these elevators. He put in $15,000 in money, took possession of them, and operated them in the buying and shipping of grain until August, 1894; that some time in 1891, at the request of Warren & Co., he executed his note for some $2,400 to the bank; that in 1892 he executed another note to the bank for about $3,000, and in 1893 executed to the bank the note in suit; that he executed these notes to the bank at the request of Warren & Co., because that copartnership was indebted to the bank; that he executed all these notes to the bank in pursuance of an agreement between himself and Warren & Co. that

the latter would indemnify him for so doing,—that is, that they would repay to him whatever money he paid the bank on those notes; that he paid the notes of 1891 and 1892, and all the notes in suit except some $375. The effect of this evidence is that Murphey executed the note in suit as an accommodation for Warren & Co. We do not think he executed the note without consideration. The promise of Warren & Co. to repay him what he should pay the bank was a sufficient consideration to support his promise to the bank, and the fact that Warren & Co. failed to keep their promise to indemnify did not release Murphey from his promise to the bank.

2. A second defense of Murphey's was that he was induced to execute all three of the notes mentioned by certain false and fraudulent representations made by one Gallop, alleged by Murphey to be the joint agent of Warren & Co. and the bank. The false representation which Murphey alleges Gallop made was that Warren & Co. were financially solvent, when as a matter of fact they were insolvent. Murphey's evidence completely failed to support this defense. In the first place Gallop was the general managing agent of Warren & Co. He was not the agent of the bank, except that the latter sent him out to Nebraska to have Murphey execute the note in suit; but as such agent of the bank he had neither express nor ostensible authority to make any representation as to the financial condition of Warren & Co. Furthermore, Murphey says he knew at the time he executed these notes that Warren & Co. were in financial straits; that they owed a great deal more than they were able to pay,—from all of which it is evident that Murphey did not rely upon any representation made by Gallop as to the financial responsibility of Warren & Co., even if Gallop was the agent of the bank and invested with authority to make such representations.

3. A third defense was in the nature of a counter-claim. Murphey sought to recover a judgment against the bank for all the moneys which he had paid out on all three of

the notes mentioned, basing his right to such recovery upon the theory that the bank had obtained the money from him by reason of the fraudulent representation of its agent, Gallop. What has already been said disposes of this defense.

4. A fourth defense interposed by Murphey was also in the nature of a counter-claim. He alleged that during the time he was in possession of these elevators he had made certain repairs upon them; that the repairs were necessary to the elevators; that the bank had received the benefit of the repairs and improvements made, and that such improvements were reasonably worth a certain sum. There are three views which may be taken of this defense: If the bank is to be regarded as the owner and Murphey the tenant of this property after February 26, 1894, at which time it is said the bank became the owner of the property, then to hold the bank liable for repairs made upon the leased premises by Murphey it is necessary for him to plead and prove an express contract, since the bank as landlord was not bound, in the absence of an express contract, to repair the leased premises itself, nor to pay for repairs made by its tenant. (*Turner v. Townsend*, 42 Neb. 376.) Murphey did not plead nor prove an express contract on the part of the bank to pay for any improvements put upon the property by him. If the bank, by purchasing this property from Warren & Co., became liable to carry out the contract existing between Murphey and Warren & Co., then the bank's liability and its rights as the representative of Warren & Co. were measured by the written contract existing between Murphey and Warren & Co., and this written contract does not bind Warren & Co. to keep the elevators in repair, nor to pay for improvements which Murphey might make thereon. But Murphey alleges that the contract between him and Warren & Co., by which the latter were to keep the elevators in repair and to make the necessary improvements thereon, rested in parol. But if this were so, the bank, by purchasing the property from

Warren & Co., would not be bound by an oral contract existing between Warren & Co. and Murphey of which it had no notice, and it is not pleaded nor proved in this record that the bank ever had any knowledge or notice of the oral contract which Murphey alleges existed between him and Warren & Co. in and by which the latter were to pay for the improvements made upon the elevators. Finally, this record tends to show that Warren & Co., being indebted to the bank, executed to it a trust deed or mortgage upon these elevators as security. If this is the status of the bank as regards the elevators, then the bank is not liable to Murphey for any repairs he may have made upon the property either before or after its interest in the property attached, in the absence of an express agreement upon the part of the bank authorizing such improvements. So that in any view we may take of the case the evidence discloses no liability upon the part of the bank to pay for such improvements as Murphey alleges he made upon the elevators. The evidence would not support a verdict in favor of Murphey had the jury rendered one. The district court was therefore right in instructing a verdict for the bank, and its judgment is

AFFIRMED.

HERMAN HOLT, APPELLANT, V. EILERT SCHNEIDER, APPELLEE.

FILED JANUARY 19, 1899. No. 8646.

1. **Principal and Agent:** ESTOPPEL OF PRINCIPAL. Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority.

2. ———: APPARENT AUTHORITY: QUESTION OF FACT. Whether or not an act is within the scope of an agent's apparent authority is to

be determined under the foregoing rule as a question of fact from all the circumstances of the transaction and the business. *Johnston v. Milwaukee & Wyoming Investment Co.*, 46 Neb. 480, followed.

3. ———: OSTENSIBLE AUTHORITY: EVIDENCE. Ostensible authority to act as agent may be inferred 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. *Thomson v. Shelton*, 49 Neb. 644, and *Phœnix Ins. Co. v. Walter*, 51 Neb. 182, followed. *Porter v. Ourada*, 51 Neb. 510, and *Frey v. Curtis*, 52 Neb. 406, distinguished.

4. ———: AUTHORITY OF AGENT: PAYMENT BY NOTE. Generally, the authority of an agent or attorney to collect his principal's debt does not include the authority to accept as payment anything but money; and where a debtor gives his own note to the agent, it will not discharge the debt due the principal, in the absence of ratification of such payment by him.

APPEAL from the district court of Lancaster county. Heard below before HOLMES, J. *Reversed.*

C. C. Flansburg, for appellant.

Stevens & Cochran, contra.

RAGAN, C.

Herman Holt brought this suit in the district court of Lancaster county against Eilert Schneider and others to foreclose a real estate mortgage executed by Schneider to Holt in February, 1884, to secure a note of Schneider of that date payable to Holt for $3,200, due January 1, 1889, with eight per cent interest per annum from its date. As a defense to the action Schneider pleaded payment. The court found the issues in his favor and dismissed Holt's action, and he has appealed.

1. The history of the case is as follows: From 1882 until this controversy arose C. C. Burr, at Lincoln, Nebraska, was engaged in the business of negotiating real estate loans, and until this time Herman Holt was a capitalist residing in New Hampshire. About the year 1882 Burr began lending money to borrowers, taking their notes secured by mortgage payable to Holt. Burr

would give his own check to the borrower for the amount of the loan, record the mortgage, and transmit the papers evidencing the loan to Holt, and draw on him for the amount of the mortgage loan. This course of business was in pursuance of an agreement between Burr and Holt that the latter would take about $20,000 of such loans. The payment of all the loans so made for Holt by Burr in pursuance of this arrangement were guarantied by the latter. The applications for loans were made to Burr. He examined, or caused to be examined, the borrower's title, passed upon its validity, and determined its value as security. He collected interest on the Holt loans from time to time as they matured, and from time to time sent Holt statements of the interest he had collected, and sent him drafts for such interest, deducting any charges made for his services in collecting this interest. In some instances Burr also collected the principal of loans, which he likewise remitted to Holt in the statements made to him from time to time of collections in his hands. Holt sent to Burr from time to time coupons that were due for collection, and when these coupons were received by Burr and paid, he would turn them over to the borrower. Sometimes Burr remitted the interest due before it was actually paid to him. Sometimes the borrower would pay his interest to Burr before Burr received the coupon. In no instance did Holt ever notify any of his debtors to remit the principal or interest of their loans to him, nor did he notify them to pay their loans to Burr. In fact, he had no communication at any time with any of the persons who had borrowed his money, except in one or two instances borrowers wrote him asking, that if they would remit him the amount due on their loans, would he release the mortgages; and in such instances he answered, saying, that he would first communicate with Burr and ascertain if Burr had in his possession any coupon which he, Burr, had paid but which had not been paid to him. Burr also caused in some instances the mortgaged property to be insured for

the benefit of Holt, and generally he transacted the entire business in reference to the making and collection of these loans on behalf of Holt. In 1884 Schneider made application to Burr for a loan of $3,200. Schneider executed to Holt the note and mortgage in suit. Burr caused this mortgage to be recorded and forwarded the same, together with the bond which it secured, to Holt and drew his draft on Holt for $3,200, which Holt paid. When the annual interest coupons matured in January, 1885, 1886, and 1887, Schneider paid them to Burr and he remitted the amounts to Holt. He made these remittances, not exactly at the time they were paid, but according to the usual method adopted by him and Holt for the transaction of their business. It seems that when money was collected by Burr he placed it to his own credit in the bank until such time as he was ready to make a statement to Holt, and when he made such statement he would charge himself with all the moneys he had collected since his former statement, and credit himself with his charges and expenses for making the collections. Holt sent the Schneider coupons to Burr in the same manner that he sent the coupons of other borrowers, and they were by Burr turned over to Schneider. At the time Burr made this loan to Schneider he took from the latter a note for $320, secured by a second mortgage upon the same real estate mortgaged to Holt. This was Burr's commission charged Schneider for obtaining for him the loan. It seems that Burr, because of his guaranty, advanced and paid to Holt the Schneider coupon which matured January 1, 1888; and that coupon not having been paid by Schneider to Burr and Burr's commission mortgage remaining unpaid, he brought a suit in April of that year in the district court of Lancaster county against Schneider to foreclose the commission mortgage. To this suit Schneider and his wife were made parties and duly served with process of the court. Burr also made Herman Holt a party to this suit and employed a firm of attorneys for Holt. The attorneys

filed a cross-bill for Holt, in which the execution of the principal note and mortgage was alleged; that Schneider had made default in paying the interest due thereon, by reason whereof Holt had elected to and had declared the entire mortgage debt due. This case went to decree, Holt, being awarded a first lien for the principal of his mortgage and the interest thereon and Burr a second lien. Holt had not expressly authorized Burr to bring this foreclosure suit. He had no knowledge that it had been brought until October, 1894. At the time the suit was brought, and at all times until this decree was rendered, the Schneider mortgage was in Holt's possession, and at the time the decree was rendered on Holt's cross-bill in the Burr suit the mortgage had not by its terms matured. Schneider took a stay of execution of this decree, and before the stay expired procured a loan of money from the Lombard Investment Company and secured it by mortgage upon the real estate in controversy and paid the proceeds of this loan, about $3,800, over to Burr. This sum was not sufficient to discharge all liens awarded against the land by the decree rendered in the Burr case. Presumably to enable Schneider to procure the loan from the loan company, Burr released his own lien against the Schneider land and procured the release of all other liens against the same, and also as the agent and attorney of Holt released the decree which the court had awarded Holt against that land and took from Schneider his note secured by chattel mortgage for the difference between the sum of $3,800 paid him by Schneider and what it took to clear said real estate from all the liens awarded by the decree in the Burr case. Burr did not account and pay over to Holt all, if any part, of the money paid to him by Schneider to apply on the Holt mortgage. In October, 1894, Holt visited Lincoln and for the first time learned that Burr, assuming to act as his agent, had foreclosed the Schneider mortgage and received from Schneider the money already referred to. After a somewhat complete examination into this

Schneider affair, after consultation with Burr, and with a full knowledge of everything that Burr had done in reference to this Schneider loan, Holt took an assignment in writing from Burr of a large number of certificates of stock owned by the latter in certain corporations, the face or par value of this stock being something more than $200,000. The agreement recites that this assignment was made to Holt for three purposes: (1) That Holt should apply the proceeds of the stock to repay himself for any money he might pay out to redeem the stock which was then pledged as collateral security; (2) the proceeds should be applied to the payment of a note of $5,000 held by Elizabeth Holt against Burr; and (3) the excess of the proceeds of the stock was to be applied by Holt "in fulfillment, satisfaction, or discharge of any of my contracts with said Herman Holt, wherein I guaranty the payment of any notes to him." The evidence also tends to show that this assignment of stock was made and received with the intention on the part of the parties thereto not only to secure the payment of all the notes which Burr had guarantied to Holt and which notes had not been paid, but that it was the intention of the parties by this assignment of stock to secure to Holt the payment of the Schneider loan which Burr had collected and not accounted for.

2. From this evidence the district court was of opinion (1) that Burr was the general agent of Holt, clothed with authority to collect any mortgage loan which he had negotiated for Holt and of which he had guarantied the payment; (2) that Schneider was justified in believing and acting upon the supposition that Burr was Holt's agent for the collection of Schneider's mortgage debt, and that the latter was justified in believing that Burr had authority to bring suit in Holt's name, declaring the mortgage due and foreclosing the same, and justified in relying upon the release of the decree made by Burr; and (3) that Holt took from Burr the assignment to secure, among others, the payment of the money which Schnei-

der had paid to Burr and which the latter had not turned over to his principal, and that Holt took this assignment with a full knowledge of everything his agent had done in the premises, and had therefore ratified all the acts of Burr, even if they were unauthorized.

3. We do not think the district court was correct in its conclusion that Burr was the general managing agent of Holt, and the latter therefore bound by all that he did; nor do we think the district court was correct in holding that Holt had ratified the action of Burr, if unauthorized, by taking from the latter the assignment referred to. But we think, and we decide, that Holt, by his conduct, led Schneider to believe that Burr was the former's agent, clothed with full authority to collect the debt which Schneider owed Holt. As already stated, Holt, though holding Schneider's mortgage, bond, and coupons, had at no time any communication or correspondence with him, and did not direct him at any time to make his remittances to him, Holt. Holt does not seem to have relied so much upon Schneider's mortgage to secure the debt as he did upon Burr's guaranty of the payment thereof. When Schneider's coupons would mature, if he paid them, he would pay them to Burr, through whom he negotiated the loan, and in due course of time Burr would return him the coupon he had paid. All this time Holt knew positively that Burr was collecting his interest on the Schneider loan. He did not disprove of that. He did not question Burr's authority to make these collections in any manner whatever. The mortgage provided that in case default should be made in the payment of interest due thereon for five days, then the mortgage, at the election of the holder of the mortgage debt, should become due. When Schneider was summoned into court to answer the cross-bill filed therein by Burr for Holt that cross-bill set out the fact that Schneider had made default in the payment of the annual interest due on his loan, and that by reason thereof Holt had elected to declare the whole mortgage

debt due. Now while Holt himself did not file this cross-bill, while he did not expressly authorize Burr to file it, yet Burr, assuming to act as his agent, filed, or caused to be filed, the cross-bill, and Schneider was guilty of no negligence in not inquiring into the authority of Burr to cause this cross-bill to be filed. He had the right to presume from what he already knew of Burr and Holt's method of conducting business that since his mortgage was in default Burr had the authority to collect it, and if authority to collect it, had a right to declare it due, and to bring a suit to foreclose it.

It is true that the note and mortgage were not filed in court at the time this decree was taken; and it is also true that the district court should not have permitted this decree to be taken except upon the filing and cancellation of this note and mortgage. But Schneider was not guilty of negligence in not seeing that this was done or not done. When he was about to pay over to Burr the proceeds of the new loan which he had made upon his farm to discharge this Holt indebtedness he inquired for the note and mortgage, and was answered that they could not be given to him because they were part of the files of the court. This satisfied him, and under the circumstances he was not guilty of negligence in paying the money without the production of the note and mortgage.

This case falls within the doctrine of *Johnston v. Milwaukee & Wyoming Investment Co.*, 46 Neb. 480, in which it was ruled: "Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority." And in the case cited it was further ruled: "Whether or not an act is within the scope of an agent's apparent authority is to be determined under the foregoing rule as a question of fact from all

the circumstances of the transaction and the business." The case at bar is also within the doctrine of *Thomson v. Shelton*, 49 Neb. 644, where it was said: "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." To the same effect is *Phœnix Ins. Co. of Hartford v. Walter*, 51 Neb. 182. The case at bar is distinguishable from *Porter v. Ourada*, 51 Neb. 510. In that case the mortgagor voluntarily paid to the original mortgagee the full amount of the mortgage debt before its maturity, the mortgagee not being in possession of the evidence of the debt, and it was held that such a payment would not discharge the debt, it being evidenced by a negotiable promissory note not then due and in the hands of an innocent holder. In that case the mortgagor had made payments of interest to the mortgagee, but the mortgagee was not the agent of the holder of the negotiable paper, and the latter did not know that these payments were made by the mortgagor to the mortgagee. In the case at bar Holt knew all the while that Schneider was paying his interest as it matured to Burr for him, Holt. He recognized and approved these payments and thereby justified Schneider in believing that Burr had authority to collect for Holt. In the case at bar, at the time Schneider paid the $3,800 to Burr, he supposed, and had the right to suppose, that Burr, as Holt's agent for the purpose of collecting it, had declared the entire mortgage debt due; and the payment made by Schneider under the circumstances was not a voluntary payment, but one made *in invitum*. (*Green v. Hall*, 43 Neb. 275.) The case at bar is also distinguishable from *Frey v. Curtis*, 52 Neb. 406. In that case a mortgagor voluntarily paid to the agent, through whom he had negotiated it, a mortgage loan before its maturity, the loan being evidenced by a negotiable promissory note, and at the time in the hands of an innocent third party, and it was held that the mortgagor

was not protected by reason of the payment made. In the *Frey Case*, as in the *Ourada Case*, the holder of the mortgage debt had no notice or knowledge that the mortgagor had ever paid any of his interest coupons to the agent through whom the loan was negotiated. In the case at bar one of two innocent persons must suffer,—either Holt or Schneider. In equity who should bear this loss? Certainly not the one without fault. The one whose negligence caused the loss. If Holt, knowing that Schneider was paying his interest coupons to Burr, had communicated with Schneider and directed him to make his interest payments on his loan directly to him, Holt, then, if Schneider had paid or attempted to pay through Burr, he would not have been protected; but Holt did not do this, did not deal with Schneider in any respect, but permitted Burr to collect what Schneider owed him; allowed Burr to place it to his own credit, and from time to time account to him, Holt, for it with other collections made. Schneider knew that Burr was collecting his interest for Holt and remitting it, and he was justified, from what he knew of the course of dealing between Burr and Holt, in regarding the former as the latter's agent for the purpose of collecting the entire mortgage debt.

As already stated, Schneider obtained the $3,800 paid to Burr by means of a loan from the Lombard Investment Company, and secured the payment of this loan by a mortgage upon the land in controversy. When the investment company's loan matured, Schneider borrowed money from the Union Central Life Insurance Company, with which he paid off and discharged the investment company's mortgage, and secured the life insurance company's loan by another mortgage upon this land. The loan of the life insurance company remains unpaid. The insurance company was made a party to this action and filed an answer in the nature of a cross-bill, seeking to foreclose its mortgage. Although under the circumstances disclosed by the evidence in this record it must be

held that Schneider was justified in regarding Burr as Holt's agent clothed with authority to collect the debt which Schneider owed Holt, yet Burr had no authority, either actual or ostensible, to make collections of Holt's debt in anything but money. Schneider could not discharge his debt to Holt by giving his own note secured by chattel mortgage to Burr. (*Cram v. Sickel*, 51 Neb. 828.) If Burr was Holt's agent with authority to collect the Schneider mortgage, he was not his agent to accept from Schneider in payment of that mortgage anything but money; and though Schneider was justified in regarding Burr as Holt's agent to receive payment of his debt, he was not justified in believing that Burr had authority to accept anything other than money in satisfaction of his principal's claim. Schneider, therefore, has paid to Holt only $3,800 of what was due the latter at the time such payment was made. Schneider, therefore, is entitled to be credited on the Holt mortgage loan with $3,800 as of the date when he made the payment of that sum to Burr, and he is still indebted to Holt for the difference between that sum and the amount due on the Holt mortgage when the $3,800 were paid. But the real estate in controversy is now incumbered by a mortgage made by Schneider to the Union Central Life Insurance Company, and under the evidence in this record the insurance company is an innocent mortgagee or purchaser of this real estate, and its mortgage lien thereon is superior to any lien which Holt may have upon the real estate to secure the payment of the balance due him from Schneider.

The decree of the district court will be reversed and the cause remanded, not for a retrial, but with instructions to ascertain the amount due to Holt from Schneider after deducting the $3,800 paid by the latter to Burr, and to award Holt a lien upon the real estate in controversy for the payment thereof, postponing such lien, however, to that of the Union Central Life Insurance Company.

REVERSED AND REMANDED.

JAMES M. BARRY ET AL. V. MICHAEL WACHOSKY ET AL.

FILED JANUARY 19, 1899. No. 8633.

1. **Objection to Jurisdiction:** WAIVER: ANSWER. Where a defendant objects specially to the court's jurisdiction over him and, that being overruled, pleads generally to the merits and interposes as a defense in his answer the facts showing the court's want of jurisdiction, he does not thereby waive the objection that the court had no jurisdiction over him.

2. **Venue:** DEFENDANTS IN DIFFERENT COUNTIES: PROCESS: PARTIES. The test for determining whether an action is rightly brought in one county against the defendant found and served therein, so that others made defendants thereto may be served in a foreign county, is whether the defendant served in the county in which the action is brought is a *bona fide* defendant to that action,—whether his interest in the action and in the result thereof is adverse to that of the plaintiff.

3. **Non-Negotiable Note:** ACTION BY ASSIGNEE. A non-negotiable promissory note is a mere chose in action, as such is assignable, and the assignee thereof may maintain an action thereon in his own name.

4. ———: ———: PARTIES. To such a suit the assignor is not a necessary party. (Code of Civil Procedure, sec. 30.)

5. ———: ASSIGNMENT: LIABILITY OF PAYEE. The payee of a non-negotiable note who writes his name across the back thereof, and sells and delivers the note, does not thereby render himself liable on such note to the holder thereof.

6. ———: ———: ———. Such a payee of such a note may render himself liable to his assignee for the payment of such note by writing a contract to that effect over his signature; but such a contract, if made, would be a separate and independent one from that evidenced by the note, and the makers of the note would not be liable on that contract.

7. ———: ———: ACTION BY ASSIGNEE: PARTIES. To a suit by the assignee of such a note thereon the original payee is not a proper party. To a suit by such assignee on the payee's contract to be liable for the payment of the note the makers thereof are not proper parties.

8. **Joinder of Causes of Action.** Two causes of action on two separate contracts cannot be united in one petition unless each cause of action affects all parties made defendants.

ERROR from the district court of Douglas county. Tried below before SLABAUGH, J. *Reversed.*

Mel C. Jay, Jay & Welty, and *Alfred Pizey,* for plaintiffs in error.

George E. Pritchett, contra.

RAGAN, C.

James M. Barry, J. M. Brannan, and C. D. Ryan made their promissory note for $500, and delivered the same to one D. F. Clarke. The note was payable to Clarke only. It was non-negotiable. Before the note matured Clarke seems to have sold it to Michael Wachosky. At any rate he wrote his name across the back of the note, and over that he recited in writing that he guarantied the payment of the note, and delivered it to Wachosky. The latter, in the county court of Douglas county, brought a suit against Clarke, Barry, Brannan, and Ryan and set out in his petition the execution and delivery of the note by the makers thereof to Clarke, and then that Clarke wrote his name on the back of the note, and wrote over his name his contract guarantying the payment of the note, and delivered it to him, Wachosky. Clarke resided and was summoned in Douglas county. The makers of the note were found and summoned in Dakota county. The makers of the note, on being brought into the county court, appeared specially and objected to the jurisdiction of the court over them, upon the grounds that they were found and summoned in Dakota county, where they resided, and that Clarke was summoned in Douglas county. This objection of the makers to the jurisdiction of the county court over them was by it overruled. The makers of the note then answered to the merits of Wachosky's petition, and interposed as a defense to the court's jurisdiction the fact that they were residents of and found and summoned only in Dakota county. Wachosky, by

a reply to this answer, admitted that the makers were found and summoned only in Dakota county. Wachosky had a verdict and judgment in the county court, and the makers prosecuted a petition in error to the district court to reverse that judgment. The district court affirmed the judgment of the county court, and its judgment is now before us on a petition in error.

1. The plaintiffs in error adopted the proper practice to raise the question of the court's jurisdiction over them. (*Hurlburt v. Palmer*, 39 Neb. 158; *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897; *Lowe v. Riley*, 57 Neb. 252.) The court having overruled the objections of the plaintiffs in error to the court's jurisdiction over them, they properly set up the facts of their being residents of and summoned only in Dakota county as one of the defenses of their answer, and by so doing did not waive the question of jurisdiction, though in the same answer they pleaded generally to the merits of the plaintiffs' case.

2. Section 60 of the Code of Civil Procedure provides, in substance, that every action not otherwise specifically provided for must be brought in the county in which the defendant, or some one of the defendants, resides or may be summoned. Section 65 of the Code provides that when an action is rightly brought in any county a summons may be issued to another county against any one or more of the defendants at the plaintiff's request. Now Clarke was made a defendant to this action, and he was served with summons in Douglas county, and therefore it was proper to summon the other defendants to the action in Dakota county, if the action was rightly brought against Clarke in Douglas county. The test for determining whether an action be rightly brought in one county against the defendant found, and served therein, so that the other defendants may be served in a foreign county is whether the defendant served in the county in which the action is brought is a *bona fide* defendant to that action,—whether his interest in the action and in the

result thereof is adverse to that of the plaintiff. (*Hanna v. Emerson*, 45 Neb. 708, and cases there cited; *Miller v. Mecker*, 54 Neb. 452.) *Pearson v. Kansas Mfg. Co.*, 14 Neb. 211, is no longer regarded as sound, but has in effect long been overruled. So that, looking at this action as a suit upon the promissory note executed by the plaintiffs in error to Clarke, we have the question, Did Clarke, by assigning this note to Wachosky, become liable upon the note? We think not. The note was non-negotiable. It was a mere chose in action. It was assignable, and when assigned by Clarke, the payee, his assignee, Wachosky, could maintain an action upon it in his own name, and to this action Clarke was not a necessary party. (Code of Civil Procedure, sec. 30.) Clarke, by assigning this note to Wachosky, did not become liable to him or his assignee on the note, and therefore, viewing this action as a suit upon the note, Clarke was not interested in the result of that action adversely to Wachosky, and therefore the action was not rightly brought on the note in Douglas county and the court had no jurisdiction over the plaintiffs in error. Of course, if the payee of a negotiable promissory note writes his name across the back thereof, without more, and delivers it to a third party, the law will write over that signature the promise on the part of such payee that, if the holder thereof presents it to the maker when due for payment, and it be dishonored, and he be given due notice thereof, he will pay the note to the holder. But the payee of a non-negotiable note who sells it, writes his name across the back thereof, and delivers it to the vendee, without more, does not thereby become liable upon the note. His assignment and delivery of the note simply amounts to a quit-claim upon his part of his interest in the note to his vendee. Such a payee of such a non-negotiable note may of course make himself liable to his assignee for the payment of said note by a writing evidencing such a contract over his signature. But in that case such contract would be a separate and independent one from the contract

evidenced by the note and would not affect the makers of the note nor their liability; nor enable the holder of the note to unite in one action the makers and the payee. In the case at bar Clarke did write over his signature on this note a guaranty of payment, and by so doing he became liable to Wachosky as a guarantor of this note. But the makers of the note were not parties to this contract of guaranty. The contract of guaranty was Clarke's contract, and a separate and independent contract from the contract made by plaintiffs in error. Clarke was not, and is not, liable to Wachosky on the note. The makers of the note are not liable to Wachosky upon Clarke's guaranty. Therefore, if we regard this as a suit upon the note, Clarke was not a proper party thereto, and the court had no jurisdiction over the plaintiffs in error. If we regard it as a suit upon the guaranty, Clarke was the only proper party thereto and the court had no jurisdiction over the plaintiffs in error. Wachosky has, perhaps, two causes of action. One cause of action is on the note and against the makers thereof. The other cause of action is against Clarke on his guaranty of payment. These two causes of action cannot be united, for the obvious reason that each one does not affect all the parties to the action. (*Mowery v. Mast*, 9 Neb. 445; Code of Civil Procedure, sec. 88.) The judgment of the district court is reversed and the action, so far as it affects the plaintiffs in error, is dismissed.

REVERSED AND DISMISSED.

GERMAN INSURANCE COMPANY OF FREEPORT V. MARCUS FREDERICK.

FILED JANUARY 19, 1899. NO. 8600.

1. **Summons.** A summons issued from the district court need not state the nature of the action.
2. ———: CORPORATIONS. In suing a corporation it is not necessary that in the summons it be described as such.

3. **Pleading:** CORPORATIONS. A petition, at least after answer to the merits, is not open to attack because it does not allege the corporate character of the defendant.

4. **Summons:** NAME OF PARTY. A writ returned as served on "H. L. Bode" will not be quashed because of the use of initials, unless at least it be shown that such initials were in fact a contraction and not the full name of the person described.

5. **Insurance:** MISSTATEMENTS IN APPLICATION: PAROL EVIDENCE. An insured is not precluded from recovering on a policy because of misstatements in a written application, when it is made to appear that the application was written by the agent of the insurer and that the insured truthfully stated to him the facts in question. Such facts may be shown by parol.

6. ———: VACANT PREMISES. An insurance policy contained a provision avoiding the policy should the demised premises "be or become vacant." They were vacant when the policy was issued and the agent who issued the policy knew that fact. *Held*, A waiver by the insurer of that provision.

7. **Witnesses:** COMPETENCY. A party to an action is not an incompetent witness by whom to prove a transaction with an agent of the other party since deceased.

8. **Pleading:** AMENDMENTS. The allowance of certain amendments after trial so as to conform the pleadings with the proof *held* proper.

9. **New Trial:** NEWLY-DISCOVERED EVIDENCE: AFFIDAVIT. An affidavit in support of a motion for a new trial on the ground of newly-discovered evidence should state as specifically as practicable the nature of such evidence and not merely its general object.

ERROR from the district court of Hall county. Tried below before THOMPSON, J. *Affirmed.*

C. J. Garlow and *M. T. Garlow*, for plaintiff in error.

J. W. Edgerton, contra

IRVINE, C.

This was an action by Frederick on a policy of fire insurance issued by the defendant insurance company. From a judgment for the plaintiff the insurance company prosecutes these proceedings in error.

Before answering, the company filed a special appear-

ance objecting to the jurisdiction of the court over the person of the defendant. The objections were overruled, and the matter thereof has been preserved by averments in the answer to which a demurrer was sustained, by the motion for a new trial, and by appropriate assignments of error. Following are the grounds stated for the objections to the jurisdiction: "First, because the face of the summons served in the case fails to state upon what the action is based or the amount claimed. Second, because the defendant is not properly defined or designated. Third, because the amount claimed by plaintiff is indefinite and uncertain. Fourth, because there is no such person as H. L. Bode, upon whom service is represented to this honorable court to have been made." In addition to the foregoing points certain others are argued in the briefs. Some relate to matters affecting the form of the return and were corrected by amendment thereof by leave of the court. Others cannot be considered, because not presented to the trial court. We consider in order those preserved by the foregoing statement.

The summons in a case begun in the district court need not state the nature of the action. Section 64 of the Code of Civil Procedure prescribes the requisites of a summons and contains no such requirement. Section 910, relied on by plaintiff in error, is a part of the provisions regulating practice before justices of the peace, and is not here applicable. The objection that the defendant is not properly defined or designated is based on the fact that the summons described the defendant as the German Insurance Company of Freeport, Illinois, and did not state that it was a corporation or a partnership. The section already cited requires the defendant to be named, but it does not require that it should be described. Under this head there are argued in the briefs certain questions as to the method of service on corporations. Undoubtedly, if the defendant were not in fact a corporation and were served as such, but not in a manner good against an individual or partnership, such objection might be urged

by appropriate averments. But the objection here made was not sufficient to raise the sufficiency of the service, conceding that the defendant is a corporation. The objection that the amount claimed is uncertain seems to refer to the indorsement on the writ. Conceding that a service of a proper summons may be avoided for uncertainty in the amount indorsed, there was here no such uncertainty. The indorsement stated an amount certain, with interest at a rate specified from a date named. This was certain. It also said "and an attorney's fee." Attorney's fees in such cases, when allowed, are taxed as costs, and the amount need no more be stated by indorsement on the summons than that of other costs,—something which cannot be estimated in advance. Finally, the objection that there is no such person as H. L. Bode is based on the theory that it is a designation of a person by initials, and not by his Christian and surname. Possibly the objection to the return might have been good if it had been shown, after the manner of a plea in abatement, that "H. L. Bode" was not the true name, and also what the true name was. But this court has held that in the absence of such showing it cannot be presumed that the initials do not express the full name. (*Oakley v. Pegler*, 30 Neb. 628; *Scarborough v. Myrick*, 47 Neb. 794.) The objections to the jurisdiction were properly overruled.

It is said that the petition fails to state a cause of action, in that it does not allege the corporate or other capacity of the defendant. It is more than doubtful whether an averment of the corporate capacity of the defendant was necessary. If so, it was too late to insist on the defect after an answer to the merits. (*Exchange Nat. Bank v. Capps*, 32 Neb. 242.) The objection was first made by an objection to the introduction of evidence.

The principal question in the case arises from the fact that the policy provided that it should be void if the insured premises "be or become vacant or unoccupied." They were in fact vacant when the policy was issued, and

remained so until the time of the fire, nine days thereafter. The written application contained an inquiry as to how the premises were occupied and the answer, "It is occupied by tenant as a private dwelling." The proof shows that the application was written by the agent or, under his direction, by his clerk, and that the answer was inserted after a statement by the insured that the premises were then vacant, but had been leased, and that the tenant would move in the next day. Two things are established by former adjudications in this connection. One is that oral evidence is admissible to show that an application was made out by the agent of the insurer on the statements of the insured and that the statements made were true. This relieves the insured from any charge of fraud or misrepresentation, although the agent did not truthfully state the facts. (*Home Fire Ins. Co. v. Fallon*, 45 Neb. 554.) The other is that the provision against vacancy is one for the benefit of the insurer and may be waived, and that it is waived if the company issues the policy with knowledge of an existing vacancy. (*Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537.) The only thing to differentiate this case from the last one cited is that here there was a statement that the premises would be occupied the following day, and there is proof tending to show that the agent withheld delivery of the policy until that day, but without further inquiry as to the occupancy. It can hardly be claimed that there was a warranty that the tenant would move in the next day. It was a fact that the insured could not control. His statements, so far as they concerned facts, were true, and the agent saw fit to issue the policy, relying on the probability of early occupancy.

It is charged in the brief that the policy was procured by fraud. To this there are two answers. Such fraud was not pleaded, nor was it proved.

Objection is made to the introduction of evidence as to the transactions of the insured with the agent, on the ground that the agent was dead at the time of trial. This

fact seems to have been assumed, but it was not proved. However, the statute makes such testimony incompetent only where the adverse party is the representative of the deceased. Here that was not the case. The deceased in his lifetime had been the representative of the adverse party. Perhaps such cases ought to be brought within the statute, but they are not now within it.

Some complaint is made in the briefs because there were taxes against the property not stated in answer to the inquiry as to incumbrances. No such defense was pleaded.

The plaintiff, after trial, was permitted to amend petition and reply so as to admit that the premises were vacant, but to plead the waiver above sustained. There was no error in this. The evidence had gone in on this issue without objection based on its irrelevancy, and the amendment was a proper one to conform the pleadings with the proof. Terms were imposed, by way of requiring compensation for the expense of witnesses to prove the fact of vacancy, and we cannot see that there was any abuse of discretion.

It is urged that the evidence was insufficient to sustain the finding. Without rehearsing it at length it is sufficient to say that we think it was sufficient.

Objection is made to the allowance of attorney's fees. This question is too well settled to now permit of reconsideration.

A new trial was sought on the ground of newly-discovered evidence. The affidavit in support of this motion merely stated the general purpose of the testimony without stating its nature, and so afforded no basis for an inquiry by the court as to whether the testimony was of such a character as to warrant the granting of a new trial.

AFFIRMED.

HARRISON, C. J., not sitting.

FRANCIS C. FAULKNER, ASSIGNEE, V. CYRUS P. GILBERT.

FILED JANUARY 19, 1899. No. 8597.

1. **Contract:** CONSIDERATION. The consideration of a contract need not move to the promisor. A disadvantage to the promisee is sufficient, although the promisor derives no benefit therefrom.

2. **Guaranty:** CONSIDERATION. The extension of time to a principal debtor is a sufficient consideration to support a guaranty by a stranger of the payment of the new obligation.

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

S. L. Geisthardt, for plaintiff in error.

A. N. Sullivan, contra.

IRVINE, C.

This was an action by Faulkner, as assignee of the Connecticut River Savings Bank, against Gilbert, on a contract whereby it was alleged that Gilbert had guarantied the payment of a promissory note made by one Parkins and his wife to Benjamin A. Gibson, and which had become the property of the Connecticut River Bank. Of the several matters pleaded in defense the only one submitted to the jury was want of consideration for the contract of guaranty. There was a verdict and a judgment for defendant.

The theory of the plaintiff was that Parkins and Gilbert were indebted to Gibson on a note or notes past due; that Parkins and wife executed their note due in five years and a mortgage to secure the same, and that Gilbert guarantied the note in consideration of Gibson's accepting it, extending the debt and releasing the old notes. The theory of the defendant was that Gibson had agreed that if Gilbert would induce Parkins and wife to make the new note and the mortgage securing it, Gibson would release Gilbert from further liability; that

Gilbert had done as required, and that, after Gibson had accepted the new note and mortgage, Gilbert was induced, without further consideration, to sign the contract of guaranty.

The court instructed the jury that if it should find that a consideration passed between Gilbert and the payee of the note, it should find for the plaintiff. Further, "that if the guaranty was executed for the purpose of extending an indebtedness due from defendant to plaintiff," the consideration would be sufficient. Again, that "before the plaintiff can recover in this case you must find from the evidence that the defendant received a consideration for his guaranty." These instructions were erroneous as applied to the facts of the case, because each required, in order that a consideration should be found to exist, that such consideration should move to the defendant. That is not necessary. A disadvantage to the promisee constitutes a consideration, although no advantage accrue to the promisor. The extension of a debt to the principal debtor is a sufficient consideration to support a contract of suretyship as to the new debt. (*Smith v. Spaulding*, 40 Neb. 339.) Under the pleadings and the evidence in this case the jury might have found that there had been an agreement to release Gilbert from the old debt if he would procure the execution of the new note and the mortgage, and that he nevertheless guarantied the payment of the new note concurrently with its delivery and to procure its acceptance. If so, there was a consideration; but the instructions given told the jury that there would not be, because it did not move to Gilbert.

It is not deemed proper at this time to comment upon the sufficiency of the evidence, or necessary to consider other questions argued.

REVERSED AND REMANDED.

SCHOOL DISTRICT NO. 35 OF SHERMAN COUNTY V. JAMES L. RANDOLPH.

FILED JANUARY 19, 1899. NO. 8607.

School District: SCHOOLHOUSE: RIGHTS OF ELECTORS. Subject to certain restrictions, the qualified electors of school districts are intrusted with the power to determine what sort of a schoolhouse shall be erected and the extent of the expenditure therefor; and when so determined, the school board has no authority to change the same and thus bind the district for an increased expenditure. *Gehling v. School District*, 10 Neb. 239, followed.

ERROR from the district court of Sherman county. Tried below before SINCLAIR, J. *Reversed.*

Wall & Burrowes, for plaintiff in error.

T. S. Nightingale and *R. J. Nightingale, contra.*

IRVINE, C.

School District 35 of Sherman county undertook to erect a schoolhouse. Plans and specifications were adopted at a district meeting, and the contract for erecting the house was let to Randolph. He built the house according to contract, it was accepted, and he received the contract price. It was, however, discovered that the designs failed to provide for certain work on the foundations, for certain braces, for window shutters, and for a platform and steps at the door as means of ingress. Randolph, at the request of the district board, supplied these deficiencies and brought this suit, not on a *quantum meruit*, but on the special contract with the board, to recover for the extra work. The district court gave him judgment for the price of the shutters, platform and steps, and the district asks a reversal.

However meritorious the claim may be as a moral obligation upon the district, we are satisfied it cannot be sustained, at least through a suit on the special contract

with the district board. In support of the claim the defendant in error invokes section 9, subdivision 5, chapter 79, Compiled Statutes, as follows: "The said board shall have the care and custody of the schoolhouse and other property of the district, except so far as the same shall be confided to the custody of the director." Conceding that this provision confers upon the board authority to contract for ordinary repairs, to maintain the house in good condition, it cannot be given the effect of authorizing new construction without a conflict with other provisions of the law. The work here in controversy was not in the nature of repairs. It was additional work to complete the building, beyond that which the electors had authorized by the adoption of the plans and specifications. Section 10, subdivision 2, chapter 79, Compiled Statutes, gives to the electors the power to build, hire, or purchase a schoolhouse. Section 12 gives them the power to determine the number of mills on assessment valuation which shall be expended for such building. Section 13 provides that the tax collected shall be expended under the direction of the district made at the annual meeting, or in the absence of such direction, as the district board shall direct. Here the electors had directed. It is clear that the policy of the law is to permit the electors to determine whether a schoolhouse shall be constructed, the amount to be expended, and to permit them also, if they choose, to designate the kind of a house which shall be built. If they do so, the board is powerless to increase the expenditure by changing the adopted plans or by adding work which the electors have not seen fit to provide for. *Gehling v. School District*, 10 Neb. 239, was a case like this and the law construed as above indicated. *Mizera v. Auten*, 45 Neb. 239, presented a somewhat different question, but the same construction was indicated.

REVERSED AND REMANDED.

CITY OF BROKEN BOW ET AL., APPELLEES, V. BROKEN BOW WATER-WORKS COMPANY ET AL., IMPLEADED WITH CHARLES W. YOUNG, APPELLANT.

FILED JANUARY 19, 1899. NO. 8631.

1. **Judgment:** ENFORCEMENT: INJUNCTION. To justify an injunction to restrain the enforcement of a judgment it is not sufficient to show that the judgment debtor had a valid defense. It must be shown that he was prevented from interposing it by fraud, mistake, or accident, and without fault on his part.
2. ———: ———: ———. The fact that the judgment debtor, without fraud or concealment as to the facts, mistook the law and so suffered judgment, does not constitute a mistake which entitles him to relief.
3. **Municipal Corporations:** CONTRACTS WITH CORPORATIONS: CITY OFFICERS AS STOCKHOLDERS. The fact that the mayor and a member of the council of a city may, as having been subscribers to the stock of a corporation, become liable for an unpaid subscription if such corporation should some time become insolvent and other contingencies happen, does not of itself avoid a contract between the city and the corporation, in making which they participated as municipal officers, they being no longer stockholders.
4. **Judgment:** ENFORCEMENT: INJUNCTION. Pleadings and proof *held* insufficient to warrant an injunction to restrain the enforcement of judgments.

APPEAL from the district court of Custer county. Heard below before GREENE, J. *Reversed.*

Harry E. O'Neill, O'Neill & Gilbert, Alpha Morgan, and *A. M. Post,* for appellant.

Taylor Flick and *Kirkpatrick Bros., contra.*

IRVINE, C.

This was an action by the city of Broken Bow, with which joined a citizen and taxpayer, against the Broken Bow Water-Works Company and others to enjoin the defendants from enforcing three certain judgments recovered by the water-works company against the city

The defense was made by Charles W. Young, claiming to be the owner by assignment of two of the judgments and a greater part of the third. The plaintiffs had a decree as prayed, and the defendant Young appeals.

The city of Broken Bow in 1888 granted by ordinance to the water-works company a franchise for the construction and operation of water-works for the city. The ordinance provided for a certain number of fire hydrants and for increasing the number as the mains should be extended. It also fixed the rate to be paid as hydrant rentals and provided for the levy of taxes to the amount of seven mills to create a fund for the payment of such hydrant rentals. It happened that the sum realized by the levy proved insufficient to create a fund large enough to pay the company the stipulated rate per hydrant, and by the year 1892 the deficit amounted to over $4,000. An amicable suit was then begun by the company for the amount of the supposed deficiency. The city answered, confessing liability, and judgment was entered. In 1893 and in 1894, other deficiencies having arisen, judgments were again suffered. It seems that this course was taken under an agreement that the company, instead of enforcing the judgments immediately, would look for payment in annual installments. These are the judgments which are attacked.

The petition did not state a cause of action. It set out the ordinance in full, alleged the levy of a seven mills tax each year and the payment of the proceeds thereof to the company, and then proceeded: "Notwithstanding the fact last recited the defendant water-works company, on the —— day of ——, 1892, conceived the idea that the said city was obligated by said ordinance to pay the said water-works company a large sum of money annually, over and above the amount raised by the seven mills therein stipulated; and thereupon and thereafter, by threatening to bring suit for such sums, induced the principal plaintiff to confess judgments for such annual excesses in sums as follows: [reciting them]. On which

judgments the city has paid $1,000, the record of which appears on said judgment records (book 3, page 263). That said judgments, with the accrued interest thereon, now amount to the sum of $8,685.78, all of which plaintiffs aver is in excess of the limit stipulated in said ordinance, and is also in excess of the amount that said city could lawfully contract to pay for water service. Moreover, they were confessed by mistake, for the principal plaintiff was not then, and is not now, indebted to the principal defendant in any sum of money." There were no other averments tending to impeach the judgments. It is an equitable truism that a judgment at law will not be set aside or its enforcement restrained because of the existence of a defense which might have been made against the rendition of the judgment, unless the plaintiff shows that he was not in fault in failing to interpose such defense in the original case. He must show that the judgment was procured by fraud, through mistake, or because of some accident which prevented him, without fault of his own, from interposing the defense at the proper time. We have here only two averments which could have been intended to supply this essential part of the plaintiff's case. One is that the company conceived the idea that it was entitled to the money and threatened suit if it was not paid, and so induced the confession of judgment. It is the first time we have heard that one conceiving money to be justly due him is guilty of fraud or any other sin in seeking payment, or in threatening to resort to the remedy afforded by law for that purpose. There is no allegation that any facts were misrepresented, or that the company did other than to threaten suit to recover a demand it deemed just. The other allegation is that the judgments were suffered by mistake, but the mistake is specified to be that the defendant city was not liable. It seems that the mistake by the city was one of law, for there is no averment that the facts were not by it known. Further comment on the petition would be useless.

In the reply there are other averments. It is urged by appellants that a petition cannot be helped out by averments in the reply. We assume, without deciding, that the two pleadings may be taken together; still the judgment of the district court was wrong. The first charge in the reply is that the city attorney, at the time of the first judgment, was at the same time attorney for the water-works company; that he, falsely pretending to act in the interest of the city, induced the mayor and council to authorize him to confess judgment, and then gave the record the appearance of an adversary proceeding. The evidence wholly fails to show that the attorney named was the attorney of the water-works company. There is not a particle of evidence which would warrant a finding that he was. It is true that it developed that he filed both the petition and the answer in the first case, and that he signed the names of other attorneys to the petition. But it was shown that these other attorneys were in fact employed to bring the suit; that they lived at a distance; that they dictated the petition, and the city attorney, as an accommodation to them, signed their names to it and caused it to be filed. This was not improper in view of the fact that the proceeding was amicable, as a result of an agreement, and that the mayor and council had authorized the city attorney to confess judgment. There is neither allegation nor proof of any false representation or any influence brought to bear by the attorney to induce the action of the mayor and council.

It is next alleged that when the first judgment was confessed the mayor and two members of the council were stockholders in the company. The proof fails to so show. It shows that the mayor and one member of the council were stockholders in the company at one time, but that they had parted with their stock long prior to the time in question. It is suggested that the liability resting upon original subscribers of stock by reason of section 4, article 11, of the constitution (Miscellaneous Corporations) was sufficient to disqualify the persons

named from acting for the city. This argument assumes that an interest involved behind several contingencies would operate in itself as a disqualification. Assuming that the constitutional liability still rested upon them for unpaid subscriptions, it would only be operative in the event of insolvency, and then only after the exhaustion of corporate assets. Few municipal acts would be valid if the mere participation therein of one who at the end of such a chain of contingencies might acquire a personal interest would be sufficient to avoid them.

The only ground of relief asserted against the judgments of 1893 and 1894 is that they were brought about by the mischievous precedent established by the first. The record shows nothing whatever, except that city officials, to compromise a doubtful claim, or one that they considered doubtful if not conclusively good against the city, authorized the confession of judgments, under a special agreement for their gradual payment. Subsequent officials and a taxpayer, after some years, conceived that the city might have successfully resisted the enforcement of the claims, and so brought this suit to avoid the judgments, without tangible ground other than the invalidity of the original cause of action. The case is wholly without merit. The finding of the district court that the judgments were procured by fraud is not sustained by the evidence.

REVERSED AND DISMISSED.

JOHN NAGLE ET AL. V. FIRST NATIONAL BANK OF OMAHA ET AL.

FILED JANUARY 19, 1899. NO. 8621.

1. **Purchase of Attached Property: RES JUDICATA.** One who by voluntary transfer acquires rights in personal property after a writ of attachment has been levied thereon is bound by an adjudication in the attachment case of the validity of such attachment.

2. **Mortgage on Attached Goods:** VALID ATTACHMENT: COLLATERAL ATTACK. An attachment was levied on the goods of A. Subsequently A made mortgages on such goods to other creditors. Thereafter the petition in the attachment case was amended so as to state a different cause of action. On motion to discharge in the attachment case the attachment was held good. *Held*, That the mortgagees could not in an independent action be heard to attack the attachment.

ERROR from the district court of Douglas county. Tried below before DUFFIE, J. *Reversed.*

The opinion contains a statement of the case.

Charles Ogden, Joel W. West, and *J. M. Macfarland,* for plaintiffs in error.

References: *Rudolf v. McDonald,* 6 Neb. 166; *Ward v. Howard,* 12 O. St. 158; *Tilton v. Cofield,* 93 U. S. 163; Waples, Attachment 145; Drake, Attachment 282; *Felton v. Wadsworth,* 7 Cush. [Mass.] 588; *Peirce v. Partridge,* 3 Met. [Mass.] 44; *Fairfield v. Baldwin,* 12 Pick. [Mass.] 388.

Montgomery & Hall, contra:

Plaintiffs in error changed their cause of action from one for goods sold to one for money loaned, which was not an amendment, but was the substitution of a new cause of action, so their lien dates only from the time of filing the amended petition. (*Clark v. Omaha & S. W. R. Co.,* 5 Neb. 318; *Busch v. Hagenrick,* 10 Neb. 415; *Scott v. Spencer,* 44 Neb. 93; *First Nat. Bank of Wymore v. Myers,* 44 Neb. 306; *Lottman v. Barnett,* 62 Mo. 159; *Lumpkin v. Collier,* 69 Mo. 170; *Scovill v. Glasner,* 79 Mo. 449; *Hollister v. Livingston,* 9 How. Pr. [N. Y.] 141; *Woodruff v. Dickie,* 31 How. Pr. [N. Y.] 167; *Robertson v. Robertson,* 9 Daly [N. Y.] 44; *Freeman v. Grant,* 30 N. E. Rep. [N. Y.] 247; *Lane v. Beam,* 19 Barb. [N. Y.] 51; *Semple v. Glenn,* 9 So. Rep. [Ala.] 265; *Givens v. Wheeler,* 5 Colo. 598; *Rockwell v. Holcomb,* 31 Pac. Rep. [Colo.] 944; *Sumner v. Brown,* 34 Vt. 194; *Bockes v. Lansing,* 74 N. Y. 437; *Barnes v. Quig-*

ley, 59 N. Y. 265; *Milliken v. Whitehouse*, 49 Me. 535; *Cooper v. Waldron*, 50 Me. 80; *Wolf v. Wolf*, 28 Atl. Rep. [Pa.] 164; *Farwell v. Wright*, 38 Neb. 445; *Fairfield v. Baldwin*, 29 Mass. 395; *Freeman v. Creech*, 112 Mass. 180; *Furness v. Read*, 63 Md. 1; *Smead v. Chrisfield*, 1 Handy [O.] 574; *Peck v. Sill*, 3 Conn. 157; *Green v. Jackson*, 66 Ga. 250; *Peirce v. Partridge*, 44 Mass. 44; *Brookmire v. Rosa*, 34 Neb. 227; *Homan v. Hellman*, 35 Neb. 414; *Scroggin v. Johnston*, 45 Neb. 714.)

The right of Nagle & Brecher to the attached property as against defendants in error commenced only when the amended petition was filed. (*McCord v. Krause*, 36 Neb. 764; *Darst v. Levy*, 40 Neb. 594; *Landauer v. Mack*, 43 Neb. 430; *Bauer v. Deane*, 33 Neb. 487; *Rogers v. Heads Iron Foundry*, 51 Neb. 39; *Heidel v. Benedict*, 63 N. W. Rep. [Minn.] 490; *Whitney v. Brunette*, 15 Wis. 67; *Witte v. Myer*, 11 Wis. 309; *Bell v. Hall*, 2 Duv. [Ky.] 288; *Putnam v. Hall*, 3 Pick. [Mass.] 445; *Berry v. Spear*, 13 Me. 187; *Shirley v. Phillips*, 17 Ill. 471; *Calef v. Parsons*, 48 Ill. App. 253; *Hammond v. Bush*, 8 Abb. Pr. [N. Y.] 152; *McKee v. Tyson*, 10 Abb. Pr. [N. Y.] 392; *Hunt v. Grant*, 19 Wend. [N. Y.] 90; *Bank of Rochester v. Emerson*, 10 Paige [N. Y.] 359; *Boyden v. Johnson*, 11 How. Pr. [N. Y.] 503; *Johnston v. Fellerman*, 13 How. Pr. [N. Y.] 21; *Van Beck v. Shuman*, 13 How. Pr. [N. Y.] 472; *Bryan v. Miller*, 28 Mo. 32; *Smith v. Hood*, 25 Pa. St. 218; *Patterson v. Steamboat Gulnare*, 2 Disn. [O.] 505; *Ohio Life Ins. & Trust Co. v. Urbana Ins. Co.*, 13 O. *220; *Williams v. Sharp*, 70 N. Car. 582; *Davidson v. Cowan*, 1 Dev. Law [N. Car.] 304; *Purcell v. McFarland*, 1 Ired Law [N. Car.] 34; *Bank of Cape Fear v. Williamson*, 2 Ired. Law [N. Car.] 147; *Wilcox v. Emerson*, 11 R. I. 501; *Fairbanks v. Stanley*, 18 Me. 296; *Quillen v. Arnold*, 12 Nev. 234; *Greenvault v. Farmers & Mechanics Bank*, 2 Doug. [Mich.] 498; *Moore v. Davis*, 58 Mich. 25; *Moody v. Lucier*, 62 N. H. 584; *Lillard v. Porter*, 39 Tenn. 176; *Denny v. Ward*, 20 Mass. 199; *Hall v. Hooper*, 47 Neb. 111; *Flatley v. Memphis & C. R. Co.*, 9 Heisk. [Tenn.] 230; *Crofford v. Cothran*, 2 Sneed [Tenn.] 492; *Rudolf v. McDonald*, 6 Neb.

163; *Ward v. Howard*, 12 O. St. 158; *Peirce v. Partridge*, 3 Met. [Mass.] 44; *Fairfield v. Baldwin*, 12 Pick. [Mass.] 388; *Felton v. Wadsworth*, 7 Cush. [Mass.] 588; *Irwin v. Sanders*, 5 Yerg. [Tenn.] 287; *Jordan v. Dewey*, 40 Neb. 644; *Grotte v. Nagle*, 50 Neb. 363.)

IRVINE, C.

Prior to March 15, 1892, R. R. Grotte was engaged in the liquor business in Omaha. He became indebted to the firm of Nagle & Brecher, who, on the date mentioned, instituted an action against him, aided by proceedings in attachment. The proceedings were begun under telegraphic instructions from Nagle & Brecher to attorneys in Omaha, and the petition filed was for goods sold and delivered. As a matter of fact the claim was for money lent, and some time after the institution of the proceedings and the levying of the writ of attachment upon Grotte's stock the petition was amended so as to count upon money lent instead of goods sold and delivered. A motion was made to dissolve the attachment. This motion was overruled. Grotte brought the case to this court, where the judgment of the district court was affirmed. (*Grotte v. Nagle*, 50 Neb. 363.) The day the attachment was levied Grotte had agreed with Montgomery, Charlton & Hall, attorneys representing a number of other creditors, to execute in their favor mortgages upon his stock. Three or four of these mortgages had been drawn and signed by Grotte by 5 o'clock on that day, but none was then recorded. It was, however, agreed that the creditors should be put in possession; but before this was accomplished the Nagle & Brecher attachment had been levied. Grotte, however, proceeded to execute the mortgages, which were filed for record the following morning. A few days thereafter the present action was begun by the mortgagees to foreclose their mortgages. They alleged the attachment proceedings and a contest with regard to the different claims, and a receiver was appointed, who, pursuant to the orders of

the court, sold the stock. The controversy became one between Nagle & Brecher claiming under the attachment on the one side, and the mortgagees on the other, as to the right to the fund resulting from the sale. The decree of the district court was in favor of the mortgagees, and Nagle & Brecher bring the case here for review.

Counsel have saved us a detailed examination of quite a large record by agreeing substantially as to the facts of the case and as to the question presented, which is, whether the abandonment by Nagle & Brecher of their first petition, and the amendment already referred to, operated so far to discharge the original attachment as to postpone the rights of Nagle & Brecher to those mortgagees whose rights accrued subsequent to the original levy, but before the amendment.

Counsel for the mortgagees present a large number of authorities to establish two propositions: First, that the amendment of the petition from one for goods sold and delivered to one for money lent operated as a change of the cause of action. Secondly, that an amendment which does substantially change the cause of action in an attachment case discharges the attachment as to rights accruing between the original levy and the time of amendment. Without deciding it, we assume that the first proposition is sound, but we think the second is subject to certain qualifications which prevent its operation in favor of the mortgagees in this case. It will undoubtedly be conceded that the judgment of the district court on the motion to discharge the attachment, affirmed by this court in *Grotte v. Nagle, supra*, operated as an adjudication as between the parties to that case of the regularity and continued effect of the attachment, notwithstanding the amendment made. The mortgagees are not in the position of subsequent attaching creditors or others claiming rights independent of the parties to the attachment case. Their claim is under voluntary transfers from Grotte, the defendant in that case; and these transfers were not made—that is, they did not be-

come effective—until after the levy of the attachment and the service of summons. Section 85 of the Code of Civil Procedure provides: "When the summons has been served or publication made, the action is pending so as to charge third persons with notice of pendency, and while pending, no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title." The remainder of the section contains special provisions with reference to actions concerning real estate. What has been quoted is merely a declaration of the common law. In a suit very similar to the present the supreme court of the United States held that the propriety of the amendment affected only the regularity of the proceedings in the attachment case, and did not reach the validity of the attachment, or expose it to collateral attack by purchasers whose rights accrued after the levy and before the amendment. It was there said: "The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it at the outset." (*Tillon v. Cofield*, 93 U. S. 163.) We are entirely satisfied with the conclusion reached in the case cited, and think it applicable to the law of this state. Whatever collateral attacks might be open to creditors claiming liens of independent derivation, a mortgagee who claims by voluntary transfer subsequent to the levy attacks as a purchaser *pendente lite*. It is probable that these mortgagees might have been heard in the attachment suit to defend their rights. But in any event, as their rights accrued subsequent and therefore subject to the attachment, they were bound by the result of that case.

The briefs are so copious in their citation of authorities that we shall not attempt a detailed review thereof. We think that all the cases are reconcilable with the principle upon which we base the decision. Thus, *Heidel v. Benedict*, 63 N. W. Rep. [Minn.] 490, was a contest between an attaching creditor and the assignee under a

general assignment for creditors, and the decision was based on the ground that the assignee represented creditors and could assert their rights rather than those of the transferee from the debtor. In this state the assignee represents the debtor, except as otherwise expressly authorized (*Lancaster County Bank v. Gillilan*, 49 Neb. 165), so that if the case were otherwise in point, it would not be applicable to the law of this state. And even to reach the result there reached the court found it necessary to hold that the decision of a motion to discharge an attachment was not an adjudication which protected the attachment from collateral attack,—a ruling certainly contrary to the law of this state. *Freeman v. Creech*, 112 Mass. 180, while on its face an authority in favor of the mortgagees, is founded on an express statute protecting purchasers from attachments where such amendments have been made, unless they have been given notice of the application to amend. Other cases, well represented by *Whitney v. Brunette*, 15 Wis. 67, are cases where an attachment was absolutely void until after the amendment. Such of course do not bind even the defendant prior to the amendment. To this class of cases belongs *Bauer v. Deane*, 33 Neb. 487, where it was held that where no cause of action was stated against the defendant whose property was attached, a subsequent amendment would not cause the attachment to relate back to the time of levy. In *Farwell v. Wright*, 38 Neb. 445, no cause of action existed when the attachment was issued, and it was held that the attachment could not be aided by a subsequent acquisition of a cause of action. These were proceedings between the original parties. If in point at all, they would militate against the correctness of the decision in the attachment case, but they do not indicate that that decision can be disregarded. On the contrary, *Rudolf v. McDonald*, 6 Neb. 163, holds that when property has been seized under an order of attachment, no question of ownership raised, or fraud or collusion alleged, final judgment concludes all inquiry

by third persons concerning the regularity of the proceedings, no matter how erroneous they may have been; and the same conclusion is reached in *Horkey v. Kendall*, 53 Neb. 522. We conclude, therefore, that the judgment of the district court giving the mortgagees priority over Nagle & Brecher was erroneous.

REVERSED AND REMANDED.

MISSOURI PACIFIC RAILROAD COMPANY V. HANS P. LAU.

FILED FEBRUARY 9, 1899. No. 8297.

1. **Bills of Lading**: CONSIGNMENT TO SHIPPER: TITLE. A party who ships goods by common carrier, consigned in the bill of lading to himself, his agent, or the order of either, will be presumed to have intended to retain the title to the goods.

2. ———: ———: REBUTTAL OF PRESUMPTION. Such presumption may be rebutted by proof; and where the question of the intention is litigated, it is one of fact for the jury, unless conclusively established by the evidence.

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

B. P. Waggener, J. W. Orr, and *A. R. Talbot,* for plaintiff in error.

References: *Hooper v. Chicago & N. W. R. Co.*, 27 Wis. 81; *Michigan C. R. Co. v. Phillips*, 60 Ill. 190; *Pennsylvania R. Co. v. Stern*, 35 Am. & Eng. R. Cas. [Pa.] 551; *Furman v. Union P. R. Co.*, 32 Am. & Eng. R. Cas. [N. Y.] 500; *Libby v. Ingalls*, 124 Mass. 503; *McEwen v. Jeffersonville, M. & I. R. Co.*, 33 Ind. 368; *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb. 379; *Union P. R. Co. v. Johnson*, 45 Neb. 57; *Union Stock Yards Co. v. Westcott*, 47 Neb. 300.

Willard E. Stewart, contra.

Defendant in error did not file a brief.

HARRISON, C. J.

The defendant in error instituted this action to recover the damages alleged to have been occasioned to him by reason of the negligence or lack of care of the plaintiff in error during the transporting over its line of road from St. Louis into Lincoln a car load of oranges in transit from Leesburg, Florida, to Lincoln, by reason of which negligence it was alleged the oranges were frost-bitten or frozen and were rendered partially or wholly valueless. The company answered the complaint of the defendant in error, and a trial resulted in a verdict and judgment against the company, of which it now seeks a reversal.

It appears that one E. H. Mote shipped 250 boxes of oranges, of which shipment the bill of lading disclosed that he was the consignor, and under the printed words on the face of said bill, "Marks," "Full name and address of consignee must be given in every case," appeared in writing, "S/O. Notify H. P. Lau, Lincoln, Neb." The "S/O," it was testified, were used to indicate, or meant, "Shipper's order," and that the goods, of which the bill of lading in which they appeared, were consigned to be delivered to the shipper at their destination. The bill of lading in this case was attached to a draft and with it forwarded to a bank in Lincoln, the bill to be delivered to H. P. Lau on payment of the draft which it accompanied. That the oranges were shipped to the order of the consignor, as evidenced by the bill of lading, was presumptive or almost conclusive of the fact of the continued title or ownership in the shipper, but it is competent and allowable to show to the contrary. (Benjamin, Sales sec. 399 and American note thereto; Newmark, Sales [pony series] sec. 147; 21 Am. & Eng. Ency. Law 508; *Merchants Nat. Bank v. Bangs*, 102 Mass. 291; *Dows v. National Exchange Bank*, 91 U. S. 618.) The same doctrine is recognized in *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb. 379; *Union Stock Yards Co. v. Westcott*, 47 Neb.

300; *Union P. R. Co. v. Johnson*, 45 Neb. 57. It was stated by RAGAN, C., in the opinion in *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.*, 54 Neb. 321: "Where a vendor of goods delivers them to a carrier for transit to his vendee, and causes the goods to be consigned in the bill of lading to himself, his agent, or his order, the presumption arises that he thereby intended to retain the title in himself to the goods." The same rule was voiced in the dissenting opinion in the case by Judge NORVAL. (See 54 Neb. 343.) The other members of the court made no expression on the subject at that time.

In the case at bar the court instructed the jury: "Hans P. Lau, the plaintiff, under the law, was so far the owner of the car of oranges as that he is entitled to maintain this action, but his right of action for any act or omission of defendant during transit of said car is governed by the contract of shipment made by E. H. Mote, the shipper, and the railroads, and Lau has thereunder the same rights as Mote would have, no more, no less." That this was an error is of the assignments presented for review. The evidence did not clearly establish that there had been any change of the ownership of the goods from the shipper to the defendant in error. It could be at most a question of fact to be submitted to the jury. (*Merchants Nat. Bank v. Bangs, supra.*) It was therefore prejudicial error to charge the jury that the defendant in error had sufficient title to the goods to enable him to maintain the action for damages.

There was but one brief filed in this case, that for the plaintiff in error.

There are discussions of some other alleged errors other than the one we have considered, but inasmuch as the judgment must be reversed and the cause remanded for further proceedings, we do not deem it necessary to examine and decide them at this time.

REVERSED AND REMANDED.

AUGUST SCHMELLING V. STATE OF NEBRASKA ET AL.

FILED FEBRUARY 9, 1899. No. 8698.

1. **Trial:** HARMLESS ERROR. That improper evidence was admitted during the trial of a cause to a court without a jury is not alone sufficient reason for the reversal of the judgment.
2. ———: ———. If the trial was to the court without a jury, the presumption will prevail on appeal that the court considered none but the proper evidence.
3. ———: ———: LEADING QUESTIONS. If no abuse of discretion appears, the permission of leading questions to a witness is not cause for reversal of the judgment.
4. **Banks:** INSOLVENCY: PREFERRED CLAIMS. The owner of a sum of money on a general deposit in a bank at the time of its failure is not entitled to a preferred claim against the assets in the hands of its receiver.
5. **Review.** A finding upon conflicting evidence will not be disturbed on appeal if there is sufficient evidence for its support.

ERROR from the district court of Nuckolls county. Tried below before HASTINGS, J. *Affirmed.*

Stubbs & Mauck, for plaintiff in error.

References: *State v. State Bank of Wahoo*, 42 Neb. 896; *May v. Le Clare*, 11 Wall. [U. S.] 232; *Duncan v. Jaudon*, 15 Wall. [U. S.] 165; *United States v. State Bank*, 96 U. S. 30; *Dillon v. Connecticut Mutual Life Ins. Co.*, 44 Md. 386; *Libby v. Hopkins*, 104 U. S. 303; *Peak v. Ellicott*, 1 Pac. Rep. [Kan.] 499; *Ellicott v. Barnes*, 1 Pac. Rep. [Kan.] 767; *People v. City Bank of Rochester*, 96 N. Y. 32; *Kimmel v. Dickson*, 58 N. W. Rep. [S. Dak.] 561; *Anheuser-Busch Brewing Ass'n v. Morris*, 36 Neb. 31; *Griffin v. Chase*, 36 Neb. 328.

S. A. Searle, contra.

References: *Wilson v. Coburn*, 35 Neb. 530; *Hanchett v. Waterbury*, 115 Ill. 220; *Illinois Trust & Savings Bank v. Smith*, 21 Blatch. [U. S.] 275; *In re North River Bank*, 14 N. Y. Supp. 261; *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168.

HARRISON, C. J.

The Bank of Superior failed in business on or about February 11, 1895, and in the regular course of procedure under the law of the state then in force relative to banks, and the adjustment of the affairs of insolvent ones, a receiver was appointed for the bank we have named and entered upon the discharge of the duties which by law were devolved upon him. The plaintiff in error presented an application to the receiver by petition in the district court of Nuckolls county, by which he demanded that for the sum of $822.77 he be adjudged to have a preferred claim against the assets of the bank in the hands of the receiver, and that it be ordered paid to him. Issues were joined, and after a trial thereof to the court the prayer of the application was denied.

The application of plaintiff in error for a preferred claim was predicated upon the assertion that he had placed in the bank the amount he claims to be his due, not generally, but to be held to await the arrival of the time for the performance of a contract for the sale and purchase of some real estate in which he was the named purchaser (this contract was then put in care of the bank), at which time it was to be paid to the vendor of the land. The contention was and is that the money was not a general deposit, but a special and specific one, and as such entitled to preference in payment from the assets of the bank. The deposition of the party who at the time the bank failed was its cashier was taken, also of the one who was then its assistant cashier. This was done in Chicago, to which city these persons had removed subsequent to the closing of the bank. The plaintiff in error was not present in person or by counsel at the taking of the depositions, and for him there were filed objections to a number of the interrogatories propounded. This was done after the depositions were received and filed in the court of trial and prior to the hearing. The objections were overruled and the depositions read and

received in evidence, and the admission of this testimony is of the errors assigned and presented. That evidence admitted during a trial to the court without a jury was incompetent, irrelevant, or immaterial will not alone work a reversal of the judgment. (*McKee v. Bainter*, 52 Neb. 604; *King v. Murphy*, 49 Neb. 670; *Viergutz v. Aultman*, 46 Neb. 141.) It will be presumed that the trial court considered none other than the proper evidence. (*McKee v. Bainter, supra; Smith v. Perry*, 52 Neb. 738.) Moreover, a considerable portion of the testimony to which objection was interposed was competent and material.

Of the objection that each of a majority of the questions asked at the taking of the depositions was leading it must be said that they were open to the complaint, and had the trial court's ruling been the reverse of what it was, we should have been entirely satisfied of its propriety and correctness; but the rule is: "The extent to which leading questions may be allowed rests in the discretion of trial court, and the rulings in that respect will not, in the absence of an abuse of discretion, be disturbed by this court." (*Baum Iron Co. v. Burg*, 47 Neb. 21; *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448; *German Nat. Bank of Hastings v. Leonard*, 40 Neb. 676; *St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb. 351.) We do not feel warranted in saying that there was any abuse of discretion in the allowance of these leading questions; hence must disregard this argument.

The only further assignment of error is that the finding and judgment were not supported by the evidence. The evidence on the main point involved in the litigation was conflicting, and there were facts and circumstances, as well as direct testimony, which would have warranted a contrary conclusion to the one reached by the trial court; but the one at which the court arrived had sufficient of the evidence to sustain it and will not be disturbed.

The decision of the case hinged upon the question of

whether the money of the plaintiff in error was in the bank as a special deposit, a special or trust fund, and entitled to a preference in payment from the assets of the bank, or was it an ordinary or a general deposit and the claim not entitled to be preferred? The trial court determined it was the latter, and there was sufficient evidence to sustain the finding. The judgment was proper and must be

AFFIRMED.

EMAN J. SPIRK ET AL. V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED FEBRUARY 9, 1899. NO. 10394.

1. **Harmless Error.** The exclusion of evidence, if not prejudicial to the complaining party, furnishes no ground for the reversal of a judgment.
2. **Review:** INSTRUCTIONS. Assignment of error relative to giving instructions must be specific in both petition in error and motion for a new trial; if grouped in either and not of force as to one of the number included, it is without avail as to all.
3. **Railways:** PASSENGERS. Whether passengers on a railway train have exercised the required care to ascertain whether they are on the right train or in the proper car of the train to reach their destination is generally a question of fact to be submitted to the jury.
4. **Review:** OFFER OF PROOF NECESSARY. *Held*, That there should have been an offer of proof to present for review the action of the trial court by which certain testimony was excluded.
5. **Damages.** The damages assessed were inadequate and did not furnish compensation for the necessary loss shown.

ERROR from the district court for Saline county. Tried below before HASTINGS, J. *Reversed.*

J. H. Grimm and *J. R. Webster*, for plaintiffs in error.

References: *Baltimore & O. R. Co. v. Bambrey*, 16 Atl. Rep. [Pa.] 67; *Head v. Georgia P. R. Co.*, 79 Ga. 359; *Alabama G. S. R. Co. v. Heddleston*, 3 So. Rep. [Ala.] 53; *South & N. A. R. Co. v. Huffman*, 76 Ala. 496; *Louisville, N. A.*

& C. R. Co. v. Wolfe, 27 N. E. Rep. [Ind.] 606; *English v. Delaware & Hudson Canal Co.*, 66 N. Y. 454; *Chicago, S. L. & P. R. Co. v. Holdridge*, 118 Ind. 281; *St. Louis, A. & T. R. Co. v. Mackie*, 9 S. W. Rep. [Tex.] 451; *Shepard v. Chicago, R. I. & P. R. Co.*, 41 N. W. Rep. [Ia.] 564; *Ellsworth v. City of Fairbury*, 41 Neb. 881; *Stanwood v. City of Omaha*, 38 Neb. 552; *Sternberg v. State*, 36 Neb. 307.

J. W. Deweese, F. I. Foss, and *F. E. Bishop, contra.*

References: *Church v. Chicago, M. & S. P. R. Co.*, 60 N. W. Rep. [S. Dak.] 854; *Chicago & A. R. Co. v. Randolph*, 53 Ill. 515; *Ohio & M. R. Co. v. Applewhite*, 52 Ind. 546; *Barker v. New York C. R. Co.*, 24 N. Y. 599; *Beauchamp v. International & G. N. R. Co.*, 9 Am. & Eng. R. Cas. [Tex.] 307; *State v. Brady*, 69 N. W. Rep. [Ia.] 290; *Tyler v. Chicago & N. W. R. Co.*, 71 N. W. Rep. [Ia.] 536; *People v. Dow*, 64 Mich. 717; *Sira v. Wabash R. Co.*, 21 S. W. Rep. [Mo.] 905; *Georgia Railroad & Banking Co. v. Eskew*, 47 Am. & Eng. R. Cas. [Ga.] 635; *Lewis v. Flint & P. M. R. Co.*, 18 Am. & Eng. R. Cas. [Mich.] 263; *Henry v. St. Louis, K. C. & N. R. Co.*, 12 Am. & Eng. R. Cas. [Mo.] 288; *Platt v. Chicago & N. W. R. Co.*, 21 Am. & Eng. R. Cas. [Wis.] 319; *Pittsburg, C., C. & S. L. R. Co. v. Lightcap*, 34 N. E. Rep. [Ind.] 243; *Allen v. Wilmington & W. R. Co.*, 8 Am. & Eng. R. Cas. n. s. [N. Car.] 257; *Noble v. Atchison, T. & S. F. R. Co.*, 5 Am. & Eng. R. Cas. n. s. [Okla.] 309; *Trotlinger v. East Tennessee, V. & G. R. Co.*, 13 Am. & Eng. R. Cas. [Tenn.] 49; *White v. Evansville & T. H. R. Co.*, 33 N. E. Rep. [Ind.] 274; *Townsend v. New York C. & H. R. R. Co.*, 56 N. Y. 301; *Selleck v. Lake S. & M. S. R. Co.*, 23 Am. & Eng. R. Cas. [Mich.] 340; *Carsten v. Northern P. R. Co.*, 44 Am. & Eng. R. Cas. [Minn.] 394; *Brown v. Chicago, M. & S. P. R. Co.*, 3 Am. & Eng. R. Cas. [Wis.] 444; *Texas & P. R. Co. v. Ludlam*, 57 Fed. Rep. 484

HARRISON, C. J.

