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

FILED APRIL 6, 1899. No. 8851.

Unauthenticated Bill of Exceptions: REVIEW. A bill of exceptions will be disregarded in the appellate court unless authenticated by the certificate of the clerk of the court below.

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.

F. C. Power, contra.

NORVAL, J.

This was an action in ejectment, and the defendant has prosecuted error from the judgment obtained against him in the court below. Attached to the clerk's transcript of the pleadings and judgment is a document styled a "Bill of Exceptions," but it is in no manner authenticated by the clerk of the district court as being either the original bill of exceptions in the cause, or a copy thereof, and hence must be disregarded. As no question is argued which does not require an examination and consideration of matters to be found only in a bill of exceptions, the judgment is

AFFIRMED.

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

FILED APRIL 6, 1899. No. 8852.

Unauthenticated Bill of Exceptions. An unauthenticated bill of exceptions will not be considered.

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.

F. C. Power, contra.

NORVAL, J.

The judgment in this case is affirmed for the reason stated in the opinion filed in *Murphey v. Illinois Trust & Savings Bank*, 58 Neb. 428, decided herewith.

AFFIRMED.

FREDERICK SMITH ET AL., APPELLEES, V. HENRY H. SILVER ET AL., APPELLANTS.

FILED APRIL 6, 1899. No. 9970.

1. **Appeal:** TIME TO FILE TRANSCRIPT: JURISDICTION. This court is without jurisdiction to determine an equity cause on appeal when the transcript is not filed with the clerk of said court within six months from the entry of the decree or final order sought to be reviewed.
2. ———: MOTION FOR NEW TRIAL. A motion for a new trial is not essential to a review of an equity cause.
3. ———: ———: TIME TO FILE TRANSCRIPT. The filing of a motion for a new trial will not extend the time for prosecuting an appeal. The time for taking an appeal begins to run from the date of the entry of the decree or final order, and not from the overruling of the motion for a new trial.

APPEAL from the district court of Gage county. Heard below before LETTON, J. Submitted on motion to dismiss appeal. *Dismissed.*

Wolfenbarger & Williams and *Hazlett & Jack*, for appellants.

George A. Murphy, contra.

NORVAL, J.

On March 27, 1897, a decree was rendered in this cause in the court below foreclosing a real estate mortgage, and within three days thereafter the defendants filed a motion for a new trial, assigning various statutory grounds therefor, which motion, on September 27, 1897, was overruled. On March 24, 1898, the defendants filed a transcript of the record, and the bill of exceptions, duly authenticated, in this court for the purpose of reviewing the cause on appeal. Plaintiff moved a dismissal of the appeal on the ground that the same was not taken in time.

It will be observed that the appeal was not lodged in this court within six months from the entry of the decree, but was filed within that period of time from the date of the ruling on the motion for a new trial. The question of practice involved is whether the time within which an appeal may be perfected dates from the decree or from the overruling of the motion for a new trial, and the determination thereof necessitates a consideration of the provisions of section 675 of the Code of Civil Procedure, and certain adjudications of this court. Said section 675 follows: "That in all actions in equity either party may appeal from the judgment or decree rendered or final order made by the district court, to the supreme court of the state; the party appealing shall, within six months after the date of the rendition of the judgment or decree, or the making of the final order, procure from the clerk of the district court and file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the cause in the district court, containing the pleadings, the judgment, or decree rendered or final order made therein, and all the depositions, testimony, and proofs offered in evidence on the hearing of the cause, and have said cause properly docketed in the supreme court; and on failing thereof, the judgment or decree rendered or final order made in the district court shall stand

and be proceeded in as if no appeal had been taken." This statute limits the time to six months within which an appeal in an equity cause may be taken, and this period dates from the rendition of the decree, or judgment, or the entry of the final order. This court is without jurisdiction to determine a case on appeal where the transcript of the proceedings in the trial court is not filed here within the six months. (*Withnell v. City of Omaha*, 37 Neb. 621; *Omaha Loan & Trust Co. v. Ayer*, 38 Neb. 891; *Moore v. Waterman*, 40 Neb. 498; *Albers v. City of Omaha*, 56 Neb. 357.) An exception to the rule stated has been recognized and applied where the appellant, without fault or laches, is prevented from having his appeal docketed within the statutory period, solely through the neglect or failure of the clerk of the trial court to make a transcript of the proceedings. Such omission will excuse the filing of the appeal out of time. (*Continental Building & Loan Ass'n v. Mills*, 44 Neb. 136.)

It is argued by counsel for appellants that the time within which the appeal should be filed begins to run from the overruling of the motion for a new trial, and not from the rendition of the judgment, and *Sharp v. Brown*, 34 Neb. 406, is cited in support of this contention. In that case it was held, overruling *Hollenbeck v. Tarkington*, 14 Neb. 430, that a proceeding in error may be instituted within one year from the overruling of the motion for a new trial. The principle governing *Sharp v. Brown, supra*, is not controlling. A motion for a new trial is indispensable to a review by proceeding in error of the rulings of the trial court made during the progress of a trial, or of any question which is proper to be raised by a motion for a new trial, as that the verdict is contrary to the evidence, and the damages are excessive or inadequate. (*Smith v. Spaulding*, 34 Neb. 128; *Jones v. Hayes*, 36 Neb. 526; *Miller v. Antelope County*, 35 Neb. 237; *Zehr v. Miller*, 40 Neb. 791; *Brown v. Ritner*, 41 Neb. 52; *Koehler v. Summers*, 42 Neb. 330; *Losure v. Miller*, 45 Neb. 465; *Gaughran v. Crosby*, 33 Neb. 33.) But a motion for

a new trial is not essential to a review of an equity cause on appeal. (*Swansen v. Swansen*, 12 Neb. 210.) In the course of the opinion in the case last mentioned it is said: "In our dual system of practice, an appeal in actions in equity may be taken to the supreme court from a final decree in the district court, at any time within six months from the rendition of the decree, and no motion for a new trial is necessary, while in actions at law and equity cases, taken on error to the supreme court, a motion for a new trial, containing the errors complained of, must have been filed and acted upon by the trial court." In *Ainsworth v. Taylor*, 53 Neb. 484, this court, in construing said section 675 of the Code of Civil Procedure, held that an appeal of an equity cause does not present for review the rulings of the court in the exclusion of proper evidence. The court, speaking through RYAN, C., said: "In this section there is no requirement that errors shall be assigned. If a party elects to appeal from a judgment in an equitable action, his election seems to imply that he is content to retry the cause in the supreme court upon the evidence actually considered by the district court." (*Vide Alling v. Nelson*, 55 Neb. 161; *Village of Syracuse v. Mapes*, 55 Neb. 738; *Frenzer v. Phillips*, 57 Neb. 229.) If a motion for a new trial is not necessary to a review on appeal of an equity cause, it logically follows that the filing of such a motion could not extend the time for perfecting an appeal. The transcript herein not having been filed in this court within six months from the entry of the decree the appeal is

DISMISSED.

JOHN N. FRENZER V. ALFRED R. DUFRENE.

FILED APRIL 6, 1899. No. 8661.

1. **Husband and Wife:** CONVEYANCES. A man cannot allege his wife's recalcitrance to avoid the consequence of failing to perform a lawful contract made on the assumption that she would join him in executing a conveyance.

2. **Estoppel.** "Where a party gives a reason for his decision and conduct touching anything involved in a controversy, he is estopped, after litigation has begun, from changing his ground and putting his conduct on another and different consideration." (*Ballou v. Sherwood*, 32 Neb. 666.)

3. **Contracts:** PERFORMANCE. Where stipulations of parties are dependent, and to be performed concurrently, mutual readiness to perform is an essential prerequisite to performance.

4. ———: ———: TENDER. The doctrine of tender, as understood in cases where the relation of debtor and creditor exists, is not applicable to mutual and concurrent promises. In this class of cases a party who has signified his readiness and willingness to perform has done all that he is required to do, until the other party is also ready and willing to perform his part of the agreement.

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

The opinion contains a statement of the case.

Will H. Thompson, for plaintiff in error:

Where defendant assigns a reason for refusing to keep his agreement he cannot base his refusal on other grounds after he has been sued. (*Foley v. Holtry*, 41 Neb. 563; *Ballou v. Sherwood*, 32 Neb. 666; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258.)

Plaintiff's offer to cash the note was sufficient. (*Smith v. Lewis*, 26 Conn. 119; *Clark v. Weis*, 87 Ill. 438; *Gould v. Banks*, 8 Wend. [N. Y.] 562; *Wright v. Reed*, 3 Durn. & E. [Eng.] 554; *Duffy v. O'Donovan*, 46 N. Y. 223; *Rawson v. Johnson*, 1 East [Eng.] 203.)

Howard B. Smith, contra:

The agent's right to recover commission does not exist until he furnishes a lender able, willing, and ready to make the loan. (*Jones v. Stevens*, 36 Neb. 849; *Barber v. Hildebrand*, 42 Neb. 400; *Mayer v. Ver Bryck*, 46 Neb. 221.)

Plaintiff cannot recover, for the reason that he failed to cash the Spotts note. (*Rice v. Gibbs*, 40 Neb. 264.)

SULLIVAN, J.

This action was brought by John N. Frenzer against Alfred R. Dufrene and tried to a jury in the district court of Douglas county. In the first count of the petition, with which alone we are concerned, it is alleged that there is due to the plaintiff from the defendant the sum of $375 on an express contract for services rendered in negotiating with the Penn Mutual Insurance Company for a loan upon Omaha real estate. The defenses relied upon were (1) that the company did not make the loan and was not ready to make it, and (2) the non-performance by the plaintiff of a concurrent promise to cash a $1,500 note executed by Eugene Spotts to Julia Shaw and by her transferred to the defendant. The reply admits that the plaintiff agreed to cash the Spotts note, avers a constant readiness on his part to perform the agreement, and notice to the defendant of that fact. The trial court was of opinion that the evidence was insufficient to warrant a verdict for the plaintiff and peremptorily directed the jury to find against him. The court was wrong and the judgment rendered in favor of the defendant must be reversed.

The evidence either establishes or tends to prove the following facts: The litigants reside in Omaha. The plaintiff is a real estate and loan agent. In 1894 the defendant desired to borrow $18,000 to be used in the construction of buildings upon real estate owned by him. The plaintiff proposed to negotiate the loan for a commission of two and one-half per cent. The defendant accepted the proposition, and his application for an $18,000 loan, to be secured by a real estate mortgage, was soon after forwarded to the Penn Mutual Life Insurance Company at Philadelphia. The company declined to loan $18,000, but offered to loan $15,000. This offer was eventually accepted in connection with an agreement on the part of Frenzer to cash the Spotts note and thus enable Dufrene to obtain at once the sum of $16,500 to use in

the construction of his buildings. The application to the loan company provided that the principal and interest of the loan should be paid, "at the option of the lender, in gold coin of the present standard of weight and fineness, or its equivalent." There was some delay in consummating the transaction, owing principally to apparent infirmities in defendant's title to the property offered as security, so that before the bond and mortgage were ready for execution Frenzer, in fulfillment of a prior engagement, was obliged to make a trip to the state of California. In his absence his clerk, M. Grocox, was authorized to act for him. About April 10 the bond and mortgage were prepared and handed to the defendant for examination. He made some objection on account of the gold clause, but a day or two later handed the papers to Mr. Grocox to be sent to the loan company for examination and approval. The company returned them about April 20, when they were delivered to the defendant to be signed and acknowledged. They were received for that purpose without objection. Not being presently returned, Grocox called at Dufrene's office and also at his residence several times to get them. He did not succeed in his purpose, but Dufrene informed him that they had not been signed; that Mrs. Dufrene was reluctant to sign on account of the gold clause, but that she would probably sign in a few days. The defendant also suggested that Grocox should not call again at the house until informed that the papers were ready for delivery. The papers were afterwards signed, but were not acknowledged or delivered, and nothing further was ever done by the defendant to bring the matter to a conclusion. When the note and mortgage were ready for delivery they were to be handed to the law firm of Montgomery, Charlton & Hall, who were thereupon to wire their client, the loan company, to forward the money. On May 3 Mr. Hall inquired of Dufrene why the loan had not been closed, and was informed that Mrs. Dufrene had not yet signed the papers. No other reason was given. On May

15 Frenzer returned to Omaha and at once wrote to the defendant to know why the loan had not been closed and offering to cash the Spotts note. Dufrene did not reply. About May 26 the parties had a conversation, in which the defendant assigned as his only reason for not closing the loan that he objected to the gold clause and his wife refused to sign the mortgage. On June 4 Dufrene told Frenzer that he might yet close the loan and would let him know definitely in regard to the matter by the following Thursday. As late as June 18 the loan company was ready to close the loan. Plaintiff has been ever ready to take the Spotts note. These are the facts which the jury might have found from the evidence; and they are quite sufficient to sustain a judgment in favor of the plaintiff. They show that Frenzer procured a lender ready, able, and willing to loan him $15,000, and that he refused, without adequate reason, to deliver the securities which he agreed to furnish. They show that in the first instance he refused to execute a mortgage containing a gold clause, but that he subsequently assented to the mortgage in the form in which it was submitted to him for execution. The refusal of Mrs. Dufrene to sign the papers does not, of course, release the defendant from his agreement to pay Frenzer for the services which he performed. A man cannot plead his wife's recalcitrance in avoidance of a lawful contract. The defendant now insists that he had other reasons for not executing the bond and mortgage to the insurance company. He assigned no other reason before the action was commenced, and it is a justifiable deduction that no other existed. The other reasons referred to did not occur to him while the negotiations were pending, and are obviously mere pretexts by which he now hopes to go scatheless out of a just contract which he is unwilling to perform. In *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, it was said: "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground,

and put his conduct upon another and different consideration. He is not permitted thus to mend his hold." This doctrine is distinctly approved in *Ballou v. Sherwood*, 32 Neb. 666, and has been frequently enforced in other jurisdictions.

But it is contended that if the plaintiff produced a lender ready to make the $15,000 loan, still he was not entitled to his commission until he cashed the Spotts note or at least tendered performance of that branch of the contract. Yielding provisional assent to this proposition let us see how the matter stands on the evidence. The plaintiff was in fact prepared to take the Spotts note at a price agreed upon, and he so advised the defendant and asked to be notified by telephone, or otherwise, whenever the defendant was ready to proceed with the business. The defendant at no time signified a readiness to transfer the note or assign the mortgage securing it. It is claimed, however, that the defendant was not in default because Frenzer failed to make an actual tender of $1,500 in current funds. We think a tender such as is contemplated by the law governing the relation of debtor and creditor is not at all applicable to cases of this kind. The stipulations of the parties were dependent. They were to be performed concurrently and mutual readiness to perform was an essential prerequisite to performance. Frenzer was ready to pay Dufrene $1,500, but he was not required to hand it over before receiving the Spotts note. He was not required to make an unconditional tender. He was not, after having signified his readiness, required to do anything until informed that the other party to the contract was also ready to carry it into execution. (2 Parsons, Contracts [6th ed.] *528; *Clark v. Weis*, 87 Ill. 438; *Smith v. Lewis*, 24 Conn. 624, 26 Conn. 110.) In the last mentioned case it is said: "Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties, as applicable to the case of mutual and concurrent promises. The word 'tender,'

as used in such a connection, does not mean the same kind of offer as when it is used with reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it and nothing further remains to be done, but the transaction is completed and ended; but it only means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability, and notice are sufficient evidence of, and indeed constitute and imply, an offer or tender in the sense in which those terms are used in reference to the kind of agreements which we are now considering. It is not an absolute, unconditional offer to do or transfer anything at all events, but it is in its nature conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement." In the case at bar the agreement of the parties with reference to the Spotts note was never carried into execution, because there never was a concurrent readiness to perform. Dufrene never responded to Frenzer's notification that he was prepared to fulfill his promise; and this failure to respond was unquestionably sufficient to discharge the plaintiff from the obligation which the contract imposed. But was there not another circumstance which produced precisely the same result? Remembering that the cashing of the Spotts note was a mere complemental transaction,—an indispensable incident of the loan,—the inference would seem warranted that its performance as an independent contract was never contemplated by either party, and that when the principal contract was abandoned it was intended that its accessory should be abandoned with it. However, as this question has not been discussed, we express no final opinion in regard to

it. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

PETER FOX ET AL., APPELLEES, V. KOUNTZE BROTHERS ET AL., APPELLANTS.

FILED APRIL 6, 1899. No. 8812.

1. **School Districts:** TAXATION: ACTION BY TAXPAYER. A taxpayer who has voluntarily paid taxes levied at the instance, and for the benefit, of one school district cannot maintain an action to compel the county treasurer to hold such taxes for the benefit of another school district.
2. **Taxation:** UNLAWFUL LEVY: INJUNCTION. A court of equity has power to enjoin the taxing authorities from making an unlawful levy which will result in casting a cloud upon land titles; but such power will not be exercised where it does not appear that such a levy is either threatened or contemplated.

APPEAL from the district court of Adams county. Heard below before BEALL, J. *Reversed.*

Reavis & Reavis and *A. H. Bowen,* for appellants.

M. A. Hartigan, contra.

SULLIVAN, J.

The appellees, for themselves and others similarly situated, commenced this action in the district court against the appellants and obtained the judgment which is now before us for review. The material facts disclosed by the record are these: In 1873 school district 34 of Adams county was duly organized, and has ever since existed as a public corporation. A portion of its territory, by reason of a readjustment of county boundaries, now lies in Hall county and is there known as district 21. This fact, however, is of no importance in the case and the district

will hereafter be referred to by its original designation. In order to obtain money with which to build a schoolhouse the district, soon after its organization, issued two interest-bearing bonds for the sum of $500 each. These bonds were sold to Kountze Bros., who, in 1878, recovered a judgment upon them for the sum of $1,258.98 in an action brought against school district 34. In November, 1874, a portion of the territory belonging to district 34 was lawfully detached therefrom and, with other contiguous territory, erected into a new school district, which is known as district number 52 of Adams county. There was no division of property or liabilities. District 34 retained the old schoolhouse and district 52 built a new one with the proceeds of bonds issued by it for that purpose. To raise funds with which to pay a balance yet remaining due on the Kountze judgment the county board of Adams county, in 1892, levied a tax of twenty mills upon all the property within the original boundaries of school district 34. The plaintiffs are resident taxpayers of that portion of district 52 which was detached from district 34. They have voluntarily paid the tax charged against their property for the satisfaction of the Kountze judgment, and the money thus paid is now in the hands of the county treasurer. To keep it there until a final decree should be rendered an injunction was granted at the beginning of the suit. The specific purposes for which the action was instituted are clearly stated in the brief of plaintiffs' counsel. After denying that the petition was framed with a view of recovering the money in the hands of the treasurer he proceeds to say: "Appellees are not seeking a recovery, but are asking that the money taken from the taxpayers be retained for the benefit of district 52; that they be protected against future levies for this unlawful and unauthorized purpose. This was the relief sought—and the money collected should be applied for the benefit of the territory where it was raised." The trial court made no final disposition of the money in question, but did perpetually

enjoin the payment of any portion of it to Kountze Bros. The decree also restrained the taxing authorities of Adams county from making any future levy to satisfy the judgment against district 34. Both by demurrer and answer the defendants challenged the sufficiency of the petition to entitle the plaintiff to any equitable relief, and they now insist that no case has been made of which a court of equity can take cognizance. We think they are clearly right. The money raised by the twenty-mill levy was voluntarily paid. The plaintiffs do not claim that they are entitled to recover it back, but contend that it should be held by the treasurer for the benefit of district 52. But this district, it is evident, has neither a legal nor equitable title to the money. The tax was not laid at its instance nor for its benefit, but at the instance and for the benefit of district 34. Besides, the plaintiffs have no commission authorizing them to champion the cause of district 52. They cannot act as its guardian and invoke the action of the court in its behalf. It is a corporation endowed by law with ample capacity to act for itself and assert its rights at such time and in such manner as its officers may deem proper. It was made a party to the action, but its answer is not in the record, and we are, therefore, not informed as to its attitude toward the proceeds of the tax in the hands of the county treasurer. We know, however, that it does not complain of the decree, which fails to enforce any claim which it may have asserted.

Are the plaintiffs entitled to a decree protecting them from future levies? Not unless future levies are threatened by the taxing authorities; and upon this question the record is entirely silent. It is not alleged that any further levy upon the property of plaintiff is contemplated by any one; and it does not appear from the evidence that a levy upon any property will be necessary to satisfy the Kountze judgment. It is quite apparent that plaintiffs' lands in Kenesaw precinct are not at present overcast, or seriously threatened, by any cloud which the

county board or other officials of Adams county intend to create in the interest of either Kountze Bros. or district 34. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

GEORGE W. MCBRIDE, APPELLANT, V. JOHN A. WAKEFIELD ET AL., APPELLEES.

FILED APRIL 6, 1899. NO. 8816.

1. **Mortgages**: RIGHTS OF MORTGAGEE WHO PURCHASES OTHER LIENS. A mortgagee who contracts with the mortgagor to "take care of" other incumbrances upon the mortgaged property may purchase, and take an assignment of, a lien covering the property described in the mortgage and other property, and may afterwards assert such lien against the other property; and this he may do notwithstanding the fact that the mortgagor was legally bound to discharge the lien against the other property.
2. **Void Judgments**: INJUNCTION. A court of equity will not grant relief against an irregular or void judgment unless it appears that there is a defense to the action in which the judgment was rendered.

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

B. N. Robertson, for appellant.

Montgomery & Hall, contra.

SULLIVAN, J.

In 1891 John C. Luke was the owner of twenty-six lots in Luke & Templeton's Addition to the city of Omaha. Upon this property the Winona Savings Bank had a first mortgage to secure an indebtedness of $8,000. Hugo Leubben had a second mortgage on twenty of the lots to secure a note for $350. This note was transferred to

the German Savings Bank as collateral security and by it reduced to judgment in an action brought for that purpose in the county court of Douglas county. After the execution and recording of the mortgages above mentioned Luke sold lot 18 to George W. McBride. This lot was subject to the lien of both mortgages, and the purchaser expressly assumed the payment of $400 of the indebtedness to the Winona Savings Bank. The deed made no reference to the Leubben mortgage, but contained a general covenant against incumbrances. It was recorded in December, 1891. Afterwards Luke executed to John A. Wakefield a deed conveying five of said lots, upon which houses were then in process of construction. In consideration of the conveyance Wakefield agreed to complete the houses and "take care of the indebtedness now existing on said property, and hold said property under said deed as security for total amount of such sums paid and supplies furnished, together with interest at ten per cent per annum upon such sums paid or supplies furnished from date of paying or supplying same." The Leubben mortgage was a lien on one of the lots conveyed to Wakefield, and, in performance of his contract, he was obliged either to purchase it or pay it off. Which line of action he pursued is one of the controverted questions in the case. In February, 1893, the Winona Savings Bank commenced an action to foreclose its mortgage, making Luke, McBride, Wakefield, and others parties defendant. The answer day was March 20. Immediately after service of summons upon him McBride called upon the plaintiff's attorney and in consideration of the payment of $416 obtained a release of lot 18 from the lien of the first mortgage. He also secured the attorney's promise to dismiss him from the action. This promise was not performed. Afterwards Wakefield filed an answer in which he demanded a foreclosure of the Leubben mortgage and pleaded facts showing his right to that relief. In due time McBride was defaulted and a decree rendered against him in accordance with the prayer of the

cross-petition. In execution of this decree lot 18 was sold to Wakefield, who now holds the legal title to the property. The present action was instituted by McBride against Wakefield to vacate the decree of foreclosure and the order confirming the sale, to set aside the sheriff's deed to the defendant, and to quiet plaintiff's title to the lot. The trial court found the issues in favor of the defendant and rendered judgment dismissing the cause. The plaintiff brings the record here for review by appeal.

The first question to be considered is the character of the transaction between Wakefield and the German Savings Bank. If it was in substance a payment of the indebtedness secured by the Leubben mortgage, then, of course, that instrument ceased to be a lien on the plaintiff's property, and the decree of foreclosure was manifestly unjust. There are circumstances which tend strongly to sustain plaintiff's theory that an absolute payment was intended, but they are not controlling or decisive. Wakefield was bound by the terms of his contract to "take care" of the indebtedness existing against the lots conveyed to him. These lots with others rested under a common burden, and he was certainly not required to remove this burden from all the property and look to part of it for reimbursement. His obligation was not to pay off and discharge all existing liens but to "take care" of them. He was under no obligation at all with reference to lot 18; its exoneration was not within the purview of his contract. To protect himself he had the undoubted right to take an assignment of the Leubben mortgage, keep it on foot and resort to it if necessary. He did take an assignment, and thus succeeded to the rights of the former owner. From a careful examination of all the evidence we think the trial court was right in finding that the mortgage survived the assignment and was a valid and enforceable lien against the plaintiff's property. It is true that it was Luke's duty to discharge the lien against McBride's lot, but that duty was never transferred to, or assumed by, Wakefield. To construe

the transaction in question as a payment would involve the assumption that Wakefield did more than he agreed to do,—that his performance exceeded his promise.

It is further contended that the decree of foreclosure in favor of Wakefield is void because the amended answer was filed without leave and after answer day. Both answers sought a foreclosure of the same mortgage, and while the judgment may have been irregular it was not void. Neither is it inequitable. Wakefield was entitled to have lot 18 sold to satisfy the amount due on the Leubben mortgage. This amount the defendant does not offer to pay. He does not offer to do equity, and he is therefore not entitled to the relief demanded. The judgment is

AFFIRMED.

WILLARD HAMMOND, APPELLANT, V. CHAMBERLAIN BANKING HOUSE ET AL., APPELLEES.

FILED APRIL 6, 1899. No. 8832.

1. **Judicial Sale: RIGHTS OF PURCHASER: PRIOR LIENS.** A purchaser at a judicial sale cannot, in the absence of special circumstances, maintain an original action to enjoin the enforcement of a prior lien of which he was ignorant at the time he acquired his title.
2. ———: ———: ———. If one who has bought property at a judicial sale under a mistake of fact in regard to the title, discovers his error before confirmation, his ordinary remedy is an application to the court to be released from his bid.
3. ———: MISREPRESENTATION OF SHERIFF: LIABILITY OF PLAINTIFF. A creditor is not responsible for erroneous representations made by an officer conducting a sale under process issued on a judgment in his favor, unless he has either authorized such representations or acquiesced therein.
4. **Action by Purchaser at Judicial Sale for Injunction Against Enforcement of Prior Lien: JUDGMENT FOR DEFENDANTS.** The evidence examined, and *held* to sustain the findings and judgment of the trial court.

APPEAL from the district court of Johnson county. Heard below before LETTON, J. *Affirmed.*

Daniel F. Osgood, for appellant.

M. B. C. True, contra.

SULLIVAN, J.

This suit was commenced by the appellant to obtain a perpetual injunction against a threatened execution sale of eighty acres of his real estate in Johnson county. The property was originally owned by George Goracke, for the satisfaction of whose debts it was regularly sold to Hammond by the sheriff, acting under valid orders of sale issued out of the district court in certain actions wherein the Chamberlain Banking House and others were plaintiffs and Goracke was defendant. Prior to the lien of the judgments on which the orders of sale issued, were a mortgage in favor of the Tecumseh National Bank, a judgment for about $100 in favor of the Chamberlain Banking House recovered in 1893, a judgment in favor of W. B. Compton recovered in 1894, and the taxes due for the last named year. The theory of Hammond is that the land was, with the authority and consent of the Chamberlain Banking House, sold subject only to the lien of the mortgage and taxes. The question for decision is one of fact. There is some conflict in the evidence, but the trial court was undoubtedly right in finding the issues in favor of the defendants. The sheriff announced at the sale that the property would be sold subject to the mortgage and the taxes, but he did not declare that those were the only prior liens. Hammond may have put that construction upon the language used and may have acted on a false assumption in making his bid, but that was his fault; and he certainly cannot allege his own palpable negligence as a ground for relief in an original action. It has been even held that a purchaser at a

foreclosure sale could not be released from his bid although it was made under a mistake resulting from an unwarranted overconfidence in representations of the officer making the sale. (*Norton v. Nebraska Loan & Trust Co.*, 35 Neb. 466; same case on rehearing, 40 Neb. 394.) Whatever may be said of the doctrine of the *Norton Case*, it is entirely clear that in the case at bar there was no circumstance which deterred or forbade the appellant from exercising for his own protection that reasonable caution and vigilance which the rule of *caveat emptor* exacts of those who purchase property at judicial sales. He should have acquainted himself with the condition of the title in which he was about to invest his money. He should not have relied upon the sheriff's statement nor on his own inference from the fact stated. That the representative of the Chamberlain Banking House neither authorized nor knew of the special announcement made by the sheriff is pretty conclusively established. It is also proven quite satisfactorily that Hammond's attorney had actual knowledge of the prior judgment before the order of confirmation was entered. This being so, he should have resisted confirmation and asked to be released from his bid. This was a plain and adequate remedy, and, under the circumstances, it was the only remedy available. The judgment is obviously right and is

AFFIRMED.

SOCIETY OF THE HOME FOR THE FRIENDLESS V. STATE OF NEBRASKA.

FILED APRIL 6, 1899. No. 10590.

1. **State Institutions:** HOME FOR THE FRIENDLESS. The institution established under the authority of the act of February 28, 1881, entitled "An act to establish a home for the friendless in the state of Nebraska, and to provide for the erection and location and government of the same," is a state institution.

2. ———: ———. By section 4 of said act the Society of the Home for the Friendless, an eleemosynary corporation, was given supervision of said institution, subject to the paramount authority of the board of public lands and buildings.

3. ———: ———: VESTED RIGHTS. The supervision given to said society over the home for the friendless was a mere privilege, and not a vested, irrevocable right. It depended upon the statute and was entirely extinguished when section 4 was repealed.

4. ———: ———: TITLE TO PROPERTY. In establishing a home for the friendless under the authority of said act the board of public lands and builings could not lawfully purchase a building site and take the title thereto to the state in trust for the Society of the Home for the Friendless.

5. ———: ———: ———: TRUSTS. Real estate purchased by the board of public lands and buildings upon which to erect a home for the friendless was conveyed to "the state of Nebraska for the use and benefit of the home for the friendless." *Held*, That the clause, "for the use and benefit of the home for the friendless," was not designed to create a trust, but was merely descriptive of the use to which the property should be devoted by the state.

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

J. H. Broady and *H. A. Babcock*, for plaintiff in error.

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

SULLIVAN, J.

This was an action for the recovery of real property brought by the state against the Society of the Home for the Friendless. In obedience to a peremptory instruction the jury found in favor of the plaintiff and judgment was rendered on the verdict. The property in dispute is a small tract of land in the city of Lincoln upon which stands a dwelling-house used as a home for destitute and friendless women and children. It is conceded that the legal title to the premises is in the state, but the defendant insists that it is the equitable owner, and therefore rightfully in possession. The essential facts are not con-

troverted. In 1876 the defendant came into existence as a corporation with the avowed object of affording protection and employment, or assistance, to worthy and destitute women and children until permanent homes and means of subsistence could be provided for them. By resolution of its board of directors the society, soon after its incorporation, adopted, for business purposes, the name "Home for the Friendless," and by this designation it has been generally known. Originally it was without a habitation. It received no assistance from the state, and in the prosecution of its benevolent work depended for its resources upon private charity. In 1881, however, there was, at the instance of the society, initiated a measure of legislation which resulted in the adoption of the following statute:

"Section 1. That a home for the friendless shall be established in the state of Nebraska.

"Sec. 2. The location of said home shall be under the supervision of the board of public lands and buildings, and shall be located at the city or town which shall, after duly advertising for bids for its location, donate the largest amount to said home.

"Sec. 3. The sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of the general fund of the treasury for the erection of said home.

"Sec. 4. The government of said home shall be by and under the supervision of the Society of the Home for the Friendless; *Provided*, That nothing herein contained shall be so construed as to prevent the board of public lands and buildings from establishing rules and regulations for the government of such home in any manner."

Proceeding under the authority of section 2 of this act the board of public lands and buildings advertised for bids. The people of Lincoln offered the largest donation and the home was accordingly located in this city. The board then purchased the land, and constructed thereon the buildings now occupied by the defendant. The deed

by which the state acquired title recites that the property is conveyed to "the state of Nebraska for the use and benefit of the home for the friendless in the state of Nebraska." As soon as the buildings were completed the society took possession of the premises and has ever since occupied the same. In its new quarters it has carried on the work for which it was incorporated. It has been the almoner of much private bounty and, since 1883, has expended more than a quarter of a million dollars appropriated by the legislature for the benefit of the "Home for the Friendless." In 1897 section 4 of the act of 1881 was repealed and the management of the home, under the supervision of the board of public lands and buildings, was committed by the statute to officers and employés of the state to be appointed by the governor.

If we rightly understand the position of counsel for the defendant it is that the act of 1881 was intended to recognize and confirm the existence of the defendant as an eleemosynary institution and to provide for it a suitable abiding place, and that, in execution of this purpose, the legal title to the property in dispute was conveyed to the state to hold in trust for the society. The argument is ingenious but not sound. In the first section of the act the legislature spoke with reference to the future. It did not assume to create an institution at once by legislative fiat. The first section declared that a home for the friendless should be established. The second section provided how and when and where it should be established. The third section provided the means for bringing the home into existence, and the fourth made provision for its government. The home contemplated by the legislature was a physical home—a place where the unfortunates of society, the jetsam and flotsam of life's restless sea, might find a temporary refuge, clothing and food, and shelter and rest. This is demonstrated by the language of section 4, which provided that the government of "said home"—that is, the home mentioned in the preceding sections—should be under the supervision of

the Society of the Home for the Friendless. Surely the legislature did not commit the folly of saying that the defendant by its business name should be under the supervision of the defendant by its corporate name. The deed to the state must be construed in the light of the statute authorizing the purchase of the property therein described. The board of public lands and buildings possessed no power to buy land and construct buildings for the defendant. An attempt to do so would be a misappropriation of public funds. We are not warranted in holding that the language quoted from the deed was intended to create a trust, but if that were the intention, the trust would be void. The property having been bought with the state's money, the state, both in law and in equity, would be the owner. We think, however, that the purpose of the language was to describe the use to which the property should be devoted and not to create a trust. The judgment is clearly right and is

AFFIRMED.

HARRISON, C. J., not sitting.

STATE OF NEBRASKA, EX REL. AGGE AXEN, TREASURER OF STANTON COUNTY, V. JOHN B. MESERVE, TREASURER OF THE STATE OF NEBRASKA.

FILED APRIL 6, 1899. No. 10549.

1. **Officers:** COMPENSATION. A public officer is required to perform the duties of his office, however onerous they may be, for the compensation fixed by law.

2. **County Treasurers:** STATE FUNDS: PAYMENT TO STATE TREASURER. By section 165 of the revenue act the treasurers of the several counties are required to pay into the treasury of the state twice each year, and at such other times as the state treasurer may require, all funds in their hands belonging to the state.

3. ——: ——: ——. The duty thus imposed is not discharged by

delivering such funds to an express company or other carrier for transmission.

4. ———: ———: ———: RECEIPTS. The state treasurer is required to issue receipts to county treasurers only for state warrants actually delivered to him and for money actually paid into the treasury of the state.

5. ———: ———: ———: EXPRESS CHARGES. A county treasurer who sends state funds by express to the state treasurer, without prepayment of express charges, is entitled to receipts only for the amount received by the state treasurer after deducting the cost of carriage.

ORIGINAL application for mandamus to require the state treasurer to issue, without deducting express charges, receipts for the full amount of state funds which relator forwarded by express to the state treasury. *Writ denied.*

John A. Ehrhardt and *G. A. Eberly*, for relator.

References: *State v. Lincoln County*, 18 Neb. 283; Sutherland, Statutory Construction sec. 288; *Sniffen v. City of New York*, 4 Sand. [N. Y.]193; Mechem, Agency [2d ed.] sec. 653; 1 Am. & Eng. Ency. Law [2d ed.] 1117; 19 Am. & Eng. Ency. Law [1st ed.] 541.

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General, contra.*

SULLIVAN, J.

This is an original application for a writ of mandamus to compel the respondent, John B. Meserve, as state treasurer, to issue to the relator, as treasurer of Stanton county, duplicate receipts for state funds sent by express from the city of Stanton to the city of Lincoln on or about December 1, 1898. The amount forwarded was $731.57, but the express charges not having been prepaid the sum actually received by the respondent and paid into the state treasury was only $719.72. The relator contends that he is entitled to be credited with, and to receive re-

ceipts for, the entire amount delivered by him to the express company, and not merely for the net amount received by the respondent after paying the cost of carriage. The validity of this claim is the only question for decision in the case and is raised by demurrer to the petition, which, by mutual consent, stands for the alternative writ.

We have carefully considered the various statutory provisions, as well as the text-books and adjudged cases, to which our attention has been directed, but without being persuaded that the respondent is under legal obligation to issue receipts for money which never came into his hands. Section 165 of the revenue act is as follows: "The treasurers of the several counties shall pay into the state treasury all funds in their hands belonging thereto, on or before the tenth day of February and tenth day of October in each year, and at such other times as the state treasurer shall require, and funds so paid in shall be the identical state warrants, if any, received by the treasurer for payment of the taxes, or in coin, or in treasury notes of the United States." This section, in plain terms, imposes on the treasurer of each county the duty of paying into the state treasury all the funds in his hands belonging to the state. Delivery to a carrier is obviously not a fulfillment of this obligation. The proposition needs no elaboration; it is enough to state it. With the equity of the rule we have nothing to do. A public officer must perform every service required of him by law, and he must look to the statute for his compensation. If it provides none, then the services are gratuitous. (*State v. Silver*, 9 Neb. 85; *Bayha v. Webster County*, 18 Neb. 131; *Adams County v. Hunter*, 78 Ia. 328; *Decatur v. Vermillion*, 77 Ill. 315; *Troup v. Morgan County*, 109 Ala. 162; *Sampson v. Rochester*, 60 N. H. 477.) A person accepting a public office takes it with its burdens, and whenever those become insufferably oppressive he may resort to that excellent and adequate remedy which a wise legislative foresight has provided, viz., a letter of

resignation addressed to the proper authority. The petition does not state a cause of action and the writ is therefore denied.

WRIT DENIED.

WILLIAM F. DOOLITTLE ET AL. V. AMERICAN NATIONAL BANK OF OMAHA.

FILED APRIL 19, 1899. No. 8825.

1. **Rulings on Pleadings:** TRANSCRIPT FOR REVIEW. In the absence of a pleading from the transcript presented to this court in an error proceeding, an alleged error of the trial court in sustaining a motion to strike out portions of said pleading cannot be reviewed.

2. **Review of Interlocutory Order:** DELAY OF TRIAL. The pendency of attempted review by error proceeding of an order in a case not final does not furnish forceful reason for the delay of a trial of the cause on its merits.

3. **Bill of Exceptions:** EXTENSION OF TIME: REVIEW. An order of refusal to extend the time within which to prepare a bill of exceptions which does not appear of record cannot be reviewed.

4. ———: EVIDENCE: REVIEW. If there is no bill of exceptions, questions which for their due consideration require an examination of the evidence cannot be determined.

5. **Conflicting Evidence:** REVIEW. A determination of matters of fact based upon conflicting evidence and sustained thereby will not be disturbed on review.

6. **New Trial:** TIME TO FILE MOTION. A motion for a new trial is without force if filed after final adjournment of the term of district court during which the trial occurred.

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

David Van Etten, for plaintiffs in error.

Howard B. Smith, contra.

HARRISON, C. J.

This action was instituted by defendant in error in the district court of Douglas county February 3, 1894, to re-

cover of plaintiffs in error an amount alleged to be its due on a promissory note signed by them. For plaintiffs in error there was filed on October 26, 1894, what was styled a "substituted answer," and a motion was filed for the bank that portions of the substituted answer be stricken out, which motion was on hearing sustained. Without awaiting the trial and judgment in the action there was an attempt to present to this court for review the order striking out portions of the "substituted answer." To this error proceeding there was filed an objection to the jurisdiction on the ground that the order of which there was complaint was not a final one. The objection was sustained and the proceeding dismissed. In the meantime issues had been joined in the district court on the merits of the action, and of them there had been a trial, which resulted in a verdict in favor of the bank. At some time during the course of the action in the district court there was filed what was designated an "amended substituted answer," but this was apparently without leave of court obtained. At the time the motion to strike out portions of the "substituted answer" was sustained it was a part of the order that the parties were given seven days from this date in which to prepare and present for the inspection of the court an amended answer. It does not appear that there was any compliance with the portion of the order just quoted. There was a motion for a new trial, which was heard, and on consideration overruled. The plaintiffs in error did or could not procure a bill of exceptions within the time allowed or apparently at any time, or have not done so. The first motion for a new trial was filed of date October 26, 1895, and on November 7, 1895, and of the September, 1895, term of the court, was overruled and judgment rendered on the verdict. On October 28, 1896, a second motion for a new trial was filed, which reads as follows: "Now come defendants and move the court to vacate and set aside the judgment and verdict herein and grant a new trial in said action, for the reason that, without the fault of

defendants, they have been unable to obtain a bill of exceptions of the proceedings and evidence on trial, and thereby have so been deprived of their right to be heard in the court of last resort of said state. This motion is supported by the affidavits hereto attached, marked Exhibits 'A' and 'B,' respectively, hereof, and hereby made a part of this action." This was during the September, 1896, term of the court. The trial term adjourned *sine die* January 4, 1896. This motion was heard and overruled, the order in the matter being of date November 4, 1896. The cause has been removed to this court by petition in error.

It is argued that the district court erred in its order to strike out portions of the "substituted answer." This must fail, for the reason that the said answer is not a part of the transcript filed here and without it we cannot examine or determine the question raised. The answer to which we have just referred was with the bill of exceptions of the hearing on the second motion for a new trial, but was omitted therefrom by the trial judge who settled and allowed the bill, and it has not been made of the transcript and is not before us for consideration. At the time the case was called for trial on its merits it was objected that it could not then be heard, for the reason that to secure a reversal of the order to strike out portions of the "substituted answer" a proceeding in error had been instituted in the supreme court and was then pending. This objection was not countenanced, and that it was not is now urged as an error. The order was not a final one, and that there had been an attempt to lodge an error proceeding in this court to review it furnished no reason for any delay in the trial of the cause on its merits in the district court.

It is complained that there was an error committed in overruling a motion for an extension of time within which to prepare a bill of exceptions. There is no such motion embodied in the transcript before us, but it is conceded it was made of date February 14, 1896. The judge

who presided at the trial had then retired from office. That the motion was ever denied does not appear. There is a showing in the bill of exceptions that counsel for plaintiffs in error wrote to the judge who had heard the trial and received a letter from him in reply in which he declined to sign or make an order of extension of time for preparation of a bill of exceptions, but there is no order or matter of record in the court on this subject which can be reviewed. In the absence of a bill of exceptions we cannot review any of the assignments of error which for their due consideration and decision would require an examination of the evidence.

It is also contended that it was an error to overrule the second motion for a new trial. It was not filed until after the close of the term of court during which the trial occurred and was not entitled to be heard and sustained. (Code of Civil Procedure, sec. 316.) If it be conceded that it was competent for the trial court to entertain the motion filed of the time that it was, then its decision by which it overruled the motion was based upon conflicting evidence, of which there was sufficient in its support, and it will not be disturbed. The judgment of the district court must be

AFFIRMED.

CHARLES H. HOFMANN V. EUGENE A. TUCKER, ADMINISTRATOR.

FILED APRIL 19, 1899. NO. 8868.

1. **Action by Administrator to Recover Property Fraudulently Transferred.** An administrator cannot maintain a suit under the provisions of section 211, chapter 23, entitled "Decedents" (Compiled Statutes 1897), unless there are debts of the deceased to be paid and insufficient assets to discharge them, and, ordinarily, the claims must have been allowed or adjudicated against the estate.

2. ——: PLEADING AND PROOF; VARIANCE. If the pleading is of al-

lowed claims, and the proof is of claims presented but not adjusted at the time of the institution of the action, there is a variance.

3. ———: FINDING FOR PLAINTIFF: EVIDENCE. The finding and judgment of the district court *held* not warranted or sustained upon any entertainable theory of the issues presented and evidence adduced in their support.

ERROR from the district court of Richardson county. Tried below before BABCOCK, J. *Reversed.*

Edwin Falloon and *James Falloon*, for plaintiff in error.

Clarence Gillespie, *Francis Martin*, and *E. A. Tucker*, *contra.*

HARRISON, C. J.

It was alleged in the petition herein that Charles Hofmann, then a resident of Richardson county, died on or about January 25, 1893, and that he left no last will and testament, and on September 8, 1893, the defendant in error was by the proper court appointed administrator of the estate of the deceased, gave his bond, and, after the completion of usual preliminary proceedings, entered upon his duties as such administrator; that claims were presented and allowed, in the aggregate the sum of $2,000, and there were further claims of which the administrator had information which would probably be presented for adjustment; that Charles Hofmann, at the time of his death, was the owner and in possession of certain personal property which had been appropriated by Charles H. Hofmann, a defendant in the action, now plaintiff in error, and the administrator had been unable to obtain possession or control of any portion or article of the personal estate of the deceased, and the whole of it, or its proceeds, if he could have reduced it to possession and disposed of it, would not have been sufficient to discharge the claims allowed against the estate. It was further pleaded that Charles Hofmann, at the time

of his death, was the real and equitable owner of 240 acres of land, a farm in Richardson county (it was specifically described in the petition), of the value of $6,000 or $7,000; that the greater number of the debts which had been allowed against the estate were contracted prior to February 20, 1888; that on February 22, 1888, Charles Hofmann and his wife executed a warranty deed, by which they purported a conveyance of the land, to which allusion has been made, to his two sons, Charles H. Hofmann and Fred W. Hofmann, and said deed was duly filed and recorded in the proper office and book April 14, 1888. For some further statements we will quote from the petition: "The said deed was so made without any consideration whatever and covered all the land owned by said deceased, and the same was, in truth and in fact, made to the said grantees in trust to pay the debts of deceased, although no trust was recited therein, and the consideration was falsely stated to be $5,000. No such amount of money and no amount whatever was in fact paid for such conveyance. Said Charles Hofmann always, after the execution of said deed, claimed to be the owner of said land, and he paid the taxes thereon to the time of his death. The said deed was executed and received by the grantees in fraud and to defraud the creditors of Charles Hofmann, which fact was then and there well known to the said grantees named in the deed." "On the 30th day of January, 1893, said Fred W. Hofmann conveyed all his interest in the above described land to his brother, Charles H. Hofmann, in consideration of $1,000, by deed recorded February 2, 1893, in book 53, page 594, of the records of said county. It was further stipulated between said last named parties that as a further consideration of said deed Charles H. Hofmann was to pay all the debts of the estate of said Charles Hofmann, deceased. Said agreement is shown and evidenced by an article of agreement in writing and now in the hands of Charles H. Hofmann, or his attorney, Charles H. Herold, of Bern, Kansas." The prayer was

that the warranty deed to the sons be declared null and void, and the administrator be authorized to sell the land for the payment of the claims against the estate. For Fred W. Hofmann there was filed a disclaimer of any interest in the subject of the action. In the answer of Charles H. Hofmann there was an admission that the land described in the petition was on the date stated conveyed by the father to the two sons; that at the time the father was indebted to certain persons in sums stated in the answer; also that he had for a sufficient valuable consideration become charged with the care and maintenance of his idiotic sister; that the sons, in consideration of the conveyance to them of the land aforesaid, assumed the payment or discharge of the obligations of the father which were set forth in the answer, and had duly performed their agreements. It was further answered for Charles H. Hofmann that he had purchased and received a conveyance of the interest in and to the land of his brother, Fred W. Hofmann. It was also stated that the father, when he conveyed the land to his sons, was possessed of sufficient other property to discharge his debts, and that none of the claims to which reference was made in the petition were contracted prior to February 22, 1888, the date the father conveyed the land to his two sons. There was also a plea of the bar of the statute of limitations. The reply was a general denial of all the material allegations of new matter in the answer.

After the trial of the issues presented the court made a finding "That the real estate in question was deeded by the deceased in his lifetime, Charles Hofmann, to his two sons, Charles Hofmann and Frederick Hofmann, charged with the payment of all the legal debts of the grantor," and adjudged "That the claims allowed against the estate of the said Charles Hofmann, deceased, be, and the same are hereby, declared to be a charge and lien against the real estate of Charles Hofmann, deceased, described in the plaintiff's petition herein." The petition was so framed as to possess a dual character or

effect. There were allegations which clearly indicated an action to set aside the conveyance of the land to the sons because it was fraudulent as to the rights of creditors. There were also statements by which it was sought to fasten upon the property conveyed a trust which might be enforced herein. There was here really pleaded a conveyance of the land to the sons and a contract by them to pay the debts of the grantor.

The first branch of the petition to which we have referred was evidently written to outline a right of the administrator to claim relief under and by virtue of the provisions of section 211, chapter 23, Compiled Statutes 1897, which reads as follows: "When there shall be a deficiency of assets in the hands of an executor or administrator, and when the deceased shall, in his lifetime, have conveyed any real estate or any right or interest therein, with the intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or shall have so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator may, and it shall be his duty to commence and prosecute to final judgment any proper action or suit at law or in chancery for the recovery of the same, and may recover, for the benefit of the creditors, all such real estate so fraudulently conveyed, and may also, for the benefit of the creditors, sue and recover for all goods, chattels, rights, or credits which may have been so fraudulently conveyed by the deceased in his lifetime, whatever may have been the manner of such fraudulent conveyance." And the pleading, aside from some possible indefiniteness not very material, was sufficient in its averments of a cause of action under said section. To authorize the action by the administrator there must be creditors and an insufficiency of assets in the hands of the administrator or of the estate to be administered to discharge the debts. (*Field v. Andrada*, 39 Pac. Rep. [Cal.] 323.) It has also been announced that prior to the allowance of the claims against the estate, the statu-

tory action by the administrator will not lie. (*Field v. Andrada, supra; Ohm v. Superior Court*, 26 Pac. Rep. [Cal.] 244; *Mesmer v. Jenkins*, 61 Cal. 153; *McMinn v. Whelan*, 27 Cal. 300; *O'Connor v. Boylan*, 49 Mich. 209, 13 N. W. Rep. 519; *Fletcher v. Holmes*, 40 Me. 364; *Estes v. Wilcox*, 67 N. Y. 264.) It has been decided in Wisconsin under a statute similar to ours that the administrator, if satisfied that there will be a deficiency, should not wait to have claims of creditors judicially established before bringing the action. (*Andrew v. Hinderman*, 71 Wis. 148, 36 N. W. Rep. 624.) The best reasons, we think, are in favor of the first of the rules stated; hence we approve it.