For each of the plaintiffs in error an action was instituted to recover the damages alleged to have been caused

by their wrongful, unlawful, and forcible ejection, before arrival at their destination, from a train of the company, on which they were passengers. The causes of action originated in the same occurrences and the causes were consolidated and but one trial had. There were verdicts and judgments for the plaintiffs, which on error to this court in behalf of the company were reversed and the causes remanded. A second trial in the district court resulted in verdicts and judgments for the plaintiffs, but being dissatisfied with the amounts of recovery they now present the causes here for review. The facts were stated in a former opinion (see 51 Neb. 167) and we will not restate them, but for the main facts refer the reader of this opinion to that one.

The company was allowed to introduce what are termed in railway business "train sheets," the memoranda or records made by a train dispatcher of arrivals and departures of trains to and from stations. That these were admitted in evidence is the burden of one of the assignments of error. Whether the action of the court in overruling objections to the introduction of these "train sheets" was or was not erroneous is without weight at this time, with the existing conditions of the evidence in regard to the movements of the trains on which the plaintiffs traveled at the time of the occurrences in which these suits originated; and of the train on which they should have made a part of their journey the evidence contained in the "train sheets" could not possibly prejudice the rights of the plaintiffs.

It is complained that the seventh instruction given on the court's own motion was erroneous. In the assignments in the motion for a new trial this was grouped with other instructions, and to some of the group no exceptions seem to have been noted, and some were without error; hence the assignment must be overruled.

It is also urged that the court erred in giving instruction numbered eight, requested by the company. In the complaint of this action in the motion for a new trial

this is joined with another to which there was no exception, and against which no objection is at this time raised, and the assignment must be held unavailing.

It is argued for the company that it was the duty of the plaintiffs to ascertain where, when, and how they could travel to their destination by the trains of the company, what changes would be necessary, and, apparently having failed in the duty, they had no just cause of complaint against the company. A number of other and further more or less connected matters are also discussed. However all these things may be, we are satisfied that, under the facts undisputed or established and those which on conflicting evidence were determined necessarily favorably to plaintiffs in order to reach a general finding in their behalf, the question of whether they had done all that in the exercise of ordinary prudence under the circumstances was required in making inquiries relative to the running and stopping of trains at stations was a matter of fact, and if so, was for the consideration and determination of the jury; and as the verdict was for the plaintiffs, it must be concluded that this, with other facts elemental of the groundwork of such a verdict, was decided in their favor.

It is also complained that the damages awarded the plaintiffs were inadequate. This contention is correct. The amounts of the verdicts were below the pecuniary loss established; hence the judgment must be reversed. (*Stanwood v. Omaha*, 38 Neb. 552; *Ellsworth v. City of Fairbury*, 41 Neb. 881.)

It is complained that testimony was excluded of the cost of the railway tickets which had been purchased by plaintiffs for passage over the company's line of road to Haigler, the place to which they were traveling. Relative to this it may be said that to give the court a full knowledge of what it was sought to show in the answer to the interrogatory to which an objection was sustained, and to direct attention to its relevancy and materiality, if any it would possess, it was necessary that an offer of

proof should have followed the ruling of the court. There was no offer, and the alleged error will not be reviewed.

REVERSED AND REMANDED.

A. P. S. STUART V. BANK OF STAPLEHURST.

FILED FEBRUARY 9, 1899. No. 8611.

1. **Removal of Causes:** JURISDICTION. In an action in a state court, wherein a removal to a United States court is sought under the provisions of section 2 of the act of congress of March 3, 1887, as corrected in 1888 (see 25 U. S. Statutes at Large, p. 434, ch. 866), and it appears from the face of the record that the suit is not a removable one, the application does not deprive the state court of its jurisdiction.

2. ———: ———: PROCEEDINGS PENDING DETERMINATION. The better practice in such a case is, upon a proper application in the state court for removal to the federal court, for the state court to suspend proceedings in the suit and await the action of the federal tribunal on a motion to remand, but its action during the interim may be of force and valid.

3. **National Banks:** DIRECTORS: FALSE REPORTS. Directors of a national bank, who, in simulated performance of the duties prescribed by the law applicable to such an institution relative to the preparation and publications of advertisements, statements, and reports, knowingly make and publish false statements and reports of the financial condition of the bank with intent to deceive, and such matters are believed and acted upon by parties to their damage, are liable for the damages in an action for the deceit.

4. ———: ———: ———: CUMULATIVE REMEDIES. The liabilities which are fixed in the national banking law for violation of its provisions are not exclusive and do not preclude the action for deceit.

5. ———: ———: ———. The petition in the case at bar *held* to state a cause of action for deceit and not for relief under the national banking law, and to present no federal question for adjudication.

6. ———: ———: PERSONS AFFECTED. The statements and reports which are required and are made to the comptroller and published in the newspapers have among their purposes that of conveyance of information to those persons, each or all, who con-

template dealings with the bank in which its financial condition enters as a vital matter.

7. **Parties:** JOINDER: TORT. A petition in an action for a tort which joins several parties as defendants, if it states a joint act and relative to a tort which may from its nature be joint or committed by persons in combination, is not open to attack by demurrer on the ground of misjoinder of parties defendant.

8. **Review:** ASSIGNMENTS OF ERROR. Questions of which there is no assignment in the petition in error will not be considered on review.

ERROR from the district court of Seward county. Tried below before BATES, J. *Affirmed.*

C. C. Flansburg, for plaintiff in error:

It was the duty of the state court, upon the filing of the petition and bond, to proceed no further in the cause. (*Stevens v. Phœnix Ins. Co.*, 41 N. Y. 149; *Shaft v. Phœnix Mutual Life Ins. Co.*, 67 N. Y. 544; *State v. Coosaw Mining Co.*, 45 Fed. Rep. 804; *Torrent v. Martin Lumber Co.*, 37 Fed. Rep. 727; *Clark v. Chicago, M. & S. P. R. Co.*, 11 Fed. Rep. 355; *Sweet v. Chicago, M. & S. P. R. Co.*, 11 Fed. Rep. 355; *Hatch v. Chicago, R. I. & P. R. Co.*, 6 Blatch. [U. S.] 105.)

The question of jurisdiction belongs to the federal court and must be determined there exclusively (*Cobb v. Globe Mutual Life Ins. Co.*, 5 Fed. Cas. 2, 921; *Fisk v. Union P. R. Co.*, 8 Blatch. [U. S.] 243); and the fact that other than federal questions may arise in the course of the litigation cannot withdraw the question from the jurisdiction of the federal court. (*Tennessee v. Davis*, 100 U. S. 294; *Mackaye v. Mallory*, 6 Fed. Rep. 751; *Osborne v. Bank of United States*, 9 Wheat. [U. S.] 738; *Butterfield v. Home Ins. Co.*, 14 Minn. 310; *Gordon v. Longest*, 16 Pet. [U. S.] 97; *Kanouse v. Martin*, 15 How. [U. S.] 198; *French v. Hay*, 22 Wall. [U. S.] 250; *Gaines v. Fuentes*, 92 U. S. 10; *New Orleans, M. & C. R. Co. v. Mississippi*, 102 U. S. 135; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 14; *Wilson v. Western Union Telegraph Co.*, 34 Fed. Rep. 562; *Marshall v. Holmes*, 141 U. S. 589; *Removal Cases*, 100 U. S. 472;

Morey v. Lockhart, 123 U. S. 56; *Wilkinson v. Nebraska*, 123 U. S. 286; *Sherman v. Grinnell*, 223 U. S. 679; *Bressler v. Wayne County*, 25 Neb. 468; *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374; *Freeman v. Howe*, 24 How. [U. S.] 451.)

As to what is a federal question see: *Leather Manufacturers Bank v. Cooper*, 120 U. S. 778; *Carson v. Dunham*, 121 U. S. 421; *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.*, 68 Fed. Rep. 13; *Cohens v. Virginia*, 6 Wheat. [U. S.] 357; *Van Allen v. Atchison, C. & P. R. Co.*, 3 Fed. Rep. 547.

As to what the federal question involved see: *National Exchange Bank v. Peters*, 44 Fed. Rep. 13; *Pollard v. Bailey*, 20 Wall. [U. S.] 520; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747; *Ripley v. Sampson*, 10 Pick. [Mass.] 370; *Stone v. Wiggin*, 5 Met. [Mass.] 316; *Gray v. Coffin*, 9 Cush. [Mass.] 192; *Cole v. City of Muscatine*, 14 Ia. 296.

A petition in the nature of a common-law action of deceit for damages on the ground of false representations is insufficient unless it shows the representations were made to the person complaining. (*Smithers v. Calvert*, 44 Ind. 242.)

When parties severally liable for distinct torts are joined as defendants in a single action it is good ground of demurrer. (*Franklin Fire Ins. Co. v. Jenkins*, 3 Wend. [N. Y.] 130; Pomeroy, Remedies & Remedial Rights secs. 308, 309.)

George W. Lowley, Pound & Burr, Roscoe Pound, and *Biggs & Thomas, contra:*

Assignments of error not discussed in the brief are waived. (3 Ency. Pl. & Pr. 717; *Wood Mowing & Reaping Machine Co. v. Gerholt*, 47 Neb. 397; *City of Kearney v. Smith*, 47 Neb. 408; *Glaze v. Parcel*, 40 Neb. 732; *Erck v. Omaha Nat. Bank*, 43 Neb. 613.)

Question not raised by proper assignments of error will be disregarded. (3 Ency. Pl. & Pr. 717; *Post v. Olmsted*, 47 Neb. 893.)

The district court had jurisdiction and the case was not removable. (*Tennessee v. Union & Planters Bank*, 152 U. S. 454; *Cherokee Nation v. Georgia*, 5 Pet. [U. S.] 69; *Gold-Washing & Water Co. v. Keyes*, 96 U. S. 201.)

The proceedings of a state court, after a petition and bond for a removal which is refused by the state court, depend upon the fact whether the cause is in fact removable or not. (*Stone v. South Carolina*, 117 U. S. 430; *Carson v. Hyatt*, 118 U. S. 279; *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 513; *Crehore v. Ohio & M. R. Co.*, 131 U. S. 240; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556.)

A published false statement of the condition of a bank is actionable though not addressed to the individual defrauded. (*Salmon v. Richardson*, 30 Conn. 360; *Bartholomew v. Bentley*, 15 O. 659; *Seale v. Baker*, 70 Tex. 283; *Morgan v. Skiddy*, 62 N. Y. 319; *Huntington v. Attrill*, 118 N. Y. 365; *Solomon v. Bates*, 118 N. Car. 311; *Caldwell v. Bates*, 118 N. Car. 323; *Tate v. Bates*, 118 N. Car. 287; *Edgington v. Fitzmaurice*, 29 L. R. Ch. Div. [Eng.] 459; *Peek v. Gurney*, 8 Moak [Eng.] 2; *Westervelt v. Demarest*, 46 N. J. Law 37.)

HARRISON, C. J.

The defendant in error instituted this action in the district court of Seward county and alleged for cause that the plaintiff in error and parties who were co-defendants were at the times of the occurrences upon which the suit was predicated, directors of a national bank, in the business which its name indicates, in the city of Lincoln, and at various stated times made and published, or caused them to be published, in newspapers of general circulation in said city, and in the state of Nebraska, certain false statements of fact of and concerning the bank of which they were directors, and its matters of business, and which related to its solvency and reliability; that such statements were made and published with a knowledge of their falsity and with an intent to mislead and deceive the public and the defendant in error, and that

the statements accomplished or served the purpose for which they were intended; that the defendant in error was thereby induced to deposit money to a large amount, stated in the petition, in the said bank, which was lost by reason of the insolvency and failure of the said bank. The commencement of the action was of date February 25, 1895. On March 29, 1895, the plaintiff in error and his co-defendants filed an application or petition for the removal of the cause to the United States circuit court for the district of Nebraska. Said petition was accompanied by the requisite bond. On April 1, 1895, there was filed in the state court for the plaintiff in error and each of his co-defendants a demurrer to the petition. These were on April 5, 1895, overruled and the application for removal was denied.

There appears in the record the following, as setting forth what was done in the cause in the federal court:

"And on the 14th day of October, 1895, the following order was made:

" 'This cause having been heard on the motion of the plaintiff to remand the same to the state district court in and for Seward county, Nebraska, from whence it came, Messrs. Pound & Burr and Biggs & Thomas appeared for the plaintiff and Deweese & Hall, C. O. Whedon, and C. C. Flansburg for the defendants, whereupon, after careful consideration thereof, and being fully advised in the premises, it is now on this day considered, ordered, and adjudged by the court that said motion be, and the same is hereby, overruled, to which ruling and order by the court said plaintiff by his attorneys then and there duly excepted.'

"And on the 8th day of May, 1896, the following further order was made in said cause, *i. e:*

" 'This cause coming on for hearing on the motion of the plaintiff to remand the same to the state district court in and for Seward county, Nebraska, from whence it came, was argued and submitted to the court by attorneys for the respective parties, whereupon, after care-

ful consideration thereof, and being fully advised in the premises, it is now on this day ordered and adjudged by the court that said motion be, and the same is hereby, sustained, and said cause is remanded to the said district court in and for Seward county, Nebraska, from whence it came.'"

May 6, 1895, answers were filed in the state court for all parties sued except the plaintiff in error. July 9, 1895, and during the pendency of a term of the state court, a judgment by default was rendered therein against the plaintiff in error, and the case is presented for him to this court by error proceeding. The petition in error is as follows:

"1. The petition does not state facts sufficient to constitute a cause of action against this plaintiff and in favor of the defendant in error.

"2. The court had no jurisdiction to render said judgment.

"3. The court erred in overruling the demurrer of this plaintiff to said petition.

"4. The court erred in exercising jurisdiction of said cause after the same was removed to the circuit court of the United States within and for the district of Nebraska.

"5. The court erred in rendering a judgment by default against plaintiff in error while said cause was pending on removal proceedings in the circuit court of the United States.

"6. The court erred in assuming to determine whether said cause was properly removed under the acts of congress and assuming to withdraw said action from the proper circuit court of the United States."

It is first argued for plaintiff in error that as the jurisdiction of the state court in the cause ceased as soon as the application for removal was filed, it could not further proceed therein, and its subsequent acts were void. In section 2 of the act of March 3, 1887, as corrected in 1888 (see 25 U. S. Statutes at Large, p. 434, ch. 866), amenda-

tory of the act of 1875, it is provided: "That any suit of civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district." The act further provides that the application shall be by petition, accompanied by a bond and the time when it shall be filed, and when it has been done, "it shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit." (25 U. S. Statutes at Large, p. 435, ch. 866, sec. 3.) If the case is a removable one, and the petition and bond are filed, the state court should, as stated in the portion of the statute we have quoted, proceed no further in the suit. It has no jurisdiction to do so, and it is probably better, in all cases where the petition for removal accompanied by the bond has been presented, especially if the right of removal is questionable or doubtful, to await in the state court the action of the United States court on the point of the removability of the suit. An examination of the authorities discloses much confusion and conflict on the subject now under discussion, but it may be said that if the cause for removal exists and is disclosed by the record, if the application is made, if the proper papers are filed, the jurisdiction of the state court ceases without and despite any choice or act on its part. It may also be stated that if the cause is in fact not a removable one, and that it is not appears on the face of the record, or is disclosed by the papers, the case is not removed, and the state court does not lose, but retains, its jurisdiction, and action therein, even during the time a transcript is on file in the United States court, may be good and ultimately prevail.

We have no doubt that in all cases the better course

is to suspend proceedings in the state court until the court of removal has acted on the matter on a motion to remand, but, as we have just stated, there may be cases wherein the records disclose their non-removable character, and in any such the state court retains jurisdiction, notwithstanding the removal proceedings. (Dillon, Removal of Causes [5th ed.] sec. 143; *Tennessee v. Union & Planters Bank*, 152 U. S. 454; *Walker v. Collins*, 167 U. S. 57; *Chappell v. Waterworth*, 155 U. S. 102; *Blair v. West Point Mfg. Co.*, 7 Neb. 146, and cases cited; *Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199; *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 513; *Stone v. South Carolina*, 117 U. S. 430; *Carson v. Hyatt*, 118 U. S. 279.) An examination of the petition herein convinces us that it did not declare on any cause of action conferred by statute or United States law. It was not to enforce a liability arising solely by reason of the violation of any provision of the national banking law. There was in the petition a direct statement of an action for false representations, or more properly and generally stated, for deceit. Some of the acts declared upon may have been violations of the national banking act, but they were not relied upon as such, nor was a remedy sought under said act. The petition for removal did not in its statements of facts present any stronger reason or cause for removal than was disclosed by the original petition in the action. There were some conclusions averred in it, but these did not strengthen it beyond its statements of facts. The acts which constitute the basis for an action similar to the one at bar may be within or without the duties of officers or directors of a national bank, and they may be violative or not of the duties of the parties sued, as directors of a national bank, and the acts may furnish cause for a common-law action of deceit (*Prescott v. Haughey*, 65 Fed. Rep. 653; *Gerner v. Thompson*, 74 Fed. Rep. 125; *Merchants Nat. Bank v. Thoms*, 28 W. L. B. [O.] 164; *Bartholomew v. Bentley*, 15 O. 660; Morawetz, Private Corporations sec. 573); and any action which might accrue by reason of

the same acts under the national banking law would not be exclusive of another action and would not exclude the one of deceit. (*Prescott v. Haughey, supra.*) It seems clear that the record disclosed on its face that the case was not one which could be removed and that the state court did not lose its jurisdiction.

Another point of argument is that in an action of deceit it must appear that the representations alleged in the complaint were made directly to the complainant. We do not think this is tenable. The representations, if made for the whole or any of the public, if seen and relied and acted upon by any person, and damages result, the right of action arises. (*Merchants Nat. Bank v. Thoms, supra; Prewitt v. Trimble,* 92 Ky. 176; *Tate v. Bates,* 118 N. Car. 287, 24 S. E. Rep. 482; *Graves v. Lebanon Nat. Bank,* 10 Bush [Ky.] 23; *Seale v. Baker,* 70 Tex. 283, 7 S. W. Rep. 742; *Peek v. Gurney,* 8 Moak [Eng.] 2; *Westervelt v. Demarest,* 46 N. J. Law 37, 50 Am. Rep. 400.)

It is also contended that the petition was defective in its joinder of the parties defendant in an action of deceit. The petition charged joint actions of the defendants, and the acts were such as might be done in combination; hence it was not open to attack by demurrer for an improper joinder of parties. (Pomeroy, Remedies & Remedial Rights secs. 281, 307; *Stiles v. White,* 11 Met. [Mass.] 356; *White v. Sawyer,* 16 Gray [Mass.] 586; *Consolidated Ice Machine Co. v. Keifer,* 134 Ill. 481; *Wisconsin C. R. Co. v. Ross,* 142 Ill. 9; *City of Chicago v. Babcock,* 143 Ill. 358.) This disposes of all the questions argued which were raised by the assignments in the petition in error. There was another point presented, but it was not assigned for error in the petition, hence need not be considered. (*Post v. Olmsted,* 47 Neb. 893.) It follows that the judgment of the district court will be

AFFIRMED.

A. P. S. STUART V. THOMAS BAILEY.

A. P. S. STUART V. ISAAC HOLT.

A. P. S. STUART V. JONES NATIONAL BANK.

A. P. S. STUART V. UTICA BANK.

FILED FEBRUARY 9, 1899. NOS. 8612, 8613, 8614, 8615.

Removal of Causes: NATIONAL BANKS: FALSE STATEMENTS: LIABILITY OF DIRECTORS. Judgments affirmed pursuant to rulings in preceding case. (*Stuart v. Bank of Staplehurst*, 57 Neb. 569.)

PROCEEDINGS IN ERROR from the district court of Seward county. Tried below before BATES, J. *Affirmed.*

THE parties filed the following stipulation:

"It is hereby stipulated by and between the parties plaintiff and defendant in the above entitled causes, respectively, that briefs shall be filed in the first numbered case, No. 8611, A. P. S. Stuart against Bank of Staplehurst. It is further stipulated and agreed that inasmuch as the records in all these cases are alike, and the same identical points are raised by the petition in error in each case, that the order of the court made in No. 8611, A. P. S. Stuart against Staplehurst, shall be the order in each of the other cases and shall be entered therein; that if No. 8611 is reversed, all said causes shall stand reversed, and if said No. 8611 is affirmed, all of said causes shall stand affirmed, the same as if the briefs were filed and arguments made separately in each of said cases."

C. C. Flansburg, for plaintiff in error.

George W. Lowley, Pound & Burr, and *Biggs & Thomas*, *contra.*

HARRISON, C. J.

The above stipulation speaks for itself, and in accordance with its terms an order of affirmance of the judg-

ment is entered in each case. (*Stuart v. Bank of Staplehurst*, 57 Neb. 569.)

AFFIRMED.

PLATTSMOUTH WATER COMPANY, APPELLEE, V. ANSELMO B. SMITH ET AL., APPELLANTS.

FILED FEBRUARY 9, 1899. No. 8554.

1. **Review**: EVIDENCE. The decision of a trial court on litigated matters of fact will not be disturbed on review, if sustained by sufficient evidence, or as a conclusion from all the evidence, it is not manifestly wrong.
2. **Waters**: RIPARIAN RIGHTS. Riparian owners upon streams of water are entitled, in the absence of grant, license or prescription, to the usual, natural flow of water in the streams, without material alteration.

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

Allen Beeson and *Jesse L. Root*, for appellants.

A. N. Sullivan and *John A. Davies, contra.*

HARRISON, C. J.

The appellee, the Plattsmouth Water Company, furnished, through its system of water-works, the water used in the city of Plattsmouth, and was the owner of a tract of land on which was situated its pumping apparatus, pump house, etc. It drew at the time of the inception of this suit the greater portion of the water required from a channel, or, as it was called by some witnesses, a "slough," which had its course near the pump house, through a tract of land in the angle formed by the confluence of the Platte and Missouri rivers, and there flowed through this channel—for such it was whether merely a slough or not—water which entered it from the Platte river. It is contended herein on behalf of one party that this channel was all within and a part of the

bed of the Missouri river, and but a portion of the water of said river which here had pursued its way through a sand bar, apparently, for a short distance separated from the main body of the water of the stream. The head of the channel was at or near the mouth of the Platte river, or at or near where the Platte river emptied into the Missouri. The flow of water in the channel was not at one season of the year sufficient in quantity to fully answer the purposes of the water company; and to increase the supply the company ordered to be constructed at the head of the channel what is termed in the evidence a "dam," the effect of which was to deflect from its course in the Platte river a larger quantity of water than would ordinarily be the case, and cause it to run down the channel. The company at some points along the channel had removed accumulations, principally of sand, which were obstructing the free flowage of the water, and had by such action increased the volume of water in the channel. The appellants had taken steps, or were about to proceed, to remove the company's dam or put in another which would counteract or destroy the effectiveness of the one belonging to the company, and also the other work it had done in the removal of obstructive material from the channel; and, to enjoin them, the company instituted this action. The appellants answered, and with some admissions and denials of the matters stated in the petition, in affirmative pleas, asserted ownership of the land through which the channel had its course, and also that on which the company had placed its dam, and performed the other labor on or in the channel, and asked that the company be enjoined from going upon appellants' land and opening channels, or doing anything which would cause the water to flow from the main channel of the Platte river over or upon the said land. Issues were joined, and at the close of a trial thereof the court made a general finding for the water company, and also the following:

"The court finds that the plaintiff furnishes water to

the city of Plattsmouth for fire protection, and to its citizens for family use and other purposes. The court further finds that plaintiff derives its supply of water from a well-defined channel in the Missouri river as it lawfully might. The court further finds that in seasons of low water that a portion of the water of the Platte enters the Missouri river through said channel, and that said channel has been in existence since the first government survey. The court further finds that the acts of plaintiff in taking water from said channel and in keeping the channel open was a reasonable use of said channel, and does not infringe the rights of the riparian owners. The court further finds as a conclusion of law that the plaintiff is entitled to the relief prayed for, to which findings the defendants except."

A temporary injunction had been granted at the commencement of the action, which was as follows: "Upon the duly verified petition in this cause, and for good cause shown, it appearing to me that the plaintiff is entitled to an injunction restraining the defendant from obstructing the channel through which the plaintiff derives its water supply, through the west half of section 6, in township 12 north, of range 14 east of the sixth P. M., in Cass county, Nebraska, it is therefore ordered that a temporary injunction be granted in this cause restraining the defendant, his agents and employés, from obstructing the channel through said described land, or diverting the water which it used by the plaintiff and collected in its settling basins, or in any manner annoying, harassing, or disturbing the plaintiff in the quiet enjoyment of its franchise in furnishing water to the city of Plattsmouth, and its citizens thereof, upon the plaintiff entering into an undertaking in the sum of $300 conditioned as required by law."

The final decree was as follows: "It is therefore ordered by the court here that the injunction heretofore granted be, and the same hereby is, made perpetual, enjoining the defendants, and each of them, from di-

verting the waters of said channel or interfering or molesting the plaintiff in the use of the waters in said stream, according to its chartered duties and powers in furnishing the city of Plattsmouth and its citizens a suitable supply of water."

It was shown by plats of the different tracts of land just where the meander line of the United States survey of land adjacent to the Platte and Missouri rivers ran, and it was also shown that the piece of land which had been purchased by the water company was east of this meander line, or within what was at one time the bed or channel of the Missouri river. Indeed, it was shown that all of this land which was, incidentally at least, within the inquiries of this suit was once of the channel of the Missouri river, and that the water had another course, further to the east, to which it had gradually receded, and occupied, leaving in the main, or at first entirely, a bed or sand bar, some portions of which had been more or less thickly covered with a growth in some places of small timber, and in others of small willows and brush. At or near, and to the east of the pump house, it was shown to be a sand bar. It was further shown that all this land, during freshets or high waters, had been submerged,—wholly covered by the water of the Missouri river. The evidence also disclosed that quite a large portion of this land was included within the boundary or meander line of the government survey, and had been conveyed as fractional parts of sections of land; and of some of these fractions or lots, as they were designated on the plat, and through which the stream of water from which at a lower point the water company pumped its supply, the appellants had apparently become the owners, and been in possession. For the appellants it is urged that the findings and judgment are not sustained by the evidence. Of the findings, the one that the company obtained or derived its supply from a channel which at that point was in the bed of the Missouri river was correct; but of the quantity of water

taken, or that it was so taken at this specific point, there was no complaint, and the appellants were not doing anything when this suit was instituted to interfere with the mere act of procuring a supply of water, and at the particular place, but the appellants were, it was pleaded, about to or had done things which would destroy the effectiveness of the company's efforts to increase the flow of water through the slough or channel.

We think best to here insert a statement relative to the ownership of, or the rights in or to, the land which was the site of the acts and operations which have resulted in this suit. The appellants claimed to own all this land inclusive of the place at which the water company erected the dam to turn water from the Platte river into the channel or slough through which it would flow to and beyond where its works were situated; and the appellants did show, to some portions of this land, a chain of title to which the United States patent furnished the first or inceptive link, and the conveyance to them, or one of them was, the last link added. Of the land on which the water company built the dam and removed sand from the slough which it was in evidence was but a sand bar, and that adjacent thereto the appellants had what purported to be conveyances of the titles to them or one of them; but there was no evidence from which it appeared the grantors of said conveyances ever had any titles to or rights in the lands described in the conveyances. To these last mentioned portions or pieces of the land the appellants did not show a title by conveyance, nor by acts of occupation which will, if continued for the statutory time, give title or ownership. Where the dam was put in, the evidence in this case discloses, was on a lot in a section, and within the meander line of the Platte and Missouri rivers, relative to the land within the angle of their confluence; and where the greater portions of the work of removal of sand from the slough was performed was in a sand bar of the Platte river.

The injunction which was granted to the water company, which we have quoted, was fully warranted by the evidence and the law applicable. The appellants could clearly not successfully claim to divert the water which flowed down this channel from its course, and diminish the quantity which would naturally run through the channel and pass by the property of the water company. The latter was entitled to such flow of the water undiminished from its regular, natural volume. It must be borne in mind that we do not decide, for it is not presented, any question of the water company's right to take from the stream any particular quantity of water, or water to supply the city residents or citizens. We but decide that it was entitled to have the usual, natural, regular quantity of the water in said stream flow uninterruptedly, and without material diminution or alteration, through the channel to or past its property. (Gould, Waters [2d ed.] sec. 204.)

We now turn to the question of the right of the appellants to an injunction against the water company and its performance of certain acts. The appellants did not show the entry by the water company upon any lands which were owned by appellants. They did show that the water company had gone upon land near that owned by appellants, and thereby had done certain things which had resulted in an increase in the flow of water in the slough and through lands which appellants owned. Actions for diminution of the quantity of water which usually and naturally flows by or through tracts of land are frequent; but for the increase of the quantity suits are, or rather have been, infrequent. That such an action will lie, see *Tillotson v. Smith*, 32 N. H. 90; *Gerrish v. New Market Mfg. Co.*, 30 N. H. 478; *Thompson v. Crocker*, 9 Pick. [Mass.] 59; *Chapman v. Thames Mfg. Co.*, 13 Conn. 268. There was some evidence introduced, more in the nature of conclusions than facts, which might probably have supported a finding that there had been some acts of the water company by which the flow of water upon,

through, or over the land owned by appellants had been appreciably or materially increased; but whether this was true was a matter of fact, and we cannot say from a review of all the competent evidence that a contrary finding, or that it had not been shown that there had been such a material change, or increase or decrease, from the wonted flow of the water as to be such an infringement of the appellants' rights that a court of equity should intervene, was manifestly wrong; hence we cannot alter the decision of the court on this branch of the case. The decree of the district court, to the extent it enjoined the appellants from diverting from the channel or slough the flowage of the natural volume or quantity of water, and its denial of relief to appellants, is

AFFIRMED.

HERMAN MUCHOW ET AL. V. MARY REID ET AL.

FILED FEBRUARY 9, 1899. No. 8715.

1. **Witnesses:** CREDIBILITY: REVIEW. The credibility of witnesses and the weight to be accorded to their testimony are matters for consideration and determination by the triers of facts, and not for the court of review.
2. **Action for Damages Resulting from Sale of Intoxicating Liquors:** VERDICT FOR PLAINTIFFS. Evidence *held* sufficient to sustain the findings and verdict of the jury.
3. **Misconduct of Counsel:** RECORD: REVIEW. Averments in a motion for a new trial of misconduct of counsel in argument to a jury will not present such matter for review, in the absence of any other appearance of record of the occurrences upon which the averments are based, or of which they purport to be statements.

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

E. S. Abbott and *M. H. Fleming*, for plaintiffs in error.

Hastings & Sands, *Samuel Rinaker*, and *R. S. Bibb*, *contra.*

HARRISON, C. J.

This action was instituted by Mary Reid, widow of George Reid, deceased, in her own behalf and as next friend for the other defendants in error, minors and her children, and of whom the deceased was the father, to recover the damages which it was alleged they suffered by reason of the death of the husband and father by accident, and of which a moving or contributory cause was his intoxicated condition, which condition was contributed to by intoxicating liquors sold or furnished by one of the plaintiffs in error, then a licensed saloon-keeper. The other plaintiffs in error were sureties on the bond of the saloon-keeper. Another saloon-keeper and his bondsmen who were joined in the prosecution in the suit declined to join in the prosecution of this error proceeding, and were made defendants in error. Issues were joined in the district court, and as the result of a trial the widow and children were given judgment, to reverse which is the object of the presentment of the case in this court.

It is argued that there was not sufficient evidence to support a finding that Herman Muchow, the saloon-keeper, plaintiff in error, either sold or furnished any liquor to George Reid, which caused or contributed to produce his intoxication on the day of the accident to him of which the final result was his death. The argument is in part, at least, if not entirely, based upon the proposition that a portion of the testimony, or that of one witness, must be rejected and should not have been given credence in the trial court. The questions of the credibility of this and all witnesses, and the weight to be accorded any evidence, were for the trial jury, and we cannot now set aside its evident determination of them. If we view the evidence as a whole,—and we cannot do otherwise,—we are forced to the conclusion that there was sufficient thereof to support the finding, necessarily elemental of the verdict returned, that some of the liquor

which produced the intoxication of George Reid on the day to which we have referred was obtained at the plaintiff in error's place of business,—his saloon.

Another contention for plaintiffs in error is founded upon alleged misconduct, during argument to the jury, of counsel for the widow and children. Of this it must suffice to say that there is nothing in the record to show any of the conduct of counsel for any of the parties during the arguments to the jury, or indeed anything that then occurred, except it may be said to be evidenced by a statement in the motion for a new trial to the effect that there were certain matters presented in argument to the jury by the counsel for the widow and children, and also that the objectionable matter stated by counsel in argument to the jury is set forth in affidavits attached to and made a part of the motion for a new trial, and in support of the allegations thereof. There are no such affidavits in the record now before us; hence there is no other or further presentation of the alleged matter of the misconduct than what appears in the body of the motion for a new trial. There is, then, but a mere averment, unsupported by any proof or evidence. This is not sufficient to present the stated error for examination, and the argument must fail.

It is also asserted that there was not sufficient evidence of loss of support. Evidence on this branch of the case was ample and undisputed and was not appreciably weakened or diminished in force by the allegations of the petition and some testimony on the subject, and to the effect that, during a stated time prior to his death, George Reid had been addicted to the excessive or immoderate use of intoxicating liquors. The evidence disclosed that he had supported his family and had earned yearly a specifically stated sum of which his death, of course, caused a cessation. It follows that this portion of the argument is of no avail.

We have examined all the objections of plaintiffs in

error, and conformably to the conclusions reached the judgment of the district court must be

AFFIRMED.

FRANK M. ROSS, APPELLEE, V. CHARLES E. SUMNER ET AL., APPELLANTS.

FILED FEBRUARY 9, 1899. No. 8677.

1. **Vendor and Vendee:** RESCISSION. A false representation by the vendor of land situated in another state, as to the character, location, and value of the property, relied on by the vendee, who had no other knowledge, is ground in equity for rescinding the contract.
2. **Review.** The supreme court will not disturb a finding based on a conflict of evidence.
3. **Decree.** A decree must conform to the pleadings and evidence.

APPEAL from the district court of Buffalo county. Heard below before GREENE, J. *Modified.*

Francis A. Brogan, Ira D. Marston, and *S. M. Nevius,* for appellants.

References: *Jones v. Wessel,* 40 Neb. 115; *Stetson v. Riggs,* 37 Neb. 797; *Ish v. Finlay,* 34 Neb. 419; *Hodsden v. Hodsden,* 72 N. W. Rep. [Minn.] 562; *Wheatley v. Wheatley,* 102 Ia. 737; *New York Life Ins. Co. v. Miller,* 32 S. W. Rep. [Tex.] 550; *Lovett v. Taylor,* 34 Atl. Rep. [N. J.] 896; *First Nat. Bank v. Yocum,* 11 Neb. 329.

John S. Kirkpatrick, contra.

References: *Schade v. Bessinger,* 3 Neb. 140; *Roche v. Norfleet,* 63 Ill. App. 612; *Stinson v. Anderson,* 96 Ill. 373; *Bovee v. Hinde,* 135 Ill. 137; *Provart v. Harris,* 150 Ill. 40; *Wilson v. Wilson,* 158 Ill. 567; *Koehler v. Hughes,* 148 N. Y. 507; *Jordan v. Davis,* 108 Ill. 336; *Pratsman v. Baker,* 30 Wis. 644.

NORVAL, J.

This suit was instituted by Frank M. Ross for the rescission of a contract for the exchange of lands and to require the reconveyance by the defendants to plaintiff of the real estate conveyed by the latter under said contract. There was a hearing on the merits, and a decree against the defendants. They appeal.

In December, 1894, plaintiff and the defendant Charles E. Sumner entered into a verbal contract, whereby the former agreed to convey to the latter eighty acres of land owned by Ross and situate in Buffalo county, this state. In exchange therefor said defendant agreed to convey to plaintiff about sixty acres of real estate located near Colton, in San Bernardino county, in the state of California. Plaintiff, in pursuance of the terms of the agreement, together with his wife, executed and delivered to Mr. Sumner a deed to the Buffalo county real estate, which the grantee caused to be duly recorded. Mr. Sumner likewise executed to Mrs. Ross, the wife of the plaintiff, a deed for the California tract, which, according to the undisputed evidence, was merely a temporary conveyance to be held by plaintiff until such time as Mr. Sumner could procure a more accurate description of his land, when the latter and his wife were to execute a new conveyance of the property which was to be exchanged for the said temporary deed. Subsequently, the Sumners executed a proper deed, which was sent to his agent, H. B. Strout, at Lincoln, to be by him delivered to plaintiff. Mr. Strout duly tendered this conveyance to Ross, who declined to accept the same, because he had been induced to make the exchange of properties by reason of certain false representations made by Mr. Sumner, and that the deed tendered did not conform to the contract, in that it described two separate tracts, while Mr. Sumner, it is asserted, when the trade was arranged, represented that his land laid in a single body. This deed was returned by Strout to Sumner, and the plaintiff has never received

or accepted the same. Subsequently this suit was brought.

It is disclosed that neither party was acquainted with or knew the land the other proposed to exchange, and that each relied upon the representations and statements made by the other. Plaintiff alleges as ground for relief, and he so testified on the trial, that Mr. Sumner, during the negotiations for the exchange, represented to plaintiff that his land was level, consisted of a single tract, was worth at least $50 per acre, was all under ditch and could be easily irrigated, was good fruit land, and could all be cultivated. The defendant denies making the representations imputed to him, but plaintiff's version of the transaction is in several important particulars corroborated by the testimony of H. B. Strout, who, both parties agree, was present during a portion of the time the trade was being negotiated. The trial court passed upon the conflicting evidence, and we decline to review the proofs further than to ascertain that they are sufficient to sustain the findings of fact. A careful perusal and scrutiny of the entire evidence leaves no room to doubt that the trial court was justified in finding that at least more than one of the representations above specified were made by Mr. Sumner as an inducement to Mr. Ross to deed his land. The evidence, however, fails to show that all such representations and statements were false and untrue. It was established beyond question that Mr. Sumner's land did not lay together in a single body, but consisted of two separate tracts. There was likewise evidence tending to show that when the contract for the exchange was made Mr. Sumner's land was worth about $40 per acre, and all of it could not be easily irrigated. These representations, which were shown to be false and untrue, were of a material character, and having been relied upon by plaintiff, were sufficient cause for the rescission of the contract and for the interposition of a court of equity. (*Delorac v. Conna*, 29 Neb. 791; *Morgan v. Dinges*, 23 Neb. 271; *Hoock v. Bowman*, 42 Neb. 80; *Stochl v. Caley*, 48 Neb. 786.)

In argument by defendants it is stated that plaintiff should be denied relief because the title to the California land remains in Julia E. Ross, plaintiff's wife, and for that reason defendants have not been placed *in statu quo* by returning the consideration. To this proposition there is a ready answer. In the first place it is conceded by both parties that the deed executed by Mr. Sumner alone to Mrs. Ross was regarded as temporary only, to be held until such time as a perfect description of the California land could be obtained, when Mr. Sumner and his wife were to execute a permanent conveyance. The "temporary deed," as the first one is called by both parties, was never recorded, and it was the understanding of both parties that it was to be surrendered to the grantees; and in pursuance thereof the deed was returned to Mr. Sumner, who testified that he received it by registered mail. The delivery of the deed to plaintiff under those circumstances and its surrender to the grantor left the legal title to the California land in Mr. Sumner. Had the deed been executed and received by plaintiff as a permanent transfer of the property, then a redelivery to the grantor would not have revested the title in him. But this is not the case at bar.

The decree does not conform to either the pleadings or the evidence in one particular. While the court found the issues in favor of the plaintiff, the decree orders a reconveyance of the Buffalo county land to Julia E. Ross. The pleadings did not ask this to be done, nor did the evidence warrant an adjudication in her favor. She was not before the court. Frank M. Ross was the owner of the property, and the decree should have directed a reconveyance of the land to him. The decree will be accordingly modified.

DECREE MODIFIED.

THEODORE H. TE POEL, APPELLEE, V. ELIAS B. SHUTT ET AL., APPELLANTS.

FILED FEBRUARY 9, 1899. NO. 8680.

1. **Contracts:** CONSTRUCTION. While a court may construe and enforce contracts duly entered into, it is not the province of the judiciary to make contracts for parties.
2. **Tender.** A tender, to be effectual, must be without conditions and made to the party entitled to receive the same.
3. ———: CHECKS. Ordinarily, a bank check is not a sufficient tender of money.
4. **Parol Evidence:** CONTRACTS. A written contract cannot be varied, modified, or contradicted by parol evidence of a prior or contemporaneous agreement between the parties.
5. **Appeal:** PRACTICE. Rulings on the admission or exclusion of testimony cannot be reviewed where the cause is brought to this court on appeal.
6. **Contracts:** RESCISSION. One is not entitled to a rescission of a contract who is unwilling to perform his part of the agreement.
7. ———: TIME OF PERFORMANCE. The contract for the exchange of lands set out in the opinion construed, and *held* that the forty days designated therein for the exchange of deeds did not commence to run from the time the contract was made, but from the effecting of a loan of a certain sum of money stipulated to be made by one of the parties in consummation of the trade.
8. **Specific Performance.** Under the evidence plaintiff was entitled to a specific execution of the contract for the exchange of lands.

APPEAL from the district court for Burt county. Heard below before KEYSOR, J. *Modified.*

W. G. Sears and *W. S. Summers*, for appellants:

The time limit expired on May 5 and the contract was unenforceable thereafter. (*Paget v. Park*, 52 N. W. Rep. [Minn.] 532; *Roberts v. Wilcox*, 8 W. & S. [Pa.] 470; *Shinn v. Roberts*, 43 Am. Dec. [N. J.] 636; *Wells v. Smith*, 31 Am. Dec. [N. Y.] 274; *Curtis v. Blair*, 59 Am. Dec. [Miss.] 257; *Brown v. Ulrich*, 48 Neb. 409; *Spaulding v. Fierle*, 33 N. Y. Supp. 402.)

Appellee abandoned his claims by mortgaging the land. The court erred in rejecting the evidence as to the agreement concerning the abstract. (*Beyerstedt v. Winona Mill Co.*, 51 N. W. Rep. [Minn.] 619; *Paul v. Owings*, 32 Md. 402; *Sire v. Rumbold*, 39 N. Y. 85; *Hultz v. Wright*, 16 Am. Dec. [Pa.] 575; *Raub v. Barbour*, 6 Mackey [D. C.] 245; *Bretto v. Levine*, 52 N. W. Rep. [Minn.] 525.)

Te Poel's farm is incumbered and Shutt has sold his land to Hebebrand, who is a *bona fide* purchaser. The time for performance has passed and specific performance should not now be required. (*Welty v. Jacobs*, 64 Ill. App. 285.)

The decree should require Mrs. Te Poel to join in the conveyance.

Charles Sumner Lobingier, for appellee:

The rights of the parties became vested and the equitable title passed when the contract was signed (*Brewer v. Herbert*, 30 Md. 301; Pomeroy, Specific Performance sec. 314; 1 Pomeroy, Equity Jurisprudence [1st ed.] sec. 368); and Shutt could not extinguish these rights by merely withdrawing the papers which he had deposited. Shutt failed to perform the duties imposed upon him: (1.) By not incumbering his farm for $5,000. (2.) By failing to pay Te Poel's creditors the amount of their liens. (3.) By not even making a sufficient tender, which must be (*a*) to the proper party (*Fletcher v. Dougherty*, 13 Neb. 224); (*b*) absolute and without qualifications (*Tompkins v. Batie*, 11 Neb. 147; *Williams v. Eikenberry*, 22 Neb. 215); and (*c*) of actual money, unless waived (*Guthman v. Kearn*, 8 Neb. 502; *Walter Bros. v. Reed*, 34 Neb. 544). (4.) By failing to furnish a proper abstract. (5.) By failing to deliver or tender to Te Poel a warranty deed.

On the other hand, Te Poel did all and more than was required of him. Shutt could not rescind so long as he was in default, nor could he complain of Te Poel's nonperformance of duties like the procuring of releases, which Shutt himself had prevented by refusing to pay

the creditors. (*Minneapolis & S. L. R. Co. v. Cox*, 76 Ia. 316; *Pryor v. Hunter*, 31 Neb. 678; *Laird v. Smith*, 44 N. Y. 618; *Post v. Garrow*, 18 Neb. 682; *Mix v. Beach*, 46 Ill. 311; *Crabtree v. Levings*, 53 Ill. 526; *Potter v. Tuttle*, 22 Conn. 512; *Hubbell v. Von Schoening*, 49 N. Y. 326; *Kellogg v. Lavender*, 9 Neb. 425; *Voltz v. Grummett*, 49 Mich. 453; *Bass v. Gilliland*, 5 Ala. 761; *Clark v. Sears*, 3 Ia. 104.)

The forty days for exchanging deeds were to run from the time Shutt should obtain the loan by incumbering his land for $5,000. This must be true, because (1) the context requires it; (2) the clause was plainly inserted in order to allow time for further details after the loan was obtained; (3) appellant's contention would make the period expire and the date of exchange fall on Sunday, which is not a business day. But even if the forty days were to be construed as running from the date of the contract, failure to exchange within that time would not have been fatal, for time was not of the essence. (*Langan v. Thummel*, 24 Neb. 265; *Willard v. Foster*, 24 Neb. 205; *Kellogg v. Lavender*, 9 Neb. 418; *Merriam v. Goodlett*, 36 Neb. 384; *King v. Gsantner*, 23 Neb. 795; *Taylor v. Longworth*, 14 Pet. [U. S.] 171.) Nor is this rule confined to cases where possession has been taken and money paid. *Hubbell v. Von Schoening*, 49 N. Y. 326; *Quinn v. Roath*, 37 Conn. 16; *Gibbs v. Champion*, 3 O. 335; *Voltz v. Grummett*, 49 Mich. 453.)

The undelivered and unrecorded mortgage was no bar to specific performance. (*Milliken v. Ham*, 36 Ind. 166; *Filchner v. Fidelity Mutual Fire Ass'n*, 72 N. W. Rep. [Ia.] 530.) Even an actual mortgage would not have been so. (*Tiernan v. Roland*, 15 Pa. St. 429; *Dahill v. Booker*, 140 Mass. 308.) Nor would any other incumbrance. (*Megibben v. Perin*, 49 Fed. Rep. 183; *Oakey v. Cook*, 41 N. J. Eq. 350; *Keating v. Gunther*, 10 N. Y. Supp. 734; *Mastin v. Grimes*, 88 Mo. 478; *Ley v. Huber*, 3 Watts [Pa.] 367.)

There was no error in rejecting the offer to show a "general understanding" that the "fact" of a loan by a regular loan company should be substituted for the re-

quired abstract. (*Kaserman v. Fries*, 33 Neb. 427; *Dodge v. Kiene*, 28 Neb. 216.) Even had this been error, it could not be reviewed on appeal. (*Ainsworth v. Taylor*, 53 Neb. 484; *Walker v. Smith*, 54 Neb. 31.)

The unrecorded and undelivered deed to Hebebrand is no bar to specific performance. (*Snowman v. Harford*, 57 Me. 397; *Welfley v. Shenandoah Iron, Lumber, Mining & Mfg. Co.*, 3 S. E. Rep. [Va.] 376.)

Mrs. Te Poel died before the decree was rendered, and, moreover, was not a party to the suit and could not be required to convey. Appellants have cited no case in point.

For centuries the English law has taught the lesson: Keep your contracts. To enforce this lesson it has devised the very remedy of specific performance here sought,—a remedy peculiar to our jurisprudence and beneficent in social effects. (*Lumley v. Wagner*, 1 D. M. & G. [Eng.] 619; *French v. Macale*, 2 Dru. & War. [Ir.] 272.) Appellee has observed this lesson and appellants should be compelled to observe it by the affirmance of a decree both technically right and morally just.

NORVAL, J.

On March 26, 1895, Theodore H. Te Poel and Elias B. Shutt entered into a written contract for the exchange of farms. Both parties and their wives signed the agreement, a copy of which follows:

"TEKAMAH, NEB., March 26, 1895.

"This memorandum witnesseth, that Theodore H. Te Poel has this day traded to Elias B. Shutt his Burt county, Nebraska, farm of 400 acres, being the southwest quarter northwest quarter and east half northwest quarter and west half northeast quarter and southeast quarter, all in section No. 33, and the southwest quarter southwest quarter of section No. 34, all in township 22 north, of range 11 east of the 6th P. M., at the agreed price of $12,000, for the Saunders county, Nebraska, farm

of 330.92 acres of said Elias B. Shutt at the agreed price of $14,891.40. Theodore H. Te Poel agrees to procure release of all incumbrances against his farm and place the same of record and furnish abstract of title to his farm showing perfect title in him, and to execute to said Elias B. Shutt a general warranty deed for the same. The said Elias B. Shutt agrees to incumber his Saunders county farm for $5,000 for five years, at six per cent annual or semi-annual interest, or for such greater amount as he may be able to procure thereon at said rate of interest, and to execute to said Theodore H. Te Poel a general warranty deed, subject to such mortgage as he may put thereon in accordance with the foregoing agreement, which mortgage and interest said Te Poel, by the terms of such deed, shall assume and agree to pay. Said Shutt shall also furnish an abstract of title to the Saunders county land from date of said loan to the time of exchange of deeds, showing perfect title in him except said mortgage. For his trouble and expense in the matter of getting loan Te Poel agrees to pay Shutt $70 extra above agreed price, and Shutt agrees to get loan as soon as possible, and when funds are so borrowed the deeds above provided for shall be exchanged and delivered, or within forty days at the most. Said Te Poel shall agree with his creditors who have liens upon his lands as to amount due them, and said Shutt shall pay the creditors the several amounts agreed upon by said Te Poel with them to the extent of the proceeds of the loan, if so much is required to pay the incumbrances on Te Poel's farm. The balance of purchase price ($2,891.40) said Te Poel agrees to pay in cash to said Shutt when deeds are exchanged as above provided for, less any amount of funds that may remain in hands of said Shutt out of proceeds of loan after making payments to creditors of Te Poel as above provided. The land to be deeded by said Shutt is the east half northeast quarter and east half southeast quarter section 1, township 16, range 7 east, and lots No. 1 and No. 2, section 6, and northwest quarter section 5, and fractional

northeast quarter section 7, all in township 16 north, range 8 east, Saunders county, Nebraska, being 330.92 acres. Each party shall assign insurance policies in force on buildings on premises, and any difference in value shall be paid in cash on basis of pro rate. It is agreed that possession shall not be given by either party until March 1, 1896. Te Poel is to have use of rents of Burt county farm and Shutt is to have use of rents of Saunders county farm. J. R. Force shall pass on abstract to be furnished by Te Poel.

THEODORE TE POEL.
"DORA TE POEL.
"ELIAS B. SHUTT.
"JANIZA A. SHUTT.

"In presence of
"JAMES R. FORCE."

This suit was instituted by Theodore H. Te Poel to enforce the specific performance of the contract set out above, and from a decree in his favor the defendants Shutts appeal.

They contended in the trial court, and so insist here, that time was made the essence of the contract, which required the conditions and stipulations of the parties to be fully performed within forty days from the date of the agreement; that the plaintiff wholly neglected, failed, and refused to comply with the terms of the contract on his part to be performed within the stipulated time; and that defendants either did all things required of them by and under the provisions of the contract, or were ready, willing, and able to comply with every condition imposed upon them within the specified period. If these contentions of the defendants are well founded, it is perfectly plain that the decree is wrong, and must be set aside. It will be observed that the contract required of each party the performance of several things, and in more than one particular the act stipulated to be done by one hinged upon the performance by the other party of another distinct condition. Thus, Elias B. Shutt, among other duties, was required to procure a loan as soon as possible

on the farm he was to convey to Te Poel for a sum not less than $5,000, furnish an abstract from the date of said loan to the time of exchanging deeds showing perfect title in Shutt to the land, except said mortgage, pay Te Poel's creditors the amounts agreed by the latter to be due them on their liens against his lands, assign insurance policies and execute to Te Poel a warranty deed, subject to such mortgage, with the grantee's assumption thereof. On the other hand, Te Poel obligated himself, *inter alia*, to agree with his creditors as to the amount of their liens, obtain release of such liens and have the same recorded, furnish an abstract of title to, and execute a warranty deed for, the lands owned by him and to be exchanged, assign his insurance policies, and pay the balance of the consideration, including a premium or bonus of $70 to Shutt for procuring the loan. An examination of the contract in question plainly reveals that the first step to be taken in carrying out its terms was the obtaining of the loan by Shutt on the lands to be deeded by him for a sum not less than $5,000. Until this duty was performed nothing was required of Te Poel. He was to agree with his creditors as to the amount due on their liens against his farm, and the contract next obligated Shutt to pay such creditors, and Te Poel was to obtain and record releases of said liens or incumbrances.

The record shows that Shutt never obtained a loan on his farm according to the terms of the contract, but did effect a loan about April 26, 1895, for $4,500 only, which sum was $500 less than the amount required, and left with J. R. Force a blank note and mortgage for Te Poel to execute to Shutt for $500. It is claimed that the latter could not borrow but $4,500 on the land, and the taking of a mortgage to himself for the remaining $500 was a substantial compliance with the terms and conditions of the contract in question. In this view we are not able to concur. The question is not whether the giving of two mortgages aggregating $5,000 was as favorable to Te Poel as though Shutt had procured a loan of $5,000 and

secured the payment thereof by a single mortgage. Our inquiry is confined alone to the stipulations of the parties, and whether the arrangement proposed by Shutt relating to the mortgages was a compliance with the terms of the agreement. Te Poel never obligated himself to give Shutt a mortgage for any sum. This court is powerless to make a new contract, but its province is to construe and enforce the agreement made by the parties themselves. We are constrained to hold that Shutt failed to perform one of the first conditions of the contract on his part to be observed in not obtaining a loan on his farm for $5,000. It is also shown that Shutt never paid the creditors of Te Poel the amounts of their liens as he obligated himself to do. Shutt left with J. R. Foree his conditional check for $5,000, drawn on a bank with a capital of less than half that sum, and in which the drawer had no funds to pay the check. But this was not a compliance with the contract in any particular. Shutt was to pay Te Poel's creditors himself. Moreover, the check was never tendered to plaintiff, but was left with Foree, who drew the contract for the exchange of lands. He was not the agent of Te Poel, nor did he have any power or authority to bind plaintiff in any way in the transaction. A tender, to be effectual or available, must be absolute and unconditional, and made to the party entitled to receive the same. (*Fletcher v. Dougherty*, 13 Neb. 224; *Tompkins v. Batie*, 11 Neb. 147; *Williams v. Eikenberry*, 22 Neb. 215.) Shutt did not produce the money or leave it with Foree for Te Poel. The check was ineffectual as a tender of money. (*Guthman v. Kearn*, 8 Neb. 502; *Walter v. Reed*, 34 Neb. 544.) It would have been different had Te Poel dispensed with the actual production of the cash. But this he did not do, for the obvious reason he was given no opportunity to object. The alleged tender was insufficient because it was not kept good.

Shutt never furnished an abstract of title to his lands to Te Poel as he offered to do. He procured on May 1, 1895, and introduced in evidence on the trial, a certificate

from the register of deeds of Saunders county that no instruments had been filed against the lands owned by Shutt since April 26, 1895, the date of the filing of the mortgage for $4,500. This was insufficient to show that no judgment liens had been obtained against the premises, and therefore did not meet the requirements of the contract to furnish an abstract of title.

The defendants attempted to show on the trial by parol evidence that at the time the contract was entered into it was the general understanding of the parties that in case the loan was obtained, for which provision was made in the contract, such fact should relieve the necessity of furnishing an abstract. The offered testimony on that branch of the case was excluded, and the ruling is now assailed. The testimony was clearly inadmissible and was properly ruled out, since parol evidence of a prior or contemporaneous agreement is inadmissible to vary the terms of a written contract. (*Mills v. Miller*, 4 Neb. 443; *Hamilton v. Thrall*, 7 Neb. 210; *Dodge v. Kiene*, 28 Neb. 216; *Kaserman v. Fries*, 33 Neb. 427; *Mattison v. Chicago, R. I. & P. R. Co.*, 42 Neb. 545; *Maxwell v. Burr*, 44 Neb. 31; *Waddle v. Owen*, 43 Neb. 489; *Commercial State Bank v. Antelope County*, 48 Neb. 496.)

In the next place, the rulings of the trial court on the admission or exclusion of evidence are not reviewable in a case brought to this court on appeal. (*Ainsworth v. Taylor*, 53 Neb. 484; *Walker v. Smith*, 54 Neb. 31.)

Shutt executed a warranty deed for his lands to Te Poel, and within forty days from the time the contract was made placed the same, with the check and certificate of the register of deeds already mentioned, in the hands of J. R. Foree; but the conveyance was never delivered or tendered to Te Poel, nor did Foree have any authority to receive the deed for plaintiff. He was merely to pass upon plaintiff's abstract, and in so doing was the agent only of Mr. Shutt. A tender to any one other than Foree would have been just as effectual as a tender. Immediately on the expiration of the forty days from the execu-

tion of the contract Shutt procured the deed, check, and other papers which he had left with Foree, and claims to have rescinded the contract and refused thereafter to carry out its provisions. The reason Shutt declined to fulfill his contract is, doubtless, because an opportunity was presented to dispose of his lands on more favorable terms to another party for cash. Shutt himself being in default was not entitled to a rescission of the contract. (*Post v. Garrow*, 18 Neb. 682; *Pryor v. Hunter*, 31 Neb. 678.)

The evidence adduced by the plaintiff on the trial tends to establish that he complied with all the duties imposed upon him by the terms of the contract, at least so far as the acts of Shutt, or his refusal to perform his obligations, would permit Te Poel to do. The respective stipulations of the parties were in some respects at least mutual and dependent, and were to be performed simultaneously, so that Shutt could not rescind the contract until he had tendered performance of the stipulations imposed upon him, nor could he take advantage of any default of the plaintiff occasioned by his laches. (*Crabtree v. Levings*, 53 Ill. 526.) The record shows that on May 8, 1895, Te Poel sent his son to Shutt's home to inform him he was ready to exchange deeds, and three days later Te Poel, with witnesses, went to Shutt and requested that he carry out the terms of their contract, which the latter peremptorily declined to do. Plaintiff tendered Shutt a warranty deed for the lands and insurance policies, with the balance of consideration, also amount of money required to pay off all liens against the property, informed him of the sum due his creditors, and caused an abstract of title to be made and submitted to J. R. Foree. Shutt threw the paper on the ground and declined to accept or consider the tender. Under the evidence the court was justified in finding the plaintiff had so far performed the contract on his side as to entitle him to a specific execution of the agreement by the defendants.

Counsel for Shutt argue in their brief that the time

limited by the contract for the exchange of deeds expired on May 5, 1895, and that plaintiff's tender is ineffectual, having been made subsequent to that date. This contention is not well founded. It will be observed that the contract does not fix May 5 as the limit for exchanging deeds. The only stipulation on the subject is that "Shutt agrees to get loan as soon as possible, and when funds are borrowed the deeds above provided for shall be exchanged and delivered, or within forty days at the most." If the forty days are to be computed from the date of the contract, then the time limit expired on May 5. A consideration of the entire contract, and of the various duties imposed upon each party, in connection with the language employed, makes it reasonably certain that the time limit was not to date from the execution of the contract, but rather from the period the funds were borrowed by Shutt. It might have consumed the entire first forty days from the execution of the contract, or more, to complete the loan, in which event no time would have remained for paying Te Poel's creditors, the obtaining of a discharge of the several liens, the paying the balance of the purchase price, the procuring abstracts of title and the exchanging of deeds. The clause quoted makes no reference to the date of the contract, but does specify the borrowing of funds, and it is very evident that it was the intention of the parties that it was from the occurrence of this event that the period fixed for the exchange of deeds should be counted. As Shutt did not borrow the amount of money called for by the contract, the time limit for the exchange of title papers had not expired when plaintiff's tender was made. Aside from the question whether time was of the essence of this contract, the court is convinced that plaintiff was not in default, but complied substantially with his part of the agreement.

It is urged that relief should be refused plaintiff because he mortgaged his farm on August 14, 1895. It is true he executed a mortgage to his brother on that date,

yet it was never delivered to the mortgagee or placed upon record, so that the mere execution of the mortgage was not an incumbrance of the lands, nor did not preclude Te Poel from complying with his contract with Shutt. (*Tiernan v. Roland*, 15 Pa. St. 429; and cases* cited in brief of plaintiff.)

Another argument advanced by appellants is that Shutt is not the present owner of the title to the lands which he was to exchange. The record shows that the Shutts executed a deed purporting to convey the legal title to the property to John Hebebrand, the person to whom, after the alleged rescission of the contract in suit, Shutt agreed to convey lands. This deed was never delivered to the grantee, nor was he aware of its existence until a short time before the cause was called for trial in the district court. Moreover, Hebebrand was not a *bona fide* purchaser, since he had knowledge of the existence of the rights of the plaintiff. Besides, Hebebrand was made a party to this suit, and he has not appealed from the decree. The making of the deed by Shutt is no defense to the present suit. (*Snowman v. Harford*, 57 Me. 397; *Welfley v. Shenandoah Iron, Lumber, Mining & Mfg. Co.*, 3 S. E. Rep. [Va.] 378.)

The decree is faulty in one particular. It requires Te Poel alone to convey his lands to Shutt. It should have required Mrs. Te Poel to have joined in the conveyance. Shutt was entitled to receive a warranty deed executed by plaintiff and his wife before he could be required to convey to Te Poel. It is suggested in the brief of counsel that Mrs. Te Poel died before the decree was rendered; but the record fails to verify this statement. The decree, in the respect just indicated, will be modified, and in all other particulars it is affirmed.

DECREE MODIFIED.

*See *ante*, p. 593.

MARY A. JONES, APPELLEE, V. ELIZABETH BURTIS ET AL., APPELLANTS.

FILED FEBRUARY 9, 1899. NO. 8699.

Foreclosure: ALLEGATION OF NO PROCEEDINGS AT LAW NECESSARY. In a suit to foreclose a real estate mortgage the petition must allege whether any proceedings at law have been had for the recovery of the debt, or any part thereof; and where the answer is a general denial, there can be no recovery, in the absence of proof sustaining such allegation of the petition.

APPEAL from the district court of Lancaster county. Heard below before HOLMES, J. *Reversed.*

Clark & Allen, for appellants.

References: *Gregory v. Hartley*, 6 Neb. 356; *Meehan v. First Nat. Bank of Fairfield*, 44 Neb. 213; *Hargreaves v. Menken*, 45 Neb. 668; *Bing v. Morse*, 51 Neb. 842; *Shufelt v. Shufelt*, 9 Paige [N. Y.] 47; *Cooper v. Bresler*, 9 Mich. 533; *Scofield v. Doscher*, 72 N. Y. 492.

Flansburg & Williams, contra.

References: *Henry & Coatsworth Co. v. McCurdy*, 36 Neb. 863; *Mundy v. Whittemore*, 15 Neb. 647.

NORVAL, J.

The action was to foreclose a real estate mortgage. Plaintiff obtained a decree, and the mortgagors appeal therefrom, claiming that the findings are unsupported by the evidence. The petition contains, *inter alia*, the averment that no proceedings at law have been had for the recovery of the debt secured by the mortgage, or any part thereof. The answer was a denial of each and every allegation in the petition contained. On the trial plaintiff introduced as evidence the note and mortgage in question, and rested. No other or further evidence was adduced in the case by either party. The question,

therefore, is presented whether it was incumbent on the plaintiff and appellee to establish on the trial the averment of the petition heretofore mentioned.

Section 850 of the Code of Civil Procedure is in the language following: "Upon filing a petition for the foreclosure or satisfaction of a mortgage, the complaint shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected and paid." It is conceded by counsel for plaintiff, and there is no room to doubt that the statute so requires, that a petition to foreclose a mortgage on real estate must contain the averment called for by the section just quoted, and a petition which omits such allegation is demurrable. (*Gregory v. Hartley*, 6 Neb. 356; *Meehan v. First Nat. Bank of Fairfield*, 44 Neb. 213; *Hargreaves v. Menken*, 45 Neb. 668; *Bing v. Morse*, 51 Neb. 842.) In the case last cited it was said: "Whether a proceeding at law has been had for the recovery of a mortgage debt, or any part thereof, and whether such a debt, or any part of it, has been paid, are essential facts which must be pleaded in order to invest the mortgagee of a real estate mortgage with the right to invoke a court of equity to foreclose such mortgage. The petition filed, then, for the foreclosure of a real estate mortgage must aver the facts required by section 850 of the Code, or the petition will not state facts sufficient to entitle the plaintiff to the relief he demands." The object or purpose of the statute was to prevent the prosecution of an action at law and a suit in equity at the same time to collect the mortgage debt, and the legislature has required that the plaintiff in a petition to foreclose a real estate mortgage shall, by suitable averments therein, advise the court whether an action at law is pending to enforce the collection of the same debt. This being a material and indispensable allegation in a petition of foreclosure, if the same is denied by the answer, no relief can be granted in the absence of proof of the truthfulness of

such averment. Ordinarily, a pleader is not required to prove a negative allegation, but this rule does not obtain where the facts are within his own knowledge. No one can be better advised than the mortgagee whether any action at law is pending to recover the mortgage debt. A suit, aided by attachment, might be instituted against a non-resident mortgagor to collect the debt without the latter's knowledge. The plaintiff in this case, by reason of the general denial in the answer, was required to establish, by competent evidence, each material averment of the petition, including the one that no action at law was pending to enforce the payment of the debt secured by the mortgage. In the absence of such proof the decree cannot stand.

REVERSED.

WILLIS E. BROWN V. A. P. BRINK, RECEIVER, ET AL.

FILED FEBRUARY 9, 1899. No. 8687

1. **Stockholders:** LIABILITY: ENFORCEMENT. An action for the enforcement of the individual liability of the stockholders of a banking corporation must be prosecuted by one creditor for the benefit of all, or by the receiver of the corporation.

2. ———: ———: ———: INTERVENTION. A creditor may not intervene in such an action, instituted by the receiver, at least where it is not made to appear that the receiver is not prosecuting the case in good faith for the best interests of the creditors, or in some way has disregarded or violated the duties of his trust in that regard.

ERROR from the district court of Sheridan county. Tried below before WESTOVER, J. *Affirmed.*

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

Frank T. Ransom and *W. W. Morsman, contra.*

NORVAL, J.

This action was instituted by the receiver of the Bank of Rushville to enforce stockholders' individual liability for the debts of the bank. Willis E. Brown, a creditor of the bank, sought to intervene, and his application therefor was denied, and upon stipulation of the parties a judgment was rendered in favor of the receiver and against the defendants for the sum of $2,600. Brown has prosecuted a petition in error.

A single question is presented for the consideration of this court, namely, Did the court below err in refusing to permit Brown to intervene? We are all of the opinion that the answer must be in the negative. It has been judicially determined that an action like the present one must be brought for the benefit of all the creditors of the corporation, and when a receiver has been appointed the suit should be prosecuted in his name. (*Farmers Loan & Trust Co. v. Funk*, 49 Neb. 353; *German Nat. Bank of Lincoln v. Farmers & Merchants Bank of Holstein*, 54 Neb. 593.) A receiver for the Bank of Rushville had been appointed, and he instituted suit against the stockholders to charge them individually for the debts of the corporation, and the creditor could not maintain an independent action to enforce the same liability against defendants. If Brown, therefore, could not in his own right have instituted a separate suit, manifestly he could not intervene in the one brought by the receiver,—at least, unless it was shown that the receiver was either failing to prosecute the cause or was in some way disregarding or violating the duties of his trust. The petition of intervention contains no such averment, but alleges substantially the same facts as are set forth in the petition of the receiver, with the further allegation that Brown is a creditor of the bank and that his claim has been allowed. Moreover, this record discloses that in the case in which Mr. Brink was appointed receiver of the Bank of Rushville he, as such receiver, was ordered and directed to compromise

the present suit upon certain terms, and that the judgment herein was rendered in pursuance of such settlement. In view of the order of settlement entered in the receivership case we are unable to see how Mr. Brown could have been prejudiced by the denial of his application to intervene herein, since, had his petition for intervention been allowed, it would not have prevented the rendition of the same judgment which was subsequently entered. Whether the court rightfully ordered the receiver to compromise the right of action against the stockholders is not presented by this record.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BANK OF RUSHVILLE, APPELLEE, IMPLEADED WITH W. E. BROWN, APPELLANT.

FILED FEBRUARY 9, 1899. No. 8686.

1. **Receivers:** COMPROMISE OF SUIT. A court appointing a receiver for an insolvent bank may authorize the receiver to settle and compromise a suit instituted by himself in behalf of the estate, where it appears that as large a sum will probably be realized in that way as if the litigation was continued, or it is disclosed that the best interests of the estate require that such settlement be effected.
2. ———: REVIEW. An order of the court giving directions or instructions to a receiver in the performance of his trust will not be disturbed on review where no abuse of discretion is shown.

APPEAL from the district court of Sheridan county. Heard below before WESTOVER, J. *Affirmed.*

W. W. Wood and *Stewart & Munger*, for appellant.

Frank T. Ransom and *W. W. Morsman*, *contra.*

NORVAL, J.

The record before us discloses that the Bank of Rushville, incorporated under the laws of this state, became

insolvent, and on January 5, 1894, A. P. Brink was appointed the receiver of said bank, who duly qualified as such and entered upon the discharge of the duties of the trust. The receiver converted the assets into money, and the proceeds, under the order of the court, were distributed by him among the several creditors. The assets being insufficient to pay the liabilities of the bank, on application of the receiver the district court ordered him to proceed at once to enforce against the stockholders their constitutional liability for the unpaid indebtedness of the bank. In obedience to said order the receiver instituted suit in the district court of Sheridan county against William May, Elmer Williams, and Arthur Kinney, as stockholders of said bank, by which it was sought to charge said May as the owner of 105 shares of stock and said Williams and Kinney each for the number of shares owned by them respectively. In said cause May filed an answer admitting his liability to the extent of twenty-six shares of the capital stock of the bank, and denying all other or further liability. Subsequently the receiver applied to the court in the proceeding to wind up the affairs of the bank for an order authorizing him to settle and compromise the suit against the stockholders by taking judgment against May, the only solvent defendant, for the sum of $2,600, and which sum he was to immediately thereafter pay the receiver. One W. E. Brown, a creditor of the Bank of Rushville, resisted the application for authority to settle and compromise the suit pending against the stockholders, and the court, upon the hearing, granted permission to settle the suit as recommended and advised by the receiver. From this order Brown has prosecuted an appeal.

The power of the court to authorize a receiver appointed by it to wind up the affairs of an insolvent corporation, to settle and compromise doubtful claims, or a pending suit in which the result of the litigation is uncertain, cannot well be questioned. A receiver discharges his functions under the directions and instruc-

tions of the court making the appointment. He is "the arm of the court." Manifestly, where the court has not abused its discretion in the giving of instructions to the receiver, its orders in the premises will not be disturbed on review in the appellate court. Therefore, in the present case it devolved upon the creditor to show that a larger sum than $2,600 would probably have been realized from the suit against the stockholders without the compromise prescribed by the terms and order of the court, and that it was to the interest of the bank not to settle the action. Brown, the appellant, introduced no evidence on the hearing in the court below except his written application protesting against the granting of authority to compromise, which was verified by his counsel, upon belief merely. The petition of the receiver for instructions is sworn to positively, sets forth that at the time of his appointment and the insolvency of the bank the capital stock of the bank consisted of 50 shares at $100 each, of which said William L. May was the owner of 26 shares, and no more; that two years prior to the insolvency of the bank its capital stock consisted of 200 shares at $100 each, of which said May owned 105 shares; that at that time the capital of the bank was reduced to $5,000 and the stockholders surrendered their shares, and the said 105 shares owned by May were likewise surrendered and canceled and 26 shares of stock were issued to him, and which he owned when the bank closed its doors and the receiver was appointed. The application of the receiver for instructions further states that the suit to enforce the stockholders' liability is founded upon the theory that the reduction of the capital stock of the bank was illegal and fraudulent; that the stockholders were liable for the number of shares held by them prior to the reduction of the capital; that the result of the legislation upon such issue is doubtful and uncertain; and that the receiver is advised by his counsel, and is himself of the opinion, that the best interest of the estate requires that the compromise be made as proposed.

There was introduced absolutely no evidence to show that the averments in the application of the receiver were untrue. He was an officer of the court, and the latter was justified in acting on the advice and recommendation of the former. It is claimed by counsel for Mr. Brown that he was a creditor of the bank prior to the reduction of its capital stock, and hence is placed in a different relation from the other creditors, and as to him the stockholders were liable for the number of shares held when the reduction was made. There is not a scintilla of evidence to sustain this contention. On the contrary, the record shows that Mr. Brown's claim against the bank, as presented and allowed, consisted of a certificate of deposit issued by the bank subsequent to the time the capital stock was reduced to $5,000. If, as suggested by counsel, such certificate of deposit was given to cover moneys deposited in the bank on open account when its capital was $20,000, such fact should have been established on the hearing. No abuse of discretion of the court below having been shown, the order is

AFFIRMED.

HENRY HOBSON, SHERIFF, v. J. A. CUMMINS.

FILED FEBRUARY 9, 1899. No. 8673.

1. **Summons**: ISSUANCE TO OTHER COUNTIES. Where a personal action is properly brought in one county and service of summons is had therein upon a real defendant, summons may be issued to any other county of the state to bring in other parties defendant.
2. ———: TO WHOM DIRECTED. A summons issued by a county court for a defendant residing in a county other than the one in which the suit is brought is properly directed to the sheriff or any constable of such county.
3. ———: CONTENTS. A summons issued by a county court is not rendered void because it does not contain the names of all the persons made defendants.
4. **Pleading**: STATUTE OF LIMITATIONS. The statute of limitations as a defense is waived, unless raised either by demurrer or answer.

ERROR from the district court of Dawson county. Tried below before SINCLAIR, J. *Reversed.*

Ricketts & Wilson and *E. A. Cook*, for plaintiff in error.

References: *Bair v. People's Bank*, 27 Neb. 577; Van Fleet, Collateral Attack secs. 369, 436, 437, 439, and citations; Maxwell, Code Pleading, 91; *Barnes v. McMurtry*, 29 Neb. 178; *Hanna v. Emerson*, 45 Neb. 708; *Scroggin v. National Lumber Co.*, 41 Neb. 196; *Langley v. Ashe*, 38 Neb. 53; *Winters v. Means*, 25 Neb. 142; *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552; *Gould v. Loughran*, 19 Neb. 392; *North Pacific Cycle Co. v. Thomas*, 38 Pac. Rep. [Ore.] 307; *Fickes v. Vick*, 50 Neb. 401.

George C. Gillan, contra.

References: *Walker v. Stevens*, 52 Neb. 653; *Dailey v. Kinsler*, 35 Neb. 836; *Cobbey v. Wright*, 29 Neb. 274; *Dunn v. Haines*, 17 Neb. 560; *Pearson v. Kansas Mfg. Co.*, 14 Neb. 211; *Cobbey v. Wright*, 23 Neb. 250; *Allen v. Miller*, 11 O. St. 374; *Hurlburt v. Palmer*, 39 Neb. 175; *Rogers v. Green*, 33 Tex. 661; *Lyman v. Milton*, 44 Cal. 630; 24 Am. & Eng. Ency. Law 510, 511; *Kellar v. Stanley*, 86 Ky. 240; *Burleson v. Henderson*, 4 Tex. 49; *Portwood v. Wilburn*, 33 Tex. 713; *Graves v. Drane*, 66 Tex. 658; *Reynolds v. May*, 4 Greene [Ia.] 283; *Lewis v. Grace*, 44 Ala. 307; *Burgett v. Williford*, 56 Ark. 187; *Smith v. Morris*, 29 Ga. 339; *Bank of Havana v. Magee*, 20 N. Y. 355; *Bentley v. Smith*, 3 Cai. [N. Y.] 170; *Scott v. Soans*, 3 East [Eng.] 111; *Clay v. Oxford*, 4 H. & C. [Eng.] 690; *Letherbarrow v. Ward*, 5 Jur. [Eng.] 388.

NORVAL, J.

This suit was instituted by J. A. Cummins against Henry Hobson, as sheriff of Dawson county, to enjoin the enforcement of an execution issued upon a judgment obtained in the county court of Red Willow county by the McCormick Harvesting Machine Company against

said Cummins and one Tom Hayden. A general demurrer to the petition was overruled, and the plaintiff electing to stand on his demurrer, a decree was entered perpetually enjoining said execution and judgment. The sheriff prosecutes error.

In the action in which the judgment sought to be enjoined was rendered Hayden was served with process in Red Willow county, and summons was issued to, and was served upon, Cummins in Dawson county. Neither defendant appeared in the action. It is now argued that the county court of Red Willow did not acquire jurisdiction over the person of Cummins, for the reason that Hayden was a nominal defendant merely, and the service of summons upon him in the county in which the writ issued conferred no power to summon the other defendant in another county. The doctrine announced by this court in numerous cases, and which is invoked herein, is that in a personal action the service of a summons in a county where suit is brought, on a nominal defendant merely, does not confer authority to issue summons to another county for a real defendant. (*Dunn v. Haines*, 17 Neb. 560; *Cobbey v. Wright*, 23 Neb. 250; *Hanna v. Emerson*, 45 Neb. 708.) The rule stated might have been urged in the county court of Red Willow county before the judgment against Cummins was rendered, and if it had been then shown that his co-defendant, Hayden, had no substantial interest in the subject of the suit, but was merely a nominal party to the proceeding, no judgment could have been obtained against Cummins. The note which was the basis of that action was payable to C. H. & L. J. McCormick, and indorsed by Tom Hayden. The latter was therefore apparently a proper party defendant, and the service of process upon him in Red Willow county authorized the issuance of a summons to Dawson county for Cummins. (*Belcher v. Palmer*, 35 Neb. 449; *Hanna v. Emerson*, 45 Neb. 708; *Miller v. Mecker*, 54 Neb. 452; *Barry v. Wachowsky*, 57 Neb. 534.) If there was collusion or fraud between the execution and judgment

plaintiff and Hayden, that was a matter which should have been made an issue in the county court of Red Willow county before the entry of the judgment. The question is not now available. (Van Fleet, Collateral Attack secs. 369, 436, 437.) That court had jurisdiction of the subject-matter, and one of the parties having been summoned within the county in which the suit was brought, that court had the power to issue a summons for the other defendant to any county within the state. (Code of Civil Procedure, sec. 65; *Bair v. People's Bank*, 27 Neb. 577.)

It is insisted that the summons served upon Cummins in the action in the county court was void because the writ did not contain the names of both defendants, and was directed to "sheriff or any constable of Dawson county, Nebraska." Section 21, chapter 20, Compiled Statutes, provides that all process in civil actions in the county court shall be directed to the sheriff or any constable of the county. Section 910 of the Code of Civil Procedure, relating to summons in actions before justices of the peace,—and the suit in which the judgment was rendered against Cummins was within the jurisdiction of a justice's court,—requires such writs to be "directed to the constable or sheriff of the proper county (except in case a person be deputed to serve it, in which case it shall be directed to such person)." Section 65 of the same Code declares: "Where the action is rightly brought in any county, according to the provisions of title four, a summons shall be issued to any other county, against any one or more of the defendants, at plaintiff's request." It has been held that the section last above quoted is applicable to actions brought in the county court. (*Bair v. People's Bank*, 27 Neb. 577; *Miller v. Meeker*, 54 Neb. 452.) It is too plain to admit of argument that, when a process is issued by a county judge for a defendant in his own county, the same should be directed to the sheriff or any constable of the county to which the writ is issued. We find no provision in the

statute, and none has been cited by counsel for plaintiff below, which requires in an action brought in the county court, where summonses are issued to different counties, each must contain the names of all the defendants, and in the absence of such a provision we do not feel warranted in holding that the summons served on Cummins is void because it did not mention the names of all parties defendant.

It is contended that the action brought against Cummins was barred by the statute of limitations. The defense of the statute was neither interposed by demurrer nor answer, and therefore is waived. (*Atchison & N. R. Co. v. Miller*, 16 Neb. 661; *Alexander v. Meyers*, 33 Neb. 773; *Scroggin v. National Lumber Co.*, 41 Neb. 195.) The petition in the case at bar did not aver sufficient facts to justify enjoining the collection of the judgment of the county court, and the demurrer should have been sustained. The decree is accordingly

REVERSED.

WILLIAM D. MEAD, JR., V. GEORGE B. TZSCHUCK.

FILED FEBRUARY 9, 1899. No. 9693.

1. **Stare Decisis.** A decision of this court on a former appeal of a question presented by the record is thereafter the law of the case.
2. ———: EVIDENCE. When the evidence is substantially the same as on a former appeal, the weight and effect to be given such evidence must be considered as foreclosed by the former decision on that point.

ERROR from the district court of Douglas county. Tried below before FAWCETT, J. *Affirmed.*

W. A. Redick, for plaintiff in error.

E. W. Simeral, contra.

NORVAL, J.

This is the second appearance of the case before this court. (*Tzschuck v. Mead*, 47 Neb. 260.) On the former hearing the decree of the district court in favor of Mead was reversed, and the cause was remanded for further proceedings therein. The second trial in the court below resulted in a decree against Mead, and he has brought the record here for review.

The opinion filed on the former hearing contains a complete statement of the case and the questions involved, which obviates the necessity of making an extended statement at this time. The suit was instituted by Mead to foreclose a mortgage and for a deficiency judgment. Prior to the bringing of the suit Mead had obtained a decree of foreclosure of the same mortgage in the circuit court of the United States for the district of Nebraska, and a sale of the mortgaged premises was had thereunder. The sale was confirmed and a deficiency judgment was refused against Tzschuck. In the present cause the latter interposed as a defense the decree and proceedings in the circuit court of the United States. Upon the consideration of the pleadings and evidence in the prior opinion it was held that the order of said circuit court entered in the cause, refusing a deficiency judgment, involved the merits of the application, and not the question of jurisdiction only. Counsel for plaintiff, in his brief, argues none but propositions which were settled adversely to his contention in the former opinion. The determination of a question presented in reviewing proceedings had in the cause in the district court becomes the law of the case and will not be re-examined. (*Coburn v. Watson*, 48 Neb. 257; *Fuller v. Cunningham*, 48 Neb. 857.) The competent and material evidence adduced on the last trial is substantially the same as on the former appeal, and the question whether the circuit court of the United States denied the motion for a deficiency judgment for want of jurisdiction must

be considered foreclosed by the former decision on that point. The decree is

AFFIRMED.

MISSOURI, KANSAS & TEXAS TRUST COMPANY, APPELLANT, V. F. G. RICHARDSON ET AL., APPELLEES.

FILED FEBRUARY 9, 1899. No. 8689.

1. **Mortgage Foreclosure:** PARTIES. In an action to foreclose a mortgage prior incumbrancers may be made parties defendant for the purpose of having the amount and rank of their liens adjudicated.
2. **Rights of Creditors:** IMPOUNDING PROPERTY: LIENS. A creditor whose claim has not been reduced to judgment, and who has neither a general nor specific lien on his debtor's property, is not entitled to have such property impounded as security for the claim.
3. ———: CANCELLATION OF TRANSFERS: INJUNCTION. Nor is such creditor entitled to an injunction restraining his debtor from disposing of some or all of his property. Neither is he entitled to a decree canceling fraudulent transfers already made.
4. **Interest:** LEASE. A lessee is entitled to interest at the rate of seven per cent per annum upon advance payments of rent made for the accommodation of the lessor and at his request.
5. **Landlord and Tenant:** EFFECT OF ASSIGNMENT. Without the landlord's consent, a tenant cannot, by assigning the lease, absolve himself from an express covenant to pay rent, or otherwise change the conditions of his obligation.

APPEAL from the district court of Lancaster county. Heard below before HOLMES, J. *Reversed.*

Thomas Ryan, for appellant.

C. A. Atkinson, contra.

As to the effect of the assignment see: *Conrady v. Bywaters*, 24 S. W. Rep. [Tex.] 961; Wood, Landlord & Tenant 737; *Jackson v. Davis*, 5 Cow. [N. Y.] 124; *Bliss v. Gardner*, 2 Ill. App. 422; *Fletcher v. McFarlane*, 12 Mass. 42.

General creditor cannot reach assets or set aside transfers. (*McConnel v. Dickson*, 43 Ill. 99; *Scott v. M'Millen*, 1 Litt. [Ky.] 302; *Southard v. Benner*, 72 N. Y. 424; *Brown v. Long*, 1 Ired. [N. Car.] 190; *Massey v. Gorton*, 12 Minn. 83; *Dahlman v. Jacobs*, 15 Fed. Rep. 863; *Heyneman v. Dannenberg*, 6 Cal. 376; *Dormueil v. Ward*, 108 Ill. 216; High, Injunctions sec. 1403; *Bassett v. St. Albans Hotel Co.*, 47 Vt. 314; *Wiggins v. Armstrong*, 2 Johns. Ch. [N. Y.] 144; *Day v. Washburn*, 24 How. [U. S.] 355; *Dunham v. Cox*, 2 Stockt. Ch. [N. J.] 437; *Thurmond v. Reese*, 3 Ga. 449; *Jones v. Green*, 1 Wall. [U. S.] 330; *Birely v. Staley*, 5 Gill & J. [Md.] 432; *Rice v. Barnard*, 20 Vt. 479; *Brittain v. Quiet*, 1 Jones Eq. [N. Car.] 328; *Sanders v. Watson*, 14 Ala. 198; *Miller v. Davidson*, 3 Gil. [Ill.] 518; *Baxter v. Moses*, 77 Me. 465; *Henderson v. McVay*, 32 Ala. 471; *Castle v. Bader*, 23 Cal. 76; *Brown v. Bank of Mississippi*, 31 Miss. 454; *Meux v. Anthony*, 11 Ark. 411; *Dunlevy v. Tallmadge*, 32 N. Y. 427; *Griffin v. Nitchner*, 57 Me. 270; *Uhl v. Dillon*, 10 Md. 500; *Rich v. Levy*, 16 Md. 74; *Briggs v. Austin*, 129 N. Y. 208; *Tennent v. Battey*, 18 Kan. 324; *Martin v. Michael*, 23 Mo. 50; *Rollins v. Van Baalen*, 56 Mich. 610; *Crompton v. Anthony*, 95 Mass. 33.)

SULLIVAN, J.

In October, 1891, Theodore F. Barnes was the owner of the Windsor Hotel in the city of Lincoln. The property was incumbered by two mortgages, the first being for $25,000 and the second for $5,000. The second mortgage was given to, and owned by, the appellant, the Missouri, Kansas & Texas Trust Company. The hotel was leased by Barnes to F. G. Richardson for a term of five years, commencing February 10, 1892, at a monthly rental of $416.66, payable each month in advance. This lease was assigned by the lessor to the trust company as collateral security for his indebtedness to it; and in order to induce said company to dismiss a pending action for the foreclosure of its mortgage, Mr. Richardson, at

the instance of Barnes, paid to the appellant upon the lease the sum of $3,368.75. This payment was made on or about October 8, 1891, that being the day upon which the lease was executed. January 1, 1893, Richardson assigned his lease to Jennie Opelt, and at the same time sold her the hotel furniture, supplies, etc., taking back, as security for the unpaid purchase price, which amounted to $6,500, a chattel mortgage upon the property sold. April 2, 1894, to secure an indebtedness of $1,215.83, Mrs. Opelt gave Richardson a second chattel mortgage covering the same property described in the $6,500 mortgage. This second mortgage was on September 28, 1894, assigned to the appellant as security for rent then in arrears. July 28, 1893, Richardson transferred to his daughter, Clara M. Richardson, the first mortgage upon the hotel furniture and other property therein described. After the trust company became the assignee and owner of the second chattel mortgage it commenced this action against Jennie Opelt, F. G. and Clara Richardson in the district court of Lancaster county. The purpose of the suit is indicated by the prayer of the petition, which is here set out: "Wherefore this plaintiff asks that an injunction issue restraining the sale of said property described in said first named chattel mortgage, or the taking of said property under said chattel mortgage, for the purpose of foreclosure; that the assignment thereof from said Frederick G. Richardson to his daughter, Clara M. Richardson, be declared null and void, and that it be set aside and held for naught; that an accounting be taken of the amount yet due from said Frederick G. Richardson to plaintiff and judgment entered therefor; that the lien of the first chattel mortgage be declared junior and inferior to the lien of the plaintiff, and that the amount found due on said chattel mortgage No. 59710 be declared a first lien on said chattel property; that it be declared in full force and effect, valid and subsisting, and that on the final hearing of this case the injunction be declared and de-

creed perpetual; and that the plaintiff have such other, further, or different relief as it may be entitled to, including costs of this case." The court rendered judgment against Richardson for the sum of $11,702.19, and against Opelt for the sum of $12,948.34. The other relief prayed for was denied.

In view of the conclusion at which we have arrived it will not be necessary to separately consider the several propositions ably discussed by counsel for the trust company. Plaintiff acquired its chattel mortgage with notice of the fact that it was junior and subordinate to the mortgage for $6,500 executed by Opelt to Richardson. It had a right, of course, to proceed by action to enforce its security, and as an incident to that right it was entitled to bring the Richardsons before the court in order to have the rank of their mortgage and the amount due upon it adjudicated. But clearly the plaintiff is not entitled to have the transfer from Mr. Richardson to his daughter canceled, nor the further disposition of the mortgage by Miss Richardson enjoined. It is true the plaintiff had a second mortgage on the hotel furniture, but it did not have a specific lien upon the first mortgage. That was Richardson's property, and a mere general creditor could not impound it. The mortgaged chattels belong to Mrs. Opelt, and the plaintiff can assert no right to them except through the mortgages. The first mortgage was not made in fraud of the rights of Richardson's creditors, and a fraudulent assignment of it could not change the fact that it was and is a first lien on the hotel furniture. If it is an equitable asset available to Richardson's creditors, it must be reached in the usual way after the ordinary remedy has been exhausted. (High, Injunctions sec. 1041; *Dormueil v. Ward*, 108 Ill. 216; *Briggs v. Austin*, 129 N. Y. 208; *People's Savings Bank v. Bates*, 120 U. S. 556.) We approve the action of the trial court in refusing to annul the transfer of the mortgage from Richardson to his daughter and in refusing to enjoin her from making a sale or other disposi-

tion of the security; but we think a decree should have been rendered foreclosing the plaintiff's mortgage and fixing the amount due upon the first mortgage. The facts alleged in the petition and proven on the trial entitled the trust company to that relief. The prayer for general relief was quite sufficient. Its vagueness did not mislead the defendants, and in fact no one complains of it who is entitled to be heard upon that question. (3 Ency. Pl. & Pr. 347; *Danforth v. Smith*, 23 Vt. 257; *Simplot v. Simplot*, 14 Ia. 449.) In determining the amount due from Richardson to the plaintiff the trial court credited Richardson with the sum of $1,246.15 as interest upon the advance payment of rent made in October, 1891. From the evidence we are satisfied that Richardson is entitled to a credit upon the lease; but we think the court erred in its computation of the amount of interest for which credit should be given. To the extent only that rent was paid before it became due the lessee is entitled to interest thereon. The whole amount of the advance payment was bearing interest up to February 10, 1892. After that time the sum bearing interest was reduced $416.66 each month until the advancement was entirely exhausted by being applied upon the lease in accordance with the terms of that instrument.

Richardson complains of the decree, and contends that he is no longer liable on the lease assigned by Barnes to the plaintiff. The grounds for his contention are (1) that the plaintiff accepted Mrs. Opelt as its tenant, and (2) that he was, at most, Mrs. Opelt's surety, and as such has become discharged by a change in the terms of the original contract made without his knowledge or consent. The evidence does not sustain the propositions of fact upon which Richardson's argument is founded. The findings of the trial court are against him, and they rest upon adequate proof. Neither is it true as a proposition of law that the assignment of a leasehold interest discharges the lessee from an express covenant to pay

rent. He cannot, without the lessor's consent, release himself from or change the conditions of his obligation. (*Le Gierse v. Green*, 61 Tex. 128; *Fanning v. Stimson*, 13 Ia. 42.)

The judgment is reversed so far as it fails to conform to the views herein expressed. The cause is remanded with direction to the district court (1) to fix the amount due on the $6,500 mortgage and adjudge it to be a first lien on the property; (2) to render a decree foreclosing the plaintiff's mortgage; and (3) to increase the amount of the judgment against Richardson, by reducing the credit allowed him on account of interest, from $1,246.15 to the sum of $143.51.

REVERSED AND REMANDED.

PHENIX INSURANCE COMPANY OF BROOKLYN V. JAMES R. HOLCOMBE.

FILED FEBRUARY 9, 1899. No. 8664.

1. **Fire Insurance:** OTHER INSURANCE: REPLY. In an action on a contract of insurance containing a clause forbidding other insurance without the written consent of the company, a reply defectively alleging notice to the insurer that additional indemnity had been obtained will, after trial on the merits, be liberally construed with a view of giving effect to the evident intention of the pleader.

2. ———: KNOWLEDGE OF AGENT. An insurance company which commits to an agent the supervision and inspection of its risks is charged with knowledge of any fact learned by such agent while engaged in the performance of his duty as such inspector.

3. ———: OTHER INSURANCE: WAIVER. An insurance company, having notice that the insured has obtained additional insurance in violation of the contract, will be deemed to have waived its right to insist upon a forfeiture when it refrains for more than ten months from exercising its right and then bases an attempted cancellation upon other ground.

4. ———: ALIENATION: DOES NOT INCLUDE SALE BY PARTNER. A condition in a contract of insurance which prohibits a sale, transfer,

or any changes in the title or possession of the insured property without the consent of the insurer has no application to a sale or transfer by one partner to another of his interest in the partnership property.

5. ———: FORFEITURE. Forfeitures are not favored, and in contracts of insurance a construction resulting in a loss of the indemnity for which the insured has contracted will not be adopted except to give effect to the obvious intention of the parties.

6. ———: FAILURE TO OPERATE FACTORY. The insured property was merchandise and machinery used in manufacturing. The policy provided that if the insured property be a manufacturing establishment, its non-operation would avoid the contract. *Held*, That the insured machinery was not a manufacturing establishment within the meaning of the policy.

7. **Trial:** EVIDENCE. The decision of preliminary issues touching the competency of witnesses, or admissibility of evidence, is for the trial judge.

8. ———: ———: If proffered evidence is *prima facie* admissible, it is the duty of the court to receive it; otherwise it should be rejected.

9. **Insurance:** VERDICT FOR INSURED. The evidence examined, and *held* to be sufficient to sustain the verdict.

ERROR from the district court of Dawson county. Tried below before GREENE, J. *Affirmed.*

Greene & Breckenridge and *E. A. Cook*, for plaintiff in error:

Notice to Hopkins would not establish a waiver of the provision of the policy against additional insurance without consent thereto in writing indorsed on the policy. (*Eagle Fire Co. v. Globe Loan & Trust Co.* 44 Neb. 380; *German Ins. Co. v. Heiduk*, 30 Neb. 288; *Hughes v. Insurance Co. of North America*, 40 Neb. 626; *Burlington Ins. Co. v. Campbell*, 42 Neb. 208; *Phenix Ins. Co. v. Covey*, 41 Neb. 724; *Kitchen v. Hartford Fire Ins. Co.*, 57 Mich. 135; *Home Fire Ins. Co. v. Hammang*, 44 Neb. 566; *O'Leary v. Merchants & Bankers Mutual Ins. Co.*, 66 N. W. Rep. [Ia.] 175; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1; *Gould v. Dwelling House Ins. Co.*, 90 Mich. 302; *Carey v. German-American Ins. Co.*, 84 Wis. 80; *Ruthven v. American Fire Ins. Co.*, 60

N. W. Rep. [Ia.] 663; *Northwestern Nat. Ins. Co. v. Mize*, 34 S. W. Rep. [Tex.] 670; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356; *Baumgartel v. Providence-Washington Ins. Co.*, 136 N. Y. 547; *Moore v. Hanover Fire Ins. Co.*, 141 N. Y. 219; *Kyte v. Commercial Union Assurance Co.*, 144 Mass. 43.)

The sale by Reynolds and Beyers to Holcombe of their interest in the insured property was such a change of title or possession to the insured property as avoided the policy. (*Allemania Fire Ins. Co. v. Peck*, 133 Ill. 220; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 550; *Wood v. Rutland & Addison Mutual Fire Ins. Co.*, 31 Vt. 552; *Finley v. Lycoming County Mutual Ins. Co.*, 30 Pa. St. 311; *Barnes v. Union Mutual Fire Ins. Co.*, 51 Me. 110; *Hathaway v. State Ins. Co.*, 64 Ia. 229; *Oldham v. Anchor Mutual Fire Ins. Co.*, 57 N. W. Rep. [Ia.] 861; *Jones v. Phœnix Ins. Co. of Hartford*, 66 N. W. Rep. [Ia.] 169; *Gibb v. Fire Ins. Co.*, 61 N. W. Rep. [Minn.] 137; *Ehrsam v. Phenix Ins. Co.*, 43 Neb. 554.)

A portion of the property insured constituted a manufacturing establishment, which was not being operated at the time of the fire. (*Stone v. Howard Ins. Co.*, 153 Mass. 475; *McKenzie v. Scottish Union & Nat. Ins. Co.*, 44 Pac. Rep. [Cal.] 922.)

Warrington & Stewart, contra.

On question as to waiver see: *Billings v. German Ins. Co.*, 34 Neb. 502; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. [Va.] 88; *Pennsylvania Fire Ins. Co. v. Kittle*, 39 Mich. 51; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Lycoming Mutual Ins. Co. v. Slockbower*, 26 Pa. St. 199; *Lewis v. Council Bluffs Ins. Co.*, 63 Ia. 193; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Rathbone v. City Fire Ins. Co.*, 31 Conn. 193; *Gilliat v. Pawtucket Mutual Fire Ins. Co.*, 8 R. I. 282; *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md. 506; *Hale v. Union Mutual Fire Ins. Co.*, 32 N. H. 295; *New England Farmers & Merchants Ins. Co. v. Wetmore*, 32 Ill. 221; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 550; *Billings v. German*

Ins. Co., 34 Neb. 502; *Hamilton v. Home Ins. Co.*, 94 Mo. 352; *Carpenter v. Continental Ins. Co.*, 28 N. W. Rep. [Mich.] 749; *Key v. Des Moines Ins. Co.*, 41 N. W. Rep. [Ia.] 614; *Home Fire Ins. Co. v. Kennedy*, 47 Neb. 138; *German-American Ins. Co. v. Hart*, 43 Neb. 441; *Van Bories v. United Life, Fire & Marine Ins. Co.*, 8 Bush [Ky.] 133.

As to the transfer of the Reynolds and Beyers interest to Holcombe see: *Hoffman v. Ætna Fire Ins. Co.*, 32 N. Y. 405; *Pierce v. Nashua Fire Ins. Co.*, 50 N. H. 297; *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y. 401; *Burnett v. Eufaula Home Ins. Co.*, 46 Ala. 11; *Dermani v. Home Mutual Ins. Co.*, 26 La. Ann. 69; *West v. Citizens Ins. Co.*, 27 O. St. 1; *Texas Banking & Ins. Co. v. Cohen*, 47 Tex. 406; *Roby v. American Central Ins. Co.*, 24 N. E. Rep. [N. Y.] 808; *Virginia Fire & Marine Ins. Co., v. Vaughan*, 14 S. E. Rep. [Va.] 754; *New Orleans Ins. Co. v. Holberg*, 1 So. Rep. [Miss.] 5; *Dresser v. United Firemen's Ins. Co.*, 45 Hun [N. Y.] 298; *Cowan v. Iowa State Ins. Co.*, 40 Ia. 551; *Powers v. Guardian Fire & Life Ins. Co.*, 136 Mass. 108; *Lockwood v. Middlesex Mutual Assurance Co.*, 47 Conn. 553; *Allemania Fire Ins. Co. v. Peck*, 133 Ill. 230.

As to non-operation of establishment see: *Mayhew v. Hardesty*, 8 Md. 479; *Halpin v. Insurance Co. of North America*, 23 N. E. Rep. [N. Y.] 989.

SULLIVAN, J.

January 18, 1893, the Phenix Insurance Company issued to the Gothenburg Overall & Shirt Factory a policy of insurance in the sum of $1,500. Of this amount $750 was upon electric motors, sewing machines, and other implements used in the factory, and $750 on merchandise, consisting of raw materials and manufactured articles. When the policy was issued the concern insured was a partnership composed of Holcombe, Reynolds, and Beyers. Reynolds was also defendant's local agent and transacted its ordinary business at Gothenburg. In July, 1893, Holcombe bought Reynolds' interest in the business, and in August of the same year he purchased

the interest of Beyers, and thus became sole owner of the insured property. January 14, 1894, the property was wholly destroyed by fire, and Holcombe thereupon brought this action in the district court of Dawson county to recover upon the policy. A trial to a jury resulted adversely to the company, and by this proceeding in error it seeks to reverse the judgment rendered against it on the verdict.

The policy contained the following provision: "If the assured shall have, or shall hereafter make, any other contract of insurance (whether valid or not) on the property herein described, or any part thereof, without written notice to and without the consent of this company written hereon, * * * this policy shall be void." The defendant claims that there was a breach of this condition, and that the policy was thereby invalidated. The plaintiff concedes that additional insurance was procured of the Ætna Insurance Company, but insists that the right to a forfeiture, by reason of that fact, was waived by the defendant. The reply alleges that Hopkins, an agent of the company, charged with the supervision of its business in this state, was in Gothenburg at or about the time the additional insurance was obtained, and, being "informed of the desire of the plaintiff, and his intention, to take such additional insurance, * * * made a personal investigation of the facts and conditions pertaining to the said property, and after having so investigated the same gave his consent and approval to the taking of the said additional insurance." The defendant claims that this allegation does not amount to an averment that it was notified of the additional insurance after such insurance was procured, and cites *Eagle Fire Ins. Co. v. Globe Loan & Trust Co.*, 44 Neb. 380, where it was held that notice to an agent of an intention on the part of the insured to take out other insurance is not notice to the principal that further indemnity has been obtained. Had the pleading been assailed before trial, we would not hesitate to hold it insufficient;

but a trial having been had and proof having been made, under the issues joined, that Hopkins was informed of the existence of the Ætna policy, and not merely of the plaintiff's intention to procure it, we feel bound to sustain the reply by interpreting it according to the evident intention of the pleader. The company, having committed to Hopkins the supervision of its risks in Gothenburg, was charged with notice of any fact affecting the risk which came to his knowledge while engaged in the performance of his duty as an inspector. (*Eagle Fire Ins. Co. v. Globe Loan & Trust Co., supra.*) In the case just cited it was held, under a policy containing a forfeiture clause like the one here in question: "(1) That the provision in the insurance policy prohibiting additional insurance on the insured property was inserted therein for the benefit of, and might be waived by, the insurer; (2) that the violation of the policy by the insured in procuring additional insurance on the insured property, without the knowledge or consent of the first insurer, did not render the policy issued by it void, but voidable only, at the election of such first insurer." In *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395, it was held that "notice to an agent of an insurer that the insured had taken out additional insurance on the insured property is notice to such agent's principal." It was also held in the same case that the failure of an insurer to cancel its policy, after receiving notice of a breach of the condition against additional insurance, is evidence from which a waiver of the right of forfeiture may be inferred. On the authority of these cases, due notice being established, a waiver was the only inference properly to be deduced from the conceded fact that the defendant, more than ten months after being advised of the additional insurance, made an attempt to cancel its policy, based exclusively on the fact that the factory was not in operation.

One of the conditions of the policy is as follows: "If the property be sold or transferred (in whole or in part), * * * or any change takes place in title or possession

(except in case of succession by reason of the death of the assured), whether by legal process or judicial decree, or voluntary transfer, assignment, or conveyance; or if the title or possession shall be changed from any cause whatsoever, * * * without written notice to, and the consent of, the company indorsed hereon, this policy shall in each and every instance be void." Under this provision it is claimed that the sale by Reynolds and Beyers to the plaintiff voided the policy. The argument is that the contract of insurance, being purely a personal one, is broken whenever there is a change in the ownership of the insured property. The question is a vexed one. The adjudged cases are in direct conflict, but undoubtedly the decided numerical preponderance is against the proposition that a sale by one partner to another is within the meaning of an inhibition against a sale, transfer, or alienation of the insured property. The precise question has not been heretofore presented to this court for decision, and in disposing of it we feel at liberty to adopt the rule which will be in harmony with, and follow the trend of, our former adjudications. Heretofore, in actions on policies of insurance, while diligently endeavoring, in every case, to seek out and give effect to the true intention of the parties as expressed in their contract, we have, in construing clauses providing for forfeitures, been disposed to lean somewhat in favor of the insured and resolve questions of doubt and uncertainty against the insurer. So in this case, the proper interpretation of the clause under consideration being a matter of grave doubt, as shown by the diversity of judicial opinion in other jurisdictions, we have determined to adopt the view which will avoid a forfeiture, and secure to the plaintiff the indemnity for which he contracted. In some cases it has been held that an inhibition against a change of title, interest, or possession would invalidate the policy, although a clause forbidding a sale or alienation might not have that effect. (*Hathaway v. State Ins. Co.*, 64 Ia. 229; *Gibb v. Philadelphia Fire Ins. Co.*, 59 Minn.

267, 61 N. W. Rep. 137.) But a contrary conclusion was reached in *Burnett v. Eufaula Ins. Co.*, 46 Ala. 11, and in *New Orleans Ins. Co. v. Holberg*, 8 So. Rep. [Miss.] 175. In the latter case it was said that the provision in question was inserted for the protection of the insurer against the risk of having strangers substituted for the party with whom the contract was made, and was designed only to interdict a sale by a party who was insured to a party who was not insured. The same conclusion was reached in *Virginia Fire & Marine Ins. Co. v. Vaughan*, 88 Va. 832, 14 S. E. Rep. 954, under a clause in the policy forbidding any change "in the title or interest of the assured." "The object of such a provision," said Lewis, P., speaking for the court, "is to protect the insurers against the risk of the introduction of a stranger to the contract, perhaps not in any way known to them, or, if known, not deemed worthy of their confidence. But this reason cannot apply where there is simply a transfer of interest by one partner to another." In *Powers v. Guardian Fire Ins. Co.*, 136 Mass. 108, the reason for the rule is stated to be "that partners, jointly contracted with as such, are to be regarded as so far only one person, and the condition as so far limited to keeping the ownership of the thing insured in some member of the insured body, that changes between themselves in the relative amounts, or in the nature of their respective interests, do not fall within the fair meaning of the words used." In the case of *Drennen v. London Assurance Corporation*, Miller, J., charging the jury in the United States circuit court (cited in 49 Am. Rep. 24), used the following pertinent language: "Many changes may take place in the title, and also in the possession, without a sale or transfer of the property to another party; for instance, a sale by one partner to another has been held by the courts not to be such a sale or transfer as is included in this policy, and for the very obvious reason that the possession does not change. * * * The sale or the transmutation of the various interests between the part-

ners themselves, and nobody else having the control, and leaving the possession where it was, does not invalidate the policy." Other cases sustaining the view that a provision against a change of title does not apply to sales between partners are *Pierce v. Nashua Ins. Co.*, 50 N. H. 297, and *Lockwood v. Middlesex Mutual Assurance Co.*, 47 Conn. 553. Without further reviewing the authorities upon this question, our conclusion is that the policy in suit was not invalidated by the sale of the interest of Reynolds and Beyers to Holcombe.

This further condition appears in the policy: "Or if it be a manufacturing establishment, running wholly or in part overtime, or running at night, or if it shall cease to be operated from any cause whatever, except during the night-time, Sundays, and legal holidays, without said written notice to and without special agreement indorsed on this policy, then, and in every such case, this policy shall be void." It was alleged in the answer and proven on the trial that the factory referred to in the policy was not operated more than one day in each month after August 4, 1893, and by reason of this fact it is claimed the policy became null and void. We do not think it did. The insured property was not a manufacturing establishment, and the provision quoted is without force or relevancy. If the thing insured was a manufactory, and the machinery described in the policy was used in connection with the operation of the establishment, the defendant's argument would be unanswerable. But the things insured being exclusively personal property—machinery and merchandise—it needs no citations of cases to show that the claim for a forfeiture on the ground of non-operation of the plant is entirely baseless. However, we refer to a case decided by the New York court of appeals, *Haplin v. Insurance Co. of North America*, 23 N. E. Rep. 989, as a direct authority for the conclusion reached upon this point. In that case a policy on mill machinery and apparatus, apart from the building in which it was contained, provided that "if a building covered by this policy shall become vacant

or unoccupied, or if a mill or manufactory shall stand idle, * * * without notice to, and consent of, the company clearly stated herein, all liability hereunder will thereupon cease." It was held that the machinery did not constitute a mill within the meaning of the provision quoted. Vann, J., delivering the opinion, said: "It would not be a natural or ordinary use of language to describe machinery used in milling as a mill, or in manufacturing, as a manufactory." He also remarked that "forfeitures are not favored, and the party claiming a forfeiture will not be permitted, upon equivocal or doubtful clauses or words contained in his own contract, to deprive the other party of the benefit of the right to indemnity for which he contracted."

To prove the value of the property destroyed by the fire the defendant, on the trial, offered in evidence an affidavit made by plaintiff, and used in the adjustment of his claim against the Ætna Insurance Company. This offer was refused on the ground that the value fixed in the affidavit—being $1,000—was a compromise valuation made, without prejudice, pending negotiations for the settlement of a disputed claim. Upon this ruling error is assigned. It is a conceded rule of procedure that the decision of preliminary issues of fact touching competency of witnesses, or admissibility of evidence, is within the province of the trial judge, and does not belong to the jury. If proffered evidence is *prima facie* admissible, it is the duty of the court to receive it; otherwise it should be rejected. In this case the defendant was not content with proving the signature of the plaintiff as a basis for the introduction of the affidavit in evidence. It went further, and brought before the court conflicting testimony bearing upon the competency of the document. It thus needlessly presented to the trial judge an issue of fact involving the veracity of witnesses; and we are not prepared to say that the finding of the judge in regard to the competency of the affidavit is unsupported by sufficient evidence.

A final ground upon which defendant asks for a reversal of the judgment is that the verdict is not warranted by the evidence. We have carefully considered the evidence and think it sufficient. The judgment is

AFFIRMED.

DAVID O. LUSE, APPELLANT, V. ENOCH W. RANKIN ET AL., APPELLEES.

FILED FEBRUARY 9, 1899. No. 8696.

1. **Jurisdiction:** JUDGMENT. A judgment rendered against a party upon whom process has not been served, and who has not submitted to the jurisdiction of the court, is unauthorized and void.
2. **School Lands:** LEASES. When the state accepts a statutory application for a lease of school lands, and issues its receipt in due form for an installment of rent paid by the applicant, antecedent conditions being performed, a binding and enforceable contract is created.
3. ———: IMPROVEMENTS: WAIVER. One who has occupied and improved school lands of the state waives his right to compensation for the improvements by electing to remove them.
4. ———: LEASES: RESULTING TRUSTS. One who has obtained a lease from the state, with actual or constructive notice of another's prior claim thereto, will be treated as holding such lease in trust for the person who is equitably entitled to receive it.
5. **Agency:** STATE. The state is bound by the acts of its authorized agents done within the scope of their authority.
6. **School Lands:** APPRAISEMENT. A reappraisement of school lands which has neither been authorized nor approved by the board of educational lands and funds is absolutely void.
7. **Review.** A finding of the trial court unsupported by any evidence will be set aside.

APPEAL from the district court of Blaine county. Heard below before THOMPSON, J. *Reversed.*

John S. Kirkpatrick and *L. E. Kirkpatrick*, for appellant.

Sullivan & Gutterson, contra.

SULLIVAN, J.

This is an action by David O. Luse against Enoch W. Rankin and J. R. Loughran to obtain the cancellation of a school-land lease and for general relief. The members of the board of educational lands and funds are named as parties defendant in the petition, but they were not served with process and did not formally submit to the jurisdiction of the court. The decree against them was therefore unauthorized. The facts essential to an understanding of the controversy between the other parties to the litigation are these: The real estate in question is a section of school land in Blaine county. For some time prior to 1890 it had been occupied by the defendants without permission of the state. They were squatters and used the land for pasturage. Rankin had erected a sod house and stable and Loughran had built a wire fence; otherwise the premises were unimproved. Under the authority of the state an appraisement had been made by the county commissioners and had been duly approved. In this appraisement the valuation fixed upon Loughran's fence was $13.90. The sod house and stable were not taken into account. No estimate was made of their worth. On April 23, 1890, all the school lands in Blaine county were offered for sale pursuant to notice previously given. The commissioner of public lands and buildings attended the sale. The section in dispute was not sold and the plaintiff made application in due form to lease it. The commissioner was in the office of the county treasurer when the application was filed and the first installment of rent paid. He said the lease would be forwarded in due time. The treasurer issued a receipt in the usual form. The appraised value of the wire fence was not paid to the county treasurer, but was, at the suggestion of the commissioner, tendered to Loughran, who refused to receive it. The plaintiff took immediate possession of the leased premises. January 30, 1891, he paid to the county treasurer the

second installment of rent and took a receipt therefor. The lease was never issued, nor the money paid to the county treasurer refunded. The plaintiff's application for a lease has mysteriously disappeared. As to what has become of the money paid by him the record is mute. February 14, 1891, Rankin applied to the commissioner for a lease of the entire section and received it. Loughran, in the following August, acquired an interest in a part of the premises by an assignment from his co-defendant. The decree of the trial court was in favor of the plaintiff as against Loughran, but in favor of Rankin as to the part of the land not included in the assignment.

Luse is entitled to a decree against both defendants. He dealt with the authorized agent of the state and made a valid contract for a lease. This contract was in writing. It consisted of the application and the receipts. It was specifically enforceable. (*Fery v. Pfeiffer*, 18 Wis. 535; *Seaman v. Aschermann*, 51 Wis. 678; *McCarger v. Rood*, 47 Cal. 138; *Wallace v. Scoggins*, 17 Ore. 476.) The defendants knew of its existence, and they were warned by plaintiff's possession that he claimed rights in the land. The lease to Rankin was subject to the plaintiff's prior equities.

It is contended that the failure of Luse to pay to the treasurer the appraised value of the wire fence was a condition precedent to the right to receive a lease. That argument has no weight, except as to the particular subdivision upon which the fence stood; and as to that tract it is without force, in view of the fact that Loughran elected to remove the fence and thereby waived his right to compensation.

Another argument in favor of the validity of the Rankin lease is that there was a reappraisement of a part of the premises on May 28, 1890, resulting in an increased valuation, which then became the only lawful basis for a lease. This contention is grounded upon an alleged reappraisement of lot 3, which, it is claimed, resulted in

fixing the value of the sod house and stable at $25. In regard to this point it should be remarked that it was beyond the power of the board of educational lands and funds to order a revaluation of the property, or to do anything else impairing the rights of the plaintiff as fixed by the contract made on April 23, 1890. The state, like an individual, is bound by the acts of its agents within the scope of the agency, and, like an individual, it must stand to and perform its engagements, whether they be advantageous and provident or otherwise. If the agents of the state failed to appraise the sod house and stable on lot 3, it was not the plaintiff's fault; that did not abrogate the contract or justify a forfeiture of the payment made by Luse in fulfillment of its conditions. The state was as firmly obligated to make and deliver the lease as Luse was to receive it and pay the stipulated rental. Agreements with public corporations are not unilateral nor exclusively dependent for their enforcement upon moral sanctions. They are within the cognizance of the courts. But there is in the record no competent evidence that there was an authorized reappraisement. The finding of the trial court on that issue is unsustained by the evidence. It rests entirely upon a document found in the office of the commissioner of public lands and buildings. This paper professes to be a reappraisement of lot 3 made by the original appraisers in May, 1890, after one of them had ceased to be a commissioner of Blaine county. It is indorsed: "Approved Aug. 4, 1890. J. S." This indorsement was made by John Steen, who at the time was commissioner of public lands and buildings. There is nothing, however, to indicate that the first appraisement was rejected or disapproved in whole or in part, or that the board of educational lands and funds ordered or approved the alleged reappraisement. The commissioner could not override the previous action of the board ratifying the original appraisement. Authority to cause appraisements to be made, or to ratify them, is not given to him

by the statute, but to the board of which he is, *ex officio*, a member.

Our conclusion is that the defendants hold the lease in trust for the plaintiff and should assign it to him. An account should be taken between the parties. The defendants should be charged with the use value of the land occupied by them and credited with payments made upon the lease. If there be found a balance in their favor, the assignment should be conditioned upon its payment. The judgment is reversed and the cause remanded with direction to the district court to render a decree conforming to these views.

REVERSED AND REMANDED.

HARRISON, C. J., not sitting.

DANIEL W. MOSELEY ET AL., APPELLANTS, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED FEBRUARY 9, 1899. No. 8714.

1. **Railways**: RIGHT OF WAY: CONSIDERATION. The agreed consideration for the grant of a right of way is conclusively presumed to include the value of the land conveyed and all damages to the grantor's adjacent lands resulting from the non-negligent construction and operation of the road.

2. ———: ———: ———: FAILURE. Where a part of the consideration for a right of way deed is the promise of a railroad company to construct and operate a line of road over the grantor's land, the failure of the company to perform its agreement does not entitle the grantor to a cancellation of the deed.

3. ———: ———: ———: DAMAGES. The remedy in such case is by an action at law to recover the damages resulting to the grantor from the company's failure to perform its contract.

4. **Review**: REFORMATION OF ISSUES. Where a plaintiff has mistaken his remedy, but is apparently entitled to some relief, the cause may be remanded with direction to the trial court to permit a reformation of the issues.

APPEAL from the district court of Lancaster county. Heard below before HOLMES, J. *Reversed.*

Webster, Rose & Fisherdick and *Willard E. Stewart*, for appellants:

The remedy is by rescission of the conveyance and compensation for the property taken and the injury done. (*Burk v. Bowles*, 69 Ind. 1; Kerr, Fraud & Mistake [Bump's ed.] 339; *Blanchard v. Detroit, L. & L. M. R. Co.*, 31 Mich. 44.)

The judgment must be reversed, though plaintiffs are not entitled to rescission, and the remedy be at law. (*Gregory v. Lancaster County Bank*, 16 Neb. 411; *Harral v. Gray*, 10 Neb. 186; *Williams v. Lowe*, 4 Neb. 394; *Comstock v. Michael*, 17 Neb. 228; *Keens v. Gaslin*, 24 Neb. 315; *Malloy v. Malloy*, 35 Neb. 224; *Oliver v. Lansing*, 48 Neb. 338; *Hassett v. Curtis*, 20 Neb. 164; *Goodman v. Pence*, 21 Neb. 462; *Davenport v. Jennings*, 25 Neb. 87; *Noll v. Kenneally*, 37 Neb. 881; *Roberts v. Swearingen*, 8 Neb. 363.)

J. W. Deweese and *F. E. Bishop, contra:*

There is no ground for rescission and no proof to sustain such a claim. (*Tennessee & C. R. Co. v. Taylor*, 57 Am. & Eng. R. Cas. [Ala.] 296; *Pittsburg, V. & C. R. Co. v. Pittsburg & S. L. C. R. Co.*, 57 Am. & Eng. R. Cas. [Pa.] 46.)

As to remedy see: *Houston & T. C. R. Co. v. McKinney*, 8 Am. & Eng. R. Cas. [Tex.] 728; *Galveston, H. & S. A. R. Co. v. Pfeuffer*, 56 Tex. 66; *Lorenzen v. Kansas City Investment Co.*, 44 Neb. 99; *Warner v. Benjamin*, 62 N. W. Rep. [Wis.] 179; *Hodsden v. Hodsden*, 72 N. W. Rep. [Minn.] 562.

John H. Ames, also for appellee.

SULLIVAN, J.

August 28, 1894, Daniel W. Moseley, James Kilburn, and Sophronia Lane brought this action against the Chi-

cago, Burlington & Quincy Railroad Company, alleging in their petition that they were in 1890, and still are, the owners in fee simple of the southwest quarter and the west half of the southeast quarter of section 14, in township 10 north, range 6 east of the sixth P. M., in Lancaster county; that the defendant, having in contemplation the construction of a railroad between Havelock and West Lincoln, as part of a projected belt line for the city of Lincoln, obtained from the plaintiffs, on August 2, 1890, a deed for a right of way 100 feet wide across said land; that the consideration for such conveyance was $300 in cash and the promise of the company to build and put in operation the proposed line of road within a reasonable time; that the quantity of land deeded to the defendant was about ten acres and its value about $3,000; that soon after the deed was executed the company entered upon the land and constructed a road-bed, but did not complete the work, and has now entirely abandoned the enterprise. The relief demanded is specific performance, or else cancellation of the deed, with compensation for injuries resulting to the land conveyed and to the tract of which it was a part, resulting from the construction of defendant's road-bed. The defendant answered, admitting the conveyance of the right of way, but denying that the construction and operation of a railroad over the plaintiff's land was any part of the consideration therefor. The answer also admits that the road in question has not been completed and that no work has been done upon it since the summer of 1890, but denies that the enterprise has been permanently abandoned. The trial court found that there is no equity in the petition, and "that the plaintiffs, for value, conveyed to the defendant by warranty deed the property in controversy herein, together with the right to remove earth from the sides of the land so conveyed." From a judgment rendered in favor of the defendant upon these findings the plaintiffs have appealed.

In the brief filed by appellants in this court it is con-

ceded that no case has been made for the specific enforcement of the alleged contract to build and operate a railroad between West Lincoln and Havelock, and the claim of the petition in that respect has been abandoned. Neither can there be any recovery for damages resulting from the grading already done. The value of the land conveyed for right of way purposes and all damages to the balance of the plaintiff's adjacent real estate which have accrued or may accrue in consequence of the non-negligent construction and operation of the road are conclusively presumed to be included in the agreed consideration for the right of way deed. (*Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698; *Chicago, R. I. & P. R. Co. v. Smith*, 111 Ill. 363; *Gulf, C. & S. F. R. Co. v. Richards*, 83 Tex. 203, 18 S. W. Rep. 611.) It is equally clear that the failure of the company to furnish the promised consideration at the time appointed would not alone warrant an application to a court of equity for relief by rescission. There has been, it would seem, no permanent abandonment by the defendant of the purpose for which the land was acquired; and while it is true that there are cases in which rescission is the only adequate remedy for non-performance of an agreement upon the faith of which real estate has been conveyed to the promisor, it is quite evident the case at bar does not belong to that class.

If the defendant failed to keep its engagement with the plaintiffs, they have a plain and adequate remedy by an action at law to recover the value of the promised consideration. (*Lake v. Gray*, 35 Ia. 459; *Gray v. Lake*, 48 Ia. 505.) The benefits which it was expected would result to other adjacent lands of the plaintiffs by reason of the use to be made of the strip conveyed was contemplated by both parties to the transaction and, at least, a partial inducement to the conveyance. If the company agreed to construct and operate a railroad over the plaintiffs' land, within a reasonable time, it was legally bound to perform its contract or make just compensation for its failure to do so. That the damages in such case is not

deemed incapable of reasonably accurate estimation is shown by the following decisions: *Varner v. St. Louis & C. R. R. Co.*, 55 Ia. 677, 8 N. W. Rep. 634; *Winne v. Kelly*, 34 Ia. 339; *Hull v. Chicago, B. & P. R. Co.*, 65 Ia. 713, 22 N. W. Rep. 940; *Fraley v. Bentley*, 1 Dak. 25, 46 N. W. Rep. 506. In the Iowa cases cited it was held that the damages resulting from the promise of a railroad company to build fences, as part of the consideration for a right of way deed, was the increased rental value of the grantor's adjacent lands which would have resulted had the fences been built according to the agreement. In the Dakota case the defendant had orally promised, as part consideration for a piece of land bought of the plaintiff, to erect thereon "a good sawmill." He failed to keep his agreement, and in an action brought against him for damages it was held that the measure of plaintiff's recovery was a sum equal to the value which would have been added to his adjacent lands by the erection of the mill for which he had contracted. Had the defendant company acquired the right of way through condemnation proceeding instead of by purchase, the appraisers, or a jury in case of appeal to the district court, would be required, in determining whether there should be an award of incidental damages, to inquire into and ascertain the money value of the special and peculiar benefits which would accrue to the plaintiffs' adjacent lands. The ascertainment of general benefits is not necessarily more difficult.

It follows from these considerations that the judgment of the district court is right, but as the plaintiffs are entitled to some relief, if the defendant made the agreement alleged, the case is remanded to the district court with direction to permit the petition to be amended, and for further proceedings; all costs to the present time to be taxed to the plaintiffs. This course strikes the writer as being incongruous and illogical, but it has the sanction of precedents which we may not disregard. (*McKeighan v. Hopkins*, 14 Neb. 361; *Malloy v. Malloy*, 35 Neb.

224; *Roberts v. Swearingen*, 8 Neb. 363; *Gregory v. Lancaster County Bank*, 16 Neb. 411.) Whether the amendment of the petition, in conformity with the views expressed in this opinion, will be, in substance, the commencement of a new action has not been discussed and it is not decided.

It is contended by the defendant that the special finding above quoted disposes of the claim that the company agreed to build the road and put it in operation within a reasonable time. In view of the fact that the conclusion of the trial court does not necessarily depend on the special finding, we think its meaning should not be enlarged by construction. We think the point has not been decided.

REVERSED.

WILLARD E. STEWART ET AL., APPELLANTS, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED FEBRUARY 9, 1899. No. 8714.

Stare Decisis. This case is ruled by *Moseley v. Chicago, B. & Q. R. Co.*, 57 Neb. 636, the questions for decision in both cases being substantially identical.

APPEAL from the district court of Lancaster county. Heard below before HOLMES, J. *Reversed.*

Webster, Rose & Fisherdick and *Willard E. Stewart*, for appellants.

J. W. Deweese, F. E. Bishop, and *John H. Ames, contra.*

SULLIVAN, J.

The questions involved in this case are, in all substantial respects, like those in the case of *Moseley v. Chicago, B. & Q. R. Co.*, 57 Neb. 636. The judgment in this case will therefore be the same as in the *Moseley Case.*

REVERSED AND REMANDED.

L. F. MAGINN ET AL. V. JANE PICKARD.

FILED FEBRUARY 9, 1899. No. 8649.

1. **Review.** A finding of the trial court upon substantially conflicting evidence will not be disturbed.
2. **Foreclosure Sale:** SHERIFFS: DEPUTIES. Where a decree of foreclosure directs the sheriff to make a sale of the mortgaged premises, the deputy sheriff has authority to act in the matter, and may execute the decree for and in the name of his principal.
3. ——: APPRAISEMENT: NOTICE. The owner of real estate which is about to be sold under a decree of foreclosure is not entitled to notice of the time and place of making the appraisement.
4. **Review.** All presumptions favor the regularity of the proceedings of the district court, and an order or judgment made therein will not be reversed unless the error complained of is established by the record.

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

L. F. Maginn, for plaintiffs in error.

References: *Watson v. Tromble*, 33 Neb. 450; *Stockmeyer v. Tobin*, 139 U. S. 190; *Sessions v. Irwin*, 8 Neb. 9; *Bozza v. Rowe*, 30 Ill. 198; *Minnesota Co. v. St. Paul Co.*, 2 Wall. [U. S.] 631; *Blossom v. Milwaukee & C. R. Co.*, 3 Wall. [U. S.] 207; Rorer, Judicial Sales [2d ed.] sec. 9.

B. E. B. Kennedy, contra:

Appraisals for judicial sales will not be set aside except for fraud. (*Vought v. Foxworthy*, 38 Neb. 790; *Smith v. Foxworthy*, 39 Neb. 214; *Ecklund v. Willis*, 44 Neb. 129.)

Deputy sheriff may act. (*Hamer v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 709; *Nebraska Loan & Building Ass'n v. Marshall*, 51 Neb. 534.)

SULLIVAN, J.

This proceeding in error brings up for review an order of the district court confirming a judicial sale of real estate in the city of Omaha.

It is first contended that the sale should have been set aside on the ground that the valuation fixed by the appraisers was so low as to afford an inevitable inference of fraud in the appraisement. There is considerable difference between the estimate of the appraisers and that of some of the witnesses who testified for the defendant, but the disparity is not so great as to warrant the conclusion that the appraisers acted corruptly. The ruling of the trial court on this point is fully sustained by *First Nat. Bank of Omaha v. Hahn*, 56 Neb. 679, *Nebraska Loan & Building Ass'n v. Marshall*, 51 Neb. 534, and other cases.

Another contention of the defendant is that the court having directed the sheriff to execute the decree of foreclosure, the sale conducted by his deputy was unauthorized and void. The precise question was decided in *Nebraska Loan & Building Ass'n v. Marshall, supra.* It was there held that the deputy sheriff possesses the same power as his principal to carry into effect an order of the court directing the sale of real estate for the satisfaction of a mortgage.

A further reason urged for a reversal of the order of confirmation is the failure of the appraisers to give the defendant an opportunity to appear before them and be heard on the question of valuation. The right to such a hearing was claimed and expressly denied in *Tillson v. Benschoter*, 55 Neb. 443, and in *Mills v. Hamer*, 55 Neb. 445.

Complaint is made because one of the appraisers had been frequently selected by the sheriff of Douglas county to act in a like capacity in other cases. In the absence of a showing that the appraisement was unfair we fail to perceive how the defendant was prejudiced, even if it be true that the appraiser was a "professional." To justify this court in reversing an order or judgment of the district court error must affirmatively appear; it will not be presumed.

It is claimed that the notice of sale was not published in a newspaper of general circulation in Douglas county,

and that the sale should be, therefore, set aside. The evidence before us does not tend in the remotest degree to support this claim, and we cannot act on counsel's suggestion to search the record of another case in this court for evidence to sustain his contention.

Other questions presented are too attenuated to merit special consideration. The order of confirmation is

AFFIRMED.

ELSIE D. TROUP ET AL., APPELLANTS, V. PAUL W. HORBACH ET AL., APPELLEES, AND NATHAN BLAKELY ET AL., APPELLANTS.

FILED FEBRUARY 9, 1899. No. 10499.

1. **Reversal:** NEW TRIAL: AMENDMENT. Where a judgment in an equitable action is reversed and the cause remanded for further proceedings not inconsistent with the opinion filed in the case, the district court may, if consistent with the views expressed in the opinion, permit a reformation of the issues and a trial *de novo*.

2. ———: ———: ———: DISCRETION. But there is no strict and absolute right to file new pleadings in such case. The matter is committed to the sound discretion of the court, and its action in the premises will not be reversible error unless it amounts to an obvious abuse of discretion.

3. ———: ———: ———: REVIEW. In order to bring up for review any action of the trial court with reference to the amendment of pleadings it must appear by the record that an exception was taken to the order complained of.

4. ———: ———: ———: INTERLOCUTORY ORDER. An order denying an application for leave to amend pleadings is interlocutory and not appealable.

5. **Dismissal:** DENIAL INTERLOCUTORY. An order refusing a party permission to dismiss his action is not final, and cannot be brought here for review by appeal.

6. **Appeal:** ERROR: INTERLOCUTORY ORDERS. On appeal to this court the only question to be considered is whether the judgment or final order responds to, and is warranted by, the pleadings and proofs. To reach errors in interlocutory orders a petition in error should be filed with the record.

APPEAL from the district court of Gage county. Heard below before LETTON, J. *Affirmed.*

J. E. Cobbey, G. M. Johnston, Griggs, Rinaker & Bibb, and *A. C. Troup,* for appellants.

References: *City of Hastings v. Foxworthy,* 45 Neb. 676; *Porter v. Sherman County Banking Co.,* 40 Neb. 274; *Badger Lumber Co. v. Holmes,* 55 Neb. 473; *Thomas v. Thomas,* 33 Neb. 373; *State v. Cornell,* 52 Neb. 25; *Sharpless v. Giffen,* 47 Neb. 146.

John D. Howe and *E. R. Duffie, contra.*

References: *State v. Sheldon,* 26 Neb. 151; *Merriam v. Gordon,* 20 Neb. 405; *Anglo-American Land Co. v. Brohman,* 33 Neb. 409; *Lancaster County Bank v. Gregory,* 24 Neb. 656; *Homan v. Steele,* 18 Neb. 652; *Smith v. Schaffer,* 29 Neb. 656; *Oliver v. Lansing,* 51 Neb. 818; *Gaines v. Rugg,* 148 U. S. 228; *Sexton v. Henderson,* 47 Ia. 131; *Sanxey v. Iowa City Glass Co.,* 68 Ia. 542; *Garmoe v. Windle,* 76 Ia. 239; *Adams County v. Burlington & M. R. R. Co.,* 55 Ia. 94; *Austin v. Wilson,* 57 Ia. 586; *Kurtz v. St. Paul & D. R. Co.,* 67 N. W. Rep. [Minn.] 809; *Butler v. Barnes,* 61 Conn. 399; *Kavanagh v. Barber,* 22 N. Y. Supp. 874; *O'Riley v. Diss,* 48 Mo. App. 62; *Miner v. Medbury,* 7 Wis. 90; *Carney v. Emmons,* 9 Wis. 109; *Roberts v. Corbin & Co.,* 28 Ia. 355; *City of Chicago v. Gregsten,* 45 N. E. Rep. [Ill.] 505; *Sanders v. Peck,* 131 Ill. 407; *Pattern Paper Co. v. Green Bay Canal Co.,* 66 N. W. Rep. [Wis.] 601; *Treadway v. Johnson,* 39 Mo. App. 176; *Whitney v. Traynor,* 45 N. W. Rep. [Wis.] 550; *National Investment Co. v. National Savings Loan & Building Ass'n,* 53 N. W. Rep. [Minn.] 546.

A. H. Babcock and *A. Hazlett,* also for appellees.

SULLIVAN, J.

This equitable action was commenced by creditors of an insolvent corporation against its stockholders to re-

cover unpaid stock subscriptions. A judgment of the district court in favor of the plaintiffs was brought here for review and at a former term reversed, except as to the defendant G. M. Johnston and certain other defendants who were defaulted. The cause was remanded for further proceedings not inconsistent with the views expressed in the opinion. (*Troup v. Horbach*, 53 Neb. 795.) After receiving the mandate the district court permitted the plaintiffs to file an amended and supplemental petition. This pleading being filed, the defendants Horbach, Horbach, and Lantry moved the court for an order striking it from the files, or else "to dismiss them from said petition." The motion assigned various reasons for the action it invoked. It was submitted on June 8 and sustained on the grounds (1) that the additional facts alleged in the petition had not been discovered since the former trial; (2) that the material matters contained in the petition had been already tried and adjudicated; and (3) that the averments of the original petition are the same as those contained in the amended and supplemental petition. To the ruling on the motion no exception was taken, and the court thereupon rendered judgment "that defendants Horbach, Horbach, and Lantry go hence without day." On June 8 the Brush Electric Company, which had intervened in the action, obtained an order dismissing its cross-petition without prejudice. June 27 this order was set aside and an order entered dismissing the cross-petitions of all interveners unless amendments presenting material new matter should be filed by them on or before July 8. Nathan Blakely, one of the interveners, filed an amended cross-petition, and to this pleading Horbach, Horbach, and Lantry immediately addressed a motion similar to the one by which the amended and supplemental petition of the plaintiffs had been successfully assailed. The motion was sustained on the grounds (1) that it contained no supplemental matter; (2) that it contained no facts of which Blakely was ignorant at the time of the trial; and (3) that the

matters contained in the amended pleading were in substance identical with those contained in the original cross-petition, and had been already adjudicated. The Brush Electric Company having tendered no amendment, the court, upon sustaining the motion, directed against Blakely's amended pleading, dismissed the cross-petitions of both interveners as to Horbach, Horbach, and Lantry. There is nothing in the record to indicate that the action has been finally disposed of as to all the defendants. Except as to Johnston, the defendants defaulted, and the appellees herein, the case seems to be still pending and undetermined in the district court of Gage county. It may be doubtful under the circumstances whether the appeal gives this court jurisdiction of the case; but, assuming that it does, we proceed to consider some of the questions discussed by counsel in the briefs.

The plaintiffs and the intervener Blakely have declined to discuss the sufficiency of the new pleadings filed by them in the case. They do not attempt to show that the amendments were substantial, but seem to rest their claim to a reversal of the judgments on the proposition that they had a strict and absolute right to amend, and to a trial, in the usual way, of the sufficiency and truth of their allegations. The Brush Electric Company stands upon the proposition that the vacation of the order dismissing its cross-petition was reversible error. On the other hand, the appellees contend that the power of the court, under the mandate, was limited to entering the judgment that should have been rendered at the conclusion of the trial. We think it perfectly clear that neither the position of the plaintiffs and Blakely, nor that of the appellees, is tenable. The judgment was reversed, with authority to the trial court to take such further action, in the interests of justice, as the law would sanction and a sound discretion dictate or approve. Within the bounds of judicial discretion the court might grant, or refuse, leave to amend the plead-

ings. It might decide the case on the record already made. It might take additional evidence, or it might try all the issues *de novo*. Error could not be predicated of its orders unless there was an obvious abuse of discretion. (*Badger Lumber Co. v. Holmes*, 55 Neb. 473; *Oliver v. Lansing*, 51 Neb. 818; *Bush v. Bank of Commerce*, 38 Neb. 403; *Brown v. Rogers*, 20 Neb. 547.)

Plaintiffs complain of the order sustaining the motion addressed to their amended and supplemental petition. The order was interlocutory, and the point made, that in the absence of an exception it cannot be reviewed, must be sustained. (*Farmers Loan & Trust Co. v. Bankers & Merchants Telegraph Co.*, 109 N. Y. 342; *Spears v. Mayor of New York*, 72 N. Y. 442; *Mechanics & Traders Ins. Co. v. Gerson*, 38 La. Ann. 349.) In order to bring up for review any question touching the action of the trial court with reference to amendments, the record must show that an exception was taken to the order complained of. (*Healy v. Aultman*, 6 Neb. 349; *State v. Bartley*, 56 Neb. 810; 1 Ency. Pl. & Pr. 534.)

There is another reason why the merits of plaintiffs' complaint cannot be considered. The order in question is not appealable. It was, in legal effect, a refusal to permit, as against the Horbachs and Lantry, a reformation of the issues and a second trial upon new pleadings. The judgments, based upon the original pleadings and the evidence contained in the bill of exceptions, definitely settled the rights of the parties to this proceeding and, as to them, ended the litigation in the district court. They are appealable, but the orders preceding them are not. The correctness of these judgments is the only question properly before us for determination. Admitting, for the sake of argument only, that a trial on the reformed pleadings might have resulted in a conclusion favorable to plaintiffs and Blakely, and also assuming that there was prejudicial error in the rulings which prevented a reinforcement of the record by bringing in other material facts to influence the action of the court, still

we are not authorized, on this appeal, to take cognizance of such error and because of its commission reverse the judgments rendered. The judgments, being warranted by the pleadings and evidence, must be affirmed, conceding that they are the possible products of error in the rejection of allegations and consequent exclusion of proof. This proposition is firmly established by recent decisions. In *Ainsworth v. Taylor*, 53 Neb. 484, *Alling v. Nelson*, 55 Neb. 161, and *Village of Syracuse v. Mapes*, 55 Neb 738, it was held that rulings of the trial court in excluding evidence could not be reviewed on appeal. In *Frenzer v. Phillips*, 57 Neb. 229, we refused to consider on appeal a ruling of the district court on a motion to quash the service of a summons; and in *National Life Ins. Co. v. Martin*, 57 Neb. 350, we said, with respect to an order denying a motion to strike from the files an amended and supplemental petition, that "alleged errors in matters of procedure occurring at or before the trial cannot be reviewed on appeal. In this court the correctness of the judgment rendered on the pleadings and proof is the only question to be considered." As it does not appear affirmatively that either of the final judgments rendered by the district court in favor of Horbach, Horbach, and Lantry is erroneous, both of said judgments are

AFFIRMED.

GRAND ISLAND BANKING COMPANY, APPELLEE, V. GUSTAVE KOEHLER, APPELLEE, AND CHARLES T. DURKEE ET AL., APPELLANTS.

FILED FEBRUARY 9, 1899. No. 8629.

1. **Mechanics' Liens:** CHARACTER OF MATERIALS. Section 1, chapter 54, Compiled Statutes, gives a right of lien in two classes of cases, one of which is for material furnished, but this does not necessarily imply raw material in the condition in which it is actually furnished or delivered.

2. ——: ACCOUNT. A running account, or an account made up of

items which may be tacked to constitute a single account, must be considered and classified by referring, among other considerations, to the intention of the parties as manifested by their contemporaneous conduct with reference to the transactions involved, and thus tested, the rights of a litigant herein are determined.

3. ———: PRIORITY OF MORTGAGE. A mortgage filed during the erection of a building on the premises mortgaged has priority over the rights of a person who subsequently began to furnish material for such erection.

APPEAL from the district court of Hall county. Heard below before THOMPSON, J. *Reversed.*

Charles G. Ryan, for appellants.

References: *Holmes v. Hutchins*, 38 Neb. 601; Phillips, Mechanics' Liens 386; 2 Jones, Mechanics' Liens 1389; *Simpson v. Murray*, 2 Pa. St. 76; *White Lake Lumber Co. v. Russell*, 22 Neb. 129; *Chappell v. Smith*, 40 Neb. 579; *Badger Lumber Co. v. Mayes*, 38 Neb. 830; *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207; *Congdon v. Kendall*, 53 Neb. 282; *Hoagland v. Lowe*, 39 Neb. 397; *Bohn Mfg. Co. v. Kountze*, 30 Neb. 719; *Buchanan v. Selden*, 43 Neb. 559; *Weir v. Thomas*, 44 Neb. 507; *Great Western Mfg. Co. v. Hunter*, 15 Neb. 37; *Swift v. Thompson*, 9 Conn. 63; *Allen v. Mooney*, 130 Mass. 155; *Carpenter v. Walker*, 140 Mass. 416; *First Nat. Bank v. Elmore*, 52 Ia. 541; *Tifft v. Horton*, 53 N. Y. 377; Phillips, Mechanics' Liens sec. 174 *et seq.*; *Ballou v. Black*, 17 Neb. 389; *Central Loan & Trust Co. v. O'Sullivan*, 44 Neb. 834; *Hansen v. Kinney*, 46 Neb. 208.

Abbott & Caldwell, for appellant Durkee.

References: *Great Western Mfg. Co. v. Hunter*, 15 Neb. 37; *Dewing v. Congregational Society*, 13 Gray [Mass.] 414; *Howes v. Reliance Wire Works Company*, 46 Minn. 44; *Sweet v. James*, 2 R. I. 270; *Jones v. Keen*, 115 Mass. 170; *Wilson v. Sleeper*, 131 Mass. 177; *Badger Lumber Co. v. Mayes*, 38 Neb. 822; *Chapman v. Brewer*, 43 Neb. 890; *Noll v. Kenneally*, 37 Neb. 879.

Frick & Dolezal, for appellant Fremont Manufacturing Company.

R. C. Glanville, for appellees.

References: Anderson's Law Dictionary 16; *Frankoviz v. Smith*, 34 Minn. 403; *Lamb v. Hanneman*, 40 Ia. 41; *Skyrme v. Occidental Mill & Mining Co.*, 8 Nev. 236; *Schmeiding v. Ewing*, 57 Mo. 78; *O'Leary v. Burns*, 53 Miss. 171; *Pacific Mutual Life Ins. Co. v. Fisher*, 106 Cal. 224; *Choteau v. Thompson*, 2 O. St. 424.

W. H. Thompson, for appellee George A. Hoagland and others.

RYAN, C.

This action was brought in the district court of Hall county for the foreclosure of a mortgage held by the Grand Island Banking Company, and it obtained a decree, of which neither it, nor any other party, complains. This mortgage was upon certain real property in Grand Island, on which the proprietor had succeeded in erecting a hotel, but had not succeeded in paying the mechanics' liens and mortgage indebtedness thereby rendered unavoidable. It is not essential, and would be simply confusing, to describe many of these, for no one asks to have them placed in a class senior or junior to that in which they were placed by the district court. The appellants are Charles T. Durkee and the Fremont Manufacturing Company, whose appeals present the same question, and Samuel A. Peterson and George A. Packer, who, as joint mortgagees, hold but a single interest litigated. The appellee whose priority is challenged is the Chicago Gas & Electric Fixture Manufacturing Company. This appellee was placed in the first class, Peterson and Packer were alone placed in the second class, and Durkee and the Fremont Manufacturing Company were placed in the third class, and in this order the respective priorities of these parties were established by the decree appealed from. The mortgage to Peterson and Packer was made while the hotel was in course of erection, and was

filed for record April 28, 1893. The rule enforced in *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207, for determining priorities as between claimants under the mechanics' lien law and the holders of mortgages made while the building was in course of erection is accepted by all parties; but it is claimed by Durkee and the Fremont Manufacturing Company that there are circumstances which entitle them to a better standing than that rule would give them. As the contention of these two parties and the facts upon which that contention is based are practically the same, we shall let the facts in one case represent both, and so describe them.

Charles T. Durkee alleged that on October 10, 1892, he entered into a written contract with Gustave Koehler, the proprietor of the hotel building in course of erection, by the terms of which contract Durkee undertook to furnish the tin-roofing, steel ceilings, copper and iron cornices, bay-window trimmings, copper finials, crestings, galvanized iron cornices, gutters, and conductors that should be necessary in and about the construction and completion of the hotel building, for all of which he was to receive $2,435. There were extras furnished, but the balance, because of payments found by the court, was $1,002.14. The debit items of the account attached to the claim filed for a mechanic's lien were as follows:

"1893. Aug. 25.

To work, labor, and material on building, as per original contract	$2,435 00
To extra iron ceiling in office saloon, reading room, and lunch room, agreed value	400 00
To extra copper work	30 00
To extra tinning and work	60 00
To metal tile extra	26 00
	$2,951 00"

On the face of the above statement it would seem unquestionably true that the mortgage to Peterson and Packer should have precedence over the lien of Durkee.

He, however, insists that he began the manufacture of the copper cornices, finials, etc., in February, 1893; that these were suitable for no other building than that hotel for which they had been designed; that it was necessary thus early to commence the manufacture of them that they might be ready when needed, and that, therefore, the priority of Durkee as for labor done should date from the commencement of the work in February.

In *Badger Lumber Co. v. Mayes*, 38 Neb. 822, there was used, with reference to facts resembling those under consideration, the following language: "It is probable that * * * in a contest between a lienor and mortgagee the time when the material in its manufactured form was delivered upon the premises should be considered the time when the lien attached. So if, in this case, the evidence showed that the mortgage of the New Hampshire Fire Insurance Company was executed before any delivery of the manufactured material upon the premises, it would appear unjust to give the plaintiff priority of lien, although lumber may have been delivered for the purpose of manufacturing at the planing mill before the mortgage was made. The notice to subsequent lienors is derived from the condition of the premises (*Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207; *Holmes v. Hutchins*, 38 Neb. 601); and it would seem too much to require of a mortgagee that he should not only take notice of what was actually going on upon the premises, but should also investigate as to whether or not materials had been purchased for an improvement and had been delivered elsewhere." Counsel for Durkee insist, however, that the above quoted language was with reference to the delivery of raw material at a planing mill for manufacture into blinds, doors, etc., whereas Durkee's claim was for work for the building on the raw material, and, therefore, that the lien commenced from the commencement of this work. But what is raw material? Is it the copper ore upon which Durkee's employés expended their skill; and if so, why? Before this ore reached Fremont

it had been mined and freed from impurities, and it had been transported hundreds of miles. Strictly speaking, it ceased to be raw material when it was removed from its bed. Every manipulation it thenceforward underwent tended to increase its value. If Durkee can avoid the effect of the rule in *Badger Lumber Co. v. Mayes, supra*, as he seeks to, why could not the lien be still further antedated by referring its origin to the time when the ore was first mined? Under section 1, chapter 54, Compiled Statutes, liens are given to any person who shall perform any labor or furnish any material, etc. If the word "labor" is to be held to embrace all the value of the material furnished except such as is strictly raw material, then the word "material," as applied to lumber, must be restricted to trees standing in the forest, ore in the mines, etc. But in the very nature of things the latter in that condition could not be furnished in Nebraska. It is very clear that the statute has left no room for this difficulty, for it gives a lien in two classes of cases: one where labor has been done, the other where material, not necessarily raw material, has been furnished. When Durkee filed his claim for a lien, he recognized this distinction, and very properly claimed simply for the manufactured material furnished by delivering it on the premises. Neither he nor the Fremont Manufacturing Company can be advanced from the class in which they were placed by the district court.