In the case at bar the petition contained declarations of claims which had been allowed, but when the proof was reached it disclosed that prior to the inception of the suit none had been allowed, although they had been presented for adjustment; hence, regardless of the view we might have accepted relative to the rule which should prevail of the two to which we have alluded, or a modification of either, there was a variance herein between the allegations and the proof, and the latter would not support the former. It has been held that the administrator cannot sue to enforce a trust and compel a reconveyance of lands. (*James v. Throckmorton*, 57 Cal. 387.) But this we need not decide. The evidence in the case at bar tended to support a third possible theory of the petition—that is, that the land had been conveyed to the sons upon the agreement by them to pay the grantor's debts. This was admitted by the plaintiff in error with the modification that the agreement was not to pay all the father's debts but to pay such as were specified, and of which there are averments in the answer. Viewed in any light or upon any entertainable theory of the issues formed and the evidence adduced, the finding and the judgment of the court based thereon, the entry of which we have quoted, were not warranted or sustained, must be reversed, and the cause remanded.

REVERSED AND REMANDED.

MICHIGAN MUTUAL LIFE INSURANCE COMPANY, APPELLEE, v. HENRY G. RICHTER ET AL., APPELLANTS.

FILED APRIL 19, 1899. NO. 8878.

1. **Judicial Sale**: SEPARATE TRACTS: REVIEW: PRESUMPTIONS. If in the record presented to this court in an appeal from an order of confirmation of a sale of real estate under decree of foreclosure there is no evidence that the property sold consisted of separate tracts or lots, it will be presumed that the officer who conducted the sale did his duty in a lawful manner and that his offer and sale of it as a whole or one piece of property was proper.

2. ———: APPRAISEMENT: REVIEW. An appraisement duly made of real estate for the purposes of a judicial sale cannot be successfully attacked solely on the ground that the property has been appraised too low. To make the low valuation a successful ground of attack on the appraisement it must be challenged for fraud. *Brown v. Fitzpatrick*, 56 Neb. 61, followed.

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

Parke Godwin, for appellants.

V. O. Strickler, contra.

HARRISON, C. J.

In an action to foreclose a real estate mortgage there was a judicial sale to enforce the decree, of the north half of lot 10, in block 8, and the south half of lot 7, in block 8, all in Kountze & Ruth's Addition to the city of Omaha, and from an order of confirmation of the sale this appeal has been perfected.

It is urged that there were two separate portions of lots or non-contiguous properties sold as a whole; that the half lots should have been offered separately, and that the sale was not so conducted, rendered it ineffective, and it should not have been confirmed. This argument is based on the asserted fact that the appraisement of the half lots was separately made, and the mode of

sale should have conformed to that of the appraisement, but the contention is all founded on the proposition that these two half lots sold were non-adjacent or separate and should have been offered for sale separately. The value of each half lot was specifically stated in the appraisement, and then the values were combined and from the total the incumbrance of taxes was deducted and the interest of the defendants was stated in gross with no separation. Of the facts upon which reliance is apparently placed in the argument, to show prejudice to the rights of defendants in the manner in which the sale was conducted, there is in the record an entire lack of evidence. It is not disclosed that the half lots sold were non-contiguous or separate properties, and in the absence of any evidence, the presumption that the officer who conducted the sale did his duty and properly must prevail. (*Kane v. Jonasen*, 55 Neb. 757.) Within this view this objection must be overruled. It is also argued that the sale should not have been confirmed, for the reason that the appraisement placed too low a value upon the property. There were affidavits filed in support of this view, also affidavits to sustain the appraisement. There was a conflict in the evidence, but the finding of the district court had sufficient of the evidence in its support and will not be disturbed. Furthermore, an appraisement of real estate preliminary to a judicial sale cannot be successfully attacked on the sole ground that the appraisement was too low. It must also be challenged for fraud. (*Brown v. Fitzpatrick*, 56 Neb. 61, and cases cited.) The order of confirmation must be

AFFIRMED.

GEORGE DAVIS V. STATE OF NEBRASKA.

FILED APRIL 19, 1899. No. 10566.

1. **Criminal Law**: INTENT TO DEFRAUD: INFORMATION. "It shall be sufficient in any indictment, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person or body corporate." (Criminal Code, sec. 417; *Roush v. State*, 34 Neb. 325; *Morearty v. State*, 46 Neb. 652.)
2. **Forgery**: EVIDENCE OF OTHER ACTS. In a trial on the charge of uttering forged instruments evidence of similar acts on the same day may be received to show the guilty knowledge or the intent of the accused in the act charged.
3. ———: INFORMATION: COPY OF INSTRUMENT. In an information of the uttering a forged written or printed instrument there should be set forth a copy or the purport of each material portion of said instrument.

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.

HARRISON, C. J.

The plaintiff in error was charged in an information filed in the district court of Douglas county with the forgery of railroad passenger tickets in one count of the information, with uttering forged tickets in a second count, and with having such tickets in his possession in a third count. During a trial the third count was abandoned by the state and the trial jury returned a verdict by which the plaintiff in error was pronounced not guilty of the charge in the first count and guilty of that in the second. After motion for a new trial heard and overruled the accused was sentenced to imprisonment in the penitentiary for a term of three years.

In the error proceeding to this court it is complained that the information was insufficient, in that it charged the intent to defraud in general and not as to any specific or designated person, etc. It is in this connection urged that the doctrine announced by this court in *Roush v. State*, 34 Neb 325, and *Morearty v. State*, 46 Neb. 652, that to state the intent to defraud generally will suffice, is radically wrong and should be overruled. The decisions to which reference is made do not state or publish a rule other than is plainly and clearly, without ambiguity, expressed by the legislature in section 417 of the Criminal Code, wherein it is prescribed in unequivocal terms, and with no necessity or room for construction: "It shall be sufficient in any indictment, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person or body corporate." With this in view we must adhere to the decisions which have been herein made the subject of attack.

The evidence tended to prove that on July 2, 1898, the plaintiff in error sold the ticket, upon the sale of which the charge in the information was predicated, to a "ticket broker" in Omaha. It purported to be the return portion of an excursion ticket from Chicago to Council Bluffs and return. There was also evidence that on the same day the plaintiff in error, in the same city, made quite a number of other sales to different ticket brokers of similar tickets, differing probably only in the number. Each ticket had a specific number. They all appeared to have been issued by one road. The reception of this evidence of the sales other than the one of the ticket declared upon in the information was assigned for error and the assignment is now urged. The general rule is that evidence of the commission or attempt to commit a crime similar to the one charged is inadmissible. (*Morgan v. State*, 56 Neb. 696; *Berghoff v. State*, 25 Neb. 213; *Davis v. State*, 54 Neb. 177.) But an exception has been quite uniformly

made in trials of some charges, of which is the one in the case at bar, where it is necessary to show the intent or guilty knowledge of the accused. The evidence in this case of these similar acts was not to show that the party charged had committed other similar distinct crimes, but to bear upon the question of his knowledge of the quality of his act and the intent with which he did it. The acts of sales of tickets by the plaintiff in error were all of one date, of similar tickets, in all particulars so nearly identical as to be almost connected, and were clearly within the reason of the exception to the general rule. The purpose of, and the effect to be given to, the evidence of the other similar acts should have been outlined and enforced by an instruction. (*Knights v. State*, 58 Neb. 225.) For a statement in regard to the exceptions to the general rule see Roscoe, Criminal Evidence [7th ed.] 92. In its support there is cited *Knights v. State, supra; State v. Raymond*, 53 N. J. Law 260, 21 Atl. Rep. 328; *Commonwealth v. McCarthy*, 119 Mass. 354; *Pierson v. People*, 79 N. Y. 424; 1 Rice, Evidence, 453.

The count of the complaint of the charge of which the plaintiff in error was adjudged guilty was in part as follows: "And the said Howard H. Baldrige, county attorney as aforesaid, upon his oath and by the authority aforesaid, further gives the court to understand and be informed: That the said George Davis, on the said 2d day of July, in the year aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being in said county, and then and there having in his custody and possession a certain false, forged, counterfeited, and falsely printed ticket, purporting to have been issued by the Chicago & Northwestern Railroad Company, of the purport, value, and effect following, to-wit:" Here was inserted a copy of what appeared on the face of the ticket, and further: "Then and there knowingly and feloniously did utter and publish the same as true and genuine, with the intent then and there and thereby unlawfully to defraud; he, the said George Davis, then and there well

knowing said false, forged, and counterfeited ticket as aforesaid to be false, forged, and counterfeited." On the back of the ticket there was stamped "C. & N. W. Ry. W. W. Coup, Ticket Agent. Jul. 1, 1898. 22 Fifth Ave., Chicago." This was omitted from the complaint. It will be seen from the quotation we have made that the charge was of uttering a ticket purporting to have been issued by the Chicago & Northwestern Railroad Company." It was testified that a part of the act of issuance of each ticket by an agent was to stamp it on its back similarly to what appeared on the one upon which the complaint was founded, the date in the stamp to be that of the issue; that the impress of the stamp appears is evidential of the act of issuing the ticket. Whether the impress of the stamp on the back of the ticket herein immediately in question was spurious or genuine was a subject of specific inquiry during the trial, was a material fact in the establishment of the charge in the information, so much so that it may be said that it was elemental of the accusation, and if so, it should have been of the description in the information of the alleged forged and uttered instrument; and as it was omitted therefrom, the information was not of the crime of which proof was received, and there was a variance. (*Roode v. State*, 5 Neb. 174; *Haslip v. State*, 10 Neb. 591.)

There are other assignments of error, but we deem their discussion at this time unnecessary. For the error indicated the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

CHADRON LOAN & BUILDING ASSOCIATION, APPELLANT, V. JESSIE SMITH ET AL., APPELLEES.

FILED APRIL 19, 1899. No. 8873.

Mortgage Foreclosure: RECEIVERS: HOMESTEAD. The remedy of appointment of a receiver to take charge of the property in certain contingencies in an action of foreclosure of a real estate mortgage is not applicable where the mortgaged property is the homestead of the mortgagor, direct defendant in the suit.

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

Albert W. Crites, for appellant.

References: *Callanan v. Shaw*, 19 Ia. 183; *Chicago & S. E. R. Co. v. St. Clair*, 42 N. E. Rep. [Ind.] 225; *Link v. Connell*, 48 Neb. 574; Waples, Homestead & Exemption 714; *Jarboe v. Colvin*, 4 Bush [Ky.] 70.

Allen G. Fisher, contra.

HARRISON, C. J.

In an action of foreclosure for the association in the district court of Dawes county there was a decree in its favor on August 18, 1896, by which there was subjected to sale to apply in satisfaction of its mortgage lien thereon two non-adjacent lots in the city of Chadron, on each of which there was a dwelling-house, one of which was occupied by Jessie Smith and was her statutory homestead. She was the owner of both lots which were included in the mortgage and decree of foreclosure. Within the proper time she filed a request for stay of the execution of the decree, and soon thereafter for the association there was presented an application for the appointment of a receiver to take charge of the properties and collect the rents thereof. On hearing the court appointed a receiver for the one lot but refused to make any

appointment applicable to the homestead. The association has appealed to this court, and in the appeal proceedings has also presented an original application for the appointment of a receiver. The transcript was filed in this court November 19, 1896, and the bill of exceptions on the 30th of the same month. The transcript was accompanied by the application to this court for a receiver. Of this application there was a hearing and on January 8, 1897, it was denied.

In the brief which was filed November 30, 1896, it was urged that this court should abandon the rule established in the opinion in the case of *Eastman v. Cain*, 45 Neb. 48, that applications similar to the one in this matter at bar should ordinarily be first made to the district courts wherein the actions were instituted. In the decision of the application herein to this court we again considered the advisability and propriety of the directions in regard to practice stated in *Eastman v. Cain*, and with approval. We may add that in any such case, if an appeal is taken from the order of the district court in the matter of the application for a receiver, the proceeding in this court will, on motion, be advanced for hearing and thus delay be avoided.

It was shown that the lot as to which the petition for a receiver was denied was the homestead of the mortgagor. For the association there was proof that the property was probably insufficient to discharge the mortgage debt, also that repairs were greatly needed and were not being made, that the taxes had not been paid, and the property had been sold for the delinquent taxes. On the established facts there was quite a strong showing for the relief asked,—the appointment of a receiver to collect the rents of the mortgaged property. One and of the main questions presented was, will a homestead, under the ordinary or any facts and circumstances, be placed in the possession and care of a receiver? It is stated in Waples, Homestead & Exemption 719, 720: "Under some circumstances, a receiver may be appointed, in an action

to foreclose a mortgage, though the property is a homestead. It may be hotel property about to be diminished in value by being closed, so that such appointment would be advisable. The court has equitable jurisdiction to make the appointment when its exercise becomes necessary to protect the rights of a mortgagee not resting on the common-law principle of a legal estate transferred to him by the mortgage. In an action for forcible detainer, in which the defendant claimed homestead, a receiver was appointed. But it is questionable whether it is ever proper to take possession of a mortgagor's homestead while proceedings to foreclose are pending. Certainly it is not proper practice, as a general rule. An application for such an appointment should always be refused when the amount of the mortgage debt is the subject of contention in the case." (See, also, Beach, Receivers sec. 546.) In the decision of the case of *Lowell v. Doe*, 44 Minn. 144, without an extended discussion of the subject or lengthy statement of reasons for it, the rule was announced as follows: "The homestead rights * * in the mortgaged property are subject to the ordinary legal and equitable rights of the mortgagees as such." It is also observed that the sufficient answer to the assertion that possession of homestead in property may not be disturbed by the appointment of a receiver is: "That by the terms of the homestead law (General Statutes 1878, ch. 68, sec. 2) the homestead exemption 'shall not extend to any mortgage thereon lawfully obtained.' The homestead rights of the mortgagor are subject to the ordinary legal and equitable rights of the mortgagee in respect to the mortgaged premises which may be enforced by the appropriate remedies." In our state the legislature saw fit, and it is a wise and politic provision much to be commended, to exempt from judgment liens and execution or forced sale the homestead, and have made no exceptions from the absolute character of the exemption save and only as follows: "The homestead is subject to execution or forced sale in satisfaction of judg-

ments obtained: First—On debts secured by mechanics', laborers', or vendors' liens upon the premises. Second—On debts secured by mortgages upon the premises, executed and acknowledged by both husband and wife, or an unmarried claimant." (Compiled Statutes, ch. 36, sec. 3.) The legislature is frequently said to be the body or branch of the government nearest the people and is sovereign and exclusive in its sphere, that of lawmaking, and it is not for the courts to infringe upon the domain of the legislative power. The homestead right was made subject to be disturbed only through some voluntary act of the parties who might be entitled to it, and then alone by execution or forced sale. This clearly does not contemplate the deprivation of the enjoyment of the homestead right by or through the appointment of a receiver, and we cannot extend what the lawmakers have said, and read into the law, the incidental remedies which accompany mortgage liens ordinarily or in general. Any invasion of the homestead right will not be extended beyond the fair, direct import of the enactment by which it may be sought to make it less absolute. It follows that the district court was right and its decree is

AFFIRMED.

NORVAL, J., expressed no opinion.

JACOB DILLON, APPELLEE, V. CHICAGO, KANSAS & NEBRASKA RAILROAD COMPANY, APPELLANT.

FILED APRIL 19, 1899. No. 8857.

1. **Res Judicata.** A judgment rendered by a court having jurisdiction of the parties and of the subject-matter, as between such parties, conclusively settles all questions litigated, unless subsequently reversed or modified in the manner provided by law.

2. **Modification of Judgments.** The jurisdiction of a district court to

modify its judgments after the term is limited to the grounds enumerated in section 602 of the Code of Civil Procedure.

3. ———: ERRORS OF LAW. A district court has no power to vacate or modify its judgment after the term, on the ground that error of law had been committed by it in rendering such judgment.

4. ———: EXPIRATION OF LIEN. A judgment becomes dormant on which no execution has been issued and levied before the expiration of five years next after its rendition.

5. **Eminent Domain**: JUDGMENT FOR DAMAGES: INJUNCTION TO PREVENT OPERATION OF RAILROAD. A railroad company condemned real estate for right of way, and the landowner appealed from the award to the district court, where judgment was rendered against the company, which it paid in full and the judgment was satisfied. Two years after, and at a subsequent term of the district court, on application of the landowner, the judgment was modified for error of law committed by the court on rendering its original judgment. The railroad company, after condemnation proceedings, took possession of the right of way, constructed its road, and operated the same for several years without objection of the landowner. The modified judgment became dormant, and, without its having been revived, the landowner sought to enjoin the operation of the railroad until the company should pay said modified judgment. *Held*, Injunction would not lie.

APPEAL from the district court of Nuckolls county. Heard below before HASTINGS, J. *Reversed.*

M. A. Low, W. F. Evans, J. E. Dolman, S. A. Searle, L. W. Billingsley, and *R. J. Greene,* for appellant.

H. D. Short and *R. D. Sutherland, contra.*

NORVAL, J.

This suit was brought in the court below on April 20, 1895, by Jacob Dillon to enjoin the defendant from operating its railway over and across the northwest quarter of section 16, township 2 north, of range 5 west, in Nuckolls county. A peremptory injunction was allowed on the final hearing as prayed, unless the defendant should, within a short time fixed by the court, pay to the plaintiff the amount of a certain judgment or final order, which

he had obtained in the same court against the defendant on May 9, 1889, for $103.17, with seven per cent interest thereon from said date. This appeal is by the railroad company.

In October, 1886, plaintiff held, under a contract of purchase made by him with the state, the real estate already mentioned, and during said month defendant condemned for right of way purposes a portion of said tract and other lands belonging to Dillon. The amount of the award of the commissioners was deposited by the defendant with the county judge, and Dillon appealed from the award to the district court, where on a trial to a jury at the May, 1887, term of the court the following verdict was returned:

"We, the jury, duly impaneled and sworn in the above cause, do find on the issues joined for the plaintiff, and do assess his damages as follows: For 14.11 acres of land actually taken for railroad right of way in S. ½ of sec. 8, T. 2, range 5 west, 6th P. M., $254. For damages to the balance of tract by reason of location of such railroad, $450. We find the value of the 3.62 acres actually taken by the railroad for right of way in the N. W. ¼ of sec. 16, T. 2, R. 5, $90.50; and we find the damages to the balance of such tract by reason of the location of said railroad, $120. We find generally for the plaintiff, and so assess his damages at the sum of $914.50, if the court shall determine that the law allows the plaintiff to recover for the 3.62 acres on the N. W. ¼ of sec. 16, T. 2, R. 5; but if the court shall determine that the law will not allow the plaintiff to recover for the 3.62 acres aforesaid, then we find and assess the damages at the sum of $824.

"WM. C. OVILMAN, *Foreman.*"

A motion for a new trial was filed in said cause by Dillon, which was overruled, and the following judgment was rendered on said verdict: "It is thereupon, on this 5th day of May, 1887, considered and adjudged by the court that the court finds as a matter of law that as to

the three and sixty-two hundredths acres, section 16, township 2, range 5, being school lands, plaintiff is not entitled in this action to recover for the value of such land, being the same actually taken by the railroad. It is thereupon considered and adjudged by the court that the plaintiff have and recover of the defendants the sum of $824, and his costs, taxed at $——." Subsequently the railroad company paid and satisfied the judgment in full, and Dillon, on August 29, 1887, received the money and receipted therefor to the clerk of the district court, and satisfied the judgment of record. On October 2, 1888, Dillon filed in said cause a motion for a modification or completion of the said judgment, by the rendition of a judgment on the verdict of the jury for said sum of $90.50 and interest, the amount found by them to be the value of the land taken by the railroad company for the right of way in said northwest quarter of section 16, and notice was served on the railroad company that said motion would be for hearing at the October, 1888, term of the district court of Nuckolls county. Without any other or further notice the motion was sustained on May 9, 1889, and a judgment was rendered in favor of Dillon and against the railroad company for $90.50, with the further sum of $12.67, interest on said amount from May 9, 1887, making in the aggregate $103.17. The judgment also contained the provisions following: "It is further ordered that said sum of $103.17 shall be paid to the county treasurer of Nuckolls county, and by said county treasurer applied, as required by law, on contract of purchase of said Jacob Dillon, plaintiff, of said northwest quarter of section 16, aforementioned and described. Whereupon, by filing with the commissioners of public lands and buildings, as required by law, a plat of said land and designating and describing the same, said defendant company shall receive a deed of conveyance of title of said three and sixty-two hundredth acres right of way in said tract heretofore set forth and described in this cause." This last mentioned judgment has never been paid. On

January 9, 1891, the state conveyed the said northwest quarter of section 16 to Dillon, who, more than four years thereafter, brought this suit to enjoin the defendant herein from operating its railroad over the right of way condemned across said quarter section. As already stated, on May 5, 1887, the district court of Nuckolls county, on the trial of Dillon's appeal from the award of the commissioners appointed by the county court, specifically found that Dillon was not entitled to recover in that action for the value of the 3.62 acres of land which had been appropriated by the railroad company by reason of the construction of its line of road across said section 16, and judgment was rendered in favor of Dillon for the value of his other lands taken by the railroad company for the right of way. This was an adjudication against Dillon as to the value of the 3.62 acres, from which he never appealed, but accepted payment of the amount of the judgment in his favor for the value of the other lands. The court of Nuckolls county had jurisdiction of the parties and subject-matter involved in the condemnation proceedings, and its judgment conclusively settled all questions litigated therein, and is a complete bar to a recovery for the value of said 3.62 acres of land, unless the judgment has been subsequently legally vacated or modified. (*Hapgood v. Ellis*, 11 Neb. 131; *Keeler v. Elston*, 22 Neb. 310; *Gapen v. Bretternitz*, 31 Neb. 302; *Spear v. Tidball*, 40 Neb. 107; *Chase v. Miles*, 43 Neb. 686.)

The next subject for investigation is whether the judgment of May 5, 1887, has been legally modified or changed. It will be observed that the district court, more than two years after the entry of the judgment, pretended to modify the same by rendering a judgment against the defendant for the value of the same 3.62 acres of land already mentioned, which in the judgment of May 5 it had been determined there was no liability to Dillon by the railroad company. This action of the district court was taken and had on motion of Dillon filed after the term and nearly eighteen months subsequent to the

rendition of the original judgment, on the ground that the court had committed an error of law in entering its judgment. Authority is conferred by section 602 of the Code of Civil Procedure upon a district court to reverse, vacate, or modify its own judgment after the term at which it was rendered, upon the grounds and for the causes in said section enumerated. The power of a district court to vacate or modify its judgment after term is limited to the grounds specified in said section 602 of said Code. (*Iler v. Darnell*, 5 Neb. 192; *Carlow v. Aultman*, 28 Neb. 672; *McBrien v. Riley*, 38 Neb. 561; *Barnes v. Hale*, 44 Neb. 355.) The statute has made no provision for a district court modifying its judgment subsequent to the term when rendered, because of an error of law committed by it in pronouncing or entering the original judgment. It follows that the district court of Nuckolls county had no jurisdiction or power on May 9, 1889, to modify its said judgment of May 5, 1887, and such modification was for that reason void and not enforceable. If the district court of Nuckolls county erred in rendering its original judgment in not allowing Dillon to recover the value of said 3.62 acres of land, he should have had the error corrected by review in this court by proper appellate proceeding. This he did not do, and he is bound by such judgment. Moreover, the modified judgment was rendered more than five years prior to the bringing of this suit, and at the time was dormant, since no portion thereof had been paid, and no execution had been issued thereon. Plaintiff is in this attitude: he seeks to enjoin the defendant from operating its road over the tract in question, and when the road has been operated for several years without objection, until the railroad company shall pay a dormant void judgment. We do not think the plaintiff entitled to such relief. No case has been cited which sustains the plaintiff in his contention. The decree is reversed and the cause dismissed.

REVERSED AND DISMISSED.

C. N. FOLSOM, APPELLEE, V. WALTER E. PAILING, APPELLANT, ET AL.

FILED APRIL 19, 1899. No. 8858.

1. **Set-Off**: PARTNERSHIP. A claim against a member of a partnership cannot be set off against a debt due the firm.

2. **Conflicting Evidence**: REVIEW. A finding based on conflicting evidence will not be disturbed on appeal.

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

George W. Clark and *D. K. Barr*, for appellant.

C. S. Polk, contra.

NORVAL, J.

This suit was instituted in the court below by C. N. Folsom to foreclose a mechanic's lien on property of Walter E. Pailing, one of the defendants, and from a decree in favor of plaintiff Pailing prosecutes an appeal.

John Montgomery and Charles Stevens were partners engaged in the manufacture and sale of brick, and under an oral contract the firm sold and delivered to Pailing 44,600 brick, at the agreed price of $7.20 per thousand, to be used by the latter in the erection of a brick building on lot 361, in the village of Greenwood. At the time the contract was entered into Pailing was engaged in the mercantile business, and Montgomery, as well as Stevens, was indebted to him. Thereafter each purchased goods from the store on credit, and Pailing made certain cash payments on the brick. Subsequently Montgomery and Stevens filed a mechanic's lien for $321.12, the total contract price of the brick, and then assigned the lien to plaintiff. The district court allowed Pailing credit only for the cash payments made by him, and disallowed the amount of indebtedness due him from Montgomery and

Stevens respectively. A single question is presented for our consideration, namely, did the court err in not allowing Pailing credit for the amount of the individual accounts of Montgomery and Stevens? Without a contract to that effect, the defendant had no right to set off against his debt to the firm his account against a member of this firm. This proposition is so elementary as to make the citation of authorities in support thereof unnecessary. We have read the evidence and find that it is conflicting. That introduced by the plaintiff tends to show that no agreement was entered into between Pailing and Montgomery and Stevens that the former was to receive credit for the individual account of the members of the firm, or for the value of the goods subsequently purchased by Montgomery and Stevens respectively. As the evidence is sufficient to sustain the finding, the decree is

AFFIRMED.

J. B. MARKEY V. SCHOOL DISTRICT NO. 18 OF SHERIDAN COUNTY.

FILED APRIL 19, 1899. No. 8847.

1. **Schools and School Districts:** FURNITURE: TIME WARRANTS. A school district has no authority to purchase school furniture and issue a warrant therefor payable in the future. *Pomerene v. School District*, 56 Neb. 126, followed.

2. ———: CONTRACTS: TIME WARRANTS. A recovery cannot be had on a contract with a district board providing for payment in time warrants. (*Pomerene v. School District*, 56 Neb. 126.)

3. **Pleading.** The ultimate or issuable facts to be established should be alleged in a pleading.

4. ———: CONCLUSIONS OF LAW: DEMURRER. The averment of a mere conclusion of law in a pleading will not be taken as admitted by the filing of a general demurrer.

5. **Schools and School Districts:** CONTRACTS: RATIFICATION. A school district cannot ratify a void contract entered into by its officers,

at least when it has not observed the conditions as prerequisites essential to make a valid contract in its inception.

6. **Implied Assumpsit:** LIMITATION OF ACTIONS. An action to recover on an implied assumpsit is barred at the expiration of four years after the cause of action arose.

7. **School Boards:** ACTS OF MEMBERS. An individual member of a school district board cannot bind his district by acts not authorized by the board.

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

W. W. Wood, for plaintiff in error.

Thomas L. Redlon and *C. Patterson, contra.*

NORVAL, J.

It appears from the averments of the petition filed in the court below that the defendant School District No. 18 of Sheridan County, on August 5, 1886, entered into a written contract with the Union School Furniture Company whereby it agreed to furnish the defendant with certain school furniture of the stipulated value of $150, payment to be made, at the option of the defendant, in cash on the delivery of the furniture or an order on the treasurer of the school district for said amount payable on September 25, 1890; that the furniture was received by defendant and placed in the schoolhouse, and, pursuant to the terms and conditions of said contract, on October 18, 1886, the defendant issued to said Union School Furniture Company a warrant for $150, bearing interest at the rate of eight per cent per annum from the date thereof, payable September 25, 1890, and the plaintiff J. B. Markey is the present owner of said contract and order. A general demurrer to the petition was sustained by the district court, and the action dismissed. Plaintiff brings error.

The contract and order in question each required the amount therein specified to be paid at a date which had

not then arrived. School district officers can contract for the furnishing of schoolhouses only with reference to money on hand and at the time available for that purpose. The officers of the school district possessed no authority to make a contract or give a district order payable at a future time. This principle has been frequently stated and applied by this court. (*School District v. Stough*, 4 Neb. 360; *State v. Sabin*, 39 Neb. 570; *Andrews v. School District of McCook*, 49 Neb. 420; *Pomerene v. School District*, 56 Neb. 126.) It follows that the contract and order in question, at their inception, were illegal and void.

It is argued that the contract is enforceable, because the same was subsequently ratified by the voters of the district. The averment in the petition, on that point, is "that at a meeting of the voters of said defendant school district, held on the 4th day of October, 1887, the buying of said bill of school furniture, thereinbefore described, was ratified by said legal voters." This is the statement of a mere conclusion, and not an allegation of an ultimate or issuable fact, and therefore a ratification of the contract was not sufficiently pleaded. There is also in the petition an averment to the effect that at a meeting of the legal voters of the district a proposition was unanimously carried to issue bonds to pay the debt sued for in the present action, and it is insisted, in argument, by counsel for plaintiff that this constituted a ratification of the action of the district board. The contract being void for want of authority to make the same, it was incapable of ratification by the school district, or the voters thereof, only upon the observance of the conditions essential to the making of a valid contract in the first instance. (*Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb. 775; *Tullock v. Webster County*, 40 Neb. 211; *Townsend v. Holt County*, 40 Neb. 852.) These essential prerequisites to a legal contract the petition does not state were observed in the attempted or alleged ratification.

A recovery cannot be had in this case upon a *quantum meruit*, for the reason such cause of action, if it ever existed, arose, as disclosed by the petition, not later than October, 1886, and the action was not instituted until February 4, 1895, more than eight years after the acceptance of the furniture by the defendant. The action was fully barred by the statute of limitations when the petition was filed in the court below. (*Pomerene v. School District*, 56 Neb. 126.) An action to recover for an implied assumpsit is barred in four years after the cause of action arose.

The petition alleges that certain letters were written to the plaintiff by a director of the defendant district acknowledging the validity of the indebtedness, and promising to pay the same. It is obvious that a single officer of a school district cannot bind the district by acts not authorized by the board, or the majority of the members thereof when convened and acting as a board. It is not alleged that the director had been previously authorized by the district or district board to write the letters relied upon to prevent the running of the statute of limitations. The defendant, therefore, is not bound by the acknowledgment of the debt by the director, or the mere promise made by him to pay the same. (*People v. Peters*, 4 Neb. 254.)

The demurrer to the petition was properly sustained. The judgment is

AFFIRMED.

MERCANTILE TRUST COMPANY, APPELLEE, V. MARGARET O'HANLON ET AL., APPELLANTS.

FILED APRIL 19, 1899. No. 8865.

1. **Review:** PRESUMPTIONS. Error must affirmatively appear. It will never be presumed to exist.

2. **Affidavits:** BILL OF EXCEPTIONS: REVIEW. Affidavits used on the

hearing of a motion, to be available in the appellate court, must be embodied in the bill of exceptions.

3. **Refusal to Set Aside Default:** REVIEW. The overruling of a motion to vacate a decree rendered upon default regularly entered against a defendant will not be disturbed, unless it is made to appear that there has been an abuse of discretion by the court below.

APPEAL from the district court of Dawes county. Heard below before GREENE, J. *Affirmed.*

Allen G. Fisher, for appellants.

Albert W. Crites, contra.

NORVAL, J.

This suit was instituted in the court below to foreclose a real estate mortgage. The mortgagors, Margaret O'Hanlon and Peter O'Hanlon, were made defendants. They waived the issuance and service of summons and entered their voluntary appearance in the cause, but having failed to answer or demur, a default was taken against them and a decree of foreclosure was rendered. Six days thereafter, and at the same term of court, the defendants filed a motion to set aside the default, assigning therefor the following reasons: (1.) Because the defendants are not in default. (2.) That they have a meritorious defense. (3.) For the reasons stated in the affidavit of Margaret O'Hanlon. The motion was denied, and the defendants appeal.

It is argued that the motion for security for costs should have been sustained. The transcript does not purport to contain copies of all the orders and rulings made in the case, and the presumption must be indulged that the motion asking a cost bond be given was sustained by the court. Error must affirmatively appear from an inspection of the record to work a reversal. Moreover, plaintiff did give security for the costs on the day the motion of the defendants was filed, and the de-

fendants recovered no costs against the plaintiff, so no prejudicial error is shown upon this branch of the case.

It is insisted that a cause of action is not stated in the petition, and this argument is based upon the fact that the pleader, in drafting the petition, omitted therefrom the words "their promissory note," in describing the principal obligation the mortgage was given to secure. It sufficiently appears from the entire pleading assailed that the indebtedness which the mortgage secured was evidenced by a principal note, and ten coupon interest notes thereto attached, each coupon being for the sum of $157.50, and maturing one on the first day of June after its execution and one each six months thereafter, and that the defendants had broken the conditions of the mortgage. The amount of the indebtedness is with sufficient particularity averred in the petition and that default has been made in the payment of the mortgage debt.

The journal entry states that the defendants were in default of a pleading at the time the decree was rendered against them, and this recital is not disproved by the portion of the record brought up. There is attached to the transcript the affidavit of the defendant Margaret O'Hanlon to the effect that the defendants had not made default, and that there existed a meritorious defense to the suit. But this affidavit cannot be considered for any purpose, since it was not embodied in a bill of exceptions. (*Hartford Fire Ins. Co. v. Corey*, 53 Neb. 209.)

No abuse of discretion has been shown in overruling the motion to vacate the default entered against the defendants; therefore this court should not interfere. (*Mulhollan v. Scroggin*, 8 Neb. 202; *Bernstein v. Brown*, 23 Neb. 64; *Lichtenberger v. Worm*, 41 Neb. 856.)

AFFIRMED.

BENJAMIN F. MANNING V. EUNICE W. FREEMAN ET AL.

FILED APRIL 19, 1899. NO. 10606.

1. **Abstract of Record:** REVIEW. Where a case is submitted on an agreed printed abstract, the court will not look beyond the abstract. *O'Neill v. Flood*, 58 Neb. 218, followed.

2. ———: PETITION IN ERROR. The printed abstract must include the petition in error, or an abstract of the assignments of error therein contained.

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

Wright & Thomas, for plaintiff in error.

Ellery H. Westerfield, contra.

NORVAL, J.

This is a proceeding in error to review the judgment of the district court of Douglas county. A submission was taken in this court under section 1 of rule 2, which, *inter alia*, provides "for such submission on printed briefs accompanied by or containing an agreed printed abstract of the record and evidence upon which the case is to be determined." The transcript as prepared by the clerk of the trial court has been printed literally, and nothing else. Neither the petition in error nor the substance thereof is contained in the alleged printed abstract. This is a non-compliance with requirements of section 1 of rule 2. (*O'Neill v. Flood*, 58 Neb. 218, and cases there cited.) The object of the section of the rule was to enable the court to pass upon the questions presented without an examination of the record. The printed abstract must contain all that is necessary to present the points raised; and without an abstract of the assignments of error we are unable to tell the ground relied on for reversal. Again, the printing of the record in full, instead

of an abstract thereof, is a violation of said rule. For the reasons stated the judgment is

AFFIRMED.

W. S. FISK, APPELLEE, V. MARY K. OSGOOD, APPELLANT, ET AL.

FILED APRIL 19, 1899. No. 8641.

1. **Acknowledgments.** The office of an acknowledgment is to furnish authentic evidence that the instrument acknowledged has been duly executed and is entitled to be recorded.

2. **Mortgages:** ACKNOWLEDGMENT: MARRIED WOMEN. A mortgage executed by a married woman upon her separate property, other than a homestead, to secure her husband's debt constitutes a valid and enforceable lien, although not acknowledged as required by law.

3. ———: REGISTRATION: DEED: PRIORITY. A deed, for which no valuable consideration has been given, is not entitled to take precedence of a prior unrecorded mortgage of which the grantee in such deed had no actual notice.

APPEAL from the district court of Johnson county. Heard below before STULL, J. *Affirmed.*

S. P. Davidson and *Daniel F. Osgood,* for appellant.

W. H. Kelligar and *W. W. Giffen, contra.*

SULLIVAN, J.

From a decree of the district court of Johnson county foreclosing two mortgages upon her real estate in the city of Tecumseh Mary K. Osgood prosecutes this appeal. The mortgage to Fisk, who is plaintiff in the action, was executed by appellant to secure the payment of $500 borrowed by her husband, Daniel F. Osgood, for his own exclusive use and benefit. The instrument was witnessed and recorded, but not acknowledged. The other mortgage in suit was given to Charles McCrosky in

1885, and is now owned by Sarah M. Wright. It was made by Mr. Osgood when he was a single man and sole owner of the property in question. It was acknowledged and recorded, but not witnessed. Appellant's title was acquired by a deed from her husband in 1895. It is claimed that this conveyance was made in performance of an ante-nuptial contract, and that Mrs. Osgood, at the time it was made, did not know of the McCrosky mortgage.

The first contention of counsel for appellant is that the Fiske mortgage is void because not acknowledged in the manner prescribed by the statute. The contention cannot be sustained. The office of an acknowledgment is to furnish authentic evidence that the instrument acknowledged has been duly executed and is entitled to be recorded in the office of the register of deeds. (*Burbank v. Ellis*, 7 Neb. 156.) In *Lessee of Foster v. Dennison*, 9 O. 125, it is said that an acknowledgment is required by the statute as evidence of execution, or as authority for registration. This is also true with respect to the statutory requirement that deeds, mortgages, and other instruments relating to real estate shall be witnessed. The attestation of a witness is no part of the instrument attested. As between the parties thereto, written contracts concerning land are valid although neither witnessed nor acknowledged, except where the premises are a homestead. (*Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192; *Pearson v. Davis*, 41 Neb. 608.) The Fisk mortgage was appellant's contract in relation to her separate property; and she possessed, under the married woman's act, as ample authority to make it as though she were unmarried. Notwithstanding the lack of authentication the mortgage created a valid and enforceable lien.

A reversal of the decree in favor of Wright is urged on the ground that the McCrosky mortgage was not lawfully recorded and that appellant was without actual knowledge of its existence at the time she became the

owner of the property. The difficulty with this position is that the evidence in the bill of exceptions does not show that the conveyance to Mrs. Osgood was made in execution of an ante-nuptial contract. Such evidence was offered, but it was not received. The court erroneously excluded it. The recitals in the deed show that it was made without a valuable consideration; and this being so, it is not entitled to take precedence of the prior unrecorded mortgage which was given to secure an actual indebtedness. (*Merriman v. Hyde*, 9 Neb. 113.) The judgment is

AFFIRMED.

HOME FIRE INSURANCE COMPANY V. ELIZABETH KUHLMAN.

FILED APRIL 19, 1899. No. 8863.

1. **Insurance:** UNOCCUPIED PREMISES: FORFEITURE. A policy of fire insurance providing that it shall be null "if the building be or become vacant or unoccupied and so remain for ten days," does not, upon a violation of such condition, become absolutely void unless the insurer chooses to take advantage of the forfeiture.

2. ———: WAIVER OF FORFEITURE. An insurance company, upon being informed that there has been a breach of a condition in its policy providing for a forfeiture, may decline to take advantage of such forfeiture, and in that event the contract would remain in force.

3. ———: ———. A waiver, to be effective in defeating a forfeiture, need not rest on either a new agreement or an estoppel; and when once made it is irrevocable.

4. ———: ———: POWER OF AGENT. An agent of a corporation, acting within the scope of his authority, may, by his declaration or conduct, waive his principal's right to take advantage of a forfeiture.

5. ———: ———. An inference of waiver may be drawn from any declaration or conduct of the insurer which fairly indicates that it has, with full knowledge of the facts, freely chosen to treat the policy, and deal with it, as a valid and subsisting contract.

6. ———: FORFEITURE. When an insurer has taken advantage of a

forfeiture and has elected to treat the policy as void, the contract is at an end and cannot be revived, except by mutual consent of the contracting parties.

7. ———: ———: UNEARNED PREMIUM. When an insurer has elected to treat a policy of insurance as void for breach of condition providing for a forfeiture, the assured has no claim upon the company for any unearned premium.

8. **Trial:** REJECTION OF EVIDENCE: REVIEW. It is not error to reject proffered evidence which has no material bearing upon the facts in dispute.

9. **Evidence:** REVIEW. A judgment based upon a verdict which is supported by sufficient competent evidence will not be disturbed on the ground that the apparent preponderance of the evidence is on the side of the losing party.

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

Greene & Breckenridge, for plaintiff in error.

Lee S. Estelle, contra.

SULLIVAN, J.

In the district court for Douglas county Elizabeth Kuhlman recovered a judgment against the Home Fire Insurance Company in an action on a policy of fire insurance covering a two-story frame building located in the city of Omaha. The policy provided that it should be null "if the building be or become vacant or unoccupied and so remain for ten days." The building did become vacant and so remained for more than thirty days before April 11, 1893, the date of the fire by which it was damaged. The company insists that the judgment against it should be reversed because the policy had been forfeited and was not in force when the fire occurred. While conceding that there had been a breach of the condition against non-occupancy, counsel for plaintiff contends that the right to declare a forfeiture had not been exercised, but had been voluntarily relinquished by the defendant acting through Mr. Charles J. Barber, its sec-

retary and general manager. This defense was properly pleaded and the evidence justified its submission to the jury. Under our decisions the fact of vacancy did not *per se* annul the contract, but merely gave to the company the right to treat it as void. (*Hughes v. Insurance Co. of North America*, 40 Neb. 626; *Eagle Fire Co. v. Globe Loan & Trust Co.*, 44 Neb. 380; *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395.) The defendant, on being informed that the insured property had been vacant for more than ten days, might decline to take advantage of the forfeiture, and in that event the policy would remain in force. The election to waive being once made it would be irrevocable. It could not be recalled. (*Illinois Live Stock Ins. Co. v. Baker*, 153 Ill. 240.) The contention that a waiver must have the elements of an estoppel in cases of this kind cannot be sustained. "It is," says Sutherland, J., in *People v. Manhattan Co.*, 9 Wend. [N. Y.] 381, "a technical doctrine introduced and applied by courts for the purpose of defeating forfeitures." In *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, it was held that an effective waiver need not be based on either a new agreement or an estoppel. Substantially the same holding was made in *Hollis v. State Ins. Co.*, 65 Ia. 454; and such is now the settled doctrine of this court. (*Billings v. German Ins. Co.*, 34 Neb. 502; *Eagle Fire Co. v. Globe Loan & Trust Co.*, *supra*.) The material inquiry then upon this branch of the case is whether the defendant elected to exercise or to waive its right to take advantage of the forfeiture. The intention of the agent was, of course, the intention of the corporate principal. The decision of Mr. Barber was the decision of the company. Did he, upon being advised of the broken condition, determine to treat the policy as being without force or vitality from the time of the breach, or did he purposely forego this privilege? The fire occurred on April 11, and on or before April 13 the company was informed of the fact and caused an estimate of the loss to be made. To the plaintiff, who resided in San Francisco, the following letter was sent on the day of its date:

"OMAHA, April 13, 1893.

"*Mrs. Elizabeth Kuhlman, No. 873 Mission Street, San Francisco, Cal.*—DEAR MADAM: We herewith inclose bank draft for $3.90, being in full of return premium under policy No. 65008, issued by the Home Fire Insurance Company to you on May 23d last for $1,000, on building located at No. 920 Douglas street, Omaha, Nebraska, said policy being this day canceled on our books, and our liability terminated thereunder from and after this date. We have this day tendered Mr. W. E. Rhodes, your agent at the U. S. National Bank, this city, $3.90 cash, in cancellation of said policy. Our object in canceling this policy is that it has just come to our notice that the city authorities some time since condemned and ordered said building to be torn down. We also are just in receipt of information that the building has been vacant for some time. Please sign and return the inclosed receipt, and oblige,

"Yours truly, CHAS. J. BARBER, *Sec'y.*"

This letter was certainly competent evidence of a waiver, and the trial court did not err in so informing the jury. It shows action on the part of the company altogether inconsistent with an election to treat the policy as having been previously invalidated. It was written for the express purpose of terminating the contract and on the assumption that the contract was then in full force and effect. It indicates that the company was then seeking to put an end to a valid and subsisting contract of insurance, not because of any act or omission of the owner of the insured property, but because of some action taken by the city authorities concerning it. Undoubtedly the jury might find that the defendant had forborne to claim a forfeiture from the fact that on April 13 it considered the policy in force and was taking affirmative action to destroy its vitality. Other letters written by Mr. Barber to the plaintiff give strong support to the hypothesis of a waiver. He said in a letter written May 22 that the policy would be canceled from the date that

plaintiff received the draft for $3.90. He also assured her that she could not avoid a cancellation of the policy, and that it had been canceled and was void from the time she signed the receipt for registered letter containing the draft. "The cancellation," he continued, "does not date beyond the receipt by you of our registered letter containing the remittance, but simply terminates any liability accruing from and after that date." "The $3.90," he added "belongs to you and is the unearned premium on the said mentioned policy, which is canceled and void as to any accruing liability thereunder" after the letter of April 13 was received. On July 31 Mr. Barber again wrote to the plaintiff urging her to accept the $3.90 unearned premium, saying that it belonged to her and that the policy was not in force after the receipt by her of the company's draft in April. From the statements contained in these letters it is clear that the defendant considered the policy in force until the draft for $3.90 reached the plaintiff at San Francisco. There is also, perhaps, in the evidence ground for an inference that the premium was considered as earned, and that it was retained, up to the 17th of April. In *Eagle Fire Co. v. Globe Loan & Trust Co.*, *supra*, the insurer, with knowledge of the loss, canceled its policy, the cancellation taking effect from and after the date of the loss, and it repaid to the assured the unearned premium for carrying the risk from and after the date of the loss until the expiration of the policy according to its terms. This circumstance, it is said in the opinion, "was evidence which tended very strongly to show that the insurance company at that time recognized the policy as being in force up to and including the day that the loss sued for occurred." The loss occurred November 9, and on November 24 the insurer repaid the unearned premium from November 10. Concerning this it was said that the assured "having violated the policy by procuring additional insurance thereon without the knowledge and consent of the insurer, it was entitled, on discovering such

violation, to cancel the policy by reason thereof, such cancellation to take effect from and after the date of its violation." So in this case, the defendant had a right, on being informed that a condition of the policy had been broken, to treat the policy as of no effect from the date of the breach. If there was a forfeiture of which the defendant had taken advantage, then there was no contract to cancel, for it had already ceased to exist. It was dead and could not be reanimated except by mutual consent of the contracting parties. (*Moore v. Phœnix Ins. Co.*, 62 N. H. 240; *New v. German Ins. Co.*, 31 N. E. Rep. [Ind.] 475; *Boyd v. Insurance Co.*, 90 Tenn. 212; *Baldwin v. German Ins. Co.*, 105 Ia. 379, 75 N. W. Rep. 326; *Ferree v. Oxford Fire & Life Ins., Annuity & Trust Co.*, 67 Pa. St. 373; Ostrander, Fire Insurance [2d ed.] sec. 342.) And if the company had taken advantage of the forfeiture, there was no unearned premium which the plaintiff was entitled to receive. (*Farmers Mutual Ins. Co. v. Home Fire Ins. Co.*, 54 Neb. 740, 74 N. W. Rep. 1101; *Collins v. St. Paul Fire & Marine Ins. Co.*, 44 Minn. 440, 46 N. W. Rep. 906; *Baldwin v. German Ins. Co.*, 105 Ia. 379, 75 N. W. Rep. 326; *Jackson v. Millspaugh*, 103 Ala. 175; *Phœnix Ins. Co. v. Stevenson*, 78 Ky. 150; *Johnson v. American Ins. Co.*, 41 Minn. 396; *Colby v. Cedar Rapids Ins. Co.*, 66 Ia. 577.) If the defendant had not waived its right to claim a forfeiture, it is, as was said in the *Eagle Fire Ins. Co. Case*, difficult to understand its insistence that there was an unearned premium which rightfully belonged to Mrs. Kuhlman. It is equally incomprehensible why the company should so persistently seek to rescind the contract if, by reason of the forfeiture, it was already lifeless and incapable of rescission. We are entirely satisfied that the question of waiver was submitted to the jury upon proper instructions, and that the finding thereon is supported by sufficient evidence.

The refusal of the court to permit Mr. Gilbert, a witness called on behalf of the defendant, to testify to the filthy condition of the floors of the insured building is as-

signed for error. We think the evidence sought to be elicited could have no very material bearing on the question of damage, and it was not relevant to any other issue. Besides, there having been no formal offer to prove any specific fact, the alleged error is not available.

The court refused to receive testimony on behalf of the company tending to show the cost of putting the building in good condition immediately before the fire. In this there was no error. The plaintiff's claim was not based on an injury suffered by the building in good condition. The question in controversy was the damage caused by the fire—the expense of restoring the building to its former condition. What it would cost to renovate and modernize the whole structure before it was damaged was not an issue in the case, and therefore the evidence tendered was properly refused.

It is finally insisted that there should be a reversal of the judgment because the damages are excessive. The recovery seems quite large, but it is well within the estimates of competent witnesses, and we see no sufficient reason for substituting our judgment of the evidence for that of the jury. The judgment is

AFFIRMED.