The Grand Island Plumbing Company, having complied with the provisions of the statute with reference to filing its claim for a lien, assigned that claim to the Chicago Gas & Electric Supply Company, the appellee hereinbefore specially referred to. The first item supplied in this account was the furnishing and putting in of some galvanized pipe, a globe valve, a nipple, and a coupling. These, it was testified, were necessary to connect with the city water main, and it was further testified that when completed this was paid for. The date of this item was April 15, 1893. The next item in the

account attached to the claim filed for a lien was for sheet lead, and it was of date May 2, 1893. The mortgage to Peterson and Packer, as already noted, was filed for record April 28, 1893, so that this mortgage, under the rule already invoked, would seem entitled to preference. But it is said the sheet lead had been ordered before April 28, 1893. This could make no difference, for, as we have already seen, the date of the furnishing must govern. In this case the sheet lead had to be ordered from Chicago, and because of the delay incident to lodging the order and transmitting the material, it reached Grand Island after the mortgage to Peterson and Packer had been filed. It was, nevertheless, not furnished until subsequent to the filing of this mortgage, and therefore is not available against it. The next item is in August, and from thenceforward the items run into November. The district court evidently regarded this as a running account from the date of the item amounting to $29.15. Whether or not an account is a running account, or, as counsel for the gas and electric company insist, the items should be tacked, is largely governed by the intention of the parties as evidenced by their conduct. In this case the first item was separately ordered and paid for. It is clear the parties did not by this transaction intend to open a continuous account. The sheet lead was for use under pillars, and had no reference to the material described in the first item; therefore, could neither vary, control, nor extend it. The account, therefore, should only be deemed to have originated, at best, on May 2, 1893, and hence this claim should be placed in the third class,—otherwise the classification of the district court, we think, was correct.

There was a contention as to whether certain saloon fixtures were personal or real property. We are not at all confident that we could add to public general knowledge any new or valuable information by describing the appearance or functions of what seem to be the ordinary equipments of a saloon. We shall therefore refrain from

the attempt. On the evidence submitted it was found that these were parts of the real property, and we are satisfied to accept the judgment of the district court in respect thereto. On the appeal of Peterson and Packer against the lien of the Chicago Gas & Electric Supply Company the judgment of the district court is reversed, and the cause is remanded with instructions to the district court to enter a decree conformable with the views above expressed.

REVERSED AND REMANDED.

HARRISON, C. J., not sitting.

EDMOND GEORGE V. STATE OF NEBRASKA.

FILED FEBRUARY 9, 1899. NO. 10356.

Receiving Stolen Cattle: CONVICTION: EVIDENCE. The evidence in this case stated, and *held* insufficient to sustain the verdict of the jury.

ERROR to the district court for Cherry county. Tried below before KINKAID, J. *Reversed.*

J. Wesley Tucker, for plaintiff in error.

References: Maxwell, Criminal Procedure 383; *Walbridge v. State,* 13 Neb. 236; *Sumner v. State,* 5 Blackf. [Ind.] 579; *Commonwealth v. Webster,* 5 Cush. [Mass.] 296; 1 Greenleaf, Evidence secs. 33, 34.

C. J. Smyth, Attorney General, and *Ed P. Smith, Deputy Attorney General, contra.*

RYAN, C.

In the district court of Cherry county Edmond George, in the first count of an information, was charged with unlawfully and feloniously taking, stealing, and driving away four cattle of the aggregate value of $100. In the second count of said information it was charged that on

or about October 7, 1897, the said George, in said county, did unlawfully and feloniously receive the same cattle, of the same value as were described in the first count, as then and there lately stolen and driven away, with the intent on the part of said George to defraud the owners of said cattle, the said George then and there well knowing that all of said cattle had been stolen. There was a conviction on the second count, whereupon there was judgment that George be imprisoned in the penitentiary for the term of five years and pay the costs of the prosecution. To reverse this judgment he has prosecuted error proceedings in this court. One of the assignments in his petition in error is that the evidence does not sustain the verdict, and in the view we take it will be unnecessary to consider any other assignment.

One of the owners of the cattle alleged to have been stolen testified that he missed said cattle October 6 or 7, 1897; that he saw the accused at the ranch of witness in the latter part of September, 1897; that the accused was then riding a gray horse and another horse of the same color was following; that accused watered the horses at the water-trough of the witness; that the horse which was following the horse the accused was riding stopped at the hay of witness, whereupon the accused asked a son of witness to drive said horse away. This witness, a day or so previous to the date above referred to, had seen a person whom he believed to be the accused riding one gray horse and leading another along or near Fairfield creek, which is near the ranch of witness. This is the substance of the evidence relied upon to show that the accused had felonious intentions with reference to the cattle before they were stolen.

It was testified that one of the cattle, before the theft, was branded with a circle U on the right side, another was branded with a circle U on the left side, another had the letters F J on the right hip, and, it seems, the other was branded with the figures 13. About six weeks after the cattle were missed at the ranch they were found by

their owners at the ranch of Mr. Carr, a mile west of Springview, in Keya Paha county. The brands had, meantime, been changed. It was shown by the evidence, without contradiction, that the cattle had been brought to the farm of Mr. Carr by Mr. Lamoreux, who had purchased them October 9, 1897, from the accused. Mr. Lamoreux, at the time of this purchase, was living on the Sioux Reservation, in South Dakota, and the purchase of the cattle by him was at his home. The brands at that time, he testified, had been altered. The same afternoon of his purchase Lamoreux placed these cattle among other cattle, and with the whole bunch thus made up started to go to Springview, in Keya Paha county. The cattle he had bought of George he did not ship at Springview, as he did the remainder of the lot, but left them with Mr. Carr, where they were afterward found by the owners and reclaimed. From this evidence it seems clear that some one stole these cattle and altered their distinctive brands. The conviction of George, however, was not of larceny but of purchasing stolen cattle, knowing them to have been stolen. From this conviction we are bound to assume that a person other than George had been guilty of larceny, and that George's connection with the transaction began after the theft had taken place. Let us now consider what evidence there was to show how, when, and where George purchased as the jury found he did.

The accused was sworn on his own behalf and testified that previous to October 4, 1897, he had been told by Chris Colombe, who resided on the Sioux Reservation, that the said Colombe was desirous of hiring a hand; that on October 4, aforesaid, accompanied by Eugene Myers, who proposed to hire to Colombe, the accused started to go from near Sparks, in Cherry county, to the ranch of Colombe; that when they had passed beyond the state line about sixteen miles the accused and Myers fell in with Chris and David Colombe at the intersection of two highways; that while these four persons were talking,

a man by the name of Joe Cross came up one of the roads driving five head of cattle; that Cross offered to sell the cattle; that after some negotiations the accused purchased them for $85, which he then and there paid Cross; that at that time the accused did not notice that the brands had been worked over; that Cross, upon receiving payment, made a bill of sale of the cattle to the accused; that the accused had never seen Cross since that time; that after purchasing the cattle the accused and Myers took the cattle to Chris and David Colombe's ranch and kept them there five days, at the end of which time the accused sold them to Lamoreux. Ed Colombe was sworn and testified that Joe Cross was well known to witness and had worked for witness' father about ten years off and on; that witness was acquainted with the handwriting of Cross, and that the bill of sale made to the accused had, in the opinion of witness, been executed by said Cross. There were two witnesses who testified that they were well acquainted with the region about the Rosebud Agency, where it was claimed Cross had been living, and that they never heard of such a man. Eugene Myers testified that he went with the accused from Cherry county to the ranch of the Colombes on October 4, 1897, but that neither the accused nor himself saw or drove any cattle at that time, and that the accused did not buy any cattle of Cross, or any one else, on that trip.

In brief, the above was all the evidence offered by either side, and while the contradictions of the testimony of George might lead to the conclusion that he was very unreliable as a witness, it does not follow from these contradictions that the jury were justified in finding that he purchased the cattle in Cherry county, Nebraska, as charged in the count of the information on which he was convicted. On this, the essential proposition, there was no evidence to justify the verdict, and the judgment thereon rendered is reversed.

REVERSED AND REMANDED.

JEROME H. SMITH, APPELLANT, V. C. C. NEUFELD ET AL., APPELLEES.

FILED FEBRUARY 9, 1899. No. 8705.

1. **Homestead:** REMOVAL OF CLOUD. Equitable relief may be granted for the removal from a homestead of the apparent lien of a judgment on the theory that such lien, though only apparent, is a cloud upon the owner's title.

2. ———: ———: PLEADING. A general demurrer was improperly sustained to a petition wherein were allegations that plaintiff had succeeded to the homestead rights of his grantor and that such rights were within the statutory limits defining homestead exemptions, though such homestead rights were asserted with reference to but a portion of an entire 320-acre tract, and the prayer of the petition was for equitable relief as against the apparent liens of certain described ordinary judgments which had been rendered against the said grantor while he was entitled, as owner of the land, to the statutory homestead exemption invoked by plaintiff.

APPEAL from the district court of Hamilton county. Heard below before SEDGWICK, J. *Reversed.*

Hainer & Smith, for appellant.

References: *Roberts v. Robinson*, 49 Neb. 717; *Corey v. Plummer*, 48 Neb. 481; *Mansfield v. Gregory*, 11 Neb. 297; *Galway v. Malchow*, 7 Neb. 285; *Dorsey v. Hall*, 7 Neb. 460; *Berkley v. Lamb*, 8 Neb. 399; *Hoy v. Anderson*, 39 Neb. 386; *Mundt v. Hagedorn*, 49 Neb. 409; *Giles v. Miller*, 36 Neb. 346; *Schriber v. Platt*, 19 Neb. 625; *Baumann v. Fransc*, 37 Neb. 807; *Hooper v. Castetter*, 45 Neb. 67; *Faeth v. Leary*, 23 Neb. 267.

Stark & Day, contra.

References: 1 Black, Judgments (1891 ed.) secs. 359, 366, 400; *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556; Waples, Homestead & Exemptions, p. 23, par. 13, p. 208, sec. 1.

RYAN, C.

In this case there were two defendants in the district court of Hamilton county. A demurrer to the petition filed by each of them was sustained, and accordingly there was a judgment in their favor, from which plaintiff has appealed. This involves a consideration of the averments of the petition, which we shall now undertake.

Jerome H. Smith, the plaintiff, alleged in his petition that on October 23, 1894, and for more than five years prior to that date, Tobias Voth was the owner in fee simple of five separately described governmental subdivisions of land in Hamilton county, of which the aggregate area was 320 acres; that during all of said five years Voth, the head of a family, lived on said land and tilled it as a single farm; that while Voth was the owner and in the possession of said land he and his wife mortgaged it as an entirety to secure the payment of $3,500 to one person, to secure the payment of $900 to another, and the payment of $388.60 to plaintiff, in addition to which mortgages said Voths made another mortgage on the same property to secure the sum of $2,000 to still another person; that in September, 1894, default having been made in the payment of these mortgages, proceedings were begun for the foreclosure of the $3,500 mortgage, in which with said Voths the said Smith was made a defendant, and that at said time there was due on all the mortgages the aggregate sum of $7,000. It was further alleged in the petition that the value of said land never exceeded $7,300, and that Voth in said land had an interest outside the mortgages of not to exceed $300; that there was at said time a lien on the land of $54.40 for taxes, and that Voth and his wife, for the purpose of ending the foreclosure proceedings and procuring the liens to be satisfied on said land, on October 23, 1894, sold the same to plaintiff for the agreed consideration of $7,300, the full fair value of the same, and on the day thereafter, to-wit, October 24, 1894, conveyed said land to plaintiff

by a warranty deed, in which they recited that Jerome H. Smith, the grantee, had assumed and agreed to pay as part of the consideration the $3,500 mortgage, the $900 mortgage, the $388.60 and the $2,000 mortgage, and in his petition plaintiff alleged, independently of the recitations of said deed, that the assumption of payment was as above receited, and also that plaintiff assumed the payment of $34.40 in taxes as part of the consideration. Plaintiff, moreover, averred that he paid as the balance of the consideration for said conveyance the sum of $267.10 in cash to Tobias Voth. He furthermore alleged that the said Voth, at the time of said conveyance to plaintiff, was entitled to the homestead exemptions allowed by the laws of this state to a head of a family, and that said excess in value over and above the amount of said incumbrances was likewise exempt under the laws of this state, which excess plaintiff alleged had been conveyed to him in consideration of its value paid to said Tobias Voth as above described. The relief sought was that the judgment based upon debts not secured by mortgage, mechanic's, laborer's, or vendor's lien, confessed by Voth in favor of the defendants October 23, 1894, and which were apparent but not actual liens on said land as against the rights of plaintiff, might be decreed not to be binding on said land; that the cloud cast upon plaintiff's title by each of said judgments might be removed, and that defendants might be enjoined from enforcing either of said judgments against the land purchased by plaintiff for Voth.

There is in argument a considerable stress laid upon the proposition that one eighty-acre tract was not contiguous, for the reason that, with the nearest tract, it had but one point, the center of a section, in common. We shall not specially consider this feature, for the reason that there were in all 320 acres, and as the statute exempts but 160 acres as a homestead, there was one 160-acre tract which was not homestead in character. A consideration of the eighty-acre tract not contiguous,

upon the theory of defendants in error, would be important only as showing that said eighty-acre tract is not within the terms of exemption of the homestead statute, and this same proposition is involved in the existence of 160 acres outside the homestead tract.

By the petition it was shown that Voth had a float exemption right to the extent of 160 acres in a tract of 320 acres. Under the provisions of chapter 36, Compiled Statutes, he was entitled to have set off to him as a homestead 160 acres, equal in value, above incumbrances, to $2,000. As there were incumbrances of the sum of $7,000, he could require that the 160 acres which he had not procured to be segregated as a homestead should be first sold in satisfaction of the $7,000 incumbrances resting on the entire tract. Tested by the averments of the petition, this would leave unpaid such an amount of mortgages that, to satisfy them and the taxes, there would be absorbed the entire value of the homestead quarter-section, lacking $267.10 in value. It is not material that to arrive at this result it is necessary to take into consideration the steps we have indicated, first, that the debtor had the right to have first sold the quarter-section which he did not select as his homestead, and second, the status of his homestead quarter-section as affected by the balance of mortgages and taxes not paid by the sale of the non-exempt quarter. When in the above order of procedure we reach the point at which the debtor has but 160 acres in which he claims homestead rights as above indicated, he has the same rights of homestead exemption with reference to it that he would have had if he had never been the owner of more than that particular quarter-section. We are not determining that the judgments, ordinarily, would not be liens on a portion of his 320-acre tract, for, under the averments of the petition, that question is not involved. Under the facts admitted by the demurrer other considerations have been eliminated from the case, and our concern is alone with the value of Voth's homestead right, which was equal

to $267.10. If he had owned but 160 acres of that value, there is no room for doubt that he would have been entitled to a decree by which the apparent lien of the judgments would have been removed. (*Corey v. Schuster*, 44 Neb. 269.) If he had but 160 acres of less value than $2,000, he could have conveyed it to Smith free from liens of the judgments against him. (*Corey v. Plummer*, 48 Neb. 481; *Corey v. Schuster*, *supra*.) The same result follows where the value of the 160-acre tract, after the deduction of mortgage and other incumbrances, is less than $2,000. (*Hoy v. Anderson*, 39 Neb. 386; *Prugh v. Portsmouth Savings Bank*, 48 Neb. 414.) This last proposition is thus discussed in *Bank of Bladen v. David*, 53 Neb. 608: "But it is contended that, when the land lost its homestead character, it became liable for the satisfaction of the bank's judgment. A sufficient answer to that contention is that it was not then the property of the judgment debtor. The conveyance which vested the title in Mrs. David infringed none of the legal rights of David's creditors. It was valid when made. It was not vitiated by Mrs. David's subsequent change of domicile. It is valid still. Even Jove himself could not change the nature of a past transaction." In *Horbach v. Smiley*, 54 Neb. 217, it was said: "The provisions of the existing homestead act exempt from forced sale upon execution or attachment a homestead not exceeding in value $2,000; and a judgment recovered against the owner thereof is not a lien thereon, even after the sale and abandonment of the homestead." These cases recognize and enforce the right of the judgment debtor to sell his homestead so as to vest in the grantee the title divested of ordinary judgment liens. As we have seen, the existing conditions, under the averments of the petition, are as though the judgment debtor had title to only 160 acres, subject to mortgages to such an amount in the aggregate that his real interest was of much less value than $2,000. The plaintiff, under such circumstances, we conclude, took the title free from the lien of the judgments of the defendants.

It is, however, urged by the appellees that, in any event, the appellant had no standing to invoke the equitable powers of the court. If it was necessary to refer to the adjudications of courts of other states to sustain the holdings of this court on this point in *Corey v. Schuster*, *supra*, *Corey v. Plummer*, *supra*, and *Hoy v. Anderson*, *supra*, that support would be found in *Conklin v. Foster*, 57 Ill. 104, *Irwin v. Lewis*, 50 Miss. 363, *Ketchin v. McCarley*, 26 S. Car. 1, *Smith v. Zimmerman*, 85 Wis. 542, and *Webb v. Hayner*, 49 Fed. Rep. 601, wherein the right to equitable relief against the apparent cloud upon homestead rights created by a judgment is expressly recognized. The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

STANDARD OIL COMPANY V. OTTO HOESE ET AL.

FILED FEBRUARY 9, 1899. No. 8624.

1. **Guaranty.** Where goods were sold and paid for to an amount in excess of $300 by the party referred to in a written guaranty, and the action was for a balance of his account of less than $300 not paid, the guarantors are liable therefor on their guaranty, which was in the following language: "We do hereby guaranty the payment of any purchases of oil he may make of your company within the next year, to an amount not exceeding $300."

2. ———: PARTNERSHIP: ULTRA VIRES: PLEADING. A general demurrer to a petition in which it is averred that the defendants, as a partnership firm, executed a certain guaranty, impliedly admits the existence of the power to make such guaranty, and it will not, under such circumstances, be assumed that the making of the guaranty was *ultra vires*.

3. ———: ACCEPTANCE: NOTICE. The party to whom a guaranty of payment for goods to be sold in the future is addressed is not required to notify the guarantor of the acceptance of such guaranty in advance of extending the proposed credit thereon.

ERROR from the district court of Cedar county. Tried below before NORRIS, J. *Reversed.*

John Bridenbaugh, for plaintiff in error.

References: *Tootle v. Elgutter*, 14 Neb. 158; *Rindge v. Judson*, 24 N. Y. 64; *Taussig v. Reid*, 145 Ill. 488; *Gates v. McKee*, 13 N. Y. 232; *Rice v. Loomis*, 139 Mass. 302; 9 Am. & Eng. Ency. Law 77; *Wilcox v. Draper*, 12 Neb. 138; *Lawrence v. McCalmont*, 2 How. [U. S.] 426; *Hargreave v. Smee*, 6 Bing. [Eng.] 244.

J. C. Robinson, contra.

References: Brandt, Suretyship & Guaranty [2d ed.] sec. 93; *Bank of Commerce v. Selden*, 3 Minn. 99; *Selden v. Bank of Commerce*, 3 Minn. 109; *Osborne v. Stone*, 30 Minn, 25; *Levi v. Latham*, 15 Neb. 509; 2 Daniel, Negotiable Instruments [1st ed.] 660; *Winnebago Paper Mills v. Travis*, 58 N. W. Rep. [Minn.] 36; *Crane Co. v. Specht*, 39 Neb. 123; *Lininger v. Webb*, 51 Neb. 10; *Columbus Sewer Pipe Co. v. Ganser*, 25 N. W. Rep. [Mich.] 377; *Morgan v. Boyer*, 39 O. St. 324; *Birdsall v. Heacock*, 32 O. St. 177; *Schwartz v. Hyman*, 14 N. E. Rep. [N. Y.] 447; *Smith v. Van Wyck*, 40 Mo. App. 522; *Historical Publishing Co. v. La Vaque*, 66 N. W. Rep. [Minn.] 1150.

RYAN, C.

This action was brought on a written guaranty, and, a general demurrer of each of the defendants to the petition having been sustained, this error proceeding brings up for review the correctness of the ruling whereby the petition was held not to state a cause of action.

It is first urged by the defendants in error that the guaranty sued upon was signed by a partnership firm, and that as a firm it was incapable of becoming surety. The demurrers impliedly admitted the truthfulness of each averment of the petition, and therein it was alleged that the firm, as such, executed and delivered the guar-

anty sued on, and that on the faith of the guaranty credit had been extended and goods had been sold by plaintiff. Under these conditions we do not feel warranted in holding that the guaranty was not executed. There might have been circumstances under which the firm would have possessed power to execute the guaranty sued on, and we must assume, under existing conditions, that the power existed in this instance, for, otherwise, the execution of the guaranty was impossible.

It is next insisted that the petition failed to state that there was notice of the acceptance of the guaranty by the company in whose favor it was made. This proposition has been settled adversely to the contention of the defendants in error. (*Wilcox v. Draper*, 12 Neb. 138; *Klosterman v. Olcott*, 25 Neb. 382.)

The guaranty sued on was in the following language:

"HARTINGTON, NEB., Dec. 1, 1893.

Standard Oil Co., Omaha, Neb.—GENTLEMEN: Mr. A. E. Lively has been established in this city as an oil peddler for —— past, and during the whole of that period he has conducted himself in such a manner as to secure the respect and confidence of his fellow-citizens and to establish his reputation as an energetic and prudent man in business operations. His capital at the commencement of this venture was about $1,200. He is now generally estimated by our citizens to be worth about $1,200. As, however, you are not acquainted with him, we willingly do, and do hereby, guaranty the payment of any purchases of oil he may make of your company within the next year, to an amount not exceeding $300.

"Yours respectfully, HOESE & MORTEN."

It was alleged that, ending with April 5, 1894, plaintiff sold oil to Lively to the amount in value of $853.51. There were credits in the petition of the aggregate amount of $557.34, leaving the balance sued for of $296.17. It seems to have been held by the district court that the guaranty was exhausted when, as shown by the

averments of the petition, there had been sold and paid for an amount of oil of the value of $300. The contention of the plaintiff in error is that the guaranty was for any amount that Lively might fail to pay for to the extent of $300, provided only that the sales should be made within the year from the date of the guaranty.

It is provided by section 341, Code of Civil Procedure: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." If the language of the guaranty, with reasonable clearness, expresses a certain intention of the guarantor, we are of the opinion that such intention should prevail irrespective of the rule attempted to be invoked that the liability of a surety is one *strictissimi juris*, for it is not assuming too much to presume that the guarantor had reason to suppose that the Standard Oil Company would understand its letter in its ordinary sense. The guaranty, in effect, was the same as if it had read, we do hereby guaranty the payment of an amount not exceeding $300 of any purchases of oil he may make of your company within a year. The restriction in amount was with reference to payment. The restriction of time was applicable to purchases. In *Tootle v. Elgutter*, 14 Neb. 158, the language was: "Please let Mr. John Newman have credit for goods to the amount of $100, and for the payment of which I hold myself responsible." In that case it was insisted that the guaranty should be construed as though it was with reference to a credit for goods of the value of $100, and no more, but it was held that the limitation was with reference to the amount of the liability to which the guarantor was willing to subject himself, and did not necessarily limit the sales to that amount. A case specially relied on by the defendant in error is *Historical Publishing Co. v. La Vaque*, 66 N. W. Rep. [Minn.] 1150, in which the guaranty was in this language: "Dec. 9, 1892.—Historical Publishing Co., Philadelphia—Gentlemen: I request

that should Jesse L. Jellison, of Duluth P. O., Minn. state, order books from you at any time within two months from the date of this letter of credit, that you ship the same to his order; and I hereby obligate myself to see that they are paid for within thirty days after the books arrive at destination, provided that Mr. Jesse L. Jellison should fail to pay and the amount of the bill does not exceed $100." Jellison ordered and received books of the value of $217.20 within the specified period, and he paid to plaintiff $111.20, or $11.20 in excess of the sum of $100 for which defendant agreed to become liable should Jellison default. The court used this language in disposing of the case: "Construing the writing fairly, it authorized credit to be extended in the sum of $100, and no more, and defendant only guarantied the payment of an indebtedness incurred not in excess of that amount." There was a very clear justification of this holding in the language of the instrument, for there was therein a proviso that the amount of the bill should not exceed $100. The court held that while there were two items sold at different times, yet that the history of these transactions constituted but one bill, and that as the guaranty limited the liability of the guarantor to one bill not in excess of $100, his liability was with reference to the first indebtedness of $100 contracted, and that, when this $100 was paid, the guarantor's liability ceased. In effect, the guaranty itself was as if, in the case under consideration, the limitation had been with reference to purchases not exceeding $300 in amount. The construction adopted was the natural construction of the proviso that the amount of the bill should not exceed $100, for, as already indicated, the word "bill" implied simply a description of the sales, and thus by apt words the limitation was to the amount to be sold. This definite limitation is lacking in the case under consideration, and this difference in the phraseology serves to illustrate more forcibly the correctness of our construction of the language employed in the guaranty under consid-

eration in the case at bar. The demurrers should have been overruled, and accordingly the judgment of the district court is reversed.

REVERSED AND REMANDED.

BRISTOL SAVINGS BANK, APPELLEE, V. EMMETT E. FIELD ET AL., APPELLANTS.

FILED FEBRUARY 9, 1899. No. 8708.

Judicial Sales: DECREE SELF-OPERATING. A decree of the district court directing the sale of real property to be made by the sheriff need not be supplemented by a formal order of the clerk of the district court to give efficacy to such decree.

APPEAL from the district court of Buffalo county. Heard below before WESTOVER, J. *Affirmed.*

B. O. Hostetler, for appellants.

References: *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb. 282; *Hooper v. Castetter*, 45 Neb. 67; *Burkett v. Clark*, 46 Neb. 466.

Dryden & Main, contra.

References: *Rector v. Rotton*, 3 Neb. 171; *Fried v. Stone*, 14 Neb. 402.

RYAN, C.

This is an appeal from an order of confirmation of a sale made under the authority of a decree of foreclosure entered by the district court of Buffalo county. In this decree there were directions with respect to the enforcement of its provisions, as follows: "That said premises be sold, and an order of sale shall be issued to the sheriff of Buffalo county, Nebraska, commanding him to sell the above described premises as upon execution," and "that he shall execute to the purchaser of said real estate

a good and sufficient deed of conveyance therefor and put such purchaser in the actual possession of said premises." It is urged, in argument, that the above quoted language required that an order of sale issue to authorize the sheriff to act, and that without a formal order of the character indicated the sheriff was without authority to sell. The sheriff had a certified copy of the decree upon which he relied as his authority to make the sale, and in this we think he was clearly justified. In *McKinley-Lanning Loan & Trust Co. v. Hamer*, 52 Neb. 709, it was pointed out that the issuance by the clerk of a formal order to supplement the provisions of the decree was entirely unnecessary. The sheriff was acting in this matter merely as the agency of the court, and this agency would not have been strengthened, or better evidenced, if the clerk, as such, had directed the sheriff to carry out the decree directing a sale. The judgment of the district court is

AFFIRMED.

B. F. STURTEVANT COMPANY V. BOHN SASH & DOOR COMPANY ET AL.

FILED FEBRUARY 9, 1899. No. 8690.

Garnishment: MONEY IN HANDS OF CLERK. Money about to be paid to a clerk of the district court, to be by him distributed under the decree of said court, cannot be reached by garnishment process issued out of the county court against one of the distributees.

ERROR from the district court of Douglas county. Tried below before FAWCETT, J. *Dismissed.*

John P. Breen, for plaintiff in error.

References: *Dixon Nat. Bank v. Omaha Nat. Bank*, 54 Neb. 796; Drake, Attachment secs. 496, 509, 509*a*; *Gaither v. Ballew*, 4 Jones Law [N. Car.] 488; *Weaver v. Davis*, 47

Ill. 235; *Williams v. Jones*, 38 Md. 555; *Oppenheimer v. Marr*, 31 Neb. 811.

B. G. Burbank, contra.

RYAN, C.

The first pleading which we find in the transcript in this case is a petition of intervention of the Dixon National Bank, the Thompson National Bank, and the Middleborough National Bank, the claimants, by assignment, of the funds sought to be reached by garnishment. To this petition there was filed the answer of the B. F. Sturtevant Company, whereby were assailed the validity and *bona fides* of the assignment relied upon by the interveners. By reply the averments of the answer were denied. There was a trial without a jury and a judgment in favor of the interveners, in which judgment there was a finding that "The garnishment proceedings of the plaintiff herein against the garnishee, Frank E. Moores, are of no force and effect." Since the B. F. Sturtevant Company, by its petition in error, asks the court to grant affirmative relief against the judgment rendered by the district court, we cannot ignore this finding. While it is true there was no issue joined which involved this question, there was put in evidence by the B. F. Sturtevant Company the record of the earlier proceedings in this case, which disclosed that the garnishee had been garnished in the county court of Douglas county; that at the time of said garnishment the garnishee was clerk of the aforesaid district court, and had not then in his hands the funds now sought to be reached; that within a few hours after the garnishment there was paid to said clerk the sum of $15,942.27, which, by a decree of the said district court, had been ordered to be distributed among the parties to the suit wherein the decree was entered; that of this sum the distributive share of the Bohn Sash & Door Company under said decree was $3,334.17, and that by the garnishment it was sought in the county

court to compel said clerk of the district court to pay to the B. F. Sturtevant Company the amount due it from the Bohn Sash & Door Company which was evidenced by a judgment of said county court in favor of the former company against the latter, and was for less in amount than the $3,334.17 above mentioned. The B. F. Sturtevant Company, by its own proofs, was thus shown to be attempting in the county court to hold liable as garnishee the clerk of the district court for money received and held by him under the decree of the court of which he was clerk. Such a procedure is expressly discountenanced in *Scott v. Rohman*, 43 Neb. 618, *Baker v. Peterson*, 57 Neb. 375, and in *Anheuser-Busch Brewing Ass'n v. Hier*, 52 Neb. 424. In the first of these three cases it was held that a judgment of the district court of this state could not be reached by garnishment proceedings before the county court, and in the third there was used this language: "The rule that personal property *in custodia legis* is not subject to attachment or garnishment was adopted for the protection of the officer and to avoid collision of authority and conflict of title." The principle was then laid down which, applied in this case, would require the B. F. Sturtevant Company to intervene and seek to establish its claim to the distributive share of the Bohn Sash & Door Company in the case wherein the clerk had received it. Under these conditions we cannot grant relief to plaintiff in error, and accordingly its petition in error is

DISMISSED.

J. RALSTON GRANT, APPELLANT, V. WILLIAM O. BARTHOLOMEW, APPELLEE.

FILED FEBRUARY 9, 1899. No. 8534.

1. **Pleading**: ABSENCE OF REPLY: EFFECT. Though the evidence disproves the material allegations of new matter in an answer, such evidence will be disregarded, unless such new matter is denied by a reply. (Code of Civil Procedure, sec. 134.)

2. **Taxation.** The listing and assessment of real estate for taxation in the name of a person then deceased do not invalidate such assessment or the taxes levied thereon.

3. ———: EQUALIZATION: WANT OF NOTICE. A board of county commissioners, sitting as a board of equalization, without notice to the landowner and without a complaint that his real estate was assessed too low, raised the value placed thereon by the assessor. *Held*, That the board was without jurisdiction and its action a nullity.

4. ———: ———: ———. Such action of the board of equalization did not vitiate the assessment made of the property by the assessor.

5. ———: ———: ———. Only so much of the tax as arose out of the difference between the valuation placed upon the property by the assessor and the value attempted to be placed thereon by the board of equalization is illegal.

6. ———: DISTRESS WARRANT. To invest a county treasurer with jurisdiction to seize personal property for the satisfaction or enforcement of a tax lien thereon the warrant provided by section 83 of the revenue law must be attached to the tax list. *Reynolds v. Fisher*, 43 Neb. 172, followed.

7. ———: REALTY: LIABILITY OF OWNER. Under our revenue law a real estate tax is not the personal obligation of the real estate owner. The real estate, and not the owner thereof, is liable for its payment.

8. ———: SALE. The warrant provided by section 83 of the revenue law to be attached to the tax list is not essential to invest a treasurer with jurisdiction to sell real estate for the non-payment of taxes which are delinquent and a lien thereon.

9. ———: ———. The county treasurer's authority and jurisdiction to make such a sale of real estate is derived from the express and mandatory provisions of sections 109 and 113 of the revenue law. (Compiled Statutes, ch. 77, art. 1.)

10. ———: ———: WARRANT. Assuming that the warrant provided by section 83 of the revenue law must be attached to the tax list to invest the county treasurer with jurisdiction to make a sale of real estate for delinquent taxes thereon, then a sale made by the county treasurer, where such warrant was not so attached to the tax list, would be void.

11. ———: ———: ———. But though such a sale would be void as a tax sale within the meaning of the revenue law, and such sale and subsequent statutory proceedings under it could never have the effect of divesting the landowner's title to the real estate and vesting it in the purchaser at the sale, still the rule in this jurisdiction is that such a void sale is effective as an assignment

and transfer of the liens of the public to the tax purchaser and invests him with all liens and rights which the public had against said real estate by reason of the taxes assessed and delinquent thereon.

12. ———: ———: ———. This rule is not the creature of this court, but it is founded upon the revenue legislation of the state.

13. ———: REVENUE LAW. The theory of our revenue law is that a purchaser of real estate at a sale made thereof for delinquent taxes shall not lose his money. If no tax was due on the real estate at the time of the sale, then the county is to reimburse the purchaser the money paid. If the land was liable to taxation, and there was a legal tax due and delinquent against the land, then, if the tax purchaser failed to acquire a good title to the real estate because of any violation of the revenue law or the failure of public officers to comply with its provisions, the law declares that the sale shall nevertheless be effective as an assignment of the public's rights and liens against the real estate to the attempted tax purchaser thereat.

14. ———: TRUSTS: COUNTIES. The various counties in this state are trustees of the state and the various cities, villages, and school districts within their borders for the collection of the public revenue.

15. ———: COUNTIES. A county is a person within the meaning of section 1, article 5, of the revenue law of 1879. (Compiled Statutes 1897, ch. 77, art. 5, sec. 1.)

16. ———: LIEN: FORECLOSURE BY COUNTY. Under the revenue laws of this state a county may enforce its lien for taxes against real estate by an ordinary foreclosure suit in a court of equity after the taxes on such property have become delinquent and after the time the property becomes liable for sale for the non-payment of such taxes.

17. ———: ———: ———. It seems that the right of a county to maintain a suit in equity to foreclose the public's lien against real estate for the non-payment of taxes thereon exists independently of statute.

18. ———: SALE. A county treasurer has no authority to sell real estate for the delinquent taxes of one year without including in such sale all taxes delinquent against such real estate for all previous years.

19. ———: ———: INTEREST. One who purchases real estate at a void sale attempted to be made thereof by the county treasurer for the non-payment of delinquent taxes thereon is entitled to the same rate of interest upon the taxes paid by him that such taxes were drawing at the time he paid them.

APPEAL from the district court of Douglas county. Heard below before DUFFIE, J. *Reversed.*

Saunders & Macfarland, for appellant:

The burden of proof is upon the defendant. (*Miller v. Hurford*, 13 Neb. 14; *Adams v. Osgood*, 42 Neb. 450; *Towle v. Holt*, 14 Neb. 221; *Dillon v. Merriam*, 22 Neb. 151; *Bryant v. Estabrook*, 16 Neb. 217.)

The defenses alleged in the answer are technical, and are not a defense to an action for the foreclosure of a tax lien. (*Roads v. Estabrook*, 35 Neb. 297; *Merriam v. Dovey*, 25 Neb. 618; *Otoe County v. Matthews*, 18 Neb. 466.)

The decree is absolutely void for want of findings of fact. (*Doty v. Summer*, 12 Neb. 378; *Connelly v. Edgerton*, 22 Neb. 82; *Petalka v. Fitle*, 33 Neb. 756.)

D. L. Thomas and *W. O. Bartholomew*, *contra.*

References: *Merrill v. Wright*, 41 Neb. 351; *Leavitt v. Bell*, 55 Neb. 57; *National Lumber Co. v. Ashby*, 41 Neb. 292; *Van Etten v. Kosters*, 48 Neb. 152; *Smith v. Davis*, 30 Cal. 536; *Cruger v. Dougherty*, 43 N. Y. 107; *McGee v. State*, 32 Neb. 149; *State v. Edwards*, 31 Neb. 369; *Morrill v. Taylor*, 6 Neb. 246; *Morris v. Merrill*, 44 Neb. 423; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *Marsh v. Chestnut*, 14 Ill. 223; *Ledwich v. Connell*, 48 Neb. 172; *Reynolds v. Fisher*, 43 Neb. 172; *Reynolds v. McMillan*, 43 Neb. 183; *Croskery v. Busch*, 74 N. W. Rep. [Mich.] 464; *Van Nest v. Sargent County*, 73 N. W. Rep. [S. Dak.] 1083; *Sioux City & P. R. Co. v. Washington County*, 3 Neb. 30; *Hutchinson v. City of Omaha*, 52 Neb. 345; *Baldwin v. Douglas County*, 37 Neb. 283; *Case v. Dean*, 16 Mich. 12; Cooley, Taxation 295 and note 1, 296; *Harmon v. City of Omaha*, 53 Neb. 164; *Smith v. City of Omaha*, 49 Neb. 883; *Frosh v. City of Galveston*, 73 Tex. 409; *Flewellin v. Proetzel*, 80 Tex. 195; *Erickson v. First Nat. Bank*, 44 Neb. 622; *Scroggin v. Johnston*, 45 Neb. 714; *Hamilton v. Home Fire Ins. Co.*, 42 Neb. 883; *Coad v. Read*, 48 Neb. 40.

RAGAN, C.

J. Ralston Grant brought this suit in the district court of Douglas county against William O. Bartholomew to foreclose a lien upon lot 28, in Horbach's First Addition to the city of Omaha, based on a tax-sale certificate issued to Grant's assignor by the county treasurer of Douglas county on June 11, 1890, pursuant to a private sale then and there made by said treasurer of said real estate for the delinquent taxes thereon for the year 1888, said taxes and interest then and there amounting to the sum of $29.65. Grant, in his petition, also alleged that on June 11, 1890, and at various dates since that time, he had paid and discharged taxes levied and assessed upon said lot, and which were liens thereon, for years both prior and subsequent to the year 1888. The prayer of Grant's petition was for an accounting of the amount due him on his tax lien, and for the taxes paid by him to protect such lien, and for a decree foreclosing it. As a defense to the action Bartholomew, in his answer, interposed, in effect, first a general denial, and then set up, as separate and distinct defenses, certain new matter, which will be hereinafter noticed. There was no reply filed to this answer. The district court entered a judgment dismissing Grant's action, and he has appealed.

1. The evidence discloses that the real estate in controversy was sold to Grant's assignor by the county treasurer of Douglas county on June 11, 1890, at a private tax sale for the delinquent taxes thereon for the year 1888; that these taxes—or part of them at least—were legally levied upon this property, were unpaid and delinquent, and a lien upon the property; that Grant, at that time and at various times subsequent thereto, paid and discharged other taxes which had been legally levied upon such property and were due and delinquent. The decree of the district court cannot, therefore, be sustained, unless it rests upon the allegations of new matter pleaded

by Bartholomew in his answer as defenses to the action, and which new matter was not denied by a reply; and we now proceed to an examination of the new matter set up in the answer as a defense to this action, and, in obedience to section 134 of the Code of Civil Procedure, shall treat these averments of new matter as true.

2. As a defense Bartholomew alleged that the real estate was assessed in the year 1888 in the name of Abner French; that he died in 1885, and therefore the assessment, upon which the tax sale was based, was void. In support of this contention *Smith v. Davis*, 30 Cal. 537, and *Cruger v. Dougherty*, 43 N. Y. 107, are cited. In those cases certain assessments were held void because the property was assessed in the name of a person then deceased; but the courts reached the conclusion they did in those cases because of the peculiar language of the revenue laws construed. The cases are not authority here for the contention in support of which they are cited, as our revenue law provides that no assessment of real property shall be considered as illegal by reason of the same not being listed or assessed in the name of the owner or owners thereof; and no sale of real property for taxes shall be considered invalid on account of the same having been charged (assessed) in any other name than that of the rightful owner. (Compiled Statutes 1897, ch. 77, art. 1, secs. 43, 136; *Lynam v. Anderson*, 9 Neb. 367.) The theory of our revenue law is that real estate taxes are a charge against real estate only; that real estate taxes are not the personal debt or obligation of the real estate owner.

3. Another defense was that the property in controversy, in 1884, was valued by the assessing officer at $350, and that subsequently the board of county commissioners of Douglas county, sitting as a board of equalization, without notice to Bartholomew, raised this assessment to $385. The argument is that all the 1884 taxes levied against this property were void and that Grant, by paying the same, acquired no lien upon the

property. There can be no doubt but that the action of the board of equalization in raising the valuation placed upon this property by the assessor was void. To invest the board of equalization with jurisdiction to raise the valuation placed upon this property by the assessor it was essential that some one should complain to the board that Bartholomew's property was assessed too low, and that he should be notified of such complaint, if a resident of Douglas county, which he was. (*State v. Dodge County*, 20 Neb. 595; *Dixon County v. Halstead*, 23 Neb. 697; *State v. Edwards*, 31 Neb. 369; *McGee v. State*, 32 Neb. 149; *Sioux City & P. R. Co. v. Washington County*, 3 Neb. 30; *South Platte Land Co. v. Buffalo County*, 7 Neb. 253; Compiled Statutes 1897, ch. 77, art. 1, sec. 70.) But it does not follow that the action of the board of equalization vitiated the assessment made of this property in the year 1884 by the assessor. Though the board of equalization raised the value placed on the property by the assessor without having acquired jurisdiction to do so, the property is still liable for the taxes which arise out of the valuation placed on the property by the lawful assessor. The reason is that all property must bear its just proportion of the burden of taxation; that the law has committed to the assessors of the state the authority to determine, subject to the review and revision of the board of equalization provided for by said section 70, the value of the taxpayer's property for the purposes of taxation; and in this case the board was without jurisdiction, its action was void, and therefore it did nothing. The valuation of $350 placed upon the property by the assessor remained unaffected by the action of the board of equalization, and only so much of the 1884 taxes as arise out of the difference between the valuation placed upon the property by the assessor and the valuation attempted to be placed thereon by the board of equalization is illegal, or, in this case, one-eleventh of the 1884 tax is void. (*Webster v. People*, 98 Ill. 343; *State v. Allen*, 43 Ill. 456; *Mix v. People*, 72 Ill. 241; *Mayor v. Los Angeles City Water-*

Works Co., 49 Cal. 639; *Missouri R., F. S. & G. R. Co. v. Morris*, 7 Kan. 210; *South Platte Land Co. v. Board of County Commissioners*, 7 Neb. 253; *Burlington & M. R. R. Co. v. Board of County Commissioners*, 7 Neb. 487; *Sioux City & P. R. Co. v. Washington County*, 3 Neb. 30; *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb. 393; *Spiech v. Tierney*, 56 Neb. 514.) In *State v. McClurg*, 27 N. J. Law 253, the rule is thus stated: "If more tax is assessed than is authorized by law, the assessment will not be void, but will be valid for what the law allows, and the excess only will be remitted." To the same effect is *Avery v. City of East Saginaw*, 7 N. W. Rep. [Mich.] 177.

4. Another defense was that for the year 1886 the assessor valued the property in controversy at $500, and the board of equalization, without notice to Bartholomew, raised it to $550. From what has just been said it follows that one-eleventh of the 1886 taxes on this property is void.

5. Another defense was that for the year 1888 the assessor valued the property in controversy at $800, and that the board of equalization, without notice to Bartholomew, raised the valuation to $1,200. It follows from what we have already held that one-third of the 1888 taxes upon this property is void.

6. Another defense is that the tax list of 1888 delivered by the county clerk to the county treasurer of Douglas county had no warrant attached thereto, as provided by section 83, chapter 77, article 1, Compiled Statutes 1897, and therefore the sale made of the real estate in controversy for the taxes of said year was void for want of jurisdiction in the treasurer to make the sale, and in support of his contention appellee cites us to *Reynolds v. Fisher*, 43 Neb. 172. In that case certain personal property was assessed in 1891. The tax list for that year, when delivered to the county treasurer, had not the county clerk's warrant provided for by section 83 of the revenue act attached thereto. Subsequently the person taxed pledged his personal property by mortgage to

Fisher, who took possession thereof, and thereupon the county treasurer, claiming that the 1891 taxes and the taxes for some of the subsequent years were liens upon the personal property, demanded possession of it, and, this being refused, seized it on a writ of replevin. It was ruled that the treasurer's action, so far as he claimed to be entitled to possession of the property by virtue of the 1891 taxes, must fail. The court, speaking through the present chief justice, said: "As there was no warrant attached to the tax list for 1891, the treasurer had no right to enforce the collection of the personalty tax for that year by distress or other proceedings provided by the statutes in relation to taxes and their collection." And still discussing this feature of the case, namely, whether the treasurer had authority to seize the property for the payment of the 1891 taxes, the chief justice, after quoting section 83 of the revenue act, said: "The warrant provided for in this section is the treasurer's authority for enforcing the collection of any and each particular tax of the list to which it is attached when it becomes necessary to resort to any of the proceedings provided by law. To collect the tax, then, the warrant must be in the hands of the collector, and, in this state, attached to the tax list, as his authorization to institute such proceedings. If he proceeds without it, he becomes a trespasser. An officer of the law who makes a levy must be empowered to do so by the proper writ in his possession. So with the treasurer. The warrant required by the law to be attached to the tax list is the source of the right to use the means of collection provided by the statutes." It must be remembered that all this was said in reference to the right of the treasurer to distrain the personal property in controversy or to seize it on replevin for the taxes of 1891. Now the revenue law (section 139) provides: "The taxes assessed upon personal property shall be a lien upon the personal property of the person assessed, from and after the time the tax books are received by the collector." The law does not make the personal taxes of

the citizen a lien upon his personal property from the time the tax is assessed thereon, but only from the time the tax books come into the hands of the county treasurer. The personal tax list, when delivered to the county treasurer, is analogous to a judgment, and to enable the treasurer to satisfy the tax—judgment—by the seizure of the personal property of the tax debtor it is essential that the treasurer should be armed with the tax warrant, which in that case is his execution. In the *Fisher Case* the failure of the clerk to attach his warrant to the tax list did not divest the lien which the public had upon the taxpayer's property for the personal tax of 1891, and we did not so hold. Because the clerk had not attached his warrant to the tax list the treasurer had no execution in his possession which either authorized or commanded him to seize the tax debtor's property for the 1891 taxes, and therefore his seizure of it was illegal. He was not entitled to possession of it, and that is what we held in the *Fisher Case;* and all that we said upon the subject in reference to the tax warrant had reference solely to this 1891 personal tax, to satisfy which the treasurer had, without a warrant, without execution, without any authority, seized the taxpayer's personal property. But the distinction between the *Fisher Case* and the one at bar is obvious. Section 138 of the revenue law makes the taxes assessed against real estate a lien thereon from the first day of April in the year in which they are assessed until the taxes are paid. This lien does not depend for its support upon the tax list being delivered to the county treasurer. When the tax is assessed, the lien attaches. If the tax is not assessed until after April in any year, it relates back and attaches on the first day of April of that year. No statute in this state exists which either commands or authorizes the county treasurer to seize the personal property of the taxpayer for the payment of the taxes assessed against his real estate. No provision of law exists authorizing the treasurer to institute any legal proceedings for the recovery

of a personal judgment against the owner of real estate for his non-payment of the taxes assessed thereon. The theory of the revenue law is that the land, and not the landowner, is bound for the payment of taxes assessed against real estate. The purpose of the warrant provided for by section 83 of the revenue law is, first, to authorize the treasurer to collect and receive all the taxes enumerated in the tax list from persons who may voluntarily pay them to him; second it is his authority, or writ in the nature of an execution, for the seizure of personal property for the non-payment of personal taxes. But the authority to collect and receive a tax when voluntarily paid and the authority to enforce the collection of personal taxes by some of the means provided for by section 89 of the revenue act are very different things from the authority and power to sell real estate for the non-payment of taxes which are liens thereon. The revenue law not only authorizes, but in mandatory terms commands the treasurer, on the first Monday in November, annually, to offer for sale all real estate upon which there are delinquent taxes. This section 109 is the treasurer's warrant for the sale of real estate for the non-payment of taxes, and the clerk's warrant provided by section 83 of the revenue act was never intended by the legislature to be the treasurer's authority for the sale of real estate for the non-payment of taxes. The treasurer could be compelled by mandamus to sell the real estate for non-payment of taxes thereon according to the provisions of section 109 if no warrant whatever was attached to the tax list. In the case of personal property the tax is a lien from the time the tax books are delivered to the county treasurer. The statutory method of enforcing that lien is by an actual seizure of the personal property. To authorize the treasurer to do this he must be armed with the clerk's warrant, which is his execution. The taxes are a lien upon the real estate from the first day of April in the year in which they are assessed. One of the statutory methods of enforcing and satisfying this

lien is by a sale of the property; and to effect this sale no seizure of the property is necessary, and authority to make the sale is conferred by express provisions of statute. In support of these views see *Parker v. Sexton*, 29 Ia. 421; *Sully v. Kuehl*, 30 Ia. 275; *Johnson v. Chase*, 30 Ia. 308; *Hurley v. Powell*, 31 Ia. 64; *Rhodes v. Sexton*, 33 Ia. 540.

Our conclusion therefore is that to invest the treasurer with jurisdiction to seize personal property for the satisfaction or enforcement of a tax lien thereon the warrant provided by section 83 of the revenue law must be attached to the tax list, but that the presence of such a warrant attached to the tax list is not essential to invest the treasurer with jurisdiction to sell real estate for the non-payment of taxes which are due and a lien thereon; that the treasurer's authority and jurisdiction to make such a sale is derived from the express provisions of sections 109 and 113 of the revenue act. But assuming that this sale was void because the absence of the warrant from the tax list left the treasurer without authority or jurisdiction to make the sale, it does not follow that the purchaser at such attempted sale did not acquire a lien against the land attempted to be sold. Our revenue law must be looked at as a whole to ascertain its objects. The theory upon which the law was framed is that, if taxes upon real estate are not paid, the treasurer shall sell this real estate for the non-payment of such taxes; that he shall execute to the purchaser a tax-sale certificate, and if the owner does not redeem within a certain time, then the owner of this certificate may present that to the county treasurer and procure from him a deed for the lands based upon such sale; and that this deed, when executed and delivered, shall divest the title of the real estate owner to the land and vest it in the tax-sale purchaser or his assignee.

In the case at bar, if the sale by the treasurer for the delinquent taxes of 1888 was void as a tax sale within the meaning of the revenue law, then of course such a sale would not uphold the statutory treasurer's tax deed

for the real estate, even if the latter should be unredeemed and the treasurer should execute a deed in all respects according to the statute and deliver it to the purchaser or his assignee. But though this sale be void as a tax sale within the purview of the revenue law, and though such sale and subsequent statutory proceedings under it could not have the effect of transferring the landowner's title to the real estate in controversy to the tax purchaser, still the sale will be held effective as an assignment and a transfer of the liens of the public to the tax purchaser and invest with or subrogate such purchaser to all the liens and rights against the real estate which the public had by reason of the taxes assessed against it and the liens thereon. Such is the doctrine of this court declared and recognized in the following cases: *Pettit v. Black*, 8 Neb. 52; *Wilhelm v. Russell*, 8 Neb. 120; *Wood v. Helmer*, 10 Neb. 65; *Boeck v. Merriam*, 10 Neb. 199; *Hallo v. Helmer*, 12 Neb. 87; *O'Donohue v. Hendrix*, 13 Neb. 257; *Reed v. Merriam*, 15 Neb. 323; *Shelley v. Towle*, 16 Neb. 194; *Otoe County v. Brown*, 16 Neb. 398; *Merriam v. Hemple*, 17 Neb. 345; *Otoe County v. Mathews*, 18 Neb. 466; *Lammers v. Comstock*, 20 Neb. 341; *Helphrey v. Redick*, 21 Neb. 80; *Parker v. Matheson*, 21 Neb. 546; *Dillon v. Merriam*, 22 Neb. 151; *Merriam v. Dovey*, 25 Neb. 618; *Shepherd v. Burr*, 27 Neb. 432; *Roads v. Estabrook*, 35 Neb. 297; *Stegeman v. Faulkner*, 42 Neb. 53; *Adams v. Osgood*, 42 Neb. 450; *Alexander v. Thacker*, 43 Neb. 494; *Osgood v. Grant*, 44 Neb. 350; *Weston v. Meyers*, 45 Neb. 95; *Frank v. Scoville*, 48 Neb. 169; *Johnson v. Finley*, 54 Neb. 733; *Twinting v. Finlay*, 55 Neb. 152; *Spiech v. Tierney*, 56 Neb. 514; *Medland v. Connell*, 57 Neb. 10. In the foregoing cases, and each of them, the rule stated above will be found recognized in some form; and it will thus be seen that the doctrine that a purchaser at a sale invalid and void as a statutory sale is, nevertheless, held to be the assignee of the public and to acquire at such void sale all the rights and interests against the real estate which the public had. This rule does not seem to be contested by the appellee in

cases where the tax purchaser fails to acquire a perfect title to the real estate because of some irregularity in the tax proceedings or some failure of some officer to follow the express provisions of the revenue law. But the appellee's contention here is, there being no warrant attached to the tax list, that the treasurer was without jurisdiction, and therefore the tax purchaser's payment was a voluntary one and the pretended sale invested the purchaser thereat with no rights whatever. No such a distinction as this can be found in any of the cases just cited, nor in any other case in this court. On the other hand, the uniform holding has been that if the sale was void, no matter for what reason, it was still effective as an assignment of the public's interest.

In *Johnson v. Hahn*, 4 Neb. 139, Johnson brought a suit to enjoin Hahn, who was county treasurer, from offering for sale or selling at public tax sale certain real estate for the taxes of 1870. Johnson admitted that taxes had been legally assessed upon this real estate, and were delinquent and a lien thereon, and alleged that Hahn, as county treasurer, was about to sell it for these delinquent taxes, and as a ground for injunction alleged that he was possessed of sufficient personal property in the county where he resided, and in which the land was situate, out of which the taxes on the land could be made. The revenue law in force at that time provided that the treasurer should only sell real estate for delinquent taxes thereon after he had exhausted the owner's personal property. The court held, in effect, that the treasurer was without jurisdiction to sell until he had exhausted the personal property of the landowner, and that such sale, if made, would be illegal and absolutely void, and issued the injunction as prayed.

In *Pettit v. Black*, 8 Neb. 52, the lands were sold in September, 1872, for the delinquent taxes of the years 1869, 1870, and 1871, and at the time the sale was made the landowner was possessed of sufficient personal property situate in the county in which he resided, and in which

the real estate was situate, out of which the real estate taxes could have been collected, and the court, following *Johnson v. Hahn, supra*, held that the sale made of the real estate by the treasurer was void, because the treasurer was without jurisdiction to make it until he had exhausted the personal property of the real estate owner. The court said: "In this case there is evidence that the county treasurer went through the forms of a sale of these lands, but that he did so in the absence of certain conditions precedent, which * * * were not only necessary to the validity of such sale, but the absence of which renders such sale absolutely void; in other words, render such proceeding no sale. * * * Now while this sale was inoperative to pass even an inchoate title to the lands, yet, together with the receipt and retention of the money from Black, it was sufficient as the foundation for the ratification by the county of the sale and transfer of its lien for these taxes to him. It will be presumed that the county treasurer paid the money received from Black into the county treasury, and that the county, having retained the same for several years, has ratified the acts of her officer in respect to the same. Black will therefore be subrogated to all the rights of the county in the premises." This is the first case in which the rule or doctrine under consideration was announced in this state, and that it has been uniformly adhered to ever since is evident from an examination of the cases just cited. The rule or doctrine that a purchaser at a tax sale will in equity be subrogated to the liens of the public against the property if the title of the purchaser fails because the sale was void is denied in some jurisdictions, and the denial is placed upon the ground that subrogation must rest upon involuntary payment and that a purchaser at a tax sale is a volunteer. But the rule under consideration in force here is a just and equitable one. It has been in force in this state for twenty years, has become a rule of property, and it should not now be disturbed, even if contrary to the weight of authority. This

rule cannot be said to be a creature of this court. The authority for the doctrine is found in the revenue legislation of the state. From 1871 to 1879 the revenue laws of this state, in express terms, provided that whenever the title acquired by a purchaser at a tax sale should fail, such purchaser should have a lien on the real estate so purchased for the full amount of his purchase-money, with interest, and a lien upon such real estate for all taxes lawfully assessed against the same which such purchaser might pay. (See Session Laws 1871, p. 82, sec. 7.) This act was repealed by the revenue law of 1879, and that act provided that when, by mistake or wrongful act of the treasurer or other officer, land is sold on which no tax is due, the county shall save the tax purchaser harmless. (Compiled Statutes, ch. 77, art. 1, sec. 131.) By section 179 of said revenue act it is provided that the owner of a certificate of tax sale shall be deemed the assignee and owner of all the liens for taxes which the public had upon the real estate described in such tax certificate and for which it had been sold; and that such owner may foreclose such tax certificate as a mortgage for the amount paid for the real estate at the tax sale and for all subsequent and prior taxes paid by him which were valid liens upon such real estate. Now, what was the object of this legislation? It was designed as an incentive and an inducement to persons to purchase real estate offered for sale by county treasurers for the nonpayment of delinquent taxes thereon so that the state might collect its revenues and discharge its obligations; and the legislature, having in mind the abhorrence of the courts for all forfeitures and the disposition upon their part to put a strict construction upon revenue laws which deprived the citizen of his property for a tax much less than its value, provided that in no event should a purchaser at a tax sale whose title failed lose his money. If one purchased at a tax sale real estate on which no tax was due at the time, then the county was to hold the purchaser harmless by reimbursing him the money he had

paid out at such tax sale; and if the land was liable for taxation, if taxes were due and delinquent against the land, then the owner of a tax-sale certificate was declared to be the assignee and the owner of the liens which the public had against that land and for which the public had sold or attempted to sell it.

But it seems to be the contention of the appellee that though the appellant here may have acquired the liens which the public had against the real estate in controversy by his purchase at the treasurer's alleged void sale, still the appellant did not acquire the right to bring an action to foreclose this tax lien, because the county could not have maintained a suit to foreclose its lien. Of course, if this sale was void, the purchaser thereat acquired no other or different right than the public had, and the question therefore is, Can a county maintain an action in the courts to foreclose and enforce a lien which it has upon real estate for the non-payment of delinquent taxes thereon? The legislatures of 1879 and 1881 enacted what are now articles 3 and 4 of our present revenue law. (Compiled Statutes, ch. 77.) By these enactments county authorities were expressly authorized to purchase from the county treasurer any real estate which had been advertised and offered for sale by him and remained unsold for want of bidders, and in the name of their county foreclose the certificates of tax sale issued to them by the county treasurer. But these provisions of the revenue law have no application to the case at bar, as the real estate in controversy, under the theory of the appellee, has never been sold at all, and therefore the precise question is, May a county maintain an action in the courts to foreclose the public's lien upon real estate for the delinquent taxes thereon without the real estate having been first sold at public sale by the county treasurer? In 1875 the legislature enacted what is now article 5 of our revenue law. Section 2 of this act provided that any person or corporation possessing a certificate of a treasurer's tax sale may foreclose the same according

to the provisions of the act. The other class of cases provided for is found in section 1 of the act, which provided that any person or corporation having, by virtue of any provision of the revenue law of the state, a lien upon any real property for taxes assessed thereon may enforce such lien by an action in the nature of foreclosure of a mortgage for the sale of so much of such real estate as may be necessary to discharge the taxes and interest. It is to be observed that section 2 of the act under consideration applies to persons or corporations who have become purchasers at a tax sale and hold tax-sale certificates, while section 1 of the act applies to persons or corporations having a lien on real estate by virtue of some provision of the revenue law. Now, the various counties of the state act as trustees or agents for the state and for the various cities, villages, school districts, etc., within such counties for the purpose of collecting the public revenue; and by section 138 of the revenue law the taxes on real estate are declared to be a lien thereon from the first day of April in the year in which they are assessed until they are paid. By other provisions of the revenue law taxes upon real estate become due on the first day of October of the year in which they are assessed and become delinquent upon the first day of May of the succeeding year. But by section 109 of the revenue act real estate is not liable for sale for the non-payment of taxes due thereon until the first Monday of November of the year succeeding the year in which they are levied. If, therefore, a county is a person within the meaning of section 1 of said article 5 of the revenue law, we perceive no reason why a county may not enforce a lien for taxes against real estate by an ordinary foreclosure suit in a court of equity after the taxes on such property have become delinquent and after the time the property becomes liable for sale for the non-payment of such taxes. This court, in *Lancaster County v. Trimble*, 34 Neb. 752, and in *Lancaster County v. Rush*, 35 Neb. 119, expressly held that a county is a person within the meaning of said section 1 of said article 5. So

much then for the statutory authority of a county to maintain a suit to foreclose the lien of the public against real estate for the non-payment of taxes thereon. But it seems that the right of a county to maintain a suit in equity to foreclose the public's lien against real estate for the non-payment of taxes thereon exists independently of statute. Such was the ruling of the supreme court of Iowa in *McInery v. Reed*, 23 Ia. 410. (See, also, *Mayor v. Colgate*, 2 Kern. [N. Y.] 140; *United States v. Pacific R. Co.*, 4 Dill. [U. S.] 66.) These cases rest upon the principle that the grant of a lien in any given case of necessity carries with it all the usual modes of enforcing it known to the law. Therefore, if we adopt the view of the appellee that the tax sale in controversy was void, nevertheless such sale was effective as an assignment of the public's lien and its right to enforce such lien upon this real estate,—and included in the right of enforcement was the right of the public to maintain an action to foreclose its tax lien,—without the property having been first sold by the county treasurer.

7. Another defense is that the property in controversy was sold for the delinquent taxes of 1888 only; that at that time there existed taxes against this property which were delinquent and liens thereon for the previous years. The duty of the treasurer in selling property for the delinquent taxes of 1888 was to sell it for all taxes due and delinquent and which were liens thereon for all previous years. He had no authority or jurisdiction to sell real estate for the 1888 taxes without including in such sale all taxes which were liens upon the real estate for all prior years; and because of his omission to include in his sale taxes which were liens against the real estate for the years prior to 1888 the sale was void. But though, as we have already seen, such sale was void as a tax sale within the purview of the revenue act, it was nevertheless operative and effective as an assignment of the public's lien on the real estate to the attempted purchaser thereat. It remains to be said that the purchaser at the

sale in controversy acquired no greater interest in the property than the public had, and is therefore not entitled to any greater rate of interest upon the taxes paid by him than such taxes were drawing at the time he paid them. (*Adams v. Osgood*, 42 Neb. 450.)

The decree appealed from is reversed and the cause remanded to the district court, not for retrial, but with instructions to enter a decree in favor of Grant as prayed in his petition, deducting, however, from the amount found to be due him one-third of the 1888 taxes paid by him and one-eleventh of the 1884 and 1886 taxes paid by him; the appellant to have interest on the amounts paid by him, from the date of their payment until the date of the decree, at the same rate the taxes were drawing when paid; the decree to draw seven per cent interest.

REVERSED AND REMANDED.

NORVAL and SULLIVAN, JJ., concur.

RYAN, C., dissenting.

I cannot assent to certain propositions upon which it is attempted to found the rights of the appellant, and I shall now state my grounds of objection.

Whatever rights or remedies the appellant possesses depend for their validity upon a private sale made by the county treasurer to him. It is not questioned that the treasurer had no warrant from the county clerk for commanding the collection of the taxes, when, as such treasurer, he sold the land and issued to appellant a certificate evidencing such sale. In the opinion to which I take exceptions it is sought to sustain the rights of the appellant to collect the taxes as assignee under said sale on the theory, first, that the warrant is not essential to clothe a treasurer with jurisdiction to sell real estate for the non-payment of taxes which are delinquent and a lien thereon—the county treasurer's power to sell not being derived, as it is said, from the warrant, but from

sections 109 and 113 of the revenue law (Compiled Statutes, ch. 77, art. 1); second, even though the warrant is essential to a valid sale, nevertheless it is insisted that a sale without the warrant operates to transfer, by an equitable assignment, the rights of the county to the purchaser; third, from these propositions it results, as claimed, that the purchaser can maintain an equitable action for the foreclosure of the lien to which he has been subrogated by a sale made by the county treasurer without the authority of a warrant empowering him to collect taxes.

In the case of *Reynolds v. Fisher*, 43 Neb. 172, it was said: "The warrant provided for in this section is the treasurer's authority for enforcing the collection of any and each particular tax of the list to which it is attached, when it becomes necessary to resort to any of the proceedings provided by law. To collect the tax, then, the warrant must be in the hands of the collector, and, in this state, attached to the tax list, as his authorization to institute such proceedings. If he proceeds without it, he becomes a trespasser. An officer of the law who makes a levy must be empowered to do so by the proper writ in his possession. So with the treasurer. The warrant required by the law to be attached to the tax list is the source of the right to use the means of collection provided by the statutes." There does not seem to me to be any grounds on which to assume that this language is applicable alone to the seizure and sale of personal property, but such is the assumption in the opinion to which I object. This limitation is justified in that opinion on the theory that taxes on personal property become a lien on the personal property of the person assessed from the time the tax books are received by the collector, whereas the lien on real property comes into existence on the first day of April in each year, irrespective of the time of delivery of the tax list to the treasurer. In the case at bar there was no warrant attached to the tax list. To constitute a tax list, within the pur-

view of the statute, the warrant is indispensable, for section 83, chapter 77, Compiled Statutes, is in this language: "The tax list shall be completed and delivered to the county treasurer on or before the first day of October annually, and before its delivery the county clerk shall attach a warrant under the seal of the county, which warrant shall be signed by said clerk, and shall, in general terms, command the said treasurer to collect the taxes therein mentioned according to law; but no informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes or sales or other proceedings for the collection of taxes as provided for in this act." If the warrant is essential to constitute the tax list which justifies the treasurer in collecting taxes, no argument can be founded on the assumption that a sale can take place without such warrant being attached. I am not unmindful that in Iowa the tax list without a warrant has been held the treasurer's sufficient authority for selling real property. In the opinion herein dissented from the proposition relied on is thus stated: "The taxes are a lien upon the real estate from the first day of April in the year in which they are assessed. One of the statutory methods of enforcing and satisfying this lien is by a sale of the property; and to effect this sale no seizure of the property is necessary, and authority to make the sale is conferred by express provisions of the statute. In support of these views see *Parker v. Sexton*, 29 Ia. 421; *Sully v. Kuehl*, 30 Ia. 275; *Johnson v. Chase*, 30 Ia. 308; *Hurley v. Powell*, 31 Ia. 64; *Rhodes v. Sexton*, 33 Ia. 540. Our conclusion therefore is that to invest the treasurer with jurisdiction to seize personal property for the satisfaction or enforcement of a tax lien thereon the warrant provided by section 83 of the revenue law must be attached to the tax list, but that the presence of such a warrant attached to the tax list is not essential to invest the treasurer with jurisdiction to sell real estate for the non-payment of taxes which are due and a lien thereon;

that the treasurer's authority and jurisdiction to make such a sale is derived from the express provisions of sections 109 and 113 of the revenue act." Of the sections thus invoked section 109 prescribes when and where the county treasurer shall offer at public sale the lands on which the taxes for the previous year shall not have been paid, how the sale may be adjourned, if necessary, the notice by publication which must precede the sale, and what such notice shall contain. That I may be strictly accurate it is necessary that I should say that this section also provides for defraying the expenses of advertising, though this is immaterial to our present inquiry. Section 113 of chapter 77, Compiled Statutes, provides that after the tax sale shall have closed and the treasurer has made his return thereof to the county clerk, the county treasurer shall sell at private sale, at his office, the unsold lands, to any person who shall pay the amount of taxes, penalty, and costs, and shall issue certificates showing such sale. These certificates are to be issued in duplicate, but it is unnecessary further to describe the provisions of this section, for they merely refer to the recitations which must be embodied in the aforesaid duplicate certificates.

This abstract of these sections, upon comparison, serves to show the differences between the statutes of this state and those of Iowa, of which a synopsis is given in the opinion to which I shall now refer. *Parker v. Sexton, supra*, very properly was first in the citation of Iowa cases on this subject, for the others cited came after and followed in its wake. In the quotation which I shall now make from this case it will be noted that there is no distinction, or room for distinction, between the power to sell real and to sell personal property; and if its reasoning is to prevail in this state, it necessarily follows that *Reynolds v. Fisher, supra*, must be overruled. Again, in the statutory provisions of Iowa which we shall find noted in the opinion in *Parker v. Sexton, supra*, there are special features which have been seized upon to justify

dispensing with the necessity of a warrant, and these features have no place in our statute. I note these matters in advance, for, perhaps, some special excuse should be offered for quoting as freely as I shall, as follows: "The next question made is upon the fact * * * that the tax warrant is not attested by the official seal of the board, instead of the seal of the district court, and it is claimed that this informality renders the sale of the land void. A careful analysis of our revenue statute will show the error of this claim. Revision section 748: 'An entry shall be made upon the tax list showing what it is and for what county and year it is, and the clerk of the county board of supervisors shall attach thereto a warrant, under his hand and the official seal of said board, in general terms requiring the treasurer to collect the taxes therein levied, according to law, and no informality in the above requirements shall render any proceedings for the collection of taxes illegal. The clerk of the county board of supervisors shall cause the tax book to be delivered to the treasurer of the county by the first Monday of November and his receipt taken therefor, and such list or book shall be full and sufficient authority for the collector to collect taxes therein contained.' Now, it will be observed that by the provisions of this section the tax warrant requires the treasurer to collect, and is his authority for the collection of, the taxes in the tax list contained; but it does not authorize him to collect taxes therein named by distress and sale of personal property; nor to sell real estate; nor does it exempt him from personal liability for illegal or erroneous taxes collected by him. In short, the tax list and warrant, as provided by this section, becomes simply the authority of the treasurer to collect or receive the taxes—nothing more. And if there were no other provisions in our revenue law respecting the enforcement of the collection of taxes, this section would not authorize the seizure or sale of either personal or real property. It was directly held by this court in *Ham v. Miller*, 20 Ia. 450, that the express power

given to a city in its charter to 'provide for the assessment of all taxable property' and 'to collect taxes,' etc., did not include the power to sell or convey real property in case of non-payment; and this adjudication was reaffirmed in *Merriam v. Moody*, 25 Ia. 163, and it was therein stated that all the adjudged cases, without exception, were to the same effect; so that if there was nothing more in our revenue law giving authority therefor than the tax list and warrant as provided in this section 748, there would be no power to either seize or sell property for the non-payment of taxes. It is clear, then, upon general principles, that the power to sell does not come from the tax warrant. It is further provided by section 751 that the treasurer, after making entries upon the tax list of the delinquent taxes for the previous years, 'shall proceed to collect the taxes, and the list and warrant shall be his authority and justification against any illegality in the proceedings prior to receiving the list,' etc. This, without giving him any additional authority, simply exempts him from a personal liability to which he might otherwise be subject. And the idea that the tax warrant confers no other authority than merely to collect or receive the taxes finds further support in section 756: 'No demand of taxes shall be necessary, but it is the duty of every person subject to taxation to attend at the office of the treasurer (unless otherwise provided) at some time during the time mentioned in a previous section of this act and pay his or her taxes; and if any one neglects to pay them before the first day of February following the levy of the tax, the treasurer is directed to make the same by distress and sale of his or her personal property, excepting such as is exempt from taxation, and *the tax list alone* shall be sufficient warrant for such distress.' So that the tax warrant is fully exhausted and its object accomplished when it clothes the treasurer with the authority to collect the taxes; for when it comes to enforcing the payment by distress and sale of personal property the tax list alone is the authority—the tax warrant has no

connection with it. And for the sale of real property for the payment of the taxes there is an express and independent statutory command and authority found in section 763: 'On the first Monday of October in the year 1860, and in each year thereafter, the county treasurer is required to offer at public sale, at the court house or at the office of the county treasurer, all lands, town lots, or other real property on which taxes of any description for the preceding year or years shall have been delinquent and remain due and unpaid; and such sale shall be made for and in payment of the total amount of taxes, interest, and costs due and unpaid on such real property.' Section 764 directs the manner of advertisement or notice of sale, etc., and it is then provided by section 765, that 'the county treasurer shall attend at the court house in his county, or at his own office as hereinbefore provided, on the day of sale, and then and there, at the hour of 10 o'clock in the forenoon, proceed to offer for sale, separately, each tract or parcel of real property advertised for sale on which the taxes and costs shall not have been paid.' The mandate and authority for the sale of real estate for taxes are very clearly and specifically given by these provisions themselves, and that, too, without any reference to or aid from the tax warrant. The latter is simply an authority to collect or receive the taxes; the power to sell real estate is derived directly from the statute. We conclude, therefore, that whether the tax warrant in this case was attached by the clerk under the direction of the board or properly attested and sealed are questions not at all connected with the validity of the sale and cannot affect the result."

It is worthy of special note that in the above quotation of the language reproduced from section 756 there were italicized the words "the tax list alone" in the clause "and the tax list alone shall be sufficient warrant for such distress." This was a provision referring to payment of taxes by distress and sale of personal property, and I cannot reconcile this construction with what

is conceded to be the import of the opinion in *Reynolds v. Fisher, supra*. The Iowa statute, as shown by the above quotation, requires that before the tax list is intrusted to the county treasurer there shall be attached to it by the clerk a warrant requiring the treasurer to collect the taxes therein levied, according to law. In *Corbin v. Hill*, 21 Ia. 70, the opinion was prepared by Cole, J., whose language in *Parker v. Sexton, supra*, we have freely quoted. In *Corbin v. Hill, supra*, he said: "The tax warrant has the force of an execution and is the authority for the collection of many thousands of dollars and for the sale of the property and homesteads of individuals, and it is but the merest justice that the records shall show the legal authority for the person or officer issuing such process to so issue it." The author of this opinion, at its close, without giving his reasons, dissented therefrom, and in *Parker v. Sexton, supra*, disclaimed its authority as applied to the necessity of a tax warrant. The proposition that the warrant has the force of an execution and is the treasurer's authority does not rest alone on the above case, but is recognized in every other case I have been able to find involving that question, as the following citations serve to demonstrate:

In *Den v. Stewart*, 4 Dev. & B. [N. Car.] 386, there was under consideration the validity of a tax deed, and it was said: "The certified copies of the tax lists delivered by the clerk to the sheriff are, in law, his warrants of distress or executions against the property of each individual for the satisfaction of the money due on them. If there is no personal property to be found, the sheriff is to distrain the land and, after advertising the same as the law directs, and also performing the duties prescribed by the act of 1819 (1 Revised Statutes, ch. 102, secs. 52, 53), he will sell the same, or so much thereof as shall be sufficient for the payment of the taxes due and the costs of the sale. It seems to us, therefore, that until it be shown by competent evidence that a specific tax has been legally ascertained to be due, the authority of

the sheriff to sell for a tax does not appear; and as his sale can operate to transfer title only by force of his authority, unless that be shown, his deed passes no estate."