H. G. VERNON V. UNION LIFE INSURANCE COMPANY OF OMAHA.

FILED APRIL 19, 1899. No. 8876.

1. **Pleading:** ELECTION BETWEEN DEFENSES: TIME. A motion to compel a defendant to elect upon which of two inconsistent defenses he will proceed to trial comes too late after issue has been joined by filing a reply.

2. **Accord and Satisfaction:** EVIDENCE. Evidence examined, and *held* to conclusively establish the defense of accord and satisfaction.

3. **Review:** HARMLESS ERROR. Where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed. In such case, errors occurring at the trial could not have been prejudicial.

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

John C. Stevens and *Capps & Stevens,* for plaintiff in error.

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

SULLIVAN, J.

This action was brought by H. G. Vernon against the Union Life Insurance Company to recover a balance alleged to be due upon a policy of life insurance. The petition states that in October, 1887, the defendant insured the life of James A. Vernon in the sum of $2,000; that the plaintiff was the beneficiary named in the contract; that the insured died on October 28, 1891; that the fact of death was proven in due time to the satisfaction of the company; that there was paid on the policy $1,566.11, and that there is a balance yet due of $433.89. The answer does not deny the issuance of the policy, the death of the insured, nor the payment to the plaintiff of $1,566.11, but alleges as a defense that James A. Vernon represented in his application for insurance that he was only fifty-four years old when he was in fact fifty-six years old; that the assessment for death losses at the age of fifty-four was only $5.50, while the assessment for such losses at the age of fifty-six was $7.50; that the policy was issued on the faith of the representation aforesaid and in the belief that it was true, and that, the policy having been issued on a false basis, the beneficiary was justly entitled to receive thereon the sum of $1,566.11, and no more; that the plaintiff having claimed the full sum of $2,000, there arose a controversy between the parties in regard to the amount due on the policy, and that such controversy was settled and compromised by the payment of $1,566.11. The defendant also pleaded a counter-claim, to which, in view of the verdict, it is

unnecessary to make extended reference. The reply concedes that there was a dispute touching the extent of the company's liability on the policy, but denies that there was any final adjustment of the matter. The jury found against the plaintiff on his cause of action and against the defendant on its counter-claim. Judgment was rendered on the verdict, and Vernon by this proceeding in error brings the record here for review.

The first error assigned relates to the action of the court denying an oral motion, made at the trial, by which it was sought to force the company to abandon one of its defenses, on the ground that they were inconsistent. The issues having been joined by replying to the answer, the motion came too late and was properly overruled. (14 Ency. Pl. & Pr. 103.)

The evidence offered by the defendant is to the effect that there was a compromise of the dispute referred to in the pleadings and that the sum of $1,566.11 was paid by it and received by the plaintiff in settlement and satisfaction of the amount due according to the terms of the policy. It also appears that the policy was surrendered by Mr. Vernon, who at the same time voluntarily made and delivered the following receipt:

"DONIPHAN, NEBRASKA, January 6, 1892.

"Received of the Union Life Ins. Co. fifteen hundred sixty-six and 11-100 dollars in full payment of all claims under policy No. 1679 issued by said Union Life Ins. Co. upon the life of James A. Vernon, who died October 28, 1891.

H. G. VERNON."

It further appears from the record that James A. Vernon was sixty-one years of age at the time he was insured; that by reason of that fact he was not insurable in the defendant company; that plaintiff, who was a son of the insured, furnished the requisite proofs of his death, and in doing so made an affidavit in which he declared that his father was fifty-six years old when the policy was issued. To meet the evidence of the defendant on

the issue of accord and satisfaction the plaintiff produced no testimony but that of his brother, J. D. Vernon, who proved to be a shifty and unreliable witness. The substance of his material testimony is that he was present when the company paid his brother $1,566.11 on the policy in suit; that the company's representative then said that the plaintiff had fallen into an error in fixing his father's age at fifty-six years in the affidavit which he had made in furnishing proofs of death; that whenever this mistake should be corrected—whenever the plaintiff should make another affidavit declaring that he was not positive in regard to his father's age at the time the first affidavit was made—the company would pay the full sum for which the policy called. The entire testimony of this witness as to what the parties did may be compressed into one of his own sentences: "They settled on conditions that after H. G. Vernon's affidavit was made out different they would pay in full." Assuming that the jury might have accepted this extraordinary account of the transaction, would they have been warranted in returning a verdict for the plaintiff? Clearly not. Considered together the evidence of both parties conclusively shows that a settlement was made. This settlement, according to the testimony of J. D. Vernon, was revocable in a certain contingency; but that contingency has not yet arisen. The plaintiff has not yet corrected the erroneous statement contained in his affidavit, but has evidently elected to stand to and abide by it. The obvious truth is that there was a fair adjustment of the dispute between the parties, and that the defendant promised to pay the balance according to the terms of the policy in case it should be afterwards shown that the insured was only fifty-four years of age when the insurance was written. On the question of compromise there was no conflict in the evidence as to any material fact, and the verdict is therefore right whatever errors may have intervened at the trial. (*Babcock v. Purcupile*, 36 Neb. 417; *Jeffries v. Cashman*, 42 Neb. 594;

Stratton v. Dole, 45 Neb. 473.) The judgment is right and is

AFFIRMED.

JOHN G. ROOT, APPELLANT, V. GERHARDT FAST ET AL., APPELLEES.

FILED APRIL 19, 1899. No. 8860.

1. **Negotiable Note:** PAYMENT: SUBSEQUENT TRANSFER. When the owner and holder of a past due negotiable note receives payment thereof from the maker or other person liable thereon, the obligation is extinguished, and if it be afterwards transferred to another, the transferee will acquire no better title or greater right than the transferrer possessed.

2. ———: ———: ———: EVIDENCE. The evidence examined, and *held* sufficient to sustain the finding of the trial court.

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

C. C. Flansburg, for appellant:

A surrender of notes held as collateral, in exchange for other securities, makes the holder of such new security a holder for value. (*Clark v. Iselin*, 21 Wall. [U. S.] 360; *Sawyer v. Turpin*, 91 U. S. 114; *Greenwell v. Hayden*, 78 Ky. 332; *Cherry v. Frost*, 7 Lea [Tenn.] 1.)

A transfer of collateral security may be made to a third party as trustee by agreement. (*City Bank of New Haven v. Perkins*, 29 N. Y. 554.)

A note does not cease to be negotiable because it is overdue, and may, notwithstanding its dishonor, be transferred for value, to a third party, who takes it subject only to existing defenses. (*Baxter v. Little*, 6 Met. [Mass.] 7; *Kniseley v. Evans*, 34 O. St. 158; *Davis v. Miller*, 14 Gratt. [Va.] 1; *Davis v. Noll*, 17 S. E. Rep. [W. Va.] 791; *Fitch v. Gates*, 39 Conn. 373; *Phillips v. Runnells*, Morris [Ia.] *391; *Annan v. Houck*, 4 Gill [Md.] 325;

Leavitt v. Putnam, 3 N. Y. 494; *Scott v. First Nat. Bank of Kokomo*, 71 Ind. 448.)

Every person dealing with a corporation is bound to take notice of the provisions of its charter, constitution, and by-laws, and its way of doing business. (*Relfe v. Rundle*, 103 U. S. 222; *Credit Co. v. Howe Machine Co.*, 54 Conn. 357; *Bocock v. Alleghany Coal & Iron Co.*, 82 Va. 913.)

A writing signed by one, an officer of a corporation, in his individual name, does not make it the signature of the corporation by adding thereto the title of his office. (*Sumner v. Williams*, 8 Mass. 162; *Hately v. Pike*, 44 N. E. Rep. [Ill.] 441; *Klopp v. Moore*, 6 Kan. 27; *Alexander v. Cauldwell*, 83 N. Y. 480.)

Gilbert Bros., contra:

Foss had authority to accept payment from Goosen for the Loan and Guarantee Company, and payment to the agent was sufficient. (*Preston Nat. Bank v. Smith*, 47 N. W. Rep. [Mich.] 502; *Oakes v. Cattaraugus Water Co.*, 38 N. E. Rep. [N. Y.] 461; *Eureka Iron Works v. Bresnahan*, 27 N. W. Rep. [Mich.] 524; *Hastings v. Brooklyn Life Ins. Co.*, 34 N. E. Rep. [N. Y.] 289; *Steinkraus v. Korth*, 44 Neb. 777; *Heaton v. Thayer*, 42 Neb. 47.)

Ratification is equivalent to original authority to act, and corporations are bound in the same manner as natural persons. (*Rich v. State Nat. Bank*, 7 Neb. 201.)

SULLIVAN, J.

From the bill of exceptions it appears that on February 5, 1896, the Loan & Guarantee Company of Hartford, Connecticut, made to Gerhardt Fast a loan of $1,200, secured by a mortgage upon the borrower's farm in York county; that in the following August Johann Goosen bought the land and in the deed of conveyance assumed the payment of the mortgage indebtedness. The loan company was incorporated in 1884, and from that time until January, 1895, F. I. Foss, of Crete, in this state, was a stockholder, a director, and its vice-president. The

company was loaning money in Nebraska and its business here was conducted, prior to May, 1890, by the firm of Dawes & Foss, and after that time by Mr. Foss until 1895, when his official relations with the company ceased. The Fast loan matured February 1, 1891. By the terms of the bond and mortgage the interest was payable semi-annually, and it was generally paid by Mr. Goosen about the time it became due. Each payment was made to the company's representative at Crete, who would afterwards mail the interest coupon to the defendant. On May 29, 1891, Goosen sent a draft to Foss for $1,283.40, that being the balance then remaining due upon the loan. The draft was received by Mr. Foss and paid in due course. What became of the money does not appear. From March 1, 1886, to March 19, 1891, the bond and mortgage given by Fast to the Loan & Guarantee Company were deposited with, and held by the Trust & Safe Deposit Company of Hartford as collateral security. On the last named date these securities were released and returned to the Loan & Guarantee Company. The plaintiff claims that they were then deposited with him as collateral security for a loan of $5,000 previously made by the Farmers & Merchants National Bank of Hartford to the Loan & Guarantee Company. It appears that the $5,000 loan was made on the note of the Loan & Guarantee Company indorsed by its president, W. L. Matson, and that as collateral security there was deposited with the plaintiff, as trustee, a number of western farm mortgages owned by the borrower. These collaterals were to be held primarily for the benefit of the loaning bank, of which Mr. Root was president, and secondarily for Matson and the loan company. Eventually, then, the loan company would receive the fruits of this litigation, if any there should be. This fact has, of course, no bearing upon the substantive rights of the plaintiff, and is only mentioned in this connection as a circumstance affecting the credibility of his principal witness, whose testimony we will hereafter have occasion to consider.

It is contended by counsel for appellant that Foss was not authorized to collect money for the Loan & Guarantee Company. This contention rests upon the testimony of Frank E. Johnson, who was secretary of the loan company prior to January 15, 1895, and is now its president. He says the company never gave any one authority to represent it in the collection of notes, except in cases where the notes were sent out to some one with express direction to collect them. This sweeping statement is not conclusive. It does not carry conviction. It is remarkable only for the boldness and abandon with which the witness testified to a fact of which he was necessarily ignorant. He was not the business manager of the company and in the very nature of things could not know what authority that officer had conferred upon Mr. Foss or others. It is established beyond dispute that the following letter was sent to Mr. Foss soon after the dissolution of the firm of Dawes & Foss:

"THE LOAN & GUARANTEE COMPANY OF CONNECTICUT.
"Wm. L. Matson, Pres. Frank E. Johnson, Sec'y.
"HARTFORD, CONN., September 14, 1890.

"*F. I. Foss, Crete, Neb.:* You are hereby authorized in behalf of this company to collect any or all moneys due or to become due on account of interest or principal on all mortgages negotiated for and sold to us by either yourself or Dawes & Foss.

"Yours truly, W. L. MATSON, *President.*"

To avoid the evidential effect of this letter an attempt was made to repudiate Mr. Matson's authority to write it. This effort was unsuccessful. From the testimony of Mr. Foss, which is practically undisputed, it appears that Matson was the general financial manager of the company from the time of its organization until January, 1895; that all the business of the corporation was under his immediate control and direction, and that all the Nebraska business was done through him. Foss further testified that, under contract with the company, either

the witness, or the firm of Dawes & Foss, had made all the company's Nebraska loans and had collected all the money which became due on such loans prior to 1895. There is abundant proof—in fact it is almost conclusive—that a payment to Foss was a payment to the Loan & Guarantee Company.

But it is insisted that on May 29, 1891, when the payment was made, the Fast bond and mortgage were held by the plaintiff as collateral for the Farmers & Merchants National Bank. The testimony upon this point is rather unsatisfactory. Evidently an intimate business relationship exists between the bank and the loan company. Mr. Root is president of one corporation and a stockholder and director of the other. From time to time collaterals held as security for the $5,000 loan were surrendered by the plaintiff, who accepted other securities in their place. He testified on the trial that he could not tell the exact date when he, as trustee, received the Fast papers, but that, according to his best recollection, they were substituted some time in the year 1891 for other like securities which he permitted the loan company to withdraw from his custody. Frank E. Johnson, after testifying that he was secretary for the loan company prior to 1895, said in part: "It is impossible to tell the exact date when this loan was substituted. No date was ever put down when a loan was either substituted or withdrawn. The Fast loan was undoubtedly substituted on or about March 19, 1891." The witness then refers to the fact that the Trust & Safe Deposit Company had the papers from March 1, 1886 to March 19, 1891, and adds: "To the best of my knowledge and belief the Fast mortgage loan was transferred to Mr. John G. Root, as trustee, on March 19, 1891, or within a few days thereafter. I am convinced of this from the fact that I find evidence of the withdrawal about that time of certain loans which were in the hands of Mr. Root, as trustee, and for which in part the Fast loan was undoubtedly substituted." It will be noticed in reading the evidence quoted that the witness does not

testify to any specific fact within his personal knowledge, but only to his belief, and to his faith in the correctness of a deduction. He says he found what he chooses to call evidence, not of the transfer to Root of the Fast papers, but of another fact from which he makes an inference in regard to the date of the transfer. Whether the evidence he found possessed probative force we do not know; and whether the fact which he thinks it establishes warrants the conclusion deduced therefrom, we cannot even conjecture. It is quite possible that in the exuberance of his zeal for the success of the trustee Mr. Johnson may have drawn his conclusions from false or inadequate premises. His evidence is discredited by other circumstances. On January 11, 1895, he wrote Goosen that the Loan & Guarantee Company then held the note and mortgage made to it by Fast and, in effect, demanded payment. About a month later he again wrote saying that he had applied to Foss for an explanation of the matter and that Foss had promised to send the statement at once. April 8, 1895, Johnson wrote another letter in which he said the loan company had put the matter of the alleged payment of the Fast loan in the hands of William Stull, of Lincoln, for adjustment. The papers were afterwards sent to Stull. The mortgage was assigned to the plaintiff, but the assignment, either through design or accident, was not dated. The acknowledgment of the assignment, however, shows that it was taken long after Goosen had paid the loan. Why the assignment was not acknowledged at the time plaintiff claims it was made has not been explained. Neither has there been any attempt on the part of Johnson to explain why his company claimed to hold, and why it asserted the right to receive payment of, the loan on January 11, 1895, if it had in fact been previously transferred to Root. Everything considered we think the trial court was right in finding the issues in favor of the defendant. The plaintiff, being a stockholder and director of the Loan & Guarantee Company, has evidently, at its instance and for its benefit, put

on the guise of a good-faith purchaser, hoping thus to succeed in this action. The judgment is

AFFIRMED.

FARMERS & MERCHANTS INSURANCE COMPANY V. REBECCA N. NEWMAN.

FILED APRIL 19, 1899. No. 8849.

1. **Insurance:** POLICY FORBIDDING LITIGATION: MORTGAGE FORECLOSURE. The policy of fire insurance in suit provided that it should be void "if the property insured be or become involved in litigation without notice to, and consent of, the company indorsed hereon." *Held*, That an action brought without the consent of the insured to foreclose a mortgage covering the insured property did not violate the condition nor work a forfeiture of the insurance.

2. ———: INCREASE OF INCUMBRANCE. A condition in a policy of fire insurance against an increase of incumbrances is not broken by a mere change in the form of an existing incumbrance.

3. ———: FORFEITURE. Forfeitures are not favored, and to be available as a defense to an action must be pleaded and strictly proved.

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

Joseph Wurzburg, for plaintiff in error:

The policy was invalidated by the increasing of the mortgage, by the mortgage-foreclosure, and by the procuring of other insurance. (*Billings v. German Ins. Co.*, 34 Neb. 502; *Brunswick Savings Institution v. Commercial Union Ins. Co.*, 68 Me. 313; *Bates v. Equitable Ins. Co.*, 10 Wall. [U. S.] 33; *Foote v. Hartford Fire Ins. Co.*, 119 Mass. 259; *Smith v. Union Ins. Co.*, 120 Mass. 90; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 417; *Meadows v. Hawkeye Ins. Co.*, 62 Ia. 387; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356; *Johnson v. American Ins Co.*, 41 Minn. 399; *Phœnix Ins. Co. v. Stevenson*, 78 Ky. 150.)

Halleck F. Rose and *Wellington H. England*, also for plaintiff in error:

It is competent for the insurer to provide by contract for the termination of the insurance risk, on the insured property becoming involved in litigation. (*McIntire v. Norwich Fire Ins. Co.*, 102 Mass. 230; *Merchants Ins. Co. v. Brown*, 77 Md. 79; *Springfield Steam Laundry Co. v. Traders Ins. Co.*, 66 Mo. App. 199; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Meadows v. Hawkeye Ins. Co.*, 62 Ia. 387; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356.)

Foreclosure terminated the insurance. (*Agricultural Ins. Co. v. Montague*, 38 Mich. 551.)

Where the policy contains a mere loss-payable clause for benefit of mortgagee, the contract is with mortgagor, and the mortgagee cannot recover in case of a breach of the condition by mortgagor. (*Syndicate Ins. Co. v. National Life Ins. Co.*, 65 Fed. Rep. 173; *Martin v. Franklin Fire Ins. Co.*, 38 N. J. Law 140; *State Ins. Co. v. Maackens*, 38 N. J. Law 564; *Ormsby v. Phenix Ins. Co.*, 58 N. W. Rep. [S. Dak.] 301; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141; *Governor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y. 401; *State Ins. Co. v. New Hampshire Trust Co.*, 47 Neb. 62; *Hocking v. Virginia Fire & Marine Ins. Co.*, 42 S. W. Rep. [Tenn.] 451.)

Gilbert Bros., contra:

Renewal of a mortgage with accrued interest is not a violation of a provision against future incumbrances. (*Kansas Farmers Fire Ins. Co. v. Saindon*, 35 Pac. Rep. [Kan.] 15; *George Home Ins. Co. v. Stein*, 72 Miss. 943.)

Mortgage foreclosure is not a violation of the provision against litigation involving the insured property. (*Cole v. Conner*, 10 Ia. 299; *Hall v. Niagara Fire Ins. Co.*, 53 N. W. Rep. [Mich.] 727; *National Bank of Mills & Co. v. Union Ins. Co.*, 26 Pac. Rep. [Cal.] 509; *Billings v. German Ins. Co.*, 34 Neb. 502; *Sprigg v. American Central Ins. Co.*, 40 S. W. Rep. [Ky.] 575.)

Other void insurance policies do not invalidate the insurance. (*Slobodisky v. Phœnix Ins. Co.*, 52 Neb. 395; *Woolpert v. Franklin Ins. Co.*, 26 S. E. Rep. [W. Va.] 521; *Sweeting v. Hartford Mutual Fire Ins. Co.*, 34 Atl. Rep. [Md.] 826; *German Ins. Co. v. Hayden*, 40 Pac. Rep. [Colo.] 453.)

SULLIVAN, J.

Rebecca N. Newman brought this action against the Farmers & Merchants Insurance Company to recover on a policy of fire insurance covering a dwelling-house owned by John M. and Angeline Crain. The court directed the jury to find for the plaintiff, and from a judgment rendered on the verdict the defendant prosecutes error.

Mrs. Newman had a mortgage on the insured property to secure an indebtedness of $750, and for her benefit the company had attached to the policy a slip in the usual form, making the loss, if any, payable to the mortgagee as her interest might appear. The action was defended mainly on the ground that the property, before its destruction, had become involved in litigation, and that the right to indemnity had been thereby lost under the operation of the following condition of the contract: "If the assured shall have, or shall hereafter take, any other insurance on the property hereby insured, or any part thereof, without the consent of the company, written hereon; or if the property above mentioned, or any part thereof, be, or hereafter become, mortgaged or otherwise incumbered, or if the same be, or shall hereafter become, involved in litigation without notice to and consent of this company indorsed hereon, * * * then and in every such case this policy shall be void." It appears from the record that Mrs. Newman's mortgage was a second lien on the property in question; that she had been made a party defendant in an action brought to foreclose the first mortgage; that she had answered therein asserting her lien; that a decree of foreclosure had been rendered on both mortgages, and that a stay had been taken and was effective at the time of the fire.

In view of these conceded facts was the property involved in litigation within the meaning of the condition above quoted? We do not think it was. In actions on policies providing that the rights of the mortgagee shall not be invalidated by any breach of condition by the mortgagee or owner it has been generally held that the mortgagee has a distinct interest embraced in a separate contract, and that his right to indemnity is not affected by any act or omission for which he is not responsible. (*Phenix Ins. Co. of Brooklyn v. Omaha Loan & Trust Co.*, 41 Neb. 834; *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Neb. 717; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743.) In *State Ins. Co. of Des Moines v. New Hampshire Trust Co.*, 47 Neb. 62, the doctrine of these cases was applied, although the contract in suit did not exempt the mortgagee from the consequences of a breach of the conditions imposed on the assured. On rehearing, however, the court receded from this position to the extent of leaving the question open and undetermined. We are now convinced, as the result of a pretty thorough examination of the authorities, that under a clause like the one here in question the mortgagee claims through the mortgagor and can recover only to the extent that the insurer is indebted to the insured in consequence of the loss. The ordinary "mortgage slip" is, in effect, an agreement by the company to pay the mortgagee all, or a part, of any money which may become due to the insured under the contract for indemnity. The cases bearing upon this question are collected in an elaborate note to *Oakland Home Ins. Co. v. Bank of Commerce*, 58 Am. St. Rep. 663. (47 Neb. 717.) This action, then, was in substance one brought by the plaintiff to recover of the company a sum of money due from it to the Crains. Her rights are neither greater nor less than theirs. Recurring now to the language of the policy, it will be noticed that the condition under which the forfeiture is claimed is not an absolute condition. It has an important qualification. It declares that litigation concerning the property shall invalidate the in-

surance unless the company's consent shall be indorsed on the contract. This suggests the idea quite naturally that a forfeiture may be prevented by a seasonable application to the insurer for its consent while the litigation is yet *in posse*. It does not imply that action under it may cure an existing forfeiture. It contemplates prevention, and not remedy. The construction contended for by counsel for defendant is, in effect, that any action involving the property, by whomsoever commenced, would avoid the policy. We cannot agree to this proposition. So far as the meaning is doubtful, the doubt must be resolved against the insurer, because forfeitures are not favored, and also because contracts of this kind are prepared by the insurer without consultation with the insured, and are thronged with conditions, stipulations, provisos, and exceptions which have not been the subject of previous deliberation. In *Oakland Home Ins. Co. v. Bank of Commerce, supra*, it was said: "The policy is proposed and tendered by the insurer on its own form. If it seeks to protect itself by a condition, it should clearly express that condition by the policy. If it resorts to ambiguous language, under familiar rules of construction, such language must be taken most strongly against the party proposing it and in favor of the other party." The meaning to be extracted from the clause in question is the meaning which it was, under the circumstances, fairly calculated to convey. From the language employed it is hardly possible that the insured would understand that the indemnity for which they had paid was absolutely at the mercy of any stranger who might make an unprovoked or wanton attack upon their title. They doubtless acted on the assumption that there was some substance in the qualifying clause referred to, and that they were contracting against their own acts and omissions and not against the conduct of strangers. Of what value is a provision giving the right to involve the property in litigation, after obtaining the company's consent, if it cannot be known when, or by whom, or for what

cause, an action is to be instituted? A mortgagee, a creditor, an adverse claimant may bring an action without notice and without cause; and if the defendant's theory is right the insurance is thus sacrificed without fault of the insured. A policy having this obvious import would, it seems to us, be generally considered too precarious a shelter to be worth the premium. Actions aided by attachment are nearly always commenced without warning; and it often happens that the affidavit, which is the basis for the ancillary proceeding, is a mere tissue of falsehoods, made with absolutely criminal recklessness. To put into a policy a clause providing that a forfeiture of indemnity might in such cases be prevented by obtaining in advance the company's consent to the suit would be the veriest nonsense. It may be said, however, that in this case the action was commenced in consequence of the failure of the Crains to redeem their promise to the owner of the first mortgage. That, of course, is true, but it does not affect the question of interpretation. The condition embraces actions by whomsoever commenced, or it refers only to suits instituted by the assured. In *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 490, 28 N. E. Rep. 919, 32 N. E. Rep. 914, the policy in suit contained this provision: "If the assured or any other person as parties interested shall have existing during the continuance of this policy any other contract or agreement for insurance (whether valid or not), against loss or damage by fire on the property hereby insured or any part thereof, not consented to by this company in writing, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect." The court held that other insurance taken out by a mortgagee or other person having an insurable interest in the property was not forbidden and would not work a forfeiture of the indemnity for which the owner of the equity of redemption had contracted. In the case of *Small v. Westchester Fire Ins. Co.*, 51 Fed Rep. 789, the court, construing a provision similar to the one here in question, said: "Courts will

not construe them as embracing acts of third parties or proceedings *in invitum*, unless the language of the condition is so plain and explicit that no other construction can be adopted. * * * If the bringing of a suit involving the title or possession of the property against the assured, *ipso facto*, avoids the insurance, then every policy-holder, when sued, loses, *eo instanti*, his insurance. The assured can no more prevent the institution of a suit involving the title or possession of the insured property than he can the accruing of a tax lien, a judgment, or a mechanic's lien. The bringing of a suit is a proceeding *in invitum*. It is usually brought without consulting the defendant, and it would ordinarily be impossible to apply to the company for the consent necessary to save a forfeiture. It would seem that the condition in question ought to be construed as applying only to voluntary litigation, involving the title or possession of the property insured." These observations seem just and reasonable. They entirely meet our approval, and, without further extending the discussion, we hold that the property was not involved in litigation within the meaning of the contract. In *Billings v. German Ins. Co.*, 34 Neb. 502, upon somewhat different reasoning, the same conclusion seems to have been reached. Other analogous cases illustrating the strictness with which provisions for forfeitures are to be construed are: *Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184, 53 N. W. Rep. 727; *Phenix Ins. Co. of Brooklyn v. Pickle*, 119 Ind. 155; *Green v. Homestead Fire Ins. Co.*, 82 N. Y. 517.

It is also urged on behalf of the defendant that the policy was forfeited by reason of an unauthorized increase in the amount of the plaintiff's mortgage. This alleged increase consisted merely in a change in the form of the security. The incumbrance was not in fact augmented.

A further and final contention is that the owners of the property obtained additional insurance in violation of the terms of the policy. In regard to this defense it need only be said that it was not established on the trial. It

was not shown by competent evidence, nor by any evidence, that the assured, John M. Crain and Angeline Crain, had taken out other valid insurance, or that they had at the time of the fire any indemnity whatever except that furnished by the contract in suit. The defense of forfeiture is regarded by the courts with aversion, and especially so where the entire premium has been paid to, and retained by, the insurer; and to escape liability under such circumstances the facts from which it is claimed the forfeiture resulted must be alleged and strictly proven. (*Thomas v. Builders' Mutual Fire Ins. Co.*, 119 Mass. 121; *Niagara Fire Ins. Co. v. Scammon, supra; Knight v. Eureka Fire & Marine Ins. Co.*, 26 O. St. 664.) The judgment is

AFFIRMED.

E. A. FLETCHER V. CO-OPERATIVE PUBLISHING COMPANY.

FILED MAY 3, 1899. No. 8885.

1. **Action by Corporation:** CORPORATE EXISTENCE: PLEADING. In an action by a corporation, if its name imports a corporation, it is not essential to aver in terms its corporate existence or to plead the act of incorporation.
2. ——: ——: ——. A general denial does not place in issue the pleaded existence of a corporation.
3. **Account:** PLEADING. Section 129 of the Code of Civil Procedure, wherein it provides that an account may be pleaded by copy thereof, is permissive. The facts may be averred in any proper form.
4. **Action on Account:** JUDGMENT FOR PLAINTIFF. The judgment *held* warranted and sustained by the evidence.

ERROR from the district court of Franklin county. Tried below before BEALL, J. *Affirmed.*

E. A. Fletcher and *W. H. Ashby*, for plaintiff in error.

H. Whitmore, contra.

HARRISON, C. J.

The defendant in error instituted this action before a justice of the peace of Franklin county to recover an amount alleged to be its due on an account of certain designated law books and publications sold and delivered to plaintiff in error and was given judgment, from which an appeal was perfected to the district court, where the publishing company was again successful and was accorded a judgment, of which the adverse party seeks a reversal in an error proceeding to this court.

It is argued that the petition was insufficient in its statement or plea of the corporate existence of the publishing company. The action was commenced in the corporate name of the company, and it was also stated that it was a corporation organized and incorporated under and by virtue of the laws of a designated state and doing business in the state of Nebraska. This was a sufficient plea of the corporate capacity of the company. (*Exchange Nat. Bank v. Capps*, 32 Neb. 242; 5 Ency. Pl. & Pr. 70, 71.) The general denial did not put in issue the corporate existence of the company. There was no special denial, and no proof of the fact was necessary. (*Herron v. Cole*, 25 Neb. 692.) The pleading was of the sale and delivery of the books and publications, the statement being specific in relation to them. It gave the date of each, the book or publication, and the price. As a statement of the account it was not defective. The section of the Code to which counsel for plaintiff in error referred in argument, 129, that a plaintiff may set out in his petition a copy of the account on which suit is brought, is permissive merely. The facts may be stated in a different form. (*Collingwood v. Merchants Bank*, 15 Neb. 118.) An examination of the evidence, in the light of the rules of law applicable to the facts developed, discloses and leads to the conclusion that the amount for which judgment was rendered was, after the deductions made in favor of plaintiff in error, none too large and

that it was in all respects warranted and supported by the facts shown; hence it must be

AFFIRMED.

KEMPER, HUNDLEY & MCDONALD DRY GOODS COMPANY, APPELLEE, V. F. D. RENSHAW & COMPANY ET AL., APPELLANTS.

FILED MAY 3, 1899. NO. 8872.

1. **Time to Assail Petition.** That a petition does not state a cause of action may be raised at any stage of the proceedings, even in this court in an appeal.
2. **Cancellation of Instruments:** ALLEGATIONS OF FRAUD. In a petition in the nature of a creditors' bill to annul a conveyance or mortgage as fraudulent the facts of the asserted fraud must be specifically stated; general allegations thereof are not sufficient.

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

M. B. C. True and *Isham Reavis*, for appellants.

T. Appelget and *Ben Phillips, contra.*

HARRISON, C. J.

In this action a petition in the nature of a creditors' bill was filed in the district court of Johnson county, the expressed purpose being to secure a decree by which a chattel mortgage of a stock of merchandise, some store fixtures and furniture should be declared void and the petitioner allowed to subject the property to the payment of an asserted debt or claim against the mortgagor. To the petition there was interposed a general demurrer, which on hearing was overruled. After issues were joined there was a trial, which resulted in a decree for the petitioner. In the appeal to this court there is presented the question of the sufficiency of the petition.

The objection that a petition does not state a cause of action is available at any stage of the proceedings in a cause, and this is as applicable to a petition of the nature of the one in the case at bar as any other, and the right exists during an appeal. It is true this court has decided that an appeal from a judgment sustaining a demurrer to a petition on the ground of a misjoinder of causes of action does not lie to the supreme court. The remedy is by petition in error. To this LAKE, then C. J., dissented. (See *Stewart v. Carter*, 4 Neb. 564.) But it has also been decided that where a general demurrer to a petition in a suit in equity is sustained in the district court, the cause may be taken by appeal to the supreme court and the matter of demurrer heard. (*Arnold v. Baker*, 6 Neb. 134.) In the case at bar the appeal is from the judgment and presents the case for hearing in this court on the pleadings and proofs. (*National Life Ins. Co. v. Martin*, 57 Neb. 350.) That the petition does not state a cause of action, if true, is a quality of the pleading which is inherent and is with and of it in any and all of the proceedings and the question may be raised at any time and in an appeal to this court. (*Thomas v. Franklin*, 42 Neb. 310; *Sage v. City of Plattsmouth*, 48 Neb. 558.) In regard to pleadings in actions similar to the one at bar it has been established by this court: "In an action to avoid a conveyance or mortgage for fraud the facts constituting the fraud must be specifically pleaded; a general allegation of fraud is insufficient." (*Rockford Watch Co. v. Manifold*, 36 Neb. 801.) In the petition in this suit the only allegation relative to the asserted debt of the appellee was of a judgment obtained thereon at a stated date subsequent to the execution and filing of the mortgage which it was sought to have declared void. There was no allegation that the mortgagor had no other property and sufficient to satisfy all his debts, if any existed at that time. There were no statements of the time when appellee became a creditor of the mortgagor, whether prior or subsequent to the date of the mortgage, and if

subsequent, that the instrument was executed with a fraudulent purpose as to subsequent creditors. The allegations of fraud were but general. For rules applicable and within which the pleading must be adjudged insufficient see: *Leasure v. Forquer*, 41 Pac. Rep. [Ore.] 665; *Petree v. Brotherton*, 32 N. E. Rep. [Ind.] 300; *Winstandley v. Stipp*, 32 N. E. Rep. [Ind.] 302; *Burton v. Platter*, 53 Fed. Rep. 901; *Horbach v. Hill*, 5 Sup. Ct. Rep. 81. The judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

TURNER-FRAZER MERCANTILE COMPANY, APPELLEE, V. F. D. RENSHAW & COMPANY ET AL., APPELLANTS.

FILED MAY 3, 1899. No. 8871.

Time to Assail Petition: CANCELLATION OF INSTRUMENTS: ALLEGATIONS OF FRAUD.

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

M. B. C. True, for appellants.

T. Appelget, contra.

HARRISON, C. J.

This case is governed by the decision in the case of *Kemper v. Renshaw*, 58 Neb. 513, and the judgment must be reversed and the action dismissed.

REVERSED AND DISMISSED.

SYMNS GROCERY COMPANY V. SNOW BROTHERS.

FILED MAY 3, 1899. NO. 8894.

1. **Attachment:** MOTION TO DISSOLVE: RIGHTS OF DEFENDANT. A defendant in an attachment proceeding may move to discharge the attachment although he may have disposed of his entire interest in the property, or, for other reasons, at the time may have no further interest therein.
2. **Order Dissolving Attachment:** REVIEW. The finding and order of the district court determined against the clear and decisive preponderance of the evidence; hence reversed.

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

G. Norberg and *Hall, St. Clair & Roberts*, for plaintiff in error.

Rhea Bros. & Manatt and *S. A. Dravo, contra.*

HARRISON, C. J.

E. H. Snow and W. S. Snow, brothers, who were in partnership and in the general mercantile business in Holdrege on June 15, 1895, executed three chattel mortgages, each of which purported to incumber the entire stock of merchandise then in the firm's business room or rooms at the place we have indicated. One of the mortgages was in favor of the plaintiff in this action and the amount stated in it was $1,479.41. One was to the United States National Bank of Holdrege, the sum named in it being $2,400. Another was made to S. A. Parker, an uncle of the brothers, and the expressed consideration was $2,774.75. The firm also on the same day conveyed a piece of city property to one J. J. Parker, who immediately transferred it to Bertina Snow, the wife of W. S. Snow, one of the members of the firm. The real estate thus conveyed was the only property of that nature the title to which then rested in the partnership, or rather

was of record in its name. The mortgages were executed in the office of a firm of attorneys in the city about 4 o'clock P. M. of the day and were left with the attorneys to be filed. The plaintiff company and the bank neither had any knowledge of the execution of the mortgage to it, and when such knowledge was received did not accept the action apparently performed for its benefit and in its behalf. Each instituted a suit, in which a writ of attachment was procured to issue and was levied on the stock of merchandise by the officer to whom it was directed and delivered. At the time of the execution of the mortgages the firm of Snow Bros. was indebted to the plaintiff in the sum of $1,510.29; to the bank, $2,400; the claim of the uncle, S. A. Parker, was $2,774.75; indebtedness to other creditors, about $1,000; total debts, about $7,685.04. The value of the stock of merchandise was $4,900. For S. A. Parker there was commenced an action of replevin, and under the writ therein issued possession of the stock of goods was taken and delivered to him. There was a trial of the replevin action, but prior to that trial or a hearing of the attachment portion of the case at bar Parker had foreclosed the chattel mortgage on the stock, offered the whole of the merchandise for sale, and as a whole, and at the sale bid in the stock for about $2,600. He made sufficient sales from it afterwards to realize therefrom about $1,100, and then turned it over to Hattie A. Snow, the wife of E. H. Snow. In consideration of the transfer to her she gave S. A. Parker her notes aggregating $4,900. She, subsequent to the deal by which she gained possession of the goods, purchased the claim of the United States National Bank against Snow Bros. in the amount of $2,400, for which she paid $1,800. For this latter amount she gave her note to the bank.

The ground for attachment in this action was stated in the affidavit as follows: "That the defendants have sold, conveyed, and otherwise disposed of their property with intent to cheat and defraud their creditors and to

hinder and delay them in the collection of their debts, and that defendants are about to sell and convey and dispose of their property with fraudulent intent." There was filed in the action what was styled an "Answer and Motion," which was verified positively and was also made to perform the office of an affidavit in denial of the assertions in the affidavit for attachment. It was objected to as not being sufficient, either as an affidavit or a motion. There was also an objection that the plaintiff had not been notified of any hearing of a motion to dissolve the attachment. These matters we shall pass over and examine into what was developed at the hearing of what at least was treated as a motion to dissolve the attachment.

As a result of the hearing the attachment was dissolved. The plaintiff complains that the defendants should not have been allowed to attack the attachment, since prior to the time of the attack they had transferred the property and had no longer its ownership or possession. This contention cannot prevail. The defendants could be heard to move the discharge of the attachment on the ground of the falsity of the affidavit upon which it was predicated. (*McCord v. Bowen*, 51 Neb. 247; *Grimes v. Farrington*, 19 Neb. 44; *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb. 863; *Dayton Spice-Mills Co. v. Sloan*, 49 Neb. 622; *Kountze v. Scott*, 52 Neb. 460; *South Park Improvement Co. v. Baker*, 51 Neb. 392.)

It is urged that upon the evidence adduced the trial court should have sustained the attachment; that its decision is clearly wrong and not supported by the evidence. S. A. Parker, the uncle of the two brothers, the members of the firm, was called as a witness, and after stating certain facts in regard to the indebtedness of the firm to him, how it was incurred, etc., further testified of the execution and delivery of the chattel mortgage on the stock of goods by the firm to him, the subsequent foreclosure of the mortgage, inclusive of the sale of the goods and his bid therefor, also of an attempt to sell the stock to an Iowa man, and further as follows:

"Q. What effort did you make to dispose of the goods while you were selling them, if any?

A. After I got the goods the First National Bank,—one of the members, the president or cashier,—had a conversation with me in regard to having the goods purchased—

Q. The First National or United States National?

A. The United States National—to let Eugene H. Snow and wife take the goods and sell them out. They said that he could manage the goods and get a large amount out of them. I told them I was willing to do that, provided they would advance me a thousand dollars on my claim and I would let the rest stand and take the rest out of the goods. They said, "No, you ought to prorate with us, and if you will do that we will let Mr. and Mrs. Eugene H. Snow have the goods and sell them out." They urged me to do that with them and the Symns Grocery Company, the three together, and, by the way, Mr. Norburg had some talk with me about it. I told them I could not do that, but I would take part of mine and let the rest come out as they could. This same Iowa man, I kept him here about a week to try to sell to him, but he went away without purchasing, and decided that he would not give what I wanted to make on the goods. During this time Eugene Snow and W. S. Snow says, "We don't want you to sell these goods to the Iowa man unless he will give more than enough to pay your claim." I said, "I could not get enough to pay me," but they says, "We must have more than that out of it. We don't want the United States Bank to lose." I made up my mind I would not sell it unless I could get something out of it besides my claim. I proposed to take the goods and sell them out to pay me first and the Symns Grocery Company. I talked to the bank, and they said, "If you do anything, let Eugene Snow and his wife take it;" so I decided to drop the other matter. Then I tried to get Mr. Snow to propose it to her, and he finally did. I went up and talked with her in regard to it, and they went down and talked with the bank in regard to this matter. I

tried to get a compromise that whatever amount they should pay me should go to the United States Bank and Symns Grocery Company, and we tried to figure out how much of a percentage they could figure on the debts. The Symns Grocery Company would not accept. I think at that time they were going to pay them about twenty-three hundred dollars on their claim, but they finally refused. Mr. W. S. Snow said, "I have a friend that I think will buy the goods and put me in charge of them." I says, "See what you can do." He came back and says, "We can pay you so much money and give you security for the rest of your claim, and we will sell the goods and every dollar shall be turned in to pay first the United States Bank and then the Grocery Company." I said, "What security have I that that will go to pay them?" Each party said, "Don't let the goods go without getting something out of them to pay our debts." So I said, "I wouldn't do it without I could get a guaranty that it would go to pay the debts." The other party wouldn't consent to that; I presume Mr. Snow would. Then I had to go back to Mrs. Snow, and she finally consented in this way: that she would pay me so much for the goods,—with a great deal of reluctance it was too, I assure you;—she would pay me so much for the goods, and first pay my claim, and the balance I should have in a note to hold her that the balance should apply on the balance of the debts. I took it in separate notes that way, so the balance stands the note I held of hers. When certain conditions are complied with regarding those debts, that note is to be returned to her without a cent's payment to me. She consented to it and I turned the goods over to her. During that time I had sold goods up to something in the neighborhood of eleven hundred dollars. I had also taken a bill of goods of my own, which, with the other item I had taken previously, amounted to something like eighty dollars. When I went away Mrs. Snow borrowed eighty dollars of my brother and gave to me, which he wrote since she has paid, leaving one note I took of thir-

teen hundred dollars. I took the note for the balance which then was supposed to be due. I will say that a few bills of expenses I had not got hold of which they were to pay and afterwards settled; for instance, I had not got the printing bill, but they paid afterwards and sent me. The balance coming to me was about seventeen hundred and forty dollars. The rest of the amount was a little less than nineteen hundred dollars, which was the amount that I would conditionally surrender, but I had got to know that the amount would be applied on her debts.

Q. You mean the boys' debts?

A. On the debts of Snow Bros., and it was the request of W. S. Snow that I should request that be done to relieve him.

Q. Those are the notes that have been introduced?

A. I never want a dollar of that amount, but it should be explained to my satisfaction in paying those debts and I am to surrender those notes, there is about a thousand dollars due me on my personal debt.

It also appeared of evidence that two brothers of the Mrs. Snow, who finally held possession of the stock of goods, had, prior to the time of the transactions which are most prominent in this action, loaned to the United States National Bank $10,000, and were quite anxious that the bank should not lose its claim or any part thereof which it had against the firm of Snow Bros., and that they were somewhat active in urging the arrangement of the affair of the transfer of the possession of the stock of goods to Mrs. Snow, because thereby the bank would be materially assisted in the collection of its debt against the firm and be more able to meet its own liabilities.

The course pursued by S. A. Parker, in that after he had obtained a chattel mortgage on the goods, had foreclosed it and at the sale bid in the stock, had been in its possession and selling it at retail, and at the solicitation of the individual members of the firm delivered possession and control to the wife of one of them to be disposed

of to benefit the uncle and the firm, not the wife, is scarcely consistent with true dealing, nor is it the usual manner of conducting a *bona fide* transaction of transfer.

The portion of the evidence which we have quoted, in connection with other facts and circumstances disclosed, lead to a conclusion that supports the affidavit in attachment. The finding and order of the trial court were clearly wrong. The preponderance of evidence against the ruling was strong and decisive. The order is reversed and the district court is directed to reinstate the attachment.

JUDGMENT ACCORDINGLY.

FARMERS & MERCHANTS INSURANCE COMPANY V. IVER JENSEN.

FILED MAY 3, 1899. No. 9877.

1. **Insurance:** TRANSFER OF TITLE: TERMINATION OF CONTRACT. The decisions of points of litigation herein announced in the former opinion, 56 Neb. 284, approved and adhered to.
2. **Statute of Uses.** The statute of uses is not of the law of this state.

REHEARING of case reported in 56 Neb. 284. *Former decision sustained.*

Clark & Allen, for defendant in error:

The statute of uses is applicable. Iver Jensen has, therefore, the legal title to the premises, and the insurance contract is in force. (*State Ins. Co. v. Schreck*, 27 Neb. 527; *Thatcher v. Omans*, 3 Pick. [Mass.] 521; *Marshall v. Fisk*, 6 Mass. 24; *Witham v. Brooner*, 63 Ill. 344; *Helfenstine v. Garrard*, 7 O. 276; *Gorham v. Daniels*, 23 Vt. 610; *Hutchins v. Heywood*, 50 N. H. 491; *Sutton v. Aiken*, 62 Ga. 733; *McCoy v. Monte*, 90 Ind. 441; *Roberts v. Moseley*,

51 Mo. 282; *Pugh v. Hayes*, 113 Mo. 431; *Schaffer v. Lavretta*, 57 Ala. 14.)

Halleck F. Rose and *Wellington H. England*, for plaintiff in error:

It has been the practice for courts of equity to entertain jurisdiction over all trust estates, without regard to the statute of uses, and without distinction between uses and trusts. The statute of uses is not in force in Nebraska. (*Hochne v. Breitkreitz*, 5 Neb. 110; *Bear v. Koenigstein*, 16 Neb. 65; *Jones v. Johnson Harvester Co.*, 8 Neb. 446; *Carter v. Gibson*, 29 Neb. 324; *Thomas v. Churchill*, 48 Neb. 266; *Dailey v. Kinsler*, 35 Neb. 835; *Blodgett v. McMurtry*, 39 Neb. 210; *Leader v. Tierney*, 45 Neb. 753; *Hews v. Kenney*, 43 Neb. 815; *Gorham v. Daniels*, 23 Vt. 609.)

HARRISON, C. J.

In an action instituted in the district court of Saunders county the defendant in error recovered a judgment, which on hearing in an error proceeding in this court was reversed. A motion for a rehearing was sustained, not on the questions decided in the former opinion (56 Neb. 284), but to allow argument as to whether the rule of the statute of uses is in force or is of the law of this state. We are satisfied of the correctness of the former decision, and relative to the points therein determined announce at this time our adherence to what was then stated.

The issues presented by the pleadings in the suit were succinctly set forth in the former opinion, and we will reproduce the statement: "Jensen, in his petition, declared upon an ordinary insurance policy. The insurer interposed as a defense to the action that the contract of insurance provided that it should cease to be in force 'in case any change shall take place in the title * * * of the assured in the above-mentioned property' without the consent of the insurer thereto indorsed on the policy; that after the delivery of the policy the insured—his wife

joining therein—conveyed the real estate on which the insured property was situate, by ordinary warranty deed, to one John H. Jensen, and that the latter, afterward by an ordinary warranty deed, conveyed the insured property to the wife of the insured,—all without the knowledge or consent of the insurer. The insured attempted to meet this defense by a reply admitting the conveyance of the title by the insured to John H. Jensen, and by him to the wife of the insured, but alleging that these conveyances were made in pursuance of an agreement between the insured and his wife that the latter should and would hold the title to the property for the use and benefit of the insured, and subject to his direction and control."

The argument now is that the use by reason of the operation of the rule of law embodied in what is termed "the statute of uses" was executed, and the title to the property was in Iver Jensen; that there was no change of title or interest, and the agreement of the policy of insurance was not violated, and the policy remained in force. The statute of uses is in part as follows: "Where any person or persons stand or be seized * * * of and in any * * * lands, tenements, * * * or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, * * * every such person and persons, and bodies politic, that have or hereafter shall have any such use, confidence, or trust, in fee simple, fee-tail, for term of life, or for years, or otherwise, * * * shall from henceforth stand and be seized, deemed, and adjudged in lawful seisin, estate and possession of and in the same * * * lands, tenements, * * * and hereditaments * * * of and in such like estates as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were or hereafter shall be seized of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be

from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence, or trust, after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust that was in them." (Statutes 27 Henry VIII., ch. 10.)

Counsel for defendant in error gives this exemplification of its effect: "If A, owning real estate, shall convey or will it to B under an agreement between them that, notwithstanding the conveyance, A or some other person or corporation shall have the rents and profits arising from the real estate notwithstanding the conveyance made by A under that agreement, he shall still have the title he had before he made the conveyance."