In *Gossett v. Kent*, 19 Ark. 602, a bill in chancery had been filed for the cancellation of a tax deed because of certain irregularities in the proceedings leading up thereto, and in respect to the question under consideration English, C. J., for the court, said: "The county court, after correcting any errors that may be made to appear in the assessment list returned by the assessor, causes to be stated thereon the state and county tax to be collected from the persons and property embraced in the list; and distinguished into the two classes above indicated. (Sec. 35.) The process of assessment, thus completed by the action of the county court, becomes, it is said, in the nature of a judgment. (Blackwell, Tax Titles 199.) The tax book, which is but a copy of the assessment list thus perfected, is then delivered to the collector (secs. 35, 36), attached to which is a process in the nature of an execution. (Sec. 40.)" It was held in this case that the liability of the land to sale was to be determined by the conditions existing when the warrant and tax list went into the hands of the sheriff, and not by a circumstance which afterward arose—in this case the departure of the owner of the property into another state.

Hannel v. Smith, 15 O. 134, was an action of ejectment brought by the holder of a tax deed. The tax sale had been conducted under the authority of the following statutory provision: "The auditor of state, at the time he transmits the county duplicate for the year 1831 to the several county auditors, shall also transmit to each county auditor a list of the forfeited lands lying in such county, which list shall set forth the name or names of the person or persons to whom such lands stand charged with taxes, the amount due thereon for each year, including the year 1831, and for what years, and shall certify and sign said list and affix thereto the seal of his office." The certificate which it was contended fulfilled the above requirements was as follows:

"AUDITOR OF STATE'S OFFICE,

"COLUMBUS, OHIO, June 5, 1843.

"*Auditor of Hamilton County:* You will carefully examine the foregoing list and strike from it all such lands as you may know to be erroneously forfeited, taking care that none escape the duplicate of taxation. You will then proceed to advertise and sell the remainder, according to the original act for the sale of forfeited lands and the amendatory act passed February 15, 1842, etc.

"JOHN BROUGH,

"*Auditor of State.*

"By J. B. THOMAS."

In the discussion of this certificate it was said in the opinion of the court delivered by Hitchcock, J.: "It is apparent from this document that it was annexed to a list, called a list of forfeited land, but it was not such a verification of that list as the law required. * * * This instrument is not only without the signature of the auditor, but it is not verified by his official seal, nor is it therein certified that the list to which it is attached is correct. It is defective, and would no more authorize the county auditor to sell the land contained in the list than a letter written by a clerk of a court and directed to a sheriff, informing him that a judgment had been rendered in a certain case, would authorize that sheriff to levy upon and sell the lands of a judgment debtor."

In *State v. Woodside*, 8 Ired. [N. Car.] 104, it was said: "To enable the sheriff to enforce by distress the collection of the taxes from the individual who has given in his property as required by law, he must be provided with a copy of the returns in the office of the clerk, duly certified by the clerk, that the taxpayer may see the amount which he is bound to pay; otherwise he may refuse to pay and the sheriff cannot distrain his property. The certified copy is his warrant of distress to collect the taxes (*Slade v. Governor*, 3 Dev. [N. Car.] 365; *Kelly v. Craig*, 5 Ired. [N. Car.] 131), and it is the duty of the sheriff to apply to the clerk in proper time for such a copy."

In *Hilbish v. Hower*, 58 Pa. St. 93, it was said, on the authority of *Pearce v. Torrence*, 2 Grant [Pa.] 82, and *Stephens v. Wilkins*, 6 Barr [Pa.] 260, that the authority of a collector of taxes to collect is his warrant, and that without a warrant the collector becomes a trespasser as soon as he meddles with the property of a taxpayer. This case involved the validity of a seizure and sale of personal property, but the above principles were stated without qualification or limitation.

In *Van Rensselaer v. Witbeck*, 3 Seld. [N. Y.] 517, it was held that, as the warrant to the collector consists in part of the assessment roll, of which the property certificate is a necessary element, the want of the latter is a defect apparent upon its face and renders the process no protection to the officer.

The case of *Donald v. McKinnon*, 17 Fla. 746, was ejectment, wherein plaintiff claimed title through a tax sale as well as under a judicial sale. To invalidate the tax deed there was an offer on the trial to show by one Gamble, the tax collector of the revenue, that there was no warrant attached to the assessment roll under which the tax sale was had. This evidence was excluded. In the discussion of the admissibility of this evidence the court said: "The law requires that to the assessment roll delivered to the collector of revenue a warrant under the hand of the assessor should be annexed in the following form, to-wit [giving the form, etc.]. Without this warrant 'delivered by the officer of the law designated for that purpose, the collector has no authority to proceed to enforce the payment of taxes.' This being omitted, the performance of all other acts, such as due advertisement, will lay no foundation for the sale of land. (*Kelly v. Craig*, 5 Ired. [N. Car.] 131; *Van Rensselaer v. Witbeck*, 7 N. Y. 517; *Homer v. Cilley*, 14 N. H. 85; Hilliard, Taxation 396; Cooley, Taxation 292; Blackwell, Taxation 167.) The warrant in this proceeding fills the place and performs the functions of a summons. It is the writ to the officer by which he is authorized for public pur-

poses to collect the tax, or, in the event of its non-payment, to subject the property to sale. For this reason we think the court erred in rejecting the proposed testimony of Gamble, the person who at the time of the sale was the collector of revenue and who proposed to produce the assessment roll." If the warrant is equivalent to, and fulfills the purpose of, an execution, as seems to be quite uniformly held, the mere fact that the tax is a lien on real property, and may be satisfied by a sale thereof, no more authorizes a treasurer to sell without a warrant than would the fact that under the provisions of sections 476 and 477, Code of Civil Procedure, lands are subject to be sold, and are under the lien of a judgment, authorize a sheriff, without an execution, to sell such lands. I have found no case going even as far as those from Iowa, and, as already intimated, I do not assent to the proposition that even they sustain the construction attempted to be placed upon our statute.

The second proposition to which I cannot yield assent is that upon the theory of an equitable assignment, independently of the authority of a warrant, appellant was subrogated to the rights of the county with respect to maintaining an action for the recovery of the taxes which he had paid. The cases cited to show that where a sale which failed to confer title nevertheless operated to subrogate the purchaser to the rights of the county were abortive sales, by reason of some defect in the procedure and not from lack of jurisdiction. It may be urged that the failure to attach the assessor's oath to his assessment is not a mere irregularity, but as directly impairs the jurisdiction as does the failure to accompany the tax books with a warrant to the treasurer. To my mind there is, between these a clear distinction as to the office of these instruments. The warrant is the treasurer's sole authority to act, while the oath of the assessor is merely evidence of the correctness of the assessment. The assessment is essential to enable the board of supervisors to levy the taxes to be collected. It is a matter

of evidence upon which that board exercises its judgment for the purpose indicated. After the assessment has been acted upon, the inquiry as to whether or not there was due proof of the correctness of the assessment when the board acted upon it becomes, not an inquiry into a jurisdictional, but into an evidential fact. The attack upon a sale subsequently made draws into question, in a sort of collateral way, the sufficiency of the proofs upon which the board acted. As to the warrant by virtue of which the treasurer conducts the sale the inquiry is as to a jurisdictional fact, which, as I understand it, is always open to question. In all of the cases cited there is not to be found one which upholds the doctrine that where the treasurer was entirely without jurisdiction his acts, nevertheless, operated to confer rights upon the purchaser. If one may assert rights with respect to taxes merely because he has voluntarily paid them to one who has no authority to coerce payment, this will be the only direction in which the law encourages and rewards this sort of intermeddling, and I see no justification for such a departure from a universally accepted principle.

Upon the proposition that when a special remedy is given by statute there can be no resort to the courts unless this course be expressly authorized, I have not felt called upon to invoke the decisions of the tribunals of states other than this. The doctrine was enforced in a tax case, *Richards v. County Commissioners, Clay County*, 40 Neb. 45, wherein it was said of section 89, chapter 77, Compiled Statutes: "It will be observed that the section quoted authorizes actions in three cases only: First, where no personal property of the delinquent can be found, the treasurer or town collector, when directed so to do by the commissioners or supervisors, may commence an action in the district court of the county where the tax is levied; secondly, if any person having personal property assessed shall, in the opinion of the treasurer or town collector, be about to remove out of the county,

or in any other manner seek to put his personal property out of the reach of the treasurer or collector, the treasurer and collector shall collect such taxes by distress or attachment, as the case may require; and, thirdly, if any person owing taxes remove, the treasurer and town collector shall forward such tax claim to the treasurer or tax collector at the adopted residence or place of abode of such taxpayer, where the taxes may be collected by distress or civil action. In the last case the treasurer or tax collector to whom such claim is forwarded is authorized to institute the action in the name of the commissioners or supervisors of the county from which such tax claim was forwarded. No other provisions for suit are found. This case is not within any of these classes." In the case just quoted from the attempt was to attach property subject to taxes in Clay county after its removal to York county, under the authority of the general statutory provisions governing such proceedings, but this right was denied for the reasons above indicated. This doctrine, that where special remedies are given for the enforcement of rights, no resort can be had to general provisions or the protection of those rights, has been repeatedly enforced in the jurisprudence of this state. (See authorities cited in *Richards v. County Commissioners, Clay County, supra, Keith v. Tilford,* 12 Neb. 271, *Reynolds v. Fisher, supra,* and *German-American Fire Ins. Co. v. City of Minden,* 51 Neb. 870, with the cases therein referred to.)

In the outset I stated the propositions in which I could not concur, and have given reasons which, I think, justify my dissent. It would be alike useless to recapitulate these propositions and the arguments to sustain them. To me they are sufficiently convincing to prevent my concurrence in the opinion which is to determine this appeal; hence I do not feel called upon to express my views with reference to other propositions than those which should be determinative of this case.

HARRISON, C. J., and IRVINE, C., concur in this opinion.

GEORGE C. BAILEY V. STATE OF NEBRASKA.

FILED FEBRUARY 9, 1899. No. 10483.

1. **Rape.** A woman not "previously unchaste," within the meaning of section 12, chapter 4, of the Criminal Code, is one who has never had unlawful sexual intercourse with a male prior to the intercourse with which the prisoner stands indicted.
2. ———. The object of the statute is to protect the virtuous maidens of the commonwealth,—to protect those girls who are undefiled virgins; and a female under eighteen years of age and over fifteen years of age who has been guilty of unlawful sexual intercourse with a male is not within the act.
3. ———. The gist of the crime denounced by this statute is the defilement of a virgin with her consent, over fifteen and under eighteen years of age, by a man over eighteen years of age.
4. ———. The prisoner was indicted for rape under the statute for having in Nebraska had sexual intercourse, with her consent, with a girl over fifteen and under eighteen years of age and not "previously unchaste." The evidence showed that the female, after she was fifteen years of age and before her sexual intercourse with the prisoner in Nebraska, had had illicit sexual intercourse for the first time with him in the state of Iowa, and that she had sustained such relations with no other man than the prisoner. *Held*, That the evidence would not sustain a conviction.
5. ———: INFORMATION. In such an indictment may be included all acts of unlawful sexual intercourse which occurred between the prisoner and the prosecutrix in the state of Nebraska after the female became fifteen years of age and which were not barred by the statute of limitations.
6. **Criminal Law:** ESTOPPEL OF ACCUSED. The state, in a criminal prosecution, may not invoke against the prisoner the doctrine of estoppel.
7. ———: CONVICTION. To sustain a criminal conviction it is not enough for the state to show that the prisoner indicted has violated the spirit of the statute, but the evidence must show beyond a reasonable doubt that he has offended against the very letter of the law.

ERROR to the district court for Douglas county. Tried below before SLABAUGH, J. *Reversed.*

Macfarland & Altschuler, for plaintiff in error.

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General,* for the state.

References: Greenleaf, Evidence, sec. 54; *State v. Fitzsimmons,* 9 Am. Crim. Rep. [R. I.] 347; *McCombs v. State,* 8 O. St. 643; *State v. Forshner,* 43 N. H. 89; Wharton, Criminal Law secs. 226, 311, 1151; *State v. Bryan,* 34 Kan. 63; *Ingram v. Plaskett,* 3 Blackf. [Ind.] 450; *Snowden v. United States,* 9 Am. Crim. Rep. [D. C.] 449; *Hardtke v. State,* 67 Wis. 554; *Clough v. State,* 7 Neb. 342; *Yeomans v. State,* 21 Neb. 176.

RAGAN, C.

Section 12 of chapter 4 of the Criminal Code of this state, among other things, provides: "If any male person, of the age of eighteen years or upwards, shall carnally know or abuse any female child under the age of eighteen years with her consent, unless such female child so known and abused is over fifteen years of age and previously unchaste, every such person so offending shall be deemed guilty of rape." George C. Bailey was indicted in the district court of Douglas county, under the statute just quoted, for having on June 13, 1898, had sexual intercourse with one Clara Blue with her consent, she then and there being a female of the age of sixteen years and not previously unchaste. Bailey was convicted and sentenced to the penitentiary, and brings that judgment here for review on error. Of the numerous assignments of error argued in the brief it would subserve no useful purpose to notice but two.

1. The evidence in the bill of exceptions shows, without contradiction, that in June, 1898, Clara Blue was between sixteen and seventeen years of age; that no man had ever had sexual intercourse with her except the prisoner; that in March of that year she lived in the state of Iowa; that the prisoner formed her acquaintance at a hotel in Pacific Junction, in that state, in the month of March, 1898; that with her consent he then had sexual

intercourse with her in Iowa; that subsequently in June of said year she came to the city of Omaha, in this state, and on the 13th of said month, and at divers other times before and after that date, he again had sexual intercourse with her in this state, she consenting thereto. As to the meaning of the phrase "previously unchaste," found in the statute just quoted, the district court instructed the jury as follows: "By the phrase 'unchaste,' as used in the law defining rape, is meant, lewd; having an indulgence of lust; and, as applied to a female child previously unchaste, means that she was previously, before the act complained of, lewd, or had an indulgence for lust." The prisoner took an exception to the giving of this instruction. We do not approve of the construction placed upon the phrase in the statute as embodied in this instruction. The definition of an unchaste woman, within the meaning of the statute, is by the district court given as a lewd woman,—a woman possessing an indulgence for lust; or, as we understand the court's definition, a woman, to be unchaste, within the meaning of this statute, must be of notorious lewd and lascivious habits; in the ordinary language of the day, she must be a "prostitute." We do not think this is the meaning of the statute. A woman not "previously unchaste," within the meaning of the statute, is one who has never had unlawful sexual intercourse with a male prior to the act of intercourse for which the prisoner stands indicted. The object of the statute quoted was to protect the virtuous maidens of the commonwealth,—in other words, to protect those girls who were undefiled virgins; and a female under eighteen years of age and over fifteen years of age who has been guilty of unlawful sexual intercourse with a male is not within the act.

2. But the evidence in this record does not sustain the verdict on which the judgment rests. The material allegations of the indictment are: That the prisoner was a man over eighteen years of age; that in Douglas county Nebraska, with her consent, he had sexual intercourse

with Clara Blue; that she was then and there sixteen years of age, and not "previously unchaste." The latter averment was not only not proved by the state, but the undisputed evidence shows that Clara Blue, prior to the date of her intercourse with the prisoner in Nebraska, was unchaste. The fact that she was first deprived of her virginity by the prisoner does not strengthen the state's case. That first illicit sexual act of the female and prisoner occurred in the state of Iowa. Had the first defilement of the girl by the prisoner occurred in Nebraska instead of Iowa on the date it did, and which was prior to the one charged in the indictment, then the first defilement would be no defense to the prisoner on an indictment for the second, since both would have been within the statute of limitations and each intercourse a part of the crime charged in the indictment. But to sustain this conviction on this evidence is to punish the prisoner here for the crime committed in another jurisdiction. The statute is a harsh one and the penalties for its violation severe. To sustain a conviction under it the evidence must show beyond a reasonable doubt, among other things, that the female with whom the sexual intercourse was had was, prior to that intercourse, sexually pure,—chaste as Diana. To show that she was chaste prior to the sexual act in Nebraska but for her previous seduction by the prisoner in another state does not satisfy the statute. Suppose the statute of limitations for this crime was one year instead of three; suppose the prisoner in Nebraska deprived this girl of her virginity when she was sixteen and she did not again carnally know any man until she was seventeen and a half, and then, with her consent, sexual intercourse occurred between herself and the prisoner and he is indicted therefor. Is it not clear that the intercourse which occurred when she was sixteen would, if established, afford the prisoner a complete defense? It would, because after the second sexual act she was not chaste. The first illicit intercourse would not be included in and

a part of the crime charged in the indictment; that act would be barred by the statute of limitations. The statute does not punish men for unlawful sexual relations with a prostitute over fifteen years of age, nor for such relations with a female who, though not a prostitute, has already submitted herself to the illicit embraces of a male capable of performing the copulative act.

3. But it is said by counsel for the state that to allow the prisoner to urge as a defense here the intercourse which took place between himself and the prosecutrix in the state of Iowa would be permitting the accused to take advantage of his own wrong. This is simply saying that the accused is estopped from asserting the truth of his unlawful conduct in another jurisdiction, because that conduct would establish his innocence of the crime with which he is charged with having committed in this state. But the state, in criminal prosecutions, may not invoke against the prisoner the doctrine of estoppel. (*Moore v. State*, 53 Neb. 831.) To sustain a criminal conviction it is not enough for the state to show that the prisoner indicted has violated the spirit of the statute, but the evidence must show beyond a reasonable doubt that he has offended against the very letter of the law. (*Moore v. State*, 53 Neb. 831; Criminal Code, sec. 251.) Here the prisoner is charged with having had in this state sexual intercourse, with her consent, with a girl sixteen years of age, she being prior thereto chaste. At the time the intercourse occurred in this state the female was not chaste. Prior to the prisoner's intercourse with her in Iowa, so far as this record shows, she was chaste, and in Iowa—for we must presume the laws of that state to be the same as ours—he robbed her of her virginity and committed the crime for which he is convicted here. The judgment of the district court is

REVERSED.

STATE OF NEBRASKA V. THOMAS P. KENNARD.

FILED FEBRUARY 9, 1899. No. 10322.

1. **Public Lands.** At the time of the admission into the Union of the state of Nebraska the lands therein occupied in common by the Pawnee Indians, and known as the "Pawnee Indian Reservation," were public lands within the meaning of section 12 of the act of congress known as the enabling act. (13 U. S. Statutes at Large 47.)

2. ———: TITLE. The fee simple title to said lands at said time was in the United States, incumbered only with the right of said Indians to occupy the same.

3. ———: SALE: APPLICATION OF PROCEEDS. By section 12 of said enabling act congress granted to the state of Nebraska five per cent of the proceeds arising from the sale of said lands, which took effect upon the extinguishment of the Indians' right of occupancy and the sale of the lands by the United States.

4. **Claims Against State:** COMPENSATION OF AGENT. *State v. Kennard*, 56 Neb. 254, reaffirmed.

REHEARING of case reported in 56 Neb. 254. *Judgment below reversed.*

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General,* for the state.

Tibbets Bros., Morey & Ferris, and *Talbot & Allen, contra:*

The lands were not public. (*Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733; *Wilcox v. Jackson*, 13 Pet. [U. S.] 498; *Cherokee Nation v. Georgia*, 5 Pet. [U. S.] 1; *United States v. Cook*, 19 Wall. [U. S.] 591; *State v. Delesdenier*, 7 Tex. 76; *Spaulding v. Martin*, 11 Wis. 274; *Buttz v. Northern P. R. Co.*, 119 U. S. 63; *United States v. Forty-three Gallons Whiskey*, 93 U. S. 188; *Polk v. Wendall*, 9 Cranch [U. S.] 87; *Vincennes University v. Indiana*, 14 How. [U. S.] 268; *United States v. Payne*, 2 McCrary [U. S.] 289; *Dubuque & S. C. R. Co. v. Des Moines V. R. Co.*, 109 U. S. 329.)

RAGAN, C.

This is a rehearing of *State v. Kennard*, 56 Neb. 254. By section 12 of the enabling act passed by congress April 19, 1864 (13 U. S. Statutes at Large 47), the United States donated to the state of Nebraska five per centum of the proceeds of sales of all public lands lying within the state of Nebraska which had prior to that time been sold, or which should subsequently be sold, by the United States, after deducting expenses incident to such sale. At the time the state was admitted into the Union a tribe of Indians known as the "Pawnees" occupied in common a tract of lands in this state known as the "Pawnee Indian Reservation." After the state was admitted into the Union the United States took such steps as resulted in the extinguishment of the rights of these Indians to the lands in this reservation, sold the lands, and, it seems, used the proceeds of the sale to defray the expenses incident thereto in procuring other lands for the Indians elsewhere, and placed the remaining proceeds of the sale of these lands in the United States treasury to the credit of the Indians. By an act passed by the legislature of the state of Nebraska in February, 1873 (see General Statutes 1873, ch. 59), it seems that the legislature was of opinion that by reason of section 12 of the enabling act the United States was indebted to it for five per cent of the value of the lands lying within the state used as Indian reservations, and five per cent of the value of all lands on which private parties had located military land warrants and land scrip issued for military service in the wars of the United States, and five per cent of the value of all such as had been donated by the United States to railroads. It is also recited in said act that the United States had donated to other states swamp and overflowed lands lying within their borders, but that no such donation or allowance of swamp and overflowed lands had been made to this state, and it seems to have been the opinion of the legislature that all the swamp

and overflowed lands lying within the state belonging to the United States should by it be donated to the state. The act under consideration authorized the governor to employ an agent, in behalf of the state, to prosecute to final decision before congress or in the courts the claim of the state of Nebraska against the United States for the five per cent of the value of the lands disposed of by the United States for any of the purposes already mentioned and for the purpose of procuring from the United States a donation of the swamp and overflowed lands within its borders. The act left the compensation of the agent to be agreed upon by the governor and the agent, but provided, in effect, that the agent should not be entitled to any compensation for collecting from the United States any part of the five per cent cash school fund which had been donated to the state by the United States by section 12 of the enabling act aforesaid. The governor of the state entered into a contract with Kennard in pursuance of the act of the legislature just mentioned, in and by which he authorized Kennard to prosecute and collect the claims of the state against the nation in conformity with the act of the legislature, and that the state should pay him one-half of all moneys, except such cash school fund, he should collect for the state as such agent. Mr. Kennard entered upon the performance of his contract with the governor, and by his efforts induced the secretary of the interior to acknowledge that the United States were indebted to the state of Nebraska in the sum of five per centum of the proceeds of the sale of the "Pawnee Indian Reservation" lands made by the United States subsequent to the admission of the state into the Union; and in pursuance of this decision of the secretary of the interior the United States paid into the treasury of this state $27,000. Mr. Kennard, by permission of the legislature, then brought this suit to recover one-half of that sum. He had judgment in the district court for Lancaster county and the state brought the same here for review, and the judgment of the district

court was reversed. We based our judgment of reversal of this judgment upon the proposition that the lands of the "Pawnee Indian Reservation" were public lands within the meaning of section 12 of the enabling act, and that the only money collected by Mr. Kennard was the five per cent of the proceeds of the sale made of these lands by the United States, and by the terms of his contract he was not to have any compensation for collecting these moneys. Counsel for Mr. Kennard so strenuously insisted that we were wrong in this conclusion that we granted a rehearing. We have again examined the question, with the result that we adhere to our former conclusion.

In 1873 the Great and Little Osage Indian tribes occupied certain lands in common in the state of Kansas. The lands occupied by them were known as Indian reservations. In that year congress passed an act (see 12 U. S. Statutes at Large 772) in and by which it granted to the state of Kansas, to enable a railroad to be constructed between certain points, each alternate section of land, designated by odd numbers, for ten sections in width on each side of said railroad as it should be located. The legislature of the state of Kansas accepted this grant and designated the Leavenworth, Lawrence & Galveston Railroad Company to construct the road and receive the grant of land. The railroad company constructed the road and received from the state of Kansas patents for the alternate sections of this land within these Indian reservations. The United States then brought ejectment against the railway company for the lands lying within the Indian reservations which had been conveyed to the railroad company by the state of Kansas, and the supreme court, by a divided opinion, held that the act of congress granting to the state of Kansas the alternate sections of land within ten sections of this railroad did not vest the state of Kansas with any lands within the Indian reservation. It was conceded that the fee simple title to the Indian reservation lands was in the United

States and that the only title of the Indian was the right to occupy, and because the United States were not invested with possession and the right to possession as well as the fee the court held that the grant did not embrace the lands within the reservations. The principle upon which the case was decided was that all grants are to be strictly construed against the grantee; that nothing passes except what is conveyed in clear and explicit language; and that, strictly construing the act of congress, it would not be held that the United States intended to convey what it did not own, namely, both title and seisin. (*Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 753.) This conclusion of the court was reached notwithstanding the fact that on the same day the act donating these lands to the state of Kansas passed another act of congress went into effect authorizing the president, by treaty or otherwise, to extinguish the rights of these Osage Indians to the lands in their reservation, and that subsequently the title of these Indians to these lands was extinguished, the lands put upon the market and sold by the United States, and the proceeds placed in the United States treasury to the credit of the Indians. In 1864 certain tribes or bands of Sioux Indians occupied in common certain lands in what was then known as Dakota territory, and by an act of congress passed in July of that year (13 U. S. Statutes at Large 365) congress granted to the Northern Pacific Railway Company each alternate section of public lands, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of its line of railway as the same was to be constructed between Lake Superior and Puget Sound. The railroad, as constructed, passed through the lands occupied by these Sioux Indians, and it claimed that the act of congress vested in it the title to these alternate sections of land lying within these Sioux reservations. On the other hand, it was contended that at the time the grant to the Northern Pacific went into effect the United States were not in possession of both the fee title

and the possession and right to possession of these Indian lands; that the grant should be strictly construed, and that the act could not be interpreted to mean that the United States granted the railroad company what it did not own, and the case in 92 U. S. just referred to was relied upon to support that contention. But the national supreme court held that by the act of congress the United States donated to the railroad company all the right and title which it, the United States, had in those lands. (*Buttz v. Northern P. R. Co.*, 119 U. S. 55.) This Northern Pacific railroad case virtually overruled the case in 92 U. S. The doctrine then of the supreme court of the United States is that all Indian lands, all lands occupied in common by the Indians, whether these lands be reservations or not, are public lands, the fee simple title to which is in the United States; that the Indian is but the ward of the nation, and his only interest or title to the lands of which he is in possession is the right to occupy. We think, therefore, that when Nebraska was admitted into the Union the lands of the "Pawnee Indian Reservation" were public lands, the fee simple title was in the United States, and the Indians had only the right of occupancy in those lands, and that an absolute grant by congress to the state of all public lands within her borders would have invested the state with the title to the lands of the "Pawnee Indian Reservation," incumbered only with the Indians' rights of occupancy. The United States then, by paying into the state treasury, at the request and solicitation of Mr. Kennard, of five per cent of the sale of these Indian reservation lands, were simply performing the grant made by the nation to the state by section 12 of the enabling act, as by the grant the United States promised to pay to the state not only five per cent of the proceeds of all public lands lying within the state and which had prior to that time been sold by the United States, but also to pay to the state five per cent of the proceeds of all public lands lying within the state which might after the date of the grant be sold by the United

States. The fact that the United States sold these lands and put the money to the credit of the Pawnee Indians is not a consideration of any importance in determining whether these "Pawnee Indian Reservation" lands were public lands within the meaning of the enabling act. The thing of controlling importance is that the fee simple title to these lands was in the United States. They were, therefore, public lands, and the promise was that when sold by the owner it would pay five per cent of the proceeds of the sale to the state. What the United States did with the money derived from the sale of those lands is unimportant. The judgment of the district court is

REVERSED.

ARLINGTON STATE BANK ET AL., APPELLANTS, V. EDMUND PAULSEN ET AL., APPELLEES.

FILED FEBRUARY 9, 1899. No. 8608.

1. **Wills:** VESTING OF TITLE. Whether the title to the testator's real estate vests at his death in his executors or heirs is not to be determined solely by the presence in, or absence from, the will of some particular words of conveyance, but determined so as to accord with the testator's intention as deducible from an examination of the entire will.

2. ———: EXECUTORS: POWERS: PRESUMPTION. The presumption is that the executors are invested with such power, and all the power, necessary to enable them to carry out the testator's intention with reference to the disposition directed by him to be made of his property.

3. ———: VESTING OF TITLE. The will of a testator directed his executors to pay his debts out of his personal estate, and if that proved insufficient, "to sell and convey" his real estate for that purpose, and "to sell and convey" his real estate and pay the proceeds over in certain proportions to certain heirs. *Held*, That the legal title to the real estate of the testator vested on his death in his executors.

4. ———: CONSTRUCTION. The executors of such will conveyed the testator's real estate to one of his heirs upon the sole consideration that she would mortgage it to secure money for the use

of the executors and then reconvey to the executors, subject to such mortgage. This was done. *Held*, That the transaction between the executors and heir was not a sale and conveyance within the meaning of the will.

5. ———: ———: EXECUTORS: POWERS. The will gave the executors power to convey the real estate only to an actual *bona fide* money purchaser thereof.

6. ———: ———: ———: CONVEYANCES. The conveyance by the executors to the heir was a voluntary one, and, as to her and her grantees with notice, void at the suit of the estate and its creditors, and at the suit of prior judgment creditors of the beneficiaries of such estate.

7. **Executors:** CONVEYANCES: INNOCENT PURCHASER. One who took from such heir a mortgage on the real estate so conveyed to her by the executors, having knowledge at the time that the heir had not actually purchased such real estate, or one who, having knowledge of such facts in the premises as ought to put a prudent man on inquiry as to the character of the heir's title, took such mortgage without inquiry, when a reasonable investigation would have revealed the defect in the heir's title, is not a subsequent innocent purchaser and entitled to protection as such.

8. ———: ———: ———: PLEADING. That one is a subsequent innocent purchaser of real estate is an affirmative defense, which the claimant, to avail himself of, must plead, and upon him is the burden of proof to establish it.

9. ———: ———: ———: ———. One who claims the protection of the rule applicable to subsequent innocent purchasers without notice is not relieved from the duty of affirmatively pleading and proving the facts which he claims show him to be such innocent purchaser, because he claims under the vendee of an executor, and the conveyance from such executor is attacked by the judgment creditors of the beneficiaries of the trust property as having been made without consideration to the knowledge of the one claiming to be an innocent purchaser.

10. **Wills:** EXECUTORS: INTEREST. Where the will of a testator vests the legal title to his real estate in his executors and directs them to sell and convey it and pay the proceeds over in certain proportions to certain heirs, the interest of such heirs in such proceeds is property.

11. ———: HEIRS: INTEREST. But the heirs have no interest in the real estate as such, and it cannot be seized on attachment by their creditors, nor is a judgment against them a lien thereon.

12. ———: ———: JURISDICTION. The district courts of the state are invested with ample powers to enjoin executors from diverting trust property, to annul conveyances made by them without

consideration in violation of the trust, and, on application of a prior judgment creditor of a beneficiary of such trust property, when such creditor has exhausted his legal remedies, to compel the interest of such beneficiary in such property, if not exempt, to be applied to the payment of his debts.

13. ———: ———: POWERS: PRESUMPTION. The presumption is that a will which simply clothes executors with power "to sell and convey" the testator's real estate for paying debts and to make distribution of the remaining proceeds to certain persons does not confer on the executors the power to mortgage such real estate.

14. ———: ———: ———: ———. But such presumption may be overthrown when an examination of the whole will shows that the disposition directed by the testator to be made of his property is of such a character as authorizes the inference that it was the testator's intention that his executors should have power to mortgage his estate.

15. ———: ———: CONVEYANCES. When executors of a will have individual interests in the testator's property, whether a conveyance made by them shall be construed as an execution of the trust or a conveyance of their individual interests is a question of intention; and if from the conveyance itself it is apparent that it was intended as an execution of the trust in pursuance of the will, it will be so construed.

16. ———: ———: TRUSTS. Where a trustee wrongfully makes a voluntary gift or conveyance of trust property, whether a subsequent creditor of the beneficiaries of such trust property may successfully invoke the aid of a court of equity to annul the wrongful disposition made of the trust fund, to restore it to the trustees and cause it to be applied to the payment of debts of the beneficiaries, not decided.

17. **Subrogation.** The doctrine or rule of subrogation is not a fixed and inflexible rule of law or equity. It does not owe its origin to statute or custom. It is a creature of the equity courts, invented and applied by them to do justice or prevent an injustice being done in a particular case and under a particular state of facts, where the law is powerless in the premises.

18. **Wills:** EXECUTORS: MORTGAGE BY HEIR. A testator directed his executors to sell and convey his real estate and pay the proceeds over in certain proportions to certain heirs. The executors deeded the real estate without consideration to one of the heirs, and she mortgaged it to a trust company and a bank. In a suit by the judgment creditors of the heirs to annul the conveyances of the executors and the mortgages made by the heir the creditors were given a decree as prayed, but *held* that the mortgagees were entitled to judgments against the testator's estate for such of the moneys represented by their mortgages as were actually applied to the payment of debts allowed by the probate court

against the testator's estate, as were actually used to discharge taxes against the real estate of the testator, as were actually applied to discharge debts of the testator secured at the time of his death by mortgages on his real estate, such judgments to be liens against the property of the testator's estate as the allowed claims of other creditors and paid in due course of administration.

APPEAL from the district court of Douglas county. Hear below before DUFFIE, J. *Reversed.*

E. Wakeley and *A. C. Wakeley*, for appellants:

A mere power of sale does not confer upon the donee of the power authority to execute a mortgage. (*Bloomer v. Waldron*, 3 Hill [N. Y.] 361; *Russell v. Russell*, 36 N. Y. 581; *Coutant v. Servoss*, 3 Barb. [N. Y.] 128; *Ferry v. Laible*, 31 N. J. Eq. 567; *Hoyt v. Jaques*, 129 Mass. 286; *Stokes v. Payne*, 58 Miss. 614; *Hubbard v. German Catholic Congregation*, 34 Ia. 31; *Price v. Courtney*, 87 Mo. 387; *Willis v. Smith*, 66 Tex. 31; *Patapsco Guano Co. v. Morrison*, 2 Woods [U. S. C. C.] 395; *Wilson v. Maryland Life Ins. Co.*, 60 Md. 152; *Butler v. Gazzam*, 81 Ala. 491; *Switzer v. Wilvers*, 24 Kan. 384; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9; *Wood v. Goodridge*, 6 Cush. [Mass.] 117.)

Whenever a plaintiff establishes a right to attack or set aside a conveyance of lands in the hands of a grantee by reason of actual fraud, or other sufficient reason, a party holding under such grantee by deed or mortgage, in order to protect himself, must both plead and prove that he is a *bona fide* purchaser or incumbrancer. (*Tompkins v. Anthon*, 4 Sandf. Ch. [N. Y.] 97; *Hunter v. Simrall*, 5 Litt. [Ky.] 62; *Boone v. Chiles*, 10 Pet. [U. S.] 177; *Larrowe v. Beam*, 10 O. 498; *Gallatian v. Cunningham*, 8 Cow. [N. Y.] 361; *Cunningham v. Erwin*, Hopk. Ch. [N. Y.] 48.)

The sale was to be for the payment of debts and the executors do not take title. (*Haskell v. House*, 3 Brev. [S. Car.] 242; *Greenough v. Welles*, 10 Cush. [Mass.] 557; *Den v. Young*, 23 N. J. Law 478; *Perkins v. Presnell*, 100 N. Car. 220.)

The transaction with Lammrich was in no sense of the term a sale. (*Trudo v. Anderson*, 10 Mich. 363; *Taylor v. Starkey*, 59 N. H. 142; *Hampton v. Moorhead*, 62 Ia. 91; *Taylor v. Galloway*, 1 O. 232; *Dupont v. Wertheman*, 10 Cal. 354.)

Paul Charlton, also for appellants.

References as to notice and *bona fides*: *Drey v. Doyle*, 99 Mo. 459; *Reeder v. Bair*, 4 O. 447; *Mack v. Brammer*, 28 O. St. 508; *Anglesey v. Colgan*, 14 Atl. Rep. [N. J.] 627; 2 Devlin, Deeds secs. 727-729, 738, 741-743, 801-821; *Rice v. Winters*, 45 Neb. 517; 2 Blackstone, Commentaries 446 Benjamin, Sales sec. 1; 21 Am. & Eng. Ency. Law 446; *Dudley v. Sumner*, 5 Mass. 438; 4 Am. & Eng. Ency. Law 432; *Roll v. Rea*, 12 Atl. Rep. [N. J.] 905; *Attorney General v. Abbott*, 28 N. E. Rep. [Mass.] 346; *Gillespie v. Rogers*, 16 N. E. Rep. [Mass.] 711; *Sickles v. White*, 17 S. W. Rep. [Tex.] 543; *Mason v. Black*, 87 Mo. 329; *Rabb v. Flenniken*, 7 S. E. Rep. [S. Car.] 597; *Johnson v. Prairie*, 91 N. Car. 159; *Moore v. Smith*, 19 S. W. Rep. [Tex.] 781; *Blagge v. Moore*, 23 S. W. Rep. [Tex.] 466; *Rush v. Mitchell*, 32 N. W. Rep. [Ia.] 367.

C. A. Baldwin, also for appellants.

References: *Schroeder v. Wilcox*, 39 Neb. 156; *Stokes v. Payne*, 58 Miss. 614; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 26; *Page v. Cooper*, 16 Beav. [Eng.] 396; *Hoyt v. Jaques*, 129 Mass. 287; *Ferry v. Laible*, 31 N. J. Eq. 566.

Hamilton & Maxwell, for appellee Omaha Loan & Trust Company:

The State Bank and Omaha National Bank are subsequent creditors and cannot impeach the mortgage. (18 Am. & Eng. Ency. Law 247; *McCauley v. Holtz*, 62 Ind. 205; *Parks v. Ingram*, 22 N. H. 283; *Steenbergen v. Gowdy*, 19 S. W. Rep. [Ky.] 186; *McDonald v. The Tom Lysle*, 48 Fed. Rep. 690; *Dunnington v. Kirk*, 22 S. W. Rep. [Ark.] 430; *Frazer v. Miller*, 35 Pac. Rep. [Wash.] 427; *Shuford*

v. Chinski, 26 S. W. Rep. [Tex.] 141; Wait, Fraudulent Conveyances [2d ed.] sec. 105; *Usher v. Hazeltine*, 5 Greenl. [Me.] 471; *Miller v. Miller*, 23 Me. 22; 1 Freeman, Judgments [4th ed.] sec. 244.)

The attachment proceedings and judgments of the appellants Arlington State Bank and Omaha National Bank created no lien upon the land. (*Meek v. Briggs*, 54 N. W. Rep. [Ia.] 456; 2 Pomeroy, Equity Jurisprudence, p. 572, sec. 1011; *Hale v. Hale*, 33 N. E. Rep. [Ill.] 858; *Wicker v. Ray*, 118 Ill. 472; *Poor v. Robinson*, 10 Mass. 131; *Hitchcock v. Southern Iron & Timber Co.*, 38 S. W. Rep. [Tenn.] 588; *Prouty v. Mather*, 49 Vt. 415; *Heard v. Hall*, 16 Pick. [Mass.] 457; *Favill v. Roberts*, 50 N. Y. 222; *Lee v. Getty*, 26 Ill. 77; *Adler v. Hellman*, 55 Neb. 266; *Johnson v. Johnson*, 36 Neb. 700; *Stewart v. Rogers*, 25 Ia. 395; *Price v. Sanders*, 60 Ind. 310; *Whitesel v. Hiney*, 62 Ind. 168; *Noble v. Hines*, 72 Ind. 12; *Moore v. Lampton*, 80 Ind. 301.)

The will of John T. Paulsen conferred power on the executors to mortgage the real estate. (18 Am. & Eng. Ency. Law 877, and note 2; *Dabney v. Manning*, 3 O. 321; *Rowe v. Beckett*, 30 Ind. 154; *Rowe v. Lewis*, 30 Ind. 163; *Stokes v. Payne*, 58 Miss. 614; *Waterman v. Baldwin*, 26 N. W. Rep. [Ia.] 435; *Faulk v. Dashiell*, 62 Tex. 642; *McCreary v. Bomberger*, 24 Atl. Rep. [Pa.] 1066; *Kent v. Morrison*, 153 Mass. 137; 18 Am. & Eng. Ency. Law, note pp. 941, 942; 2 Washburn, Real Property 708, note 3; *Loebenthal v. Raleigh*, 36 N. J. Eq. 172; *Pennsylvania Life Ins. Co. v. Austin*, 42 Pa. St. 263; *Zane v. Kennedy*, 73 Pa. St. 192; *Kent v. Morrison*, 26 N. E. Rep. [Mass.] 427; *Williams v. Woodard*, 2 Wend. [N. Y.] 492; 9 Myer, Federal Decisions sec. 912; *Butler v. Huestis*, 68 Ill. 594; *Ayers v. Palmer*, 57 Cal. 309; Sugden, Powers 267; *Singleton v. Scott*, 11 Ia. 589.)

Cowin & McHugh, for appellee United States National Bank.

F. A. Brogan, also for appellees.

RAGAN, C.

John T. Paulsen died in the city of Omaha on September 5, 1889, leaving a widow and six children, having first made his last will and testament, which was subsequently duly probated. The testator left a widow, Anna C. Paulsen, four sons, Edmund, Henry K., Herman F., and William Paulsen, and two daughters, Augusta Paulsen (now Lammrich), and Emma C. Paulsen (now Woolridge). By his will the testator appointed his widow and his sons, except William, to be his executors, without bond. The persons so nominated by the testator were by the probate court of Douglas county duly appointed executors of the will and accepted the trust. The testator died seized of real estate estimated to be worth from three to four hundred thousand dollars. Some of this real estate was incumbered with mortgages. More than $20,000 of claims, exclusive of the debts secured by real estate mortgages, were filed against the testator's estate and allowed by the probate court. The will of the testator, so far as material to this controversy, was as follows:

"It is my will, and I do direct, that all my just debts be fully paid out of my estate in the manner hereinafter provided. * * *

"It is my will, and I do direct, that any and all debts and demands against me and existing at the time of my decease be fully paid, and to that end and for that purpose I do direct that in the payment of my debts my executors shall use, (1) any and all moneys I may have on hand at my decease; (2) the avails of any debts, claims, demands, notes, and mortgages that may be due and owing to me at my decease; and should the amount of my liabilities at my decease exceed the amount of money so on hand and the amount so due me as aforesaid, or should my said debts exceed the amount that can be realized on such claims, then I do direct that any such balance be paid out of the proceeds arising from the sale or sales of any land or lots of land [of] which I may die

seized. If it shall become necessary for any executors to sell any of my real estate for the purpose of paying any debt or liability existing against my estate, I do direct and empower my executors hereinafter named to sell, and by deed convey, any such part or parts of the real estate of which I shall die seized as shall be necessary for that purpose. And it is my desire and my will, and I do direct, that in making such sale or sales that my executors shall make sale of such part of my real estate, and on such terms and in such manner as in the judgment of my executors shall be for the best interests of all persons interested in my estate. After my debts have been fully paid, as hereinbefore provided, I do direct, authorize, and empower my executors to make a sale or sales of any part or all of the real estate of which I shall die seized, at such time and in such manner as shall in the judgment of my executors be for the best interests of my estate and all persons interested therein, and to that end and for that purpose I do authorize and empower my said executors, if they shall see fit and proper so to do, to divide, subdivide, and plat any portion thereof for such sale, and I do authorize and empower my said executors to sell and convey by good and sufficient deed to any purchaser or purchasers of any part of my said real estate so by them sold, thereby conveying to such purchasers the full and complete title to the premises so purchased by them. The proceeds arising from any and all sales of any part of my said real estate, after my debts have been fully paid as such proceeds shall accumulate from time to time, and all moneys that are not necessary to be used in paying off any existing indebtedness that shall come to the hands of my executors as such executors of my estate from any source whatever, I do give and bequeath to my said wife and children as follows: * * *

"It is my will, and for a more perfect understanding of this my will and to avoid the possibility of a doubt as to my intention and purpose here I do again declare

it to be my will, and I do direct and empower my executors acting and performing the duties of this trust to use their own judgment and discretion, subject to the provisions hereinbefore made, as to the proper time and manner of making sale or sales of any part of my real estate; and I hereby authorize and empower my said executors to sell, deed, and convey the same and divide and pay over the proceeds of such sale as hereinbefore provided."

The testator, by his will, also set apart certain specifically described real estate and gave his wife the use of the rents and profits thereof during her natural life. This real estate is not involved in the controversy here. On December 30, 1891, the executors executed a deed to Augusta Lammrich, and thereby conveyed to her a large part of the real estate of which the testator died seized. The consideration expressed in this deed was $150,000. As a matter of fact this deed was a voluntary conveyance. The executors did not sell this real estate to Augusta Lammrich, and she paid nothing whatever for the conveyance to her. She was one of the heirs of the Paulsen estate and practically without means. On December 31, 1891, the widow and all the heirs of the testator, except William Paulsen, executed and delivered to the Omaha Loan & Trust Company a note for $25,000, drawing interest at the rate of six per cent per annum from date until maturity, interest payable semi-annually, evidenced by coupons attached thereto. To secure the payment of this note Augusta Lammrich, on said date, executed and delivered to said Omaha Loan & Trust Company a mortgage upon all the real estate previously conveyed to her by the executors. Subsequently Augusta Lammrich reconveyed all said real estate to the executors, subject to the mortgage given thereon by her to the trust company. On February 3, 1894, the executors made another deed to Augusta Lammrich, and thereby conveyed to her practically all the real estate of which the testator died seized, except

that which they had previously conveyed to her by the deed of December 30, 1891. The consideration expressed in this last deed was $50,000. This deed was also a voluntary one. The deed was not executed to consummate an actual sale made of the real estate by the executors to Augusta Lammrich. She had not bought the real estate described in the deed, or any part thereof, and she paid the executors nothing for such conveyance. On the same day this deed was made to Augusta Lammrich she mortgaged the same to Milton T. Barlow, to secure the payment of a note of $16,000, payable to Barlow and executed by Augusta Lammrich, Edmund Paulsen, Anna C. Paulsen, the testator's widow, Herman F. and Henry K. Paulsen. Subsequently Augusta Lammrich conveyed the real estate mortgage to Barlow back to the executors, subject to the Barlow mortgage. The $16,000 note held by Barlow belonged to the United States National Bank. Barlow was the cashier of the bank and its trustee in this transaction. The Arlington State Bank, the Blair State Bank, and the Omaha National Bank brought this suit in the district court of Douglas county. The Omaha Loan & Trust Company, United States National Bank, Milton T. Barlow, the widow and heirs of John T. Paulsen, deceased, and the executors of his will, and others were made parties to the action.

We state the material averments of the petition of the Arlington State Bank, as the petitions of the Blair State Bank and the Omaha National Bank are the same: The Arlington State Bank, in its petition, set out, among other things, the facts hereinbefore detailed, and further averred that, prior to the execution of either of the two deeds by the executors to Augusta Lammrich, Paulsen's widow and his sons, Edmund, Herman, and Henry, became and were justly indebted to the Arlington State Bank; that it brought a suit upon the evidence of such indebtedness and recovered a judgment; that it caused an execution to be issued thereon, which was returned wholly unsatisfied. The petition of the Arlington State

Bank then charged that the executors had never at any time sold or disposed of the real estate, or any part thereof, of which John T. Paulsen died seized; that no consideration whatever was paid for the conveyances made by the executors of the testator's real estate to Augusta Lammrich; that the purpose for which such conveyances were made was that Augusta Lammrich might incumber the same by mortgages to the trust company and the United States National Bank; that the trust company and the United States National Bank had full knowledge and notice that Augusta Lammrich had parted with no consideration for the conveyances made to her of the testator's real estate; that the trust company and the United States National Bank knew the purpose for which the executors made such conveyances to Augusta Lammrich, and that such conveyances were unauthorized and invalid, since, by the provisions of the will of John T. Paulsen, his executors had no power or authority to mortgage his real estate, or any part thereof, for any purpose, and no power to make a conveyance thereof, except in consummation of an absolute sale made by them; that the conveyances made by the executors to Augusta Lammrich and the mortgages made by her on such real estate to the trust company and the United States National Bank were made and accepted for the fraudulent purpose of preventing it from collecting the debt owing to it by its judgment debtors. The prayer of the petition was for a decree canceling and annulling the two deeds made by the executors to Augusta Lammrich and the two mortgages made by her to the trust company and the United States National Bank, and for other, further, and general relief. The widow and all the heirs and executors of the testator answered this petition of the Arlington State Bank, admitting the making of the two conveyances by the executors to Augusta Lammrich and the execution of the mortgages by her to the trust company and the United States National Bank; denied that the conveyances made by the executors were with-

out consideration; alleged that they were made for a good and valuable consideration, and denied that there was any fraud intended or practiced by any of the parties to said transaction. The Omaha Loan & Trust Company, by its answer, among other things, admitted the execution of the conveyances by the executors to Augusta Lammrich and the execution by her to it of the mortgage of December 31, 1891, and denied all allegations of fraud. The United States National Bank, in its answer to the petition of the Arlington State Bank, admitted the execution and delivery of the deed by the executors to Augusta Lammrich on February 3, 1894, the execution and delivery by Augusta Lammrich to Milton T. Barlow for it, the United States National Bank, of the $16,000 mortgage of said date; denied all allegations of fraud, and affirmatively averred that at the time of the testator's death he was indebted to the United States National Bank in the sum of $12,000, and that the mortgage made to Barlow for it by Augusta Lammrich was made to secure this $12,000 and a further sum of $4,000 advanced by the bank to the executors and used by them in paying the debts of the testator's estate.

The district court found, among other things, that there was no fraud intended or practiced by any of the parties in the execution of the two deeds by the executors to Augusta Lammrich and her execution of the mortgages to the trust company and the United States National Bank, and that such mortgages were valid and first liens upon the property therein described; that the Arlington State Bank and other judgment creditors had liens upon the interests of their debtors in the real estate of the testator, subject to the liens of the trust company and the United States National Bank's mortgages, and entered a decree accordingly. The Arlington State Bank, the Blair State Bank, and the Omaha National Bank have appealed.

1. A question presented by the record, and one much discussed by counsel, is, in whom did the legal title to the

testator's real estate vest upon his death? Did the executors take the legal title or did the heirs? The will of the testator contains no language which in express terms would vest the title either in the executors or the heirs. The will declares that the executors shall pay the testator's debts out of money on hand at his decease and money derived from debts owing to him, and if these sources should prove insufficient, the executors are directed to pay the remainder of his debts from the sale of his lands, or a part thereof. In case of a sale of any part of the testator's real estate for the purpose of paying his debts, the executors are directed and empowered to convey the parts sold by deed. After the payment of his debts, the executors were directed and authorized to sell and convey any or all of his real estate and divide and pay over the proceeds of such sale in certain proportions to certain heirs. Whether the heirs or executors took the legal title to the real estate of the testator upon his death is not to be determined solely by the presence or absence of some particular language of the will; and the courts cannot say that the executors did not take the legal title and that the heirs did, solely because no apt language is found in the will expressly declaring that the executors should have the legal title. The question is to be determined by ascertaining from an examination of the entire will of the testator what his intentions were. If the cardinal object, intention, and purpose of the testator in making disposition of his property can be effectuated only by having the legal title to the property vested in the executors, then the will will be given such a construction as will carry out the lawful intentions of the testator; and the presumption must be indulged that the testator gave his executors all the power necessary to carry out his intentions. As was said by SULLIVAN, J., in *Weller v. Noffsinger*, 57 Neb. 455: "No rule of law is better settled or more in accord with good sense than that which requires the intention of the testator to be ascertained from a liberal interpretation

and comprehensive view of all the provisions of the will. No particular words, no conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property. The court, without much regard to canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it." As we construe the will in this record, we think the testator had in view two things: (1) The payment of his debts, and (2), after his debts were paid, the conversion of his real estate into cash and a distribution thereof in certain proportions among certain heirs; and though the will does not in express terms say that the executors shall have the legal title, still, we think, they could not carry out the testator's intentions, unless they were invested with the legal title to his real estate. They were to sell this real estate and make deeds of conveyance to the purchasers whether they sold the land to pay debts or sold it for the purpose of distributing the proceeds among the legatees and heirs. We think, therefore, that in this case the legal title to these lands upon the death of the testator vested at once in his executors; that the title to no part of the testator's real estate descended to the heirs; that a conveyance or a mortgage by them of this real estate would be a nullity, as a real estate conveyance would cloud the executors' title, and, if effective for any purpose, could be held to be nothing more than an assignment of such heirs' interest in the estate of the testator. In support of these views see *Hale v. Hale*, 33 N. E. Rep. [Ill.] 858; *Wicker v. Ray*, 8 N. E. Rep. [Ill.] 835; *Meek v. Briggs*, 54 N. W. Rep. [Ia.] 456; 2 Pomeroy, Equity Jurisprudence 1011.

2. Another question presented by the record is whether the two conveyances made by the executors of the testator's real estate to Augusta Lammrich were sales within the meaning of the testator's will. As already stated, these deeds to Augusta Lammrich were made without consideration. They were not in consummation of contracts of bargain and sale entered into between her and

the executors. She paid nothing, promised nothing, parted with nothing valuable for the conveyances, and if the conveyances were made to her upon the consideration that she would mortgage the real estate conveyed and then reconvey to the executors subject to that mortgage, the conveyances to Augusta Lammrich were still without consideration. The will conferred no power upon the executors to make a gift of the testator's real estate to any one. Their power was to convey only to an actual *bona fide* money purchaser. The conveyances made by the executors to Augusta Lammrich were not executed in pursuance of, or in accordance with, the provisions of the will. They were not good executions of the powers conferred upon the executors, and as between Augusta Lammrich and her grantees with notice, the testator's estate, the creditors of that estate, and the creditors of the beneficiaries of that estate, those conveyances were voidable. (*Trudo v. Anderson*, 10 Mich. 357; *Hampton v. Moorhead*, 17 N. W. Rep. [Ia.] 202; *Dupont v. Wertheman*, 10 Cal. 354; *Taylor v. Galloway*, 1 O. 232; *Briggs v. Davis*, 20 N. Y. 15; *Russell v. Russell*, 36 N. Y. 581; *Ferry v. Laible*, 31 N. J. Eq. 566.)

3. This brings us to the contention of the trust company and the United States National Bank, that they are innocent purchasers or mortgagees of this real estate conveyed by the executors to Augusta Lammrich and entitled to protection as such. There are to this contention three answers: (1.) Although the district court made no finding upon that subject, we are constrained by the evidence, without quoting it, to hold that both the trust company and the United States National Bank actually knew that the executors had made the conveyances they did to Augusta Lammrich, not as a consummation of actual sales of the real estate to her but in order that she might execute the mortgages now held by the trust company and the United States National Bank. (2.) Assuming that the trust company and the United States National Bank did not actually know that this real estate

had been conveyed to Mrs. Lammrich without consideration, still they should have known. They were in possession of such facts in the premises as should and would have excited the suspicions of prudent men as to the character of Mrs. Lammrich's title, and these inquiries, if pursued with any diligence whatever, would have revealed the fact that Mrs. Lammrich was a voluntary vendee. (3.) Neither the trust company nor the bank have, by either pleading or proof, shown, or made any attempt to show, that they are innocent purchasers of this property and entitled to the protection of that rule. The bill filed by the appellants in this case set out the fact of the conveyances by the executors to Mrs. Lammrich, charged that these conveyances were without consideration, that they were invalid because of want of power in the executors to make them, and then charged that the conveyances were fraudulently made and accepted. The answer of the trust company and the United States National Bank to this was a general denial. Under this pleading, evidence on their part tending to show that they were innocent purchasers from Lammrich, had they offered such evidence, would have been irrelevant. That one is an innocent purchaser of real estate is an affirmative defense, and though the bill charged in this case that the trust company and the United States National Bank had knowledge and notice that Mrs. Lammrich was a voluntary vendee, it did not relieve the trust company and the bank from the duty of pleading that they were innocent purchasers, if they intended to rely upon that defense. The proof shows, without contradiction, that the conveyances made by the executors to Mrs. Lammrich was without consideration, and we think it shows that the trust company and the bank had actual knowledge of that fact. Assuming, however, that it does not, when the appellants showed that the conveyances to Mrs. Lammrich were without consideration and voidable as against them, then the burden was upon the mortgagees of Mrs. Lammrich to show that they took their

mortgages from her without knowledge of the defect in her title. Augusta Lammrich acquired no title to the real estate described therein by reason of the conveyances made to her by the executors, and she could convey to others no greater title than she herself possessed. The mortgages, then, of the trust company and the United States National Bank can only be sustained if they are innocent purchasers or mortgagees within the meaning of that rule. The doctrine of this court is that where a claim to real estate can be sustained only upon the ground that the person asserting it is a subsequent purchaser in good faith, such person is required to show affirmatively that he purchased without notice of the equities of another and relying upon the apparent ownership of his grantor. (*Bowman v. Griffith*, 35 Neb. 361; *Garmire v. Willy*, 36 Neb. 340; *Phœnix Mutual Life Ins. Co. v. Brown*, 37 Neb. 705; *Baldwin v. Burt*, 43 Neb. 245; *American Exchange Nat. Bank v. Fuckler*, 49 Neb. 713; *Yeend v. Weeks*, 16 So. Rep. [Ala.] 165; *Rush v. Mitchell*, 32 N. W. Rep. [Ia.] 367; Pomeroy, Equity Jurisprudence sec. 784; *Bassick Mining Co. v. Davis*, 17 Pac. Rep. [Colo.] 294; *Weber v. Rothchild*, 15 Pac. Rep. [Ore.] 650; *Cunningham v. Erwin*, Hopk. Ch. [N. Y.] 48-54; *Richards v. Snyder*, 11 Ore. 501; *Lupo v. True*, 16 S. Car. 580; *Ferry v. Laible*, 31 N. J. Eq. 566.)

4. Another argument of the trust company and the United States National Bank is that since the title of the lands of which the testator died seized did not descend to his heirs, the judgments of the appellants here against those heirs are not liens upon any real estate of which the testator died seized, and therefore this action cannot be maintained. We agree with the contention that the title of the testator's lands at his death did not descend to and vest in his heirs, that the heirs have no such estate or interest in those lands as can be seized and sold upon execution or attachment, and that the judgments of the appellants are not liens upon those lands; but all this conceded, it does not follow that this

action cannot be maintained. The interest which the heirs have in the estate of the testator, though a contingent one, is still an interest—is property not exempt from being applied to the payment of their debts. The pleadings and the proof show that the appellants have recovered judgments against these heirs; that executions have been issued and returned wholly unsatisfied; that these heirs have interests in the real estate of the testator, which real estate the executors, in violation of their trust, have conveyed to another without consideration. The appellants cannot sell the interest of the heirs in this real estate on execution. They cannot seize such interest by attachment process. They cannot successfully garnish the executors, because by their wrong conduct they have, in effect, put the property in which the heirs have an interest out of their hands. The case then stands thus: The heirs are justly indebted to the appellants. The heirs have, or should have, property in the hands of the executors or trustees, and the latter have diverted it and unlawfully disposed of it. The appellants have exhausted all the legal remedies for the collection of their debts, and now it is said that this is the end of the law. If this is so, it is a reproach to our system of jurisprudence. But we do not think it is so. It has always been one of the powers possessed by courts of equity to compel the application of a debtor's unexempt property to the payment of his debts when the creditor had no other means of redress; and we have never before heard it doubted that a court of equity was invested with inherent power to prevent a trustee from diverting a trust fund, to set aside and annul conveyances and grants made by a trustee without consideration. In other words, when all other remedies have failed, a court of equity will, at the suit of a creditor, take the unexempt property of a debtor wherever found, in whatever condition it may be, and cause it to be applied towards the payment of his debt. In *Eliot v. Merchants' Exchange*, 14 Mo. App. 234, it was held that a

certificate of membership in the Merchants' Exchange of St. Louis was property and liable for the debts of its owner; that a creditor, having exhausted his legal remedies for the collection of his debt, might successfully appeal to a court of equity for the sale of the debtor's membership in the exchange and the application of the proceeds to the discharge of his debt. In *Ager v. Murray*, 105 U. S. 126, the supreme court of the United States held that a patent right might be subjected by a bill in equity to the payment of the judgment debts of the patentee. In *Ricketson v. Merrill*, 148 Mass. 76, a testator devised all his property to his executors to be sold and the proceeds divided between certain heirs, and the court held that the interest of a beneficiary before distribution and sale of the realty was not attachable, and that, as he had no other property, his judgment creditor could maintain a creditors' bill to compel the executor to apply the heir's interest to the payment of the creditor's debt. In *McGough v. Insurance Bank of Columbus*, 2 Ga. 151, it was said: "It is certainly true that where a creditor has exhausted his remedies at law and there are assets belonging to his debtor which he cannot get hold of, equity will assist him to reach and subject those assets to the payment of his judgment." In *Watkins v. Dorsett*, 1 Bland [Md.] 530, it was said: "Where a party cannot obtain relief, either by an ordinary execution or by the extraordinary process of outlawry or attachment by reason of the peculiar situation of the property or the equitable nature of the title to it, he may obtain relief by bill in equity." See generally as to the power of a court of equity to lay its hands upon and apply to the satisfaction of his debts every species of property belonging to a debtor: *Edmeston v. Lyde*, 1 Paige Ch. [N. Y.] 637; *Earle v. Grove*, 92 Mich. 285; *Edwards v. Edwards*, 24 O. St. 402; *Miller v. Davidson*, 3 Gil. [Ill.] 518; *Furlong v. Thomssen*, 19 Mo. App. 364; *Pickens v. Dorris*, 20 Mo. App. 1; *Millard v. Parsell*, 57 Neb. 178; *Galveston, H. & S. A. R. Co. v. McDonald*, 53 Tex. 516; *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*, 55 Neb. 86.

5. A further contention of the appellees is that the conveyances made by the executors to Augusta Lammrich and the mortgages made by her to the trust company and the United States National Bank in effect constituted a mortgaging of the testator's real estate by the executors, and that the executors had power under the will to execute mortgages upon the testator's real estate for the purpose of raising money to pay the testator's debts. We assume, without deciding, that the legal effect of the transactions of the executors with Augusta Lammrich and her conveyances to the trust company and the United States National Bank was a mortgage of the testator's real estate by the executors. Whether the executors had power to mortgage the testator's real estate is, of course, to be determined from the intention of the testator on the subject as ascertained from an examination of the entire will. In support of the contention that the executors had power to mortgage counsel have cited us to the following cases: *Waterman v. Baldwin*, 26 N. W. Rep. [Ia.] 435; *Faulk v. Dashiell*, 62 Tex. 642; *McCreary v. Bomberger*, 24 Atl. Rep. [Pa.] 1066; *Kent v. Morrison*, 153 Mass. 137, 26 N. E. Rep. 427; *Lochenthal v. Raleigh*, 36 N. J. Eq. 169; *Williams v. Woodard*, 2 Wend. [N. Y.] 486; *Ayres v. Palmer*, 57 Cal. 309; *Pennsylvania Life Ins. Co. v. Austin*, 42 Pa. St. 263; *Zane v. Kennedy*, 73 Pa. St. 192. It would subserve no useful purpose to review all these cases. The doctrine of the Pennsylvania court is that an absolute and unrestricted power to sell includes power to mortgage, although no power to make the mortgage is expressly given to the trustee or executor. Aside from the Pennsylvania cases, we think the other cases cited by counsel in support of their contention are not in point here.

In the *Waterman-Baldwin Case* the debtor conveyed all his property to a trustee, "to sell and dispose of for the payment of his debts," and it was held that the trustee might execute a mortgage upon the property to secure the payment of money he had borrowed for the purpose

of redeeming a part of the debtor's land from a mortgage foreclosure sale. But the power of attorney in that case is broader than the will here. The power of attorney gave the trustee power to sell and dispose of, while the will in the case at bar conferred upon the executors only the power to sell.

In the *Faulk-Dashiell Case* the will gave the executors power "to sell, exchange, and dispose of," and it was held that the executors had power to mortgage. But it is to be observed that in that case also the executors had power, not only to sell, but to exchange and dispose of his estate; and the will in that case further invested the executors with full authority to control the estate, in their discretion, for the interest of the testator's children, in their education, etc.

In the *Ayres-Palmer Case* the trustee was given power to sell and convey or to mortgage the land. He conveyed it to J. B., upon no other consideration than that the latter would execute a mortgage upon the land for a sum of money, and the court held that the transaction was, in effect, a mortgaging of the land by the trustee, and that he was clothed with that authority by the power of attorney.

In the *Williams-Woodard Case* the trustee was authorized to bargain, sell, convey, and assure a tract of land, and the court held that he had authority to execute a life lease upon the land, the lease containing a provision for an eventual purchase of the land by the lessee.

In the *Kent-Morrison Case* the testator devised all his property to his wife, with "full power to sell and convey the same by deed (part or all of it), and the proceeds thereof are to be used for her comfort and otherwise as she may think proper." Upon her death the estate remaining undisposed of was to go to the testator's son. The court held that the power "to sell and convey" was an absolute and unrestricted power to sell for her benefit and in her discretion, and vested in her a power to mortgage the estate for her benefit.

But we do not regard these cases, or any of them, as of controlling authority here. In all the cases cited the executor or trustee was, by a fair construction of the will, clothed with authority, not only to sell, but to otherwise dispose of or mortgage the real estate; or the executor was invested with such control and management of the testator's property and such discretion in the premises as to clothe him with authority to execute a mortgage for the purpose of carrying out the testator's intention with reference to the disposition of his estate; or the executor was given such an interest in the property as authorized him to mortgage it for his own benefit. In the case at bar the executors were not directed to preserve as a whole the testator's estate, or any specific part of it, or to manage, control, collect the rents and profits thereof and distribute them to certain legatees. They did not receive this estate charged with the duty of raising and paying out of the same certain specific legacies. The executors were to pay the testator's debts out of his personal property. If that proved insufficient, they were authorized to sell and convey sufficient of the real estate to pay those debts; and after the debts were paid, they were to sell and convey all the testator's real estate and divide the proceeds in certain proportions among certain parties. This was a trust with a power of absolute sale, and, looking at the entire will of the testator, we do not think it can be said that he ever contemplated such a thing as his executors borrowing money to pay his debts and pledging his property by mortgage to secure the repayment of the money borrowed. The two transactions of a sale and a mortgage are essentially different: A power to sell implies that the trustee is to receive for the benefit of the testator's estate the value of the land in cash. Power to mortgage involves a right in the trustee to convey the land for a less sum than its value and hazard the entire estate for its repayment. The presumption is that a will which simply clothes the executors with "power to sell and convey" the testator's

real estate and make distribution of the proceeds to certain persons does not include the power to mortgage; but such presumption may be overthrown when an examination of the whole will shows that the disposition directed by the testator to be made of his property is of such a character as to authorize the inference that it was his intention that his executors should have power to mortgage his estate. The will may authorize the inference of such an intention, notwithstanding the language thereof vests the executors with only power to sell and convey, if the executors are charged with the preservation and retention of a certain part of the estate, with the control and management thereof, the collection of the rents and profits of the estate, with the making of improvements on certain parts of the real estate, or if the estate comes to them charged with a specific legacy which the executors are to pay out of the estate.

In *Ferry v. Laible*, 31 N. J. Eq. 566, the testator, who was a brewer, directed his executors to continue his business and to invest the interest and profits which they should receive therefrom in bonds and mortgages or in the purchase of real estate. The will also contained this clause: "And they shall also have the power to sell." The executors, on December 2, 1871, conveyed the testator's real estate to one Wiedenmayer, and nine days afterwards the latter executed a mortgage upon it for $65,000. The executors made the deed to Wiedenmayer for the purpose of having him execute the mortgage, and the mortgage was executed for the purpose of paying debts which the executors had contracted in the conduct of the testator's business. The suit was to foreclose the mortgage. The vice chancellor said: "The primary purpose of the present suit is to compel the payment of this mortgage by a sale of the mortgaged premises. * * * Has it [the mortgage] any force against those who are entitled to the fee? It is not necessary to stop to inquire who they are. That question was not spoken to on the argument. It is enough for present purposes to know that all

persons now in being who can claim any estate or interest in the mortgaged premises are before the court as parties to this suit. The proofs show, quite incontestably, that the conveyance to Wiedenmayer was not made in consummation of an actual sale, but was a mere contrivance to enable him to execute a mortgage to the complainants. He accepted it under an arrangement that he should execute a mortgage to the complainants and then reconvey the lands. It is not pretended that a contract of sale and purchase was made, or that any price was agreed upon or consideration paid or given other than the execution of the mortgage to the complainants. Indeed, the parties to the transaction did not take the trouble to put on it the guise of a sale. No reference to authorities is required to show that this was not a valid exercise of the power given by the will. The executors were intrusted with power to make sale of the brewery premises in a certain contingency, but no power to donate the property nor to create preferences against it in favor of certain creditors, to the exclusion of others. If the executors used the power at all, they were bound to keep within its terms, and any attempt by them to exercise power in excess of that delegated must be held to be simply nugatory. Where the creator of a power defines the method of its execution, that method must be strictly followed, so far, at least, as may be necessary to give effect to his intent and design. This rule is fundamental. It is clear the conveyance to Wiedenmayer passed no title. * * * But it was very plausibly argued by the counsel of the complainants that the power to sell, conferred by his will, embraces also a power to mortgage, and that if he was right in this contention, the mortgage should be upheld as within the power, for, although not executed by the executors themselves, yet, having been executed by their grantee, to whom they conveyed the mortgaged premises for the purpose of having them mortgaged to the complainants, it should, in a court which deals mainly with the substance of

transactions, regardless of mere questions of form, be treated as the deed of the executors. My judgment rejects both propositions as thoroughly unsound. The last is much too devious, and too strongly marked by false suggestions, if not actual falsehood, ever to be recognized as the fit foundation of a judicial conclusion." The court held not only that the executors under the will had no power to mortgage the testator's real estate, but that the voluntary conveyance made thereof to Wiedenmayer was nugatory.

In *Hubbard v. German Catholic Congregation*, 34 Ia. 31, the congregation authorized a committee to sell certain real estate belonging to it and to execute a deed to the purchaser therefor in order to raise a fund for the purpose of paying the debts of the congregation. The committee executed a mortgage on the property to the various creditors of the congregation to secure the payment of their debts, and the court held that the mortgage was void for want of power in the committee to execute it.

In *Taylor v. Galloway*, 1 O. 232, a will provided: "All the rest of my estate I leave to be sold as my executors hereafter named shall think best, and the moneys arising from such sale I give unto my infant daughter." The executor entered into a contract with Taylor in and by which the latter was "to change the locations, to redeem such parts of the land as had been sold for taxes, and to do whatever might be necessary to secure the property and perfect the title, in consideration of which Taylor was to have an equal moiety of the land," and the court held that the contract was a nullity. The court said: "But the most important question is whether the contract made with the complainant Taylor be such a sale as was contemplated or authorized by the will. The manifest design of the testator was to convert the whole of his estate into money for the benefit of his infant daughter. The trustees are not authorized to exchange or incumber the land or to dispose of any part of it to perfect a title to the residue. The power is to

sell, and the sale must be for money. It may be said that the contract with Taylor was a sale, and that he is a purchaser for a valuable consideration. This is technically true, as it would have been if the executor had conveyed to him a moiety of the land as a reward for effecting a sale of the other moiety. But it is presumed that such a sale would not be valid, as it would defeat the object of the testator. The power must be strictly pursued and must be executed according to the manifest intent of the testator." To the same effect are: *Morris v. Watson*, 15 Minn. 165-212; *Hoyt v. Jaques*, 129 Mass. 286; *Wood v. Goodridge*, 6 Cush. [Mass.] 117; *Switzer v. Wilvers*, 24 Kan. 384; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 1; *Price v. Courtney*, 87 Mo. 387.

In *Bloomer v. Waldron*, 3 Hill [N. Y.] 361, Medcef Eden died leaving a will, which provided: "I give to my wife, so long as she shall remain single, * * * full power and authority to sell and convey all or any part of my real estate, provided * * * Aaron Burr shall in writing * * * approve and consent to such sale. * * * The moneys from all such sales to be vested and secured in such manner as the said Aaron Burr shall direct." The widow executed a mortgage on the testator's real estate with the consent in writing of Aaron Burr, and the court held that the will conferred upon the widow the power to sell and convey the testator's lands and invest the proceeds; that the widow was required to sell for cash or something equivalent thereto; that the widow had no authority to mortgage, and that the mortgage executed on the lands by her was utterly void.

6. Another contention of the appellees is that though the conveyances made by the executors to Augusta Lammrich were void for want of consideration, still such conveyances operated to transfer to her the interests which the heirs signing such conveyances as executors had in the property of the testator. One answer to this contention is that the title of the testator's real estate,

upon his death, descended to and vested in the executors and not in his heirs, and though the executors who executed the conveyances to Augusta Lammrich were the heirs of the testator, those conveyances were absolutely valueless as real estate conveyances. A second argument to the contention is that the conveyances made by the executors were by them and their grantees intended to convey to Augusta Lammrich the fee simple title to the lands. It was not the intention of any of the parties thereto that those conveyances, or either of them, should operate as an assignment to Augusta Lammrich of the interest which the heirs of the testator had in his real estate. In support of the contention under consideration counsel cite us to the following cases: *Hitchcock v. Southern Iron & Timber Co.*, 38 S. W. Rep. [Tenn.] 588; *Poor v. Robinson*, 10 Mass. 131; *Heard v. Hall*, 16 Pick. [Mass.] 457; *Favill v. Roberts*, 50 N. Y. 222; *Lee v. Getty*, 26 Ill. 77. We do not think the cases cited support counsel's contention, and a review of two of them must suffice.

In the *Favill-Roberts Case* the executors of the will had no authority to sell the testator's real estate or to control it. But with the knowledge of the heirs he applied to the court and obtained an order authorizing him to sell, and with the consent and at the request of the heirs he made a sale of the real estate, conveyed it, received the purchase-money, the heirs at the time informing the purchaser that the executor was authorized to make the sale, and it was held that the heirs were afterwards estopped from asserting title to the land as against the purchaser at such sale.

In the *Heard-Hall Case* the guardian of a *non compos mentis*, in pursuance of a license of court therefor, sold his ward's real estate and conveyed the same to the purchaser with a covenant that he, the conservator, was duly authorized to sell the premises. It was held that this covenant estopped the conservator from afterwards claiming in his own right a portion of the real estate under a previous conveyance to him in his own right.

It is obvious that these cases are not in point here. They rest upon the principle of estoppel. It may be that the heirs who, as executors, executed the voluntary deeds to Augusta Lammrich could not maintain a suit as such heirs against her to annul those conveyances on the ground of want of consideration. Doubtless, a debtor who voluntarily conveys his real estate to another for the fraudulent purpose of preventing it being applied to the payment of his debts could not maintain a suit against such voluntary grantee to annul such a conveyance, but it does not follow that because the debtor would be estopped from maintaining such suit that his creditor would. In the case at bar the grantors of Augusta Lammrich described themselves as the executors of the testator. The deed made by them purported to convey the legal title which they possessed to Augusta Lammrich for a consideration equal to its value. Augusta Lammrich did not suppose she was buying the individual interest of the heirs who signed the deeds to her as executors, and it was not the intention of any party to that transaction that those conveyances should convey the interests which the heirs, as children of the testator, had in the lands. When the grantor is a donee of power, and also has an individual interest in the property, whether the conveyance shall be construed as an execution of the donee's power or a conveyance of the donee's interest is a question of intention, and if from the conveyance itself it is apparent that it was intended as an execution of the power, it will be so construed. (*Blagge v. Miles*, 1 Story [U. S.] 426; *Lee v. Simpson*, 134 U. S. 572; *Patterson v. Wilson*, 64 Md. 193; *Ritchie v. Putnam*, 13 Wend. [N. Y.] 524; *Munson v. Berdan*, 35 N. J. Eq. 376; *Owen v. Switzer*, 51 Mo. 322; *Funk v. Eggleston*, 92 Ill. 515.)

7. A further contention of the appellees is that the appellants did not become creditors of the heirs of the testator prior to the conveyances made by the executors to Augusta Lammrich. Authorities are cited to show

that a subsequent creditor cannot maintain an action to set aside a voluntary conveyance made by his debtor prior to the time of the contracting of the debt, where the debt was not contracted with the intention of becoming indebted. This opinion is already too long, and it must suffice to say that the evidence in the record does not sustain the contention of the appellees that the appellant's debts were not contracted prior to the conveyances made by the executors to Augusta Lammrich; and it may very well be doubted if the rule that a creditor whose debt is contracted after the voluntary alienation of his debtor's property, the alienation not having been made with intention to become indebted, has any application to this case. Here the trustees of a fund have misappropriated it,—have made a donation of it to a third party,—and it would seem that the creditors of the beneficiary of this fund, irrespective of the time when their debts were contracted, and irrespective of the question as to whether the misappropriation and donation of the fund was made by the trustees for a fraudulent purpose, might successfully invoke the aid of a court of equity to annul the wrongful disposition made of this trust fund and restore it to the trustees of the beneficiaries and apply it to the payment of the latter's debts.

8. It remains to be said that since the title to the testator's lands, upon his death, vested in his executors, the appellant's judgments are not liens thereon. This suit then must be treated as an equitable garnishment brought by appellants against the executors of the testator's estate to reach the interest of the beneficiaries therein who are debtors of the appellants.

9. A final contention of the trust company and the United States National Bank is that a part at least of the moneys advanced by them on their mortgages was actually used in paying the debts of the testator's estate, such as claims allowed against the estate by the probate court, taxes upon the real estate of which the testator died seized, and paying debts secured by mortgages upon

the real estate, and which debts were not included in the claims allowed by the probate court against the testator's estate, and therefore they are entitled in equity to be subrogated to the rights and liens of the holders of the debts which the money advanced by them discharged. This doctrine of subrogation has been several times considered by this court. The cases of this court bearing upon the subject are: *Washburn v. Osgood*, 38 Neb. 804; *Rice v. Winters*, 45 Neb. 517; *Brownell v. Stoddard*, 42 Neb. 177; *Guthrie v. Ray*, 36 Neb. 612; *Betts v. Sims*, 35 Neb. 840; *Bohn Sash & Door Co. v. Case*, 42 Neb. 281; *South Omaha Nat. Bank v. Wright*, 45 Neb. 23; *Skinkle v. Huffman*, 52 Neb. 20; *Hubbard v. Knight*, 52 Neb. 400; *Ocobock v. Baker*, 52 Neb. 447; *Chicago Lumber Co. v. Anderson*, 51 Neb. 159; *Porter v. Ourada*, 51 Neb. 510; *Seieroe v. Homan*, 50 Neb. 601; *Aultman v. Bishop*, 53 Neb. 545; *Hoagland v. Green*, 54 Neb. 164.

10. In some of these cases the litigants were adjudged to be entitled to the protection of the rule of subrogation; in others they were denied its protection. The decision in each case was controlled by the particular facts, circumstances, and equities therein. In the case at bar all the claims allowed by the probate court against the estate of the testator became liens upon his lands, the taxes against his real estate were liens upon his land, and some of his lands, at the time of his decease, were incumbered by real estate mortgages given to secure the debts of the testator, and these secured debts were not among the claims allowed by the probate court against his estate. The interests which the testator by his will gave to his heirs in his real estate were burdened with these liens. The evidence before us shows conclusively that a part of the moneys, at least, advanced by the United States National Bank and the trust company was actually applied to the payment of debts allowed by the probate court against the testator's estate, was actually applied to the discharge of taxes, which were valid liens against the lands of the testator, and actually applied to the dis-

charge of debts secured by real estate mortgages upon the testator's real estate, and which latter debts were not included within the claims allowed against the estate by the probate court. This doctrine or rule of subrogation is not a fixed and inflexible rule of law or equity. It does not owe its origin to statute or custom. It is a creature of the equity courts, invented and applied by them to do justice or prevent an injustice being done in a particular case and under a particular state of facts, where the law is powerless in the premises. This trust company and this United States National Bank, the district court has found, and the evidence sustains the finding, in all these transactions acted in good faith. Now, is it equitable, is it just, to turn over this estate to the beneficiaries discharged of the liens and burdens which existed against it when their interests in the estate attached and compel the corporations that have furnished the money in good faith to discharge these liens and burdens to bear the entire loss? If the corporations are subrogated to the rights of the creditors of the estate at the time the interest of the beneficiaries therein attached, certainly no injustice will be done the beneficiaries. All the parties interested in this estate are before this court; the heirs and the beneficiaries under the will are here; the executors are here, and not one of them is objecting to the trust company and the United States National Bank being given the protection of this rule of subrogation. Only the creditors of the beneficiaries are objecting, but their claims upon the interests of the beneficiaries were subordinate to the debts of the testator against his entire estate; and if the corporations be subrogated, the creditors of the beneficiaries have not been deprived of any right. We therefore think that the peculiar facts and circumstances in this case warrant us in holding that the trust company and the United States National Bank should be awarded judgments against the testator's estate, to be certified to the probate court and paid in due course of the execution of the testator's will,

for all moneys advanced by them on their mortgages which they can show were actually paid: (1) To pay and discharge claims allowed by the probate court against the testator's estate; (2) all the moneys that were actually used in paying debts of the testator secured by mortgages upon his real estate, and which debts were not embraced in the claims allowed against the estate by the probate court; and (3) all such moneys as were actually used in paying taxes against the real estate which were legally levied against and were liens thereon, except the taxes against the real estate set apart by the will as a life estate for the widow. In *Blodgett v. Hitt*, 29 Wis. 169, an administrator's sale of his intestate's real estate was held void for want of jurisdiction and authority in the administrator to make it. The money paid by the purchaser to the administrator was applied to the payment of a mortgage existing against the land executed by the intestate and to the payment of other debts existing against the intestate's estate. The heirs of the intestate brought ejectment for the land against the purchaser at the administrator's sale. As already stated, the court held that the administrator's sale was void, but subrogated the purchaser to the rights of the holders of the claims against the real estate which had been discharged with the money paid by him at the administrator's sale. Whether the administrator had jurisdiction or power to make that sale was a question of law which the purchaser at the sale was bound to know; and if he purchased, believing that the administrator had jurisdiction, his mistake was one of law. In the case at bar the trust company and the United States National Bank advanced their moneys, believing that the voluntary conveyances made to Augusta Lammrich would support a mortgage made by her. This was a mistake of law. In the Wisconsin case the court held that the purchaser was entitled to subrogation upon the natural and inherent justice of the case, that it would be inequitable and unjust to permit the heirs to recover the estate discharged

of liens existing thereon when the title came to them and which had been discharged with the moneys of the purchaser. The same ruling was made by the supreme court of Missouri in *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152. (See, also, *Pelts v. Clarke*, 5 Pet. [U. S.] 480; *Howard v. North*, 5 Tex. 315; *Hudgin v. Hudgin*, 6 Gratt. [Va.] 320; *Bright v. Boyd*, 1 Story [U. S. C. C.] 478; *Dufour v. Camfranc*, 5 Martin [La.] 656; *McLaughlin v. Daniel*, 8 Dana [Ky.] 182; *Sidener v. Hawes*, 37 O. St. 532; *Jones v. French*, 92 Ind. 138; *Bunts v. Cole*, 7 Blackf. [Ind.] 265; *Matteson v. Thomas*, 41 Ill. 110; *Betts v. Sims*, 35 Neb. 840.) We are not deciding that one who advances or pays money is entitled to the protection of the rule of subrogation because he acted under a mistake of law. We rest our decision here that these corporations are entitled to subrogation upon the broad principle that to deny to them, under the facts and circumstances in this record, would violate the plainest principles of ordinary justice.

The decree appealed from is reversed and the cause remanded, not for a retrial, but with instructions to the district court to enter a decree (1) canceling and annulling the two conveyances made by the executors to Augusta Lammrich on December 30, 1891, and February 3, 1894; the two mortgages executed by Augusta Lammrich on December 31, 1891, and February 3, 1894. (2.) To take evidence and determine what amount of the moneys advanced on the trust company and Barlow mortgages was actually applied to the payment of debts allowed against the testator's estate by the probate court, the amount actually applied to the discharge of the debts of the testator which were secured by liens upon his real estate at the time of his death, the amounts that were actually applied to the payment of taxes which were liens upon his real estate, not including taxes on the real estate set apart by the will as a life estate for the widow, and to award the trust company and the United States National Bank severally judgments for such sums, to

draw seven per cent interest from the time they were advanced, against the estate of the testator, and certify them to the probate court, to be paid in due course of administration of the estate and paid in the original order of their priority. (3.) To enter a decree against the executors of the estate, requiring them, after the sale of the testator's land and the payment of the debts allowed against the estate and the costs of administration, to pay into the district court the proceeds arising from the sale of the testator's property which, under the will, would belong to the heirs who are judgment debtors of the appellants.

REVERSED AND REMANDED.

M. O. AYRES V. J. F. DUGGAN.

FILED FEBRUARY 9, 1899. No. 8658.

1. **Action on Appeal Bond.** The issuing of an execution is not a condition precedent to the right of a judgment creditor to maintain an action against the signer of an appeal undertaking executed to enable the judgment debtor to appeal.
2. **County Court**: APPEAL. Appeals from judgments of a county court are taken in the same manner as appeals from justices of the peace. (Compiled Statutes, ch. 20, sec. 26.)
3. ———: ———: BOND. It is not necessary for an appellant from a county court or justice court to sign the appeal undertaking. It need be executed only by some one in his behalf.
4. **Defect of Parties**: WAIVER. A defense that there is a defect of parties defendant is waived unless taken advantage of by demurrer or answer.
5. ———: APPEAL. Such a defense cannot be urged for the first time in this court.
6. **Replevin**: FINDINGS AND JUDGMENT. A judgment in an action of replevin, based on a general finding in favor of the defendant, but without a finding that he was entitled at the commencement of the suit to possession of the property, if erroneous and voidable, is not void.
7. ———: ———: COLLATERAL ATTACK. For such a defect such a judgment is invulnerable when attacked collaterally by any one.

ERROR from the district court of Dakota county. Tried below before EVANS, J. *Affirmed.*

Jay & Welty, for plaintiff in error:

The petition is defective because it nowhere alleges that an execution had been issued and returned before the commencement of suit. (Brandt, Suretyship & Guaranty [2d ed.] sec. 460; *Cooper v. Rhodes*, 30 La. 533; *Pinard v. George*, 30 La. 384; *Staley v. Howard*, 7 Mo. App. 377; *Paxton v. Rich*, 7 S. E. Rep. [Va.] 531; *Taylor v. Cockrell*, 16 S. W. Rep. [Tex.] 786.)

Suit should have been brought against the principal as well as the sureties. (*Van Sickle v. Buffalo County*, 13 Neb. 120.)

The judgment is void, for the reason that there is no finding. (*Smith v. Silvis*, 8 Neb. 164; *Foster v. Devinney*, 28 Neb. 416; *Hooker v. Hammill*, 7 Neb. 231; *Manker v. Sine*, 35 Neb. 746; *Singer Mfg. Co. v. Dunham*, 33 Neb. 686; *Hanscom v. Burmood*, 35 Neb. 504; *Brounty v. Daniels*, 23 Neb. 162.)

The terms of an appeal bond must be strictly construed, and the courts have no power to extend the terms of an undertaking beyond what is therein clearly expressed. (Brandt, Suretyship & Guaranty [2d ed.] sec. 495; *Zeigler v. Henry*, 43 N. W. Rep. [Mich.] 1018.)

Spaulding, Taylor & Burgess and *W. P. Warner, contra.*

Cases cited by defendant in error are referred to in the opinion.

RAGAN, C.

G. W. Wilkinson brought suit in the county court of Dakota county against J. F. Duggan. The latter had judgment, and Wilkinson appealed, M. O. Ayres executing the appeal undertaking. The trial in the district court resulted in a judgment in favor of Duggan. This judgment not having been paid, Duggan brought this

suit in the district court of said county against Ayres on the appeal undertaking. He had judgment, and Ayres has filed a petition in error here for its review.

1. The first contention is, in effect, that the petition does not state facts sufficient to constitute a cause of action. This argument is based upon the contention that the petition does not allege an execution was issued on the judgment rendered by the district court against Wilkinson, and returned unsatisfied, in part at least, prior to the institution of this suit on the appeal undertaking. But the issuing of an execution and its return unsatisfied is not a condition precedent to the right of a judgment creditor to maintain an action against the signer of an appeal undertaking executed to enable the judgment debtor to appeal. (*Flannagan v. Cleveland*, 44 Neb. 58; *Johnson v. Reed*, 47 Neb. 322.)

2. A second argument is that Wilkinson, the party against whom the judgment, both in the county and district courts, was rendered, was a necessary party to this action. Appeals from judgments of a county court are taken in the same manner as appeals from justices of the peace. (Compiled Statutes, ch. 20, sec. 26.) It is not necessary for the party against whom a judgment in a county court, or a justice court, is rendered, and who appeals from such judgment, to sign the appeal undertaking, as it need be executed only by some one in behalf of the party appealing. (*Stump v. Richardson County Bank*, 24 Neb. 522; *Van Etten v. Kosters*, 48 Neb. 152; *Chase v. Omaha Loan & Trust Co.*, 56 Neb. 358; Code of Civil Procedure, sec. 1007.) In the case at bar Wilkinson, against whom the judgment in the county court was rendered, did sign the appeal undertaking. This undertaking was incorporated into, and made part of, the petition in this case. Wilkinson was not sued in this action, and the appeal undertaking is not a joint, but the several, obligation of Wilkinson and Ayres. We do not think that Wilkinson was a necessary party to this action, but if there was a defect of parties defendant to the action,

that fact appeared upon the face of the petition, and the defect could have been reached by demurrer. (Code of Civil Procedure, sec. 94.) The petition was not demurred to for that reason, nor was it suggested by the answer filed that there was a defect of parties defendant because Wilkinson was not sued. The petition states a cause of action against Ayres, and he cannot now be heard to urge the objection that there was a defect of parties defendant to the action. (*Hurlburt v. Palmer*, 39 Neb. 158; Code of Civil Procedure, sec. 96.)

3. The third argument is that the judgment of the county court was void. The action was replevin, and tried to the county court without a jury. The exemplification of that judgment in the record recites: "After hearing the evidence and the argument of the counsel, I find in favor of the defendant. It is therefore considered by me," etc. The argument is that this judgment was void because the county court did not make a finding that, at the commencement of the action in the county court, the defendant was entitled to possession of the property. This judgment may have been erroneous and voidable for the reasons stated, but it was not, and is not void. (*Doty v. Sumner*, 12 Neb. 378; *Connelly v. Edgerton*, 22 Neb. 82.) The judgment of the county court may have been open to direct attack by the parties thereto, but the plaintiff in error recognized the validity of the judgment by executing an undertaking and enabling the defendant therein to appeal therefrom; and the appeal consigned all irregularities in that judgment to the dead past, beyond recall or resuscitation, and in this collateral proceeding the only attack the plaintiff in error can make upon that judgment is that it was void for want of jurisdiction of the court to render it. As a matter of law there was no judgment rendered. (*Irwin v. Nuckolls*, 3 Neb. 441.)

4. Complaints are made as to the action of the district court in receiving certain evidence at the trial. The case was tried to the court without a jury, and we cannot

disturb the court's finding even if it admitted incompetent and immaterial evidence on the trial, provided there is sufficient competent evidence in the record to sustain the judgment, as the presumption will be indulged in such case that the court considered only testimony which was competent. (*Monroe v. Reid*, 46 Neb. 316; *King v. Murphy*, 49 Neb. 670; *Whipple v. Fowler*, 41 Neb. 675; *Scroggin v. Johnston*, 45 Neb. 714.) There is in the record sufficient competent evidence to sustain the judgment, and it is accordingly

AFFIRMED.

JOHN F. BEARD, APPELLANT, V. ANNA M. BEARD, APPELLEE.

FILED FEBRUARY 9, 1899. No. 8700.

1. **Divorce**: VACATING DECREE AFTER TERM. Where, in a divorce proceeding, a decree is entered dissolving a marriage, and awarding the wife a judgment against the husband for $—— in full of all her claims upon him or his property by reason of their former marriage relations, it seems that the courts have no jurisdiction to vacate or modify such a judgment, after the term at which rendered, solely because of a change in the circumstances, financial or otherwise, of either of the parties thereto.
2. ——: ——. Such a judgment is a judicial determination of the share of the husband's property to which the wife is entitled as permanent alimony, and is final and conclusive unless modified or vacated in a direct proceeding.
3. ——: ——: GROUNDS. If, by reason of a change in the circumstances or conditions of either or both the parties, the courts have jurisdiction to vacate or modify such judgment after term, the fact that the property of the husband has depreciated in value, because of drouths and crop failures since the entry of the judgment, is not sufficient to support a decree modifying or vacating such judgment.
4. ——: ——: STATUTES. It seems that section 27, chapter 25, Compiled Statutes, is not applicable to such a judgment as mentioned above, but to an award for alimony payable so much weekly, monthly, etc., until the further order of the court.

APPEAL from the district court of Burt county. Heard below before KEYSOR, J. *Affirmed.*

W. G. Sears and *H. H. Bowes*, for appellant.

References: *Ellis v. Ellis*, 13 Neb. 95; *O'Brien v. O'Brien*, 19 Neb. 587; *Vert v. Vert*, 54 N. W. Rep. [S. Dak.] 655; *Cole v. Cole*, 31 N. E. Rep. [Ill.] 109; *Blythe v. Blythe*, 25 Ia. 268; *Wilde v. Wilde*, 36 Ia. 321; *Olney v. Watts*, 43 O. St. 500; *Cochran v. Cochran*, 42 Neb. 630; *Andrews v. Andrews*, 15 Ia. 423; *Shaw v. McHenry*, 52 Ia. 182.

Osborn & Aye and *Clark O'Hanlon, contra.*

References: *Fischli v. Fischli*, 1 Blackf. [Ind.] 360, 12 Am. Dec. 251; *Shaw v. Shaw*, 59 Ill. App. 268; *Sammis v. Medbury*, 14 R. I. 214.

RAGAN, C.

John F. Beard brought an action in the district court of Burt county against his wife, Anna M. Beard, for a divorce. The wife appeared and answered the petition of her husband, and filed a cross-petition, in which she prayed that a divorce might be decreed to her. A trial was had, and on April 2, 1892, the court entered a decree dismissing the husband's petition for divorce and granting the wife a divorce from her husband, on the ground of extreme cruelty of the husband, the cruelty consisting in personal violence used by the husband towards the wife. At the time this decree was rendered there were living two children, ten and five years of age, respectively, the fruits of the marriage of these parties. The court found that the husband was an unfit person to have the care and custody of the children, and decreed their care and custody to the wife, until the further order of the court. The court also found that the husband was possessed of property, consisting of personal property, some farm lands, and a business house and lot in the city of Blair, Nebraska, of the value of $12,000, and that for the purposes of the suitable maintenance of the wife and the nurture and education of the two children she

should recover from her husband the sum of $5,000, the same to be in full of all her claims against the husband growing out of their marriage relations; and thereupon the court entered a decree that the wife recover of the husband the said sum of $5,000. Certain payments were to be made at certain specified times, and from thence $500 was to be paid annually until the full payment of the said $5,000. In March, 1896, the husband filed an application in that case in the district court of Burt county, in which he recited that he had paid the judgment awarded the wife with the exception of some $1,500 and interest; that because of drouths and crop failures his real estate and personal property had depreciated in value until, in his opinion, a forced sale of all the property owned by him would not bring more than $5,000; and he prayed to be relieved from any further payments on said judgment, and that the same might be canceled. The district court denied the husband's application to relieve him from the balance of the judgment, but, by agreement of the wife in open court, reduced the annual payments from $500 to $350. The husband has appealed from this order.

1. If the district court was invested with any authority to vacate or annul the money judgment awarded by the district court to the wife in the divorce proceeding, or to reduce the amount of that judgment, it certainly did not abuse its discretion in refusing to do so. The fact that the husband's property in 1896 had depreciated in value by reason of crop failures and drouths, since the rendition of the judgment in favor of the wife, was not sufficient to authorize the district court to release the husband from the payment of the balance or any part of that judgment. The wife and both the children were still living. It was not alleged nor proven that either of them had come into possession of other property; that she was dissipating and wasting the money awarded by the court towards the support and maintenance of the children and not using it for that purpose; nor that the property

of the husband, by reason of its character, or from any other cause, had become practically worthless. We do not say that, if these facts had been pleaded and proved, they would have entitled the husband to a cancellation of the judgment; but, if the court had the power to modify or release the money judgment by reason of the changed circumstances and conditions, those shown by the husband in his application for the annulment of the judgment were not sufficient. The facts stated in the husband's application here were insufficient to sustain an order of the court annulling or reducing the amount of this judgment, if the court under any circumstances had authority to make such an order.

2. We do not decide whether the district court had any authority to reduce the amount of the judgment rendered in the divorce case upon the application of the husband. It is claimed by the husband that such authority is conferred upon the court by section 27, chapter 25, Compiled Statutes; but it would seem that that section confers power upon the court to revise and alter a decree for alimony when the alimony awarded is a certain sum payable per week, per month, or per year, etc., until a further order of the court. The alimony awarded the wife in this divorce suit was a sum in gross, meant and intended by the court to be in lieu of her dower, homestead, and all her other rights and claims against the property of the husband. It was in effect a decree awarding the wife a money judgment for her share of the common property of the husband and wife, upon the dissolution of the marriage; and where the court granting the divorce awards the wife a sum of money in gross in lieu of her dower, homestead, or other rights in the husband's property, and adjourns *sine die*, such a judgment becomes a positive, final, and conclusive one, and cannot be changed or modified after the term at which it was rendered, except for the causes and in the same manner that other judgments may be modified. (*Sammis v. Medbury*, 14 R. I. 214; *Vert v. Vert*, 54 N. W.

Rep. [S. Dak.] 655; *Cole v. Cole*, 31 N. E. Rep. [Ill.] 109; *Olney v. Watts*, 43 O. St. 500; *Shaw v. Shaw*, 59 Ill. App. 268.) The decree appealed from is

AFFIRMED.

IRVINE, C., not sitting.

FIRST NATIONAL BANK OF CHICAGO V. BARBARA STOLL.

FILED FEBRUARY 9, 1899. No. 8668.

1. **Pleading:** SHAM DENIAL. An averment in an answer that the defendant is ignorant of certain matters alleged in the petition, and therefore asks strict proof, is not a denial and presents no issue.
2. **Married Women:** COVERTURE: PLEADING. A plea of coverture must negative the conditions under which a married woman is by statute permitted to contract.
3. ———: ———: ———. A plea of coverture which merely asserts that the defendant or her separate estate received no benefit from the contract is insufficient.
4. ———: SURETYSHIP. Within the limits of her general contractual power a married woman may enter into a contract of suretyship.

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

J. E. Cobbey, for plaintiff in error.

References: *Briggs v. First Nat. Bank of Beatrice*, 41 Neb. 17; *Smith v. Spaulding*, 40 Neb. 341; *Gillespie v. Smith*, 20 Neb. 455.

R. W. Sabin and *Alfred Hazlett, contra.*

References: *State Savings Bank v. Scott*, 10 Neb. 83; *Barnum v. Young*, 10 Neb. 309; *Grand Island Banking Co. v. Wright*, 53 Neb. 574.

IRVINE, C.

The First National Bank of Chicago sued Barbara

Stoll, together with H. C. Stoll and A. C. Scheiblich, on a promissory note alleged to have been made by the defendants to the Nebraska National Bank of Beatrice, and by it sold and transferred before maturity to the plaintiff. H. C. Stoll and Scheiblich made default. Barbara Stoll undertook to plead coverture, and on a trial to the court prevailed. The answer, omitting formal parts, is as follows:

"She admits the signing of said note sued on in said action. Answering further the petition of said plaintiff this defendant says that she is the wife of H. C. Stoll, one of the said defendants in the above entitled action, and was at the time of the making and execution of said note. This answering defendant further says that she only signed said note as surety, and not as principal, and that she received no consideration whatever of the money mentioned in said note, and for which said note was given, and no benefit accrued from said note to her or to her sole and separate estate. This answering defendant further says that said promissory note signed by her as aforesaid was not given for any debt contracted by this answering defendant, or for any debt contracted by her husband, H. C. Stoll. This answering defendant further says that she knows not whether the plaintiff in this action is a corporation organized under the national banking law, and knows not whether the note sued on in this action was sold and transferred for a valuable consideration and before maturity, as alleged in the plaintiff's petition, and therefore would ask that strict proof be given for the same."

The answer stated no defense. It expressly admitted the execution of the note, and by implication admitted its transfer to the plaintiff as alleged in the petition. The averment that defendant did not know the corporate character of plaintiff or the fact of such transfer, and asked for strict proof, is not a denial and presents no issue. (*National Life Ins. Co. v. Martin*, 57 Neb. 350.)

The defense was then relegated to the plea of covert-

ure. This merely averred that defendant received no consideration and that no benefit accrued to her or her separate estate. The answer in *Gillespie v. Smith*, 20 Neb. 455, was almost in the identical language of this answer and was held to state no defense. It was there said that a plea of coverture must negative all the causes from which liability would be inferred,—that is, as the plea goes to the ability of defendant to contract, and as a married woman may now contract in certain cases, the plea must show that the case is one as to which the disability has not been removed. A married woman may carry on a separate business, and may make any contract with reference to such business or with reference to her separate estate. It is not necessary, in order to bind her, that the contract should prove beneficial to her or to her estate. The allegation of suretyship did not help out this plea, for a married woman, within the limits of her general contractual power, may enter into a contract of suretyship. (*Smith v. Spaulding*, 40 Neb. 339; *Briggs v. First Nat. Bank of Beatrice*, 41 Neb. 17.)

REVERSED AND REMANDED.

NORVAL, J., and RAGAN, C.

We concur in holding that the answer is an insufficient plea of coverture, solely on the ground that the question was in effect decided in *Gillespie v. Smith*, 20 Neb. 455. The opinion filed therein, in our view, is unsound, but the question being one of practice, the rule therein announced should be followed.

CITY OF O'NEILL V. ADDIE M. CLARK.

FILED FEBRUARY 9, 1899. No. 8651.

1. **Witnesses: OATH.** If an irregularity in the manner of administering an oath to a witness be known at the time, objection must then be made, or it will be waived.

2. **Arbitration and Award:** SEPARATE FINDINGS. Under the statute relating to arbitrations, the arbitrators must in their award state separately their findings of fact and conclusions of law; but this requirement is met if the finding be as certain as is required of the verdict of a jury.

3. ———: ———. A single cause of action having been submitted to arbitration, an award whereby the arbitrators "find for the plaintiff, assess her damages" at a sum named, and "award" her that sum is a sufficient separate finding of facts and of law.

4. ———: AWARD BY TWO OF THREE VALID. A submission to arbitration provided for three arbitrators, that the award might be made by any two, and if so made would be binding. It also provided that the award should be in writing, signed by the three arbitrators named. *Held*, That the last provision should not be so construed as to nullify that for an award by two, but that it meant that the award must be signed by those of the arbitrators concurring therein.

ERROR from the district court for Holt county. Tried below before WESTOVER, J. *Reversed.*

Thomas Carlon, for plaintiff in error.

References: *Hall v. Vanier*, 6 Neb. 86; *Murry v. Mills*, 1 Neb. 456; *Graves v. Scoville*, 17 Neb. 593; *Westover v. Armstrong*, 24 Neb. 393.

M. F. Harrington and *J. J. Harrington, contra.*

IRVINE, C.

The parties to this proceeding entered into the following agreement:

"Whereas, a controversy is now pending, between Mrs. Addie M. Clark, of O'Neill, Nebraska, and the city of of O'Neill, Nebraska, in relation to whether the said Mrs. Addie M. Clark was injured on the night of May 17, 1896, while walking on Benton street, in said city, on account of a defect in said street, and if injured, to what extent, and as to whether, if an injury was sustained, the said city was and is liable therefor, and if liable, to what amount, and as to whether the said Mrs. Addie M. Clark, at the time she received the complained

of and alleged injuries, was guilty of contributory negligence:

"Now, therefore, we, the undersigned, Mrs. Addie M. Clark and the city of O'Neill, do hereby submit said controversy to the arbitration of E. T. George, M. D. Long, and A. T. Potter, of Holt county, Nebraska, or any two of them, and we do mutually covenant and agree, to and with each other, that the award to be made by the said arbitrators, or any two of them, shall be in all things by us, and each of us, well and faithfully kept and preserved; provided, however, that the said award be made in writing under the hands of said E. T. George, M. D. Long, and A. T. Potter.

"And it is further agreed that the award of said arbitrators shall be made in writing, and so made by the 20th day of July, 1896, and reported and delivered to the district court in and for said county of Holt, and that thereupon judgment shall be rendered by said court in accordance with the terms and conditions of said award and pursuant to the statute in such cases made and provided."

This was signed by Mrs. Clark on one side and by the mayor and city council on the other, and duly acknowledged before a justice of the peace. Pursuant thereto the award was filed in the office of the clerk of the district court of Holt county, as follows:

"We, M. D. Long, E. T. George, and A. T. Potter, to whom was submitted, as arbitrators, the matters, in controversy existing between Addie M. Clark, of Holt county, Nebraska, and the city of O'Neill, in said county and state, as by their submission in writing and bearing date the 13th day of July, 1896, more fully appears: Now, therefore, we, the said arbitrators mentioned in the said submission, having been first duly sworn according to law, and having heard the proofs and allegations of the parties and examined matters in controversy submitted by them, do make this award in writing, that is to say:

"We find for plaintiff and assess the amount of her recovery at the sum of $200, which sum we do award to said plaintiff, and we also award that each party pay the cost of its suit and reference.

"Given under our hands this 20th day of July, 1896.

"M. D. LONG,
"A. T. POTTER,
"*Arbitrators.*"

The city then moved for the entry of judgment upon the award. This was resisted by Mrs. Clark, the motion was overruled, a motion to recommit was overruled, and the award was set aside. The city brings the case here by petition in error.

It will be seen that the attempt was to arbitrate a claim for personal injuries and procure the entry of judgment on the award in accordance with the provisions of title 28 of the Code of Civil Procedure. The defendant in error has not favored us with a brief, and our only means of ascertaining why the district court rejected the award is from the objections filed to its confirmation. These we take up in order:

The first is because a justice of the peace "sat at said trial and swore all the witnesses that testified." We presume that this objection is founded on section 867 of the Code of Civil Procedure, whereby "All the rules prescribed by law in cases of reference are applicable to arbitrators, except as herein otherwise expressed or except as otherwise agreed upon by the parties." Section 300 of the Code prescribes how hearings before referees shall be conducted, and has been held applicable, by virtue of the provision first quoted, to arbitrations. (*Murry v. Mills*, 1 Neb. 459; *Graves v. Scoville*, 17 Neb. 598; *Westover v. Armstrong*, 24 Neb. 393; *Burkland v. Johnson*, 50 Neb. 858.) This section, among other things, gives to referees the power to administer oaths to witnesses, and we assume that the witnesses should, therefore, have been sworn by the arbitrators themselves. But the objection and the proof are both to the effect that the jus-

tice of the peace named swore all the witnesses. It is not shown that the fact was unknown to the complaining party at the time, and, in spite of one or two isolated cases to the contrary, we are of the opinion that the irregular administration of the oath to a witness, or the taking of testimony without an oath at all, must, if known to the adverse party, be objected to at the time. He may not, with knowledge of the irregularity, permit the trial to proceed and raise the question after verdict. (*Cady v. Norton*, 14 Pick. [Mass.] 236; *Slauter v. Whitelock*, 12 Ind. 338; *Nesbitt v. Dallam*, 7 G. & J. [Md.] 494; *Lawrence v. Houghton*, 5 Johns. [N. Y.] 128.)

The next objection is that the arbitrators did not in their award find the facts or separately state their findings of fact and conclusions of law. This has been held necessary in the cases first cited; but in *Sides v. Brendlinger*, 14 Neb. 491, it was held that the finding of fact is sufficient if it be as certain as is required of the verdict of a jury or the finding of a court. This was not a case where a number of different causes of action were submitted to arbitration. A single matter in dispute was submitted, to-wit, the liability of the city to Mrs. Clark for personal injuries claimed to have been sustained by her. This was informally, but with reasonable certainty, stated in the submission. The award is, "We find for plaintiff and assess the amount of her recovery at the sum of $200," which, it will be observed, is in the form of a verdict in such a case, and so meets the requirement as to the finding of fact in *Sides v. Brendlinger*. It then proceeds, "which sum we do award to said plaintiff." This was a separate statement of the conclusion of law.

Finally, it was objected that E. T. George, one of the arbitrators, did not sign the award. By recurrence to the submission it will be found that the parties agreed to submit the controversy to George, Long, and Potter, "or any two of them," and further that the award made by "said arbitrators, or any two of them, shall be in all things by us, and each of us, well and faithfully kept and pre-

served." This is a very distinct agreement to submit and abide by the award of any two of the three arbitrators named. And by section 862 of the Code controversies may be submitted to the decision of one or more arbitrators. The proviso, "that the said award be made in writing under the hands of said E. T. George, M. D. Long, and A. T. Potter," cannot be regarded as nullifying the two prior express provisions that two may make the award. It merely meant that the award must be in writing and signed by the arbitrators, or a sufficient number of them, to comply with the agreement. The record discloses no reason why the award should not have been enforced.

REVERSED AND REMANDED.

NEBRASKA CHILDREN'S HOME SOCIETY ET AL. V. STATE OF NEBRASKA.

FILED FEBRUARY 9, 1899. No. 10330.

1. **Contempt:** DISOBEDIENCE OF ORDER. In a contempt proceeding based on the alleged violation of a judicial order, such order may be examined only with a view to ascertaining whether it was *coram judice*. No mere error or irregularity therein, or in the proceedings leading thereto, excuses its disobedience.

2. **Habeas Corpus:** DEFECTIVE PETITION. A writ of habeas corpus, allowed by competent authority, may not be disregarded because allowed on an insufficient petition. A writ so allowed is not therefore void.

3. ———: WRIT: TO WHOM DIRECTED. Although our habeas corpus act requires a writ to be directed to the sheriff, where the person charged with an unlawful restraint is not an officer charged with the custody of lawful prisoners, still the court, or judge in vacation, who has jurisdiction of the proceeding, may, when such writ proves unavailing to produce the prisoner, require by order any party to the proceeding, who is shown to have control of the prisoner, to produce his body.

4. **Contempt:** PUNISHMENT: AUTHORITY. The power to punish for contempt is incident to every judicial tribunal, derived from its very constitution, without any express statutory aid, and may generally be exercised only by that tribunal whose order has been violated or proceedings interfered with.

5. ———: ———: PROCEEDINGS. Contempt proceedings may be punitive merely, or they may be remedial, to compel obedience to an order for the time resisted.

6. ———: ———: ———: JURISDICTION IN VACATION. Without determining the power in such a case to conduct purely punitive proceedings, *held*, that a judge in vacation, vested by law with jurisdiction to conduct certain proceedings, has the inherent power, incident to that jurisdiction, to hear and determine proceedings for contempt for the purpose of enforcing his orders in the principal matter.

7. ———: ———: TRANSFER OF CAUSE. The power to punish for contempt being restricted to the tribunal whose authority is defied, it is not error for a judge, who within his authority has made an order in vacation, to refuse to transfer to another judge for hearing a proceeding in contempt based on the disobedience of such order.

8. ———: ———: INFORMATION. If the terms of an information in contempt clearly show that the act complained of was willful, the information will not be held bad for the failure to use the word "willful."

9. ———: ———: ARRAIGNMENT UNNECESSARY. It is not necessary in a contempt proceeding that the defendant be formally arraigned.

10. ———: ———: PROCEDURE. Where a contempt proceeding is instituted by information and a rule to show cause, it is the duty of the defendant to file an answer if he desires to traverse the facts charged. Failing on sufficient opportunity to so do, the court may treat the facts alleged in the information as confessed.

11. ———: ———: FINE AND IMPRISONMENT. Where the object of a contempt proceeding is to compel obedience to an order which may still be obeyed, it is not error to sentence the defendant to imprisonment until he shall obey such order, and in addition to impose a reasonable fine for past disobedience.

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

Montgomery & Hall, for plaintiffs in error:

The petition for the writ in the habeas corpus proceeding was insufficient. (Church, Habeas Corpus secs. 89, 90, 112; *Ex parte Nye*, 8 Kan. 99; *State v. Ensign*, 13 Neb. 250.)

Even if the district judge was authorized to enter the order for the production of the children, he had no power to proceed in vacation to attach and punish the plaintiffs

as for contempt of court. (*Ellis v. Karl*, 7 Neb. 381; *Browne v. Edwards*, 44 Neb. 361; *Fisk v. Thorp*, 51 Neb. 1; *Hodgin v. Whitcomb*, 51 Neb. 619; *Larco v. Casaneuava*, 30 Cal. 564; Rapalje, Contempt sec. 8; *Johnson v. Bouton*, 35 Neb. 898; *Taylor v. Moffatt*, 2 Blackf. [Ind.] 305; *Gates v. M'Daniel*, 3 Port. [Ala.] 356; *Oregon v. McKinnon*, 8 Ore. 488; *State v. Stevens*, 19 Pac. Rep. [Kan.] 367.)

The district judge erred in overruling the demurrer to the information. (*Gandy v. State*, 13 Neb. 445; *Boyd v. State*, 19 Neb. 128; *Ludden v. State*, 31 Neb. 429; *Cooley v. State*, 46 Neb. 603; *Beckett v. State*, 49 Neb. 210; *Hawthorne, v. State*, 45 Neb. 871; *Hawes v. State*, 46 Neb. 149.)

Arraignment is necessary. (*Zimmerman v. State*, 46 Neb. 13; *Boyd v. State*, 19 Neb. 128.)

A. S. Churchill, contra.

IRVINE, C.

June 20, 1898, there was presented to the Hon. Cunningham R. Scott, one of the judges of the fourth judicial district, an application for a writ of habeas corpus. The application was made in Douglas county, and apparently while the district court of that county was in vacation. The application was by Benjamin F. Dodd and Annie E. Dodd, his wife, and was based on the unlawful restraint of four minor children of the petitioners by the Nebraska Children's Home Society, a corporation, and Elmer P. Quivey, its superintendent. Judge Scott allowed the writ, which accordingly issued. The sheriff returned that he had made service of the writ upon the society and upon Quivey; that he had demanded the children and had met with refusal; that they were not found. The respondents answered, admitting that they had had the custody of the children, but alleging that they no longer had such custody. This return was on motion quashed, apparently for the reason that it failed to comply with that portion of section 371 of the Criminal Code, which requires the respondent, if he has had the party in his custody or

power, or under restraint, and has transferred such custody or restraint to another, to "state particularly to whom, at what time, for what cause, and by what authority such transfer was made." Thereupon an amended return was filed, which was deficient in the same respect, and was stricken from the files. Then the judge made an order reciting the proceedings, and requiring the respondents directly, at a time and place fixed, to produce the bodies of the children before the judge. They failing to do so, the present proceeding was begun by information against the Nebraska Children's Home Society, Louis D. Holmes, and Elmer P. Quivey, charging them with contempt of court in refusing to obey the order. A rule to show cause was made by the judge, and proceedings were had thereon which resulted in adjudging the defendants guilty, fining Holmes and Quivey each $200, and sentencing them to be confined in jail until they should produce the bodies of the children. The three defendants, by separate petitions in error, bring the case here for review.

In addition to the foregoing statement it may be said that the Nebraska Children's Home Society is a corporation whose object seems to be to obtain by contract the custody of children from their parents and the providing for them of homes elsewhere by contracts of adoption; that the Dodds had undertaken by contract to so part with their children, and the object of the habeas corpus proceedings was to test the binding force of these contracts. In the voluminous briefs presented many questions are argued. These fall into three classes: First, questions relating to the validity of the habeas corpus proceedings; second, questions relating to the power of the judge in the contempt proceedings; third, questions relating to the regularity of the contempt proceedings.

Preliminary to a discussion of the first group of questions it may be said that the proceedings in the habeas corpus case are open to examination here only so far as to ascertain whether the judge in those proceedings was acting within his jurisdiction. If not, his orders were

void, and no contempt could be committed by disregarding them. If, however, the order violated was one which the judge had authority to make, then the propriety of his making it, or the regularity of the proceedings leading up thereto, do not now concern us. No matter how erroneous that order may have been, no matter how irregular the proceedings leading thereto, such errors or irregularities cannot be urged as a defense or in extenuation of the violation of the order. The foregoing is a statement of law which has become elementary, and is rendered necessary only by the fact that counsel on both sides have seen fit to discuss at some length the question of the validity of the contracts out of which the habeas corpus proceedings grew, and other questions manifestly going only to the regularity and not to the validity of those proceedings.

It is charged that the application for a writ of habeas corpus was insufficient to authorize the judge to allow the writ. While the application in such case is the initiative proceeding, the validity of the writ does not depend on the sufficiency of the application. The issue of the writ is a judicial act. Where the application is in all respects sufficient, it is the duty of the judge to allow the writ; but it does not follow that the writ is void and can be disregarded if the judge, through mistake of law or from other cause, sees fit to allow it on an informal or insufficient petition. It has been held that the proper method of attacking the petition is by motion to quash the writ, and that insufficiency in the petition is waived unless that remedy be resorted to. (*McGlennan v. Margowski*, 90 Ind. 150.) It follows that a defective petition is not, therefore, fatal to the jurisdiction. We need not enter into an extended discussion of the nature of the writ of habeas corpus and the uniform policy of constitution, statutes, and decisions, to render it absolutely effective as a safeguard against unlawful restraint of the person. But, aside from mere technical considerations, a moment's attention to the subjects indicated must con-

vince one that when a judge sees fit to allow a writ it must be obeyed or resistance thereto made in the regular manner. Neither ministerial officer nor private citizen can be permitted to ignore its mandate because he may think the judge allowed it on insufficient grounds.

It is not seriously contended that the power to allow the writ of habeas corpus, to conduct a hearing, and adjudicate the rights of the prisoner are not vested in a judge in vacation. But it is strenuously argued that the particular order, the disobedience of which is charged in the information for contempt, was of such a nature that it could not be made by a court, and was especially beyond the powers of a judge in vacation. On this question we are favored by counsel for the defendant in error with an elaborate discussion of the history of habeas corpus as a common-law writ and under the statute of Charles II, coupled with an able argument to show that by virtue of acts of congress the common-law powers of judges with regard thereto were carried into the territory of Nebraska, and that the writ and procedure thereunder, according to English practice, were thereby recognized and perpetuated by the state constitution. To decide the question before us we do not find it necessary to examine into the soundness of this argument in its details and to its full extent. It is true that in the habeas corpus act of the territory of Nebraska, substantially preserved still in chapter 34 of the Criminal Code, there is no express warrant for such orders as Judge Scott made in this case. Section 367 of the Criminal Code, being a portion of the chapter cited, prescribes the form of the writ in case of detention by persons not being officers charged with the custody of prisoners, and the writ thereby prescribed runs to the sheriff, commanding him to bring the body of the person in question before the judge, and to summon the person charged as detaining the prisoner to appear and show cause for the taking and detention. Such was the form of the writ in this case, and by recurrence to the statement with reference to the sheriff's return it will be

found that the writ proved unavailing, through the inability of the sheriff to find the children and the refusal of the respondents to produce them. It certainly never could have been the intention of the legislature to deprive a court of all power to require the production of the prisoner except through the writ provided for in the section cited. An essential element of the remedy by habeas corpus is the power to compel the production of the body of the prisoner before the judge. It is this very feature which is embodied in the distinctive words which give the name to the writ. And while in certain cases courts have proceeded, generally by agreement of those concerned, without the actual production of the prisoner, this has always been because such production would be inconvenient, and the case was so shaped that the court was assured that its order would be effective in the absence of the prisoner. The existence of such cases is no argument whatever against the power of the court to compel the production of the prisoner before proceeding. The statute provided, in the cases named, that the writ should be directed to the sheriff, commanding him to bring the prisoner before the court, not for the purpose of preventing other means of compelling production, but for the purpose of providing an additional means which might generally be more effective than a writ directed to the person charged with the unlawful detention. We have not the slightest doubt that where the original writ fails to bring the prisoner before the court, the court may make such further orders against parties to the proceeding as will lead to the performance of that usually vital prerequisite to an examination and an effective final order in the case; and as the power to allow, hear, and determine writs of habeas corpus is vested in district judges in vacation, the power to make appropriate orders for the production of the prisoner necessarily rests as well in such judges as in the court in term time. The order made was, therefore, one which the judge had power to make, and in a proceeding whereof he had jurisdiction,

and all matters relating merely to the propriety of its making must, for the purposes of this case, be disregarded.

The next group of questions relates to the power of the judge in the contempt proceedings. As to this, the argument is that a judge in vacation possesses only such powers as are expressly conferred upon him by law. All implied powers are excluded; and although a judge in vacation may allow a writ of habeas corpus, hear and determine the same, he may not in vacation punish for contempts occurring in the course of those proceedings. It is true that this court has frequently held, and such is the law generally, that a judge in vacation is confined to those powers expressly conferred upon him; but this does not mean that all the minutiæ of the exercise of general powers conferred must also be expressly granted. *People v. Brennan*, 45 Barb. [N. Y.] 344, *Taylor v. Moffatt*, 2 Blackf. [Ind.] 305, and *Gates v. M'Daniel*, 3 Port. [Ala.] 356, in a general way, support the argument of plaintiffs in error, although those cases are open to criticisms and distinctions, which, however, we do not deem it of sufficient importance to here point out. Some cases hold that a judge in vacation may not punish as a contempt the disobedience of an order made in term time, and many cases on the subject are based on the construction of statutes not here existing. We conceive that the principles governing the question are, after all, simple and not difficult of application. Contempts are punished by that tribunal, and that one alone, whose order is violated or whose proceedings are interrupted. The effect may well be, although this we do not determine, that an order made by the court must be protected by the court, and its violation cannot be punished by a judge in chambers. It also is clear that proceedings in contempt have, or may have, a double object. They may be punitive, to vindicate the authority of the court or judge, and inflict exemplary punishment. They may also be remedial, not so much to punish a past violation of the court's orders as to compel

obedience to an order for the time being resisted. More particularly to the latter class belongs the proceeding we are now examining. As has already been said, there can be no doubt of the power, and the duty, when occasion demands, of a judge in vacation allowing, hearing, and determining a writ of habeas corpus; but that power would be nugatory were he not also vested with the power to compel obedience to such preliminary orders as may be necessary for the purpose of enabling him to exercise the power granted. Authority to allow, hear, and determine a writ of habeas corpus is vested in a judge at chambers, because the remedy is of a summary character which is to be administered without delay. And it never was intended, and never could have been intended, that this prime object should be defeated through the inability of a judge in chambers to compel obedience to his orders. The foregoing views are supported by *Cobb v. Black*, 34 Ga. 162, and *Harmon v. Wagener*, 33 S. Car. 487.

Attention is called to section 356 of the Criminal Code, which makes it the duty of witnesses subpœnaed in habeas corpus cases to attend and give evidence on penalty of being guilty of contempt, and to "be proceeded against accordingly by said judge or court." It is argued that the expression of the power to proceed against witnesses operates as an exclusion of power to punish other contempts. But the section applies as well to the court as to the judge, and the argument would go so far, if sound, as to deny even to the court all other power to compel obedience to orders in habeas corpus cases. We think this section was inserted to extend, or at least to declare, the power of the court or judge to punish witnesses for contempt. It was not intended to make witnesses alone punishable, and to permit the disobedience of orders more necessary than subpœnas to go unpunished. We are also cited to *Johnson v. Bouton*, 35 Neb. 898, where section 669 of the Code of Civil Procedure, conferring upon "every court of record" power to punish for contempt in certain cases, is cited, and certain language used from which it

perhaps might be inferred that that section was deemed exclusive, and that it restricts the power to punish for contempt to courts as contradistinguished from judges. That the language used was not so intended is evident from the fact that the contempt charged in that case was the violation of an injunction, and that by the express provisions of section 260 of the Code of Civil Procedure "Disobedience of an injunction may be punished as a contempt by the court, or by any judge who might have granted it in vacation." What was decided in *Johnson v. Bouton* was that where a county judge, under circumstances permitting him to do so, allows a temporary injunction, it does not become effective until an approved bond is filed in the district court; that the injunction is the process of the district court and not of the county judge; that his jurisdiction ceases on his allowing the injunction, and that he may not punish its violation. As against any inference which might be drawn from the language referred to in that case, several decisions may be cited. *Kregel v. Bartling*, 23 Neb. 848, held distinctly that "the power to punish for contempt is incident to every judicial tribune, derived from its very constitution, without any expressed statutory aid." In *Dogge v. State*, 21 Neb. 272, it was held, without reference to any specific statutory authority, that a notary public has power to commit for contempt a witness who refuses to give his deposition; and in *Rosewater v. Pinzenscham*, 38 Neb. 835, the court, speaking of certain actions of the board of fire and police commissioners of Omaha, on the hearing of an application for a liquor license, said: "Doubtless, this arose from the belief that the license board had no authority either to enforce the production of the books or to punish witnesses as for contempt for their refusal to testify. This court is, however, unanimously of the opinion that the board possessed such power. The proposition is too plain to require discussion or the citation of authorities in support thereof." From the foregoing it may be seen that it is the general rule

that where any officer or any tribunal has authority to hear and determine, such authority carries with it the necessary power to render it effective by contempt proceedings, especially so far as the latter are remedial in their nature. It is not, strictly speaking, implied power; it is an inherent power, essentially connected with the main purpose of the tribunal.

It is next argued, whatever may be the circumstances as to the society and Quivey, who were respondents in the habeas corpus case, that Holmes was not subject to proceedings for contempt, because he was not a party thereto. The society is a corporation. The information charges, and the proof shows, that Holmes was president thereof; that the writ of habeas corpus was served on him. The information also charges that the children are within the power and control of the society, and that Holmes, as president, has power and control over the affairs of the corporation. While a corporation is in itself amenable to punishment for contempt, it cannot be imprisoned, and frequently can be coerced only through its officers; and where a corporation disobeys a judicial order, as a general rule, not only may the corporation be proceeded against, but those of its officers who, knowing of the order, participate in its violation are also guilty of contempt. (*Sercomb v. Catlin*, 21 N. E. Rep. [Ill.] 606; *First Congregational Church v. City of Muscatine*, 2 Ia. 69.) *Boyd v. State*, 19 Neb. 128, is cited on behalf of Holmes; but in that case, which was for violating an injunction, the injunction was against certain contractors with the city, and the contempt proceedings were against Boyd, who, as mayor of the city, was charged with its violation. The court held that the injunction restrained only the defendant, and those designated in the order in subordination to the defendant. That the court did not intend to hold, and did not hold, that officers of a corporation were not guilty of contempt in violating orders directed to the corporation is apparent from the following language: "Had the plaintiff in the original case desired to bind the

city and its officers, as well as the contractors, by his proceedings in injunction, he should have made the city a party to this suit."

We are thus brought to those questions affecting the regularity of the contempt proceedings. An application was made to Judge Scott to transfer the matter for hearing to some other judge. This application was based on the alleged prejudice of Judge Scott against the respondents and their attorney. We need not review the showing made on this motion, which Judge Scott overruled. Generally speaking, a contempt may only be inquired into and punished by the tribunal whose process or proceedings have been invaded. No court can punish for contempt of another court. (Rapalje, Contempt sec. 13.) We have no statute authorizing a transfer in such cases, and even general statutes relating to changes of venue have usually been held not to apply to contempt proceedings. (Rapalje, Contempt sec. 110.) The proceeding was not before the district court of Douglas county. It was before Judge Scott in chambers. Whatever might have been the propriety of transferring the case to another judge, were the proceeding one for violating the order of the court, and whatever might have been the propriety, even under the present circumstances, of Judge Scott's requesting another judge to take up the proceedings, were he conscious of any impropriety in himself conducting them, we are satisfied that it cannot be error for a judge to refuse to transfer to another judge for hearing a proceeding in contempt where the contempt charged is the violation of his own order made in chambers.

The sufficiency of the information is attacked, and counsel invoke the well-known rule that an information in contempt must charge the offense with all the particularity required of a criminal information. The point chiefly made is that the information does not charge the willful disobedience of the order. The information is quite long, and we shall not set it out in full. It is true the word "willful" is not used, but the facts are stated with such

particularity and in such a manner as to clearly charge a willful disobedience.

It is charged that the defendants were put upon trial without an arraignment. No authority is cited, nor do we think that any can be found, to the effect that a formal arraignment is necessary in such a proceeding.

The respondents demurred to the information, and the demurrers were overruled. The bill of exceptions shows that thereupon Mr. Churchill, representing the state, said: "Counsel for the defendants inform me they do not intend to file any pleadings showing why they should not be punished for contempt. If I understand correctly, the information stands confessed then." The judge said: "Yes, I think that is the rule." The respondents seem to have said nothing. Thereupon Mr. Churchill proceeded to offer certain evidence. In view of his position and that of the judge, this was unnecessary; but the evidence was not objected to on that ground and no question is made here of its admission. Then the respondents undertook to introduce evidence on their own behalf, and were met by an objection on the ground that they had made no showing in defense, and were not entitled to make any proof. Mr. Montgomery, for the respondents, said: "I desire to state of record in response to the remark of counsel for the plaintiff, that the defendants stand upon their demurrer, that such is not the attitude of the defendants at all. We simply stand upon our right to proper proceedings and proper trial of the matter whenever it is proper to have a trial, and the right to make our defense in the usual manner, or in such manner as may be proper and lawful." No application was made for leave to answer. No answer was tendered. Repeated offers of evidence were made, but all were excluded on the same objection, that there was no issue before the court; the information standing confessed. It may be said of the evidence offered that, with a single exception, it all went to the supposed want of authority of the judge to proceed, and related to matters the value and benefit

of which has been accorded defendants in this opinion. The exception referred to was the articles of incorporation of the society, by one provision of which the control of its affairs was vested in a board of directors. This was evidence tending to exculpate Holmes by disproving that averment in the information which charged that he had control of the affairs of the society. If, in the condition of the record, the defendants were entitled to introduce evidence, it was therefore error to exclude those articles of incorporation at least. We are largely without guidance on the question of procedure so presented. The old chancery practice in contempt has never been strictly followed in this state. In *Gandy v. State*, 13 Neb. 445, it was said, quoting from *Rex v. Lyme Regis*, 1 Doug. [Eng.] 149, that the purpose of requiring an information is to inform the court and "to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it." And further in the opinion it is said: "The proceeding against the party for constructive contempt must be commenced by an information under oath, specifically stating the facts complained of. An attachment may then be issued, or order to show cause. The person accused has the right to be heard, either personally or by attorney. If the alleged contempt is admitted, the court may render judgment thereon. If the acts complained of are denied, the court should then hear the evidence and determine whether the party is guilty or not." (*Gandy v. State*, 13 Neb. 445.) While this language was largely *obiter*, it was used evidently for the purpose of removing uncertainty and pointing out the regular and orderly procedure. The case was decided in 1882, and has undoubtedly been accepted as a guide in many cases. We are not inclined to depart from the suggestions there made. Here a rule to show cause was issued. The defendants demurred to the information; their demurrer was unsuccessful. It then became their duty to show cause—that is, to present an answer which, by traverse or otherwise, would meet the charge.

of the information. They had ample notice, through the statements of counsel and of the court, that, failing to do so, the information would be taken as admitted. Had they, after that statement of the judge, tendered an answer, he should, and doubtless would, have permitted it to be filed. Instead thereof, they assumed an apparently defiant attitude and practically told the judge they were resting on their rights and not seeking to interpose a defense to the merits. We think the judge was correct in holding that by failing to answer they confessed the information and tendered no issue, and he properly, therefore, refused to receive evidence.

Finally, it is contended that the sentence imposed was improper, both as to the amount of the fine and the unlimited imprisonment inflicted. We think that the extent of the punishment, certainly within reasonable limits, rested in the discretion of the trial judge, and certainly cannot see that the fine was exorbitant. As to the imprisonment, it was for just as long or just as short a time as the defendants themselves saw fit to make it. It was until they should comply with the order of the judge which they had been convicted of violating. It was charged that it was in their power to comply. They did not by answer, or even by any evidence which they sought to introduce, attempt to show that obedience was not within their power. The proceeding being of a class which we have characterized as remedial, the imprisonment might properly be made to endure as long as the contempt.

AFFIRMED.

HARRISON, C. J., not sitting.

PARLIN, ORENDORF & MARTIN COMPANY, APPELLANT, V. JOHN I. ULRICH ET AL., APPELLEES.

FILED FEBRUARY 9, 1899. No. 8632.

Creditors' Bill: QUESTION OF FACT. In a suit in the nature of a creditors' bill only a question of fact was presented. Decree of the district court *held* to be sustained by the evidence.

APPEAL from the district court of Buffalo county. Heard below before WESTOVER, J. *Affirmed.*

Marston & Marston, for appellant.

References: *Melick v. Varney*, 41 Neb. 105; *Carson v. Stevens*, 40 Neb. 112; *Glass v. Zutavern*, 43 Neb. 334; *Aultman v. Obermeyer*, 6 Neb. 260; *First Nat. Bank of Omaha v. Bartlett*, 8 Neb. 319; *McEvony v. Rowland*, 43 Neb. 97; *Butts v. Hunter*, 33 Neb. 119; *Darnell v. Mack*, 46 Neb. 740; *Farrington v. Stone*, 35 Neb. 456.

B. O. Hostetler, *W. D. Oldham*, and *H. M. Sinclair*, *contra.*

References: *Ward v. Parlin*, 30 Neb. 376; *Dayton Spice Mills Co. v. Sloan*, 49 Neb. 622.

IRVINE, C.

This was a creditor's suit brought by the Parlin, Orendorf & Martin Company, a judgment creditor of John I. Ulrich and August Ulrich, to subject to the payment of the judgment certain lands alleged to have been fraudulently conveyed. There were several defendants, and several transfers by each debtor were attacked. The court found generally for the defendants and dismissed the case. The plaintiffs by their appeal seek a review of the case only so far as it affects certain transfers by John I. Ulrich directly and indirectly to his wife.

The question presented is solely one of fact. The transfers being from husband to wife, the burden devolved upon her of showing their *bona fides*. While the convey-

ances are in themselves of a very suspicious character, and the circumstances do not altogether remove the suspicion, still there was evidence, which, if believed, explained the transactions in a manner consistent with good faith. The credibility of witnesses was for the trial court, and it was also largely for that tribunal to draw the essential inferences from the facts proved. It would be useless to review the evidence in detail. It was of such a character that under the rule prevailing in this state we are not at liberty to interfere with the finding attacked.

AFFIRMED.

EDWARD BULLOCK, APPELLEE, V. WILLIAM J. POCK ET AL., IMPLEADED WITH J. A. GEORGE, APPELLANT.

FILED FEBRUARY 9, 1899. No. 8623.

Release of Mortgage: INNOCENT PURCHASER. Where a debt secured by mortgage has been assigned, but no assignment of the mortgage placed on record, an innocent purchaser of the mortgaged premises will be protected by a release of the mortgage executed by the original mortgagee. *Whipple v. Fowler*, 41 Neb. 675, followed.

APPEAL from the district court of Dodge county. Heard below before MARSHALL, J. *Reversed.*

W. J. Courtright, for appellant.

Stinson & Martin, contra:

The fraudulent release, like a forged release, furnishes no protection to a *bona fide* purchaser. (*Keller v. Hannah*, 52 Mich. 535; *Baily v. Smith*, 14 O. St. 396.)

Assignments are not within the recording acts. (Martindale, Conveyancing [2d ed.] sec. 471; *Powell v. Webster*, 4 Rawle [Pa.] 247; *Mott v. Clark*, 9 Pa. St. 399; *Reeves v. Hayes*, 95 Ind. 527; *Bamberger v. Geiser*, 33 Pac. Rep. [Ore.] 609; *Oregon Trust Co. v. Shaw*, 5 Sawyer [U. S.]

340; *Mead v. Leavitt*, 59 N. H. 476; *Heyder v. Excelsior Building & Loan Ass'n*, 42 N. J. Eq. 407.)

IRVINE, C.

February 10, 1892, Frederick W. Rhodes, being the owner of certain real estate in the city of Fremont, conveyed the same to William J. Pock, and Pock executed to Rhodes his notes and a mortgage on the premises for the unpaid purchase-money. This mortgage was duly recorded. Thereafter, on May 7, 1892, Rhodes sold the notes to Bullock, but no assignment of the mortgage was recorded, nor was any executed. In the meantime Pock had conveyed the land to Smith. January 20, 1893, Rhodes, the original mortgagee, executed a release of the mortgage which was, June 10, 1893, recorded. July 1, 1893, J. A. George purchased the land from Smith and received a conveyance, he having no notice that the notes had been sold by Rhodes, making the purchase in reliance on the release of the mortgage appearing of record. The mortgage had not in fact been paid. Bullock brought this suit against George and others to foreclose the mortgage. George by cross-petition sought to quiet his title against the mortgagee. Issues were joined and a decree entered in favor of Bullock foreclosing the mortgage. The foregoing statement of facts is taken from the special findings of the trial court, which are conceded to be correct.

It has several times been held by this court that where notes secured by a mortgage have been sold, but not in fact satisfied, nevertheless the entry of satisfaction by the original mortgagee, no assignment of the mortgage being of record, protects a purchaser for value without notice, against the mortgage. (*Whipple v. Fowler*, 41 Neb. 675; *Cram v. Cottrell*, 48 Neb. 646; *Porter v. Ourada*, 51 Neb. 510.) It is conceded that if these decisions be adhered to, the judgment must be reversed. But counsel, with much ability, attack the correctness of the decisions, and ask that they be overruled. After the careful consid-

eration demanded by the nature of the argument, we remain convinced of the correctness of the prior decisions, and adhere to the rule there announced. They are chiefly attacked on the ground that they are based on precedents in states where a mortgage passes the legal title. It is admitted that where such is the effect of a mortgage the rule is correct, because the legal title passing to the mortgagee, it can pass from him to a third person only by a written conveyance in proper form, and therefore a purchaser may rely on the record. But it is said that in this state a mortgage creates only a lien, that the debt is the principal thing, and that by the transfer of the evidence of debt the mortgage itself passes. In seeking to draw the distinction counsel overlook the fact that although in this state a mortgage creates only a lien, nevertheless the provisions of the statute of frauds apply equally to transfers of title and to mortgages, as do in fact the recording acts. The fundamental principle of the decisions is that by failing to take and cause to be recorded an assignment of the mortgage, the assignee has left it in the power of the original mortgagee to apparently discharge the mortgage,—that is, with apparent authority to make the record show its discharge,—and that, when this occurs, an innocent purchaser relying on the record should be protected by the doctrine of equitable estoppel, and not merely by the operation of technical rules with reference to transfers of title. The judgment of the district court is reversed and the case remanded with directions to dismiss the petition for foreclosure, and quiet the title in George as prayed.

REVERSED AND REMANDED.

NEW HAMPSHIRE TRUST COMPANY V. KORSMEYER PLUMBING & HEATING COMPANY.

FILED FEBRUARY 9, 1899. No. 8685.

1. **Evidence**: HARMLESS ERROR: TRIAL. A judgment in an action tried to the court without a jury will not be reversed for the admission of improper evidence, provided there be sufficient proper evidence to sustain the finding.
2. ———: LETTERS. To render admissible in evidence a letter purporting to be in answer to another, it is not necessary to also offer that which it answers, provided the letter offered be in itself fairly self-explanatory.
3. **Review.** Evidence *held* to sustain the finding of the district court.

ERROR from the district court of Lancaster county. Tried below before HOLMES, J. *Affirmed.*

Lambertson & Hall and *C. E. Holland*, for plaintiff in error.

S. J. Tuttle, M. L. Easterday, and *Brown & Sumpter, contra.*

IRVINE, C.

Separate actions were brought against the New Hampshire Trust Company and Hiram D. Upton by the Korsmeyer Plumbing & Heating Company, F. W. Brown Lumber Company, Western Glass & Paint Company, and Leon Baker, each being for goods sold and delivered or labor performed in and about the completion of certain buildings in Lincoln. The four cases presented similar issues and were tried together to the court without the intervention of a jury. There were findings for each plaintiff against the trust company, and judgments thereon. The trust company brings the records here for review.

The assignments of error argued relate to the admission of certain evidence over the objection of the plain-

tiff in error, and to the sufficiency of the evidence to sustain the findings. It was admitted that the several plaintiffs had furnished material and performed labor as charged in their petitions, but it was denied that the persons with whom they had contracted were agents of the trust company empowered to bind it in the matter. On the issue of agency much incompetent testimony was introduced in the form of declarations of the supposed agents; but where a case is tried to the court without a jury, the admission of improper evidence is not in itself reversible error, provided there be sufficient proper evidence to sustain the finding.

It would be useless to review the questions of fact presented in detail. Disregarding all evidence plainly improper we are convinced that sufficient remained to justify the finding, provided that certain letters purporting to have been written by the trust company were properly admitted. These were letters for the most part written to the several plaintiffs, and it appeared from each, as well as by oral evidence, that they were written in response to prior letters sent by the addressees to the trust company or to Upton, its president. The objection insisted on is that in such case the answering letter is not receivable unless the letter which it answers is also offered. Such a rule is stated in a note to section 201 of 1 Greenleaf, Evidence, and also in a note to section 80 of Underhill, Evidence. Perhaps it may be found in other text-books. In each of those cited the sole authority given is *Walson v. Moore*, 1 C. & K. [Eng.] 626, which is to that effect. The contrary was held by Lord Kenyon in *Lord Barrymore v. Taylor*, 1 Esp. [Eng.] 326, and also by Parke, B., in *De Medina v. Owen*, 3 C. & K. [Eng.] 72. In Phillips, Evidence, 416, the two former cases are referred to, but the rule is not so broadly stated as in the American books. It is a significant fact that in Phillips, *Walson v. Moore* is cited as *Watson v. Moore*, and that the typographical error is repeated in both Greenleaf and Underhill. We think the true rule is that where the letter

offered is fairly self-explanatory, that to which it is an answer need not be offered. It may of course be produced by the other side, and a failure to offer it may as a matter of fact affect the weight to be given the answering letter, but not its admissibility. The letters were properly received.

AFFIRMED.

ANDREW J. HANSCOM, APPELLEE, V. MAX MEYER ET AL., APPELLANTS, ET AL.

FILED FEBRUARY 23, 1899. NO. 8716.

1. **Appeal:** EXCLUSION OF EVIDENCE. The decision of a trial court in a cause in which there was a trial to the court without a jury cannot, in an appeal to this court, be assailed because based on the evidence from which there had been an improper exclusion of a portion from consideration, where it does not appear of record that any portion of the evidence was so excluded.

2. **Review.** The findings of a trial court based upon conflicting evidence, if not clearly wrong, will not be reversed.

3. **Mortgages:** FORECLOSURE: SALE: INVERSE ORDER. A tract of land was mortgaged as an entirety, then platted and made an addition to a city, and a number of lots at different times and to different persons sold and conveyed, after which the mortgage was foreclosed. *Held*, That under the conditions and circumstances disclosed in evidence the decree of the court that the land be sold as an entire tract, and a denial of the prayer of the mortgagors that it be sold in lots as platted, and in the inverse order of alienation or conveyance by them, was not erroneous or inequitable.

APPEAL from the district court of Douglas county. Heard below before KEYSOR, J. *Affirmed.*

James H. McIntosh, for appellants.

References as to inverse-order rule: *Ireland v. Woolman*, 15 Mich. 253; *Lausman v. Drahos*, 8 Neb. 457; *Iglehart v. Crane*, 42 Ill. 261; *Lock v. Fulford*, 52 Ill. 166; *State v. Titus*, 17 Wis. 248; *Aikin v. Milwaukee & S. P. R. Co.*, 37 Wis. 469; *Ex parte Merriam*, 4 Den. [N. Y.] 254; *Andreas v. Hubbard*, 50 Conn. 357.

Charles S. Elgutter, also for appellants.

References as to error in excluding evidence: *Riggles v. Erney*, 154 U. S. 254; *Harman v. Harman*, 70 Fed. Rep. 894; *Ferguson v. Rafferty*, 128 Pa. 337; *German-American Ins. Co. v. Hart*, 43 Neb. 441; *Woodworth v. Thompson*, 44 Neb. 311; *Barber v. Hildebrand*, 42 Neb. 400; *Holmes v. First Nat. Bank*, 38 Neb. 326; *True v. Bullard*, 45 Neb. 409.

L. F. Crofoot and *Charles Ogden*, also for appellants.

George E. Pritchett, contra.

References: *Barber v. Harris*, 15 Wend. [N. Y.] 616; *Macloon v. Smith*, 49 Wis. 212; *Sherman v. Willett*, 42 N. Y. 150; *Lamerson v. Marvin*, 8 Barb. [N. Y.] 9; *Griswold v. Fowler*, 24 Barb. [N. Y.] 135; *Bernhardt v. Lymburner*, 85 N. Y. 173; *Woolcocks v. Hart*, 1 Paige Ch. [N. Y.] 186; *Evertson v. Booth*, 19 Johns. [N. Y.] 486; *Griswold v. Fowler*, 24 Barb. [N. Y.] 135.

HARRISON, C. J.

On May 15, 1886, the appellants herein purchased of, and there was conveyed to them by, Andrew J. Hanscom, the appellee, eighty acres of land near the city of Omaha, probably about three and one-half miles distant from the then center of the city. A more particular description of the land is as follows: The southeast quarter of the northeast quarter of section 31, and the southwest quarter of the northwest quarter of section 32, in township 15 north, of range 13 east of the sixth principal meridian. The agreed consideration to be paid for the property was $40,000, of which there was a payment at the time of $2,500. The balance was divided into ten portions, to be paid at stated times, and to evidence the promises of these deferred payments promissory notes were executed, and as security a mortgage on the land purchased was executed and delivered to appellee, in which appeared the statement that it was given to secure the payment of a

part of the purchase price of the property described in it. As soon as in the regular course of such matters it could be done, the land was platted as and for an addition to the city of Omaha and named "Manhattan Addition," and sales of lots therein were made to quite a number of persons, to whom warranty deeds or contracts, as the transactions required, were executed and delivered evidencing the purchases. Some of the deferred payments of the purchase price of the land secured by the mortgage were paid, but there were defaults in the further provided payments, and this, an action to foreclose the mortgage, was instituted. The appellants, in the pleadings filed, admitted the execution of the notes and mortgage; stated the purchase of the land; that the appellee then knew the purpose of appellants with which they purchased, viz., to plat it and make of it an addition to the city of Omaha; that he advised them in regard to the manners of procedure, and suggested the name which was given the addition; also, that there was an oral agreement at the time, and which in part moved them to the purchase, that when they effected sales of lots and paid to appellee certain sums, designated portions of the amounts realized from sales of lots, he would release from the lien of his mortgage such lots. The appellants asked that if a foreclosure of the mortgage was decreed, the sale, if any, under it should not be of the land as described in the mortgage in one tract, but that the plat of the addition be accorded recognition; also, the sales by appellants of lots in said addition, and the sale to satisfy the mortgage, be of the divisions of the land as established by the plat and in the inverse order of the alienation by the mortgagors. On hearing, the trial court denied the prayer of the appellants, and sale of the land was ordered accordant with its description in the mortgage.

There are some arguments presented for appellants to establish that appellees' acts in regard to the addition amounted in law to a dedication, or joining in the dedi-

cation, of portions of the plat and estopped him from enforcing his mortgage by sale of the land in any other manner than in parcels or lots shown by the plat; and further, that the findings and decree of the district court were not sustained by the evidence. The force of these arguments is destroyed by the findings of the district court that the plat was made without the consent, knowledge, or agreement of appellee; and further, that he never made any agreement to release any portion of the land, and further fact that though the evidence relative to the points of litigation to which we have just referred was, in the main, directly conflicting, the findings had support in it and were not clearly wrong; all of which being true, the findings must be allowed to stand.

It is said by way of argument that the court did not consider some of the evidence, and for this reason reached the conclusion it did. This cannot be considered, because the record does not disclose it, and we must be governed by what appears in that document.

The main contention for appellants is of the denial of a direction in the decree that the sale be made of the land as platted and according to the inverse order of alienation or conveyances of lots by the mortgagors. The rule of liability or sale in the inverse order of alienation of mortgaged premises, where there have been subsequent conveyances of portions of property mortgaged in gross, has been very generally recognized and established. (See 2 Pingrey, Mortgages sec. 1922, and cases cited in note. See, also, 2 Jones, Mortgages sec. 1621, and collection of cases in note 2.) It has been approved and announced by this court. (*Lausman v. Drahos*, 8 Neb. 457.) The doctrine is generally invoked and enforced by and for the subsequent purchasers of parts of mortgaged property or subsequent incumbrancers of portions thereof. In this action its aid is asked in favor of the mortgagors. Whether they may call for its interposition and there be a compliance with the demand as a matter of right, as we view the conditions as disclosed herein, we

need not determine. It has been determined that where land has been mortgaged as one tract and subsequently platted or cut up into lots, and some of the lots sold, the mortgagor may not, in event of a foreclosure, insist as a matter of right that the sale be of the lots and not of the whole tract. (Wiltsie, Mortgage Foreclosure sec. 492; *Griswold v. Fowler*, 24 Barb. [N. Y.] 135; *Hubbell v. Sibley*, 5 Lans. [N. Y.] 51; *Paquin v. Braley*, 10 Minn. 304; *Durm v. Fish*, 46 Mich. 312.) There was nothing in this case to appeal to a court of equity to vary, at the instance of the mortgagors, the regular course of a foreclosure of the mortgage on the entire tract and order the sale by the lots as described in the plat. From the evidence it cannot be said that the land was of the value equal to the amount due on the mortgage debt. It may be argued, as it is in the briefs, that it probably might sell for more as city lots than it would as an individual tract, but with equal force, so far as the evidence shows it, the contrary may be asserted. In view of all the evidence we cannot say that the trial court was not fully warranted in decreeing that the sale be of the whole tract. We certainly cannot say that the decree was wrong in this particular. The decree of the district court must be

AFFIRMED.

MCCORMICK HARVESTING MACHINE COMPANY V. W. J. KNOLL.

FILED FEBRUARY 23, 1899. No. 8729.

1. **Sales:** BREACH OF WARRANTY: RESCISSION. If a contract of sale of personalty is executory and accompanied by a warranty of the quality of the property or that it is to be fit or suitable for a specified purpose, and if it is not, may be returned, and the consideration not paid, there may be a rescission for a breach of the warranty.