We deem it scarcely within our province, or necessary herein, if we felt equal to the task, to trace and set forth the evolution of transfers, conveyances of property or titles thereto, from the early, primitive, and simple methods employed down through, and following, the intricacies and complexities which came into being or existence when, as time advanced, the desires, designs, and ingenuities of mankind were drawn into and displayed therein. These may be sought in the commentaries and cases on the subject. Statutes were enacted by the proper bodies, one, and probably the main, aim at least of which was apparently to discountenance and discourage or prohibit what were deemed vicious practices in conveyancing, or rather to avoid the results condemned as pernicious, of the conveyances. One of the statutes was that of uses. It has been said that the doctrine of the statute of uses is in force in most of the United States, either by re-enactment or by adoption; and, where it has been expressly declared not of force, a knowledge of its doctrine is necessary to understand and apply the common or statutory forms of conveyances. (1 Perry, Trusts [4th ed.] sec. 299, in a note to which there are statements of the condition of the law on the subject in many of the states of the Union; Walker, American

Law 311.) In 2 Washburn, Real Property, page 438, it is stated: "It would be difficult to define, with any satisfactory degree of accuracy, the extent to which the doctrine of uses has been applied in the systems of conveyance adopted by the several states of this country. In few, if any, of these are there any prescribed forms of deeds which it is necessary to follow in executing conveyances of lands. In a large proportion of them the form is that of bargain and sale, though other forms which clearly indicate the intention of the grantor to pass the estate are held sufficient." It is further said on page 440: "It may be stated generally, that the cases in which resort has been had to the doctrine of uses have been where the parties, in undertaking to convey lands, have failed to follow the form in use in the state, or have undertaken, by a form borrowed from the common law, to create an interest like a freehold *in futuro*, for instance, which could not be done by construing the conveyance as one deriving its validity from the common law, and resort has been had to the doctrine of uses in order to effectuate the intention of the parties." (See, further, Hill, Trustees [Wharton's ed.] 233, note 4; Kent, Commentaries 299-301.) For an article on "The English Doctrine of Uses, as an Element of the American Law of Conveyance," see 5 Am. Law Reg. 641, and a second article in 6 Am. Law Reg. 65. These citations will suffice, at least, to direct to sources from which a full study of the subject may be made. The statute of uses and other parliamentary acts were modifications of the common law. The common law is composed of ancient maxims and customs. (1 Blackstone's Commentaries [Cooley, 3d ed.] *67.)

A question which is here somewhat pertinent is, what has been adopted or is in force in this country,—the common law, or the common law with statutory modifications? It has been stated by the Massachusetts court generally and particularly in reference to the statute of uses: "The statute of uses being in force in England

when our ancestors came here, they brought it with them, as an existing modification of the common law, and it has always been considered a part of our law." (*Marshall v. Fisk*, 6 Mass. 24.) It has been observed "that English statutes passed before the emigration of our ancestors, applicable to our situation, or in amendment or amelioration of the common law, are part and parcel of the common law of this country." (5 Am. Law Reg. 644, citing 2 Salk. [Eng.] 441, Journal of Congress, October 14, 1774, and 5 Pet. [U. S.] 233.) "Conflicting theories as to the origin of law in the North American colonies have been entertained, but whatever be the true one, it is settled that, speaking broadly, the law of England, as it existed at the time of the colonial settlements, is the basis of the law of all the states, with the single exception of Louisiana. (19 Am. & Eng. Ency. Law 1035, 1036, and notes.) In a decision filed March 30, 1897, it was said by the supreme court of Utah: "While the statute of uses never became a part of the English common law, and has never been adopted by the legislature of this state, the rule of law that vests a passive or naked trust in the person having the use is a part of the common law of this state." (*Henderson v. Adams*, 48 Pac. Rep. 398.) The supreme court of Vermont, in an opinion written by Redfield, J., expressed itself on the subject of the statute of uses, holding it not in force, as follows: "But so far as the conveyance of lands in this state is concerned, it seems to me that our statutes are fully adequate to all the ordinary incidents of the subject, and that in those extraordinary occasions, where the statute of uses might answer a good end, it will be safer, and better every way, to have resort to a court of equity than to introduce a portion of the ancient common-law system of conveying real estate, most of the incidents of which having been materially modified, even in England, since the separation of this country from that. It would become necessary immediately to resort to very extensive legislation in order

to render this addition to our present laws even tolerable. This view is certainly confirmed by the history of our jurisprudence upon this subject. Nothing ever existed in the history of this state calling, in the slightest degree, for the use of such a statute, except in those cases where, by some mistake, the parties have failed fully to effect their intention in the prescribed mode. The statute of uses would no doubt aid somewhat this class of cases. But its original purpose and design had not the remotest bearing, or purpose in that direction even. And to adopt a portion of a system of laws which will in its train very likely draw in the whole for the mere purpose of effecting some collateral purpose in a particular cause seems almost absurd. We entertain no doubt that our system of conveyancing, so different from the English, so simple and intelligible to all, and so intended to be, by means of a thorough system of registry, from the very first, was designed to be entire in itself. And although most of its terms, and many of its forms of deeds even, like that of bargain and sale, derived their meaning and operation, to some extent, from the common law and English statutes, and that of uses among others, yet it was no doubt the purpose of the framers of our laws upon conveyancing to have them 'understanded' of the people without the necessity of resorting to the study of the subject in other quarters. Such has been the practical construction of the subject by all, professional or unprofessional, ever since. With rare exceptions, the profession in this state have never supposed any of the common-law modes of conveyancing could be regarded as in force here. The attempt to bar an entail, in this state, by a common recovery, or the rights of a married woman by a fine, would, I think, strike the profession with some surprise." (*Gorham v. Daniels*, 23 Vt. 607.) In the state of Ohio, in 1826, in an opinion in the case of *Thompson v. Gibson*, 2 O. 339, it was stated: "The court were divided in opinion upon the point whether the statute of uses, 27 Henry VIII., ch. 10, had ever been in

force in Ohio. Two judges held that that statute was in force in Ohio from 1795 to January, 1806, for all the purposes that it was in force in Virginia or England. The other two judges held differently." In 1835 the question was again under consideration by the Ohio court, and the statute was decided not in force at any time in the state. It was said in the opinion: "After a political organization, and the administration of justice by courts, within the state of Ohio, for a period of forty-eight years, we find no traces of the authority of the statute of uses at this time as a rule of property, and no distinction is known in practice between uses and trusts. And none seems necessary, since uses in our construction are not attended with those exceptionable privileges which they possessed in England before the statute, and every quality of trusts is attached to them. Our system of conveyancing, although it has grown out of the English system, does not depend upon the statute of uses, but has taken its form and derives its authority from our own statutes and local usages. Under these circumstances, the recognition of the power of this statute is not only unnecessary, but would be mischievous, by the introduction of new and complex rules of property." (*Helfenstine v. Garrard*, 7 O. 276.)

We presume we are to ascertain whether the statute of uses is a component part of the law of this state. To appropriate some expressions of a quotation in the article in 5 Am. Law Reg. 641: "The consideration of what is reasonable or unreasonable makes no part of this question. We are inquiring now what the law is, not what it ought to be. Reason may be applied to show the impropriety or expediency of a law, but we must have either statute or precedent to show the existence of it. (Junius, Letter 16.)" It has been enacted by our legislative body: "So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the

legislature of this territory is adopted and declared to be law within said territory." (Compiled Statutes, ch. 15.) In terms and ordinary import the foregoing appears to be of the "common law of England" and not of the statutory laws or of the former as modified by the latter. This state has statutory rules for conveyancing which include some directions for construction of instruments. See chapters 32 and 73, Compiled Statutes, section 50 of the latter of which is as follows: "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." This statutory system of conveyancing would seem sufficiently complete within and of itself and to have been intended so, and that this is true seems to have been concluded by the acts and opinions of the people, the practitioners, and the courts. We know of no instance of an authorizedly expressed or recorded opinion to the contrary. It is true that no specific form of conveyance is prescribed, and doubtless many or any sufficient may be employed, and it is also safe to say that in construing any form which may be adopted by any parties any and all rules generally applicable to like forms of conveyancing in the ascertainment of the intent may be pertinent, regardless of the doctrines in which the rules may have originated, but the statute of uses, in its direct action and execution of a use and absolute establishment of the results of conveyances, is not of the law of our system of conveyancing as a statute or law. It has not been and is not recognized. In the case at bar its effect, if allowed to prevail, would be to declare that the parties by their conveyances had accomplished just the opposite of what they therein asserted in unequivocal terms that they intended or did. If we thought that such was the law, it would be our duty so to say, but believing differently we must so state. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

CLINTON SMITH V. STATE OF NEBRASKA.

FILED MAY 3, 1899. NO. 10603.

1. **Assault:** INTENT TO INFLICT GREAT BODILY INJURY: INFORMATION. The effect of section 17*b* of the Criminal Code, relative to an assault with intent to inflict great bodily injury, was to create a new and substantive crime,—one purely statutory,—and it is sufficient in an information to charge the crime in the language of the statute without a statement of the means with which the assault was committed. *Smith v. State*, 34 Neb. 689; *Murphey v. State*, 43 Neb. 34.)

2. ———: ———. The term "assault," used without qualification, has a clear and established import in criminal law.

3. ———: ———: QUESTION FOR JURY. Whether the particular intent elemental of a charge of assault with intent to inflict great bodily injury has been shown is generally a question of fact for the jury.

4. **Instructions:** CRIMINAL LAW. It is not available matter of complaint for a person, at whose request a jury has been instructed on a specific point, that the court gave an instruction on his own motion on the same subject.

5. **Assault:** CONVICTION: EVIDENCE. The verdict *held* not warranted and sustained by the evidence.

ERROR to the district court for Butler county. Tried below before SEDGWICK, J. *Reversed.*

E. R. Dean, for plaintiff in error.

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

HARRISON, C. J.

An information was filed in the district court of Butler county which contained two counts, in the first of which the plaintiff in error was charged with an assault upon Charles T. Jenkins with intent to kill and murder him, and in the second count the accusation was of an assault upon the same person with intent to do him great bodily injury. The accused on arraignment pleaded not guilty,

and a trial resulted in a verdict of his guilt of the charge in the second count of the information and not guilty as to the first. The sentence was of imprisonment in the penitentiary for a term of one year.

It is urged that the information is insufficient; this refers to the count of the charge of which the accused was determined guilty. The offense was charged in the language of the statute. The exact question here raised was under consideration and was the subject of decision by this court in the case of *Murphey v. State*, 43 Neb. 34, and it was then announced that a complaint in which the offense was alleged in the language of the statute was sufficient. We are now satisfied that the correct rule was then stated and will adhere to it.

It is argued that the section 17*b* of the Criminal Code, upon which the prosecution was based, is defective, in that in outlining the offense the word "assault" is used and the acts which will constitute it are not set forth; and further, that an "assault" is not specifically defined in our Code. The word "assault" has an exact and well-known general import when used in the sense in which it appears in the section of the Criminal Code to which reference has been made. The applicable definition is given in the text-books on criminal law and the law dictionaries. The signification which it has in criminal law is the one which must be accorded it in the portion of the statutes herein drawn into actual use.

It is contended that the trial court erred in the submission in its instructions to the jury of the question of the guilt or innocence of the accused of the crime charged in the first count of the information, for the reason that there was no evidence which tended to support the allegations of said first count. For the accused there was requested and given an instruction which challenged the attention of the jury to the guilt or innocence of the party on trial of the crime alleged in the first count of the information. This being true, he cannot be heard to complain that the court directed the attention of the

jury to the same subject. (*Richards v. Borowsky*, 39 Neb. 774; *Jonasen v. Kennedy*, 39 Neb. 313; *City of Omaha v. Richards*, 49 Neb. 244.)

It is strenuously urged that the evidence is insufficient to sustain the verdict. Relative to the main elemental facts of the occurrences upon which the charge of the information was predicated there was no conflict in the evidence, but of some of the incidents or acts there were disagreements or differences. We have given the evidence a careful examination and do not deem it necessary to quote from it or summarize all of it here. We will but refer specifically to a few of the main facts. It appeared that the accused and his son had, each in charge of a team of horses, gone from the farm to the market with a load of wheat and were returning home when they discovered two parties, one of them, Charles T. Jenkins, leading and driving along the highway some live stock (cows and colts), of which the accused evidently claimed ownership or right of possession. He told the son to follow the parties and keep them in sight. He went home, unhitched the team, hitched one horse to a "road cart," in which he had placed, or had procured it to be done, a shotgun, jumped into the cart, and drove along the road after the parties who had the stock until he overtook them, when he alighted from the cart, took therefrom the shotgun, and accosted Jenkins, who was walking along the highway behind the stock, in the following language. This is of the accused's testimony: "I says, 'Where are you going with this stock?' I says, 'You black son of a bitch,'" and demanded that the stock be released. There was more similar language on the part of the accused, but no direct verbal threats of the doing of any specific acts. Smith punched Jenkins on the legs and in the sides with the barrel end of the gun. Jenkins expressed himself as not being able to stand "that kind of an argument," and the stock was released. Smith, so Jenkins stated, then said: "Now, you son of a bitch, take this stuff back where you got it," and commenced "jabbing" him again with the

gun, and it further appears that during the continuance of the affair, at a time when Jenkins had hold of the gun, the accused used his fist and struck Jenkins a number of times on the head and in the face. The foregoing will serve to convey a general idea of what happened at the time it is alleged in the information herein the crime of which he was adjudged guilty was committed by the plaintiff in error. The main point is in regard to the appearance of the intent on the part of the accused to inflict great bodily injury upon the party alleged to have been assaulted with such intent. It has been stated by this court: "The term 'great bodily injury,' as there employed [referring to the statute], is not susceptible of a precise definition, but implies an injury of a graver and more serious character than an ordinary battery; and whether a particular case is within the meaning of the statute is generally a question of fact for the jury." (*Murphey v. State, supra.* See, also, a discussion of the subject of intention in the opinion in *Krchnavy v. State*, 43 Neb. 337.) A careful consideration of all the evidence convinces us that there was not sufficient therein to warrant the finding by the jury that there was existent the intent which is a requisite of the statutory crime, of the guilt of which the verdict convicted the accused. The record before us discloses an aggravated assault and battery by him, but not an assault with intent to do great bodily injury; hence the sentence must be reversed and the cause remanded.

REVERSED AND REMANDED.

DAVID ALBRIGHT ET AL. V. HERMAN A. PETERS.

FILED MAY 3, 1899. NO. 8875.

1. **Review**: CONFLICTING EVIDENCE. A finding will not be disturbed when based upon conflicting evidence.

2. ———: DIRECTING VERDICT. To review the action of the trial court

in refusing to direct a verdict for a party the attention of the trial court must have been challenged thereto in the motion for a new trial.

3. ———: ASSIGNMENTS OF ERROR. An assignment in a motion for a new trial, of "errors of law occurring at the trial, and duly excepted to," is sufficient to entitle a party to review the rulings of the trial court on the admission of evidence.

4. **Admission of Evidence: HARMLESS ERROR.** The admission of immaterial evidence is not ground for reversal where it does not prejudice the party complaining.

5. **Excessive Damages.** Damages awarded by the jury *held* to be excessive.

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

Thomas L. Redlon, for plaintiffs in error.

R. C. Noleman, contra.

NORVAL, J.

Herman A. Peters brought replevin before a justice of the peace to recover eight head of cattle detained by the defendant David Albright. The McCormick Harvesting Machine Company intervened, and it was made a party defendant, claiming the property under a chattel mortgage executed by one George Dublin, plaintiff's grantor. Peters had a judgment before the justice, and the defendants prosecuted an appeal to the district court, where a verdict was returned for plaintiff, the jury assessing his damages for the wrongful detention of the property at $10. The defendants filed separate motions for a new trial, which were overruled, and they have prosecuted a joint petition in error from the judgment entered on the verdict.

The first ground urged for a reversal is that the verdict is contrary to the evidence. The record discloses that one George Dublin formerly owned the stock in controversy, and while such owner he traded the same during

February or March, 1893, to the plaintiff for a mare. The cattle were left in the possession of Dublin, who, under instructions from Peters, placed the same in the herd of the defendant Albright, where they remained until the present suit was instituted. Subsequently, on May 20, 1893, Dublin mortgaged the property to the McCormick Harvesting Machine Company. Before action, the evidence tends to show, plaintiff tendered and offered to Albright the amount due him for herding, and yet he refused to surrender the cattle, on the sole ground that he had been notified not to do so by the representative or agent of the said mortgagee. The evidence is clear that plaintiff was the owner of the property and was entitled to the possession thereof at the inception of the action. It is insisted that the verdict is supported by the evidence only as to eight head of the cattle. We do not think this position is sound. The evidence was ample to authorize the jury in finding that plaintiff was the owner of all the stock seized under the writ of replevin. The rule is that a verdict founded upon conflicting evidence will not be molested on review, if sustained by sufficient evidence.

At the close of plaintiff's testimony the defendants asked the court below to instruct the jury to return a verdict in their favor, which request was denied, and the ruling is assigned as error. The decision cannot be considered at this time for the reason the attention of the trial court was not called thereto in the motion for a new trial.

The plaintiff introduced in evidence, over the objection of the defendants, a written order upon Albright, signed by George Dublin, to deliver the cattle in controversy to Mr. Peters, and complaint is made of the ruling in this court. Counsel for plaintiff argues that the question is not properly before us, because not covered by the motion for a new trial. The third ground of such motion was "errors of law occurring at the trial, and duly excepted to." This was sufficient to entitle the defendant to have reviewed the various rulings of the trial court on the admission or rejection of evidence. (*Labaree v. Klosterman*,

33 Neb. 150; *Riverside Coal Co. v. Holmes*, 36 Neb. 858.) The defendants could not have been prejudiced by the admission in evidence of the order in question. Prejudicial error alone will work the reversal of a judgment. (*High v. Merchants Bank*, 6 Neb. 155; *Folden v. State*, 13 Neb. 328; *Wilson v. Young*, 15 Neb. 627.)

There was no reversible error in the refusal of the court to eliminate from the record the testimony of the witnesses Kemp and Healy called by the plaintiff to impeach the defendants' witness, George Dublin. It was shown by the examination of Kemp and Healy that each was, and had been for several years, acquainted with the general reputation of Dublin for truth and veracity where he resided and were competent to testify upon the subject upon which each was interrogated.

A perusal of the evidence discloses that the damages established upon the trial did not exceed $6, while the amount awarded by the jury was $10. The damages allowed are, therefore, excessive, and the judgment will be accordingly reversed, unless the plaintiff in thirty days file with the clerk of this court a remittitur from the judgment of the sum of $4. In case such remittitur is so filed the judgment will be affirmed for the sum of $6.

JUDGMENT ACCORDINGLY.

JASPER F. WALKER V. HOMER J. ALLEN.

FILED MAY 3, 1899. No. 8883.

1. **Instructions: EXCEPTIONS: REVIEW.** An instruction will not be reviewed where no exception was taken thereto at the time the charge was read to the jury.

2. **Review Without Bill of Exceptions.** Where a bill of exceptions has been quashed, no question can be considered on review a determination of which involves an examination of the evidence.

3. **Assignments of Error.** An assignment in a petition in error for the denial of a motion for a new trial is too indefinite for consideration, where such motion contains several different grounds.

ERROR from the district court of Buffalo county. Tried below before SINCLAIR, J. *Affirmed.*

J. F. Walker, for plaintiff in error.

Marston & Marston, contra.

NORVAL, J.

This suit was to recover the sum of $40 claimed to be due the plaintiff as commissions on the sale of real estate. The petition was answered by a general denial, and a trial in the court below resulted in a verdict and judgment for the defendant, to reverse which is the object of this proceeding.

The first assignment of error is based upon the giving of the following instruction: "4. You are further instructed that if you find from the evidence that plaintiff had a customer who was willing to buy it on the terms which he was authorized to sell, then the defendant is liable for the agreed commission, notwithstanding the fact that the defendant made the sale himself." A review of the foregoing instruction is precluded, for the reason no exception was taken thereto by either party in the court below. (*Warrick v. Rounds*, 17 Neb. 412; *Nyce v. Shaffer*, 20 Neb. 507; *Schroeder v. Rinehard*, 25 Neb. 75; *Darner v. Daggett*, 35 Neb. 696; *Bouvier v. Stricklett*, 40 Neb. 792; *City of Omaha v. McGavock*, 47 Neb. 313; *Lowe v. Vaughan*, 48 Neb. 651; *Gravely v. State*, 45 Neb. 878.)

Complaint is made of the refusal of the court to give two instructions tendered by the plaintiff. These instructions cannot be considered, although proper exceptions were taken at the time they were refused, for the reason the bill of exceptions settled and allowed in the case, on motion of the defendant, has been quashed. In the ab-

sence of a bill of exceptions it is impossible to determine whether the proposed instructions were applicable to the evidence adduced on the trial. (*City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861.) For the reason just stated the sufficiency of the evidence to sustain the verdict cannot be determined.

The remaining assignment in the petition in error is that "the court erred in overruling a motion for a new trial." The assignment is too indefinite to present a question for review, because the motion for a new trial assigns several distinct grounds therefor, and the assignment of error in this court omits to specify to which one of the various points made by the motion the assignment was intended to apply. (*Glaze v. Parcel*, 40 Neb. 732; *Wiseman v. Zeigler*, 41 Neb. 886; *Wax v. State*, 43 Neb. 19; *Moore v. Hubbard*, 45 Neb. 612; *Conger v. Dodd*, 45 Neb. 36.) The judgment is

AFFIRMED.

CHARLES T. BURCHARD, EXECUTOR, APPELLEE, V. CHARLES H. WALTHER, APPELLANT.

FILED MAY 3, 1899. No. 8869.

Deed: RESERVATION: CONSTRUCTION. A reservation in a deed is ineffectual to create title in a stranger to the conveyance, but may, when so intended by the parties, operate as an exception to the grant.

APPEAL from the district court of Richardson county. Heard below before STULL, J. *Reversed.*

F. Martin, for appellant.

References: *Craig v. Wells*, 1 Kern. [N. Y.] 323; *Hornbeck v. Westbrook*, 9 Johns. [N. Y.] 73; *Pinkham v. Pinkham*, 55 Neb. 729.

C. Gillespie and *Edwin Falloon, contra.*

References: *Hildreth v. Eliot*, 25 Mass. 296; *Martin v.*

Cook, 60 N. W. Rep. [Mich.] 679; *Hurd v. Hurd*, 20 N. W. Rep. [Ia.] 740; *Bassett v. Budlong*, 43 N. W. Rep. [Mich.] 984; *Richardson v. Palmer*, 38 N. H. 212; *Pool v. Blakie*, 53 Ill. 495; *Riggin v. Love*, 72 Ill. 553; *Bodine v. Arthur*, 14 S. W. Rep. [Ky.] 904; *Smith v. Brown*, 1 S. W. Rep. [Tex.] 573; *Eisley v. Spooner*, 23 Neb. 470; *Rupert v. Penner*, 35 Neb. 588; *McCulloch v. Valentine*, 24 Neb. 216; *Jackson v. Phillips*, 57 Neb. 189; *Foxcroft v. Mallett*, 4 How. [U. S.] 370; *Trafton v. Hawes*, 102 Mass. 533; *Viney v. Abbott*, 109 Mass. 300; *Walworth v. Abel*, 52 Pa. St. 370; *Williams v. Sneed*, 3 Coldw. [Tenn.] 533; *Persse v. Persse*, 7 Cl. & Fin. [Eng.] 279; *Stewart v. Stewart*, 6 Cl. & Fin. [Eng.] 911; *Issitt v. Dewey*, 47 Neb. 196; *Brittain v. Work*, 13 Neb. 347; *Wait v. Baldwin*, 27 N. W. Rep. [Mich.] 697; *State v. Davis*, 96 Ind. 539; *Singer v. Scheible*, 10 N. E. Rep. [Ind.] 616; *Spencer v. Robbins*, 5 N. E. Rep. [Ind.] 726; *Pinkham v. Pinkham*, 55 Neb. 729; *Hayden v. Hale*, 57 Neb. 349.

NORVAL, J.

This action was instituted in the court below by Catherine Walther to have adjudicated whether she possessed a life estate in the undivided one-third of certain portions of lots 7 and 8, in block 58, in Falls City, and to recover the value of one-third of the rents of such real estate. On the trial a decree was entered in her favor as prayed, and for the sum of $72 as rents. The defendant appeals. Subsequently plaintiff died, and the cause has been revived in this court in the name of Charles T. Burchard, executor of her last will and testament. There is no controversy over the facts, and they may be briefly summarized as follows: On May 10, 1883, one J. P. C. Walther, being the owner of the real estate in controversy, executed and delivered to his granddaughter, Julia E. C. Walther, without any compensation therefor, a warranty deed for the land, containing this clause: "Said J. P. C. Walther reserves possession and life estate in the premises during his natural life, and his son, Charles F. Walther, after

him, and to Catherine, wife of Charles F. Walther, one-third of said interest during her life, in case she survives both J. P. C. Walther and C. F. Walther." This deed was recorded April 3, 1889. The said J. P. C. Walther, on June 10, 1885, executed another voluntary conveyance to the same property to his said granddaughter, she in the meantime having married one Jacob B. Lippold. This deed stipulated that the grantor, "J. P. C. Walther, reserves his life estate, possession, rents, and profits during his natural life; after his demise C. F. Walther shall have all the rights reserved for J. P. C. Walther, and if C. F. Walther's wife, Catherine, shall survive both J. P. C. Walther and C. F. Walther, she shall have one-third of the interest so reserved during her natural lifetime only." This deed was placed on record on May 10, 1887. The grantor remained in the possession and occupancy of the premises from the date of the execution of the first deed until April 5, 1889. On said last-named date the grantee in both of said deeds, with her husband, executed and delivered a quitclaim deed to the property to said J. P. C. Walther, who on April 8, 1889, made a warranty deed of the premises in controversy to the defendant herein, Charles H. Walther, which was recorded on the same day. Charles F. Walther named in the two deeds first above mentioned, as well as the grantor, J. P. C. Walther, died prior to the bringing of this suit, and it is asserted that a contingent estate in the property was vested in the said Catherine Walther by reason of the provision in said deeds already quoted, which contingent estate, it is claimed, became absolute upon the death of the said J. P. C. and Charles F. Walther.

The important question presented is whether the deeds executed by the said J. P. C. Walther to his granddaughter conveyed a contingent estate in the property to the said Catherine Walther. If any estate passed to her, it was by virtue of the clauses in the deeds heretofore quoted. It will be observed that in each instrument possession of the property, and a life estate therein, were re-

served in the grantor, and also there was a reservation, or exception, in favor of Catherine Walther of "one-third of said interest during her life, in case she survives both J. P. C. Walther and C. F. Walther." This provision created no present estate in Catherine Walther, which proposition no one will dispute. Neither was a contingent interest in the property conveyed to her. She was not a party to either deed, but was an entire stranger thereto. J. P. C. Walther was the sole grantor, and his granddaughter, Julia, was the only grantee. A reservation in a deed must be to the grantor, or to one of them, where there are two or more, but an estate cannot be created in a stranger to a deed by a reservation or recital therein. (9 Am. & Eng. Ency. Law [2d ed.] 142; *Whitlock's Case*, 8 Coke [Eng.] 71; *Hall v. Hall*, 66 Miss. 35; *Gould v. Howe*, 131 Ill. 496.) But if the clause in each deed should be construed as an exception, and not as a reservation, plaintiff would be in no better situation, for an exception in a deed is nothing more than a qualification, by which some part of the estate is not conveyed, which would have passed to the grantee but for the exception. (*Case v. Haight*, 3 Wend. [N. Y.] 635; *Biles v. Tacoma, O. & G. H. R. Co.*, 5 Wash. 511.) "Exceptions and reservations are created by and for the benefit of a grantor or his heirs and not for a stranger." (6 Am. & Eng. Ency. Law [2d ed.] 515, and cases there cited.) The cases cited in brief of counsel for plaintiff are not in conflict with what we have stated the rule to be. We will briefly refer to the leading authorities called to our attention.

In *Hurd v. Hurd*, 20 N. W. Rep. [Ia.] 740, a reservation in the deed of a grantor of "a life estate from year to year" during the natural life of herself and husband was held to be a reservation of an estate continuing during their joint lives. That was a contest between the grantor and grantee. It is an authority for the position that a contingent life estate vested in the husband of the grantor.

In *Bassett v. Budlong*, 43 N. W. Rep. [Mich.] 984, a hus-

band quitclaimed his farm to his wife, with a reservation that no conveyance should be made by her without his written consent, or his joining, and that the title should revert to the husband on the death of the wife. It was held, from the face of the deed and surrounding circumstances, that the effect of the reservation was to leave the title to the survivor.

The decision upon which most reliance is placed by the plaintiff is *Martin v. Cook*, 60 N. W. Rep. [Mich.] 679. There the clause was inserted in the deed made by William H. Martin, reserving to the grantor and his daughter named an estate for the lives of both in the property. The clause was held as constituting an exception to the grant in the deed; in other words, that the fee passed to the grantee by the deed subject to an estate for the lives of both the grantee and his daughter. But the court did not decide in that case that the deed passed to the daughter a contingent life estate in the property and that the same became absolute on the death of the father. The *quantum* of the estate which passed to the grantee was determined. McGrath, C. J., in delivering the opinion of the court, observed: "The language here used must, we think, be treated as excepting from the grant the use and enjoyment of the land conveyed during the lives of both father and daughter, as effectually as though that reservation had been for a fixed term of years, extending beyond the life of the father, and at the death of the father, the right to that use for the unexpired portion of the period must be held to have descended to the heirs of William H. Martin. This construction gives to the grantee the estate which both parties to the instrument evidently intended that he should take. It does not appear from the record that petitioner is the sole heir. The record will therefore be remanded, with directions to set aside the order heretofore entered, for the proper determining that question, and the entry of an order, after such hearing, in accordance with this opinion." It is clear from the language

quoted that the daughter acquired no life estate by virtue of the reservation in the deed, but that as an heir of the grantor, on his death, she took an interest in the estate excepted from the grant. Applying the principle underlying this decision to the case at bar, plaintiff is not entitled to recovery. J. P. C. Walther conveyed to his granddaughter by the two deeds the fee subject to the estate for the lives of the grantor and Charles F. Walther and Catherine Walther, which estate was expressly excepted and reserved from the grant. But as Charles F. and Catherine Walther were strangers to the conveyance, the reservation in their favor was void, and no estate, contingent or otherwise, passed to them, but the estate excepted from the grant remained in the grantor, J. P. C. Walther, and when his granddaughter reconveyed the property to him, he became vested with the entire estate or title, and the same passed to the defendant by the deed from J. P. C. Walther to him. It follows, from the construction we have given the clauses contained in the deeds under which Catherine Walther claims, the decree should be reversed and the cause remanded.

REVERSED AND REMANDED.

ISAAC CHAPEL V. FRANKLIN COUNTY.

FILED MAY 3, 1899. NO. 8884.

1. **Review**: INSUFFICIENCY OF PETITION: HARMLESS ERROR. Where a petition fails to state a cause of action and a trial results in a verdict and judgment in favor of the defendant, no error committed by the court in submitting the issues to the jury will warrant a reversal.

2. **Payment of Excessive Taxes**: RECOVERY. One who has paid personal taxes under protest cannot maintain an action to recover back the money so paid on the ground that the levy was made upon an excessive assessment.

3. **Taxation**: EQUALIZATION: RES JUDICATA. Where a party complain-

ing of an excessive assessment presents his grievance to the county board of equalization, he is conclusively bound by the order of such board fixing the value of his property for the purposes of taxation, unless he secures a reversal or modification of such order by the district court.

ERROR from the district court of Franklin county. Tried below before BEALL, J. *Affirmed.*

E. A. Fletcher, for plaintiff in error.

O. T. Patterson, contra.

SULLIVAN, J.

This action was brought by Isaac Chapel to recover from Franklin county the sum of $103.30 paid under protest in satisfaction of personal taxes which he claims were improperly charged against him for the year 1893. The question in controversy at the trial was the correctness of the plaintiff's assessment as modified by the county board of equalization. The jury found in favor of the defendant, and judgment was rendered on the verdict. The judgment is right and must be affirmed, regardless of any errors that may have intervened at the trial. The petition does not state a cause of action, and the evidence affirmatively shows that Chapel has no valid claim against the county. The petition was not framed on the theory that the tax in question was levied upon property not subject to taxation, or that there had been a double assessment, or that the levy was made for an illegal or unauthorized purpose, but upon the assumption that the assessment was excessive and unjust. The record, which is in a most unsatisfactory condition, does not show the valuation of Chapel's personalty as fixed by the assessor, but it does show that upon due notice, and after a full hearing, the assessment was increased by the board of equalization for Turkey Creek Township. It also shows that Chapel, being dissatisfied with the action of the town board, presented his grievance to the county board of equalization,

where a hearing was had and an order made reducing the assessment from $1,718 to $1,546. This order, never having been reversed, vacated, or modified, fixed conclusively the value of plaintiff's personal estate for the purposes of taxation. Being a judicial order, it might have been reviewed in the district court, but it is not subject to collateral attack. (*Sioux City & P. R. Co. v. Washington County*, 3 Neb. 30; *McGee v. State*, 32 Neb. 149.) The precise question presented for decision in this case was tried and determined by the county board of equalization, and the plaintiff, having chosen to abide by that decision, cannot now maintain an original action on the theory that the controversy was not correctly adjudicated. The order of the supervisors of Franklin county indisputably established the correctness of the plaintiff's assessment. The judgment is

AFFIRMED.

CHRISTOPHER C. DEMARY, APPELLANT, V. JENS A. CARLSON ET AL., COUNTY COMMISSIONERS OF HOWARD COUNTY, APPELLEES.

FILED MAY 3, 1899. No. 8845.

1. **Section-Line Roads.** By section 46, chapter 78, Compiled Statutes 1897, all section lines are declared to be public roads, and the county board of each county, acting within its jurisdiction, may, whenever the public good requires it, open such roads to travel and cause obstructions thereon to be removed.
2. **Conflicting Evidence: REVIEW.** A finding of the district court upon conflicting evidence will not be disturbed unless clearly wrong.

APPEAL from the district court of Howard county. Heard below before KENDALL, J. *Affirmed.*

Bell & Robinson, for appellant.

Frank J. Taylor and *J. N. Paul, contra.*

SULLIVAN, J.

In 1874 Mr. Tyler acquired a pre-emptive title to the south half of the southwest quarter and the southwest quarter of the southeast quarter of section 8, township 13 north, range 9 west of the sixth principal meridian, in Howard county. The government survey of the section was made in 1867. In 1876 Robert Harvey, county surveyor, re-established the quarter corner on the southern boundary of the section, and in doing so followed the directions indicated in the field-notes of the government survey. This resulted in locating the corner about six rods north of a direct line between the southeast and southwest corners of the section. In 1877 Tyler transferred his pre-emption to Christopher C. Demary, who has ever since occupied the premises as a family homestead. In the spring of 1885 Demary employed Thompson McNabb, the then county surveyor, to run the south line of section 8 with the view of establishing thereon a public road. McNabb, instead of following the government field-notes, found the government corners of the section and ran a straight line between them. On this survey the road, without any affirmative action on the part of the public authorities, was opened for travel, and along its northern line Demary planted trees and set out an Osage orange hedge. In 1894 the appellees, having conceded jurisdiction in such matters, were proceeding to open a road along the line of the Harvey survey, when appellant brought this action against them to obtain a perpetual injunction. The issues joined were tried to the court and a judgment rendered in favor of the defendants. The plaintiff brings the record here for review by appeal.

There is no question of estoppel raised by the pleadings, and, since the county board had undoubted authority to open all section lines for use as public roads, the only question in controversy is the true location of the south line of section 8. The finding of the trial court in favor of the defendants is sustained by sufficient evidence and

cannot be disturbed. We come reluctantly to this conclusion, because we are impressed with the strong natural equity of plaintiff's case. Owing to circumstances which it is needless to detail, the effect of the judgment is to enable Howard county to appropriate a valuable strip of Demary's land for public use without any compensation whatever. This is unfortunate, but it is unavoidable. A court of equity administers relief only in conformity with settled principles. It cannot interfere in every case where injustice has been done or is threatened. The chancellor's conscience is not the law of the land. The judgment is

AFFIRMED.

HARRISON, C. J., not sitting.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE, V. FIRST NATIONAL BANK OF OMAHA, APPELLANT.

FILED MAY 3, 1899. No. 8840.

1. **Trial Without Jury:** EVIDENCE: REVIEW. Where a cause was tried to the court without a jury, it will be presumed that only competent evidence was considered in reaching a conclusion.
2. **Conflicting Evidence:** REVIEW. Where the evidence is equivocal or fairly conflicting, the findings of the trial court are conclusive.
3. **Trusts:** PURCHASE OF LAND: TITLE. Where one person buys land in his own name, but with the money, and for the use, of another, the latter is the equitable owner of the property and the former holds the title in trust.
4. ———: STATUTE OF FRAUDS: PAROL EVIDENCE. A resulting trust is not within the statute of frauds, and parol testimony is admissible to prove the purchase for, and payment of the consideration by, the beneficiary, even though the deed recites that the consideration was paid by the grantee.
5. **Lien of Attachment.** An attachment or judgment lien on land binds only the actual interest of the attachment or judgment debtor therein.

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

Winfield S. Strawn, for appellant.

Greene & Breckenridge, contra.

SULLIVAN, J.

December 14, 1892, the appellant commenced an action in the district court of Douglas county against Turlington W. Harvey to recover the sum of $4,655 alleged to be due it on his contract of guaranty. On the same day it sued out a writ of attachment, which was by its direction levied upon the land in controversy as the property of Harvey. The legal title to the land stood in the name of Turlington W. Harvey, but on the 28th of said month, by quitclaim deed, Harvey and wife conveyed the land to the T. W. Harvey Lumber Company. Two days afterward this deed was recorded. On the trial of the case of the bank against Harvey the court found in favor of the plaintiff therein and rendered a judgment against him for $5,537.50 and costs, and ordered the sheriff to proceed as upon execution to advertise and sell so much of the attached property as should be necessary to satisfy said judgment and costs. This he was about to do when this action was commenced by the appellee, and an injunction issued to restrain the bank from taking further steps in the attachment proceeding.

The T. W. Harvey Lumber Company was incorporated in 1883 under the laws of the state of Illinois with a paid-up capital of one million dollars. T. W. Harvey owned a controlling interest in the corporation and was its president. There were seven stockholders in the concern and its main office was in Chicago. In the fall of 1885 it contemplated establishing a branch of its business at Omaha, and on October 3 of that year a lot was purchased at Gibson, a suburb of Omaha on the line of the plaintiff's railway. The title to this lot was taken in the

name of Turlington W. Harvey for the purpose, as he says, of preventing competing lumber companies learning that the T. W. Harvey Lumber Company intended to establish a yard at Omaha. In June, 1886, the yard was opened and July 31, following, Harvey and wife conveyed the lot mentioned to the lumber company. This lot was found to be insufficient for the needs of the lumber company, and Charles A. Harvey, a son of T. W. Harvey, who was the manager of the Omaha branch, negotiated with Henning Henningsen for the purchase of ten acres of land adjoining the land already owned. For some time before these negotiations were begun the lumber company had used a portion of the Henningsen tract for its purposes. The land was bought and, March 18, 1887, at T. W. Harvey's suggestion, a deed was executed in which he was named as grantee. The purchase price was $10,000, of which $5,000 was paid to Henningsen by a check of the T. W. Harvey Lumber Company on its Omaha bank. The balance was evidenced by five notes of $1,000 each, due one, two, three, four, and five years after date, respectively, signed by T. W. Harvey and secured by a mortgage on the tract. The check for the cash payment was issued March 25, 1887, and on the same day the T. W. Harvey Lumber Company, through the First National Bank of Omaha, by a sight draft, drew on T. W. Harvey, who was then in Chicago, for $5,000. There is evidence to the effect that this draft was paid by the Chicago office of the T. W. Harvey Lumber Company. The Omaha office, however, charged T. W. Harvey's personal account with the check and credited it with the draft. Mr. Henningsen was erecting some buildings in Omaha, and an arrangement was entered into whereby he agreed to take lumber from the T. W. Harvey Lumber Company and credit the same on the notes given in settlement of the balance due for the land. From September 14, 1887, to September 11, 1888, he purchased lumber to the amount of $3,778.08 and June 11, 1890, an additional small bill for $8. These amounts were credited

on the notes in the order of their maturity, and the three notes fully paid were turned over to the lumber company. The other two notes were deposited by Mr. Henningsen with the First National Bank of Omaha as collateral to a loan he had made at that bank. These notes were paid in March, 1891, checks for the purpose being sent by the Chicago office of the lumber company. The checks were those of T. W. Harvey, but he testified that the Chicago office of the lumber company furnished the funds. The tract was assessed in the name of T. W. Harvey, and receipts for taxes paid thereon were issued in his name, but he testified that the taxes were in fact paid by the T. W. Harvey Lumber Company. The tract was used and occupied to some extent by the lumber company for its yards, but Mr. Harvey received no rent; neither did he claim nor exercise any rights of personal ownership over the land. In the spring of 1890 the lumber company closed out its yards at Gibson and began to negotiate for a sale of its real estate. The negotiations did not take definite form until December, 1892, when terms were about agreed upon with plaintiff to purchase all the land the lumber company had formerly occupied at Gibson, including the tract in question. It was then discovered that the title to the Henningsen tract was in Turlington W. Harvey. When this was called to his mind he said he had supposed that the title was in the T. W. Harvey Lumber Company and did not recall that the title was in his name until the land was attached. He says that he then made the conveyance of December 28, 1892, to correct an oversight and put the title in the real owner. Before the sale was consummated plaintiff instructed its counsel to investigate the title to the land. He did so and discovered the attachment on the Henningsen tract as above set forth. He called upon defendant's counsel and sought to persuade him to release the attachment. This was refused, and plaintiff then secured a bond, signed by T. W. Harvey, to save it harmless from the attachment. Soon thereafter plaintiff issued its voucher

for the purchase price and April 20, 1893, received from the T. W. Harvey Lumber Company its deed for the tract purchased. On the trial of the cause the court found in favor of the plaintiff, and the defendant, feeling aggrieved, brings the case to this court by appeal. The questions involved are almost wholly of fact, the principal one being whether the findings are supported by sufficient evidence. The defendant has much to say regarding the competency of the evidence; and much of the evidence is incompetent, but the trial having been to the court, we presume that only the competent evidence was considered. This being so, is there sufficient competent evidence to support the decree of the court? We think there is.

Much stress is placed by defendant on the apparent variance between the testimony of the several witnesses of plaintiff and the books of account of the Omaha office of the lumber company. It is clear that the books introduced disclose only a portion of the transaction. The books do not purport to show what was paid out by the main office in Chicago. The witnesses, in their testimony, stated that certain payments were made by that office, and this testimony being uncontroverted must be taken as true. The same may be said of the contention of defendant regarding the fact that the taxes were assessed in the name of T. W. Harvey and that the receipts for taxes paid were issued in his name. Mr. Miller, a clerk from the treasurer's office, testified that tax receipts were always issued to the person in whose name the property was assessed, without any reference to the person paying, unless a special request was made that the receipt be issued differently. Mr. Harvey testified that the taxes were paid by the lumber company. From all the facts and circumstances detailed we think the trial court was justified in finding that a trust resulted in favor of the lumber company. In classifying trusts Lord Hardwicke, in *Lloyd v. Spillet*, 2 Atk. [Eng.] 148, lays down the rule as to one class of resulting trusts as follows: Where an

estate is purchased in the name of one person, but the money or consideration is given by another, a trust in the estate results to him who gave the money or consideration. 2 Pomeroy, Equity Jurisprudence [2d ed.], section 1037, says: "In pursuance of the ancient equitable principle that a beneficial estate follows consideration and attaches to the party from whom the consideration comes, the doctrine is settled in England, and in a great majority of the American states, that where property is purchased and the conveyance of the legal title is taken in the name of one person, A, while the purchase price is paid by another person, B, a trust at once results in favor of the party who pays the price, and the holder of the legal title becomes a trustee for him." To the same effect is 10 Am. & Eng. Ency. Law [1st ed.] 5, and cases cited. The consideration having been paid by the T. W. Harvey Lumber Company, it was the beneficial owner of the property.

The appellant, however, complains because parol testimony was admitted to prove that a trust resulted in favor of the lumber company, and asserts that the transaction, being one concerning real estate, is within the statute of frauds, and that, therefore, parol testimony was inadmissible to vary the terms of the deed, or to show the circumstances surrounding the transaction. In this contention of counsel we cannot concur. Resulting trusts arise by operation of law, and are expressly excepted from the operation of the statute. (Compiled Statutes 1895, ch. 32, sec. 4.) From their very nature resulting trusts are not within the statute of frauds. (*Champlin v. Champlin*, 136 Ill. 309; 10 Am. & Eng. Ency. Law [1st ed.] 25.) "The real facts as to the payment of the money by a third person may be proved by parol, even though the deed recites that the consideration was paid by the person named as grantee therein." (2 Jones, Evidence sec. 425; *Blodgett v. Hildreth*, 103 Mass. 484; *Deck v. Tabler*, 41 W. Va. 332; *Neil v. Keese*, 5 Tex. 23; *Smith v. Eckford*, 18 S. W. Rep. [Tex.] 210; *Depeyster v. Gould*, 2 Green Ch. [N. J.] 474; *Burden v. Sheridan*, 36 Ia. 125; *Livermore v.*

Aldrich, 5 Cush. [Mass.] 431.) Where the trust does not appear on the face of the deed or other instrument of transfer, a resort to parol evidence is indispensable. (2 Pomeroy, Equity Jurisprudence [2d ed.] sec. 1040.) It having been shown that T. W. Harvey had no interest in the land, it was not subject to the defendant's attachment. (2 Freeman, Judgments [4th ed.] sec. 357; *Roberts v. Robinson*, 49 Neb. 717; *Hays v. Reger*, 102 Ind. 524.)

The decree of the district court is right and must be

AFFIRMED.

JACKSON BRADLEY V. AUGUSTUS B. SLATER.

FILED MAY 3, 1899. No. 9977.

1. **Opening Judgments:** JURISDICTION OF COURTS. A court of general jurisdiction possesses inherent power to vacate or modify its own judgments at any time during the term at which they are pronounced.

2. ———: ———. Such power exists entirely independent of any statute. It is derived from the common law, and the provision of the Code of Civil Procedure relating to new trials does not assume to abridge it. Section 314 of said Code does not deal with the power of the court but with the rights of the parties.

3. ———: FORM OF APPLICATION. A defendant against whom judgment has been rendered by default may during the term, and after the expiration of three days from the date of the judgment, ask the court, as a matter of judicial grace and in furtherance of justice, to grant him a new trial; and the court may comply with his request regardless of the form in which it is presented.

4. ———: ———. If the application in such case be in the form of an ordinary motion for a new trial, it will be presumed that the court in sustaining it acted within its authority, and not in violation of law; that it rightfully exerted its inherent jurisdiction, and not that it erroneously assumed to grant the motion as a demandable right.

REHEARING of case reported in 55 Neb. 334. *Affirmed.*

Warren Switzler, for plaintiff in error.

Duffie & Van Dusen, contra.

SULLIVAN, J.

At a former term the judgment of the district court was affirmed. (*Bradley v. Slater*, 55 Neb. 334, 75 N. W. Rep. 826.) A rehearing was afterward allowed and the cause has been again argued and submitted. Of the points discussed on the re-argument it will be necessary to consider only the authority of the court to grant Slater's motion for a new trial filed more than three days after the rendition of the judgment against him. A re-examination of this question has satisfied us that the conclusion announced in the former opinion is correct, and we adhere to it. Courts of general jurisdiction possess inherent power to vacate and modify their own judgments at any time during the term at which they were pronounced. This power exists entirely independent of any statute. It is derived from the common law, and the provisions of the Code of Civil Procedure relating to new trials do not assume to abolish or abridge it. Section 314 of the Code does not deal with the power of the court, but with the rights of the litigant. It declares that a verdict or decision shall be vacated and a new trial granted, on the application of the party aggrieved, for certain enumerated reasons. If any one of these reasons exists and the party complaining makes his application in writing within the time fixed by the statute, the court has no discretion in the matter; the motion must be sustained. But if such motion be presented out of time, it is not entitled to be considered and may be stricken from the files. To overrule it is not error. Such is the effect of the decisions cited by counsel for Bradley. (*Wells v. Preston*, 3 Neb. 444; *Fox v. Meacham*, 6 Neb. 530; *Davis v. State*, 31 Neb. 240; *McDonald v. McAllister*, 32 Neb. 514; *Gage v. Bloomington Town Co.*, 37 Neb. 699; *State v. Holmes*, 38 Neb. 355; *Brown*

v. Ritner, 41 Neb. 52.) These cases are not opposed to the doctrine of this case. One may ask as a matter of judicial grace what he cannot demand as a legal right. While Slater had by his laches forfeited his statutory right to move for a new trial, it was yet entirely proper for him to request a vacation of the judgment and a retrial of the cause; and the court had undoubted right, in the exercise of its discretion and in furtherance of justice, to grant such request. The form of the application was of no consequence. It was competent for the court to grant it regardless of the form in which it was made. But it is said the motion was an attempt to assert a statutory right, and that the order sustaining it was the result of a mistaken effort to exert a statutory power. This does not appear, either directly or by inference. The presumption is that the court acted within the limits of its authority and dealt with the application as an appeal to its inherent jurisdiction. Had the motion been filed within the time fixed by the statute it would have been entitled, of course, to consideration as a statutory motion. The presumption then would be that the court so considered it, and that there was no exertion of common-law power. It seems to us entirely clear that the district court being possessed of ample authority to vacate the judgment, its order in the premises was regular and valid, although made in response to an application in the form of an ordinary motion for a new trial. Cases indirectly supporting the conclusion reached are: *Fox v. Meacham*, 6 Neb. 530; *Williams v. St. Louis Circuit Court*, 5 Mo. 254. The judgment will stand

AFFIRMED.

RICHARD BLACO ET AL. V. STATE OF NEBRASKA ET AL.

FILED MAY 3, 1899. No. 10461.

1. **Official Bonds:** SURETIES: ESTOPPEL. When sureties, for the purpose of enabling their principal to assume the duties, and enjoy the emoluments, of an office to which he has been appointed, execute an official bond containing a recital that the appointment has been duly made, they will not be permitted afterwards, when sued on such bond, to deny the validity of the act creating the office.

2. ———: ———: ———. In such case the law authorizing the appointment to be made is constructively incorporated into the bond and its validity affirmed by the obligors.

3. **Inspector of Oils:** DUTIES. Under the provisions of chapter 64, article 2, Compiled Statutes, 1887, it is the duty of the inspector of oils and his deputies to inspect every oil which is a product of petroleum and which is intended by the owner to be put upon the market and sold for illuminating purposes.