2. ———: ———: ———: NOTICE. To work a rescission there must be notice thereof to the vendor and an offer to return the property.

3. ——: ——: ——: ——. The offer to return shown in the present case *held* sufficient, in view of all the facts and circumstances of the transaction.

ERROR from the district court of Buffalo county. Tried below before WESTOVER, J. *Affirmed.*

Ricketts & Wilson, for plaintiff in error.

References: *McCormick v. Martin*, 32 Neb. 723; *Mondel v. Steel*, 8 M. & W. [Eng.] 858; *Thornton v. Wynn*, 12 Wheat. [U. S.] 183; *Lyon v. Bertram*, 20 How. [U. S.] 149; *Muller v. Eno*, 14 N. Y. 597; *Voorhees v. Earl*, 2 Hill [N. Y.] 288; *Cary v. Gruman*, 4 Hill [N. Y.] 625; *Kauffman Milling Co. v. Stuckey*, 16 S. E. Rep. [S. Car.] 192; *Minneapolis Harvester Works v. Bonnallie*, 13 N. W. Rep. [Minn.] 149; *Knoblauch v. Kronschnabel*, 18 Minn. 300; *Mandel v. Buttles*, 21 Minn. 396; *Lynch v. Curfman*, 68 N. W. Rep. [Minn.] 5; *Volland v. Baker*, 32 Neb. 391; *Frohreich v. Gammon*, 11 N. W. Rep. [Minn.] 88; *Thoreson v. Minneapolis Harvester Works*, 13 N. W. Rep. [Minn.] 156.

B. O. Hostetler, contra.

HARRISON, C. J.

In this, an action on a promissory note which was executed to evidence an indebtedness incurred in a contract of purchase by the maker of the note of a "harvester," or what is ordinarily termed a "self-binder," it was alleged in the answer that the machine was represented or warranted to be one which would satisfactorily perform the labors for which it was apparently designed, but had entirely failed and was as a machine worthless, and when such fact was discovered was by the party sued for its purchase price, "turned over" to the company, and held subject to its order and control. Issues were joined, and a trial thereof resulted in a verdict and judgment for the defendant.

For the company in this, an error proceeding in its be-

half to this court, it is urged that the trial court erred in giving in its charge to the jury the following: "Should you find from a consideration of all the evidence that the plaintiff's agent warranted said machine as alleged in defendant's answer, and that it failed to answer its warranted character, and properly perform the work for which it was purchased, as well as the average self-binding harvesting machine; that defendant repeatedly notified plaintiff's agent, and that plaintiff's agents repeatedly tried to fix said machine and make it work properly, but as often failed to do so, and that defendant finally turned the same over to plaintiff, or notified plaintiff's agent that he could take the machine away, then it would be your duty to find a verdict for the defendant."

From the brief filed for the plaintiff in error we gather that the main point of the argument relative to the erroneous nature of the instruction we have quoted may be said to be that the defense in the action was one for a breach of warranty, and that the liability for a breach of warranty of an article, the subject of a contract of sale, in the absence of fraud or a specific provision for a rescission, is solely for damages, and that the instruction given was violative of this doctrine, in that it recognized a rescission as one of the remedies which might be successfully resorted to by the party who was the sufferer by a breach of warranty. In this connection it is also argued that, if it be conceded there was a warranty and breach thereof, no damages were shown; that there was no competent evidence of damages. As we view the evidence in this cause, we need not determine the general rule in regard to the liability for the breach of a warranty. There was evidence introduced which, although somewhat indefinite and unsatisfactory, would possibly sustain a finding that the contract was to the effect that if the machine was not as represented or warranted it was to be returned, and if this was true, there could be a rescission for a breach. (*Sycamore Marsh Harvester Co. v. Grandrad*, 16 Neb. 529.)

There was ample evidence to sustain a finding that the contract was executory, that the machine was warranted as to quality to be fit and suitable for a stated specific purpose; and although conflicting on the subject, there was evidence sufficient to support a decision that the machine was unfit for the purpose for which it had been obtained, and did not fulfill the spirit or terms, even, of the representations or warranty. The evidence was to the effect that the machine was taken under an agreement to try it, and if it was satisfactory or as warranted, the vendee was to pay for it; if not as represented, then there was to be no payment,—or, in other words, it was not a sale. Under such facts and circumstances a rescission was proper for a breach of the warranty. (*Cooper v. Hall*, 22 Neb. 168, 28 Am. & Eng. Ency. Law 818, 819 and notes.)

It was shown that the defendant notified the agent of the company of a rescission of the contract and offered to deliver the machine to said agent. Of this offer there was not proven a direct refusal, but it was testified that the agent requested a further trial of the machine, which was not granted; but within the terms of the contract there was a sufficient tender of a return of the machine. (*Close v. Crossland*, 47 Minn. 500; *Paulson v. Osborne*, 37 Minn. 19; *Champion Machine Co. v. Mann*, 42 Kan. 372; *Thayer v. Turner*, 8 Met. [Mass.] 550; *Barnett v. Stanton*, 2 Ala. 181; *Thornton v. Wynn*, 12 Wheat. [U. S.] 183; *Sycamore Marsh Harvester Co. v. Grundrad, supra.*)

The instruction of which complaint was made was applicable to the evidence and within the governing rules of law; hence was not erroneous. It follows that the judgment will be

AFFIRMED.

GILBERT D. HENDRIX, ADMINISTRATOR, APPELLANT, V. GEORGE L. RICHARDS ET AL., APPELLEES.

FILED FEBRUARY 23, 1899. No. 8718.

1. **Guardian and Ward:** TRANSFER OF PERSONALTY. A transfer of the personal property of a minor by his guardian must be authorized or directed by the proper court of probate.

2. ———: ———. A guardian of a minor, to whom a note and its accompanying mortgage were made payable, resigned the guardianship and his successor was appointed. The outgoing one retained the note and mortgage and delivered to the incoming one a sum of money and some personal property in lieu thereof, or as a consideration for the retention by the former of the note and mortgage. In the absence of evidence that the ward received the benefit of said money and property, *held* that the attempted transfer of the note and mortgage was not effective.

3. ———: MORTGAGES: PAYMENT. Parties who had purchased the land on which the mortgage herein in question rested as a lien, subsequent to the resignation of the guardian who retained it in his possession, and who had knowledge of his resignation and who had an examination of the probate records made which disclosed no order of the court for the transfer, paid said former guardian the amount due on the debt evidenced by the note and the mortgage. *Held*, That said payment furnished no forceful defense against an action by an administrator of the deceased ward's estate in which a foreclosure of the mortgage was sought.

APPEAL from the district court of Cass county. Heard below before RAMSEY, J. *Reversed.*

D. O. Dwyer, for appellant.

A. N. Sullivan, contra.

HARRISON, C. J.

It is disclosed by the record herein that Charles H. Dill, who was then the duly appointed guardian of Otis M. Hendrix, sold, under order of the district court of the proper county, an interest of his ward in a piece of real estate, and to secure the payment of all or a portion

of the sum bid for such interest in the real property—the debt being evidenced by the promissory note of the purchaser—received a mortgage on real property. Subsequently, Charles H. Dill resigned or withdrew from the guardianship and George H. Hendrix was appointed. The mortgaged land was sold to George L. and Otis C. Richards, who are the appellees herein, and they assumed and agreed to pay the mortgage debt, and they asserted in the answer in this action that they paid it to Charles M. Dill, but after he had ceased to be the guardian of Otis M. Hendrix. Dill, however, released the mortgage of record at time of the alleged payment and, apparently as guardian, he signed the discharge. Both George B. Hendrix, the guardian, and Otis M. Hendrix, the ward, died and Gilbert D. Hendrix was appointed administrator of the estate of the latter, and in the course of his duties instituted this suit to procure a foreclosure of the mortgage on the land owned by the Richards. They pleaded payment, that to Charles H. Dill being the one relied upon. Charles H. Dill was allowed to become a defendant, and in an answer admitted his appointment as guardian of Otis M. Hendrix, the sale of his ward's interest in certain land, and the reception of the note and mortgage in suit as evidence of a part of the consideration to be paid for the real estate; that he afterwards resigned the guardianship and was released therefrom and his successor appointed, to whom he pleaded he paid full value for the note and mortgage and thus became their owner. There was evidence which tended to establish that, instead of delivering the note and mortgage to his successor as guardian, he gave such party some money and some articles of personal property and kept the note and mortgage. It was also of Dill's answer that the Richards had paid to him the amount due on the note and mortgage and he released the latter of record. Issues were joined, and a trial thereof resulted in a judgment for the defendants, from which the plaintiff has appealed.

In regard to the duties of a guardian it is said in section 8, chapter 34, Compiled Statutes 1897: "Every guardian appointed * * * shall have the care and management of the estate of the minor;" and of the conditions of the bond which it is prescribed a guardian shall give is, "To dispose of and manage all such estate and effects according to law, and for the best interests of the ward." (Compiled Statutes 1897, ch. 34, sec. 9.) In section 27 of the same chapter it is provided as follows: "The courts of probate in their respective counties, on the application of a guardian, or of any person interested in the estate of any ward, after such notice to all persons interested therein as the court shall direct, may authorize or require the guardian to sell and transfer any stock in public funds, or in any bank or corporation, or any other personal estate or effects held by him as guardian, and to invest the proceeds of such sale, and also any other moneys in his hands, in real estate, or in any other manner that shall be most for the interest of all concerned therein, and the said court may make such further orders and give such directions as the case may require for managing, investing, and disposing of the estate and effects in the hands of the guardian." A fair construction of the foregoing language leads to the conclusion that if the guardian desires to dispose of the ward's property of the nature described in the law, he must submit the matter to the proper probate (county) court and obtain its order that it be done. The words of the section are "may authorize or require," and the meaning seems perfectly clear; a sale or transfer of the property of the ward must be by the authorization of the court. (*Boisseau v. Boisseau*, 52 Am. Rep. [Va.] 616; *McDuffie v. McIntyre*, 32 Am. Rep. [S. Car.] 509; *Slusher v. Hammond*, 63 N. W. Rep. [Ia.] 185; *Bates v. Dunham*, 12 N. W. Rep. [Ia.] 309.)

The guardian knew or must be charged with notice that the note and mortgage could not be transferred without the order of the probate court and were held in trust for the ward; furthermore, there was no evidence

that the money and property alleged to have been given in consideration for the transfer were properly used or applied or went to the benefit of the ward. In absence of evidence of the latter fact, equity cannot relieve the parties or sanction the acts as not having resulted in any harm. (*McDuffie v. McIntyre, supra.*) The appellees, the Richards, knew that the securities were trust securities, that Dill had held them as guardian, and, prior to the payment to him, his guardianship, his trust relation, had ceased. It was also shown that they knew that no sale or transfer of this note and mortgage had ever been ordered by the county court. It was stated in evidence that they had the probate records examined, and were told that the transaction was all right; but no order for the transfer appeared of record, and it was not shown herein that any had in fact been made. It is not contended that there had been any. Under such circumstances the Richards made the payment at their peril and must abide the consequences. The ward, or the administrator of his estate, could foreclose the mortgage as the proper owner thereof. (9 Am. & Eng. Ency. Law 148, 149.) It follows that the judgment of the district court must be reversed and a decree entered here of foreclosure of the mortgage for the amount due thereon.

JUDGMENT ACCORDINGLY.

ALVA NOBLE V. HARRISON D. NEAL.

FILED FEBRUARY 23, 1899. No. 8763.

1. **Bill of Exceptions:** AUTHENTICATION. If a bill of exceptions lacks authentication, it will not be considered.
2. ———: EVIDENCE DISREGARDED. If there is no bill of exceptions, a question, the consideration of which necessitates an examination of the evidence, will be disregarded.

ERROR from the district court of Pierce county. Tried below before ROBINSON, J. *Affirmed.*

O. J. Frost, for plaintiff in error.

G. T. Kelley, contra.

HARRISON, C. J.

In this, an error proceeding, in which the reversal of the judgment of the district court of Pierce county is asked, it is argued that the verdict of the jury before which the cause was tried was contrary to, or not sustained by, the evidence; also, that the trial court erred in giving certain designated instructions to the jury. The determination of any of the points presented would necessitate an examination and consideration of the evidence introduced on the trial. There is in the record a document which purports to be the bill of exceptions, but it lacks the authentication by the clerk of the trial court, and cannot be considered (*Hale v. Sheehan*, 52 Neb. 184), and the questions which call for an examination of the evidence must be disregarded. (*Aitken v. Rawlings*, 52 Neb. 539.) It follows that the arguments herein are without avail, and the judgment must be

AFFIRMED.

WILLIAM H. GREEN, APPELLANT, V. ISABELLA E. MORSE ET AL., APPELLEES.

FILED FEBRUARY 23, 1899. No. 10501.

Appealable Order: FIXING SUPERSEDEAS BOND. An appeal will not lie from an order fixing the amount of a supersedeas bond in an application for, and in response to which there has been allowed, a writ of assistance to gain possession of real property purchased at judicial sale.

APPEAL from the district court of Douglas county. Heard below before FAWCETT, J. *Appeal dismissed.*

George E. Pritchett, for appellant.

Wright & Thomas, contra.

HARRISON, C. J.

In an action of foreclosure of a real estate mortgage, in which a decree of foreclosure was rendered and a sale of the property involved made thereunder, the appellant became the purchaser of said property, and after confirmation of the sale a deed of the property was executed and delivered to him, which, it appears, he exhibited to Isabella E. Morse, who was in possession of the premises, and demanded of her the surrender of possession, which she refused. Appellant then made application to the district court wherein the foreclosure suit had been conducted for a writ of assistance to put him in possession of the property. After a hearing the writ was granted, but at the same time the court fixed the amount of a supersedeas bond. The party on whose application the order for the issuance for the writ was made has appealed to this court and asks that the order be modified by omission therefrom of the portion in which the supersedeas bond was fixed, and as thus modified the order be affirmed.

It is not questioned herein that an appeal will lie from an order which grants or refuses a writ of assistance. The appellant has recognized the appealability of such an order. By this appeal he complains not of the entire order, but of the portion by which there was fixed a bond and countenanced a supersedeas of the order for the writ. If it be conceded—and we do not decide it—that there may be an appeal from such an order, the further question arises, might the party against whom the order was directed, or against whom the writ of assistance was obtained, in an appeal from the order be allowed the benefit of a supersedeas? It is provided in section 677 of the Code of Civil Procedure: "No appeal in any case in equity, now pending and undetermined, or which shall hereafter be brought, shall operate as a supersedeas, unless the appellant or appellants shall, within twenty days next after the rendition of such judgment, or decree, or

the making of such final order, execute to the adverse party a bond with one or more sureties as follows: * * * Third—When the judgment, decree, or order directs the sale or delivery of possession of real estate, the bond shall be in such sum as the court, or judge thereof in vacation, shall prescribe." The order for the writ of assistance was in effect for a delivery of the real estate to be described therein to the appellant, and would seem to be just such an order as is mentioned in the portion of the Code which we have quoted; but it may be further said that if it was not directly within a provision of the Code, the court might in its discretion allow a supersedeas. (*Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755.)

This appeal was in effect or in fact from the order allowing or fixing the supersedeas. The supersedeas would not deprive the appellant of his writ of assistance; it would but delay its operation; hence the order did not affect a substantial right within the meaning of section 581 of the Code of Civil Procedure, by which section a final order is defined. It follows that the appeal must be

DISMISSED.

JACOB ZIMMERMAN V. KEARNEY COUNTY BANK.*

FILED FEBRUARY 23, 1899. No. 8693.

1. **Instructions:** REPETITION. It is not error to refuse to give an instruction, the substance of which is embodied in one given in charge to the jury.

2. ———: DISCREDITING EVIDENCE. An instruction which refers to a designated portion of evidence in such manner as to tend to wholly discredit it in the estimation to be given it by the jury may be refused.

3. **Note:** INDORSEMENT: EVIDENCE. In an action between an indorsee of a promissory note and the maker, the admissions or statements of the indorser made subsequent to the indorsement may not be received in evidence to impeach the validity or weaken

*Rehearing allowed.

the force of the indorsement or the transfer of title evidenced by it.

4. **Witnesses:** CROSS-EXAMINATION. A party may not cross-examine a witness in regard to matters of which said party could not introduce evidence in chief on his part, or as such evidence in chief, and afterwards contradict the answers to the cross-examination. (*Johnston v. Spencer*, 51 Neb. 198; *Myers v. State*, 51 Neb. 517.)

5. **Review:** CONFLICTING EVIDENCE. A verdict on conflicting evidence, of which there is sufficient favorable to sustain it, will not be disturbed on review.

ERROR from the district court of Kearney county. Tried below before BEALL, J. *Affirmed.*

Ed L. Adams and *F. G. Hamer*, for plaintiff in error.

J. L. McPheely, contra.

HARRISON, C. J.

This action was instituted by the bank to recover an amount alleged to be its due from the plaintiff in error on a promissory note of which he was the maker, and of which the bank asserted it had become the owner before maturity and in good faith by purchase from the firm of Finch & Paddock, to which the note had been, as payee, executed and delivered. The execution and delivery of the note were admitted, the usurious nature of the contract which it evidenced was pleaded, and it was further pleaded in defense that the bank was not an innocent purchaser of the instrument in suit. The only issue contested during the trial was the innocent or *bona fide* character of the bank's purchase or ownership of the note. The bank was given a verdict and judgment, to reverse which is the purpose of the present proceedings in this court.

It is argued that the trial court erred in the refusal to give the following instruction to the jury: "Where usury in the original transaction is shown, it is not sufficient for the plaintiff to show the payment of value. He must

show also that he purchased in good faith. A statement by him that he did not know or have reason to believe there would be a contest over it is not sufficient to show good faith." There was no error in the refusal to give said instruction, for two reasons: one of which is that the subject was fully covered in an instruction given at the request of the parties who offered the one quoted, and the second reason is that the latter part of the instruction refused referred specifically to a fragment of testimony and stated that it could not be given a stated significance, which, if conceded to be true, yet to so state might have induced the jury to entirely disregard any such testimony or not allow it the weight to which it would be entitled.

During the trial there was read in evidence the deposition of W. H. Paddock, one of the members of the firm, the original payee and indorser and guarantor of the payment of the note in suit. When his deposition was taken he was cross-examined for the plaintiff in error, and during such cross-examination was interrogated in regard to an interview and conversation with the payor of the note subsequent to its alleged purchase by the bank in which it was asserted the witness had made certain statements relative to the sale of the note which tended to impeach the validity thereof or to show that it in fact had never occurred. The answers of the witness to these questions were in the nature of denials of any such statements or admissions on his part. Witnesses were produced for plaintiff in error by whom it was offered to show that the witness Paddock had taken part in the conversations relative to which he had been cross-examined, and that the admissions attributed to him had been made during such conversations.

In this action between the indorsee of the note and its maker, these alleged admissions of the witness Paddock could not be received to impeach the validity or destroy the force of the indorsement or its sale which the indorsement evidenced. (*Coon v. Nock*, 27 Ill. 235; *Stacy*

v. Baker, 1 Scam. [Ill.] 417.) This being true, the cross-examining parties could not have proved these admissions as a part of their case or evidence in chief, and could not cross-examine in regard to them and contradict the answers of the witness. (*Johnston v. Spencer*, 51 Neb. 198; *Myers v. State*, 51 Neb. 517.)

In regard to the questions litigated, the evidence was conflicting, and we cannot say that the verdict of the jury was without sufficient evidence to support it; and in accordance with the well established rule, it will not be disturbed. The judgment is

AFFIRMED.

INDEX.

Accessories. See INDICTMENT AND INFORMATION.

Actions. See CONTRACTS, 7, 9-11. CREDITORS' BILL. MORTGAGES, 15. REMOVAL OF CAUSES. TAXATION, 15.

1. A proceeding in a mortgage-foreclosure suit for judgment for rents and profits against signers of a supersedeas bond, *held* not an independent suit requiring issuance and service of summons. *Lowe v. Riley*..... 252
2. A petition joining several parties as defendants, if it states a joint act relative to a tort which may from its nature be joint or committed by persons in combination, is not open to attack by demurrer on the ground of misjoinder of parties defendant. *Stuart v. Bank of Staplehurst*, 570
3. Two causes of action on two separate contracts cannot be united in one petition unless each cause of action affects all defendants. *Barry v. Wachosky*..... 534

Adjournment. See COURTS, 1-3.

Administration of Estates. See EXECUTORS AND ADMINISTRATORS.

Affidavit. See ATTACHMENT, 2. EXECUTIONS, 4, 5.

Alibi. See INSTRUCTIONS, 1.

Alimony. See DIVORCE, 1-7.

Alteration of Instruments.

A written instrument signed by one party with the intention that the other shall sign it, which is changed in any manner altering its legal effect, and by that other signed in its altered condition, does not become binding on the former, unless he learn of and ratify the change. *McGavock v. Morton* 385

Animals.

1. At common law every one was liable for injuries committed by his cattle while trespassing upon the lands of others. *Lorance v. Hillyer*..... 266
2. The herd law does not do away with the common-law liability of owners of trespassing animals. *Id.*
3. The object of the herd law was to give one injured by animals trespassing upon his cultivated lands the right to take possession of such animals, invest him with a lien thereon, and the right to hold such animals until his damages were adjusted. *Id.*

Animals—*concluded.*

4. If the common-law rule has been modified by the herd law, the extent of the modification is to limit the liability of the owner of trespassing animals to damages committed by them upon cultivated lands. *Id.*
5. A city lot on which are planted fruit trees is cultivated land, within the meaning of the herd law. *Id.*
6. The remedy afforded by the herd law to one injured by trespassing animals is not exclusive. *Id.*

Appeal. See REVIEW.

Appeal Bonds. See REVIEW, 75-82.

Appearance.

1. A general appearance in an action by a defendant confers jurisdiction over his person, though no summons was ever served upon him. *State v. Smith*..... 41
2. Unless the petition discloses that the court has no jurisdiction defendant must challenge the court's attention thereto by special appearance, and, if that be overruled, stand upon his special appearance, or plead want of jurisdiction as a defense in his answer to the merits of the case. *Lowe v. Riley*..... 252
3. Defendant did not waive lack of jurisdiction, where he appeared specially and objected to jurisdiction, and, upon the overruling of the objection, pleaded in his answer as a defense the court's want of jurisdiction over him. *Barry v. Wachosky*..... 534

Appraisement. See EXECUTIONS, 1, 2.

Arbitration and Award.

1. Under a submission to three arbitrators, the award of two to be binding, a further provision that the award should be in writing, signed by three of the arbitrators, *held* not to invalidate an award by two of them. *City of O'Neill v. Clark*..... 761
2. Under the statute arbitrators must, in their award, state separately their findings of fact and conclusions of law; but this requirement is met if the finding is as certain as is required of the verdict of a jury. *Id.*
3. A single cause of action having been submitted to arbitration, an award whereby the arbitrators "find for the plaintiff, assess her damages" at a sum named, and "award" her that sum, is a sufficient separate finding of facts and of law. *Id.*

Assignments. See LANDLORD AND TENANT, 5. NEGOTIABLE INSTRUMENTS, 4-9.

1. A contract imposing on a party having an interest in the profits of land purchased by another for speculation a duty

Assignments—*concluded.*
to pay the taxes and make sales, *held* assignable. *Alden v. Frank Improvement Co*..... 67
2. An assignment of a party's "right, title, and interest" *held* to be an assignment of the benefits of the contract and not a repudiation of its burdens. *Id.*

Assignments for Benefit of Creditors. See VOLUNTARY ASSIGNMENTS.

Assignments of Error. See REVIEW, 15-22.

Assistance. See INJUNCTION, 2.

Associations. See BUILDING AND LOAN ASSOCIATIONS. INSURANCE, 7-11.

Attachment.
1. Assets of an insolvent bank are not subject to attachment at the suit of a creditor while they are in possession of a bank examiner acting under authority of the state banking board. *Andrews v. Steele City Bank*..... 173
2. While a notary public may not take the affidavit of his client for the purpose of procuring an attachment, the taking of an affidavit as indicated is a mere irregularity, and the defect may be cured by amendment. *Dobry v. Western Mfg. Co*..... 228
3. In a suit on an attachment bond, where averments of the petition are put in issue by the answer, the burden is upon plaintiff to establish that the ground stated in the affidavit for attachment did not exist. *Jandt v. Deranleau*..... 497
4. In an action on an attachment bond the defendants who undertake to make proof of facts justifying a resort to attachment should be permitted to introduce testimony relevant to that issue. *Id.*
5. One who by voluntary transfer acquires rights in personal property after a writ of attachment has been levied thereon is bound by an adjudication in the attachment case of the validity of such attachment. *Nagle v. First Nat. Bank of Omaha*..... 552
6. Where a will vests title to realty in an executor and directs him to sell it and pay the proceeds to heirs, they have no interest in the realty as such, and it cannot be seized on attachment by their creditors. *Arlington State Bank v. Paulsen* 718

Attorney and Client. See PRINCIPAL AND AGENT, 5.

Attorneys' Fees. See PARTITION. WILLS, 3.

Banks and Banking. See ATTACHMENT, 1. CORPORATIONS, 4, 5.
1. The owner of a general deposit of money at the time of a bank failure is not entitled to a preferred claim against

Banks and Banking—*concluded.*

the assets in the hands of a receiver of the bank. *Schmelling v. State*..... 562

2. Directors of a national bank who knowingly make and publish false statements and reports of the bank's financial condition, with intent to deceive, may, in an action for deceit, be liable for damages suffered by persons who believed and acted upon such statements and reports. *Stuart v. Bank of Staplehurst*..... 569

3. The liabilities imposed by the national banking law for violations of its provisions do not preclude an action for deceit. *Id.*

4. Statements and reports made to the comptroller and published in the newspapers have among their purposes that of conveying information to persons who contemplate dealings with the bank. *Id.*

Beneficiary Societies. See INSURANCE, 7-11.

Bill of Exceptions. See REVIEW, 23-27.

1. A bill of exceptions must be presented to the trial judge for settlement, and when settled it must be signed by him, and he must certify that it is allowed. *Woolworth v. Parker*, 417

2. The settlement and allowance of a bill include statements in the heading and body relative to what it contains. *Id.*

3. In authentication the use of "testimony" will not invalidate the bill where it is apparent that word was used in the sense of "evidence." *Id.*

Bills and Notes. See NEGOTIABLE INSTRUMENTS.

Bona Fide Purchasers. See NEGOTIABLE INSTRUMENTS, 15-17.

Bonds. See INJUNCTION, 1. REVIEW, 75-82.

Signers of a contractor's bond *held* liable for payment of claims of laborers and material-men. *Morton v. Harvey*.... 304

Building and Loan Associations.

1. In foreclosure by a foreign building and loan association the rate of interest is not regulated by chapter 14, Session Laws of 1891, which relates solely to domestic associations. *National Mutual Building & Loan Ass'n v. Keeney*..... 94

2. In foreclosure the rights of a foreign association with respect to interest are governed by chapter 44, Compiled Statutes, and where more than ten per cent interest has been contracted for or received, the penalties against usury should be enforced. *Id.*

Building Contracts. See CONTRACTS, 12.

Burden of Proof. See ATTACHMENT, 3. MUNICIPAL CORPORATIONS, 11.

Cancellation of Instruments. See EXECUTORS AND ADMINISTRATORS, 7. FRAUDULENT CONVEYANCES, 5. VENDOR AND VENDEE, 11.

1. To entitle one to be relieved from his contract on the ground that he was induced to make it by false representation, he must plead and prove that the other party made the representation, that it was false, and that it was believed and acted upon. *Murphey v. Illinois Trust & Savings Bank* 519

2. Where part consideration for a right of way deed is the promise of a railroad company to construct and operate a line of road over grantor's land, the failure of the company to perform its agreement does not entitle the grantor to a cancellation of the deed. *Moseley v. Chicago, B. & Q. R. Co.*. 636
Stewart v. Chicago, B. & Q. R. Co..... 641

Carriers.

1. One shipping goods consigned to himself, his agent, or to the order of either, will be presumed to have intended to retain the title in himself, but such presumption may be rebutted by proof. *Missouri P. R. Co. v. Lau*..... 559

2. Whether passengers on a railway train have exercised the required care to ascertain whether they are on the right train or in the proper car to reach their destination is generally a question of fact to be submitted to the jury. *Spirk v. Chicago, B. & Q. R. Co*..... 565

3. In an action against a carrier for wrongfully ejecting passengers from a train, damages assessed by the jury *held* inadequate to compensate plaintiffs for the loss shown. *Id.*

Cattle Stealing. See LARCENY.

Chattel Mortgages. See FIXTURES,

1. A chattel mortgage generally will be construed to secure the debt and not merely its evidence, and, while the original debt remains, the mortgage will not be defeated by a change in its form. *Arlington Mill & Elevator Co. v. Yates*.. 286

2. Mortgage describing the chattels as situate in a certain building where they had not yet been but were afterward placed, *held* not void for the misdescription. *Id.*

3. The statute whereby a chattel mortgage ceases to be valid against creditors or subsequent purchasers or mortgagees in good faith after the expiration of five years from the filing thereof, protects only creditors, purchasers, and mortgagees whose rights accrued after the five years. *Id.*

4. A mortgage to secure the payment of a debt evidenced by a note may be shown to be one of indemnity. *Honaker v. Vesey* 413

5. An indemnity mortgage cannot be foreclosed by original

Chattel Mortgages—*concluded.*

mortgagee or an assignee until damages, against which the indemnity was given, have been suffered. *Id.*..... 414

6. The lien is not divested, nor the mortgagee's right of possession impaired, by any mere irregularity in the manner of conducting the foreclosure sale. *Tackaberry v. Gilmore*.. 450

7. A rent lien created by the lease of a hotel *held* inferior to the lien of a subsequent chattel mortgage on furniture placed in the hotel after the lease was executed. *New Lincoln Hotel Co. v. Shears*..... 478

8. Where the owner of attached chattels mortgaged them to creditors other than plaintiff in attachment, and the petition in the attachment suit was subsequently amended to state a different cause of action, and the attachment was afterward held good on motion to discharge it, the mortagees, in an independent action, were not permitted to assail the attachment. *Nagle v. First Nat. Bank of Omaha*.. 553

Church. See RELIGIOUS SOCIETIES.

Cities. See MUNICIPAL CORPORATIONS.

Clergymen. See RELIGIOUS SOCIETIES.

Clerk of Court.

1. Ordinarily, the clerk of one court has not the authority to authenticate transcripts of the records kept by another court. *Comstock v. Kerwin*..... 1

2. Where, by his answer, defendant concedes that he received and receipted for certain money as clerk of the district court, and has paid a portion of it to his successor in office, he is still presumed to retain the balance *in custodia legis*, notwithstanding the fact that he may actually have paid it out on an ineffectual garnishment. *Baker v. Peterson*..... 375

3. Money about to be paid to a clerk of the district court, to be by him distributed under a decree, cannot be reached by garnishment issued out of the county court against one of the distributees. *Sturtevant Co. v. Bohn Sash & Door Co*.. 671

Collateral Attack. See CHATTEL MORTGAGES, 8. EXECUTORS AND ADMINISTRATORS, 10. JUDGMENTS, 7. RECEIVERS, 1.

Common Law.

So much of the common law of England as is applicable and not inconsistent with the federal constitution and the state constitution and laws is in force. *Lorance v. Hillyer*.. 266

Compromise and Settlement. See RECEIVERS, 5.

Settlement *held* void for mistake or fraud. *North Nebraska Fair & Driving-Park Ass'n v. Box*..... 302

Conditional Sales. See SALES, 2.

Consideration. See ESTOPPEL, 1. MORTGAGES, 4-7.

Contempt.

1. The power to punish for contempt is incident to every judicial tribunal, without any express statutory aid, and may generally be exercised only by that tribunal whose order has been violated or proceedings interfered with. *Nebraska Children's Home Society v. State*..... 765
2. A judge in vacation, vested by law with jurisdiction to conduct certain proceedings, has the inherent power, incident to that jurisdiction, to hear and determine proceedings for contempt for the purpose of enforcing his orders in the principal matter. *Id*..... 766
3. Contempt proceedings may be punitive merely, or they may be remedial, to compel obedience to an order for the time resisted. *Id.*
4. It is not necessary in a contempt proceeding that the defendant be formally arraigned. *Id.*
5. Where a contempt proceeding is instituted by information and a rule to show cause, it is the duty of defendant to file an answer if he desires to traverse the facts charged, and on failure to do so the court may treat the facts alleged in the information as confessed. *Id.*
6. If the terms of an information in contempt clearly show that the act complained of was willful, the information will not be held bad for the failure to use the word "willful." *Id.*
7. Where the object of a contempt proceeding is to compel obedience to an order which may still be obeyed, it is not error to sentence the defendant to imprisonment until he shall obey such order, and, in addition, to impose a reasonable fine for past disobedience. *Id.*
8. Mere error or irregularity in a judicial order, or in the proceedings leading thereto, will not excuse disobedience of the order. *Id*..... 765
9. In a contempt proceeding based on the alleged violation of a judicial order, such order may be examined only with a view to ascertaining whether it was *coram judice*. *Id.*
10. It is not error for a judge who, within his authority, has made an order in vacation, to refuse to transfer to another judge, for hearing, a proceeding in contempt based on the disobedience of such order. *Id*..... 766

Contracts. See ALTERATION OF INSTRUMENTS. ASSIGNMENTS. CANCELLATION OF INSTRUMENTS. MUNICIPAL CORPORATIONS, 1-3, 7. NEGOTIABLE INSTRUMENTS. SALES. STATUTE OF FRAUDS. TRUSTS, 4. VENDOR AND VENDEE.

Concurrence of Minds.

1. That a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet

Contracts—*continued.*

at every point, and that nothing be left open for future arrangement. *Krum v. Chamberlain*..... 220

2. A concurrence of minds is essential to the creation of a contract, unless in cases of estoppel. *McGavock v. Morton*.. 385

Consideration.

3. The consideration of a contract need not move to promisor, a disadvantage to promisee being sufficient, though promisor derives no benefit therefrom. *Faulkner v. Gilbert*..... 544

Construction.

4. While a court may construe and enforce contracts duly entered into, it is not the province of the judiciary to make contracts for parties. *Te Poel v. Shutt*..... 592

Damages for Breach.

5. Where part consideration for a right of way deed is a railroad company's promise to construct and operate a line of road over grantor's land, and such company fails to keep its promise, grantor's remedy is by an action at law to recover the damages resulting from the company's failure to perform its contract. *Moseley v. Chicago, B. & Q. R. Co*.... 636
Stewart v. Chicago, B. & Q. R. Co..... 641

Parol Evidence.

6. A written contract cannot be varied, modified, or contradicted by parol evidence of a prior or contemporaneous agreement between the parties. *Te Poel v. Shutt*..... 592

Performance.

7. In suing on a contract consisting of reciprocal promises, to be concurrently performed, the plaintiff must allege either performance on his part or a tender of performance before suit brought. *Burwell v. Wilson*..... 396

Rescission.

8. One is not entitled to a rescission of a contract who is unwilling to perform his part of the agreement. *Te Poel v. Shutt* 592

Severable Agreement.

9. Where in a contract there are several undertakings, each supported by a distinct consideration, the contract is generally severable, and suit may be brought on one undertaking without showing plaintiff's compliance with the whole contract. *Burwell v. Wilson*..... 396

Third Persons. Actions.

10. Where one makes a promise to another for the benefit of a third person, the latter may maintain an action upon the promise, though not a party to the consideration. *Morrill v. Skinner*..... 164

11. Where one makes a promise to another for the benefit of a third person, the latter may defend the contract against an attack for fraud. *Goos v. Goos*..... 294

Contracts—*concluded.*

12. Building contract and contractor's bond *held* to contain a promise to satisfy claims of laborers and material-men. *Morton v. Harvey* 304

Contribution. See TENANTS IN COMMON, 2.

Conversion. See PLEDGES, 3.

Conveyances. See VENDOR AND VENDEE.

Corporations. See BUILDING AND LOAN ASSOCIATIONS. WILLS, 5.

Liability of Stockholders. Actions. Parties.

1. In an action to hold liable to creditors of a corporation certain of its stockholders because, as found by the court, the property conveyed by such stockholders in payment for their stock was greatly overvalued, a judgment against the stockholders was improperly rendered in view of the further finding that defendants acted in good faith. *Penfield v. Dawson Town & Gas Co* 231

2. In suing a corporation the summons need not describe it as such. *German Ins. Co. v. Frederick* 538

3. A petition, at least after answer to the merits, is not open to attack because it does not allege the corporate character of defendant. *Id.* 539

4. In a suit by a receiver to enforce individual liability of stockholders a creditor cannot intervene unless plaintiff abuses his trust or acts in bad faith. *Brown v. Brink* 606

5. An action for the enforcement of the individual liability of the stockholders of a banking corporation must be prosecuted by one creditor for the benefit of all, or by the receiver of the corporation. *Id.*

Officers. Injunction.

6. A stockholder may obtain an injunction to restrain persons claiming to have been elected directors from acting as such, when the election was illegal and void. *Reynolds v. Bridenthal* 280

Preferring Creditors.

7. A corporation may not prefer a debt owing to its director, secretary, and treasurer. *Seeds Dry-Plate Co. v. Heyn Photo-Supply Co* 214

8. In the absence of actual fraud an insolvent corporation may prefer one or more of its creditors to the exclusion of others. *Id.*

Right to Vote Stock.

9. Right to vote stock does not exist until it has been registered in the name of the person seeking to vote it. *Reynolds v. Bridenthal* 280

Costs. See PARTITION. WILLS, 3.

Where a reversal is entered in an error proceeding, plaintiff

Costs—*concluded.*

in error may recover his costs made in the supreme court, but the costs which accrued in the district court abide the final determination of the cause. *National Masonic Accident Ass'n v. Burr*..... 437

Counties. See MANDAMUS, 3.

1. In the absence of a contract to the contrary, the first county clerk of a newly organized county, who compiles a numerical index therefor, is entitled to a compensation of fifteen cents for each necessary entry, to be paid by county. *Bastedo v. Boyd County*..... 100
2. A petition by a private individual in a suit on county warrants disclosing that they were for road district funds, *held* defective where there was no allegation that the warrants were issued to road supervisors, as required by law. *Pollock v. Stanton County*..... 399

County Clerk. See COUNTIES, 1.

County Court. See COURTS, 6, 7. REVIEW, 8.

Courts. See APPEARANCE. CLERK OF COURT. CONTEMPT. REMOVAL OF CAUSES.

Adjournment.

1. Where the record shows an order adjourning court to a future day in the term, and judicial proceedings carried on in the interval, it will be presumed, in favor of regularity, that there has been a reconvention and an express or implied vacation of the order of adjournment. *Green v. Morse*..... 391
2. A court may revoke an order of adjournment and reconvene. *Id.*
3. An adjournment of court to a subsequent day in the term is merely an intermission, and neither adjourns the term nor deprives the judges of control of the proceedings. *Id.*

Jurisdiction.

4. Jurisdiction of the subject-matter is the power to hear and determine the cause. *State v. Smith*..... 41
5. The supreme court has original jurisdiction in actions of mandamus. *Id.*
6. A county court has jurisdiction, within the statutory limit of amount, in actions to recover damages for breach of covenant against incumbrances. *Hesser v. Johnson*..... 155
7. The fact that land is situate in a state where covenant against incumbrances runs with the land does not affect the question of jurisdiction in an action on such a covenant. *Id.*
8. A district judge is without authority to render in vacation a money judgment, and consent of parties will not confer such authority. *Gamble v. Buffalo County*..... 163

Courts—*concluded.*

9. A district court has no jurisdiction to render a judgment in an action pending in one county dismissing such action from the district court of another county. *Lefferts v. Bell*.. 248

Covenants. See COURTS, 6, 7.

1. The only difference between a personal covenant and one running with the land is that the latter inures to the benefit of subsequent holders. *Hesser v. Johnson*..... 158
2. Covenants of warranty in a deed for the conveyance of real estate, not broken when made, pass with the title, though the subsequent conveyances are by quitclaim deeds. *Troxell v. Stevens*..... 329
3. An action cannot be maintained on a covenant of warranty of title, where it appears there has been no actual eviction or surrender of possession of the granted premises by reason of a paramount title. *Id.*
4. A decree canceling a deed under which grantee asserted title, the appointment of appraisers, under the occupying claimants' act, to assess the value of the improvements, and the confirmation of the report of the appraisers, alone do not amount to an eviction, where the owner of the paramount title has neither elected to accept the value of the land nor to pay the occupant the value of his improvements, and the physical possession of the latter has not been disturbed. *Id.*

Coverture. See HUSBAND AND WIFE.

Creditors' Bill. See FRAUDULENT CONVEYANCES, 5.

1. In absence of special circumstances rendering a levy of execution inadequate, a judgment creditor cannot invoke the aid of equity to subject the land of the debtor to the payment of the judgment. *Morrill v. Skinner*..... 165
2. Evidence *held* to sustain a finding for plaintiff. *Millard v. Parsell* 178
3. Where the legal estate of a judgment debtor has been exhausted, a creditors' bill will lie to subject to the payment of the judgment land in which his estate is equitable only. *Id.*
4. Matters which might have been urged in defense of an application for a deficiency judgment cannot be urged in defense of a creditor's suit to enforce such judgment. *Id.*
5. In a suit to subject alleged fraudulently conveyed realty of a judgment defendant to payment of judgment there is no foundation for an ordinary judgment against his transferee as a co-defendant, if there is a failure to allege that the title of said property by such transferee has been conveyed or subjected to a lien whereby the relief sought has been

Creditors' Bill—*concluded.*

rendered unavailable. *First Nat. Bank of Plattsmouth v. Gibson* 246

6. Decree for defendant *held* sustained by the evidence. *Parlin v. Ulrich*..... 780

Criminal Law. See HOMICIDE. INSTRUCTIONS, 1, 4, 11.

Accessories.

1. The effect of section 1 of the Criminal Code is to make the aiding, abetting, or procuring of another to commit a felony a substantive and independent crime. *Oerter v. State*, 135

Estoppel.

2. In a criminal prosecution the state cannot invoke against accused the doctrine of estoppel. *Bailey v. State*..... 706

Evidence. Conviction.

3. To sustain a conviction it is not enough for the state to show that the prisoner has violated the spirit of the statute, but the evidence must show beyond a reasonable doubt that he has offended against the letter of the law. *Id.*

Malice.

4. "Malice" donates that condition of mind which is manifested by intentionally doing a wrongful act without just cause or excuse, and means any willful or corrupt intention of the mind. *McVey v. State*..... 471

Plea in Abatement.

5. A plea in abatement may be made when there is a defect in the record which is shown by facts extrinsic thereto. *State v. Bailey* 204

6. Matters cannot be presented by plea in abatement which are triable under a plea of not guilty. *Id.*

7. In a prosecution for selling intoxicating liquor to an Indian, whether the person named in the information as having purchased the liquor was, or was not, an Indian cannot be raised by a plea in abatement. *Id.*

Rebuttal.

8. Testimony purely rebuttal in its nature may be given by a witness whose name is not indorsed upon the information. *McVey v. State*..... 471

Cross-Examination. See CRIMINAL LAW, 8. WITNESSES, 5.

Custom and Usage. See MASTER AND SERVANT, 4.

Damages. See ANIMALS. BANKS AND BANKING, 2. CONTRACTS, 5. MUNICIPAL CORPORATIONS, 4-6. REPLEVIN, 9.

1. In an action for damages for personal injuries evidence of plaintiff's complaints of such suffering as would probably be caused by the injuries may be admitted. *Omaha Street R. Co. v. Emminger*..... 240

Damages—*concluded.*

2. In an action for personal injuries plaintiff may recover the reasonable value of the services of a physician, though his bill has not been paid. *Id.*

3. Where medical experts testified to results which, in their opinion, would follow from personal injuries and to other results liable to follow, *held* not erroneous to instruct that plaintiff was entitled to recover such damages as the jury believed from the evidence she might labor under in the future as the result of the injuries. *Id.*

4. In an action for personal injuries plaintiff may make proof of such physical pain and mental suffering as resulted from the injury. *Id.* 241

5. Where judgment was rendered for $10,080 for personal injuries, upon review the filing of a remittitur for $5,080 was made a condition of affirming the judgment to the extent of $5,000. *Id.* 244

6. Jury's assessment of damages for the wrongful ejectment of passengers from a train *held* inadequate. *Spirk v. Chicago, B. & Q. R. Co.* 565

Deceit. See BANKS AND BANKING, 2-4. CANCELLATION OF INSTRUMENTS, 1.

Decrees. See JUDGMENTS.

Deeds. See CANCELLATION OF INSTRUMENTS, 2. COVENANTS. MORTGAGES. VOLUNTARY ASSIGNMENTS.

1. A deed of quitclaim passes only the interest of the grantor, subject to any equities which might be enforced against him. *Arlington Mill & Elevator Co. v. Yates* 286

2. Grantee in a quitclaim deed takes only the grantor's existing interest, and the after-acquired title of his grantor in the property does not pass to grantee. *Troxell v. Stevens* .. 329

3. By virtue of section 51, chapter 73, Compiled Statutes, an after-acquired interest in realty by a grantor inures to the benefit of the grantee when the deed purports to convey a greater estate than the grantor owns at the time of the conveyance. *Id.*

4. An after-acquired title does not inure to the benefit of the grantee, where the deed of conveyance under which he claims has been canceled and annulled by a decree of court. *Id.*

5. The surrender of an unrecorded deed by the grantee to the grantor will not reinvest the title in the latter. *Brown v. Hartman* 341

6. The destruction of a deed, after its delivery, does not divest the title of the grantee. *Id.*

Deeds—*concluded.*

7. Where a deed is delivered to the grantee by the grantor, it at once becomes operative as a conveyance, if such was the intention of the parties, though the instrument was not to be recorded during the lifetime of the grantor. *Id.*

Demand. See REPLEVIN, 4.

Deputy Sheriff. See EXECUTIONS, 3.

Descent. See WILLS, 8.

Descent and Distribution. See EXECUTORS AND ADMINISTRATORS.

Description. See CHATTEL MORTGAGES, 2.

Dismissal. See REVIEW, 58.

Where a partnership was defendant in a suit, the filing of a petition in which the suit was changed to an action against individual members was *held* an abandonment of the action against the firm. *Wigton v. Smith*..... 299

Divorce.

Alimony.

1. A wife, by praying for a reasonable sum as permanent alimony, elects to take such sum in lieu of dower in her husband's lands. *Walton v. Walton*..... 103
2. The amount allowed as alimony should be just and equitable, due regard being had for the rights of each party, the ability of the husband, the estate of the wife, and the character and situation of the parties. *Id.*
3. A decree awarding the wife $5,000 as permanent alimony, and $700 as counsel fees affirmed, under facts stated in opinion. *Id.*
4. Depreciation in value of husband's property *held* not a sufficient ground for modifying a judgment against him for permanent alimony. *Beard v. Beard*..... 754
5. Where judgment has been rendered against a husband for a certain sum in full of the wife's claims upon him or his property by reason of their former marriage relations, the court, after term, has no jurisdiction to modify the judgment solely because of a change in the circumstances of one of the parties. *Id.*
6. A judgment determining the share of the husband's property to which the wife is entitled as permanent alimony is conclusive unless assailed in a direct proceeding. *Id.*
7. Section 27, chapter 25, Compiled Statutes, relating to modification of allowances for alimony, *held* not applicable to a judgment against a husband for a certain sum in full of the wife's claims upon him or his property by reason of their former marriage relations. *Id.*

Divorce—*concluded.*

Custody of Children.

8. When a decree of divorce has settled the custody of children in one of the parents, the court should not, in habeas corpus proceedings, give them into the custody of the other, by committing them to the care of strangers with whom that other makes his home. *Norval v. Zinsmaster*.. 158

Extreme Cruelty.

9. Evidence *held* to sustain a finding that a husband falsely charged his wife with adultery, and that the false charges constituted extreme cruelty. *Walton v. Walton*..... 102

10. No conduct on the part of a wife, short of notorious and shameless unchastity,—if that does,—justifies her husband in calling her a "whore." *Id*..... 103

11. No conduct on the part of a wife that does not threaten great and immediate bodily injury will justify her husband in beating and choking her. *Id.*

12. A husband who falsely charges his wife with unchastity, accuses her on the streets with being criminally intimate with other men, calls her vile, opprobrious, and degrading names, and beats and chokes her, is guilty of extreme cruelty, justifying a divorce. *Id.*

13. A husband's act is not deprived of its legal character of "extreme cruelty" because his conduct was the result of his insanely jealous temperament, actual insanity not appearing. *Id.*

14. It is a general rule that a husband's cruelty caused by the conjugal misconduct of his wife is not ground for divorce, but where the husband's cruelty was disproportionate to his wife's offense, her conduct affords him no justification, and the cruelty entitles the wife to relief. *Id.*

15. Whether a wife's disobedience of her husband, her misconduct, or impropriety, caused or provoked the husband's cruelty toward her is a question of fact. *Id.*

16. Whether the cruelty inflicted by a husband upon his wife because of her disobedience, impropriety, or misconduct was so far disproportionate to her offense as to be unjustifiable is a mixed question of law and fact, to be determined in any case from the facts and circumstances. *Id.*

Documents. See EVIDENCE, 6-10.

Dower. See DIVORCE, 1

Duress. See MORTGAGES, 8.

Ecclesiastical Law. See RELIGIOUS SOCIETIES.

Ejectment. See EMINENT DOMAIN, 1. PUBLIC LANDS, 1.

1. Plaintiff must recover on the strength of his title, and

Ejectment—*concluded.*
cannot rely on the weakness of defendant's. *Comstock v. Kerwin* 1

2. Where appraisement has been made under the occupying claimants' act, the unsuccessful occupant cannot be ousted of possession of the premises until the successful owner has elected to pay, and has paid, the appraised value of the improvements or elected to accept the value of the land, and the occupant has refused to pay the same. *Troxell v. Stevens*..... 330

3. Findings and judgment for defendant *held* not supported by the evidence. *Brown v. Hartman*..... 341

Election of Remedies. See DIVORCE, 1. MORTGAGES, 15. REVIEW, 52.

Elections. See MANDAMUS, 3.

A nomination to public office made by four out of twenty-eight members of a county committee chosen by a political party is invalid, where previous notice of the time and the place of the meeting of the committee has not been given to the other members thereof. *State v. Smith*..... 41

Eminent Domain. See PUBLIC LANDS, 2.

1. The owner cannot maintain ejectment for land upon which a corporation has, with his prior assent or subsequent acquiescence, constructed and put in operation a railroad used by it in its business as a common carrier. *Chicago, B. & Q. R. Co. v. Englehart*..... 444

2. A railroad constructed upon land with the permission or acquiescence of the owner becomes a permanent structure, and the resulting right to compensation is a mere personal claim which will not pass to a purchaser of the land, except under the terms of an express grant. *Id*.....445

3. The agreed consideration for the grant of right of way for a railroad is conclusively presumed to include the value of the land conveyed and all damages to the grantor's adjacent lands resulting from the non-negligent construction and operation of the road. *Moseley v. Chicago, B. & Q. R. Co.* 636
Stewart v. Chicago, B. & Q. R. Co..... 641

Equalization. See MUNICIPAL CORPORATIONS, 10.

Equity. See QUIETING TITLE. SUBROGATION.

Estoppel. See CRIMINAL LAW, 2. MORTGAGES, 9. PRINCIPAL AND AGENT, 2.

1. Where payee accepts a note as a gift from the maker and abandons lucrative employment in accordance with his wish and in reliance on payment of the note, neither the maker nor his legal representatives will be permitted to re-

Estoppel—*concluded.*

sist payment on the ground that there was no consideration for the promise. *Ricketts v. Scothorn*..... 51

2. A purchaser of land at execution sale, where an apparently valid mortgage has been deducted as a prior incumbrance for the purpose of appraisal, is estopped from denying the validity of such mortgage. *Arlington Mill & Elevator Co. v. Yates* 286

3. Where a receiver has been appointed for a firm, and a partner, after having sent money to one who had previously made the firm a loan, procured the allowance against the firm of the entire amount loaned, without knowledge of the lender, and the latter accepted a dividend, it was *held* the lender was not estopped to assert that the money paid by the partner was received in part payment of the firm debt. *Foss v. Streator*..... 389

4. Where the subject-matter in dispute is the present right of possession of real property, there is no estoppel established as against plaintiffs by merely showing that during their minority their guardian received a portion of the purchase price paid for said property by the defendant and used it for the maintenance and education of such minors. *Rowe v. Griffiths*..... 489

Error. See REVIEW.

Evidence. See CRIMINAL LAW, 8. DAMAGES, 1-4. INJUNCTION, 1. MECHANICS' LIENS, 2. MUNICIPAL CORPORATIONS, 12. PLEADING, 9. REVIEW, 29-40. STREET RAILWAYS. TRIAL, 3, 4.

1. "Testimony" and "evidence" are not synonymous terms, the latter being the generic term, and the former applicable to a species or kind of evidence. *Woolworth v. Parker*.. 417

2. Evidence *held* insufficient to sustain conviction of one charged with receiving stolen cattle. *George v. State*..... 656

3. In a suit between an indorsee of a note and the maker, admissions or statements of indorser, made subsequent to the indorsement, may not be received in evidence to impeach the validity, or weaken the force of the indorsement or the transfer of title evidenced by it. *Zimmerman v. Kearney County Bank* 800

Book of Rules.

4. Book of rules relating to duties of inspectors of cars *held* admissible in evidence in an action by a servant who was injured while using a defective brake. *Union Stock-Yards Co. v. Goodwin*..... 139

Court Records.

5. A transcript of the record of a foreign court is not admissible in evidence, unless authenticated according to section 414 of the Code. *Comstock v. Kerwin*..... 1

Evidence—*continued.*

Documents. Indorsements. Letters.

6. Introduction of writing will not carry with it indorsements unless the offer is broad enough for that purpose. *Id.* 2

7. In the foreclosure of a mortgage securing a bond, identification of the bond *held* sufficient to justify its admission in evidence. *Northwestern Mutual Life Ins. Co. v. Butler*..... 199

8. A letter duly addressed, stamped, and posted is presumed to have reached the addressee in the usual course of mails, but the presumption may be overcome by proper evidence that the letter was not received. *National Masonic Accident Ass'n v. Burr*..... 437

9. Whether a letter addressed, stamped, and posted reached its destination in the usual course of mails is a question of fact to be determined from the evidence. *Id.*

10. To render admissible a self-explanatory letter, that to which it is an answer need not be offered in evidence. *New Hampshire Trust Co. v. Korsmeyer*..... 784

Foreign Laws.

11. The statute of another state will be presumed to be the same as that of the forum, the contrary not appearing. *Fisher v. Donovan* 361

Inferences.

12. A jury may draw rational, reasonable, and logical inferences from facts proved or admitted. *Union Stock-Yards Co. v. Goodwin* 138

Injured Limb.

13. In an action for personal injuries the right of plaintiff to exhibit an injured limb should not be denied on the ground that she is young, handsome, and attractive, and consequently that the sympathies of a jury composed of men would be unduly excited in her behalf. *Omaha Street R. Co. v. Emminger*..... 244

Pleadings.

14. A pleading is not competent evidence, in favor of the party whose pleading it is, of the facts averred therein. *Green v. Morse* 392

Parol Evidence. Contracts.

15. As between original parties to a note and those not innocent purchasers it may be shown by parol that one signing his name in blank on the back of the note was an accommodation indorser. *Drexel v. Pusey*..... 30

16. In a suit on an insurance policy issued on an application containing misstatements, parol evidence may be admitted to show that the application was written by insurer's

Evidence—*concluded.*
agent, and that insured truthfully stated the facts to the agent. *German Ins. Co. v. Frederick*..... 539
17. Parol evidence is not admissible to contradict a written contract. *Te Poel v. Shutt*..... 592

Exceptions. See REVIEW, 41-43.

Exchange of Property. See VENDOR AND VENDEE, 7.

Executions. See ESTOPPEL, 2. FORCIBLE ENTRY AND DETAINER. MORTGAGES, 13, 26. TAXATION, 17.

Appraisement. Notice.

1. A defendant, appealing from an order confirming a judicial sale of land, cannot be heard to complain that his interest was not singled out for appraisement, when the appraisement was the total value of the land less only liens which from their nature would have to be deducted from such defendant's interest. *Toscan v. Devries*..... 276
2. The owner of real estate which is about to be sold under a decree of foreclosure is not entitled to notice of the time and place of making the appraisement. *Maginn v. Pickard*, 642

Deputy Sheriff.

3. Where a decree of foreclosure directs the sheriff to make a sale of the mortgaged premises, the deputy sheriff has authority to act in the matter, and may execute the decree for and in the name of his principal. *Id.*

Examination of Debtor. Affidavit.

4. An order for the examination of a debtor and his debtors in aid of execution may be vacated when procured solely on an affidavit wherein the averments are upon information and belief. *Clarke v. Nebraska Nat. Bank*..... 314
5. The facts in an affidavit for an order for examination of the debtor in aid of execution should be set forth by positive averments, and not upon information and belief. *Id.*

Order of Sale.

6. A clerk's order of sale is not necessary to the execution of a decree directing realty to be sold by the sheriff. *Bristol Savings Bank v. Field*..... 670

Sheriff's Deed.

7. A sheriff's or master's deed, executed after confirmation of sale and before supersedeas of that order, and delivered after judgment of affirmance and filing of a mandate, is regular. *Green v. Morse*..... 392

Special Master. Oath.

8. If a special master appointed to make a judicial sale is required to take an oath, it will be presumed, in the absence of a showing to the contrary, that such oath was taken. *Toscan v. Devries*..... 276

Executions—*concluded.*

9. The statute does not require that a master commissioner appointed to make a mortgage foreclosure sale shall take, subscribe, and file an oath. *George v. Keniston*..... 313

10. A master commissioner appointed to make a judicial sale has authority to administer the oath to the appraisers. *Id.*

Executors and Administrators. See ESTOPPEL, 1. REVIEW, 56. WILLS, 5.

1. A district court has power to enjoin executors from diverting trust property, to annul conveyances executed by them in violation of their trust, and to require the interest of a beneficiary, if not exempt, to be applied to payment of his debts. *Arlington State Bank v. Paulsen*..... 718

Conveyances. Powers. Subrogation.

2. It will be presumed that executors are invested with power to carry out testator's intention with reference to the disposition directed by him to be made of his property. *Id.*..717

3. Will construed, and *held* to give executors power to convey realty only to a *bona fide* purchaser. *Id*..... 718

4. Transfer by executors to an heir, under an agreement requiring her to mortgage the realty for their benefit and reconvey it, *held* a voluntary conveyance, and, as to her and her grantees with notice, void at the suit of the estate and its creditors, and at the suit of prior judgment creditors of the beneficiaries of the estate. *Id.*

5. The presumption is that an executor with power to sell and convey land has no power to mortgage it, but such a presumption may be overthrown, where the entire will evinces testator's intention to clothe the executor with power to execute a mortgage. *Id*..... 719

6. Whether a conveyance by executors who have an interest in testator's property was made in execution of their trust or as a transfer of their individual interest is a question of intention, and where the conveyance shows it was made in execution of the trust it will be so construed. *Id.*

7. Where executors with authority to sell realty and pay the proceeds to heirs conveyed it, without consideration, to an heir who mortgaged it for the benefit of the executors, the conveyance and the mortgage were properly canceled in a suit by creditors of the heirs, but the mortgagee was *held* entitled to judgment against the estate for so much of the money borrowed from him as was actually applied to allowed claims and liens against such estate. *Id.*

Final Account.

8. An executor's final account should not be approved and the executor discharged, until the trust has been fully executed, *Cowherd v. Kitchen*..... 427

Executors and Administrators—*concluded.*

Incumbrances. Extension. Damages.

9. An executor may be liable for the damages resulting from his act in procuring extension of time for payment of a mortgage on the estate bequeathed. *Id.*

Notice of Application for Letters.

10. Notice of the hearing of an application for letters of administration cannot be collaterally attacked by one not interested in the estate. *Jackson v. Phillips*..... 190

Right to Bring Suit.

11. A foreign executor or administrator may maintain a suit in Nebraska. *Id.*

Exemption. See HOMESTEAD.

False Representations. See CANCELLATION OF INSTRUMENTS, 1.

Fees and Salaries. See COUNTIES, 1.

Final Order. See REVIEW, 44-49.

Findings. See ARBITRATION AND AWARD, 2, 3. JUDGMENTS, 7.

Fines. See CONTEMPT, 7.

Fixtures.

1. Articles which may or may not become attached to the freehold, according to circumstances, will retain their character of personalty by virtue of a contract between vendor and vendee to that effect, when the rights of innocent purchasers relying on their apparent character are not involved. *Arlington Mill & Elevator Co. v. Yates*..... 286

2. Where one buys an engine for his flour-mill and gives a chattel mortgage to secure the purchase price, he thereby evinces his intention that the engine shall retain its status as personalty, though attached to the freehold, and it will be so regarded whenever the rights of innocent third persons will not be prejudiced. *Edwards & Bradford Lumber Co. v. Rank*..... 323

3. Findings that equipments of a saloon were part of the realty *held* sustained by the evidence. *Grand Island Banking Co. v. Koehler*..... 655

Forcible Entry and Detainer.

An action in forcible entry and detainer lies in favor of a purchaser at judicial sale to recover possession of the premises purchased when the judgment debtor was in possession at the time the judgment or decree was rendered whereunder the sale was made. *Green v. Morse*..... 392

Foreclosure. See TAXATION, 13-15. VENDOR AND VENDEE, 8.

Fraternal Beneficiary Societies. See INSURANCE, 7-11.

Fraud. See LIMITATION OF ACTIONS, 3. MORTGAGES, 8. STATUTE OF FRAUDS.

Fraudulent Conveyances. See CREDITORS' BILL. EXECUTORS AND ADMINISTRATORS, 4.

1. In absence of fraud a debtor, while retaining dominion over his property, may prefer certain creditors to the exclusion of others. *Blair State Bank v. Stewart*..... 58
2. The right of a debtor in failing circumstances to prefer some of his creditors is subject only to the limitation that the transaction resulting in the preference must be an honest one, and not designed to hinder, delay, or defraud other creditors. *Tackaberry v. Gilmore*..... 450
3. The character of a transaction by which a creditor obtains security from an insolvent debtor depends upon the motives of the parties. *Id.*
4. Disparity between the value of security and the debt secured is a circumstance to be considered in determining whether there was a fraudulent intent in a transaction by which a creditor obtained security from an insolvent debtor. *Id.*
5. A creditor whose claim has not been reduced to judgment, and who has not a general or specific lien on his debtors' property, is not entitled to have such property impounded as security for the claim, nor to an injunction restraining his debtor from disposing of property, nor to a decree canceling fraudulent transfers already made. *Missouri, Kansas & Texas Trust Co. v. Richardson*..... 617

Gambling. See GAMING.

Gaming.

One charged only with setting up and keeping gaming tables and gambling devices cannot be convicted on evidence that he aided and abetted another in committing the offense charged. *Oerter v. State*..... 135

Garnishment. See CLERK OF COURT, 2, 3.

Gifts. See ESTOPPEL, 1.

Government Land. See PUBLIC LANDS.

Guaranty.

1. The extension of time to a principal debtor is a sufficient consideration to support a guaranty by a stranger of the payment of the new obligation. *Faulkner v. Gilbert*..... 544
2. The party to whom a guaranty of payment for goods to be sold in the future is addressed is not required to notify the guarantor of the acceptance of such guaranty in advance of extending the proposed credit thereon. *Standard Oil Co. v. Hoese*..... 665

Guaranty—*concluded.*

3. Liability of guarantors for balance of an account against debtor, where the guaranty was as follows: "We do hereby guaranty the payment of any purchases of oil he may make of your company within the next year, to an amount not exceeding $300." *Id.*

Guardian and Ward. See ESTOPPEL, 4.

1. A guardian's sale of a minor's personalty must be authorized by the court. *Hendrix v. Richards*..... 794
2. Where a guardian resigned his trust and turned over to his successor money and property in lieu of a note for trust funds secured by mortgage, it was *held*, in absence of proof that the ward received the benefit of such money and property, that the attempted transfer of the note and mortgage to the resigning guardian was not effective. *Id.*
3. In a suit to foreclose a mortgage given to secure funds of a ward, it was *held* no defense for defendant to show that he bought the land and paid to the ward's guardian, who had possession of the mortgage, the amount due thereon, where defendant knew that such guardian had previously resigned his trust, and that the court records failed to disclose authority for a transfer of the mortgage to him. *Id.*

Habeas Corpus. See DIVORCE, 8.

1. A writ issued by competent authority may not be disregarded because allowed on an insufficient petition, a writ so allowed not being void. *Nebraska Children's Home Society v. State*..... 765
2. Where a writ directed to the sheriff proves unavailing to produce the prisoner, the court, by order, may require any party to the proceeding who is shown to have control of the prisoner to produce his body. *Id.*

Harmless Error. See INSTRUCTIONS, 10.

Herd Law. See ANIMALS.

Homestead.

1. Homestead rights cannot be divested by the act of the husband alone. *Morrill v. Skinner*..... 164
2. The wife's right of homestead is not defeated, where she remains in occupancy, and the husband abandons her and lives elsewhere. *Id.*
3. Where a homestead is sold to satisfy a mortgage, the owner may have his homestead exemption set off to him from the surplus after payment of the mortgage, and before any of the proceeds are applied to debts which are subject to the homestead exemption. *Id*..... 165
4. An executory contract for the sale of realty purchased for a homestead may be enforced as security for purchase-

Homestead—*concluded.*

money, though not signed by vendee's wife. *Jackson v. Phillips* 190

5. Findings relative to an alleged homestead right *held* not contrary to the evidence. *Woolworth v. Parker*..... 417

6. In equity the apparent lien of a judment may be removed as a cloud on the title of the owner of a homestead. *Smith v. Neufeld* 660

Homicide.

An information charging that accused "then and there did make an assault upon William P. Wilcox with a certain pistol loaded with gunpowder and one leaden bullet and then and there him did shoot," charges both the assault and the shooting to have been done with a pistol loaded as described. *McVey v. State*..... 471

Husband and Wife. See DIVORCE. HOMESTEAD.

1. A widow does not become personally liable upon the note of her deceased husband by making a voluntary partial payment thereon. *Fellers v. Penrod*..... 463

2. Within the limits of her general contractual power, a married woman may enter into a contract of suretyship. *First Nat. Bank of Chicago v. Stoll*..... 758

3. A plea of coverture must negative the conditions under which a married woman is, by statute, permitted to contract. *Id.*

4. A plea of coverture which merely asserts that the defendant or her separate estate received no benefit from the contract is insufficient. *Id.*

Improvements. See MORTGAGES, 23, 27. VENDOR AND VENDEE, 10.

1. An occupying claimant may not have the land and improvements sold to pay the parties the value of their respective interests,—at least not until a time has been fixed by the court within which the successful owner may elect whether he will accept the value of the land without the improvements, or pay the value of the improvements, and he has refused to make such election. *Troxel v. Stevens*..... 330

2. One who has occupied and improved school lands of the state waives his right to compensation for the improvements by electing to remove them. *Luse v. Rankin*..... 632

Indemnity. See CHATTEL MORTGAGES, 5. REVIEW, 60.

Indian Reservations. See PUBLIC LANDS, 3-5.

Indictment and Information. See CONTEMPT, 5, 6. HOMICIDE. RAPE, 2.

On an information charging one as principal with having committed a felony he cannot be convicted as an accessory. *Oerter v. State*..... 135

Indorsements. See NEGOTIABLE INSTRUMENTS, 13.

Infants. See ESTOPPEL, 4. PARENT AND CHILD.

Injunction. See CORPORATIONS, 6. EXECUTORS AND ADMINISTRATORS, 1. FRAUDULENT CONVEYANCES, 5. JUDGMENTS, 8-10. RELIGIOUS SOCIETIES, 4.

1. In an action on an injunction bond it was *held* erroneous to submit to the jury evidence of the expenses of an unsuccessful attempt, on motion, to dissolve the injunction. *Pollock v. Whipple*..... 82

2. The remedy by forcible entry and detainer and by writ of assistance in the original case are concurrent, and an injunction will not be allowed to restrain the prosecution of a case in forcible detainer merely because the district court might proceed by writ of assistance. *Green v. Morse*.. 392

3. A litigant cannot invoke injunction to regain possession of realty wrongfully in possession of another, in absence of a showing that ordinary remedies of the law are inadequate. *Wehmer v. Fokenga*..... 510

4. Defendants *held* properly enjoined from diverting from a stream the flowage of the natural volume of water. *Plattsmouth Water Co. v. Smith*..... 579

Insolvency. See BANKS AND BANKING, 1.

1. In absence of fraud a debtor may prefer certain creditors to the exclusion of others. *Blair State Bank v. Stewart* 58

2. A person asserting a claim for preference against an insolvent estate has the burden of showing that such estate has been increased, to some extent, by the misappropriation of trust funds or property belonging to the claimant. *Morrison v. Lincoln Savings Bank & Safe Deposit Co*..... 225

Instructions. See NEGLIGENCE.

Alibi.

1. Where an alibi and its effect were correctly stated in an instruction, no harm will be presumed from the fact that in referring to it the court descriptively said that an alibi is a part of the defense. *McVey v. State*..... 471

Assuming Facts.

2. Where the court gave an instruction assuming the existence of facts as to which the evidence is conflicting, the error is not cured by submitting special interrogatories, relating to such facts, and instructing that in answering the questions the jury is not to be influenced by the former instruction. *Morton v. Harvey*..... 305

3. The court should not give an instruction assuming the existence of facts relative to which the evidence is conflicting, and then submit the question of the existence of such facts to the jury. *Id.*

Instructions—*concluded.*

Charge Construed as a Whole.

4. Instructions should be considered as an entirety, and where they correctly state the law no criticism will be available which counts upon the fact that one instruction covers but a part of the entire ground. *McVey v. State*..... 471

Discrediting Evidence.

5. An instruction referring to a portion of the evidence in such a manner as to discredit it should be refused. *Zimmerman v. Kearney County Bank*..... 800

Issues.

6. An instruction excluding from the jury a material issue upon which there was pertinent evidence, *held* prejudicially erroneous. *Knapp v. Chicago, K. & N. R. Co*..... 195

7. An instruction excluding from the jury a material issue *held* not cured by another instruction. *Id.*

8. It is error to direct a verdict on an issue as to which the evidence is conflicting. *Morton v. Harvey*..... 304

9. Where, in an action on an attachment bond because of an alleged wrongful attachment, plaintiff had made no effort to prove the allegation, and the court had refused to admit proofs contradictory thereof by defendants, *held*, erroneous to submit that issue, as one of fact, to the jury. *Jandt v. Deranleau* 497

Negligence.

10. An instruction that "contributory negligence is based upon, and presupposes, the negligence of the defendant, and cannot exist without some negligence on defendant's part," criticised, but, in view of the issues, *held* not prejudicial, if erroneous. *Union Stock-Yards Co. v. Goodwin*..... 139

Presumption of Innocence.

11. Where the jury was instructed that the presumption of innocence continues with accused until his guilt is established by the evidence beyond a reasonable doubt, *held* not prejudicially erroneous to refuse to further instruct that such presumption is a matter of evidence. *McVey v. State*.. 471

Repetition.

12. It is not error to refuse an instruction like one already given. *Zimmerman v. Kearney County Bank*..... 800

Insurance.

1. Evidence *held* sufficient to sustain a verdict for plaintiff in a suit on an insurance policy. *Phenix Ins. Co. of Brooklyn v. Holcombe*..... 623

Additional Insurance. Forfeiture. Waiver.

2. An insurer, having notice that insured has obtained additional insurance in violation of the contract, will be deemed to have waived its right to insist upon a forfeiture when it

Insurance—*continued.*

refrains for more than ten months from exercising its right and then bases an attempted cancellation upon other grounds. *Id.* 622

3. In a suit on a policy forbidding other insurance without written consent of insurer, a reply defectively alleging notice to insurer that additional insurance had been obtained will be liberally construed. *Id.*

Application. Misstatements.

4. Misstatements in an application written by insurer's agent will not defeat recovery for a loss, where insured truthfully stated the facts to the agent; and such facts may be shown by parol evidence. *German Ins. Co. v. Frederick* 539

Change in Title. Partnership.

5. In a policy, a provision forbidding a sale, transfer, or any changes in the title or possession of insured property without consent of the insurer has no application to a sale or transfer by one partner to another of his interest in partnership property. *Phenix Ins. Co. of Brooklyn v. Holcombe* .. 623

Construction of Policy.

6. In contracts of insurance a construction resulting in a loss of the indemnity for which the insured has contracted will not be adopted except to give effect to the obvious intention of the parties. *Id.*

Fraternal Beneficiary Societies. Rights of Creditors.

7. The rules and regulations of fraternal beneficiary societies for the creation and payment of their funds to the properly designated beneficiaries should receive such liberal construction as to carry out the benevolent purposes sought to be accomplished. *Fisher v. Donovan* 361

8. Creditors have no right to, or interest in, a certificate in a fraternal beneficiary society, either before or after the death of the member, and they cannot participate in the fund derived therefrom. *Id.*

9. A member holding a certificate in a fraternal beneficiary society may at his option change the beneficiary therein so long as he complies with the laws of such society and keeps within its limitations, and those of the statute under which it is organized. *Id.*

10. A certificate in a fraternal beneficiary society is a mere expectancy, and the beneficiary has no vested right therein. *Id.*

11. Upon the death of a member holding a certificate in a fraternal beneficiary society the money arising from such certificate vests absolutely in the beneficiary properly designated by the member. *Id.*

Insurance—*concluded.*

Knowledge of Agent.

12. An insurer committing to an agent the supervision and inspection of its risks is charged with knowledge of any fact learned by such agent while engaged in the performance of his duty as such inspector. *Phenix Ins. Co. of Brooklyn v. Holcombe* 622

Manufacturing Establishments.

13. Where insured property was merchandise and machinery used in manufacturing, and the policy provided that if the insured property be a manufacturing establishment, its non-operation would avoid the contract, *held* that the insured machinery was not a manufacturing establishment within the meaning of the policy. *Id.* 623

Vacant Premises.

14. A provision avoiding the policy should the premises "be or become vacant" *held* waived, where they were vacant when the policy was issued and insurer's agent knew that fact. *German Ins. Co. v. Frederick* 539

Interest. See BUILDING AND LOAN ASSOCIATIONS. LANDLORD AND TENANT, 4. TAXATION, 23, 27.

Interlocutory Order. See REVIEW, 46.

Intervention. See CORPORATIONS, 4. RECEIVERS, 2.

A person claiming ownership of property in litigation may, at any time before trial, become a party to the action by intervention. *McConniff v. Van Dusen* 49

Intoxicating Liquors.