4. **Inspection of Oils:** GASOLINE. The act providing for the inspection of oils recognizes gasoline as a product of petroleum and contemplates its inspection when kept for sale as an illuminant.

5. ———: ———. The fact that no grade or quality of gasoline will bear the statutory test does not exempt such oil from inspection, if the owner intends to offer it for sale as an illuminant.

6. ———: CONSTRUCTION OF STATUTE. The design of the law providing for the inspection of oils was not merely to prescribe a test for those products of petroleum which might or might not, according to their quality, be dangerously inflammable, but rather to require an effective inspection of every product of petroleum intended to be sold and used in this state for illuminating purposes.

7. ———: FEES: GASOLINE. A person owning gasoline, kept or intended for sale as an illuminating oil, is, under the act of 1887, legally bound to submit it for inspection; and he is also bound to pay the inspector the statutory fees for the services rendered.

8. ———: ———: OFFICIAL BOND. The fees so paid are paid for official services and are within the purview of the inspector's bond.

9. **Official Bonds:** LIABILITY OF SURETIES. In an action on the bond of a public officer the sureties cannot successfully defend on the ground that the money which their principal misappropriated was received by him for official acts irregularly performed.

10. **Inspector of Oils:** FEES. When the inspector of oils examines gasoline and places upon the cask in which it is contained the statutory brand of condemnation, he performs an official act and the fees received by him for the services are officially received, although the dangerously inflammable character of the oil has not been determined by actually applying the test prescribed by the statute.

11. **Officers:** DUTIES: PRESUMPTIONS. The presumption that a public officer has executed with fidelity the duties with which he was charged is a mere arbitrary rule of law which loses its force and effectiveness when met by opposing proof.

12. ———: ———: ———. There being in this case evidence that the inspector of oils was indebted to the state when he went out of office, and the answer containing an implied admission that he had not lawfully disbursed all moneys received for inspecting gasoline, the presumption of official faithfulness does not obtain.

13. **Principal and Surety:** FORM OF JUDGMENT: REVIEW. The failure of the clerk of the district court, in recording a judgment, to certify, in accordance with the provisions of section 511 of the Code of Civil Procedure, that some of the defendants in the action are sureties is reversible error, although the matter has not been brought to the attention of the trial court by motion or otherwise.

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

The opinion contains a statement of the case.

E. Wakeley and *Lee S. Estelle*, for plaintiffs in error:

The act purporting to create the office of state inspector of oils is void, because it is an attempt to create an executive state office in violation of section 26, article 5, of the constitution, forbidding the creation of offices other than those named in the constitution. (*In re Railroad Commissioners*, 15 Neb. 679; *Rowland v. City of New York*, 83 N. Y. 372; *United States v. Hartwell*, 6 Wall. [U. S.] 385; *Shelby v. Alcorn*, 36 Miss. 273; *Hill v. Boyland*, 40 Miss. 628; *Miller v. Supervisors*, 25 Cal. 96; *United States v. Maurice*, 2 Brock. [U. S.] 103; *Hall v. State*, 39 Wis. 79; *Henley v. Mayor*, 5 Bing. [Eng.] 91; *Commonwealth v. Evans*, 74 Pa. St. 124; *Bradford v. Justices of Inferior Court*, 33 Ga. 332;

People v. Kelly, 77 N. Y. 503; *State v. Valle*, 41 Mo. 29; *Vaughn v. English*, 8 Cal. 40; *United States v. Tinklepaugh*, 3 Blatch. [U. S.] 425.)

The law being unconstitutional, there was no such office as state oil inspector. (*Norton v. Shelby County*, 118 U. S. 425; *Hildreth v. McIntire*, J. J. Marsh. [Ky.] 206; *Hawver v. Seldenridge*, 2 W. Va. 274; *Petition of Hinkle*, 31 Kan. 712; *Ex parte Snyder*, 64 Mo. 58; *State v. City of Camden*, 28 Atl. Rep. [N. J.] 82; *Carleton v. People*, 10 Mich. 250; *Town of Decorah v. Bullis*, 25 Ia. 12; *Ex parte Strang*, 21 O. St. 610.)

The sureties are not liable for fees paid for inspection or pretended inspection of gasoline. (*Commonwealth v. Jackson*, 1 Leigh [Va.] 531; *Foxcroft v. Nevens*, 4 Greenl. [Me.] 72; *Leigh v. Taylor*, 7 Barn. & Cres. [Eng.] 491; *People v. Pennock*, 60 N. Y. 421; *Ward v. Stahl*, 81 N. Y. 406; *Carey v. State*, 34 Ind. 105; *State v. Givan*, 45 Ind. 267; *Scott v. State*, 46 Ind. 203; *People v. Tompkins*, 74 Ill. 482; *Linch v. City of Litchfield*, 16 Ill. App. 612; *Saltenberry v. Loucks*, 8 La. Ann. 95; *City of San Jose v. Welch*, 65 Cal. 358; *Lowe v. City of Guthrie*, 41 Pac. Rep. [Okla.] 198; *United States v. Adams*, 24 Fed. Rep. 348; *United States v. Morgan*, 28 Fed. Rep. 48; *McCormick v. Thompson*, 10 Neb. 484; *Moore v. State*, 53 Neb. 831; *State v. Holcomb*, 56 Neb. 583.)

The case is one in which a public officer is presumed to have done his duty and the presumption is not overcome by proof. Even in a suit against himself alone, Hilton would have been entitled to the benefit of this comprehensive presumption. In the case of sureties who undertake merely that a public officer will perform his duty, there can be no presumption that he has not done it. His default must be alleged and proved. (*United States v. Earhart*, 4 Sawy. [U. S.] 245; *Hartwell v. Root*, 19 Johns. [N. Y.] 345; *Commonwealth v. Slifer*, 25 Pa. St. 23; *Squier v. Stockton*, 5 La. Ann. 120; *United States v. Dandridge*, 12 Wheat. [U. S.] 69; *Bruce v. United States*, 17 How. [U. S.] 437.)

Admissions of an officer are only *prima facie* evidence against sureties. (*United States v. Boyd*, 5 How. [U. S.] 29, 50; *Bissell v. Saxton*, 66 N. Y. 55; *Placer County v. Dickerson*, 45 Cal. 12; *Nolley v. Callaway County Court*, 11 Mo. 447; *Townsend v. Everett*, 4 Ala. 607; *State v. Rhoades*, 6 Nev. 352; *State v. Hill*, 47 Neb. 456; *Buffalo County v. Van Sickle*, 16 Neb. 363.)

References as to the unconstitutionality of the act: *Gibson v. Ogden*, 9 Wheat. [U. S.] 1; *Denn v. Reid*, 10 Pet. [U. S.] 524; *Smith v. State*, 66 Md. 215; *Woodberry v. Berry*, 18 O. St. 456; *Newell v. People*, 7 N. Y. 9; *Koch v. Bridges*, 45 Miss. 247; *Frye v. Chicago, B. & Q. R. Co.*, 73 Ill. 399; *People v. Purdy*, 2 Hill [N. Y.] 31.

C. J. Smyth, Attorney General, for the state.

The act creating the office of state inspector of oils is not unconstitutional. (*People v. Rogers*, 13 Cal. 160; *State v. Wilson*, 29 O. St. 347; *State v. Weston*, 4 Neb. 234; *State v. Smith*, 35 Neb. 25.)

The officer's default was proved. (*Stoner v. Keith County*, 48 Neb. 292.)

Defendants are estopped from denying the constitutionality of the law under which the officer collected the money in controversy. (*Chandler v. State*, 1 Lea [Tenn.] 296; *Swan v. State*, 48 Tex. 120; *Morris v. State*, 47 Tex. 583; *Commonwealth v. City of Philadelphia*, 27 Pa. St. 497; *Middleton v. State*, 120 Ind. 166; *Mayor v. Harrison*, 30 N. J. Law 73; *Ferguson v. Landram*, 5 Bush [Ky.] 237; *Mississippi County v. Jackson*, 51 Mo. 23; *Vermillion Parish v. Brookshire*, 31 La. Ann. 736; *Miller v. Moore*, 3 Humph. [Tenn.] 189; *O'Neal v. School Commissioners*, 27 Md. 227; *People v. Brown*, 55 N. Y. 180; *Boehmer v. County of Schuylkill*, 46 Pa. St. 452; *McLean v. State*, 8 Heisk. [Tenn.] 22.)

The judgment may be modified to show who was principal and who were sureties. (*People v. Love*, 25 Cal. 520; *People v. Rooney*, 29 Cal. 643; *Schenectady & S. P. R. Co. v. Thatcher*, 6 How. Pr. [N. Y.] 226.)

SULLIVAN, J.

In 1887 there was passed and approved an act of the legislature providing for the appointment of a state inspector of oils, defining his duties, fixing his fees, and prescribing penalties. (Compiled Statutes 1887, ch. 64, art. 2.) In March, 1893, Lozein F. Hilton was, under the authority of this statute, appointed state inspector of oils. He accepted the appointment and, in compliance with section 4 of the act, executed to the state of Nebraska a bond conditioned as follows: "The condition of this bond is such, that whereas the above bounden, Lozein F. Hilton, has been duly appointed by the governor of the state of Nebraska to the office of state inspector of oils: Now, therefore, if the said Lozein F. Hilton shall well and faithfully perform the duties of said office as imposed upon him by law in that behalf, then this obligation to be void; otherwise to be and remain in full force and effect." The sureties upon this obligation were Richard Blaco, W. C. Walton, E. A. Stewart, and John A. McKeen. On January 31, 1895, Hilton retired from office without having accounted for the sum of $5,622.56, which, it is claimed, was received by him in his official capacity. This action was thereupon instituted against him and his sureties to recover the alleged shortage. The cause was tried to a jury, and the trial resulted in a verdict against all of the defendants for the full amount claimed in the petition. A motion for a new trial was overruled and judgment rendered on the verdict. The sureties prosecute error, making Hilton a party defendant.

The first ground upon which it is claimed there should be a reversal of the judgment in favor of the state is that the law creating the office of state inspector of oils is unconstitutional, and that Hilton's official bond is therefore void. We need not in this action concern ourselves with the validity of the law. Whether it is void or valid is altogether immaterial. Under its authority Hilton accepted a commission from the governor, and for nearly

two years performed the duties which the law imposed and received, and enjoyed the emoluments for which it provided. For the express purpose of securing to Hilton authority from the state to perform those duties and to receive those emoluments the plaintiffs in error executed to the state the bond in suit. In that bond they affirmed that Hilton had been duly appointed, and they therein undertook to answer for any failure on his part to perform the duties imposed upon him by the act. In affirming that Hilton was duly appointed, the sureties necessarily affirmed the validity of the law under which the appointment was made, and they cannot now repudiate their declaration nor impeach its truth. Having by their voluntary act secured to Hilton the fruits of the law, which was constructively incorporated into the bond, they are now, by a plain principle of justice, forbidden to deny that the law was constitutionally enacted. (*Chandler v. State*, 1 Lea [Tenn.] 296; *Village of Olean v. King*, 116 N. Y. 355; *Swan v. State*, 48 Tex. 120; *Morris v. State*, 47 Tex. 583; *Waters v. State*, 1 Gill [Md.] 302; *Commonwealth v. City of Philadelphia*, 27 Pa. St. 497; *Middleton v. State*, 120 Ind. 166; *Hoboken v. Harrison*, 30 N. J. Law 73; *Ferguson v. Landram*, 5 Bush [Ky.] 237; *Mississippi County v. Jackson*, 51 Mo. 23; *Police Jury v. Brookshier*, 31 La. Ann. 736.) In *Middleton v. State, supra*, it was held that the sureties of a city clerk, who had acted as collector and custodian of public moneys under the color of a void ordinance, were estopped to deny that the ordinance was void because they had contracted with reference to it. Discussing the question the court say: "In this case, the ordinances under which the principal received the money now sought to be recovered were in existence at the time the bond in suit was executed. His sureties undertook, voluntarily, that he should account for all moneys collected under such ordinances, and we know of no valid reason why they should not live up to that agreement. By this undertaking they enabled the principal to obtain the possession of the money, and we

do not think they should be permitted to say now that he received it without authority." The case of *Hoboken v. Harrison, supra,* was an action against the principal and sureties on a bond given by Harrison, who had been appointed to an office which the city authorities had by an invalid ordinance attempted to create. The bond recited that Harrison had been duly appointed to the office of collector of assessments for street improvements, and it was held that the sureties would not be permitted to deny that the recital was true. Both on reason and authority we must, for the purpose of this case, assume that the law providing for the inspection of oils is a constitutional and valid act. But while declining at this time to inquire into the validity of the law, we do not wish to be understood as intimating that it may not be valid.

Another defense to the action relied on in the trial court was that a large part of the fees collected by Hilton was for the inspection of gasoline, and that such inspection was not required nor contemplated by the statute. We think it was. Section 1 of the act is as follows: (Compiled Statutes 1887, ch. 64. art. 2.) "All mineral or petroleum oil, or any oil, fluid, or substance which is a product of petroleum or into which petroleum or any product of petroleum enters or is found as a constituent element, whether manufactured in this state or not, shall be inspected as provided in this act before being offered for sale for consumption for illuminating purposes in the state." Section 11 distinctly recognizes gasoline as a product of petroleum; and the evidence conclusively shows that it is such product and that it is used to some extent as an illuminant. What, under the law, is the duty of the state inspector of oils? By section 2 he is required to "examine and test the quality of all such oils offered for sale" and stamp upon the package, barrel, or cask the result of his inspection. The words "such oils" refer, of course, to the oils mentioned in the preceding section. It is also provided in section 2 that the inspector, or his deputies, may enter upon any premises and inspect

any such oils there found which are "intended for consumption for illuminating purposes within the state." Section 3 declares that it shall be the duty of the inspector and his deputies, when called upon for that purpose, to promptly "inspect all oils hereinbefore mentioned." Taking these several provisions together they seem, in unmistakable terms, to impose upon the inspector and his deputies the duty of inspecting every oil which is a product of petroleum and which is intended by the owner to be put upon the market and sold as an illuminating oil. They demonstrate, we think, that the inspection of gasoline is within the purview of the law, and that the duty to make the prescribed inspection may, in a proper case, be enforced by mandamus. This view is reinforced by other provisions of the act. The purpose of the legislature was to protect the public by preventing the sale of illuminating oils which are dangerously inflammable. To effect this purpose penalties were provided. Section 2 prescribes a penalty for selling, or offering for sale, for illuminating purposes, any oils that have been examined, tested, and marked "Rejected for illuminating purposes." By section 7 it is forbidden, under penalty, to sell, or attempt to sell, "any of the illuminating oils hereinbefore mentioned before having the same inspected as provided in this act." Now, if gasoline is not one of the oils previously mentioned in the act, there is, of course, in this section no prohibition against selling it or offering it for sale as an illuminant. Sections 2 and 7 contain the only provisions to be found in the act relating to unlawful sales; so that, if gasoline is not within the class of oils which are subject to inspection, its sale for illuminating purposes is not prohibited. Upon this point there is absolutely no ground for controversy. There is no room for two opinions. The proviso contained in section 11 is, however, framed on the assumption that the act does forbid generally the sale of gasoline as an illuminating oil, unless it has been first duly inspected and approved, for it is there in effect

declared that the general provisions of the law shall not apply to gasoline and other of the lighter products of petroleum when the same are sold for use in street lamps. If gasoline is not subject to inspection, and if its sale as an illuminant is not unlawful, the proviso has certainly no office to perform, and no valid reason can be given for its existence.

But it is insisted that as no quality or grade of gasoline will bear the prescribed test, the legislature could not have contemplated its inspection. This argument has weight, but it is not conclusive. The design of the law, as we interpret it, was not merely to prescribe a test for those products of petroleum which might or might not, according to their quality, be dangerously inflammable, but rather to require an effective inspection of every product of petroleum kept, or intended, for sale for illuminating purposes. An owner of gasoline kept or intended for sale as an illuminating oil was, under the act of 1887, legally bound to submit it for inspection, and he was also bound to pay the inspector the statutory fees for the services rendered. Such fees, then, were received for the performance of official acts. They were received in an official capacity and are undoubtedly within the purview of the inspector's bond.

It is said, however, that Hilton did not in fact subject gasoline to the Foster test, and that he usually failed to brand the vessels in which it was contained. It is true that the Foster test was not applied, and that frequently —perhaps most frequently—the inspector's brand was not affixed by the hand of either himself or a deputy. But this surely is no answer to an action on the bond. How can the irregularity of the inspection concern the sureties? The person called upon to pay fees might, indeed, demand the effective test for which the law provides, but if he waive the test and consent that his oil may be marked "Rejected for illuminating purposes," no one else can justly complain. The object of the statute was accomplished and the interests of the public prop-

erly safeguarded when the inspector, by his own act or by an act done at his instance and under his supervision, placed the statutory brand of condemnation upon the oil inspected. Whether the fees were received for services regularly or irregularly performed is not material in this action. They were received on account of official services which Hilton was authorized to perform, and which he did in fact perform in a manner satisfactory to every one concerned, although not with the precision and exactitude prescribed by the statute. For money so received the sureties are liable. Such is the doctrine of *State v. Moore*, 56 Neb. 82, 76 N. W. Rep. 474, where it is said: "For all wrongful acts or omissions of a public officer within the limits of what the law authorizes or enjoins upon him as such officer, his sureties are liable." (See, also, *King v. United States*, 99 U. S. 229; *Berrien County v. Bunbury*, 45 Mich. 79, 7 N. W. Rep. 704; *Marquette County v. Ward*, 50 Mich. 174, 15 N. W. Rep. 70.)

The balance in the hands of Hilton on January 31, 1895, clearly belonged to the state, and the law imposed upon him the duty to pay it over to the state treasurer. Whether he has so paid it is one of the questions upon which the parties are not agreed. The sureties assert that he has, predicating their assertion on the general presumption that public officers execute with fidelity the duties with which they are charged. This presumption is a mere arbitrary rule of law. It possesses no inherent probative force, and when met by opposing evidence is entirely destroyed. In this case it was met by opposing proof. When Hilton went out of office he left behind him a record in his own handwriting which shows that he was then indebted to the state in the sum of $5,622.56. This record evidences the state of Hilton's account at the last moment of his official life, and, being an admission against interest, it has evidential value apart from the presumption that the entries are true. Besides, the answer impliedly admits that all the moneys received for the inspection of gasoline were not lawfully disbursed.

Paragraph 4½ alleges that all moneys received by Hilton and his deputies, and not applied to the payment of salaries and expenses, or paid into the state treasury, were paid and received for the pretended inspection of gasoline. This admission is fatal to the presumption on which the sureties rely. Hilton having failed while in office to pay to the state the balance in his hands, the burden was on the defendants to allege and prove that he paid such balance afterwards. (*Stoner v. Keith County*, 48 Neb. 279.)

Another and final reason assigned for a reversal of the judgment is that the clerk of the district court failed, in recording the judgment, to certify that Hilton was principal and that the other defendants were sureties on the bond in suit. Section 511 of the Code of Civil Procedure requires such certification, and it has been held in several cases that a failure to comply with its provisions is reversible error. (*Van Etten v. Kosters*, 48 Neb. 152; *Kroncke v. Madsen*, 56 Neb. 609, 77 N. W. Rep. 202; *Maxwell v. Home Fire Ins. Co.*, 57 Neb. 207.) The statute, while enjoining a duty on the clerk, undoubtedly contemplates action by the court. The judgment is reversed and the cause remanded with direction to the district court to render a judgment on the verdict and certify therein that Hilton is principal and that the plaintiffs in error are sureties on the bond.

REVERSED AND REMANDED.

COOSE SUTTON V. STATE OF NEBRASKA.

FILED MAY 17, 1899. No. 10672.

Forgery: INFORMATION: PROOF: VARIANCE. An information charged the forgery of a receipt for money in the following terms: "'May 13, 1898. Received of C., St. P., M. & O. Ry. Co. twenty-two 50-100 dollars, in full for the within. C. C. Sutton'—which said receipt for money was indorsed on the back of a time certificate and writing obligatory of the Chicago, St. Paul, Minneapolis

& Omaha Railway Company, and which said time certificate and writing obligatory was in words and figures as follows, to-wit," —and purported to give an exact reproduction of the time certificate, but omitted any statements of matters which were printed on the back of what was styled time certificate received in evidence, and these were material in a consideration of its apparent legality or validity. *Held*, That the existence of an apparently valid time certificate was of the essential allegations of the information, that this was recognized by the pleading, and as it was pleaded specifically and particularly of words and figures, the proof must respond, and there was a variance between the proof and the pleading.

ERROR to the district court for Washington county. Tried below before POWELL, J. *Reversed.*

F. S. Howell, for plaintiff in error:

There was a fatal variance between allegations of the information and the proof. (*State v. Wheeler*, 19 Minn. 98; *Roode v. State*, 5 Neb. 174; *Millsaps v. State*, 43 S. W. Rep. [Tex.] 1015; *Sullivan v. State*, 7 So. Rep. [Miss.] 275; *Haslip v. State*, 10 Neb. 590; *Robinson v. State*, 43 S. W. Rep. [Tex.] 526; *Overly v. State*, 31 S. W. Rep. [Tex.] 377; *Specht v. Beindorf*, 56 Neb. 553; *Polo Mfg. Co. v. Parr*, 8 Neb. 379; *Grimison v. Russell*, 14 Neb. 521; *Montgomery v. State*, 12 Tex. App. 323; *Kotter v. People*, 37 N. E. Rep. [Ill.] 934; *State v. Willson*, 28 Minn. 52; *People v. Bendit*, 43 Pac. Rep. [Cal.] 901.)

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

HARRISON, C. J.

An information was filed in the district court of Washington county which contained two counts; in one of which the plaintiff in error was charged with the crime of forgery, and in the second with uttering and publishing a forgery. A motion to quash each count was filed, which was overruled as to the first and sustained as to the second. A trial resulted in a conviction of the accused. A motion for a new trial was overruled, as was

also one in arrest of judgment, and the defendant was sentenced to a term of imprisonment in the penitentiary. The first count of the information is as follows:

"Be it remembered, that Clark O'Hanlon, county attorney within and for Washington county, in the fourth judicial district of the state of Nebraska, who prosecutes in the name and by the authority of the state of Nebraska, comes here in person into court at this the October term, A. D. 1898, thereof, and for the state of Nebraska gives the court to understand and to be informed that 'Coose' Sutton, whose first name is unknown, late of the county aforesaid, on or about the 13th day of May, 1898, in the county and state aforesaid, then and there being, then and there unlawfully, feloniously, and willfully did falsely make, forge, and counterfeit a certain receipt for money, which said receipt for money was in words and figures as follows, to-wit:

"MAY 13, 1898.

"'Received of the C., St. P., M. & O. Ry. Co. twenty-two 50-100 dollars, in full for the within. C. C. SUTTON.'

which said receipt for money was indorsed on the back of a certain time certificate and writing obligatory of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and which said time certificate and writing obligatory was in words and figures as follows, to-wit:

"'CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

"'Send to Blair. Time Certificate No. 124.

"'OFFICE OF THE SUPT. NEBR. DIVISION.

"'OMAHA, April 30, 1898.

To C. C. Sutton, for services as teamster at extra gang for 75 hrs., at 30c per hr., in month of April, 1898, amounting to..... $22 50
From which deduct on account of ..... due to.. $.. ..

Leaving balance due him twenty-two 50-100 dollars.

"'Balance due $22 50

"'Why this certificate is issued—Leaving the service.

"'I hereby certify that the above is correct, and that opposite the payee's name on the time-roll or pay-roll I have marked 'Certificate given.'

"'J. W. COOPMAN, *Chf. Clk.*

"'Countersigned:

"'$22.50. H. S. JAYNES, *Supt.*'

"Indorsed across the face thereof is, 'Void if not presented for payment within fifteen days from date.'

with the intent of him, the aforesaid 'Coose' Sutton, whose first name is unknown, then and there and thereby unlawfully to defraud, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Nebraska."

It will be no doubt noticed that the receipt proper refers to the "within," the time certificate, on the back of which the former appeared. It is contended that this so connected the two instruments that in combination they constituted but one, the receipt upon which the accusation of forgery was predicated. The terms of the time check, by the receipt, were made a part thereof. To ascertain the apparent validity of the latter it was necessary to refer to the former. For what the twenty-two and 50-100 dollars was received was set forth in the "within," the time certificate. The pleader who framed the information recognized this and specifically referred to the time certificate, and stated it to be "in words and figures as follows, to-wit," and set forth, not the whole, but a part of it, omitted some statements which appeared on its face, one of which directed to "instructions on the back," and there were set forth matters which entered into the substance of the instrument and its apparent validity or legality as a time certificate. During the introduction of the evidence the time certificate was produced and the receipt on its back was offered and received; then such portions of what was on its face as had been copied or shown in the complaint were offered for

the state and received over objections interposed for the accused. The other portions of the time certificate, inclusive of what appeared on the back thereof other than the receipt, were offered by the defendant and received. The allegations of the complaint in reference to the time certificate were of the essentials of the pleading and cannot be treated as surplusage, and being stated as made specifically and with particularity by "words and figures" and as the whole of the instrument, it was essential that the proof correspond. The instrument in evidence had a number of material statements on its back which affected its apparent validity. These were of it or parts of it, and they were not shown in the information. There was a material variance between the instrument pleaded and the one proved. (*Haslip v. State*, 10 Neb. 590; *Robinson v. State*, 43 S. W. Rep. [Tex.] 526.) The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

D C. CLARK ET AL. V. CAROLINE DOUGLAS, ADMINISTRATRIX.

FILED MAY 17, 1899. No. 8888.

1. **County Judge:** ACTION ON BOND: CONVERSION. The failure of a county judge to pay to his successor in office or the person entitled thereto money which was deposited with him in condemnation proceedings constitutes a breach of the obligation of his official bond, and there accrues a cause of action in favor of the person damaged by said breach. (*Chicago, B. & Q. R. Co. v. Philpott*, 56 Neb. 212; *Clelland v. McCumber*, 15 Colo. 355, 25 Pac. Rep. 700.)

2. **County Officers:** OFFICIAL BONDS. Bonds of county officers must be in form joint and several. (Compiled Statutes, ch. 10, sec. 3.)

3. ———: ———. If the bond is given and approved, the office obtained and enjoyment of the fees and emoluments, in an action on the bond for damages for a breach of the obligation it will not, in favor of the signers of it, be adjudged void because joint

alone, but will be held good to the extent it in form complies with the statutory requirements in such regard.

4. ———: ———: CONVERSION. Where an officer holds for two terms and there is money which he received during the first term for which he has not accounted, or has not paid to the person to whom it belongs, and there is a lack of evidence to show the actual date of the misappropriation, if any, the presumption will prevail that the money continued in his official custody, until proof is adduced to the contrary.

5. ———: PRINCIPAL AND SURETY: RELEASE OF SURETY. The neglect of the creditor to prosecute a claim against the estate of a deceased surety does not effect the release of co-sureties.

6. **Action on Bond of County Judge:** DIRECTING VERDICT FOR PLAINTIFF. The evidence was sufficient to authorize the peremptory instruction given.

7. **Striking Out Testimony:** REVIEW. Under the conditions and circumstances existing the ruling of the trial court on a motion to strike out certain designated testimony was a discretionary one, and there being no abuse of the discretion, the error, if any, is unavailable.

8. **Exclusion of Testimony.** Exclusion of offered testimony examined, and *held* not erroneous.

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

J. C. Robinson and *Wilbur F. Bryant*, for plaintiffs in error.

Miller & Ready and *W. E. Gantt, contra.*

HARRISON, C. J.

In condemnation proceedings instituted by a railroad company the land of A. Hart Norris, since deceased, was taken and the amount of the appraisal thereof was by the railroad company deposited with the then county judge of Cedar county, of whom, as such officer, the plaintiffs in error were the sureties on his official bond during his second term of office. This action was instituted against the officer and the bondsmen to recover an amount of the sum of said condemnation money for which it was asserted he had failed to account or pay to the party en-

titled to receive it. At the close of a trial of the issues joined the presiding judge of the district court peremptorily instructed the jury in favor of the defendant in error, and a verdict was returned in accordance with the instruction, and judgment in the due course of the proceedings was rendered thereupon. A reversal of the judgment is sought in the present error proceeding to this court. A recent decision of this court has disposed of some of the questions presented in this case (see *Chicago, B. & Q. R. Co. v. Philpott*, 56 Neb. 212), wherein it was determined that if a county judge fails at the expiration of his term of office to pay to his successor or to the person entitled thereto condemnation money which had been regularly deposited with him, it constitutes a breach of his official bond, and a cause of action on such bond accrues to the person damaged by the breach, and the action may be instituted without a demand on the party for payment. (See, also, *Clelland v. McCumber*, 15 Colo. 355, 25 Pac. Rep. 700.) It is urged that by the statutory provision which governed bonds of county officers, inclusive of county judge, the instruments were required to be joint and several (see Compiled Statutes, ch. 10, sec. 3); that the one given, and upon the obligations of which this suit is predicated, was only joint, and was void for its non-compliance with the demands of the statute. It is true that in terms the bond in suit was joint, and it is also true that by statute it was required to be joint and several, but it is not for such reason void. It is good to the extent it complied with the legislative enactment. (4 Am. & Eng. Ency. Law [2d ed.] 669, note 2 of page 668.) The defect in the bond was one of which the public or county might have complained, but not the sureties. There was sufficient evidence to establish, *prima facie* at least, that the principal in the bond received the money and retained it through a short portion of the first and the entire second term of office. To escape liability it devolved upon the sureties on the bond for his second official term to show that the misappropriation, if any,

occurred prior to his second term. (*Stoner v. Keith County*, 48 Neb. 279; *Heppe v. Johnson*, 73 Cal. 265; *United States v. Stone*, 106 U. S. 525; *Kelley v. State*, 25 O. St. 567.) One of the sureties died, and it is urged that the defendant in error did not prosecute any claim against his estate; that there was, in effect, a release of the liability of the one surety, and it operated a discharge of all. The neglect to prosecute a claim against the estate of the deceased surety did not operate the release or discharge from liability of the co-sureties. (*Camp v. Bostwick*, 20 O. St. 337; *Eickhoff v. Eikenbary*, 52 Neb. 332.) There was sufficient evidence to warrant the peremptory instruction.

It is argued that the court erred in not striking out, on motion of plaintiffs in error, a portion of the testimony of one of the witnesses. This testimony was given by a witness who had been called by defendant in error, and was drawn out and was responsive to an interrogatory of counsel for plaintiffs in error during the cross-examination of the witness. Counsel did not object to the testimony or make the motion at the immediate time of the answer to the question, but continued the cross-examination for some considerable further time, and then asked that the portion of the testimony to which we have referred be eliminated from the record. Under the circumstances, and conceding the testimony incompetent and immaterial, or as "hearsay," as it was characterized in the motion, it was within the discretion of the trial judge to strike it from the record or not; and with the whole evidence before us we do not think there was an abuse of the discretion in allowing the testimony to remain, and without an abuse of the discretion there was no error which will work a reversal of the judgment.

It is also urged that the trial judge committed error in the exclusion of some testimony which it was sought to elicit from the witness J. C. Robinson in regard to the habits of life of the county judge at or immediately subsequent to the time the condemnation money was deposited with him; that he was spending considerable

more money than had been his wont. A close examination of this portion of the record convinces us that there was no error in the action of the trial court in the exclusion of the offered testimony.

No available errors have been presented and the judgment must be

AFFIRMED.

ERNEST M. SLATTERY, APPELLANT, V. JAMES HARLEY ET AL., APPELLEES.

FILED MAY 17, 1899. No. 8900.

1. **Riparian Rights.** The common-law rules relative to the rights of private riparian proprietors are of force in this state, with the exceptions of statutory abrogations and changes.

2. ———: JUDICIAL NOTICE: PLEADING. That a certain tract or piece of land is arid and, to be of use for agricultural purposes, must be irrigated are not matters of which judicial notice will be taken. To be available in an action they must be pleaded and, if placed in issue, proved.

3. **Judgment:** PARTIES TO ACTION. Persons not parties to the action *held* not entitled to the enjoyment of personal privileges accorded by the decree therein to those who were impleaded.

4. ———: ———: EVIDENCE. The findings and decree as to certain of the defendants *held* sustained by sufficient of the evidence.

5. ———: ———: ———: REVIEW. The finding in favor of one of the defendants determined manifestly wrong and reversed.

6. **Trial:** EXCLUSION OF EVIDENCE: REVIEW. The action of the district court by which it excluded from consideration and decree certain designated matters *held* proper.

APPEAL from the district court of Dawes county. Heard below before WESTOVER, J. *Reversed in part.*

Albert W. Crites, for appellant.

Allen G. Fisher and *Francis G. Hamer, contra.*

HARRISON, C. J.

The plaintiff commenced this action in the district court of Dawes county, and in his petition pleaded, in

substance, that he was the owner of a certain described piece of land in said county and had owned and occupied it during a number of years immediately prior to the suit; that a "creek" or stream of water flowed, and had flowed, in its regular established course or way through and upon his land, which water he did use, and had used at all times, for domestic purposes and for stock, horses, cattle, etc., to drink, and had enjoyed the natural flow in volume of the water; that the defendants were upper riparian proprietors of land on said stream, had diverted the water of the creek from its usual course and had not returned it thereto, had thus appreciably diminished the volume of water which would ordinarily and naturally have run in the stream and through the land of plaintiff, and had, in the manner indicated and at times stated, caused the creek to become entirely dry and without any water on the plaintiff's premises, and that the defendants threatened the continuance of said acts. The relief sought was an injunction by which the further or future commission of the acts of which complaint was made might be restrained. The defendants answered and asserted their use of the water of the creek for the same purposes as the plaintiff, with the added one of irrigation. The right to the latter use was claimed by prior appropriation, by reason of a decree of the court in a former action, also by virture of a contract or agreement with the plaintiff. There was a further plea of rights of defendants acquired under legislative enactments relative to irrigation, but the district court expressly refused to pass on this question, and we will not entertain it. The decree was for defendants, and plaintiff has appealed.

The appropriation theory of the defendants, as argued in the brief, is based upon the propositions that they were upper riparian proprietors and as such entitled to a reasonable use of water from the stream, which would include its employment for domestic purposes, for watering live stock, and for irrigation, and in this connec-

tion it is stated that in the arid west the common-law theories of the rights of riparian proprietors have been modified to the extent of the allowance to a riparian owner to take water from the stream and use it for irrigating. There are cases which uphold the doctrine to which we have just alluded, but possibly this court expressed the contrary rule when it said: "Although the contrary has been asserted in some of the arid Pacific states (see *Reno Smelting, Milling & Reduction Works v. Stevenson*, 20 Nev. 269; *Stowell v. Johnson*, 26 Pac. Rep. [Utah] 290), the common-law doctrine with respect to the rights of private riparian proprietors, except as modified by statute, prevails in this country. (*Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238; Pomeroy, Law of Water Rights [Black's ed.] secs. 127, 130, and authorities cited.) At common law every riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of running streams through his land, undiminished in quantity and unimpaired in quality, although all have the right to the reasonable use thereof for the ordinary purposes of life (3 Kent, Commentaries *439; Angell, Watercourses sec. 95; Gould, Waters sec. 204; Pomeroy, Law of Water Rights [Black's ed.] sec. 8), and any unlawful diversion thereof is an actionable wrong." (*Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Neb. 798.) But be this true or not, to invoke the aid of the rule asserted for defendants it was necessary that they so plead as to place themselves within its purview. To justify under the right to irrigate, even if said doctrine could prevail, they must have pleaded and proved that the lands which they occupied were arid and irrigation a necessity. They did neither. The courts will not take judicial notice that a particular piece of land is arid and must be irrigated to be of use for agricultural purposes. (*McGhee Irrigating Ditch Co. v. Hudson*, 22 S. W. Rep. [Tex.] 398, 21 S. W. Rep. 175.)

The defendants in this action were not of parties to the suit in which the decree was rendered which they

pleaded herein and of which they claimed the benefit. The decree allowed certain parties therein named to use the water of the creek in specified quantities, and the defendants assert that they were given the privilege by said parties to take the water when they did not, or on stated days the parties to the decree would use no water, but the defendants took from the stream and used for irrigation the water which might have been taken by the others. The privileges accorded by the decree were personal and could not be enjoyed by other persons in the manner we have indicated, and that the acts of which complaint is herein made were under such an arrangement as we have in substance outlined furnished no excuse or defense.

The contract to which we have just referred as pleaded in the answer was to the effect that if the plaintiff in the present action, who was a party to the agreement, would not commence a suit to enjoin the other parties to the contract from withdrawing water from the creek, they would refrain from the use of the water except as specified in the contract. One defendant and party to the contract, James Harley, answered in this suit that he had strictly observed the terms and obligations of the agreement, and there was sufficient evidence to sustain a finding that what he pleaded was true; hence the decree to the extent it is in his favor must be affirmed.

One of the other defendants in this action, F. B. Woodruff, was not a party to the contract. E. F. Woodruff, his son, who signed the contract, it appeared, was not active in the use of the water, and the decree is right as to him. As to F. B. Woodruff, the evidence is clearly to the effect that he had committed the acts stated in the petition and without right. The decree as to him must be reversed and one entered in this court perpetuating the injunction against him.

We have not considered or discussed any questions which might arise under the statutory provisions of this state, for two reasons: one of which is that they were

entirely excluded from the case and decree in the district court, and the second, we do not think they were sufficiently presented by the record to call for consideration and decision in that court; and if so, are not in this.

JUDGMENT AS INDICATED.

CHARLES E. SUMMERS, SHERIFF, v. W. A. SIMMS ET AL.

FILED MAY 17, 1899. NO. 8906.

1. **Trial:** RIGHT TO OPEN AND CLOSE. The party who would be defeated if no evidence were given on either side must be allowed to open and close the introduction of evidence and arguments to the jury.

2. ———: ———: REPLEVIN: DAMAGES. In an action of replevin in which the petition alleged damages in the sum of $300 for the unlawful detention of the property, the answer admitted that but for the affirmative matters of defense pleaded therein the plaintiffs would be entitled to judgment, inclusive of nominal damages, or in the sum of one cent. Without deciding the applicability to actions of replevin of the general rule of the right to open and close, *held*, that inasmuch as the plaintiffs' right to damages as pleaded was of issue, they were entitled to open and close even if the rule was enforced.

3. **Instructions:** REVIEW: REPLEVIN. Instructions requested and given and asked and refused examined, and the action as to each determined without error.

4. **Evidence:** VERDICT. The evidence *held* sufficient to sustain the verdict.

5. **Misconduct of Counsel:** REVIEW. Alleged misconduct of counsel, consisting of statements during argument to the jury, to be available on review must be made the subject of an objection at the time, a ruling obtained, and exception taken thereto, and the portion of the proceedings incorporated in the bill of exceptions.

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

John D. Carson, Robert J. Sloan, Ellis, Reed, Cook & Ellis, for plaintiff in error.

W. C. Sloan, contra.

HARRISON, C. J.

During the early part of the year 1890 an arrangement was effected by which certain parties, inclusive of the defendants in error, respectively executed and delivered to one John H. Wright their promissory notes, those of defendants in error being each in the sum of $100. All the notes aggregated in amount $1,950. Wright at the time to which we have referred was possessed of very little property and no available capital and desired to engage in a general retail mercantile business at Strang, this state, and the notes were given to enable him to obtain the funds or credit necessary to put into active existence his business intentions and wishes. The obligations were deposited in a bank which furnished him $1,300 in money to use in the purchase of goods. Whether the notes were given and deposited for the purpose of securing a loan solely, or with the further design of inducing parties of whom Wright should order goods to allow him credit and partially for the benefit of such parties, was one of the issuable questions of this action. In May or June, 1890, the projected business venture was effectuated and became an actuality, and continued until the 6th day of the month of February, 1891, when a transfer of the stock of goods which Wright then had was made to the defendants in error. Wright had purchased goods of a number of wholesale houses or firms on credit, and for each of several of such creditors an action was instituted, in which a writ of attachment was procured to issue and a levy of it was made on the stock of goods. For the defendants in error this, a suit of replevin, was commenced and the goods were taken under the writ and delivered to them. The action was prosecuted to a judgment, which in an error proceeding to this court was reversed and the cause remanded to the district court for further hearing. For report of the opinion then filed see *Simms v. Summers*, 39 Neb. 781. In said opinion is a full statement of the matters of controversy, to which

we now refer for such incidents of it as we have omitted at this time. From another judgment of the trial court this proceeding has been prosecuted.

In the answer in the district court for plaintiff in error it was admitted that but for the affirmative matters of defense set forth in the answer defendants in error would have been at the commencement of the suit and at all times entitled to the immediate possession of the goods or property, also entitled to judgment against the plaintiff in error for the costs of the suit, and for damages in the sum of one cent for the wrongful detention of the goods. The substance of the affirmative pleas of the answer was in regard to a transfer of the stock of goods by John H. Wright to the defendants in error and that the transfer was fraudulent as to his creditors and void.

At the trial counsel for plaintiff in error (the sheriff) asserted the right to open and close the introduction of evidence and arguments to the jury. This was denied, and that it was refused is the chief complaint at this time. The petition contained a plea, in general terms ordinarily employed in replevin actions, of the right of defendants in error to the immediate possession of the goods and for damages in the sum of $300 for unlawful detention. The reply was a general denial of the allegations of new matter in the answer. That the party to an action who, from the state of the issues joined, if no evidence is introduced, will suffer a judgment is entitled to open and close the evidence and arguments, is a right given by statute (Code of Civil Procedure, sec. 283), and it is substantial error to deny the right, but whether applicable in action of replevin we are not called upon in this case to decide. In the case of *Bixby v. Carskaddon*, 29 N. W. Rep. [Ia.] 626, it was said: "The plaintiff claims to have purchased the goods in controversy of one Billings, and the defendants pleaded that such purchase and sale was made to hinder and delay the creditors of Billings, and was therefore fraudulent. (1.) Prior to the last trial the defendants filed a pleading, admitting that the

plaintiff was in possession of the property in controversy, and that he was rightfully entitled to such possession; that the detention of the goods by the sheriff was wrongful, and that the plaintiff was damaged in the sum claimed in the petition unless his purchase from Billings was fraudulent, and all other defenses except this were withdrawn. Thereupon the defendants claimed the right to open and close the case, and assumed the burden of proof. Their claim in this respect was objected to by the plaintiff, but the court sustained it, and this action of the court is assigned as error. Under the issue the plaintiff was not required to introduce any evidence, and was entitled to judgment for all he claimed, if the defendants failed to establish the fraudulent character of the sale as pleaded. The burden was therefore upon the defendants, and they had the right to open and close the case." In the case at bar the answer admitted the damages in the sum of one cent, but the petition asserted damages to the amount of $300, and under this plea the defendants in error might have introduced proof of substantial damages; hence of the issues joined there was one at least to sustain which the defendants in error would have been obliged to produce evidence. This being true, this complaint is without force. To make their case as pleaded there was something for the defendants in error to prove, and they were entitled to open and close. (Code of Civil Procedure, sec. 283; 1 Thompson, Trials, secs. 228, 229.)

It is argued that the court erred in charging the jury as requested by defendants in error in the instructions numbered 3 and 7. These were both pertinent to the issues and evidence adduced, also within the doctrine of the opinion filed in the case at its former hearing, and not open to the objections urged against them. There was prepared for plaintiff in error an instruction numbered 8, and it was requested that it be given in the charge to the jury and this was denied. It is complained that this refusal was an erroneous one. The instruction

grouped certain facts and stated that if the jury believed from the evidence in the existence of such facts, then the verdict should be for the plaintiff in error. The instruction tendered treated prominently of at least one fact, and made it elemental of the conclusion which was to be drawn from this and other facts conjointly, viz., that the transfer of the goods by Wright to defendants in error was fraudulent, and the subordinate fact to which we have reference could in no event assume the importance or have the effect which it was stated it might. There was also asked a clear invasion of the province of the jury, since the question of fact—that of fraud in the transfer—was for that body to determine, and not for the court.

There is also argued an objection to the sixth instruction given in compliance with the request of defendants in error. This portion of the charge was in relation to the memorandum of agreement which had been introduced in evidence, and with regard to the force and effectiveness of which there was what is not inaptly termed a collateral issue, to be determined from the evidence which bore directly thereon, and the jury was directed that unless its forceful existence had been shown it might be excluded from consideration of the main issues to the extent it might therein affect the view to be adopted of the conduct of the defendants in error in the transaction involved in the litigation. Under the evidence on the subject it was not improper to instruct the jury that it might first determine whether the asserted agreement ever in fact had an existence; and if not, to drop it from further consideration.

It is complained that the ninth instruction asked for defendants in error was erroneous. This portion of the charge embodied the proposition that even if the jury believed that the defendants in error had agreed to the memorandum or to sign it, yet they might, notwithstanding that fact, deal with Wright and purchase the goods as any other person might have done. This was directly

within the doctrine announced in the former decision in the case and was moreover entirely correct.

A further contention is that the verdict is not sustained by the evidence. It appears from statements in the briefs that there have been three trials, one of which resulted in a verdict and judgment for the plaintiff in error, one in a disagreement of the jury, and one in a verdict and judgment for the defendants in error. The evidence was conflicting on some of the main points, and from a review of it we cannot say that a verdict for either party would lack sufficient to support it. The differing results of the three trials disclose very clearly that different minds would reach opposite conclusions from the evidence. The verdict will not, for the reason here urged, be disturbed.

It is also urged that there was misconduct of the counsel for defendants in error during the argument to the jury. This is attempted to be brought into the record by an assignment in the motion for a new trial and by affidavits in which are detailed what it is claimed constituted the misconduct, a statement which was, but should not have been, made to the jury. To obtain a review of this there should have been an objection at the time, a ruling thereon, exception thereto, and the portion of the proceedings made of the bill of exceptions; as it is not so presented, it is not available. (*Gran v. Houston*, 45 Neb. 813; *Bankers Life Ass'n v. Lisco*, 47 Neb. 340.) The judgment of the district court must be

AFFIRMED.

FRANCIS I. ELLICK, JR., v. JENNIE R. WILSON.

FILED MAY 17, 1899. No. 8912.

1. **Negligence: CAUSE OF INJURY.** Whether an injury is directly caused by an act or the former arises or flows from the latter proximately or naturally is a practical question rather than a theoretical one.

2. ———: PERSONAL INJURY: DAMAGES. A person whose safety is imperilled by the negligent act of another if injured in a reasonable and prudent attempt under the conditions and circumstances to escape the threatened danger may recover from the negligent one damages for the injury.

3. ———: ———: QUESTION FOR JURY. Whether the negligence and peril had existence and the attempt to avoid the latter was prudent and reasonable are usually questions of fact for the determination of a jury.

4. Instructions: REVIEW. Assigned errors of the giving designated instructions and refusals of others *held* without force.

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

Frick & Dolezal, for plaintiff in error.

N. H. Bell, contra.

HARRISON, C. J.

The petition filed in this case reads as follows: "The said plaintiff complains of the said defendant for on or about the 23d day of December, 1894, the said defendant recklessly, negligently, and wrongfully, with force and violence, threw and thrust some large and heavy planks or boards into a room in the Eno Hotel, in the city of Fremont, Nebraska, then used and occupied by plaintiff as a guest at said hotel, and plaintiff, without any fault or negligence on her part, in trying to avoid and escape from physical injury of which she was in imminent danger from the violence and wrongful act of defendant as aforesaid, dodged and made a sudden move backward and to one side, and thereby wrenched, sprained, and otherwise hurt and injured her right knee and the muscles, ligaments, tendons, and other parts thereof so that she became and was sick, sore, lame, and unable to attend to her ordinary affairs for the space of about one month, to her damage in the sum of $100, and was compelled to employ a physician at an expense of $15, and to pay for her board and lodging, care and nursing, at

said hotel the sum of $100. Plaintiff further says that her injuries so received as aforesaid are of a permanent nature and her physical vigor and bodily strength are impaired and will be during her natural life, and she will continue to suffer, as she has suffered heretofore, great mental anguish and bodily pain from the same; that she is a poor woman, dependent on her earnings as a working girl for her support, and by reason of said injuries her capacity for earning a living has been very much diminished, to her damage in all in the sum of $5,000, for which sum, with costs of suit, she claims judgment against said defendant." The answer was a general denial. A trial of the issues resulted in a judgment for the complainant, to reverse which is the purpose of a proceeding in error to this court.

When during the trial it was announced that the defendant in error rested her case counsel for plaintiff in error moved an instruction to find for plaintiff in error, "for the reason that no recovery can be had in law in this case, for the reason that it appears from the evidence that the injury complained of is not the approximate or reasonably to be expected result, and that the result was a mere accident in law." This was refused, and that it was is of the errors alleged and argued. It is disclosed by the evidence that the defendant in error and her sister were at the Eno Hotel, in Fremont, this state, and about 11 o'clock P. M. of December 23, 1894, went to their room in the hotel, and what further occurred will as well appear from portions of the evidence which we will quote. The defendant in error testified as follows:

Q. Now go on. Just state what transpired.

A. Well, we lit the lamp and my sister got ready for bed, and I was almost ready for bed. I heard my sister scream. I looked up to the transom and saw a large board sticking up through the transom, about two feet, I think it was, and I walked over to the door to see if I could see anybody in the hall. Of course we could not leave the board there all night. Mr. Ellick was standing

in the hall. I closed the door and locked it again, and pretty soon I heard Mr. Ellick laugh, and he said, "I will take the board down, girls," and instead of taking the board down he shoved it on into the room. I was standing by the wash-stand. It was right over my head. The board kind of tottered, and I stepped one side, and fell. I thought the board was going to hit me.

Q. Well, what then?

A. I fell, and I fainted after I fell down, and my sister threw some water in my face and helped me to bed, and I staid in bed a few minutes, I thought it would make my knee get better, it hurt me so; and she went over and called Mrs. Blue and she rubbed some liniment on my knee. It didn't help it any. They sent for Dr. McDonald about 12 o'clock, when he came and bandaged it up in some muslin until next morning. I didn't sleep any that night.

Q. How was it as to paining?

A. It pained me all night, and the next morning Dr. McDonald came and put a splint on my knee.

She further stated:

Q. How near did the board come to your head?

A. Why, I could reach it with my hand, if I raised my hand this way. I could touch the board.

Q. How was the board managed while it was in that position?

A. I thought it was going to fall down and hit my head, that is when I fell I jumped to one side.

The sister stated:

Well, I retired first. Sister wasn't ready yet. I heard a noise toward the transom, like the scraping of a board, and looked toward the transom and screamed, and my sister opened the door and saw Mr. Ellick in the hall and closed the door, and immediately after the door was closed I heard some one laugh, and I recognized the voice as being Mr. Ellick.

Q. How long had you known Mr. Ellick at that time?

A. I don't know just how long, a few weeks.

Q. How had you known him?

A. Why he boarded at the hotel. I waited on him in the dining-room.

Q. You saw him several times every day?

A. Yes, three times.

Q. Was he a considerable of a hand to laugh, or otherwise? Had you head him laugh before?

A. Yes, several times.

Q. You say you screamed, she opened the door, and then what,—then you heard him laugh?

A. I heard him laugh. Then he pushed the board over, and my sister thought to prevent it striking her head. She jumped quick to one side and fell forward.

The plaintiff in error stated that he went upstairs to go to his room, and when near the room in which the defendant in error and her sister were one of them called to him and requested him to "take the board away that was against the transom." There seemed to be a board against the transom. The board or boards were about twelve or fourteen feet in length and were so placed that the one end was in the room about two feet and the other rested on the hall floor. The plaintiff in error further testified: "I picked it up at the end, and being acquainted with the girls, and always in a cutting up way around there, I just pushed it in about half way, took it out and put it where the rest of the boards were and went to bed." The contention for plaintiff in error under the assignment of error to which we have referred is that there was no liability, for the reasons that it was shown that the injury to defendant was an accident and not a direct and natural consequence of the act of plaintiff in error,—not an effect of which his act was naturally the cause or which could be expected as a result; that he owed no duty toward defendant in error except such as one member of society owes to another, and his act was without malice, bad motive, or purpose. It has been stated on this subject: "Though an inquiry as to what is the proximate cause of an injury, from a legal point of view, often

involves, in a sense, metaphysical subtleties and distinctions, in determining what are and what are not the proximate consequences of an act, the law favors practical distinctions rather than those which are merely theoretical. In fact a result may be physically secondary and consequential, and yet in legal contemplation proximate. In this connection it has been well said that 'the law is a practical science, and courts do not indulge refinements and subtleties as to causation that would defeat the claims of natural justice.' So impossible is it to lay down any general rules of uniform application in this connection, that it is almost conceded that each case must be decided with reference to its own particular facts or, as it was said by one court: 'Many cases illustrate, but none define, what is an immediate or what is a remote cause. Indeed, such a cause seems to be incapable of any strict definition which will suit in every case.' To a sound judgment must be left each particular case." (8 Am. & Eng. Ency. Law [2d ed.] 567.) In the case at bar the act of plaintiff in error in pushing the board into the room was, to say the least, a reckless and careless one and no doubt planned and calculated to have some effect on the inmates thereof, a very probable one of which might very reasonably be expected to be that of fright or fear, and it would not be unreasonable to contemplate that there might be an attempt to escape what might well be viewed as a threatened injury. Whether the party injured had good reason to apprehend danger and acted with reasonable prudence under the circumstances were questions of fact for the jury, and not in this case of law for the court (8 Am. & Eng. Ency. Law [2d ed.] 581), and in view of all the evidence we cannot say that the decision of the jury was clearly wrong; hence it will not be disturbed.

There were some instructions given by the court to present to the jury the questions which in another branch of the case we have just considered, and it is urged that the exposition of them was too narrow, and it is stated that

with a view to correct said defect and others there were requested for plaintiff in error certain instructions, which were refused. That the first to which we have referred were given and the latter refused were of the assignments of error, and they are now urged in argument. We have made a careful examination of these matters, and are forced to conclude that the instructions given were thoroughly pertinent and applicable to the conditions and circumstances developed in evidence and not open to the criticisms made; and those refused being on the same subjects covered by the ones read it was not error to refuse to read them; furthermore, relative to the one refused numbered 2, it contained some objectionable matter. No errors have been established and the judgment must be

AFFIRMED.

Z. BOUGHN V. A. E. SMITH.

FILED MAY 17, 1899. No. 8889.

1. **Contract:** CONSTRUCTION. The contract set out in the opinion construed, and *held* to bind the parties thereto to account to each other for the net profits derived from the purchase and sale of lands under the contract, although such real estate was not specially described therein.

2. ———: CONSIDERATION. One consideration is sufficient to support all the stipulations of a contract, where such was the intention of the parties.

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

J. C. Robinson, for plaintiff in error.

Miller & Ready and *Barnes & Tyler, contra.*

NORVAL, J.

This suit was brought in the court below by A. E. Smith against Z. Boughn for an accounting between the

parties relating to the purchase and sale of the southeast quarter of section 29, township 28, range 1 east. The plaintiff obtained judgment for the sum of $327.40, and the defendant prosecutes error.

The petition is assailed as not stating a cause of action against the defendant. Plaintiff avers that the parties entered into a written contract, which is made a part of the petition, and a copy of which follows:

"This contract, made this 29th day of June, 1889, witnesseth that A. E. Smith sold and conveyed to Z. Boughn the following described lands, N. E. ¼ of section 21, T. 28, R. 1 E., on these express conditions and reservations, that is to say: In consideration of the sale of said lands by A. E. Smith to Z. Boughn for the sum of seventeen hundred and forty dollars the said Boughn hereby agrees that when the land shall be sold, said A. E. Smith, his heirs and assigns, shall receive from Z. Boughn one-half the net profits on the said land over and above the said seventeen hundred and forty dollars, interest and taxes, also taking into account the expenses of breaking up and cultivating the same and the crops, if any, raised on the same. And it is further expressly agreed by both parties hereto that in case either party finds a purchaser for said land, and the other party shall not desire to sell the same, then the party not desiring to sell shall purchase of the other party his interest in said land under this contract. And it [is] further agreed that the conditions and agreements shall hold good as to any other lands which the said Boughn and Smith may purchase together hereafter.

"Witness: A. E. SMITH.
"Z. BOUGHN."

It is further alleged that in accordance with, and under the terms of, said contract plaintiff and defendant, in July, 1889, purchased jointly the southeast quarter of section 29, township 28, range 1 east, for $2,000, and was held by defendant in trust for the use and benefit of plaintiff and defendant; that said written contract con-

tained the provision, "and it is further agreed that the provisions and agreements shall hold good as to any other lands which the said Boughn and Smith may purchase together hereafter;" that the land last above described was sold by defendant for $5,600 to one Christensen, and defendant has received the rents and profits of said real estate, and the whole proceeds of the sale, and has refused to account or pay over to plaintiff his share of profits in the purchase and sale of such real estate, although often requested so to do, and that defendant is indebted to plaintiff by reason of the premises in the sum of $2,500.

The contention of the defendant below is that the action is based upon the written agreement copied above, and as it refers specifically to the selling by him to Boughn, and the division of the profits of, the northeast quarter of section 21, township 28, range 1 east, no recovery can be had by reason of the alleged joint purchase of the southeast quarter of section 29, in town and range aforesaid, and the subsequent sale thereof at an increased price, and *Patterson v. Murphy*, 41 Neb. 818, is cited to sustain the argument. In that case it was held that a party suing on a written contract is limited by its terms. We fully adhere to the doctrine of that decision, but it has no application to the case at bar. While the contract describes a different tract of land from that stated in the petition, the pleading of the plaintiff is not for that reason defective. It will be observed that the contract contains the express provision that the "conditions and agreements shall hold good as to any other lands which the said Boughn and Smith may purchase together hereafter." So that the parties at the time the written contract was entered into contemplated other purchases and sales of real estate, and stipulated that the provisions of the contract should apply to such other purchases and sales. In the petition it is specifically alleged that the southeast quarter of section 29 was purchased by the parties in pursuance and under the terms

and conditions of their said written contract, for their joint use and benefit, and said quarter section is as much within the contract as if the same had been specifically described therein. Plaintiff, therefore, does not seek a recovery contrary to the written contract entered into with the defendant. The petition states a cause of action in favor of the plaintiff for his share of the profits growing out of the purchase and sale of the said southeast quarter.

It is also argued that if the contract could be construed to apply to the southeast quarter of section 29, then there was no consideration for such agreement. The contract must be regarded as an entirety, and on its face discloses a consideration for the agreements or stipulations therein contained. In consideration of plaintiff selling his land to the defendant at a stipulated sum, the latter agreed with the former that when this land should be sold the net profits derived therefor should be divided between them. This consideration was sufficient to uphold the clause in the contract relating to any other land which the parties might subsequently purchase under and in pursuance of the agreement. It is not true, as suggested by counsel for defendant, that when the transaction relating to the northeast quarter of section 21 was closed according to the agreement of the parties, the entire consideration of the contract was exhausted. One consideration is sufficient to support an entire contract, when such was the intention of the parties. No reversible error appearing in the record, the judgment is

AFFIRMED.

WILLIAM M. CLARK V. H. E. MCDOWELL.

FILED MAY 17, 1899. No. 8887.

Time to Prosecute Error. A proceeding in error in the supreme court must be commenced within one year from the overruling of the motion for a new trial, to confer jurisdiction to review the case.

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

William M. Clark, pro se.

Ambrose C. Epperson and *J. L. Epperson & Sons, contra.*

NORVAL, J.

The motion for a new trial was overruled and final judgment was rendered by the court below on November 23, 1895. This error proceeding was instituted in this court November 24, 1896, or more than one year after the rendition of the order sought to be reviewed. As the error proceeding was not commenced in this court within one year from the time the motion for a new trial was overruled, this court is without jurisdiction to review the case. (*Sharp v. Brown*, 34 Neb. 406; *Scarborough v. Myrick*, 47 Neb. 794; *Chapman v. Allen*, 33 Neb. 129; *Record v. Butters*, 42 Neb. 786.) The proceeding is

DISMISSED.

GEORGE W. LITTELL V. ANNA M. CROSS.

FILED MAY 17, 1899. No. 8896.

Review: UNAUTHENTICATED TRANSCRIPT OF JUDGMENT: DISMISSAL. A petition in error will be dismissed in the absence of an authenticated transcript of the judgment or final order sought to be reviewed.

ERROR from the district court of Pierce county. Tried below before ROBINSON, J. *Dismissed.*

John O. Licey and *B. B. Willey*, for plaintiff in error.

W. W. Quivey, contra.

NORVAL, J.

The record in this case is authenticated as follows:

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

I, R. A. Tawney, clerk of the district court of Pierce county, do hereby certify that the foregoing is the original bill of exceptions in the said cause upon the testimony taken on the motion for a new trial, and also a true and perfect transcript of the petition, answer, and instructions given in said action as the same are on file and of record in my office.

"[SEAL.] R. A. TAWNEY,
"Clerk of the District Court."

It will be observed that the foregoing makes no mention of the final judgment entered in the district court. In the absence of an authenticated transcript of the judgment or order sought to be reviewed the petition in error must be dismissed. (*Bailey v. Eastman*, 54 Neb. 416.)

DISMISSED.

L. BERKSON ET AL. V. MEYER HELDMAN ET AL.

FILED MAY 17, 1899. No. 8895.

Sales: COMMERCIAL AGENCIES: FALSE STATEMENT OF SELLER: RESCISSION. A sale of goods made on the faith of the entire report of a commercial agency as to the financial standing of the proposed buyer, and not particularly in reliance of a statement made by him to the agency, cannot be rescinded because such statement was false and untrue. *Poska v. Stearns*, 56 Neb. 541, followed.

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

Sawyer & Snell and *J. E. Philpott*, for plaintiffs in error.

V. H. Stone and *Coffin & Stone, contra.*

NORVAL, J.

Four actions of replevin were brought in the district court of Lancaster county against L. Berkson, Lewis Poska, Sol Berkson, Charles H. Dell, German National Bank, and H. Simmons Gregory Dry Goods Company, in one of which Meyer Heldman and others were plaintiffs and in each of the other three causes Julius Bamberger and others, Isaac Steppacher and others, and Katz-Nevins Company, respectively, were plaintiffs. Each action was to recover certain goods sold by the plaintiffs therein to the defendant L. Berkson, a retail merchant at Lincoln, which sale, it was claimed, was induced by certain false and fraudulent representations made by the purchaser, set forth in the petition for replevin, whereby the right to rescind the sale is asserted. The causes were tried together in the lower court, in each a separate judgment was entered against the defendants, and a separate bill of exceptions was settled and allowed. The defendants have brought the causes here for review, filing separate transcripts in this court. It is disclosed that the goods in controversy, after they had been sold by the several plaintiffs to L. Berkson, were mortgaged by the purchaser to the other defendants and possession of the property was taken by the mortgagees. The mortgages are not assailed, but the question presented for consideration is whether the vendors were entitled to rescind the sale on the ground of fraud in the purchase, and to recover the property from the mortgagees. The evidence adduced on the trial tends to show that Berkson made certain false representations as regards his financial standing to the R. G. Dun & Co. Commercial Agency, and the latter made a report or statement concerning the same to the several plaintiffs as follows: "Berkson, L., D. G. & Notions, Lincoln, Neb., July 8, 1893. Thinks the stock would invoice fully $12,000, insured $10,000, and $1,200 would pay his entire indebtedness. Is doing a fair business, which is managed

economically and with some profit. Has been here a good many years, and no complaints are heard of him in any way. His stock is largely of cheaper variety, and would suffer heavy shrinkage on forced sale. Is generally conceded a net worth of $4,000 to $5,000, this estimate allowing liberally for shrinkage in stock. Prospects thought fair." In making the sales to Berkson the several plaintiffs relied upon the foregoing statement or report, and the right to a rescission is predicated thereon. This report of the commercial agency was before the court in *Poska v. Stearns*, 56 Neb. 541, where it was held that a sale made on the faith of such report as an entirety, and not particularly on the strength of the statement made by Berkson to the commercial agency, could not be rescinded merely because such statement was false and untrue. With reference to said report, in the case just mentioned, we said "that there was no pretense that Berkson had made the statements therein embodied, except that he estimated that $1,200 would pay his entire indebtedness." This observation is equally applicable to the cases now before the court, and yet the several plaintiffs relied upon the truthfulness of the report as a whole, while it only purported to include the statement by the purchaser of a single fact. Under the rule announced in *Poska v. Stearns, supra*, the sales could not be rescinded on the ground of fraud. It is unnecessary to review the evidence. It must suffice to say that it establishes beyond controversy that the several plaintiffs, in making the sales to Berkson, relied exclusively upon the said report of his financial standing by the R. G. Dun & Co. Commercial Agency. It is true in the case of Isaac Steppacher and others against Berkson the trial court made a finding as to certain false representations made by Berkson to Max Sallinger, the traveling salesman of said plaintiffs, but there is no competent evidence which we have been able to discover in the record which tends to show that either Mr. Sallinger, or the firm he represented, relied on such statements. The cases are

governed by the decision in *Poska v. Stearns, supra,* and for the reasons stated in the opinion filed therein the judgments are

REVERSED.

C. D. WOODWARD ET AL. V. STATE OF NEBRASKA, EX REL. WILLIAM THOMSSEN.

FILED MAY 17, 1899. No. 10507.

1. **Payment of Costs:** WAIVER OF RIGHT TO APPEAL. The mere payment of the costs by an unsuccessful litigant is not a waiver of the right to appeal or prosecute error from the judgment rendered on the merits.
2. **Office and Officers:** OFFICIAL BONDS: APPROVAL. Under section 17, chapter 10, Compiled Statutes, the incumbent of a public office having public funds or property in his control, who is re-elected, shall not have his bond approved until he has produced and fully accounted for such funds and property.
3. ———: ———: ———. The provisions of said section 17 are mandatory, and are applicable to any person elected to the office of county treasurer as his own successor who has failed to account for or produce to the proper accounting officers all the public funds or property of which he had control.
4. **Mandamus:** JUDGMENT ON PLEADINGS. It is reversible error to grant a peremptory writ of mandamus upon the pleadings alone, and without the production of evidence, where a material averment in the application or petition for the writ is put in issue by the answer.
5. **Pleading:** CONCLUSIONS OF LAW. Mere conclusions of law in a pleading will be disregarded.
6. **Mandamus:** APPROVAL OF OFFICIAL BOND. Mandamus will not lie to compel the approval of an official bond when the application for the writ fails to show that the bond tendered was executed by sufficient competent sureties.

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

W. S. Pearne, County Attorney, R. R. Horth, Charles G. Ryan, and *Fred W. Ashton,* for plaintiffs in error.

W. H. Thompson and *O. A. Abbott, contra.*

NORVAL, J.

William Thomssen, the relator, instituted mandamus proceedings in the court below to compel the respondents, as members of the board of supervisors of Hall county, to approve his official bond as county treasurer of said county. An answer was filed to the application by all the respondents, except two, and the cause was submitted to the court, heard and decided upon said pleadings, a peremptory writ of mandamus was allowed and issued as prayed, and the costs, amounting to $3.60, were taxed against the respondents, which they subsequently paid.

Counsel for the relator strenuously insisted that the respondents, having voluntarily paid the costs adjudged against them by the district court, are thereby precluded from prosecuting this proceeding to have the judgment allowing the writ reviewed, and *Hamilton County v. Bailey*, 12 Neb. 57, and *Gray v. Smith*, 17 Neb. 682, are cited to sustain the argument. Those decisions are not in point here. They decide that where a litigant accepts the amount of his recovery, he thereby waives the right to have said judgment reviewed by appellate proceeding. Obviously it would be unjust to permit a party who has received the fruits of a judgment in his favor to prosecute error therefrom, for the acceptance of the benefits of the litigation is an affirmance of the regularity of the proceedings resulting in the judgment and a waiver of the right to prosecute appeal or error proceeding. The acceptance of the amount of a judgment, like the taking of a stay of execution or order of sale, is a waiver of all error in the proceedings. But the payment of the costs of a case by the party against whom the same were taxed does not have that effect. This judgment consists of two parts, one on the merits and the other for the costs. The payment and satisfaction of the latter is no bar to error proceeding to obtain the reversal of the order or judgment granting the peremptory writ. The

payment of the costs is not an affirmance of the validity of the other portion of the judgment. In Elliott, Appellate Procedure, section 152, it is said: "It is obvious that there is an essential difference between one who pays a judgment against him, and one who accepts payment of a sum awarded him by a judgment. Payment by a party against whom a judgment is rendered may often be necessary to protect his property from sacrifice, and what a party does to prevent the sacrifice of his property cannot, with any tinge of justice, be held to preclude him from assailing the judgment. Our cases holding the payment by the defendant does not estop him from prosecuting an appeal, rest on solid ground, and are sustained by the decisions of other courts." The doctrine embodied in the foregoing quotation has been recognized and applied by the courts in numerous cases. (*Kling v. Sejour*, 4 La. Ann. 128; *Armes v. Chappel*, 28 Ind. 469; *Belton v. Smith*, 45 Ind. 291; *Edwards v. Perkins*, 7 Ore. 149; *Hayes v. Nourse*, 107 N. Y. 577; *Chapman v. Sutton*, 68 Wis. 657; *Mann v. Ætna Ins. Co.*, 38 Wis. 114; *Watson v. Kane*, 31 Mich. 61; *Hartson v. Dale*, 9 Wash. 379.) If the payment of a judgment is no waiver of the right to review such judgment, the conclusion is irresistible that the payment of the costs adjudged against the respondents is not a bar to this appellate proceeding. (*State v. Martland*, 32 N. W. Rep. [Ia.] 485.)

It is urged by respondents that the court erred in rendering judgment against them upon the pleadings and without evidence. The application and the answer constituted the entire pleadings. Certain averments of the petition were admitted by the answer and other allegations of the relator were denied by the respondents. No useful purpose can be subserved by setting out the entire pleadings, or in giving a synopsis of the several averments and admissions therein contained. For present purposes it is sufficient to say that it appears from the application for the writ that the relator, at the general election held in November, 1897, was elected county

treasurer of Hall county as his own immediate successor to said office for the term of two years commencing January, 1898; that the vote cast at such election was canvassed, and he was declared elected to said office for said term, and a certificate of election was issued to him; that thereafter, and within the time prescribed by law, he executed and delivered to the county a bond in due form in the sum of $150,000, signed by himself, as principal, and the Fidelity & Deposit Company of Maryland, as surety, and that afterward said bond was approved as to form, amount, and surety by the county attorney; that the bond was referred by the county board to the committee, which after due investigation reported the same back to the board for action. The application avers: "That the said board found, which is true, that said bond was in due form, was for the amount required by law, and that the surety thereon was sufficient and ample, and that the same was in every way in accordance with the laws of the said state, and so found; * * * that this complainant prior hereto, on the — day of ——, 1895, at a general election, was elected to the said office of county treasurer of said county and gave his bonds, qualified as such and entered upon his duties as such, and has held and conducted the said office since, and is now in possession thereof under the said last-named election, and has and had produced and accounted for all public funds and property received by him as such treasurer." The answer of the respondents contains, among other denials, the following: "Denies that he has produced and accounted for all public funds and property received by him as such treasurer." The answer also affirmatively alleges specific facts as constituting a failure of the relator to produce and account for certain of the moneys of the county which had come into his hands by virtue of his office; but these averments need not be given or summarized, or be further noticed.

The provision of law invoked by respondents is that part of section 17, chapter 10, Compiled Statutes, which

declares: "When the incumbent of an office is re-elected, or re-appointed, he shall qualify by taking the oath and giving the bond as above directed; but when such officer has had public funds or property in his control, his bond shall not be approved until he has produced and fully accounted for such funds and property." This expression of the legislative will is plain and free from ambiguity, and as only one meaning can be placed on the language employed by the lawgivers, no room is left for judicial interpretation. The statute means just what it says, namely, "when such officer has had public funds or property in his control, his bond shall not be approved until he has produced and fully accounted for such funds and property." The statute is mandatory in its requirements, and applies to a person elected to succeed himself as county treasurer who during his first term, or at the expiration thereof, has not accounted for or produced to the proper accounting officers all the public funds or property belonging to the county of which he had control. The petition having averred that the relator was elected county treasurer as his own immediate successor, it devolved upon him, by suitable averments in his application for the writ, to bring himself within the provisions of the section copied above. This the relator has attempted to do by the insertion in his application of the clause quoted above. Whether the allegation on that subject is the statement of an ultimate fact, or the mere conclusion of the pleader, no opinion is now expressed thereon, but for present purposes the averment will be regarded as sufficient. But such allegation was expressly put in issue by the answer of the respondents, and the cause having been decided by the trial court upon the pleadings alone, without the introduction of any evidence, the granting of the peremptory writ was clearly erroneous. The burden was upon the relator to establish that he had complied with the statute. A party is required to prove each material averment in his own pleading which is not admitted by the pleading of his adversary.

The judgment is wrong for another reason. The petition or application for the writ fails to state sufficient facts to entitle the relator to receive the relief demanded and granted. His bond must have been signed by a competent surety before the right to approval existed. The sole averment in the petition upon the subject is that the bond was duly signed by the relator as principal and the Fidelity & Deposit Company of Maryland as surety. It is conceded by relator's counsel that the allegation with such reference to the qualification of the surety is in the nature of a conclusion, but it is insisted by him that the remedy was by motion for a more specific statement. To this proposition we do not agree. Under the Code a pleading must state facts, and not mere conclusions of law. (*Rainbolt v. Strang*, 39 Neb. 339.) The conclusions of the pleader need not be assailed by motion, but advantage may be taken thereof at any time, and in testing the sufficiency of the pleading they must be disregarded. Section 9, chapter 10, of the Compiled Statutes provides that the official bonds of all county officers shall be executed by at least two sufficient sureties who are residents of the county in which the bond is given. The bond tendered by the relator, according to the averments of the petition, was not executed by a freeholder of Hall county, so that the relator has not complied with the said section of the statute. Evidently the relator relies upon the provisions of the act of the legislature of 1895, entitled "An act to facilitate the giving of bonds, undertakings, and recognizances, and to authorize the acceptance of certain corporations as surety thereon, and to repeal all acts and parts of acts in conflict herewith." (Session Laws 1895, p. 122, ch. 22.) Conceding for the purpose of present investigation only, without venturing an opinion upon the question, that said act so supersedes or modifies section 9 of chapter 10 of the Compiled Statutes as to authorize the execution of official bonds of county officers by foreign surety companies and to do away with resident freeholders signing the same,

still the petition is defective, in substance, in not showing that the Fidelity & Deposit Company of Maryland was empowered to transact business in Nebraska, or that such company had complied with the various requirements of said act of 1895, or that it was competent to sign relator's bond as surety. It follows that relator in his pleading did not show himself entitled to have his bond approved, and the court erred in commanding the respondents to approve the same. The judgment is accordingly

REVERSED.

HARRISON, C. J., not sitting.

PETER B. NELSON V. FARMLAND SECURITY COMPANY ET AL.

FILED MAY 17, 1899. NO. 10580.

1. **District Courts:** SPECIAL SESSIONS. By section 25, chapter 19, Compiled Statutes 1897, a judge of the district court is authorized to appoint and hold a special term in any county in his district for the transaction of any business that may properly come before such court.

2. **Assignments of Error:** CONTINUANCE: RECORD FOR REVIEW. An assignment of error that the court erred in denying a motion for a continuance is without merit where the record does not disclose that the motion was ever presented to the court for decision, or that there was any action or refusal to act thereon.

3. **Motion for New Trial:** LACHES. It is not error for the court to strike from the files a motion for a new trial filed after the time limited by the statute for that purpose.

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

Allen G. Fisher and *F. O'Linn*, for plaintiff in error.

Albert W. Crites, contra.

SULLIVAN, J.

This is a proceeding in error to reverse a decree of the district court of Dawes county foreclosing a real estate mortgage executed by Peter B. Nelson and now owned by the intervener, John A. Hamilton. After the cause had been pending for nearly five years it was called for trial, and tried and determined at a special term held on September 27, 1898. The jurisdiction of the court and the validity of its judgment are called in question. Section 25, chapter 19, Compiled Statutes 1897, is as follows: "A special term may be ordered and held by the district judge in any county in his district, for the transaction of any business, if he deem it necessary. In ordering a special term he shall direct whether a grand or petit jury, or both, shall be summoned." Acting under the authority of this section Judge Westover made an order at his chambers in Rushville on September 24, appointing a special term for Dawes county to be held on the 27th of the same month. This order was filed with the clerk the day before court convened, and Nelson, being informed of the fact, appeared at the trial and participated therein. There can, under these circumstances, be no doubt with respect to the jurisdiction of the court and the validity of the judgment. But it is said that if the court had power to try the cause, it seriously erred in denying defendant's motion for a continuance based on the absence of counsel and want of timely notice that the term would be held. The defendant filed with the clerk a motion for a postponement of the trial, but the record does not show that such motion was ever presented to the court or that the court either acted or refused to act thereon. There is, therefore, no merit in this assignment. The alleged error does not affirmatively appear.

It is disclosed by the record that the special term adjourned *sine die* on September 27, and that the motion for a new trial was not filed until September 29. A mo-

tion to strike from the files the motion for a new trial was sustained on the ground that it was not filed within the time limited by the statute. This ruling of the court is assigned for error. The defendant having neglected to file his motion for a new trial during the term at which the decision was rendered, the court was without authority to grant it. It might with propriety have been either overruled or stricken out. (*Ex parte Holmes*, 21 Neb. 324; *Aultman v. Leahey*, 24 Neb. 286; *Roggencamp v. Dobbs*, 15 Neb. 620; *Davis v. State*, 31 Neb. 240; *Doolittle v. American Nat. Bank*, 58 Neb. 454, 78 N. W. Rep. 926.)

It is further contended that a new trial should have been granted on the ground of newly-discovered evidence. There was no newly-discovered evidence. What was claimed to be such was the deposition of Mr. Hamilton, which had been taken on due notice and had been among the files of the case for more than six months before the trial.

There being no statutory motion for a new trial, we cannot inquire whether the evidence is sufficient to sustain the decree. Neither can we consider in this proceeding any other matter which should have been brought to the attention of the district court by a motion for a new trial. This proposition is settled by repeated adjudications. (*Carlow v. Aultman*, 28 Neb. 672; *Jones v. Hayes*, 36 Neb. 526; *Brown v. Ritner*, 41 Neb. 52.) The judgment is warranted by the pleadings and is

AFFIRMED.

PETER B. NELSON V. WILLIAM R. ALLING, TRUSTEE.

FILED MAY 17, 1899. No. 10581.

1. **Judicial Sale:** REFUSAL TO VACATE: APPRAISEMENT: REVIEW. An order denying a motion to vacate a judicial sale on the ground that the appraisement was too low will not be set aside when based on substantially conflicting evidence.

2. ———: APPRAISEMENT. An appraisement of real estate for the purposes of a judicial sale cannot be successfully assailed on the ground that the appraisers were mistaken in their valuation of the property.

3. District Courts: SPECIAL TERMS. By section 25, chapter 19, Compiled Statutes 1897, a judge of the district court is authorized to appoint and hold a special term of court in any county of his district for the transaction of any judicial business that may properly come before him.

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

Allen G. Fisher, for plaintiff in error.

Albert W. Crites, contra.

SULLIVAN, J.

This proceeding in error brings before us for review an order of the district court of Dawes county confirming a judicial sale of real estate. The defendant Nelson resisted the motion for confirmation on the grounds that the appraisers proceeded irregularly in making the appraisement, and that the valuation fixed by them upon the property was too low. The district court having decided these questions upon substantially conflicting evidence, its decision will not be disturbed. (*Nebraska Loan & Building Ass'n v. Marshall*, 51 Neb. 534.) In the case cited the rule was applied under circumstances quite similar to those in the case at bar. But if the evidence bearing on the question of valuation were sufficient to establish fraud in the appraisement, we could not for that reason alone reverse the order of confirmation, there being in the motion to vacate the appraisal no allegation of fraud to which such evidence is responsive. It is now the established doctrine of this court that the appraisement cannot be successfully assailed merely because the appraisers were mistaken in their valuation of the property. (*Vought v. Foxworthy*, 38 Neb. 790; *Ecklund v. Willis*, 44 Neb. 129; *Kearney Land & In-*

vestment Co. v. Aspinwall, 45 Neb. 601; *Brown v. Fitzpatrick*, 56 Neb. 61; *Ballou v. Sherwood*, 58 Neb. 20, 78 N. W. Rep. 383; *Lockwood v. Cook*, 58 Neb. 302, 78 N. W. Rep. 624; *Michigan Mutual Life Ins. Co. v. Richter*, 58 Neb. 463, 78 N. W. Rep. 932.) The sale having been confirmed at a special term held on September 27, 1898, the defendant challenges the jurisdiction of the court and denies the validity of the order. The point thus presented was considered and decided in the case of *Nelson v. Farmland Security Co.*, 58 Neb. 604, 79 N. W. Rep. 161. It was there held that the term was properly convened and that the presiding judge was invested with authority to hear and determine causes properly on the calendar of the court. The judgment is

AFFIRMED.

FRANK E. MOORES ET AL. V. STATE OF NEBRASKA, EX REL. JOHN BOESEN.

FILED MAY 17, 1899. No. 10584.

1. **Intoxicating Liquors:** LICENSE: APPEAL BY REMONSTRATOR. Under section 4, chapter 50, Compiled Statutes 1897, an unsuccessful remonstrator may appeal from an order granting a license to sell intoxicating liquors.

2. ———: ———: ———. But such remonstrator cannot appeal from an order overruling his protest against the issuance of a license.

3. ———: ———: ———: TESTIMONY: MANDAMUS. Where it does not appear that a saloon license was granted over the remonstrator's protest, he cannot by mandamus compel the license board to reduce to writing and file in their office the testimony taken on the hearing of the remonstrance.

4. ———: ———: ———: ———. The provision of the statute requiring every license board to reduce to writing all the testimony taken on the hearing of any remonstrance and file the same in the proper office is for the benefit of those entitled to have such testimony reviewed in the district court.

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

E. H. Scott, for plaintiffs in error.

T. W. Blackburn and *J. J. Boucher, contra.*

SULLIVAN, J.

There is presented in this case for review a judgment of the district court of Douglas county allowing a peremptory writ of mandamus commanding the plaintiffs in error, as members of the board of fire and police commissioners of the city of Omaha, to reduce to writing and file in their office all the testimony taken by them on the hearing of relator's objections to the issuance of liquor licenses to certain persons who were applicants therefor. From the record it appears that the testimony was taken in shorthand, and that the remonstrances having been overruled, the relator desired to have the stenographer's notes extended so that he might prosecute appeals in accordance with section 4 of chapter 50, Compiled Statutes 1897. There is no doubt about the right of an unsuccessful remonstrator to appeal from an order granting a license to sell intoxicating liquors, but the statute nowhere declares that he may appeal from an order overruling his protest. The board may consider his objections insufficient or unsustained by the proof, but they may, nevertheless, for other reasons refuse to grant the license. In that event the remonstrator is not aggrieved in a legal sense, and consequently cannot prosecute an appeal. In this case it was neither alleged nor proven that any order had been made granting a license over Boesen's protest. He was, therefore, not interested in the performance of the duty enjoined by the statute on the respondents. Every license board, regardless of the condition of the revenues under its control, is required to reduce to writing all the testimony taken on the hearing of any remonstrance and file the same in the proper office; but this duty is imposed only for the benefit of those who may be entitled to have such testimony re-

viewed in the district court. No right of the relator having been infringed, he is not entitled to the relief demanded in his petition. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

LOUIS BOOKNAU V. L. CLARK.

FILED MAY 17, 1899. No. 8598.

1. **Review:** HARMLESS ERROR. Errors which are not prejudicial to the losing party will not warrant the reversal of a judgment against him.

2. ———: ———: INSTRUCTIONS. If the conclusion reached by the jury is right and is the only one permissible under the pleadings and proofs, it is immaterial whether the instructions of the court correctly stated the law applicable to the issues submitted.

3. **Personalty:** OWNERSHIP: EVIDENCE. Exclusive possession of personal property is merely *prima facie* evidence of ownership.

4. ———: ———: ———: HUSBAND AND WIFE. Under the law of this state a married woman may own and control both real and personal property, and there is no presumption that chattels found in the possession of a husband and wife belong to the husband.

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

J. S. Kirkpatrick and *L. E. Kirkpatrick*, for plaintiff in error.

A. R. Humphrey and *M. McSherry, contra.*

SULLIVAN, J.

Clark sued Booknau to recover possession of a red cow. The cause was tried to a jury in the district court, and resulted in a verdict and judgment in favor of the plaintiff. The defendant prosecutes error.

It appears from the bill of exceptions that Booknau asserts title through a chattel mortgage executed to him by H. H. Patton in November, 1891, while Clark's claim

of ownership is based on a purchase from Patton's wife made in the spring of 1894. The Pattons lived on a farm in Custer county, and, so far as the evidence gives any indication in regard to the matter, possessed equal authority and responsibility in the management of their business affairs. Each was the sole owner of a number of cattle, which were either kept on the farm or herded on the range. After reading the evidence we find it unnecessary to consider any of the assignments of error relied on for a reversal of the judgment. Whether the jury were correctly instructed is altogether immaterial, since their conclusion is right and is the only one which could have been properly reached. This remark is also applicable to the rejected evidence of identity. That the cow in controversy belonged to Mrs. Patton when the defendant's mortgage was executed is shown by the testimony of several witnesses. There is absolutely no evidence tending to prove that H. H. Patton ever had any title to the animal. It is true that in the mortgage he asserted ownership, but that fact was not competent evidence against Clark, who traced his title to another source. (*Warner v. Wilson*, 73 Ia. 719; 5 Am. & Eng. Ency. Law [2d ed.] 974.) Exclusive possession of personal property is, of course, presumptive evidence of ownership, but that presumption, being a rule of law and not of logic, loses its effectiveness when met, as it was in this case, by opposing proof. Besides, there was no evidence whatever of exclusive possession in Paton, and consequently there was nothing to which the presumption could attach. In *Oberfelder v. Kavanaugh*, 29 Neb. 427, it is said: "Under the law of this state a married woman may own personal property in her own right, the same as a married man. When such property is in the joint possession of both, the law raises no presumption that the husband is the owner thereof." We think the trial court would have been warranted in directing a verdict for the plaintiff. The judgment is

AFFIRMED.

JOHN H. LONGFELLOW, RECEIVER OF THE STATE BANK OF WAHOO, APPELLEE, V. E. H. BARNARD, APPELLANT.

FILED MAY 17, 1899. NO. 8902.

1. **Unincorporated Bank.** An unincorporated bank, exclusively owned by a private individual, is not a legal entity, even though its business be conducted by a president and cashier.
2. ———: DISPOSAL OF ASSETS. In such case the assets of the bank represent merely the portion of the owner's capital invested in banking, and he may lawfully dispose of them to pay or secure the just claims of any of his creditors.
3. **Fraudulent Vendee:** MORTGAGES. A fraudulent vendee of property may lawfully mortgage the same to secure a *bona fide* creditor of the fraudulent vendor. The consent of the vendor to such disposition of the property is implied in the conveyance by which he invested the vendee with the title.
4. **Mortgages:** CONSIDERATION. A pre-existing debt already due is a sufficient consideration for the execution of a mortgage securing the same.
5. ———: INDEMNITY. A mortgage given to indemnify a surety or guarantor is in legal effect a security to the owner of the debt, even though he did not originally rely on it or know of its existence.
6. **Fraudulent Mortgage:** ASSIGNMENT: CONSIDERATION. An assignment of a fraudulent mortgage to secure a creditor of the mortgagor is valid without any consideration moving from the assignee to the assignor. Such a transaction is, in substance, a release of the fraudulent mortgage and the execution of a new mortgage by the debtor to his creditor.
7. **Merger:** ESTATES: INTENTION. Whether a merger results from the possession by the same person at the same time of two estates of different rank in the same property depends generally on the intention of the owner.
8. **Receiver:** EFFECT OF APPOINTMENT. The appointment of a receiver is in the nature of an equitable execution. By it the court is able to reach only the actual interest of the debtor in the property impounded.

APPEAL from the district court of Saunders county. Heard below before SEDGWICK, J. *Reversed.*

Munger & Courtright, for appellant.

Good & Good, contra

SULLIVAN, J.

This action was instituted in the district court by the appellee against the appellant to cancel and annul a mortgage upon lot 7 and the west half of lot 8 in the county addition to the city of Wahoo. The defendant answered, asserting the validity of his mortgage and demanding a foreclosure of the same. The decree granted the relief sought by the petition and dismissed the counter-claim. Barnard brings the record here for review by appeal.

Most of the essential facts are either admitted or specifically found by the trial court. The lots were originally owned by W. H. Dickinson and are covered by a large brick building, one room of which was used and occupied for some years prior to 1893 by the State Bank of Wahoo. The bank was not incorporated, but was a private institution owned and managed by Dickinson, who was at the same time conducting a real estate, loan, and insurance business. He was also interested in an electric light plant and owned an elevator and coal yard. On January 24, 1893, Dickinson, being insolvent and having absconded, the bank closed its doors and soon afterwards passed into the hands of a receiver appointed under the authority of section 14, chapter 37, page 397, Session Laws 1889. In November, 1892, Dickinson, for the purpose of defrauding his creditors, executed to his sister-in-law, Harriet E. Adams, the mortgage in suit, and about a month later he made a fraudulent conveyance to her of the legal title to the mortgaged property. The deed contained a recital to the effect that the grantee had assumed the payment of her own mortgage. Both instruments were filed for record at the same time. Prior to the events just recounted Dickinson, in some transaction not connected with the banking business, became indebted to Barnard in the sum of $2,000. This indebtedness was evidenced by a promissory note which Barnard had sold to the First National Bank of Fremont

with a guaranty of payment at maturity. The note became due on January 1, 1893, and, being unpaid, Barnard went to Wahoo with a view of obtaining security or payment. He was unable to see Dickinson, but he obtained from Miss Adams, as protection to his guaranty, an assignment of her mortgage and the note which it was given to secure, and he agreed, in consideration of receiving the collateral, to take up the note which was still held by the Fremont bank and carry it himself for some indeterminate time. The defendant did afterwards take up the note according to his agreement, and now seeks to obtain payment by foreclosure of the Adams mortgage. The receiver is in possession of the property. He holds the legal title, which was conveyed to him by Miss Adams in recognition of his superior right and subject only to such incumbrances as the courts of this state might adjudge to be valid. The trial court found that Barnard knew, or ought to have known, that the conveyances by Dickinson to Adams were made for the purpose of defrauding creditors. This finding seems to be warranted by the evidence, and we shall, therefore, in the further consideration of the case assume its correctness.

With this statement of the salient facts we proceed to examine what we deem to be the decisive points discussed in the briefs of counsel. The validity of the mortgage in the hands of the defendant is the cardinal question which each of the parties, in demanding affirmative relief, presents for decision. The appellee insists that the State Bank of Wahoo was a *de facto* corporation, and that the mortgaged property, being a bank asset, was primarily liable for the payment of claims growing out of the bank business. We cannot accept this view, for it is obviously based on a false assumption. The business of the bank was conducted, it is true, by a president and cashier; but articles of incorporation were never adopted. It had no board of directors. It never pretended to possess or exercise corporate powers. It was incapable of contracting debts or of owning and holding property.

In its reports to the state banking board it was represented as a private concern, of which W. H. Dickinson was the sole proprietor. Certainly it was not in fact a legal entity, and we know of no reason why the owner, or those in privity with him, should be precluded from asserting the truth in regard to the matter. The assets of the bank represented merely the portion of Dickinson's capital invested in banking, and its liabilities represented the indebtedness incurred by Dickinson as a banker. The assets were his, and he might dispose of them as he pleased, subject, of course, to the power of creditors to reclaim them if the disposition should be in fraud of their rights. The liabilities were also his, and for their satisfaction all of his property, not exempt by law, was equally liable to seizure and sale. It results from these considerations that Barnard, before the appointment of the receiver, might have obtained from Dickinson security for the $2,000 note in the form of a mortgage on the real estate in controversy; and he might also, with Dickinson's consent, take as security an assignment from Miss Adams of the mortgage in suit. Such a transaction would be, in substance, a restoration of the property to the owner and the execution by him of a mortgage thereon to secure the just claim of a creditor. (*Murphy v. Briggs*, 89 N. Y. 446.) It would effectually purge the mortgage of the fraud with which it was originally tainted and make it a valid and enforceable security. This proposition is amply sustained by authority. (*Oriental Bank v. Haskins*, 44 Mass. 332; *Crowninshield v. Kittridge*, 48 Mass. 520; *Thomas v. Goodwin*, 12 Mass. 140; *Hutchins v. Sprague*, 4 N. H. 469; *Butler v. White*, 25 Minn. 432; *Brown v. Webb*, 20 O. 389; *Dolan v. Van Demark*, 35 Kan. 304.) In the cases here cited the property conveyed to defraud creditors was afterwards, with consent, or by the direction, of the debtor, applied to the payment of his debts. They were cases in which he exercised, through the agency of the fraudulent transferee, his undoubted right to pay or secure some of his creditors to the preju-

dice of others. The case at bar is somewhat different, and we were at first inclined to think that Miss Adams had no implied power to make either the defendant or the Fremont bank a preferred creditor; but the judicial utterances, we find, are to the effect that she had. In *Dolan v. Van Demark*, *supra*, Valentine, J., delivering the opinion of the court, said: "While, generally, a fraudulent vendee cannot, as against the creditors of the fraudulent vendor, sell, assign, or transfer the property to a third person who has notice of the fraud, nor transfer or assign the same to even a person who has no such notice, where such transfer or assignment is merely to pay a pre-existing debt of the fraudulent vendee, yet such fraudulent vendee may make a valid sale of the property to a *bona fide* purchaser without notice of the fraud, or may, with the consent of the fraudulent vendor, and probably without his consent, make a valid transfer or assignment of such property to a creditor of the fraudulent vendor, either in payment, or partial payment, of a *bona fide* debt of the fraudulent vendor, or as security for such debt, and whether such creditor has notice or not of the prior fraudulent sale." In *Webb v. Brown*, 3 O. St. 246, which was a contest between creditors, it was distinctly held that the fraudulent vendee might, without authority from his vendor, prefer one of the latter's creditors. The court said: "A conveyance by a fraudulent vendee of goods in payment or security of the vendor's debt requires no other assent than that which is contained in the vesting of the vendee with all the vendor's right in the property." We accept this as a correct statement of the law, and accordingly hold that the assignment from Miss Adams was just as effectual as though it had been made with Dickinson's express consent.

But it is contended by the receiver that Miss Adams had no mortgage to assign; that it was merged in the legal estate and ceased to exist when she became the owner of the fee. Upon this point the trial court made no finding, but the evidence, we think, pretty conclusively

shows that the mortgage was not extinguished. Whether a merger results from the possession by the same person at the same time of two estates of different rank in the same property, is generally a question of the owner's intention. (*Mathews v. Jones*, 47 Neb. 616; *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Neb. 9.) Miss Adams agreed, in the deed from Dickinson, to pay this mortgage. She filed both instruments for record at the same time and afterwards assigned the mortgage as security. These facts clearly evince an election by her to keep it alive. (*Ætna Life Ins. Co. v. Corn*, 89 Ill. 170; *Kellog v. Ames*, 41 N. Y. 259.)

The receiver asserts that the assignment of the mortgage was void for want of a valuable consideration to support it. We do not think it was. The transaction, as we have already pointed out, was, in substance and legal effect, the execution by Dickinson to Barnard of a mortgage to secure the payment of the $2,000 note. (*Murphy v. Moore*, 23 Hun [N. Y.] 95; *Seymour v. Wilson*, 19 N. Y. 417.) While it was primarily intended to indemnify Barnard against loss by reason of his guaranty, it was, as a matter of law, a security to which the First National Bank of Fremont might rightfully resort for the payment of its claim, even though it did not rely on it or know of its existence. (*Blair State Bank v. Stewart*, 57 Neb. 58, 77 N. W. Rep. 370; *Seibert v. True*, 8 Kan. 52; *New Bedford Institution for Savings v. Fairhaven Bank*, 9 Allen [Mass.] 175; *Moses v. Murgatroyd*, 1 Johns. Ch. [N. Y.] 119.) The existence of the debt and the guaranty of its payment made the assignment valid without any other consideration. The assignor was entitled to no consideration. She parted with nothing that was lawfully hers. She merely transferred Dickinson's property to pay Dickinson's debt. That a pre-existing debt, already due, is a sufficient consideration for the execution of a mortgage securing the same is a doctrine well-established by the decisions of this court. (*Turner v. Killian*, 12 Neb. 580; *Henry v. Vliet*, 36 Neb. 138; *Chaffee v. Atlas Lumber*

Co., 43 Neb. 224.) And it is equally well settled that the liability of a principal debtor to his surety or guarantor is a valuable consideration for the execution to him of an indemnity mortgage. (*Blair State Bank v. Stewart, supra; Stevens v. Bell*, 6 Mass. 342; *Buffum v. Green*, 5 N. H. 71; *Williams v. Silliman*, 74 Tex. 626; 6 Am. & Eng. Ency. Law [2d ed.] 709.) Had Dickinson himself made the mortgage to defendant, he certainly could not successfully resist foreclosure on the ground that there was no legal consideration. Neither can the plaintiff acting as a representative of creditors. The appointment of the receiver was in the nature of an equitable execution. By it the court was able to reach only the actual interest of the debtor in the property—the interest which the creditors themselves might have reached with an execution issued on a judgment at law in their favor. The judgment is reversed and the cause remanded with direction to the district court to render a decree foreclosing the defendant's mortgage as prayed.

REVERSED.

JOB A. MCWAID ET AL., APPELLANTS, V. BLAIR STATE BANK ET AL., APPELLEES.

FILED JUNE 8, 1899. NO. 8694.

1. **Purchase From Trustee.** If a purchaser of property from a trustee has at the time of the purchase notice of the trust, he is charged therewith.

2. ———: NOTICE. The transfer of property to a bank, with the knowledge of an apparent disclosed trust, *held* to have been under such conditions and circumstances that it was without notice, actual or constructive, of a secret trust, and was not placed upon inquiry further than was made of any existent or undisclosed trust.

3. **Conflicting Evidence.** Findings of a trial court on conflicting evidence will not be disturbed unless manifestly wrong.

4. **Bill of Exceptions:** CORRECTIONS. If a bill of exceptions does not

disclose what it was intended to at time of allowance, the trial judge may, after time for its settlement has expired, allow corrections therein to make it fulfill the prior intentions.

APPEAL from the district court of Washington county. Heard below before DICKINSON, J. *Modified.*

M. A. Hoyt and *Duffie & Van Dusen*, for appellants.

Osborn & Aye and *Francis A. Brogan, contra.*

HARRISON, C. J.