1. One may remonstrate against the granting of a license on the ground that notice of application was not published in the newspaper having the largest circulation, though remonstrator is personally interested in the determination of the question. *Feil v. Kitchen Bros. Hotel Co* 22
Feil v. Stack 204

2. Notice of an application for license should be inserted for two weeks in the newspaper published in the county, which has the largest circulation therein. *Id.*

3. Where notice of an application for license is inserted in a daily paper, it must be published daily for two weeks prior to the hearing. *Id.*

4. Whether several editions of a daily paper are separate and distinct publications is a question of fact, to be determined, in the first instance, by the license board. *Id.*

5. Where matter published in each of two editions of a daily paper is not the same, and each edition has a different name, and is sent to different subscribers, notice of an application for license is required to be inserted in but one

Intoxicating Liquors—*concluded.*

edition, and its circulation alone should be considered in determining whether the proper newspaper was selected. *Id.*

6. Though notice of an application for license was not inserted in the newspaper having the largest circulation, the publication will not be declared invalid if bad faith cannot be properly imputed to the applicant in making choice of the newspaper. *Id.*

7. License board has no authority to designate the newspaper in which the publication of notices of applications for license shall be made. *Id.*

8. Evidence *held* sufficient to sustain verdict for plaintiff in an action for damages resulting from sale of intoxicating liquors. *Muchow v. Reid* 585

Joinder of Causes of Action. See ACTIONS, 3.

Joinder of Parties. See ACTIONS, 2.

Judges. See COURTS.

Judgments. See DIVORCE, 4-7. MORTGAGES, 18. NEGOTIABLE INSTRUMENTS, 14. REPLEVIN, 5, 6. REVIEW, 44-49.

Change of Venue.

1. A judgment of the district court was *held* void where it was rendered in a case transferred by the court, on its own motion, from the district court of another county. *Lefferts v. Bell* 248

Effect of Reversal. Lien.

2. When a judgment of the district court is reversed in an appellate proceeding it ceases, from the date of the reversal, to be a lien on the lands of the judgment debtor. *Oliver v. Lansing* 352

3. A person who purchases real estate burdened with the lien of a judgment will hold it discharged of such lien in case the judgment be afterwards reversed. *Id.*

4. Where a judgment has been reversed in the appellate court the subsequent rendition of another judgment in the same cause will not revive the lien so as to make it effective from the date of the original judgment. *Id.*

5. A judgment is not a lien upon an equitable interest in realty. *Woolworth v. Parker* 417

6. Where a will vests title to realty in an executor and directs him to sell it and pay the proceeds to heirs, they have no interest in the realty as such, and a judgment against them is not a lien on such realty. *Arlington State Bank v. Paulsen* 718

Findings. Collateral Attack.

7. A judgment in replevin on a general finding for defendant

Judgments—*concluded.*

is not subject to collateral attack for want of a finding that defendant, at commencement of suit, was entitled to possession of the property. *Ayres v. Duggan*..... 750

Injunction. Enforcement.

8. To justify an injunction against enforcement of a judgment in favor of a creditor, the debtor must show that by fraud or mistake, or accident, and without fault on his part, he was prevented from interposing a valid defense. *City of Broken Bow v. Broken Bow Water-Works Co*..... 548

9. The fact that the judgment debtor, without fraud or concealment as to the facts, mistook the law and so suffered judgment, does not constitute a mistake which entitles him to relief by injunction. *Id.*

10. Pleadings and proof *held* insufficient to warrant an injunction to restrain the enforcement of judgments. *Id.*

Issues.

11. Decree in equity must conform to the pleadings and proof. *Ross v. Sumner*..... 588

Principal and Surety.

12. Where it is disclosed in an action on a note that one maker is principal and the other surety, a judgment for plaintiff should, under section 511 of the Code, state which defendant is the principal debtor and which is surety. *Maxwell v. Home Fire Ins. Co*..... 208

Process.

13. A judgment rendered against a party upon whom process has not been served, and who has not submitted to the jurisdiction of the court, is unauthorized and void. *Luse v. Rankin* 632

Sufficiency of Evidence.

14. A judgment lacks evidence to support it where it rests solely on testimony irrelevant under the issues made by the pleadings. *Union Stock-Yards Co. v. Goodwin*..... 139

Judicial Sales. See EXECUTIONS.

Jurisdiction. See APPEARANCE. COURTS, 4-9. DIVORCE, 5. JUSTICE OF THE PEACE. REMOVAL OF CAUSES, 2.

Jury.

In a mortgage foreclosure suit, the signers of a supersedeas bond were *held* not entitled to a jury to try issues made by their answer to a rule to show cause why judgment should not be entered against them for rents and profits. *Lowe v. Riley*..... 253

Justice of the Peace.

1. Whether a justice of the peace, for want of jurisdiction, should certify an action of replevin to the district court

Justice of the Peace—*concluded.*

for trial depends on the appraisement under section 1038 of the Code. *Kilpatrick-Koch Dry Goods Co. v. Rosenberger*..... 370

2. A justice of the peace or county court is not ousted of jurisdiction in a forcible entry and detainer case by the mere averment that it involves the question of title, but has jurisdiction to proceed until the evidence discloses such fact. *Green v. Morse*..... 392

Landlord and Tenant. See SCHOOL LANDS, 2. TENANTS IN COMMON.

1. Instrument *held* an executory contract for the sale of realty and not a lease. *Jackson v. Phillips*..... 189

2. A rent lien created by the lease of a hotel *held* inferior to the lien of a subsequent chattel mortgage on furniture placed in the hotel after the lease was executed. *New Lincoln Hotel Co. v. Shears*..... 478

3. In absence of an express contract a landlord is not bound to repair leased premises, nor to pay for repairs made by the tenant. *Murphey v. Illinois Trust & Savings Bank*..... 519

4. A lessee is entitled to interest at the rate of seven per cent per annum upon advance payments of rent made for the accommodation of the lessor and at his request. *Missouri, Kansas & Texas Trust Co. v. Richardson*..... 617

5. Without the landlord's consent, a tenant cannot, by assigning the lease, absolve himself from an express covenant to pay rent, or otherwise change the conditions of his obligation. *Id.*

Larceny.

Evidence *held* insufficient to sustain conviction of one charged with receiving stolen cattle. *George v. State*..... 656

Law of the Case. See REVIEW, 73, 74.

License. See INTOXICATING LIQUORS.

Liens. See ANIMALS, 3. CHATTEL MORTGAGES. FRAUDULENT CONVEYANCES, 5. JUDGMENTS.

Limitation of Actions.

1. Owner's cause of action against a city for damages to realty by the grading of a street accrues on the completion of the grade and is barred in four years thereafter. *City of Omaha v. Flood*.....124, 134

2. A chattel mortgage is not barred by the statute of limitations on the ground that the original evidence of the debt would be barred, where it has been kept alive by renewal notes. *Arlington Mill & Elevator Co. v. Yates*..... 286

3. An action for relief on the ground of fraud is barred in four years after the discovery of the fraud. *Buerstetta v. Tecumseh Nat. Bank*..... 504

Limitation of Actions—*concluded.*

4. The statute of limitations as a defense is waived, unless raised either by demurrer or answer. *Hobson v. Cummins*... 611
5. Where a partnership was defendant in a suit, the filing of a petition in which the suit was changed to an action against individual members was *held* an abandonment of the action against the firm, and a subsequent amendment of such petition so as to make it run against the firm did not prevent the action's being barred. *Wigton v. Smith*..... 299
6. Where facts stated in an amendment to a petition constitute a separate and independent cause of action, the statute of limitations runs against such action until the filing of the amendment. *Buerstetta v. Tecumseh Nat. Bank*..... 504

Lis Pendens.

He who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it at the outset. *Nagle v. First Nat. Bank of Omaha*..... 552

Malice. See CRIMINAL LAW, 4.

Mandamus.

1. A county clerk may be mandamused to omit from official ballots the names of persons whose nominations were void. *State v. Smith*..... 41
2. Where, by an arbitrary or capricious exercise of authority, a pupil has been refused admission to a school, he may be reinstated by mandamus. *Jackson v. State*..... 183
3. County commissioners may be required to order a special county-seat election where their refusal to grant the prayer of a proper petition for such an election was the exercise of an arbitrary or capricious authority. *Barry v. State*..... 466

Master Commissioner. See EXECUTIONS, 8, 9, 10.

Master and Servant.

1. A corporation using the cars of other corporations, as to its employés, is charged with the same duty as to inspection as if the cars were its own. *Union Stock-Yards Co. v. Goodwin* 138
2. An employé using a car in possession of the master, but owned by another, assumes no greater risk than if the master owned the car. *Id.*
3. No defect being obvious, an employé has the right to assume that a tool or appliance furnished him by his employer is reasonably safe and fit for the purposes for which he is required to use it. *Id*..... 139
4. That an employé knew of a rule or custom of his employer, continued in his service, and thereby assumed the risk of

Master and Servant—*concluded.*

injury from a defective appliance, is affirmative matter of defense which must be pleaded. *Id.*

5. In inspecting a car-brake such a test should be applied as would probably reveal a defect if one existed; and the neglect of a car inspector to make such a test is evidence of negligence. *Id.*

6. A brakeman who goes upon a car to set a brake, knowing that the car has not been inspected, does not for that reason assume the risk of the brake being defective. *Id.*

7. Facts *held* to justify an inference that a careful inspection of a brake by a competent inspector would have revealed its defective condition. *Id.* 138

8. Statement of risks of employment. *Id.* 139

Mechanics' Liens. See FIXTURES, 2.

1. The statute (Compiled Statutes, ch. 54, sec. 1) gives a right of lien for material furnished, but does not necessarily imply raw material in the condition in which it is actually furnished or delivered. *Grand Island Banking Co. v Kochler*.. 649

2. In determining whether items may be tacked to constitute a single account, the intention of the parties as shown by their contemporaneous conduct with reference to the transactions must be considered. *Id.*

3. A mortgage filed during the erection of a building on the premises mortgaged has priority over the rights of a person subsequently beginning to furnish materials. *Id.*

Merger. See MORTGAGES, 7.

Misconduct of Counsel. See REVIEW, 5.

Mistake. See COMPROMISE AND SETTLEMENT. JUDGMENTS, 9

Money in Court. See CLERK OF COURT, 2, 3.

Mortgage Foreclosure. See EXECUTIONS, 3.

Mortgages. See CHATTEL MORTGAGES. GUARDIAN AND WARD, 3. MECHANICS' LIENS, 3. TENANTS IN COMMON, 2.

1. Facts *held* not to show that defendants are entitled to protection as mortgagees in possession after default under the provisions contained in the mortgage. *Rowe v. Griffiths*.... 489

2. Where executor, without authority to sell land except to a *bona fide* purchaser, deeds realty to an heir, she agreeing to mortgage it for their benefit and to reconvey it to them, one taking from her a mortgage on such realty with knowledge of the character of her title, or with knowledge of such facts as would put a prudent person on inquiry, is not a *bona fide* purchaser or entitled to protection as such. *Arlington State Bank v. Paulsen*..... 718

Mortgages—*continued.*

Consideration.

3. Where one makes his own note payable at a future time in discharge of the past due note of a third person, the release of the third person and extension of time of payment form a sufficient consideration to support the new note and a mortgage made to secure it. *Morrill v. Skinner*.. 165

Conveyance of Land. Assuming Debt. Estate.

4. Evidence *held* to show that at the time of a divorce land was conveyed by the husband to the wife in consideration of her assuming, as a charge thereon, a debt which he had attempted ineffectually to mortgage the land to secure. *Id.*, 164

5. The promise of one to assume a debt of another in consideration of a conveyance of land by the latter to the promisor will support a note and mortgage made by the promisor to the creditor in fulfillment of the promise. *Id*..... 165

6. An equitable estate may be mortgaged, and subsequent conveyance of the legal title will not defeat the mortgage where the rights of an innocent purchaser without notice are not involved. *Arlington Mill & Elevator Co. v. Yates*..... 286

7. Conveyance of realty to mortgagee and the giving of mortgagor's note, *held* to constitute a sufficient consideration for mortgagee's assuming a subsequent incumbrance on the land conveyed. *Goos v. Goos*..... 294

8. The fact that a mortgagee was induced to assume payment of a junior incumbrance by mortgagor's threat to convey or lease the realty, *held* not to constitute fraud or duress. *Id.*

9. One who accepts a conveyance of land, and as part of the consideration agrees to pay a mortgage thereon, is bound not only to the promisee but to the incumbrancer to do so, and estopped from denying the validity of the incumbrance. *Id.*

10. Where the debt has been assigned but no assignment recorded, an innocent purchaser of the mortgaged premises will be protected by a release executed by the original mortgagee. *Bullock v. Pock*..... 781

Default. Right to Declare Debt Due.

11. Acceptance of interest due is not a waiver of mortgagor's default in payment of matured installments of the principal, nor of mortgagee's right to declare the entire debt due. *Northwestern Mutual Life Ins. Co. v. Butler*..... 198

12. Commencement of a foreclosure suit is sufficient notice of mortgagee's election to declare the entire debt due upon mortgagor's default in making payments. *Id*..... 199

Foreclosure. Judgments. Supersedeas.

13. In a foreclosure suit, *held* that a judgment creditor had no right to a decree ordering the land to be sold unless re-

Mortgages—*continued.*

demption be made from the judgment as well as the prior liens. *Morrill v. Skinner*..... 165

14. Evidence *held* sufficient to warrant a finding for plaintiff in an action to foreclose as a mortgage an executory contract securing purchase-money for land sold. *Jackson v. Phillips*, 190

15. Under the Code, as existing in 1895, either an action at law for the recovery of a debt secured by mortgage or a suit to foreclose the mortgage will lie, but both remedies cannot be pursued at the same time, unless permission is given by the court. *Maxwell v. Home Fire Ins. Co*..... 207

16. In a foreclosure suit the petition must allege whether any proceedings at law have been had for the recovery of the debt, or any part thereof; and where the answer is a general denial, there can be no recovery, in the absence of proof sustaining such allegation. *Jones v. Burtis*..... 604

17. Where one executes a note and transfers to the payee as collateral security a note held against a third person secured by a mortgage, a decree foreclosing such mortgage will not bar an action at law on the first note. *Maxwell v. Home Fire Ins. Co*..... 208

18. Where the court acquired jurisdiction of a foreclosure suit, it was *held* proper to retain it for the entry of judgment for rents and profits against signers of a supersedeas bond, though they were served only with notice of a rule to show cause. *Lowe v. Riley*..... 252

19. Finding as to rental value of premises *held* sustained by the evidence. *Id*..... 253

20. An action to foreclose a mortgage securing a note is not one founded upon an instrument for the unconditional payment of money only, within the meaning of section 129 of the Code, relating to the use of copies of instruments in pleading. *First Nat. Bank of Chadron v. Engelbercht*..... 270

21. In a mortgage-foreclosure suit a copy of the evidence of indebtedness—the note secured—should be attached to and filed with the petition, or a sufficient reason assigned for a failure to do so. *Id.*

22. In a mortgage-foreclosure suit plaintiff is not required to incorporate into his petition either the note secured or the mortgage, or to make either a part of the petition by express averments, or to attach a copy of the mortgage to the petition, but is only required to attach to and file with the petition a copy of the note secured by the mortgage. *Id.*

23. The owner of mortgaged property who expends money in improvements, believing the mortgage to be ineffective, cannot defend a foreclosure case on that ground where there

Mortgages—*continued.*

was no fraud, misrepresentation, or concealment of fact. *Arlington Mill & Elevator Co. v. Yates*..... 286

24. In foreclosure the district court cannot divert the rents and profits of the mortgaged premises from the tenant lawfully in possession claiming title under the mortgagor, except by the appointment of a receiver. *Huston v. Canfield*.. 345

25. In an action to foreclose a mortgage prior incumbrancers may be made parties defendant for the purpose of having the amount and rank of their liens adjudicated. *Missouri, Kansas & Texas Trust Co. v. Richardson*..... 617

26. A decree directing land to be sold in a tract as mortgaged, and not in lots as subsequently platted and in the inverse order of alienation or conveyances of lots by mortgagors, *held* not erroneous or inequitable. *Hanscom v. Meyer*..... 786

Improvements.

27. In the absence of express agreement to the contrary a mortgagee of real estate is not liable to the occupant thereof for improvements made by him on the premises in pursuance of an agreement with the owner that he would pay the occupant for the improvements so made. *Murphey v. Illinois Trust & Savings Bank*..... 519

Lien. Nature of Instrument.

28. A mortgage conveys no estate, but merely creates a lien. *Morrill v. Skinner*..... 164

29. An instrument properly executed, describing the parties, the land, and the debt, and evidencing an intention to charge the debt as a lien upon the land, is sufficient to constitute a mortgage. *Id.*

30. A quitclaim deed given to secure an indebtedness is in legal effect a mortgage. *Huston v. Canfield*..... 345

Registration.

31. An unrecorded mortgage is valid between the parties and is not void as to creditors generally, but only as to creditors whose instruments have been first recorded. *Blair State Bank v. Stewart*..... 58

Rents and Profits.

32. A mortgagor in possession is entitled to collect and use the rents and profits of the mortgaged premises; and this right, being transferable, will pass to his grantee, or to a subsequent mortgagee to whom possession is surrendered. *Huston v. Canfield*..... 345

Taxes. Insurance. Abstracts.

33. Mortgagee is entitled to reimbursement for taxes and insurance premiums paid by him in preserving his security, and to interest on the sums thus paid. *Northwestern Mutual Life Ins. Co. v. Butler*..... 199

Mortgages—*concluded.*

34. A provision authorizing mortgagee, upon default of mortgagor, to pay "taxes and assessments," *held* to include special assessments levied by a city. *Id.*

35. A provision requiring mortgagor to pay "expenses incurred in procuring and continuing abstracts of title for the purposes of the foreclosure" *held* unenforceable. *Id.*

Voluntary Assignments.

36. A mortgage which does not in its inception contravene the assignment law will not be invalidated by a general assignment for the benefit of creditors, made by the mortgagor within thirty days after the execution of the mortgage. *Blair State Bank v. Stewart*..... 64

Motions. See REVIEW, 41.

Municipal Corporations.

Contracts. Water-Works. Officers.

1. A contract for rental of hydrants *held* void as not within the title of an ordinance authorizing a corporation to construct and maintain a system of water-works. *Lincoln Land Co. v. Village of Grant*..... 70

2. Where a city receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received, and in such an action it is unnecessary to establish a ratification of the contract. *Id.*..... 71

3. That the mayor and a councilman, who were subscribers to the stock of a corporation, may become liable for unpaid subscriptions does not avoid a contract between the city and the corporation, such officers being no longer stockholders. *City of Broken Bow v. Broken Bow Water-Works Co.*, 548

Improvement of Streets. Damages.

4. Where property adjacent to a street is damaged through the manner adopted by the city in permanently grading the street, the city is liable to the owner for such damages. *City of Omaha v. Flood*.....124, 134

5. The measure of damages to abutting property by the grading of a street is the depreciation in value of the property caused by the construction and permanent maintenance of the grade. *Id.*

6. Statement of elements to be considered in determining the damages to abutting property by grading a street. *Id.*

Ordinances. Titles.

7. An ordinance adopted by a board of village trustees is valid only as to subjects clearly expressed in the title. *Lincoln Land Co. v. Village of Grant*..... 70

Municipal Corporations—*concluded.*

Taxation. Assessments. Equalization. Notice.

8. A council of a metropolitan city cannot lawfully pass an ordinance levying special taxes until, as a board of equalization, it has determined the sum to be assessed against the real estate as benefits. *Medland v. Connell*..... 10

9. Notice of the sitting of the city council as a board of equalization, under sections 73 and 85, chapter 12*a*, Compiled Statutes 1887, "for at least six days prior thereto" by publication in the official paper, is a prerequisite to legal action. *Id.*

10. A metropolitan city council has no jurisdiction to sit as a board of equalization for the purpose of levying special taxes incident to the opening of a street, until the report of the freeholders appointed to assess damages has been made and confirmed. *Merrill v. Shields*..... 78

11. The burden of proof is on the person asserting a lien under a proceeding levying a special tax, to show a compliance, by the taxing authorities, with all essential statutory requirements. *Id.*

12. The recitals in an ordinance declaring a new street open to public travel are not competent evidence in favor of a tax-lien claimant to establish the jurisdiction of the city council to levy a special tax. *Id.*

Negligence. See INSTRUCTIONS, 10.

An instruction that one suing for damages for personal injuries was required to use only such care as a reasonable and prudent person would exercise under the same circumstances, *held* to excuse an omission to define ordinary care and diligence. *Omaha Street R. Co. v. Emminger*..... 240

Negotiable Instruments. See EVIDENCE, 3. HUSBAND AND WIFE, 1. JUDGMENTS, 12. MORTGAGES, 22. PLEADING, 17.

1. A promissory note given by the maker to the payee to enable the latter to cease work, but without any condition being imposed or promise exacted, is without consideration and may be repudiated, in the absence of circumstances creating an equitable estoppel. *Ricketts v. Scothorn*..... 51

2. A non-negotiable note given to payee as a gratuity is without consideration, and cannot, except under special circumstances, be enforced. *Id.*

3. Where a note was executed as a gift to enable payee to live without working, and she abandoned her employment as contemplated by the maker who was a relative, it was *held* that want of consideration could not be alleged as a defense in a suit on the note. *Id.*

Assignments. Actions. Parties.

4. A note payable to a party or order may be transferred by the payee without a commercial indorsement, by either

Negotiable Instruments—*continued.*

an oral or separate, distinct, written assignment thereof followed by delivery, which would render the transferee liable to any defenses against the original payee. *Sackett v. Montgomery*..... 424

5. Payee of a non-negotiable note may render himself liable to his assignee for its payment by writing a contract to that effect over his signature; but such a contract would be a separate and independent one, and the makers of the note would not be liable on such contract. *Barry v. Wachosky*.. 534

6. A non-negotiable note is assignable, and the assignee may bring suit thereon in his own name, the assignor not being a necessary party. *Id.*

7. The payee of a non-negotiable note who writes his name across the back thereof, and sells and delivers the note, does not thereby render himself liable on such note to the holder thereof. *Id.*

8. To a suit by the assignee of a non-negotiable note the original payee is not a proper party. *Id.*

9. To a suit by the assignee of a non-negotiable note on payee's contract to be liable for its payment, the makers of the note are not proper parties. *Id.*

Collateral Security.

10. The maker of a note cannot defend an action thereon on the ground that plaintiff held a third person's collectible note as collateral security, and that the note pledged was for a greater amount than the note sued on. *Carson's Executors v. Buckstaff*..... 262

Consideration.

11. Except as against a *bona fide* purchaser for value before maturity, want of consideration is a good defense to an action on a negotiable promissory note. *Fellers v. Penrod*.. 463

12. Consideration for a note *held* sufficient. *Murphey v. Illinois Trust & Savings Bank*..... 519

Indorsements. Release of Debtor.

13. Indorsement of a name on the back of a note preceded by the words "notice and protest waived" is notice to the original payee and subsequent owners that the liability assumed is not that of a joint maker. *Drexel v. Pusey*..... 30

14. The release of property of the principal debtor from the lien of a judgment rendered on a note, without the consent or knowledge of an accommodation indorser, discharges the latter *pro tanto*. *Id.*

Innocent Purchasers.

15. One who purchases negotiable paper before maturity in the usual course of trade and for a valuable consideration and in ignorance of facts which would affect its force as be-

Negotiable Instruments—*concluded.*

tween the original parties to it is an innocent purchaser. *First Nat. Bank of Cobleskill v. Pennington*..... 404

16. To defeat recovery on a note in the hands of one claiming to be a *bona fide* purchaser, it does not suffice to prove that the purchase was with knowledge of circumstances which should have excited suspicion in the mind of a prudent person. *Id.*

17. To defeat recovery on a note in the hands of one claiming to be a *bona fide* purchaser the proof must show that the purchase was made with knowledge of such circumstances as show want of honesty or bad faith on part of the purchaser. *Id.*

Payment to Agent. Death of Payee.

18. Where a negotiable note, indorsed by the payee in blank, is delivered to an agent for collection, payment by the maker in good faith to the agent while the note is in his possession, after the death of the principal and without notice of his death, will discharge the debt. *Deweese v. Muff* 17

New Trial.

An affidavit in support of a motion for a new trial on the ground of newly-discovered evidence should state as specifically as practicable the nature of such evidence and not merely its general object. *German Ins. Co. v. Frederick*.... 539

Newspapers. See INTOXICATING LIQUORS, 1-7.

Nominations. See ELECTIONS.

Notice. See EXECUTORS AND ADMINISTRATORS, 10. INTOXICATING LIQUORS, 1-7. MORTGAGES, 12. TAXATION, 9.

Nuisance.

1. The essential ingredient of a nuisance is its unlawful or wrongful character. *City of Omaha v. Flood*.....124, 134

2. The unlawful obstruction of a public street is a nuisance, but that which is authorized by competent legal authority does not in law constitute a nuisance. *Id.*

3. Where city officers acting under statutory authority construct an improvement in a street, the improvement, though negligently constructed and resulting in damage to owners of adjacent property, is not a nuisance. *Id.*

Oath. See WITNESSES, 4.

Occupying Claimants. See EJECTMENT, 2.

Office and Officers. See CLERK OF COURT.

Order of Sale. See EXECUTIONS, 6.

Ordinances. See MUNICIPAL CORPORATIONS, 7.

Parent and Child.

1. The right of a parent to the custody of a child is not lost by an act of relinquishment performed under circumstances of temporary caprice or discouragement. *Norral v. Zinsmaster* 158

2. The court should not deprive parents of the custody of their child unless it is shown that they are unfit to perform their duties as parents or have forfeited their rights as such. *Id.*

Parties. See ACTIONS, 2. CONTRACTS, 10, 11. CORPORATIONS, 4, 5. CREDITORS' BILL, 5. INTERVENTION. LIS PENDENS. NEGOTIABLE INSTRUMENTS, 6, 8, 9. REVIEW, 60-62. SUMMONS, 4.

1. An objection that one of the defendants was not joined in an application to revive a judgment cannot be urged for the first time in the reviewing court. *Broadwater v. Foxworthy* 411

2. Defense of defect of parties defendant is waived unless raised by answer or demurrer. *Ayres v. Duggan*..... 750

Partition. See SET-OFF AND COUNTER-CLAIM, 2.

The plaintiff's attorney's fees are not taxable as costs in an action for partition where the proceedings are adversary. *Oliver v. Lansing*..... 353

Partnership. See ESTOPPEL, 3.

1. Petition *held* to declare against individual members of a firm and not against the partnership. *Wigton v. Smith*.... 299

2. A demurrer to a petition alleging that defendants, as a partnership, executed a guaranty *held* to admit the power to make such guaranty. *Standard Oil Co. v. Hoese*..... 665

Payment. See ESTOPPEL, 3. NEGOTIABLE INSTRUMENTS, 18. PRINCIPAL AND AGENT, 5.

Plea in Abatement. See CRIMINAL LAW, 5-7.

Pleading. See ATTACHMENT, 2. CONTRACTS, 7, 9. CORPORATIONS, 3. CREDITORS' BILL, 5. DISMISSAL. EVIDENCE, 14. EXECUTIONS, 4, 5. INSURANCE, 3. LIMITATION OF ACTIONS, 6. MORTGAGES, 16, 22. PARTNERSHIP, 2. PLEDGES, 3. QUIETING TITLE. REPLEVIN, 1, 2. REVIEW, 53, 54. VENDOR AND VENDEE, 2, 3.

Admissions.

1. A pleading stating that if a settlement was made its effect was avoided by mistake or fraud is an admission of the settlement. *North Nebraska Fair & Driving Park Ass'n v. Box* 302

Allegations Undenied.

2. The averments of a petition not denied in the answer must be accepted as true where there is involved no question of value or the amount of damages. *Baker v. Peterson*..... 375

Pleading—*continued.*

Amendments.

3. Facts incorporated as an amendment into a petition *held* to constitute a separate cause of action from that stated in the original petition. *Buerstetta v. Tecumseh Nat. Bank*.. 504

4. Allowance of amendments after trial so as to conform pleadings to proof *held* proper. *German Ins. Co. v. Frederick*, 539

5. Effect of amending a petition in an attachment suit so as to state a different cause of action after the attached chattels were mortgaged to creditors other than plaintiff in attachment. *Nagle v. First Nat. Bank of Omaha*..... 553

Answer. New Matter. Reply.

6. New matter relied upon as constituting an affirmative defense to a cause of action must be pleaded in the answer. *Medland v. Connell*..... 10

7. Averments of new matter in an amended answer may be put in issue by refiling the reply to the original answer. *Crosby v. Bastedo*..... 15

8. All material allegations of new matter contained in an answer are admitted and must be taken as true if no reply is made to them. *Davis v. First Nat. Bank of Grinnell*..... 373

9. Evidence disproving allegations of new matter in an answer will be disregarded, unless the new matter is denied by a reply. *Grant v. Bartholomew*..... 673

10. An answer which states "that defendant has not sufficient knowledge or information as to the claim of the plaintiff, and therefore demands and calls for strict legal proof thereof," presents no issue for trial. *National Life Ins. Co. v. Martin*..... 350

11. An averment in an answer that defendant is ignorant of certain matters alleged in the petition, and therefore asks strict proof, is not a denial, and presents no issue. *First Nat. Bank of Chicago v. Stoll*..... 758

12. An answer assailed by demurrer *ore tenus* during trial will be liberally construed. *First Nat. Bank of Cobleskill v. Pennington* 404

Jurisdiction. Waiver.

13. Lack of jurisdiction is waived when omitted from an answer to the merits of the case. *Lowe v. Riley*..... 252

14. Lack of jurisdiction is not waived when pleaded in the answer, as a defense, upon the overruling of defendants' special objection to the court's jurisdiction. *Barry v. Wachosky* 534

Petition. Copies of Instruments.

15. The object of section 124 of the Code in requiring copies of a written instrument, upon which suit is founded, to be attached to and filed with plaintiff's petition, is to furnish the

Pleading—*concluded.*

opposite party with a copy of the evidence of indebtedness. *First Nat. Bank of Chadron v. Engelbercht* 270

16. Petition *held* not to state a cause of action on an alleged contract for the sale of realty. *Darr v. Mummert* 378

17. A petition framed to meet the requirements of section 129 of the Code, relating to petitions, may be sufficient without statements of extrinsic facts to show the right or title to the instrument upon which the suit is based. *Pollock v. Stanton County* 399

Pledges. See MORTGAGES, 17.

1. A creditor, as a condition precedent to his right to sue on a note, cannot be compelled to exhaust his collateral security. *Carson's Executors v. Buckstaff* 262

2. A creditor who holds a promisory note belonging to his debtor as collateral security for his debtor's note cannot be compelled to produce in court the note pledged and turn it over to his debtor, so long as the latter's debt remains unpaid. *Id.*

3. In a suit on a note an answer averring that plaintiff has possession of collateral security but failing to allege that the debt sued for has been paid, *held* not a good plea of conversion of collateral security. *Id.*

Practice. See REMOVAL OF CAUSES, 1. REVIEW, 53, 54.

Preferring Creditors. See CORPORATIONS, 7, 8.

Presumptions. See COURTS, 1.

Principal and Agent. See INSURANCE, 12. STATE AND STATE OFFICERS, 1.

1. Where in good faith one deals with an agent within his apparent authority, in ignorance of the death of the principal, the heirs and representatives of the latter may be bound, in case the act to be done is not required to be performed in the name of the principal. *Deweese v. Muff* 17

2. Where one places an agent in such a situation that a person conversant with business usages is justified in presuming the agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped, as against such third person, from denying the agent's authority. *Holt v. Schneider* 523

3. Whether an act is within the scope of an agent's apparent authority is to be determined as a question of fact from all the circumstances of the transaction and the business. *Id.*

4. 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. *Id.* 524

Principal and Agent—*concluded.*

5. Where a debtor gives his note to the creditor's agent, it will not discharge the debt due the principal, in the absence of ratification of such payment. *Id.*

6. Evidence *held* sufficient to establish agency. *New Hampshire Trust Co. v. Korsmeyer* 784

Principal and Surety. See JUDGMENTS, 12. HUSBAND AND WIFE, 2. REVIEW, 60.

1. Rendition of judgment against principal and surety on a note without reciting which was principal and which was surety, as required by section 511 of the Code, does not extinguish the relation of suretyship between the parties and the duties of the creditor with reference thereto. *Drexel v. Pusey* 30

2. Liability of signers of a bond superseding an order appointing a receiver. *Lowe v. Riley* 252

3. Where a joint bond is signed by a surety on condition that others are to sign it as sureties, it is invalid as to him if delivered without compliance with the condition, unless obligee received the bond without notice of the condition, or such surety, after signing, waived it. *Morton v. Harvey* .. 304

4. Where a joint bond, signed by a surety on condition that others are to sign it as sureties, discloses on its face, when delivered, such an irregularity as to cast on obligee the duty to inquire as to one of the requisite signatures, and he fails to do so, a breach of the condition may be a ground of defense to such surety in a suit on the bond. *Id.*

5. A surety may insist on compliance with his contract that he signed a bond on condition it should also be signed by other sureties; and such a condition is not satisfied by subsequent ratification of a signature written by an unauthorized person. *Id.*

6. A surety who has paid off the debt of his principal is entitled to be subrogated to the securities in the hands of the creditor to whom payment has been made. *Oliver v. Lansing* 358

Process. See SUMMONS.

Property. See WILLS, 11.

Public Lands. See SCHOOL LANDS.

1. One cannot invoke section 62, chapter 73, Compiled Statutes, relating to entry on government land, unless he has complied with the provisions thereof. *Comstock v. Kerwin* 1

2. No provision of the constitution makes compensation for easement a precedent condition to the right of the state to permit a railroad company to construct and operate a line of road over the saline or other public lands. *Chicago, B. & Q. R. Co. v. Englehart* 444

Public Lands—*concluded.*

3. At the time Nebraska was admitted into the Union lands occupied in common by the Pawnee Indians were public lands within the meaning of section 12 of the enabling act. (13 U. S. Statutes at Large 47.) *State v. Kennard*..... 711
4. At the time Nebraska was admitted into the Union the fee simple title to the lands occupied by the Pawnee Indians was in the United States, subject only to the Indians' right of occupancy. *Id.*
5. By section 12 of the enabling act (13 U. S. Statutes at Large 47) congress granted to Nebraska five per cent of the proceeds arising from the sale of the Pawnee Indian reservation upon extinguishment of the Indians' right of occupancy. *Id.*

Quantum Meruit. See MUNICIPAL CORPORATIONS, 2

Quieting Title.

A general demurrer to a petition to remove the apparent lien of a judgment as a cloud on the title of the owner of a homestead, *held* improperly sustained. *Smith v. Neufeld*... 660

Quitclaim Deeds. See DEEDS.

Railroad Companies. See CARRIERS. EMINENT DOMAIN.

Rape.

1. Construction and object of section 12, Criminal Code, which provides: "If any male person, of the age of eighteen years or upwards, shall carnally know or abuse any female child under the age of eighteen years with her consent, unless such female child so known and abused is over fifteen years of age and previously unchaste, every such person so offending shall be deemed guilty of a rape." *Bailey v. State*.. 706
2. Where a prisoner is charged, under section 12 of the Criminal Code, with having had sexual intercourse with a girl, with her consent, who was over fifteen and under eighteen years of age and not previously unchaste, the indictment may include all acts of unlawful sexual intercourse which occurred between the prisoner and the prosecutrix in the state after the female became fifteen years of age and which were not barred by the statute of limitations. *Id.*
3. Accused *held* erroneously convicted, under section 12 of the Criminal Code, of having in Nebraska had sexual intercourse with a girl, with her consent, who was over fifteen and under eighteen years of age and not previously unchaste, where the evidence showed she had sexual intercourse for the first time with accused in Iowa. *Id.*

Ratification. See MUNICIPAL CORPORATIONS, 2.

Real Estate. See VENDOR AND VENDEE.

Receivers. See CORPORATIONS. REVIEW, 45.

1. The authority of a receiver appointed by a court of competent jurisdiction in a proper case is not open to collateral attack. *Andrews v. Steele City Bank*..... 173
2. A receiver of a corporation, appointed after the commencement of a suit against the corporation, may intervene in such action to defend the rights of the corporation. *Id.*
3. Liability of signers of a bond superseding an order appointing a receiver. *Lowe v. Riley*..... 252
4. A receiver discharges his functions under directions of the court. *State v. Bank of Rushville*..... 608
5. The court may authorize a receiver to settle and compromise a suit instituted by him in behalf of the estate, where the settlement is for the best interests of the estate. *Id.*

Records. See EVIDENCE, 5.

Reference.

A referee to whom an action of replevin has been referred with power to pass upon all questions of law and fact may permit plaintiff to amend his petition by alleging a special instead of a general ownership of the property. *Tackaberry v. Gilmore*..... 450

Religious Societies.

1. Courts will not investigate and determine, as an original question, whether the tenets of faith and the practice of one synod of the German "Evangelical Lutheran church in the United States" differ from the tenets of faith and the practice of another synod. *Wehmer v. Fokenga*..... 510
2. Where a minority of a congregation claim that the pastor teaches doctrines not in harmony with the doctrines of the society, they should appeal to the supervising tribunal of the church, and a proper judgment of such tribunal may be enforced by the courts. *Id.*
3. Where ecclesiastical tribunals have determined a question relating to tenets of faith, practice, and church polity, their judgment will be recognized as conclusive by the courts when called upon by contending factions of a congregation to determine their rights. *Id.*
4. A majority of a religious congregation will not, at the suit of a minority, be enjoined from employing a pastor on the ground that he teaches doctrines and practices a church polity not taught or practiced by plaintiffs nor by the founders of the congregation. *Id.*

Remittitur. See DAMAGES, 5.

Removal of Causes. See JUSTICE OF THE PEACE, 1.

1. Upon a proper application in the state court for removal to the federal court, it is the better practice for the state

Removal of Causes—*concluded.*

court to suspend proceedings in the suit and await the action of the federal court on a motion to remand, but the action of the state court in the interim may be valid. *Stuart v. Bank of Staplehurst*..... 569

2. Where it appears from the face of the record that the suit is not removable, an application for removal to the federal court does not deprive the state court of jurisdiction. *Id.*

3. Petition *held* to state a cause of action for deceit and not for relief under the national banking law, and to present no federal question for adjudication. *Id.*

Rents and Profits. See MORTGAGES, 24, 32.

Replevin. See JUSTICE OF THE PEACE, 1.

Amendment of Pleadings

1. After appeal from the county court to the district court, it is error to refuse permission to file an amended petition alleging plaintiff's special interest, where proof of such interest, without objection, was admitted below, under allegations of general ownership. *Weich v. Milliken*..... 86

2. A petition in an action of replevin may be amended by alleging a special instead of a general ownership. *Tackaberry v. Gilmore*..... 450

3. Replevin affidavit may be amended to conform to the allegation of ownership contained in the petition, and such amendment may be allowed by the court while the issues formed by the pleadings are being tried before a referee. *Id.*

Demand.

4. The rule that demand is unnecessary where the defendant contests the case on the merits does not apply to cases where a demand is necessary, not merely as a basis for asserting the remedy, but to vest in the plaintiff a right of possession, as where the plaintiff's right depends upon a condition which is broken only by demand and refusal. *People's Furniture & Carpet Co. v. Crosby*..... 282

Finding. Judgment.

5. Where plaintiff was in possession of the property, a judgment for a return thereof or for its value fixed at a certain sum must be reversed on review, in absence of a finding as to value. *Brownell & Co. v. Fuller*..... 368

6. A judgment on a general finding for defendant without a finding that at commencement of suit he was entitled to possession of the property, *held* not void. *Ayres v. Duggan*, 750

Issue.

7. In actions of replevin the vital question is the right of possession of the property at the time the action was commenced; and, ordinarily, the issue is to be determined on

Replevin—*concluded.*
the facts as they existed when the suit was instituted. *Tackaberry v. Gilmore*..... 450

Joint Owners.

8. It is proper for joint owners of chattels to join in an action for the recovery of possession. *Honaker v. Vesey*..... 413

Plaintiff's Measure of Damages.

9. Where the property has been returned to defendant for failure of plaintiff to give the statutory bond, the action may proceed as one for damages, and if plaintiff prevails, his measure of damages is the market value of the property and interest. *Id.*

Rescission. See CONTRACTS, 8. SALES, 4-6.

Res Judicata. See ATTACHMENT, 5. CREDITORS' BILL, 4. MORTGAGES, 17. PRINCIPAL AND SURETY, 1.

1. Satisfaction of a judgment cannot be urged to defeat an application for an order of revivor, where a motion to enter such satisfaction of record had been previously overruled. *Broadwater v. Foxworthy*..... 407

2. A former judgment on a note is not a defense to a subsequent action on the same note, where the judgment was void for want of jurisdiction over the person of the defendant. *Sackett v. Montgomery*..... 424

Review. See COSTS. INSTRUCTIONS.

1. A judgment based on an immaterial fact or an erroneous construction of a pleading will be reversed, unless the correctness of such judgment is otherwise affirmatively shown. *McConniff v. Van Dusen*..... 49

2. Judgment of affirmance modified so as to correct an erroneous computation of the trial court. *Lewis v. Holdrege*... 219

3. An objection that no testimony was received below must be overruled where the record shows the hearing was in the nature of a trial, and that all the evidence offered was received. *Broadwater v. Foxworthy*..... 406

4. Where the jury's assessment of damages are inadequate, a judgment on the verdict may be reversed. *Spirk v. Chicago, B. & Q. R. Co*..... 565

5. Alleged misconduct of counsel will not be reviewed where the only record thereof consists of averments in the motion for a new trial. *Muchow v. Reid*..... 585

6. In absence of an abuse of discretion instructions to a receiver will not be disturbed on review. *State v. Bank of Rushville* 608

7. An order or judgment will not be reversed unless the error complained of is established by the record. *Maginn v. Pickard* 642

Review—*continued.*

8. Appeals from judgments of a county court are taken in the same manner as appeals from justices of the peace. *Ayres v. Duggan*..... 750

Appeal and Error.

9. One cannot appeal to the supreme court from a judgment rendered in an action at law, but may prosecute a proceeding in error. *Lowe v. Riley*..... 253

10. An appeal from an order or judgment of the district court in a law action does not invest the supreme court with jurisdiction of the cause. *Hayden v. Hale*..... 349

11. Alleged errors in matters of procedure occurring at or before the trial cannot be reviewed on appeal, the correctness of the judgment rendered on the pleadings and proof being the only question for consideration. *National Life Ins. Co. v. Martin*..... 350

12. On appeal to the supreme court the only question to be considered is whether the judgment or final order responds to, and is warranted by, the pleadings and proofs. *Troup v. Horbach*..... 644

13. Rulings on the admission or exclusion of testimony cannot be reviewed on appeal. *Te Poel v. Shutt*..... 592

14. To reach errors in interlocutory orders a petition in error should be filed with the record. *Troup v. Horbach*..... 644

Assignments of Error.

15. Joint assignments of error in a petition in error which are not good as to all persons who join must be overruled. *Levy v. South Omaha Savings Bank*..... 312

16. An assignment in a petition in error that there was error in overruling the motion for a new trial is unavailing where such motion is based on more than one ground. *National Masonic Accident Ass'n v. Burr*..... 437
Hart v. Weber..... 442

17. To review error in excluding a single answer on cross-examination, the assignment of error must be specific. *Honaker v. Vesey*..... 413

18. Alleged error in the verdict will not be considered on review when not raised either in the motion for a new trial or petition in error. *Hart v. Weber*..... 442

19. An assignment in a petition in error, "errors of law occurring at the trial," presents nothing for review. *Id.*

20. 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. *Spirk v. Chicago, B. & Q. R. Co.*..... 565

21. Errors in giving instructions should be specifically assigned

Review—*continued.*

in the motion for a new trial and in the petition in error. *Id.*

22. Questions not raised by assignment of error will be disregarded. *Stuart v. Bank of Staplehurst*..... 570

Bill of Exceptions.

23. A bill of exceptions will be disregarded unless authenticated, pursuant to statute, by the clerk of the district court. *Coad v. Barry*..... 177
Gay v. Reynolds..... 194

24. In absence of a bill of exceptions the sufficiency of the evidence and questions of fact will not be considered. *Gay v. Reynolds*..... 194

25. Where correctness of instructions depends on the evidence they will not be reviewed in absence of a properly authenticated bill of exceptions. *Crawford v. Smith*..... 503

26. An unauthenticated bill of exceptions will be disregarded. *Noble v. Neal*..... 797

27. A question requiring examination of an unauthenticated bill of exceptions will be disregarded. *Id.*

Estoppel.

28. Stipulation for distribution of funds *held* not to estop appellant from assailing the decree. *Seeds Dry-Plate Co. v. Heyn Photo-Supply Co*..... 216

Evidence.

29. A finding, verdict, or judgment based on conflicting evidence will not be reversed unless clearly wrong, and conflicting evidence will not be weighed on review. *Crosby v. Bastedo*..... 15
Lydick v. Gill..... 89
Parlin v. Albrecht..... 99
Des Moines Ins. Co. v. Davis..... 372
McGavock v. Morton..... 385
Honaker v. Vesey..... 413
National Masonic Accident Ass'n v. Burr..... 437
Hart v. Weber..... 442
Fellers v. Penrod..... 463
Schmelling v. State..... 562
Ross v. Sumner..... 588
Maginn v. Pickard..... 642
Hanscom v. Meyer..... 786
Zimmerman v. Kearney County Bank..... 801

30. Findings of the trial court, when sustained by sufficient evidence, will not be disturbed on review. *Feil v. Kitchen Bros. Hotel Co*..... 23
Feil v. Stack..... 204

31. A judgment lacks evidence to support it where it rests

Review—*continued.*

solely on testimony irrelevant under the issues made by the pleadings. *Union Stock-Yards Co. v. Goodwin* 139

32. Questions of fact determined in accordance with uncontradicted evidence will not be reviewed in the supreme court. *Frenzer v. Phillips* 229

33. A judgment will not be reversed merely for the admission of incompetent or irrelevant evidence in a cause tried to a court without a jury. *National Masonic Accident Ass'n v. Burr* 437
Schmelling v. State 562

34. In a trial to the court without a jury, a judgment supported by sufficient evidence will not be reversed for the admission of improper evidence. *New Hampshire Trust Co. v. Korsmeyer* 784

35. It will be presumed that only proper evidence was considered in a trial to the court without a jury. *Schmelling v. State* 562

36. Where the conclusion reached by the jury was the only one permissible under the evidence, the judgment rendered on the verdict will be affirmed. *First Nat. Bank of Crete v. Smith* 454

37. Exclusion of evidence is not ground for reversal where the party offering it was not prejudiced by the ruling. *Spirk v. Chicago, B. & Q. R. Co* 565

38. The decision of a trial court on litigated matters of fact will not be disturbed on review, if sustained by sufficient evidence, or as a conclusion from all the evidence, it is not manifestly wrong. *Plattsmouth Water Co. v. Smith* 579

39. A finding of the trial court unsupported by any evidence will be set aside. *Luse v. Rankin* 632

40. Error cannot be based on the exclusion of evidence where the record fails to show that such evidence was excluded. *Hanscom v. Meyer* 786

Exceptions and Objections.

41. A ruling on a motion to which no exception was taken cannot be reviewed in the supreme court. *Frenzer v. Phillips* .. 229

42. On an appeal from an order confirming a sale the supreme court will consider only objections specifically made in the district court. *Toscan v. Devries* 276

43. A ruling on an application to amend a pleading will be disregarded on review in absence of an exception below. *Troup v. Horbach* 644

Final Orders.

44. An order that after exhausting the remedy against the principal debtor the creditor may apply for and obtain a

Review—*continued.*

judgment against a guarantor of collection is not final, and therefore not appealable. *Millard v. Parsell*..... 178

45. An order appointing a receiver is appealable in advance of the final disposition of the cause. *Seeds Dry-Plate Co. v. Heyn Photo-Supply Co*..... 214

46. Section 275 of the Code, authorizing an appeal from an interlocutory order, does not preclude a review of such an order upon a general appeal after final judgment. *Id.*

47. Denial of permission to dismiss an action is not an appealable order. *Troup v. Horbach*..... 644

48. Denial of permission to amend a pleading is not an appealable order. *Id.*

49. Appeal will not lie from an order fixing the amount of a supersedeas bond upon allowance of a writ of assistance. *Green v. Morse*..... 798

Issues. Reversal of Judgment. Pleading.

50. Where evidence of plaintiff's special interest in replevied property was admitted without objection in the county court under allegations of general ownership, it is error, after appeal to the district court, to disallow the filing of an amended petition showing such special interest. *Weich v. Milliken*..... 86

51. Where parties rest the priorities of liens on the determination of a definitely stated question, the reviewing court will not settle them in accordance with other conditions or facts existing in the case. *Woolworth v. Parker*..... 417

52. Where a plaintiff has mistaken his remedy, but is apparently entitled to some relief, the cause may be remanded with direction to the trial court to permit a reformation of the issues. *Moseley v. Chicago, B. & Q. R. Co*..... 636
Stewart v. Chicago, B. & Q. R. Co..... 641

53. Where a decree in equity is reversed and the cause remanded for further proceedings not inconsistent with the opinion filed by the supreme court, the district court, if consistent with such opinion, may permit a reformation of the issues and a trial *de novo*. *Troup v. Horbach*..... 644

54. After a judgment has been reversed and the cause remanded, a party has no absolute right to file new pleadings below. *Id.*

55. After a judgment has been reversed and the cause remanded, a ruling of the court below on an application for permission to file new pleadings will not be reversed in absence of an abuse of discretion. *Id.*

Jurisdiction. Time to Appeal.

56. An appeal from an allowance of a claim against an estate in the county court later than the time fixed by statute

Review—*continued.*

confers no jurisdiction on the district court to reconsider such allowance. *Baacke v. Dredla*..... 92

57. An error proceeding from a county court to a district court vests the latter with no jurisdiction to inquire whether there was error in the county court, in the absence of a petition in error. *Id.*

58. Where it appears from the record that a case was dismissed for want of jurisdiction, that question will be examined, though the record would on the merits sustain a general finding for defendant. *Hesser v. Johnson*..... 155

59. Jurisdiction of the supreme court in a proceeding in error attaches upon the filing of a petition in error and transcript of the judgment, within the statutory time, and the issuing and service of process. *Id.*

Parties.

60. Where, in an action by a surety to foreclose an indemnity mortgage, it appears from the pleadings that the proceeds of sale are to go to the creditor, who is also a party to the action, such creditor may, for his own benefit, prosecute an appeal from a judgment adverse to the surety. *Blair State Bank v. Stewart*..... 59

61. After a transcript for appeal has been filed in the supreme court, any party may assume the attitude of an appellant by the filing of a brief assailing the decree. *Goos v. Goos*... 294

62. One cannot prosecute an appeal from an order discharging an executor where he is not prejudiced by the decision. *Cowherd v. Kitchen*..... 427

Prejudicial Error.

63. In a mortgage foreclosure suit it was *held* reversible error to overrule a motion to require plaintiff to attach to and file with his petition a copy of the note secured by the mortgage. *First Nat. Bank of Chadron v. Engelbercht*..... 270

64. Denial of a statutory right demanded and not waived is reversible error. *Id.*

65. Where plaintiff, if entitled to recover, should be allowed a greater sum than that awarded by the jury, a judgment in his favor may be reversed. *Yager v. Exchange Nat. Bank*.... 310

Questions Not Raised Below.

66. Questions raised for the first time in the supreme court will be disregarded. *Broadwater v. Foxworthy*..... 407

67. A petition in error does not present for review proceedings during the trial below, where there was no motion for a new trial. *Id.*

68. Defense of defect of parties defendant cannot be raised for the first time on appeal. *Ayres v. Duggan*..... 750

Review—*continued.*

Reversal. Effect. Lien. (See also Review, 52-55.)

69. Reversal of a judgment terminates the lien, and it cannot be reinstated by a subsequent judgment below so as to bind defendant's land from date of the original judgment. *Oliver v. Lansing*..... 352

Special Findings.

70. A judgment predicated on special findings of fact will be reversed if such findings are insufficient to sustain it, and its correctness is not otherwise affirmatively shown. *Id.*

71. A finding that one of the parties to an action has obtained a judgment against the other in a collateral suit does not warrant the inference that such judgment is based on a specific claim. *Id.*

72. There is no presumption of law that questions submitted to a trier of fact have been established beyond the limits of the special findings made by him. *Id.*

Stare Decisis.

73. A decision of this court on a former appeal of a question presented by the record is thereafter the law of the case. *Mead v. Tzschuck*..... 615

74. When the evidence is substantially the same as on a former appeal, the weight and effect to be given such evidence must be considered as foreclosed by the former decision on that point. *Id.*

Supersedeas. Liability of Sureties. Parties.

75. In a mortgage-foreclosure suit, entry of judgment for rents and profits against signers of a supersedeas bond was *held* proper though they were served only with notice of a rule to show cause. *Lowe v. Riley*..... 252

76. A surety on a bond superseding an order appointing a receiver becomes a party to the suit. *Id.*

77. The appointment of a receiver cannot be superseded as a matter of right, and a court making such an appointment may fix the terms and conditions upon which the order may become operative. *Id.*..... 253

78. A bond executed in accordance with section 677 of the Code, conditioned that the appellants will prosecute an appeal without delay and during its pendency not commit, or suffer to be committed, any waste upon the premises involved in the action, will not supersede an order appointing a receiver for said premises. *Id.*

79. A bond superseding an order appointing a receiver *held* not invalid for want of consideration. *Id.*

80. A contract of the signers of a supersedeas bond to account for rents and profits of realty *held* a contract to account for the fair rental value thereof. *Id.*

Review—*concluded.*

81. On appeal from the county court or from a justice of the peace appellant need not sign the appeal bond, it being sufficient when executed by some one in behalf of appellant. *Ayres v. Duggan*..... 750

82. Issuing of an execution is not a condition precedent to the right of a judgment creditor to maintain an action against the signer of an appeal undertaking executed to enable the judgment debtor to appeal. *Id.*

Transcript.

83. Where the transcript for review is so incomplete as not to affirmatively disclose error, the proper order is affirmance, and not dismissal. *Hesser v. Johnson*..... 155

Trial.

84. An erroneous ruling is not ground for reversal where it was retracted before prejudice resulted. *McVey v. State*.... 471

85. Leading questions are not ground for reversal in absence of an abuse of discretion on part of the court. *Schmelling v. State* 562

86. Offer of proof *held* necessary to present for review the exclusion of testimony. *Spirk v. Chicago, B. & Q. R. Co*..... 565

Revivor. See RES JUDICATA, 1.

An objection that an application for revivor of a judgment should be made by affidavit and not by petition cannot be urged for the first time in the reviewing court. *Broadwater v. Foxworthy*..... 411

Riparian Rights. See WATERS.

Sales. See FIXTURES. GUARDIAN AND WARD, 1, 2. LIS PENDENS. NEGOTIABLE INSTRUMENTS, 15-17. VENDOR AND VENDEE.

1. Contract *held* not one of conditional sale, nor one of agency, but an unconditional contract of bargain and sale. *Yoder v. Haworth*..... 150

2. Where the buyer paid a large part of the purchase-money under a conditional sale, and the seller accepted payments after maturity of the entire debt, the seller cannot retake the property without a previous demand for the amount unpaid. *People's Furniture & Carpet Co. v. Crosby*..... 282

3. Where the seller delivers the goods to a carrier for transit, and causes them to be consigned to himself, the presumption arises that he intended to retain the title. *Missouri P. R. Co. v. Lau*..... 559

4. A buyer rescinding a sale must give notice to the seller and offer to return the property. *McCormick Harvesting Machine Co. v. Knoll*..... 790

5. Where the consideration has not been paid, the right of rescission for breach of warranty exists under an executory contract of sale accompanied by a warranty of quality and

Sales *-concluded.*

permitting a return of the property if unsuitable for a specified purpose. *Id.*

6. Upon a rescission for breach of warranty, buyer's offer to return the property *held* sufficient. *Id.* 791

School Lands. See TRUSTS, 5.

1. A reappraisement of school lands which has neither been authorized nor approved by the board of educational lands and funds is absolutely void. *Luse v. Rankin* 632
2. When the state accepts a statutory application for a lease of school lands, and issues its receipt in due form for an installment of rent paid by the applicant, antecedent conditions being performed, a binding and enforceable contract is created. *Id.*

Schools and School Districts.

1. A pupil may be reinstated in school by mandamus, where he was denied admission by an arbitrary or capricious exercise of authority. *Jackson v. State* 183
2. Where the qualified electors of a district have determined the character of a schoolhouse to be erected and the extent of the expenditure therefor, the school board has no authority to change the plans and bind the district for an increased expenditure. *School District v. Randolph* 546

Set-Off and Counter-Claim.

1. A debtor, when sued on a note by his creditor, may plead as a counter-claim or set-off the value of any collateral security converted by plaintiff to his own use, released, dissipated, or diverted from the purpose for which it was pledged. *Carson's Executors v. Buckstaff* 262
2. In an action for a partition a judgment lien in favor of one co-owner, upon the interest of the other, is properly offset against an equitable lien in favor of the judgment debtor, upon the interest of the judgment creditor in the joint estate. *Oliver v. Lansing* 353

Settlement. See COMPROMISE AND SETTLEMENT.

Sheriff's Deed. See EXECUTIONS, 7.

Sheriffs and Constables. See EXECUTIONS, 3.

Special Findings. See REVIEW, 70-72.

Specific Performance.

1. Specific performance will not be enforced unless the court can clearly see upon what proposition the minds of the parties met. *Krum v. Chamberlain* 220
2. Under the evidence plaintiff *held* entitled to a specific execution of a contract for the exchange of lands. *Te Poel v. Shutt* 592

Stare Decisis. See REVIEW, 73, 74.

State. See PUBLIC LANDS, 2.

State and State Officers.

1. The state is bound by the acts of its authorized agents done within the scope of their authority. *Luse v. Rankin*.. 632

2. Agent's claim for compensation for making collections for the state *held* improperly allowed. *State v. Kennard*..... 711

Statute of Frauds. See TRUSTS, 4.

The promise of one party to pay the debt of another cannot be enforced unless such promise be in writing signed by the party to be charged. *Fisher v. Donovan*..... 361

Statute of Limitations. See LIMITATION OF ACTIONS.

Statutes. See EVIDENCE, 11. TABLE, *ante*, p. lix.

Street Railways.

In an action by one who was injured in alighting from a car *held* not error to permit evidence to be given as to the distance the car ran before halting to permit assistance to be rendered plaintiff. *Omaha Street R. Co. v. Emminger*..... 243

Streets. See MUNICIPAL CORPORATIONS, 4-6.

Subrogation. See TAXATION, 23-25. TENANTS IN COMMON, 2.

Subrogation is a creature of equity courts, invented and applied by them to do justice or to prevent injustice in a particular case under a particular state of facts, where the law is powerless. *Arlington State Bank v. Paulsen*..... 719

Summons. See ACTIONS, 1.

1. A summons issued from the district court need not state the nature of the action. *German Ins. Co. v. Frederick*..... 538

2. A summons issued by a county court is not rendered void because it does not contain the names of all the persons made defendants. *Hobson v. Cummins*..... 611

3. Service of summons upon a non-resident defendant can only be made in cases where service might be made by publication, and the failure to file the affidavit required before service by publication is as fatal as a jurisdictional defect with respect to personal service upon non-resident as with respect to service by publication. *Rowe v. Griffiths*.... 488

4. That one served with summons in the county is a *bona fide* defendant with interests adverse to plaintiff is the test for determining whether other defendants may be served in another county. *Barry v. Wachosky*..... 534

5. Where a personal action is properly brought in one county and service of summons is had therein upon a real defendant, summons may be issued to any other county of the state to bring in other parties defendant. *Hobson v. Cummins* 611

Summons—*concluded.*

6. A summons issued by a county court for a defendant residing in a county other than the one in which the suit is brought is properly directed to the sheriff or any constable of such county. *Id.*

7. A summons will not be quashed because the sheriff used defendant's initials in making his return of service, unless it is shown that the initials were in fact a contraction, and not the full name of defendant. *German Ins. Co. v. Frederick* 539

Supersedeas. See REVIEW, 49, 75-82.

Taxation. See MORTGAGES, 33, 34. MUNICIPAL CORPORATIONS, 8-12.

1. A sale of land for taxes due for one year does not discharge those levied and delinquent for previous years. *Medland v. Connell* 10

2. Listing and assessment of realty in the name of a person then deceased do not invalidate such assessment or the taxes levied thereon. *Grant v. Bartholomew*..... 674

3. A real estate tax is not the personal obligation of the owner of such property. *Id.*

4. The realty, and not the owner, is liable for real estate taxes. *Id.*

5. The theory of the revenue law is that a purchaser at a delinquent tax sale of realty shall not lose the money paid on his purchase. *Id*..... 675

6. Counties are trustees for the state, cities, villages, and school districts for the collection of public revenue. *Id.*

Equalization. Notice.

7. Void action of the board of equalization in raising the assessor's valuation without notice to the landowner does not vitiate the assessment made by the assessor. *Id*..... 674

8. The act of a county board, sitting as a board of equalization, is void where it raises the assessor's valuation without notice to the owner and without complaint that the land was assessed too low. *Id.*

9. Where the action of the board of equalization in raising the assessor's valuation is void for want of notice to the landowner, only so much of the tax as arises out of the difference between the valuation of the assessor and that of the board is illegal. *Id.*

Excessive Levy.

10. Where a taxpayer is dissatisfied with the assessment of his property, he should apply to the board of equalization for relief. *Medland v. Connell*..... 10

11. In a suit to foreclose a tax lien the defense that the levy for county purposes exceeded the constitutional limit is not

Taxation—*continued.*

available, unless raised by suitable averments in the answer. *Id.*

12. Evidence *held* insufficient to establish that a levy of county taxes was fraudulent and excessive. *Id.*

Foreclosure of Lien.

13. Under the revenue law (Compiled Statutes, ch. 77, art. 5, sec. 1) a county, by a suit in equity, may foreclose its lien on realty for delinquent taxes. *Grant v. Bartholomew*..... 675

14. The right of a county to maintain a suit in equity to foreclose the public's lien against real estate for the non-payment of taxes exists independently of statute. *Id.*

15. A county is a person within the meaning of the revenue law (Compiled Statutes, ch. 77, art. 5, sec. 1), authorizing any "person" holding a tax-sale certificate to foreclose his lien by a suit in equity. *Id.*

Sale of Personalty. Warrant.

16. To invest a county treasurer with jurisdiction to seize personalty for satisfaction of a tax lien the warrant required by the revenue law must be attached to the tax list. *Id.*... 674

Sale of Realty. Warrant.

17. The warrant which the revenue law (Compiled Statutes, ch. 77, art. 1, sec. 83) requires to be attached to the tax list is not essential to invest a treasurer with jurisdiction to sell realty for non-payment of delinquent taxes. *Id.*

18. The treasurer's authority to sell realty for non-payment of delinquent taxes is derived from sections 109 and 113, chapter 77, Compiled Statutes. *Id.*

19. A county treasurer has no authority to sell realty for delinquent taxes of one year without including taxes delinquent for previous years. *Id.*..... 675

Void Sales. Purchasers. Subrogation. Interest.

20. A private sale of real estate for taxes is invalid where the treasurer has failed to make return to the county clerk of the public sale required by statute. *Medland v. Connell*..... 10

21. A tax sale is invalid where it was not made for all delinquent taxes against the land, with interest and costs. *Id.*

22. Assuming that the warrant provided by law (Compiled Statutes, ch. 77, art. 1, sec. 83) must be attached to the tax list to invest the treasurer with jurisdiction to sell realty, a sale of realty made without such warrant would be void. *Grant v. Bartholomew*..... 674

23. Where a tax sale is invalid, the purchaser is subrogated to the rights of the public to the lien for the taxes and for all legal prior and subsequent taxes levied against the property, by him paid, with interest at the same rate which the taxes were drawing when paid. *Medland v. Connell*... 10

Taxation—*concluded.*

24. Under the revenue law a treasurer's void sale of realty for delinquent taxes may be effective to transfer to the purchaser the liens and rights which the public acquired by reason of the taxes assessed against such realty. *Grant v. Bartholomew* 674

25. Where the purchaser at a tax sale, through an officer's violation of the revenue law, failed to acquire a good title to the realty, the sale may be effective to transfer to such purchaser the public's liens and rights which arose from assessment of taxes. *Id.* 675

26. Where no tax was due on realty sold by the treasurer, the county should reimburse the purchaser for the money paid by him. *Id.*

27. A purchaser of realty at a void sale for delinquent taxes is entitled to the rate of interest the taxes were drawing at the time he paid them. *Id.*

Tenants in Common.

1. As between themselves, co-tenants are liable for the payment of liens and incumbrances existing against the common estate, in proportion to their respective interest therein, each being surety for the others. *Oliver v. Lansing,* 352

2. Where one tenant in common has paid more than his proper share of a charge upon the common property, his interest or ownership therein is not proportionally expanded, but he is, to the extent of the excessive contribution, subrogated to the rights of the lien creditor to whom the payment has been made, and the right acquired by such subrogation does not pass to the mortgagee under a mortgage purporting to convey the undivided interest of the owner of the right in the common property. *Id.*

Tender. See CONTRACTS, 7.

1. A tender is sufficient, though of too large an amount and accompanied by a demand for the change, when it is refused not on that ground, but as being insufficient in amount. *People's Furniture & Carpet Co. v. Crosby* 282

2. Ordinarily, a bank check is not a sufficient tender of money. *Te Poel v. Shutt* 592

3. A tender, to be effectual, must be without conditions and made to the party entitled to receive the same. *Id.*

Torts. See ACTIONS, 2.

Transcript. See REVIEW, 83.

Trial. See CRIMINAL LAW. REVIEW, 84-86. WITNESSES, 4.

1. A party, after evidence has been introduced without objection, cannot obtain an order by which such evidence is stricken from the record, and then, for the purpose of dis-

Trial—*concluded.*

closing error on the face of the record, insist that such evidence was erroneously admitted in the first instance. *Pollock v. Whipple*..... 82

2. Admissibility of certain evidence in rebuttal. *Union Stock-Yards Co. v. Goodwin*..... 139

3. The decision of preliminary issues touching the competency of witnesses, or admissibility of evidence, is for the trial judge. *Phenix Ins. Co. of Brooklyn v. Holcombe*..... 623

4. If proffered evidence is *prima facie* admissible, it is the duty of the court to receive it; otherwise it should be rejected *Id.*

Trusts. See WILLS, 8.

1. The owner of trust property is not, merely by reason of the character of his claim, entitled to a preference over the general creditors of an insolvent trustee. *Morrison v. Lincoln Savings Bank & Safe Deposit Co*..... 225

2. A member of a fraternal beneficiary society has no such interest or property in the proceeds of a certificate therein that he can impress such proceeds with a trust in favor of his creditors. *Fisher v. Donovan*..... 361

3. To create a trust fund out of which a trustee may make disbursements the trustor must have some present or future right to, or interest in, the fund directed to be set apart. *Id.*

4. Where land was conveyed by deed of warranty purporting to convey the whole estate, a contemporaneous parol agreement that grantee was to have a beneficial interest in only one-half, and was to hold the legal title, sell the land as grantor's agent, and pay one-half the proceeds to grantor, is unenforceable, and the promise to account for one-half the proceeds, being dependent upon the trust, cannot be enforced. *Cameron v. Nelson*..... 381

5. One who has obtained a lease from the state, with actual or constructive notice of another's prior claim thereto, will be treated as holding such lease in trust for the person who is equitably entitled to receive it. *Luse v. Rankin*.. 632

Ultra Vires. See MUNICIPAL CORPORATIONS, 2. PARTNERSHIP, 2.

Usury. See BUILDING AND LOAN ASSOCIATIONS.

On trial of a suit on a note, answer alleging usury *held* sufficient against an attack by demurrer *ore tenus*. *First Nat. Bank of Cobleskill v. Pennington*..... 404

Vendor and Vendee. See DEEDS. EMINENT DOMAIN, 2. FIXTURES. GUARDIAN AND WARD, 3. JUDGMENTS, 3. MORTGAGES, 7-10. SALES. TAXATION, 24, 25. TRUSTS, 4. WILLS, 4.

1. One purchasing realty in possession of a third person un-

Vendor and Vendee—*continued.*

der a written contract with vendor assumes the obligations of such contract, in absence of an express agreement to the contrary. *Murphey v. Illinois Trust & Savings Bank*..... 519

Bona Fide Purchasers. Pleading.

2. The affirmative defense that one is a *bona fide* purchaser of realty is without avail unless pleaded and proved. *Arlington State Bank v. Paulsen*..... 718

3. One is not relieved from pleading and proving facts which he claims show him to be a *bona fide* purchaser without notice, because he claims under the vendee of an executor, and the conveyance from the executor is attacked by judgment creditors of the beneficiaries of the trust property as having been made without consideration to the knowledge of the person claiming to be an innocent purchaser. *Id.*

Contracts. Option.

4. Evidence relied on to prove that negotiations for the sale of realty eventuated in an enforceable contract *held* insufficient for that purpose. *Krum v. Chamberlain*..... 220

5. Contract set out in opinion *held* to give one party the option to purchase the realty, but his failure to make payments specified did not invest the other party with a cause of action on the contract. *Darr v. Mummert*..... 378

Construction of Instrument.

6. Rule for construction of instruments conveying realty. *Jackson v. Phillips*..... 189

Exchange of Lands.

7. The contract for the exchange of lands set out in the opinion construed, and *held* that the forty days designated therein for the exchange of deeds did not commence to run from the time the contract was made, but from the effecting of a loan of a certain sum of money stipulated to be made by one of the parties in consummation of the trade. *Te Poel v. Shutt*..... 592

Foreclosure of Contracts.

8. In an executory contract for the sale of realty, vendor, upon default of vendee, may treat the contract as a mortgage and foreclose it as such. *Jackson v. Phillips*..... 190

9. An executory contract for the sale of realty purchased for a homestead may be enforced as security for purchase-money, though not signed by vendee's wife. *Id.*

Improvements.

10. One purchasing realty in possession of a third person under a parol agreement between occupant and vendor requiring the latter to pay for improvements made by the occupant, is not bound by such oral contract where he purchases

Vendor and Vendee—*concluded.*

without notice thereof. *Murphey v. Illinois Trust & Savings Bank*..... 519

Rescission. Fraud.

11. A false representation by the vendor of land situated in another state, as to the character, location, and value of the property, relied on by the vendee, who had no other knowledge, is ground in equity for rescinding the contract. *Ross v. Sumner*..... 588

Venue. See SUMMONS, 4.

A district court has no jurisdiction on its own motion to transfer for trial a case from one county to another. *Lefferts v. Bell*..... 248

Voluntary Assignments.

1. An assignee represents creditors of the assignor only to the extent that he is expressly authorized by statute. *Blair State Bank v. Stewart*..... 58

2. A conveyance executed by an assignor before the assignment cannot be assailed by the assignee on the ground that it was made to hinder, delay, or defraud creditors, unless such creditors have previously authorized an action to be brought for that purpose. *Id.*

3. Without the written consent of creditors, the assignee cannot assail a conveyance made by his assignor, except on the ground that such conveyance was in contravention of section 42 or section 43, Compiled Statutes. *Id*..... 64

4. Creditor's conveyances made more than thirty days before the assignment are not void as being within the inhibitions of either section 42 or section 43, Compiled Statutes. *Id.*..... 59

5. A conveyance or transfer made without any intention to contravene or evade the assignment law, and at any time when an assignment was not contemplated, is valid and will be upheld. *Id*..... 64

Waiver. See IMPROVEMENTS, 2. LIMITATION OF ACTIONS, 4. MORTGAGES, 11. PARTIES, 2. PLEADING, 13, 14. WITNESSES, 4.

Warrants. See COUNTIES, 2.

Warranty. See COVENANTS. SALES, 4-6.

Water Companies. See MUNICIPAL CORPORATIONS, 1, 2.

Waters.

Riparian owners upon streams of water are entitled, in the absence of grant, license or prescription, to the usual, natural flow of water. *Plattsmouth Water Co. v. Smith*..... 579

Wills. See DEEDS, 7. EXECUTORS AND ADMINISTRATORS. JUDGMENTS.

1. If the rights given by a will are inconsistent with those

Wills—*continued.*

conferred by the law, the acceptance of the former is, by necessary implication, an abandonment of the latter. *Weller v. Noffsinger* 455

2. Under devise authorizing the executor to hold the property in trust for the beneficiary, a condition that the devised property shall not be aliened or incumbered by the beneficiary, or liable for his debts, during existence of the trust, may be valid and enforceable. *Id.*

Contest. Attorneys' Fees.

3. The estate of a decedent is not liable to an attorney for services rendered by him for and at the request of a legatee under decedent's will in a contest thereof. *Atkinson v. May's Estate* 137

Conveyance by Executor.

4. A transaction, whereby executors conveyed realty to an heir who agreed to mortgage it for the executors' benefit and reconvey it to them, *held* not a sale and conveyance within the meaning of the will. *Arlington State Bank v. Paulsen* 717

Payment of Bequests in Stock.

5. Under will construed, *held* that the executor had the right to pay specific bequests in stock of a hotel company at its face value in lieu of cash, and that the duty was not placed on the executor, but on the residuary legatee, to pay the indebtedness and mortgage of the hotel company. *Cowherd v. Kitchen* 426

Payment of Mortgage on Estate.

6. Under will construed, *held* that the residuum passed to the residuary legatee charged with payment of a mortgage. *Id.* 427

Probate. Notice.

7. Objections to sufficiency of a probate notice *held* without force. *Jackson v. Phillips* 190

Title of Executor to Realty. Trusts.

8. A devise, subject to a condition that the executor shall hold the property in trust, collect rents, pay taxes, charges, and expenses incident to the proper care of the estate, and account annually to the beneficiary for the balance, vests the legal title to the property in the executor. *Weller v. Noffsinger* 455

9. Whether the title of testator to realty vests at his death in his executors should be determined so as to accord with his intention as deducible from an examination of the entire will. *Arlington State Bank v. Paulsen* 717

10. Under the will construed, *held* that the legal title to realty of testator, at his death, vested in his executors. *Id.*

Wills—*concluded.*

11. Where a will vests title to realty in the executor and directs him to sell and convey it and pay the proceeds to heirs, their interest in such proceeds is property. *Id*..... 718

Witnesses. See CRIMINAL LAW, 8. TRIAL, 3.

1. A party to an action is not an incompetent witness by whom to prove a transaction with an agent of the other party, since deceased. *German Ins. Co. v. Frederick*..... 539
2. It is within the discretion of the court to permit leading questions. *Schmelling v. State*..... 562
3. Credibility of witnesses and weight of their testimony are questions for triers of fact. *Muchow v. Reid*..... 585
4. Where an irregularity in the manner of administering an oath to a witness is known at the time, objection must then be made, or it will be waived. *City of O'Neill v. Clark*.. 760
5. A witness cannot be cross-examined in regard to matters as to which cross-examiner could not introduce evidence in chief, and afterward contradict the answers to such cross-examination. *Zimmerman v. Kearney County Bank*..... 801

Words and Phrases.

1. "Person." *Grant v. Bartholomew*..... 675
2. "Previously unchaste." *Bailey v. State*..... 706

Writ of Assistance. See INJUNCTION, 2.