It appears that Daniel W. Archer was, and had been during some considerable time prior to April, 1894, the owner of lots 4 to 15, inclusive, in block 51, in Blair, Washington county, and had thereon a canning factory fitted with the necessary machinery and apparatus, and which he as owner had been operating. During the course of the business he had become indebted to various persons and firms and was probably unable to meet his indebtedness. The plaintiff in this action, in one against D. W. Archer in a court of Iowa, recovered a judgment for about $11,000. Suits by creditors of Daniel W. Archer had been instituted in the court in Washington county, in which writs of attachment had been procured to issue and which had been levied on the factory property and were prosecuted to judgment, and sale of the property had, at which it was purchased by Joseph Jackson, of defendants herein, and the title was conveyed to him by the sheriff. The sale was of date April 14, 1894, and soon thereafter there was formed a corporation, "The Blair Canning Company," to which the factory property was conveyed by Joseph Jackson on July 7, 1894, which was the date of the first meeting of the stockholders of the company. Officers were elected, of whom E. S. Gaylord, the vice-president, was one of the directors of the Blair State Bank and Mr. Kenny, one of the stockholders of the corporation, was a director and also president of the Blair State Bank. The company immediately en-

tered into possession of the factory and made preparation for its operation and for the "pack" of 1894. We will state here that in the record and arguments in the case use is made of the word "pack" to designate all of the product of the factory during a season, also in speaking of corn or peas canned during a season; thus, "The pack of 1894," "The pack of corn 1895," "The pack of peas, season of 1895," and we will employ the word in the same sense in the same connection, if necessary, in the opinion. In September, 1894, the plaintiffs instituted suit in Washington county on their Iowa judgment, against D. W. Archer, and February 26, 1895, were accorded judgment in the amount of $11,978.53, and in June of the same year the present action was commenced, the relief sought being to subject the factory property to sale and apply the proceeds to the payment of the judgment to which we have just referred. The Blair State Bank furnished or loaned to the canning company money to conduct its business operations and had received notes and mortgages, one of the latter being to secure a stated amount of $10,000 and an incumbrance on the real estate of the factory property. Contracts had been entered into with farmers to grow and deliver at the factory the peas and corn which when canned would constitute the "pack" of 1895, and when this suit was commenced all parties concerned in the contracts became anxious that some arrangement be concluded by which the factory might continue in operation through the season of 1895. The bank would not furnish the money, which it was apparent would be needed, unless it could be assured that the factory would be allowed to run during the entire season unmolested and without hindrance by reason of writs or movements in this action. The parties met at Blair, and after consultation a contract, which is known in the record as the contract or agreement of August 9, 1895, was consummated.

The foregoing are some of the main facts and occurrences upon which are predicated the asserted rights of

certain of the litigants in the case at bar. The plaintiffs were unsuccessful in the district court and have appealed.

It is undisputed that Joseph Jackson, when he became the purchaser of the factory property at the sale by the sheriff, and in his subsequent actions relative to it and its title, did not do so for himself but for another person, for whom he was trustee. The plaintiffs assert that Jackson was in all he did trustee for Daniel W. Archer, who secured all that was done to be done that he might thus cover up his property and keep it from his creditors, and particularly the plaintiffs; and further, that the Blair State Bank had full cognizance of the existent facts and circumstances of the purchase by Jackson and his trusteeship when it loaned the money to the canning factory and took as security for its payment a mortgage on the factory property, which being true, its lien thus created would be subject and inferior to that of creditors of Daniel W. Archer. Joseph Jackson testified on this subject that he acted in all that he did for J. L. Archer, a brother of Daniel W. Archer; that he was informed and believed that the money with which he paid for the property at the time of the sale was furnished by J. L. Archer, and he did not hear differently or have information of any other nature until the deposition of J. L. Archer, in which appeared statements to the contrary, was taken and filed for use in this suit. The bank, through its officers, did know that Joseph Jackson had purchased the property, held the title, and conveyed it to the company for some person other than himself, and when they made inquiries, were informed that it was for J. L. Archer. When the corporation, the canning company, was organized, about two hundred shares of the stock—all of it except five or six shares—was issued to J. L. Archer in consideration, Jackson states, as he and the parties were informed and fully understood at the time, for the factory property, the title to which was then passed to the company. After a full examination of all the evidence which bears upon

this branch of the case we are satisfied that the bank made its loans and received its mortgages without actual notice of a trust in favor of any other than J. L. Archer, and without cognizance of facts which required further or greater inquiry than it made relative to Joseph Jackson's transactions in respect to the property and the trust under which he acted; hence the trial court was right in its determination on this point in the case.

The contract of August 9, 1895, was in part as follows:

"This agreement, made and entered into this 9th day of August, 1895, by and between J. L. Archer, of Chicago, Illinois, D. W. Archer, Job A. McWaid, and Samuel F. Martin, partners under the name of McWaid & Martin, the Blair Canning Company, and the Blair State Bank, witnesseth, as follows:

"Whereas, certain litigation now pending, wherein the said Job A. McWaid and Samuel F. Martin are plaintiffs, and the other parties hereto are among the defendants of said action, the object of which litigation upon the part of the plaintiffs being, among other things, to subject the plant of the Blair Canning Company, of Blair, Nebraska, to the payment of the judgment in favor of said plaintiffs and against said D. W. Archer, and for other relief, and it being deemed advisable and to the best interest of all parties that the said canning factory now controlled by the defendant the Blair Canning Company shall be operated for the purpose of packing the product for the year 1895, and it being necessary to procure money for that purpose, that the same may be safely done it is agreed as follows:

"1st. It is agreed that there shall be no further proceedings of any kind or nature whatever by the said McWaid & Martin against the said defendants for the enforcement of their said judgment during the packing season of 1895, and that all such proceedings shall be suspended so that there shall be no interference with the said canning company in the operation of said factory for the year 1895, and until said pack shall be disposed of, or

with the product of said factory; that the said canning company may, without molestation on the part of the said McWaid & Martin, procure the necessary money and proceed at once to fulfill its contracts with the farmers and others in the purchase of corn, may make said pack, and may pledge said pack as security for any money so borrowed, and the said product may, if so agreed by said canning company, be held as the property of the said Blair State Bank, or other persons furnishing such money, until the expenses incident to the making of said pack and marketing the same, together with debts now existing upon said plant and owing by said canning company, shall be fully paid; and it is agreed that any surplus arising from said pack for the year 1895 above the expenses incident to packing and marketing the same and payment of debts existing against the defendant Blair Canning Company shall be paid over to the said McWaid & Martin, it being the intention of this agreement that all debts now existing against said company or said plant and all expenses which shall be necessarily incurred in the purchasing of corn or other material and making the pack for the year 1895, shall first be paid, including necessary expenditures for salaries and help, and the surplus, if any there be, turned over to the said McWaid & Martin. It is further agreed that the indebtedness from the Blair Canning Company to the Blair State Bank at the close of the business season of 1895 shall not exceed the sum of $7,642.48, and that said indebtedness shall be diminished or cut down or wholly paid off by the profits of the present year, or to the extent that said profits will extend for that purpose; and it is agreed that as fast as said indebtedness shall be paid any liens or incumbrances as disclosed by the public records shall be canceled. * * *

"It is further agreed that the said J. L. Archer and D. W. Archer shall, within five days from the date hereof, cause the stock of the said Blair Canning Company to be delivered to said McWaid & Martin, to be by them held as collateral security to their certain judgment against

the said D. W. Archer, subject, however, to redemption whenever the said judgment shall be satisfied, or until this agreement shall be modified by mutual agreement between the parties. It being understood that the defendant Blair Canning Company shall be and remain in full and complete possession of said plant for the purpose of securing, packing, and selling the product of 1895, including such portion thereof as has been already packed and until such pack shall be marketed; that they shall conduct said business economically and faithfully, and for the best interests of all parties concerned, and make the best disposition of said goods obtainable, and that all parties shall in good faith carry out this agreement. To all of which the parties acknowledge themselves mutually bound, this 9th day of August, 1895."

It is contended for appellees that this agreement recognized the priority of the mortgage of the bank over the judgment of the plaintiffs, and stipulated that the "pack" of 1895 should be sold and the proceeds appropriated to the payment of the claims of the bank, and if not sufficient, then the "plant," as the factory was termed, should be sold and the proceeds, to the extent necessary, be taken by the bank, and the surplus, if any, be paid to plaintiffs. The contract to which we have referred will not bear any such construction. We think in its clear intent it dealt with the pack and its disposition and the proceeds, to whom they should go, and left the question of the liens on the "plant" and their priority to be litigated when by the lapse of time this suit should again be entitled to progress.

It is insisted for appellants that at the time of a conference of the parties prior and preliminary to the agreement of August 9, 1895, at which the terms were mainly spoken of and settled, the bank, by one of its officers, as a basis for the figures which were then made relative to the financial condition of the canning company, stated that its total indebtedness to the bank then was $7,642.48; that said statement, and the belief in its correctness, was

one of the strongest inducements to plaintiffs to make the agreement and exerted quite an influence in that direction; and further, that the bank is now claiming a larger amount due them than was stated, and it should be held estopped to press a claim for the larger sum. There is a conflict in the evidence in relation to what was said and done on the subject of the amount due the bank at the time the parties were together and endeavoring to agree, as they finally did, as set forth in the instrument signed of date August 9, 1895. The one of appellees who was then present and acting for all of them states in his testimony that it had been ascertained by him and the other parties there that the books of the canning company disclosed an indebtedness to the bank of something more than $13,000; that the officer of the bank who was present (the parties were in the bank or one of its business rooms) observed "that is not the correct amount," and went into another room, from which he shortly returned and announced that the true amount of the indebtedness was $7,642.48; that this was accepted as correct, and all further conversation and adjustments were with said amount in view as the true one. It was T. E. Stevens, the cashier of the bank, who was with the parties, and he testifies that he does not know whether he ever stated there the gross sum then due the bank, but that it had been obtained from the canning company's books as more than $13,000; that the bank had in its control the "pack" of peas for the season, a large number of empty cans, and there were some other matters which would ultimately develop into credits in favor of the canning company on its indebtedness to the bank and the value of which he was unable to estimate correctly; that they applied the estimated values then as credits and approximately obtained the amount of the indebtedness, which was the sum we have before set forth. When the contract was reduced to writing there was in it a statement to the effect that the amount then due the bank was $7,642.48, but on objection, or probably because not

thought to be what was desired, it was stricken out, or "crossed out," and the language in regard to the amount named, which was heretofore quoted, was inserted in its stead. This, it will be remembered, was to the effect that at the end of the season the indebtedness to the bank should not be in excess of the sum designated. The cashier, during the trial, was asked to furnish an abridged, tabulated statement of the account between the bank and the canning factory. This he did, and it was offered and received in evidence without objection. The appellant who personally took part in the August 9, 1895, contract testifies in regard to the matters, the values of which the cashier says were estimated and credited to the canning company, that they were no further considered in arriving at the conclusions which finally ripened into an agreement, and there is other testimony to the same effect, and it is also disclosed that these matters were disposed of and the actual credits given the canning company during the subsequent course of the business during the year 1895, and the early part of 1896. In the testimony of the cashier he said that there was on August 9, 1895, more than $17,000 due the bank from the canning company. In his statement of the account which was received in evidence the amount of said indebtedness is fixed at $14,840.48, and the estimated value of the peas and material on hand at $7,198, which deducted from the given amount of the debt there remains $7,642.48, the sum estimated to be due the bank August 9, 1895. Preserving these figures and allowing the credit according to the estimate,—and we are furnished no better basis or figures for this credit,—and deducting its amount from the receipts from August 9, 1895, to the close of account,—this was when it was shown to have been received by the bank,—gives us the amount realized from the disposition of the "pack" of corn of the season of 1895, which last amount deducted from the balance due the bank August 9, 1895, plus the amount loaned to the canning company, also the overdrafts from

August 9, 1895, to the close of the account, and the remainder is $4,024.20, the true amount due the bank on the indebtedness. This drops from the calculation $1,588.89 of overdrafts, which, if they existed, were of creation prior to August 9, 1895. These, under all the evidence, we do not think should be considered. From the $4,024.20 there should be deducted $16.85, a later payment received by the bank, and we have $4,007.35 due the bank after the application of this further credit.

It appears that the bank purchased a large number of cases of canned corn and peas for a total consideration of $6,313.64, or probably $5,842.30. This transaction is attacked by the appellants on the ground that the prices agreed upon between the canning company and the bank were too small, and it is urged that the bank should be charged with a larger sum. Here it must be said that there was ample evidence to sustain the finding of the district court that the agreed prices were fair and the transaction one which merited approval. The evidence discloses that Daniel W. Archer had contracted with a number of firms and dealers to sell them canned goods, and it is claimed for appellants, and it was shown in evidence, that he stated on August 9, 1895, that he would turn these contracts or orders over to the canning company, which promise, the plaintiffs now say, was one of the matters by which they were induced to make the agreement of August 9, 1895, and it is contended that the bank loaned the company $1,090, which was paid to Archer as commissions for obtaining these orders; that this should not have been done and the amount should now be charged herein against the canning company and the bank. Archer did say on August 9, 1895, that he would give to the company the contracts or orders for canned goods which he had personally taken. This he afterwards refused to do unless paid the sum of $1,090, and after several attempts to have him keep his promise, also to take a less sum, it was developed that, all the facts and circumstances considered, probably the best

thing to do was to pay the commissions, and it was done, and we must approve the finding of the district court that such action was proper and that the bank is not chargeable herein with the sum paid.

Some exhibits were omitted from the bill of exceptions as settled and allowed by the trial judge. That this was true and that thereby the bill was rendered ineffective was urged in the brief filed for appellees. Appellants were allowed on motion to withdraw the bill for presentation to the district judge for amendment. The matter was heard before him and the amendment allowed. From the order of allowance an appeal was taken to this court. Our examination of the record in this appeal convinces us that while some of the facts differ from those in a somewhat similar appeal in the case of *Brennan-Love Co. v. McIntosh*, 56 Neb. 140, the rule therein announced is governable herein, from which it follows that the order of allowance of the amendment will be affirmed.

The decree, with the modification as to the amount hereinbefore indicated, is affirmed.

MODIFIED.

EDWARD W. MISKELL, APPELLANT, V. ADOLPH L. PROKOP ET AL., APPELLEES.

FILED JUNE 8, 1899. NO. 8921.

1. **Trade Name.** A right to the exclusive use in a particular locality of a trade name or sign may be acquired.
2. ———: INFRINGEMENT. A sign or trade name is not an infringement of another, if ordinary attention of persons or customers would disclose the differences.

APPEAL from the district court of Saline county. Heard below before HASTINGS, J. *Affirmed.*

A. R. Scott and *J. H. Grimm*, for appellant.

Hastings & Sands, contra.

HARRISON, C. J.

In the petition filed for plaintiff in this action January 10, 1896, it was pleaded that in October, 1889, he engaged in the mercantile business in Wilber, Saline county, and had continuously conducted said business there up to the time of the suit, and had advertised his business and store quite extensively, by which means he had attracted many customers and had established a lively and successful trade; that the sign placed on his store and the trade name which he had adopted and employed during the whole of the time he had been conducting the business was that of "Racket Store;" that by reason of his advertisement of the store by said name and the use of the sign his place of trade had become widely and well known by the said name, and that he had become entitled to the sole and exclusive use in the village of Wilber of the word "Racket" as a designation of his sign and of his store or place of business; that the defendants on or about the first day of November, 1895, engaged in business similar to that of plaintiff in Wilber in a building near that in which was plaintiff's store, on the same street, the same side of the street, and in the block east of his place, "and well knowing of the existence of the said trade sign and trade name of plaintiff and of the importance and value of the same to plaintiff and of his rights therein, did, with the design and purpose of defrauding plaintiff and of getting the benefit of plaintiff's reputation and patronage, and to mislead and deceive the public and to induce them and plaintiff's customers to believe that their store is plaintiff's store, simulate the trade sign and trade name so long used by plaintiff, as aforesaid, by placing over and above their store, in this form and manner, letters 'New York Racket Store,' New York being in much smaller letters, and advertising in the same form and manner in circulars, in the local newspapers, and on their letter-heads their business and place of business; that the assumption by de-

fendants of plaintiff's sign and trade name as aforesaid was for the purpose of supplanting plaintiff in the good-will of his established trade and business, and to cause it to be understood and believed by the public that defendants were doing business for the plaintiff, thereby by such deception depriving plaintiff of the gains and profits to which he is justly entitled; that the use by defendants of the name 'Racket' is a fraud upon the general public as well as plaintiff." The main relief sought was that the defendants should be enjoined from the further use of the word "Racket" as a part of the sign and name for their store. Issues were joined and a trial thereof resulted in a judgment for defendants. The plaintiff has appealed.

The defendants did not deny the use of the name for their place of business which the petitioner charged they had used, but denied the purposes of which the pleading of plaintiff accused them; also denied that the results had been as stated by plaintiff. The word "Racket," to the extent we are informed by the record in this cause, is what may be styled a fanciful or arbitrary appellation or designation as applied to a store of the kind operated by the plaintiff, and no doubt a man may adopt such a name for his place of business and by reason of prior appropriation and long-continued usage may acquire such a right to its use in the particular connection as to be exclusive in a certain locality, and the right will be recognized and protected by the courts. (26 Am. & Eng. Ency. Law 276-279.) In was disclosed by the evidence that the word "Racket" was quite frequently used as descriptive of stores wherein business was conducted along and in certain lines, and had been so of late years and prior to the plaintiff's adoption of it. In some cases it has been decided that such designations are but descriptive in their character, and their subsequent similar use by a near rival will not be enjoined at the instance of one who had made the prior selection and application. (*Gray v. Koch*, 2 Mich. N. P. 119; *Choynski v. Cohen*, 39 Cal. 501, 2 Am. Rep. 476.)

In the present case we think the question upon which the decision must turn is, was the defendant's sign, taken as a whole, such a simulation of that of the plaintiff as to work the mischief attributed to it or well calculated to so do? The district court evidently determined that it was not (*Lichtenstein v. Mellis*, 8 Ore. 464, 34 Am. Rep. 592; *Popham v. Cole*, 23 Am. Rep. [N. Y.] 22; *Elgin Butter Co. v. Sands*, 40 N. E. Rep. [Ill.] 616), and in view of all the evidence, inclusive of a consideration of the wording of the two signs entire, we cannot say that its finding was manifestly wrong, and it will not be disturbed. The judgment must be

AFFIRMED.

GILBERT JOHNSON V. FRED OPFER.

FILED JUNE 8, 1899. NO. 8927.

1. **Erroneous Exclusion of Evidence:** ACTION ON NOTE: SIGNATURE OF DEFENDANT. An assignment of error in relation to exclusion of evidence examined, and *held* well taken.

2. ———: ———: ———. Each party testified of one, and only one, conversation in regard to the matter at issue,—the execution of a promissory note. They differed as to the time and place of the conversation. The one gave testimony of admissions made by the other; the latter offered to show what he said at the time and place when and where he claimed to have talked with the former of and concerning the issuable matter. This was excluded. *Held*, Error.

ERROR from the district court of Hamilton county. Tried below before WHEELER, J. *Reversed.*

Hainer & Smith, for plaintiff in error.

George B. France, contra.

HARRISON, C. J.

The petition herein declared upon a promissory note, of which it included a copy, and prayed judgment for the

stated sum and interest. The signature of the plaintiff in error, as shown on the copy of the note and the instrument itself introduced in evidence, purported to be by mark. J. H. Sego, who, it developed, was the principal debtor or signer of the note, was not served with process. The plaintiff in error, who was summoned, in an answer denied generally and specially the execution of the note, and from an unfavorable judgment he has perfected an error proceeding to this court.

The main litigated issue was in regard to the signature or mark on the note, whether made by the plaintiff in error or not. To prove this fact the defendant in error and one witness, Charles Schrader, testified to admissions of plaintiff in error to the effect that he had signed the note. The admissions, it was asserted, were made during a conversation between the plaintiff in error and the defendant in error, and in which the said witness also took part, at the farm or home of the former, the time fixed being in the month of March or the springtime of the year 1892. The plaintiff in error testified that he had a conversation with the defendant in error in the presence of Charles Schrader, and in which the latter joined, but he fixes its occurrence at the farm or residence of a Mr. Webel, and that it was threshing time, or the fall of the year, and that there were present during the conversation several persons other than himself, the defendant in error, and Schrader. During his testimony he denied that he had seen or talked at his own home with the defendant in error or the witness Schrader, or the two together. They all agree as to the fact of but the one conversation, but they differ as to time and place, also do not entirely agree in regard to the parties present. During the examination in chief of the plaintiff in error, after he had testified that there was the conversation at the Webel farm and who was present thereat and joined therein, etc., he was asked, "What did you say to the plaintiff, if anything, in that conversation as to whether or not you had signed, or authorized the signing, of the

note in question?" To this an objection was interposed, which was sustained, and we are asked to review this action of the trial court. No offer of proof followed what we have detailed, and without such an offer, the error, if any, is not properly presented for review. (*Omaha Fire Ins. Co. v. Berg*, 44 Neb. 522; *Barr v. City of Omaha*, 42 Neb. 341; *Murray v. Hennessey*, 48 Neb. 608; *Alter v. Covey*, 45 Neb. 508.) One W. H. or Bert Hart was called as a witness and testified of the conversation as of occurrence at the Webel farm during threshing time,—thought it was about the middle of September. The following question was put to him: "You may now state what the defendant said to the plaintiff, if anything, at that time, in your presence, with reference to whether or not he signed the note, or authorized the signing of the note, in question." And the record of what further took place is as follows: "Objected to; incompetent, immaterial, and seeking to introduce the statements of the defendant in his own favor if anything. Sustained. Defendant excepts. Defendant now offers to prove by the witness, and he will so testify if permitted by the court, that at said time and place the defendant said to the plaintiff that he had not signed the note, or authorized any one to make his mark thereto, or place his signature to said note, and that he would not pay the same. Objected to; incompetent and immaterial. Sustained. Defendant excepts." This is of the alleged errors argued. The evidence sought to be elicited by the interrogatory to which the objection was sustained was open to the criticism of it that an answer to it would allow of evidence a "statement of the defendant in error in his own favor,—a self-serving declaration." It would be thus objectionable if to be considered as substantive evidence or as in any degree bearing directly on the question of the execution of the note by the party who made the statement; but notwithstanding this, here was a matter, a conversation relative to which all who testified of it agreed that it had transpired and that there had been but one, and they but differed in re-

gard to its time and place and what was said. We think clearly the evidence offered was competent and should have been received. Its tendency would have been to show that the defendant in error and his witness had been mistaken in regard to the time and place of the conversation, and further, to prove that when it did take place no admissions were made by plaintiff in error. For such purposes it was entirely pertinent and should have been admitted and submitted to the consideration of the jury under proper instructions, stating, limiting, and prescribing the purpose of its reception and consideration. (*Nesbit v. Stringer*, 2 Duer [N. Y.] 26.)

There were some other matters urged as erroneous, but we do not deem a discussion of them necessary at this time. The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

HENRY WILDE ET AL., APPELLANTS, V. HENRY A. HOMAN ET AL., APPELLEES.

FILED JUNE 8, 1899. NO. 8918.

Deed as Mortgage. The evidence *held* sufficient to sustain the findings and decree of the district court.

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

M. D. Hyde, for appellants.

Hall & McCulloch and *Charles W. Haller, contra.*

HARRISON, C. J.

It appears herein that Henry A. Homan, of appellees, became the owner of a portion of a lot in Omaha, the property now in suit, by purchase from Charles E. Mc-

Daniels, and the title to the property was conveyed to the former by deed of date June 29, 1873. On August 12, 1873, Henry A. Homan executed and delivered to his father, George W. Homan, a mortgage on the property as security to the father for any payments he might make of debts of the son, the notes evidencing which had been signed by the father as surety. On February 9, 1876, the son conveyed the property to his father by what was in form a "warranty deed," and the mortgage to which we have referred was discharged or released of record. The deed last mentioned was without any expressed consideration. The father subsequently conveyed the property to Carrie W. Homan, who was his second wife, at whose death, which occurred after she had become the apparent owner of the property, the title to it was assumed to have vested in her father and mother, the plaintiffs herein. They executed and delivered a conveyance of it to George W. Homan, in which conveyance were expressed certain conditions relative to the payment by the grantee of incumbrances, a mortgage and the taxes, also that he pay to the grantors and the survivor of them until death the sum of $50 on the first of each and every month of the time, and in default of the conditions or a condition, the conveyance might be declared void by and at the option of the parties or party entitled to the fulfillment of said conditions. The plaintiffs pleaded their ownership of the property, the conveyance to George W. Homan, the conditions of the transfer and defaults or non-compliances with them, and demanded that any rights under the instrument of conveyance be declared forfeited and it avoided. They further pleaded that George W. Homan died on or about July 5, 1886, and by will his property, inclusive of the property in controversy, was given to his children, five in number, and this property had been so conveyed that the title to it was claimed by, and apparently was in, Henry A. Homan. The appellee Henry A. Homan answered that the conveyance from him to his father, George W. Homan, was, while in form absolute,

in fact but a mortgage, and that it was so was well known to all the parties and to Carrie W. Homan, and denied that appellants ever acquired or had any title to the property. There was a reply for the plaintiffs. For Clinton Orcutt, who was interpleaded, there was an answer in the nature of a cross-bill, in which there was stated an indebtedness of Henry A. Homan to the cross-petitioner, and to secure its payment the execution and delivery of a mortgage on the property in suit by the former to the latter person, and the foreclosure of the mortgage was asked. A trial of the issues joined resulted in a decree by which the plaintiffs were adjudged to have no right or title in or to the property. The title was established in Henry A. Homan, and Clinton Orcutt accorded a foreclosure of his asserted incumbrance. The plaintiffs have appealed.

The main point made in argument for appellants is that the evidence is insufficient to sustain the findings and decree, and the rule is invoked that to support an assertion that a conveyance absolute on its face is a conditional one, or a mortgage, the evidence of the party who claims such character for the instrument must be quite clear, satisfactory, and convincing to the effect which he has alleged (*Roddy v. Roddy*, 3 Neb. 99; *Stall v. Jones*, 47 Neb. 706); and it is also urged in this connection that the appellants were representatives of the deceased, George W. Homan, and Henry A. Homan, an interested party in the result of the suit; hence incompetent to testify of and concerning the transactions between himself and his deceased father in regard to the property in controversy. We have carefully examined and considered the evidence, and if it be conceded that portions of the testimony of Henry A. Homan in regard to what took place between himself and his father at the time of the conveyance of the property by the son to the father, and the accompanying and attendant conversations and agreements could not be detailed by the son in this action, were not competent, also bearing in mind the doctrine in regard

to evidence in causes of the nature of the one at bar, yet we must conclude that there is evidence satisfactory in its character and effect which leads to the decisions embodied in the decree and it is sufficient to support them. This being true, the decree must be

AFFIRMED.

GEORGE E. BRADFIELD, APPELLEE, V. THOMAS SEWALL ET AL., IMPLEADED WITH KATE B. CHENEY ET AL., APPELLANTS.

FILED JUNE 8, 1899. No. 8920.

1. **Mortgage-Foreclosure Sale: RIGHTS OF LIEN-HOLDER: POSTPONEMENT OF HEARING.** The action of the court, of postponement of further litigation of an asserted lien, *held* not improper or erroneous.
2. **Pleading and Proof.** Facts pleaded and not denied need no proof.
3. **Mortgage-Foreclosure Sale: INVERSE ORDER OF ALIENATION.** The doctrine of sale of mortgaged premises under decree of foreclosure in the inverse order of alienation approved and enforced.

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

A. G. Greenlee, for appellants.

S. L. Geisthardt and *Sawyer & Snell, contra.*

HARRISON, C. J.

This action was commenced for appellee in the district court of Lancaster county to foreclose a mortgage on the west half of the southwest quarter of section 31, township 10 north, of range 7 east of the 6th P. M., executed and delivered to him by Thomas Sewall and wife May 5, 1888. In an answer for the Mays, of defendants, it was asserted that Tillie May purchased five acres of the mortgaged land, the title to which was on February 3, 1890, conveyed to her by warranty deed. It was in a cross-

petition filed for the American National Bank and Charles G. Dawes, as trustee for the bank, pleaded that five acres of the mortgaged property was on January 2, 1891, sold and by warranty deed the title conveyed to Frank W. Little, who on April 14, 1894, had executed and delivered to Charles G. Dawes, trustee for said bank, a mortgage on the portion of the land in controversy, the title to which, it was pleaded, had been transferred to the mortgagor. In an answer for Annie McNally it was set forth that she purchased five acres of the land in suit and the title to said part was transferred to her by warranty deed of date August 3, 1891. There was an answer for Kate B. Cheney in which it was stated that she became the owner of, and acquired the title to, the remainder, or sixty-five acres, of the land, of date October 15, 1894; that the conveyance to her was by warranty deed. It appeared and was of the findings of the court that Kate B. Cheney, by the terms of the conveyance to her, assumed and agreed to pay the plaintiff's mortgage debt. In a pleading for the Union Savings Bank there was asserted an action in its behalf on May 7, 1895, against Thomas Sewall and Florence A. Sewall for the recovery of an indebtedness, the issuance of attachment therein, and the levy of the writ on the land involved in the case at bar. It was further stated that for the Union Savings Bank there was, October 29, 1895, a judgment obtained against Thomas Sewall and Florence A. Sewall. A decree was rendered in the case at bar by which there was adjudged a foreclosure of the plaintiff's mortgage lien, the several pleaded conveyances were recognized, a sale was ordered in accordance with the rule of the inverse order of alienation, and the further litigation of the rights of the Union Savings Bank was postponed. It was also of the decree that the lien, if any, of the Union Savings Bank was subsequent and inferior to the liens established in this action.

In the appeal it is urged that the trial court should not have continued the matter of adjustment of the claim of

the savings bank, and could not properly do so. The future inquiry and ascertainment of and concerning the claim of lien for the bank could not affect the matters determined and settled by the decree; hence the action of the court, of which this complaint is made, was not improper. (*Brown v. Johnson*, 58 Neb. 222.)

It is argued that the conveyance to Frank W. Little was not shown. It was pleaded and not denied. The court's finding in this regard was in accord with the effect of the pleadings.

The only further contention is directly against the recognition in the decree of the doctrine of "inverse order of alienation." The rule has been very generally established and employed. (2 Pingrey, Mortgages sec. 1922; 2 Jones, Mortgages sec. 1621 and note 2; 9 Ency. Pl. & Pr. 411, 412, where the reasons for the rule as stated in *Iglehart v. Crane*, 42 Ill. 261, are quoted and the authorities collected in note 1, page 412.) The doctrine was stated with approval in *Lausman v. Drahos*, 8 Neb. 461, and was referred to, although, because inapplicable, not enforced, in *Hanscom v. Meyer*, 57 Neb. 786, and has been treated as a settled question in this state by the federal court. (See *Philadelphia Mortgage & Trust Co. v. Needham*, 71 Fed. Rep. 597.) We think the rule supported by sound reasons, and approve it. The decree must be

AFFIRMED.

FIRST NATIONAL BANK OF CHADRON, APPELLEE, V. GEORGE ENGELBERCHT ET AL., IMPLEADED WITH WILLIAM K. MILLER, APPELLANT.

FILED JUNE 8, 1899. No. 8444.

1. **Pleadings:** COPIES OF INSTRUMENTS. To "set out" means to recite or state in full.
2. **Ruling on Motion:** REVIEW. It is not error to deny a motion which is for relief to which the mover is not entitled, as a matter of right, substantially as moved.

3. **Pleading**: COPY OF INSTRUMENTS: PRACTICE. By motion is the proper method to secure the attachment to a petition of a copy of the instrument on which the suit is based.

4. ———: ———: DEMURRER. That a copy of the instrument, the foundation of the action, is not attached to the petition does not render the pleading open to successful attack by general demurrer, or, on appeal, to the objection that it is insufficient to support a decree, if the statement of facts discloses a cause of action.

5. ———: ———. The former opinion, in its general conclusion, the result of which was a reversal of the decree, overruled.

REHEARING of case reported in 57 Neb. 270. *Judgment below affirmed.*

R. C. Noleman, for appellant.

Albert W. Crites, contra.

HARRISON, C. J.

This cause was submitted and decided, the opinion then written being filed December 22, 1898. (57 Neb. 270.) A motion for a rehearing was presented and granted, and the case has been again submitted.

In the petition filed in the action there was pleaded the facts of the execution and delivery of a promissory note to the bank by the appellants, the execution by one of them of a mortgage on certain described real estate as security for the payment of the "same" note, and the conditions of the mortgage were set forth and the default alleged. The statements of the petition were full and direct in the particulars to which we have alluded, but no copy of either the note or mortgage was in the pleading or attached thereto. We stated in the former opinion: "Miller moved the court for an order compelling the bank to attach and file with its petition a copy of the note on which its action was predicated." This was not strictly correct. The motion filed was as follows: "Comes now the defendant W. K. Miller and moves the court to require the plaintiff to make its petition more definite

and specific in this, to-wit, that the plaintiff be required to set out in its petition a copy of the note sued on in said action." This was overruled, and the defendant Miller refused to plead further, and a decree was rendered in favor of the bank. In an appeal that the district court denied the motion which we have quoted is the burden of complaint.

"Set out," in the connection used in the pleadings, meant recite or state in full. (Black's Law Dictionary; Webster's International Dictionary.) Fairly and correctly read and understood, the motion of defendant was that the adverse party be required to recite or state in full in its petition the note in suit. To the relief demanded the party for whom the motion was filed was not entitled. The petitioner could not be required to "set out" the note in his petition. He might have been required to attach a copy to the petition, but not to quote it in terms in said pleading. The motion could not be granted as presented, and it was not error to deny it. (*McDuffy v. Bentley*, 27 Neb. 380; *Fox v. Graves*, 46 Neb. 812; 14 Ency. Pl. & Pr. 120, and note 4.)

It is further urged that the petition is insufficient, in that there is no copy of the note attached to it, and that the court could not, and should not, have rendered a decree based on the pleading. The demand for a copy to be attached to the petition should have been by motion. (*Dorrington v. Meyer*, 8 Neb. 211; *Ryan v. State Bank*, 10 Neb. 524.) The objection that no copy is attached must be by motion. It is not good ground of demurrer. (*Ryan v. State Bank, supra; Cheney v. Straube*, 35 Neb. 521.) There was a sufficient statement of a cause of action in the petition. That no copy of the note was attached did not make the pleading liable to successful attack by general demurrer, nor to objection on appeal to this court that there was not a sufficient statement of a cause of action. (*Home Fire Ins. Co. v. Arthur*, 48 Neb. 461; *McGonnigle v. McGonnigle*, 5 Pa. Sup. Ct. 168, 178; *Case v. Edson*, 40 Kan. 161.)

The announcements of rules in the former opinion were correct as abstract propositions, but were, in their applications in the case at bar, predicated upon an incorrect assumption of the scope of the motion. The decision, in its specific conclusions, need not be disturbed. In the general result of the reversal of the decree of the district court, it must be overruled, and the decree

AFFIRMED.

ENTERPRISE DITCH COMPANY ET AL. V. JOSEPH MOFFITT ET AL.

FILED JUNE 8, 1899. NO. 8880.

1. **Corporations**: STOCK: ASSESSMENTS. In the absence of statutory authority or power given by the articles of incorporation there can be no assessment against or on "paid-up" stock of a corporation.

2. ———: ———: ———. The fully paid-up stock of a corporation is the personal property of the owner, and the articles of incorporation and laws of the state are elemental of the contract existing between the corporation and the owner of stock, and may not be so amended by legislative enactment as to make the paid-up stock subject to an assessment or general or specific assessments, and forfeitable, or subject to summary sale by the corporation, for the non-payment of such assessment.

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

J. H. Broady and *F. H. Bentley*, for plaintiffs in error.

References: *Commonwealth v. Dituiler*, 131 Pa. St. 614; *Pfister v. Gering*, 122 Ind. 567; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 179; *Hale v Sanborn*, 16 Neb. 1.

F. A. Wright and *C. C. Wright, contra.*

References: *Atlantic Delaine Co. v. Mason*, 5 R. I. 463; *In re Long Island R. Co.*, 19 Wend. [N. Y.] 37; *Bergman v. St. Paul Mutual Building Ass'n*, 29 Minn. 275; *Trustees v.*

Flint, 13 Met. [Mass.] 539; *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98; *Great Falls R. Co. v. Copp*, 38 N. H. 134; *Hervey's Island R. Co. v. Bolton*, 48 Me. 451; *Anglo-Californian Bank v. Granger's Bank*, 63 Cal. 359; *Driscoll v. West Bradley & Cary Mfg. Co.*, 59 N. Y. 96; *State v. Morristown Fair Ass'n*, 31 Zabr. [N. J.] 195; *People v. Detroit & P. R. Co.*, 1 Mich. 458; *Williams v. Lowe*, 4 Neb. 382; *Paxton & Hershey Irrigating Co. v Farmers & Merchants Irrigation Co.*, 45 Neb. 884; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279.

HARRISON, C. J.

Six actions were commenced in the district court of Scott's Bluff county, in each of which it was sought to enjoin the sale by the Enterprise Ditch Company, a corporation, of some shares of fully "paid-up" corporate stock owned by the plaintiff in the suit because of the non-payment, by the holder, of certain assessments against said stock. The six suits were by stipulation consolidated and tried as one. Injunctions were allowed, and from the decrees appeals have been perfected for the ditch company, and the one decision here is to be applicable in all the cases. It was alleged in the petition, and admitted, "that the Enterprise Ditch Company was duly organized as a corporation under the laws of the state of Nebraska on or about the 7th day of March, 1889, and ever since has been a corporation under the laws of the state of Nebraska and doing business in Scott's Bluff county, Nebraska." A copy of the articles of incorporation was attached to each petition. Article 3 reads: "The general nature of the business to be transacted is to acquire, construct, operate, and maintain a canal taking water from the North Platte river, in said county and state, and diverting and appropriating water from said river sufficient to fill their said ditch at all times as may be necessary for the use of persons taking water therefrom and conducting through their said canal, and renting, leasing, selling, and otherwise disposing of water, water rights, or stock in said ditch to persons owning

lands under said ditch, or to any other person or persons, in the discretion of the board of directors or trustees, for the purpose of irrigation, milling, manufacturing, domestic, or other as may be necessary to fully carry out the business for which the same is organized." The provision in relation to by-laws is as follows: "The duties of all officers shall be prescribed by the by-laws of said corporation. And the board of trustees shall have authority to adopt such prudential by-laws as they shall deem proper and expedient for the management of the affairs of said corporation, and not inconsistent with the laws of the state of Nebraska, for the purpose of carrying on the business within the objects and purposes of this corporation."

By statute it is provided: "Every corporation, as such, has power * * * to make by-laws, not inconsistent with any existing law for the management of its affairs." (Compiled Statutes, 1897, ch. 16, sec. 124.) In the by-laws adopted by the ditch company it is provided that "the board of directors shall exercise a general supervision over the affairs of the company. * * * The board shall hold regular quarterly meetings, the first Tuesday in December, March, June, and September." "The board of directors shall at their first quarterly meeting make an estimate of the total cost of maintenance and levy an assessment for such an amount, subject to the call of the board of directors from time to time as the same shall be needed." It is further provided: "For non-payment of dues on any cash assessment. When any stockholder shall be in default of payment of any installment of assessment upon his stock, pursuant to any levy or assessment of the board of directors or trustees, for the period of thirty days after personal notice thereof or request to pay the same by the secretary, or after written or printed notice thereof or request to pay the same by the secretary, or after written or printed notice and demand therefor has been deposited in the post office properly addressed to such delinquent stockholder, the board of directors

may, at any meeting, order that the shares of stock held by such delinquent stockholder, and all the right or interest of such stockholder therein, be sold by the president of the company at public auction, or at some certain time and place to be designated in such order, to the highest bidder for cash; provided, however, that notice of the time and place of such sale shall be published in some general newspaper in Scott's Bluff county, Nebraska, for four consecutive weeks just prior to such sale, proof of which publication shall be the affidavit of the publisher or foreman of such paper. Further, that the proceeds of such sale, over and above the amount due on such shares and all expenses incidental to such sale, shall be paid to such delinquent stockholder, and the treasurer of this company may, for the company, purchase the said shares at said sale for an amount not exceeding what shall be due from such stockholder to the company, or, instead of the sale mentioned, the board of directors may, after like notice to the delinquent stockholder, make an order that at a certain time and place the stock of such delinquent shall be canceled at such time and place mentioned in the said order. If said delinquent fail to pay the same, then it shall be lawful for the said board of directors to declare the same canceled, and from that date the said stock shall be subject to subscription and sale the same as though it had never been sold, and all money paid thereon shall be forfeited and absolutely belong to the company." The action taken at the meeting on January 27, 1894, according to the record introduced, was as follows: "Motion by Wright that a cash levy of $6.50 per share be made upon the stock of the company, including the additional stock due and to be issued for work done in enlarging the canal; that $1 per share of said assessment be declared due in thirty days after notice to stockholders, the balance of said assessment to be subject to the call of the directors of the company." November 16, 1894: "Moved and seconded that a special levy of $1.50 per share on the capital stock of the company be made to

complete this enlargement. Carried." And on April 13, 1895: "On motion, it was decided to make a cash assessment of $4.50 per share for maintenance for the present year, $2 of the same to be paid before the delivery of water; balance to be paid when the board demanded same. Before water is delivered, approved security to be given for the payment of the same; also all back dues to be paid before water is delivered." At a meeting on October 19, 1895, it appears: "It was moved and seconded that we advertise the delinquent stock, or any stock not paid up on assessments, there being in default the following stock certificates: Nos. 125, 142, 178, 191, 116, 130, 143, 144, 135, 176, 142, 49, 88, were ordered advertised and sold." Notice was published and sale of the shares of stock would have ensued had it not been enjoined.

There was no statutory authority to assess stock of which the amount had been fully paid, neither did the articles of incorporation confer any express power so to do. In the absence of authorization by either, the directors could not enact a by-law by which provision was made for such assessments, and especially not to be enforced by a sale or practical forfeiture of stock. (*Omaha Library Ass'n v. Connell*, 55 Neb. 396; *Atlantic Delaine Co. v. Mason*, 5 R. I. 463; 2 Beach, Private Corporations, sec. 590; Cook, Stock & Stockholders, sec. 241, 242; Thompson, Corporations, secs. 1037, 1038; *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. [N. Y.] 495; *In re Long Island R. Co.*, 19 Wend. [N. Y.] 37; *State v. Morristown Fire Ass'n*, 3 Zabr. [N. J.] 195; *Williams v. Lowe*, 4 Neb. 382.)

A short time prior to the last assessment to which we have referred a legislative enactment of 1895 had become of effect, sections 66 and 67 of which were as follows:

"Sec. 66. Any corporation or association organized under the laws of this state for the purpose of constructing and operating canals, reservoirs or other works for irrigation purposes, and deriving no revenue from the operation of such canal, reservoir or works, shall be termed a mutual irrigation company, and any by-laws adopted by

such company prior to or after the passage of this act, not in conflict herewith, shall be deemed lawful and so recognized by the courts of this state; Provided, such by-laws do not impair the rights of one shareholder over another.

"Sec. 67. Any corporation or association organized under the laws of this state for the purpose of constructing or operating canals, reservoirs or other works for irrigation purposes may through its board of directors or trustees assess the shares, stock, or interest of the stockholders thereof for the purposes of obtaining funds to defray the necessary running expenses of such corporation or association. Any assessments levied under the provisions of this section shall become and be a lien upon the stock or interest so assessed, such assessment shall become delinquent at the expiration of 60 days if not paid, and the said stock or interest may be sold at public sale to satisfy said lien. Notice of such sale shall be given in some newspaper published and of general circulation in the county where the office of the company is located, the said notice to be published for four consecutive weeks prior to date of sale, upon the date mentioned in the advertisement, or at such time to which the sale has been adjourned, the said stock, or interest or so [much] thereof as may be necessary to satisfy said lien and costs of advertisements and sale, shall be sold to the highest bidder for cash." (Compiled Statutes, ch. 93*a*, art. 2, secs. 66, 67.)

The paid share or shares of stock were the personal property of any individual owner, and a contract, which embodied the articles of incorporation and the pertinent laws of the state, existed to which the shareholder was a party. Without a discussion or notice of some other branches of the argument and subject it must be said that the legislature could not so change these accrued, contractual, and property rights as to allow an assessment against the "paid-up" stock, and its forfeiture or sale for the non-payment. This would involve too violent an invasion of property and contract rights. (1 Cook, Stock

& Stockholders, sec. 50; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279; *City of Detroit v. Detroit & Howell Plank Road Co.*, 5 N. W. Rep. [Mich.] 279; Beach, Private Corporations, secs, 40, 41.

It follows that the decree will be

AFFIRMED.

DANIEL F. LA BONTY V. CARL P. LUNDGREN.

FILED JUNE 8, 1899. NO. 8881.

1. **Ejectment:** IMPROVEMENTS: OCCUPYING CLAIMANTS' ACT. A defendant in ejectment cannot avail himself of the provisions of the occupying claimants' act (Compiled Statutes, ch. 63), where all his interests in the improvements have been divested by judicial sale prior to the request for a jury to assess the value of the improvements.

2. ———: RENTS AND PROFITS. In proceedings under the occupying claimants' act the successful claimant may recover rents and profits subsequent to the commencement of ejectment suit, but not those which accrued prior to that time.

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

Griggs, Rinaker & Bibb, J. C. Crawford, and *J. A. Smith,* for plaintiff in error.

T. M. Franse, Munger & Courtright, and *E. F. Gray, contra.*

NORVAL, J.

This was ejectment brought by Daniel F. La Bonty to recover certain lands in Cuming county, and for rents and profits thereof. A trial in the district court terminated in favor of the defendant, and plaintiff brought the record to this court for review, where a judgment of reversal was entered at the January term, 1891. (31 Neb. 419.) Upon a retrial in the court below defendant again prevailed, and the plaintiff prosecuted an error proceeding,

which resulted in the reversal of the judgment. (41 Neb. 312.) The cause was subsequently tried again in the district court, and on January 12, 1895, a judgment in favor of plaintiff was entered for the possession of the real estate in controversy, which judgment also provided "that this cause be continued for the purpose of ascertaining and adjudging the amount of damages to which plaintiff is entitled, and also the value of valuable and lasting improvements made on said land by the defendant." On June 10, 1895, defendant applied for the appointment of appraisers under the occupying claimants' act, which request was granted and appraisers were selected over the objections and exceptions of plaintiff. Afterwards the latter asked the court below to ascertain itself, or appoint a referee, or call a jury to ascertain the value of the rents and profits during the four years the lands were in the possession of the defendant immediately prior to the institution of the action, which request was overruled and plaintiff excepted. The appraisers reported to the court below, assessing the value of the lasting and valuable improvements upon the land made by the defendant previous to his receiving actual notice of the claim of title by plaintiff at $3,255, and finding the rents and profits received by him after service of summons at $2,391, and assessing the value of the land at the time defendant went into possession thereof at the sum of $850. To the report of the appraisers plaintiff filed objections, which were overruled. Subsequently, one W. H. Atwood was permitted to intervene, setting up in his petition, *inter alia*, that he had purchased all the interest of the defendant in the premises and is the owner thereof, and praying that he be awarded the value of the improvements made by the defendant and the amount of the taxes paid by the latter, with interest. Plaintiff presented to the court below an application, or motion, for judgment for $1,200 for rents and profits which accrued prior to the commencement of the action, which was denied, and thereupon, on June 22, 1895, judg-

ment was rendered against the plaintiff and in favor of defendant for the sum of $1,439.16, the same being a sum equal to the amount found to have been paid by him for taxes on the lands and to redeem the same from tax sale with interest thereon, and also for the value of the improvements in excess of the amount of rents and profits received by defendant after the service of summons in the case. Plaintiff has prosecuted error.

The judgment in favor of defendant in the sum of $1,439.16 was entirely erroneous and must be set aside, since the record before us shows that whatever title or interest Lundgren ever had in the land had been divested and transferred to the intervener Atwood long prior to the entry of said judgment, by virtue of a judicial sale of the property and deed issued in pursuance thereof. Lundgren, when the value of the improvements was assessed, had no claim of title to the real estate, was not in possession of the premises, and could not avail himself of the benefits of the occupying claimants' act. The right to recover for these improvements had passed to the intervener.

The court did not err in denying the application of plaintiff to ascertain the value of the rents and profits for the four years preceding the bringing of the suit, for the reason that the application was not seasonably made. Plaintiff should have proven his damages on the trial which terminated in the rendition of the ejectment judgment. The clause attached to the judgment quoted above is not broad enough to permit the recovery of rents and profits which accrued prior to the issuance and service of summons, but as we construe the provision, the cause was merely continued for the purpose of proceeding under the act for the relief of occupying claimants, under which proceeding plaintiff was entitled to have considered the value of rents and profits subsequent to the service of summons, and not prior to that time. The judgment of June 22, 1895, is

REVERSED.

CHARLES C. KNAPP, APPELLEE, V. M. I. FISHER ET AL., IMPLEADED WITH ALEXANDER CHENEY, APPELLANT.

FILED JUNE 8, 1899. NO. 8891.

1. **Fraud:** PROOF. Fraud is never presumed, but must be proven.
2. **Fraudulent Conveyances:** QUESTION OF FACT. Whether or not a transfer of property is fraudulent as to the creditors of the vendor is a question of fact to be determined from the evidence adduced.

APPEAL from the district court of Pawnee county. Heard below before STULL, J. *Affirmed.*

Conley & Fulton, for appellant.

Story & Story, contra.

NORVAL, J.

On November 20, 1869, Richard C. Fisher was the owner of the east half of the northwest quarter of section 1, township 2 north, in range 10 east of the 6th principal meridian, and on said day, by warranty deed, he conveyed said premises, with other lands, to one Adam Christopher, which deed was placed upon record on December 6, 1869. Mary D'Arcy, now deceased, on November 25, 1873, obtained a judgment in the county court of Jersey county, in the state of Illinois, against said Fisher and one John Christopher for the sum of $475.50. Mary D'Arcy afterwards brought suit on said judgment in the district court of Pawnee county, this state, aided by attachment, the premises above described were seized under the writ of attachment, and Fisher being a non-resident of Nebraska, service by publication was made in the cause. On October 19, 1876, Mary D'Arcy obtained judgment in said action against Fisher for $624.08 and an order of the court was entered for the sale of the attached property. The land already described was sold by the sheriff, in pursuance of the said order, to Mary D'Arcy,

which sale was confirmed by the court on April 12, 1877, and on June 11, 1877, the sheriff executed and delivered to her a deed for the property, which deed on the same day was duly recorded in Pawnee county. On August 12, 1887, Mary D'Arcy died, leaving as her only heirs at law her grandson, Alexander Cheney, one of the defendants herein, and a daughter, Mrs. Ann C. Tessee, who inherited said decedent's property. On October 18, 1893, Adam Christopher and wife conveyed said real estate to Charles C Knapp, the plaintiff and appellee herein, and the deed was recorded December 8, 1893. Frank Kamen and wife made a quitclaim deed of the property to Knapp on November 15, 1895, who on February 17, 1896, instituted this suit in the court below to quiet the title to the land hereinbefore mentioned, claiming that the sheriff's deed passed no title to the property to Mary D'Arcy, and that the proceedings upon which it was founded constituted no notice to the plaintiff of her rights in the land, since Adam Christopher was not a party to the attachment suit. Alexander Cheney asserts title to the premises through his grandmother, Mary D'Arcy, deceased, claiming that the deed from Fisher to Adam Christopher was without consideration, and made for the purpose of defrauding Mary D'Arcy and other creditors of said Fisher, and that plaintiff is not an innocent purchaser for value. The decree was for plaintiff, and Cheney appeals.

It is conceded by counsel for the latter if Mary D'Arcy acquired no interest in the premises in controversy prior to her death, appellant has no interest therein, and the decree of the district court should accordingly be sustained. The record before us discloses a perfect chain of title from the United States to plaintiff, which would entitle him to the relief demanded, unless title to the property was acquired by Mrs. D'Arcy by virtue of the sheriff's deed issued in pursuance of the proceedings in the attachment case already mentioned. If Richard C. Fisher at the commencement of that action had no interest in the property subject to attachment, then it is

obvious that no title passed by the sheriff's deed. Long prior to the levy of the attachment Fisher had conveyed the legal title to the premises to Adam Christopher, plaintiff's grantor. But it is strenuously insisted that the last conveyance was fraudulent as to the creditors of Fisher. It is true such an issue was raised by suitable averments in the answer and cross-petition of Cheney, but the averments therein upon that subject were denied by the reply of the plaintiff. The burden was upon Cheney to prove that the property was transferred for the purpose of hindering, delaying, or defrauding creditors. In the absence of evidence to the contrary, honesty and fair dealing, in all transactions, is to be presumed. A perusal of the evidence contained in the bill of exceptions fails to reveal that Fisher was indebted to the plaintiff, or to any one else, at the time he executed the deed to the premises to Adam Christopher. The judgment of Mrs. D'Arcy against Fisher in the county court of Jersey county, Illinois, was not obtained until more than four years after the making of this deed, and the evidence is silent as to the date the indebtedness was contracted on which said judgment was predicated. It not having been shown that the judgment of Mrs. D'Arcy against Fisher was founded upon a debt which was in existence at the date of the execution of the deed to Christopher, or that Fisher was at that time indebted to any one, he had the undoubted right to make such disposition of his property as he desired, either with or without consideration. This principle is too familiar to require the citation of authorities to sustain it. The deed to Christopher conveyed to him the legal and equitable title, and hence Fisher had no attachable interest in the property which was subject to attachment, and the sheriff's deed constituted a cloud upon the title of plaintiff in the premises. The conclusion announced makes the consideration of the other questions argued by counsel unnecessary. The decree is

AFFIRMED.

CHARLES W. SANFORD, APPELLEE, V. SARAH H. MOORE, APPELLANT.

FILED JUNE 8, 1899. No. 8915.

1. **Tax Sale:** IRREGULARITIES: LIEN OF PURCHASER. Mere irregularities in conducting a sale of real estate for delinquent taxes legally assessed will not defeat the lien of the purchaser at such sale.

2. ———: TENDER TO PURCHASER. A tender to a tax purchaser of a less sum than is due will not discharge his lien.

APPEAL from the district court of Saunders county. Heard below before SEDGWICK, J. *Affirmed.*

Simpson & Sornborger, for appellant.

H. A. Reese, contra.

NORVAL, J.

This is an appeal from a decree foreclosing a tax-sale certificate. It is urged by the defendant, as a reason why plaintiff is not entitled to a tax lien, that the real estate was not sold by the county treasurer of Saunders county to the plaintiff at a public sale, but that the premises were sold privately, without having been offered at public sale. This contention is based upon the fact that the treasurer did not formally adjourn the tax sale from day to day, and that that official failed to publicly cry each parcel of land offered and sold. But these irregularities did not defeat the lien of the purchaser, for by section 142, article I, chapter 77, Compiled Statutes, a tax sale is not invalidated by "the failure of the treasurer to adjourn such sale from time to time as required by law, or any irregularity or informality in such adjournment; the failure of the county treasurer to offer any real estate for sale at public sale which may afterwards be sold at private tax sale, and any irregularity or informality in the manner or order in which real estate may be offered for

sale at public sale." These matters are by statute designated irregularities merely, which do not affect the sale of real estate for delinquent taxes, to such an extent as to deprive the purchaser of his lien. Plaintiff submitted to the county treasurer a bid on paper for the real estate in dispute, and other lands, offering the amount of delinquent taxes thereon with interest, penalties, and costs. No other bid was offered by any person. The property was sold to plaintiff on his bid, and a certificate of sale issued to him. No fraud in the conduct of the sale is alleged or shown, and although the sale was irregular it was not absolutely void. The supreme court of Iowa, in *Leavitt v. Watson*, 37 Ia. 94, in considering a similar sale, used this language: "Now it may be conceded that if the lands in question were sold according to this custom or habit of the treasurer, viz., of receiving bids on paper, and if no further bids were made for the same land, to enter it as sold to such bidder without publicly crying the bid, and without publicly striking down the land as sold, such sale would not be made in the manner required by the statute, yet it would be a sale in fact nevertheless. The evidence of the treasurer shows that his custom was to publicly offer the lands for sale for the taxes delinquent thereon; that if bids were handed in, and there were no other bids for the same land, he entered the same as sold without further offering the land for sale. Now while this may have been irregular and not according to the manner in which the sales ought to have been made, it is, nevertheless, a sale in fact. * * * The position of appellee's counsel is that unless the sale is a legal one, it is to be treated as no sale whatever, and the argument is that the sale is not legal unless made in strict compliance with the directions of the statute. To adopt this view would be to constitute the manner of making the sale the essential thing, whereas the sale is the essential matter. * * * In order to divest the title of the owner of lands by a sale thereof for taxes, there must be a sale in fact, but it is not essential that it should be in form and

manner as the law directs." To the same effect are *Slocum v. Slocum*, 30 N. W. Rep. [Ia.] 562; *Dodge v. Emmons*, 9 Pac. Rep. [Kan.] 951. The taxes for which the real estate was sold were legally assessed, and under the repeated decisions of this court the purchaser acquired a lien on the property. (*Medland v. Cornell*, 57 Neb. 10, and cases there cited.)

Lastly, it is argued that the receipt by the county treasurer of $84.56 from defendant on December 24, 1891, discharged plaintiff's lien. This sum did not cover the entire amount then due plaintiff on his tax certificate and did not discharge the lien. Moreover, the record shows that the treasurer did not receive the money officially, but as agent merely of the defendant for the purpose of tendering the same to the plaintiff. The decree is right, and must be

AFFIRMED.

Y. W. WILLIAMS V. A. J. MCCONAUGHEY.

FILED JUNE 8, 1899. No. 8928.

1. **Instructions:** ISSUES. Instructions should be confined to the issues in the case.
2. ———: CONFLICTING STATEMENTS. An erroneous instruction is not cured by merely giving another on the same subject stating the rule correctly.

ERROR from the district court of Hamilton county. Tried below before WHEELER, J. *Reversed.*

Hainer & Smith, for plaintiff in error.

W. A. Prince and *Howard M. Kellogg, contra.*

NORVAL, J.

This was replevin by Y. W. Williams to recover a stock of merchandise seized by the defendant, as sheriff, under certain writs of attachment issued in favor of the cred-

itors of Thomas Upton. The verdict was for the defendant, and to reverse the judgment entered thereon is the purpose of this proceeding. There was evidence introduced on behalf of plaintiff tending to show that he was engaged in the mercantile business at the town of Bromfield, and on July 7, 1893, being the owner of the stock of goods in controversy, sold the same to his brother-in-law, Thomas Upton, for $1,213.08; that of this sum $200 was at the time paid in cash, and Upton gave Williams his promissory note for the balance, due in three months, without interest; that Upton took possession of the stock and carried on the business until December 26, 1893, and at that time, being unable to pay plaintiff, he sold the stock to Williams for $1,295.07, its full invoice price, receiving $236 cash, his said note for the sum of $1,013.08, and a book account of $46. Possession of the goods was given plaintiff. While Upton was carrying on the business he became indebted to the attaching creditors for goods purchased. The resale of the goods to plaintiff is assailed as being fraudulent, and the testimony upon that issue is conflicting. It was ample to sustain a verdict for either party. This is conceded by the plaintiff.

It is insisted that the court erred in giving instruction No. 16 on its own motion, a copy of which follows: "The defendant charges fraud in the transactions of the sale and delivery of the stock of goods in controversy by the plaintiff to his brother-in-law, Thomas Upton, and the sale and transfer of said stock of goods by Thomas Upton back to the plaintiff. The burden of proof is upon the defendant to establish that one or both of such transactions were fraudulent, by a preponderance of the evidence, to entitle defendant to a verdict in his favor. But a fraudulent sale and transfer of property may be proven by showing the existence of other facts or circumstances surrounding or connected with the transaction tending to show a fraudulent intent on the part of the parties to such sale or conveyance, or tending to show a purpose not consistent with an honest intent; and if you find from the

evidence that the stock of goods in controversy was sold by the said Thomas Upton to the plaintiff, and if you further find from the evidence that said Thomas Upton and the plaintiff intended by such sale and transfer to hinder and delay and defraud the creditors of said Thomas Upton and not to secure the payment only of an actual and honest indebtedness of said Upton to said Williams, then, and if you so find, your verdict should be for the defendant." Manifestly this instruction was prejudicially erroneous. It advised the jury, in effect, that if the defendant established by a preponderance of the evidence fraud in either one of the sales—the sale from Williams to Upton, or that from the latter to the former—then the defendant was entitled to a verdict. Upon the trial no evidence was given tending in the least to impeach the sale of the stock from Williams to Upton, but the good faith of that transaction was established beyond controversy. Had that sale been never so fraudulent, it would not have justified a verdict in favor of the sheriff, since the property was attached as belonging to Upton, and he acquired no title except as through Williams. In the language of counsel for plaintiff: "If the transaction of sale from Williams to Upton was fraudulent, the attachment plaintiffs ratified and confirmed it. They are in no position to question it in the least. They had no dealings with Williams at all. They had none with Upton until after he acquired the stock from Williams. Even if the acquisition of the stock by Upton from Williams was fraudulent, the attachment plaintiffs were not prejudiced thereby. They can gain no rights by impeaching the title of Upton. Their claim must necessarily be through Upton. They may not at one and the same time impeach his title and found rights upon it. They may not at once both reprobate and approbate; 'blow hot and cold.'" As the sale from Williams to Upton was not and could not be assailed by the defendant, the instruction was clearly misleading. It submitted to the jury a question not before them. Instructions should be confined to the issues in

the case. (*Frederick v. Kinzer*, 17 Neb. 366.) While it is true, as argued by counsel for defendant, that instructions must be construed together, yet an erroneous paragraph of a charge is not cured by another instruction stating the rule correctly. (*Carson v. Stevens*, 40 Neb. 112; *Richardson v. Halstead*, 44 Neb. 606; *Metz v. State*, 46 Neb. 547.) For the reason stated the judgment is

REVERSED.

WILLITS & COMPANY V. ARENA FRUIT COMPANY.

FILED JUNE 8, 1899. No. 8909.

1. **Conflicting Evidence:** REVIEW. Conflicting evidence will not be weighed on review in error proceeding.
2. **Review:** RULINGS ON EVIDENCE: OBJECTIONS. An objection to the admissibility of testimony cannot be raised for the first time in this court.
3. **Affidavits:** BILL OF EXCEPTIONS. Affidavits used on the hearing of a motion for a new trial, to be considered in the supreme court, must be embodied in a bill of exceptions.

ERROR from the district court of Harlan county. Tried below before BEALL, J. *Affirmed.*

John Everson, for plaintiffs in error.

D. S. Hardin and *W. O. Woolman, contra.*

NORVAL, J.

Willits & Co., of Alma, sued the Arena Fruit Company, of St. Joseph, Missouri, to recover $10 as damages for non-delivery of five barrels of Cape Cod cranberries, which the former claim to have bought from the latter. The plaintiffs have prosecuted error from the judgment rendered against them.

The first assignment of error, that the verdict is not sustained by the evidence, is not well taken. The evi-

dence adduced on behalf of the defendant on the trial is to the effect that it did not sell, or agree to deliver, to plaintiffs five barrels, or any other quantity, of cranberries; that some time in November, 1892, a Mr. Peck solicited and received from the plaintiffs an order for five barrels of Cape Cod cranberries at the price of $6.50 per barrel, which order Mr. Peck forwarded by mail to the defendant and it rejected the same, and declined to fill it, and plaintiffs were at once so advised of the fact; that Mr. Peck was never in the employ of defendant, and had no authority from the latter to make sales of goods for it. While the evidence introduced on behalf of the plaintiffs tended to establish a contract of sale, the jury were fully justified in reaching the conclusion that Mr. Peck had no actual or apparent authority to bind the defendant in the transaction. The rule that a verdict reached on a consideration of conflicting evidence will not be disturbed on review is applicable here.

Complaint is made of the admission in evidence by defendant of a letter-press copy of a letter purported to have been written by the Arena Fruit Company to plaintiffs. A complete answer to this contention is that the record fails to show that plaintiffs objected or excepted to the admission of this piece of evidence in the trial court. The ruling, therefore, is not available here. (*Hurlbut v. Hall*, 39 Neb. 889; *Rupert v. Penner*, 35 Neb. 587.)

Lastly, it is urged that prejudicial error was committed in the jury taking to their room, and retaining while deliberating on their verdict, the depositions read at the trial on behalf of the defendant. The record does not sufficiently show that the jury had any depositions or other papers with them while considering of their verdict. Affidavits in support of a motion for a new trial tending to establish the misconduct charged are contained in the transcript, but not having been embodied in the bill of exceptions, must be disregarded here. (*Wright v. State*, 45 Neb. 44; *Norfolk Nat. Bank v. Job*, 48 Neb. 774; *Gray v. Godfrey*, 43 Neb. 672; *National Lumber*

Co. v. Ashby, 41 Neb. 292; *Houston v. City of Omaha*, 44 Neb. 63.) No reversible error appearing on the face of the record, the judgment is

AFFIRMED.

SCOTTISH-AMERICAN MORTGAGE COMPANY, APPELLEE, V. W. G. NYE ET AL., APPELLANTS.

FILED JUNE 8, 1899. No. 8935.

1. **Judicial Sales:** APPRAISEMENT: OBJECTIONS. Objections to the appraisement of property for the purpose of judicial sale must be made in the district court prior to the sale.
2. ———: DEPUTY SHERIFF. A deputy sheriff may perform any act for his principal in making a foreclosure sale.
3. ———: APPRAISEMENT. But one appraisement of real estate is required to be made until the property has been twice advertised and twice offered for sale.

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

Fred A. Nye, for appellants.

Dryden & Main, contra.

NORVAL, J.

A decree foreclosing a real estate mortgage was entered in this cause in the district court of Buffalo county, the property was sold thereunder by the sheriff and the sale confirmed, and defendants have prosecuted an appeal from the order of confirmation, urging as reasons why the sale should not be confirmed: First, that the appraisers were summoned and sworn by the sheriff while his deputy acted for him in making the appraisement; and second, that the appraisement was made one year prior to the sale.

The first objection urged against the confirmation can-

not be sustained, since it was urged in the trial court for the first time after the sale had taken place. It is the settled law of this state that objections to the appraisement of property for the purpose of judicial sale must be made prior to the sale. (*Ecklund v. Willis*, 42 Neb. 737; *Burkett v. Clark*, 46 Neb. 466; *Overall v. McShane*, 49 Neb. 64.) Moreover, the appraisement was not vitiated by reason that the deputy sheriff assisted in making the same. (*Nebraska Loan & Building Ass'n v. Marshall*, 51 Neb. 534; *Hamer v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 705.) If a deputy may act for his principal in making judicial sales, as this court has held in the cases cited, it logically follows that he may perform any act or acts necessary in making such sales, including the appraisement of property. The deputy acts for and in behalf of his principal, and the official acts of the deputy are, in legal effect, those of his principal. If a deputy sheriff assists in appraising property under a decree of foreclosure, he alone, and not his principal, must make the sale, is the argument advanced by defendants' counsel. If this be true, then if after a deputy sheriff has made an appraisement he should resign or die, his principal could not go on and complete the sale. We cannot yield assent to such a doctrine, but the better rule is that any act necessary to make a legal sale under a decree of foreclosure may be performed by a deputy sheriff, and the remainder of the acts may be discharged by the sheriff himself.

The appraisement was made more than a year prior to the sale, but this alone did not affect the validity of the sale. The appraisement had been made under a former order of sale, and being valid, there was no authority for making a new appraisement until the property had been twice offered for sale. (*Burkett v. Clark*, 46 Neb. 466.) The order assailed is

AFFIRMED.

JANE H. LAUNE, ADMINISTRATRIX, APPELLANT, V. LOUISA J. HAUSER ET AL., APPELLEES, AND CASSIUS L. LAUNE, APPELLANT.

FILED JUNE 8, 1899. No. 10457.

1. **Mortgage-Foreclosure:** APPOINTMENT OF RECEIVER. A receiver will not be appointed on foreclosure when the debtor is insolvent, merely because the property at some future time may become insufficient to pay the mortgage debt.
2. ———: ———: HOMESTEAD. Ordinarily, a receiver will not be appointed in a foreclosure suit, when the mortgaged property is the homestead of the mortgagor.

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

Halleck F. Rose, Wellington H. England, Roscoe Pound, and *S. B. Laune,* for appellants.

References as to appointment of receiver where mortgaged premises are occupied as a homestead: *Lowell v. Doe,* 44 Minn. 144; *Bromley v. McCall,* 18 S. W. Rep. [Ky.] 1016; *Callanan v. Shaw,* 19 Ia. 183; *Cone v. Combs,* 18 Fed. Rep. 576; *Hoge v. Hollister,* 8 Baxt. [Tenn.] 533; *Harris v. United Savings Fund & Investment Co.,* 146 Ind. 265; *Schreiber v. Cary,* 48 Wis. 208; *Marshall-Illsley Bank v. Cady,* 77 N. W. Rep. [Minn.] 831.

Daniel F. Osgood, contra:

The law authorizing appointment of a receiver in mortgage-foreclosure does not apply to a case where the premises are occupied as a homestead. (*Chadron Loan & Building Ass'n v. Smith,* 58 Neb. 469.)

NORVAL, J.

A decree was entered in this cause in the district court foreclosing a real estate mortgage, upon which an order of sale issued, the property sold thereunder to one Cas-

sius L. Laune, and the sale in all respects approved and confirmed. Within twenty days from the confirmation Louisa J. Hauser, one of the mortgagors, gave a supersedeas bond, in the sum fixed by the court, for the purpose of staying proceedings during the pendency of an appeal. Subsequently the plaintiff and said Cassius L. Laune, purchaser, applied to the district court for the appointment of a receiver, which application was refused. Louisa J. Hauser appealed from the order confirming the sale and the plaintiff and Cassius L. Laune prosecuted a cross-appeal from the order denying the appointment of a receiver, which cross-appeal has been advanced by this court for hearing, and a submission taken of that branch of the cause. No controverted question of fact is presented for consideration, since no bill of exceptions containing the evidence has been preserved. The findings of the trial court responsive to the issues, therefore, must control.

It appears from the findings that Louisa J. Hauser, who is in possession of the mortgaged premises, and who alone executed the note secured by the mortgage, is insolvent and financially irresponsible, and it is insisted that a receiver should be appointed because the mortgaged property is wholly insufficient to pay the debt. If the premises were true, the conclusion of counsel stated above might be irresistible; but the record fails to show the mortgaged premises inadequate to pay the claim of plaintiff, while on the other hand the court below found that the amount of the debt, interest, taxes, and costs aggregated the sum of $3,206.89, and that the value of the mortgaged real estate was $3,850, so that there was no foundation for the contention that the property is probably insufficient to cover the indebtedness secured by the mortgage. It is urged that by the time the cause is reached in this court on the appeal from the order of confirmation that the debt will exceed the value of the property. This fact alone is insufficient ground for the appointment of a receiver. The Code of Civil Procedure,

section 266, authorizes the appointment of a receiver in an action to foreclose a mortgage when the mortgaged premises "is probably insufficient to discharge the mortgage debt." This provision is only applicable when it is disclosed at the time the application is made, or acted on, that the property is then probably inadequate to meet the indebtedness. It does not authorize the appointment of a receiver merely because at some date in the future the property may become insufficient to pay the mortgage, as it cannot be known that the mortgage debt will not be discharged before such date has arrived.

Again, it fully appears from the findings of the trial court that the mortgaged property is occupied by the debtor as a homestead. The case, therefore, falls squarely within the decision in *Chadron Loan & Building Ass'n v. Smith*, 58 Neb. 469, where it was held that the remedy of appointment of receiver on foreclosure was not applicable when the mortgaged property is the debtor's homestead. In that case a receiver was sought pending a stay, while here the application for a receiver was made after sale and confirmation. But this distinction is unimportant. An appeal has been taken from the confirmation and a supersedeas bond given, so that the order confirming the sale is not operative pending the appeal. The order refusing a receiver is

AFFIRMED.

F. C. HOLBERT V. WILLIAM B. CHILVERS ET AL.

FILED JUNE 8, 1899. No. 8911.

1. **Conflicting Evidence:** REVIEW. Where the evidence is conflicting, it is not the province of this court to examine it further than to see that there is sufficient to justify the conclusion reached.

2. **Instructions:** REVIEW. Where instructions correctly state the propositions they assume to cover and fairly submit to the jury the only controverted question in the case, the verdict will not be disturbed.

ERROR from the district court of Pierce county. Tried below before ROBINSON, J. *Affirmed.*

H. Z. Wedgwood, for plaintiff in error.

Benjamin Lindsay, contra.

SULLIVAN, J.

This action was commenced in the district court of Pierce County by William B. Chilvers and Irene E. Chilvers to recover from F. C. Holbert and William H. Mast a balance alleged to be due upon a contract for the sale of a town lot. The cause was tried to a jury, who found in favor of Mast and against Holbert. Judgment was rendered on the verdict, and by this proceeding in error the record is brought here for review.

From the pleadings and evidence it appears that the Chilvers sold lot 2, in block 4, of Chilvers' Addition to the village of Pierce to Holbert, and about the same time sold an adjacent or adjoining lot to Mast; that the defendants afterwards exchanged these lots, each assuming the unpaid purchase price of the lot acquired by the exchange. The issue submitted to the jury was whether the plaintiffs had released Holbert from his agreement to pay for lot 2 in consideration of the promise of Mast to pay the balance due upon the purchase price of said lot. It is contended that the verdict is not sustained by sufficient evidence. We think it is. It is true that Mr. Chilvers knew of the exchange between the defendants; that he expressly consented to it and attested the assignment written on the back of Holbert's contract of purchase. It is also true that there was testimony to the effect that Mr. Chilvers accepted Mast's agreement to pay for the lot and discharged Holbert from his obligation; but this is expressly denied by Chilvers. The evidence was conflicting, and the jury having decided the issue, it is not the province of this court to review such determination or to examine the testimony further than to see that

there was sufficient evidence to justify the conclusion reached.

A general complaint is made of the instructions given, but we think they correctly state the propositions which they assume to cover and fairly submit to the jury the only controverted question in the case. The judgment is

AFFIRMED.

JOHN DOBRY V. WESTERN MANUFACTURING COMPANY.

FILED JUNE 8, 1899. No. 8527.

1. **Ruling on Motion:** REVIEW. It is not error to deny a motion which cannot be allowed substantially in the form in which it is presented.
2. **Review:** REVERSAL: PREJUDICIAL ERROR. To warrant the reversal of a judgment it must affirmatively appear from the record that the ruling with respect to which error is alleged was prejudicial to the rights of the party complaining.

REHEARING of case reported in 57 Neb. 228. *Judgment below reaffirmed.*

Henry Nunn, for plaintiff in error.

Frank J. Taylor and *Frank H. Woods, contra.*

SULLIVAN, J.

This action, brought by the Western Manufacturing Company against John Dobry in the district court of Howard county, was aided by attachment. There was also filed an affidavit in garnishment, under section 207 of the Code of Civil Procedure. After service of the writ and notice the defendant moved to dissolve the attachment and dismiss the garnishee, because the affidavits upon which the ancillary proceedings were based had been taken by one of the attorneys representing the

plaintiff in the cause, and for the further reason that the facts alleged as grounds for the attachment were false. Before the motion to dissolve was submitted the court sustained an application for leave to cure the irregularity in the attachment affidavit. Thereupon both affidavits were sworn to before the clerk of the district court. Afterwards the defendant's motion was presented, considered, and overruled.

It is contended that the amendment of the affidavit in garnishment, being made without express authority, was ineffective and could not have been considered by the court in disposing of the motion. We do not concede the soundness of this position, but we will not stop now to refute it, as the ruling was clearly right and must be sustained in any view of the matter. That the defect in the attachment affidavit was cured by the second verification is admitted. The defendant's motion was directed against both affidavits. Its purpose was to obtain an order quashing both proceedings. It could not have been granted in the form in which it was presented, and consequently it was not reversible to overrule it as an entirety. This rule of practice is established by numerous decisions. (*Keens v. Gaslin*, 24 Neb. 310; *McDuffie v. Bentley*, 27 Neb. 380; *Fox v. Graves*, 46 Neb. 812; *Hudelson v. First Nat. Bank*, 56 Neb. 247, 76 N. W. Rep. 570.)

The allegations upon which the order of attachment was issued having been traversed, the plaintiff moved the court for permission to call A. U. Dann as a witness to testify in open court on the trial of the issue. On April 25, 1894, this motion was sustained and the defendant excepted. The ruling is here assigned for error. The hearing on the motion to discharge the attachment was had June 25, 1894. The evidence submitted at that time is not in the record, so we have no means of knowing whether Dann testified to any material fact. Indeed, it does not appear that he gave any testimony at all, or that he was even called as a witness. Certainly, under these circumstances, it cannot be said that the defendant

was prejudiced by the ruling of which he complains. The judgment will stand

AFFIRMED.

HARRISON, C. J., did not sit.

SECURITY INVESTMENT COMPANY, APPELLEE, V. EDWARD R. SIZER ET AL., APPELLANTS.

FILED JUNE 8, 1899. NO. 8919.

Mortgage-Foreclosure: APPRAISEMENT: SALE. It is too late, after a sale of real estate under a decree of foreclosure, to question the correctness of the appraisement except for fraud.

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

C. A. Atkinson, for appellants.

Samuel J. Tuttle, contra.

SULLIVAN, J.

This is an appeal from an order of the district court of Lancaster county confirming a sale of real estate made under a decree of foreclosure. The appellants contend that the appraisers erred in deducting from the gross valuation of the property state and county taxes in excess of the amount actually due thereon, and that, this error being eliminated, it appears the premises did not sell for two-thirds of the value of the debtor's equity. The objection to the appraisement was not made and filed before the sale, and is not now entitled to be considered. By section 491*d* of the Code of Civil Procedure it is made the duty of an officer holding an appraisement of real estate to deposit a copy thereof in the office of the clerk of the district court of the proper county before the sale is advertised. The object of this statute is to afford parties interested an opportunity to examine the appraise-

ment and move to set it aside for cause before the sale occurs. (*Vought v. Foxworthy*, 38 Neb. 790; *Burkett v. Clark*, 46 Neb. 466.) It is too late after the sale to question the correctness of the appraisement, except for fraud. (*Kearney Land & Investment Co. v. Aspinwall*, 45 Neb. 601.) The order is

AFFIRMED.

M. E. ANDERSON V. MCCLOUD-LOVE LIVE STOCK COMMISSION COMPANY ET AL.

FILED JUNE 8, 1899. No. 8934

1. **Mortgage-Foreclosure:** CHANGE IN DECREE. A decree of foreclosure, after the final adjournment of the term at which it was rendered, cannot be changed in any essential particular without due notice to parties interested and an opportunity to be heard.
2. ———: ———: ENFORCEMENT. After the adjournment of the term the court retains jurisdiction for the purpose of enforcing the decree, but not for the purpose of destroying it.
3. **Mortgage:** RECITALS IN RELEASE: EVIDENCE. A release of a mortgage which recites that the entire debt has been paid, but releases only a portion of the mortgaged property, is not conclusive evidence of the fact recited.
4. **Liens:** RIGHT OF JUNIOR LIENOR TO REDEEM. A junior incumbrancer is entitled to redeem a senior incumbrance and to an assignment of the security redeemed.
5. **Mortgages:** RELEASE BY SENIOR MORTGAGEE. The release by a senior mortgagee of a portion of the mortgaged property will, if made with notice of a junior mortgage, operate in favor of the junior mortgagee as a satisfaction of the senior mortgage to the extent of the value of the property released.

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

L. H. Blackledge, for plaintiff in error.

A. J. Rittenhouse and *Duffie & Van Dusen, contra.*

SULLIVAN, J.

Lydia Wray and James S. Wray, being the fee owners of four lots in the village of Culbertson and a ten-acre strip on the Frenchman creek adjacent to the village, mortgaged the same to the McCloud-Love Live Stock Commission Company to secure an indebtedness. This mortgage was duly recorded in the office of the county clerk of Hitchcock county and became a first lien on the property therein described. The Wrays afterwards executed a mortgage on the four lots to John Wyett, and he assigned it to M. E. Anderson. In an action brought by the commission company to enforce its lien the mortgagees and Anderson were made parties defendant, and on May 18, 1894, the district court rendered a decree of foreclosure on both mortgages, directing therein that the plaintiff resort for satisfaction of its decree to the ten-acre tract before selling the four lots which were Anderson's only security. The execution of the decree was stayed by an application filed in conformity with the statute. In August, 1894, as an element in the adjustment of a law action pending between the plaintiff and Wray, it was agreed that the ten-acre tract should be released from the lien of the plaintiff's mortgage. In pursuance of this agreement the following instrument was executed, acknowledged, and recorded in the proper office:

"RELEASE OF MORTGAGE.

"In consideration of the payment of the debt named therein, I release the mortgage made by Lydia Wray and James T. Wray to McCloud-Love Live Stock Commission Company on the following described property, situated in county of Hitchcock and state of Nebraska, to-wit: Commencing at the S. E. corner of lot No. 3 of section 17-3-31 west of 6th P. M., on the north bank of the Frenchman river, thence north on quarter-section line 6 chains, thence west at right angles 13 chains and 13 links, thence south at right angles 8 chains to river bank, thence east along the bank of said Frenchman river to place of be-

ginning, containing ten acres, according to survey; which was recorded on September 8, 1890, in book 9 of mortgages at page 215 of the mortgage records of Hitchcock county, Nebraska.

"Witness my hand this 11th day of August, 1894.

"McCLOUD-LOVE LIVE STOCK COMMISSION CO.,

"L. E. ROBERTS, *Pres.*

"Signed and delivered in the presence of

"O. D. BRATTON."

After the expiration of the stay, Anderson caused the four lots to be sold under the decree of foreclosure and became himself the purchaser at the sale. The sheriff's return shows that the purchase price was $1,225, but that no money was actually paid. On May 9, 1895, Anderson filed a verified application for confirmation of the sale, alleging therein that the plaintiff's mortgage had been fully satisfied and released of record. The court found the facts alleged to be true, confirmed the sale, and directed the sheriff to execute a deed conveying the premises to the purchaser. The plaintiff, soon after the order of confirmation was entered, learned for the first time of the foreclosure sale and the subsequent proceedings. It immediately filed a petition charging that the allegations of fact in Anderson's application for confirmation were false and were known to be so when made, and asking that the findings and orders based thereon be set aside. Anderson answered, and, after a full hearing, the court, upon the evidence produced, found the issues in favor of the plaintiff. The sale was set aside and the findings and orders made subsequent thereto were vacated. The value of the ten-acre tract was deducted from the amount due to the plaintiff, and an order made for the enforcement of the decree as thus modified. Anderson prosecutes error.

The judgment is clearly right and must be affirmed. It is indisputably established that the mortgage debt due from Wray to plaintiff was not in fact paid off or satisfied, and that the release executed on August 11, 1894,

was not intended by either of the parties thereto to affect in any way the plaintiff's right to enforce its decree by a sale of the village lots; and it is just as conclusively shown that Anderson's counsel had actual knowledge of these facts at the time the application for confirmation was presented. So it appears the court was induced to make the order of confirmation and award the proceeds of the sale to Anderson by an exhibition of deceptive facts and a deliberate suppression of the truth. But it is claimed that the plaintiff should have been in court resisting the application for confirmation, and that it has lost its rights by its own laches. This plea is not entitled to much consideration at the hands of a court that has been tricked into making an unjust order by the party presenting it. The rights of a litigant ought not to be sacrificed as a penalty for reposing reasonable confidence in the integrity of an adversary. However, it is not true that the plaintiff was bound to be in court to protect its rights under the decree. When the term adjourned the jurisdiction of the court with respect to the decree of foreclosure was at an end. That decree could not be afterwards changed in any essential particular without due notice and an opportunity to be heard. (5 Ency. Pl. & Pr. 1049.) The court, of course, retained jurisdiction for the purpose of enforcing the decree, but not for the purpose of destroying it. The court had authority to sell the property, but it did not have authority to cancel plaintiff's judgment or annul the lien of its mortgage. To the extent that it attempted to do so its action was void.

Counsel for Anderson, in his brief, insists that, entirely independent of the intention of the parties, the inevitable legal effect of the release above set out was to destroy the lien of the mortgage on the village lots. It is claimed that this contention is sustained by *Gadsden v. Latey*, 42 Neb. 128, and *Miller v. Hicken*, 92 Cal. 229. In each of these cases the operative part of the release expressly assumed to discharge the entire mortgage, and the question

presented was merely one of construction. The release in this case, it is true, contained an admission that the indebtedness secured by the mortgage had been paid, but it did not purport to discharge the mortgage as to all the property therein described, but only as to the ten-acre tract. It was undoubtedly evidence that the entire debt had been paid, but it was not conclusive evidence of that fact. We know of no reason why the recital of payment which, as between the parties to the release, had only the force of an admission, should raise an estoppel in favor of Anderson who knew that the recital was false.

Another contention made on behalf of Anderson is that the release of the ten-acre tract having impaired his right of redemption, he became entitled to a first lien on the four lots. Such is not the law. That a junior mortgagee is entitled to redeem a senior incumbrance and to an assignment of the security, will not be questioned. The right is recognized by the decisions of this court. (*Miller v. Finn*, 1 Neb. 254-301; *Renard v. Brown*, 7 Neb. 449.) But it is not the law that a release by a senior mortgagee of any portion of the mortgaged property, regardless of its value, will operate in favor of a junior mortgagee as a satisfaction of the entire mortgage. The rule established by numerous decisions is that the release in such case, if made with notice of the junior lien, will be effective as a satisfaction to the extent of the value of the parcel released. The principles of equity require only compensation to the junior incumbrancer for what he has lost by the release. (*Guion v. Knapp*, 6 Paige Ch. [N. Y.] 35; *Clowes v. Dickenson*, 5 Johns. Ch. [N. Y.] 235; *Gaskill v. Sine*, 2 Beas. [N. J.] 400; *George v. Wood*, 91 Mass. 81; *Iglehart v. Crane*, 42 Ill. 261; 3 Pomeroy, Equity Jurisprudence sec. 1226.) The judgment of the district court is

AFFIRMED.

O. H. BARNES, APPELLANT, V. WILLIAM R. COX ET AL., APPELLEES.

FILED JUNE 8, 1899. No. 8893

1. **Deeds: RIGHTS OF THIRD PERSONS.** An instrument transferring property, even though recorded, cannot be given effect to the prejudice of third parties who acquired rights in the property before the actual delivery of the conveyance.

2. **Lien of Attachment.** An order of attachment becomes a lien on the property attached only to the extent of the defendant's actual interest therein.

3. **Fraudulent Conveyance.** Evidence examined, and *held* to sustain the finding of the trial court.

APPEAL from the district court of Pierce county. Heard below before ROBINSON, J. *Affirmed.*

Powers & Hays, W. W. Quivey, and *Benjamin Lindsay,* for appellant.

Robertson & Wigton, contra.

SULLIVAN, J.

On March 17, 1890, O. H. Barnes sued William R. Cox in the district court of Pierce county upon a judgment for the sum of $1,650 recovered in the previous January in one of the courts of the state of Texas. The action was aided by attachment, the writ being levied upon the northwest quarter of section 31, and an undivided half of the southeast quarter of section 29, in township 28 north, range 4 west of the 6th P. M., in Pierce county. In March, 1892, Barnes obtained judgment in the action and an order for the sale of the attached property. Under this order the land in section 29 was sold to the plaintiff. There were no bidders for the land in section 31. Afterwards Barnes instituted this suit against the appellees, alleging in his petition that there was of record in the office of the county clerk of Pierce county a deed convey-

ing said land from William R. Cox to John L. Cox; that, although such deed was fraudulent and void as to creditors, it constituted a cloud upon the owner's title, deterred bidders, obstructed the sale, and hindered plaintiff in obtaining satisfaction of his judgment. John L. Cox answered, asserting ownership of the land, but denying that the conveyance by which he acquired title was made to hinder, delay, or defraud his grantor's creditors. He asked that his title to the entire tract upon which the attachment had been levied be quieted and confirmed in him. The trial resulted in a decree dismissing the petition and awarding the affirmative relief for which the answer prayed. The plaintiff brings the record here for review by appeal.

The evidence in the bill of exceptions would warrant the court in finding the following facts: In 1883 William R. Cox, who resides in the state of New York, visited Pierce county with his son, the defendant John L. Cox, and while there bought the land in section 29, taking the title to himself. The purchase price was $2,000. At the same time the son secured a timber claim, for which the father paid $1,000. The following year the elder Cox purchased the land in section 31, paying therefor the sum of $1,500. It was understood that the several tracts were purchased for the benefit of John L. Cox and that the title would be transferred to him as soon as he should repay to his father the money expended, together with interest thereon at the rate of six per cent. The son took immediate possession of the property, lived on it, improved part of it, paid the taxes, and received to his own use all of the profits. Between November 12, 1886, and May 4, 1888, Ida E. Cox, wife of John L. Cox, received from the executor of her father's estate $3,408.52, which sum was paid over to William R. Cox and by him credited on the indebtedness of his son. Mrs. Cox afterwards received from the same source something over $600, a considerable portion of which was paid to her father-in-law on account of the land transaction. In 1887 there was a

settlement between the father and son at the residence of the latter in Pierce county, and it was then and there agreed between them that the land had been fully paid for and that the son was entitled to receive a deed. The wife of William R. Cox being then in New York, a conveyance could not be immediately executed. Mr. Cox, however, took with him when he returned home a Nebraska form of deed in which he wrote with pencil a description of the land in controversy. On March 20, 1888, the deed was written out, signed, and acknowledged before a notary public in the state of New York, but was not actually delivered until March 17, 1890. The attachment was levied a few hours before the deed was delivered, but the instrument had been previously sent by the grantor to the county clerk to be recorded, and had been received by the clerk for that purpose on March 12, 1890. It is contended by the defendants that the deed took effect by relation from the time it was received by the clerk for registration, and that, therefore, the legal title was vested in John L. Cox prior to the levy of the attachment. Such is not the law. The case of *Rogers v. Heads Iron Foundry*, 51 Neb. 39, is decisive of the question, for it was there held, after an elaborate review of the authorities, that the doctrine of relation cannot be given effect to the prejudice of third parties who acquired rights in the property before the actual delivery of the conveyance. But while it is true that the legal title was in the attachment defendant at the time the writ was levied upon the land in dispute, it does not follow by any means that the judgment should be reversed. The conclusion of the trial court is, we think, warranted by the evidence. There are certainly some facts of considerable weight, and a number of minor circumstances, from which it might be fairly inferred that both of the tracts in question were not embraced in the arrangements made between the father and son in 1883 and 1884, or if they were so embraced, that there remained an unpaid balance of the purchase price upon which the attachment became

a valid lien. But after a careful study of the entire evidence, keeping in view the interest of defendants' witnesses and the probable motive for making a fraudulent conveyance, we are disposed to think that the finding of the trial court is supported by a preponderance of the evidence. The judgment is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. HALLECK C. YOUNG, ADMINISTRATOR.

FILED JUNE 8, 1899. NO. 8914.

1. **New Trial:** RULING ON MOTION: RECORD FOR REVIEW. Alleged errors occurring at the trial of a law action cannot be reviewed, unless there is in the record authentic evidence that a motion for a new trial was overruled by the district court.

2. **Carriers:** INJURY TO PASSENGERS: PLEADING. In an action to recover for injuries sustained by a person in consequence of the derailment of a railroad train upon which he was being transported as a passenger it is not indispensable that the petition should allege that the injury was the result of the wrongful act or omission of the carrier.

3. ———: ———: ———: PRESUMPTIONS. The presumption in such case is that the accident was caused by the carrier's negligence, and it is unnecessary to plead what the law presumes.

4. ———: ———: LIABILITY OF RAILROAD COMPANIES: POLICE POWER. The act of June 22, 1867 (Session Laws, p. 88), making railroad companies liable, in the absence of negligence, for injuries to passengers on their trains, is justifiable legislation under the police power of the state. It aims to promote safety in travel, and neither deprives such companies of their property without due process of law, nor denies them the equal protection of the laws.

5. **Death by Wrongful Act:** ACTION BY LEGAL REPRESENTATIVE. Under chapter 21, Compiled Statutes 1897, known as "Lord Campbell's Act," the legal representative of a person who has died in consequence of an injury sustained through the wrongful act, neglect, or default of another, has a right of action in all cases where the injured party might have maintained an action had he survived the injury.

6. ———: ———: PLEADING; PECUNIARY INTEREST OF PLAINTIFF.

Such action is for the benefit of the widow and next of kin of the deceased, and the recovery authorized is compensation for the pecuniary loss suffered. If the facts alleged in the petition do not show that the persons, for whose benefit the suit was instituted, had a pecuniary interest in the life of the deceased, the pleading is defective in substance.

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

M. A. Low, W. F. Evans, R. J. Greene, and *L. W. Billingsley,* for plaintiff in error.

Strode & Strode and *Stewart & Munger, contra.*

SULLIVAN, J.

Halleck C. Young, as administrator of the estate of Ellsworth H. Morse, deceased, recovered judgment against the Chicago, Rock Island & Pacific Railway Company in an action brought under the provisions of chapter 21, Compiled Statutes 1897. The first section of the act is as follows: "That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." The petition alleges the representative character of the plaintiff; that Morse was instantly killed by the derailment of defendant's train, upon which he was being transported as a passenger between Fairbury and Lincoln, in this state; that the deceased was at the time of the accident earning an annual salary of $1,800; and that he left surviving him, as next of kin, his mother, brothers, and sister, who have sustained damages to the amount of $5,000.

At the threshold of the case counsel for plaintiff challenge our right to consider and decide some of the questions raised by the defendant, on the ground that there is in the record no authentic evidence that the motion for a new trial was ever ruled on or brought to the notice of the district court in any way. Turning to the clerk's certificate we find that this objection is entirely valid and must, under the authorities cited, be sustained. (*Hake v. Woolner*, 55 Neb. 471; *Romberg v. Fokken*, 47 Neb. 198; *Burlingim v. Baders*, 47 Neb. 204.) It is not certified, either in general or in specific terms, that there is in the transcript brought here any order of the court upon the motion. We are, therefore, precluded from reviewing the alleged errors occurring at the trial. The sufficiency of the petition to support the judgment is the only question properly before us for decision. This pleading is vigorously assailed on various grounds. Counsel first contend that it is defective because it contains no direct averment that the death of Morse was the result of any wrongful act or omission of the railroad company. To this proposition we cannot assent. It is unnecessary to allege what the law presumes. (Bliss, Code Pleading sec. 175; 1 Boone, Code Pleading sec. 11.) In *Bishop v. Middleton*, 43 Neb. 10, it was held that a pleading which alleges facts from which the law presumes another fact, sufficiently pleads that other fact. To the same effect is *Engle v. Chicago, M. & S. P. R. Co.*, 77 Ia. 661. An admission of the facts stated in the petition would be, of course, an admission of the fact supplied by implication of law. In this state the presumption is that one who has been injured while being transported as a passenger by a common carrier was injured in consequence of the carrier's negligence. (*Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890; *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672, 74 N. W. Rep. 1074.) Construed in the light of these decisions, the petition plainly shows that defendant's culpable conduct was responsible for the accident in which Morse lost his life.

It is next insisted that the action cannot be maintained because the statute imposing a liability on railroad companies, in the absence of negligence, is unconstitutional and void. As we have already shown, the petition, by legal implication, charges the defendant with negligence, and therefore states a cause of action entirely independent of the statute. But we do not rest our decision upon that ground alone. The third section of the act of June 22, 1867, is as follows: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or where the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." (Compiled Statutes 1897, ch. 72, art. 1, sec. 3.) The validity of this law has been assumed in many cases decided by this court. (*Chollette v. Omaha & R. V. R. Co.*, 26 Neb. 159; *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143; *Missouri P. R. Co. v. Baier*, 37 Neb. 235; *Chicago, B. & Q. R. Co. v. Landauer*, 39 Neb. 803; *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb. 448; *Chicago, B. & Q. R. Co. v. Hague*, 48 Neb. 97; *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Neb. 161; *Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638.) In *Union P. R. Co. v. Porter*, 38 Neb. 226, the section quoted was assailed on the ground that it violated the constitution; but the court expressly held that its enactment was not an unwarranted exertion of legislative power. The point was again raised in *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578, and the constitutionality of the act was again distinctly affirmed. Whether these decisions are altogether sound in principle, we will not now stop to inquire. They silence opposition by their mere numerical strength; and without acknowledging a servile submission to precedent, we feel bound to accept them as conclusive evidence of what the law is.

It is further contended that the petition does not show

any liability on the part of the defendant, because the statute above set out was intended to apply only to cases where the party injured survives the injury and sues in his own behalf for indemnity. This contention cannot be sustained. It was decided in *Omaha & R. V. R. Co. v. Chollette, supra,* that a husband might, under this statute, sue for and recover consequential damages which he had suffered in consequence of an injury inflicted upon his wife. And in *Chicago, B. & Q. R. Co. v. Hague, supra,* it was held that an administrator was entitled to maintain an action for the benefit of the widow and next of kin of his intestate who was killed while being carried as a passenger on a railroad train. By the act of 1867, one who has been injured while being transported as a passenger on a railroad train is entitled to recover damages from the carrier, unless the injury was the result of his own gross negligence, or the violation of some express rule or regulation of the company of which he was cognizant. The legislature by this act defined the duty of railroad corporations to their passengers and created a new right of action. The act of 1873 (Compiled Statutes 1897, ch. 21), commonly known as "Lord Campbell's Act," also created a new right of action. It gives to the legal representative of a person who has died in consequence of an injury sustained through the wrongful act, neglect, or default of another a right of action in all cases where the injured party might have sued had he survived the injury. Obviously the decisive test of the right of an executor or administrator to sue under the provisions of chapter 21 is this: Would the deceased be entitled to sue with respect to the injury if he had not died in consequence of it? There is nothing whatever to indicate an intention on the part of the legislature to except from the operation of the act of 1873 cases arising under the act of 1867, and we are, therefore, not warranted in limiting by construction the ordinary import of the language employed in the later act. Discussing a question similar to the one here under consideration Marshall, J., in *Ean v. Chicago, M. & S. P.*

R. Co., 95 Wis. 69, said: "There is nothing, either in the terms or the spirit of the act, from which the court can say the legislative idea was to confine its effect to rights of action in favor of injured persons, as the law existed on the subject at the time section 4255 was passed. On the contrary, it is too plain to be open to serious discussion that the legislative intent was to give a right of action to the personal representatives of a deceased person in all cases where such person would be entitled to recover damages for his injury if death had not ensued."

The final ground upon which defendant assails the petition is that the persons for whose benefit the action was instituted do not appear to have suffered any pecuniary injury by the death of Ellsworth H. Morse. We think this objection is valid and that it must be sustained. In *Regan v. Chicago, M. & S. P. R. Co.*, 51 Wis. 599, which was an action to recover for wrongfully causing the death of plaintiff's intestate, a general allegation of damages was held to be insufficient. In *Missouri P. R. Co. v. Baier*, 37 Neb. 235, the holding in the Wisconsin case was approved by the author of the opinion, although the precise point was not before the court for decision. In *Kearney Electric Co. v. Laughlin*, 45 Neb. 390, the petition alleged that the deceased left surviving him a widow and several minor children who were dependent upon him for support. It was held that a general averment of damages was sufficient; but in the course of the opinion it was said: "It is not doubted that the petition based on this statute must aver facts showing that the person for whose benefit the action was brought have, by reason of the death of the intestate, sustained pecuniary loss, injury, and damages." In *Orgall v. Chicago, B. & Q. R. Co.*, 46 Neb. 4, the petition alleged that the deceased was a single woman and the daughter of the plaintiff. The court expressly decided, citing *Hurst v. Detroit City R. Co.*, 84 Mich. 539, and two English cases,* that a cause of action for even

**Franklin v. South E. R. Co.*, 3 Hurl. & N. 213; *Duckworth v. Johnson*, 4 Hurl. & N. 653.

nominal damages was not stated. In the *City of Friend v. Burleigh*, 53 Neb. 674, the petition disclosed that the deceased left surviving him a widow and six children, and that at the time he was injured he was engaged in a lucrative business. The averment was held sufficient to show a pecuniary injury to the persons for whose benefit the case was prosecuted; but RAGAN, C., after citing the earlier cases in this court, said: "The rule deducible from these cases, as well as from the weight of cases elsewhere, is that the petition must show facts from which a pecuniary loss is inferable." In *Omaha & R. V. R. Co. v. Crow*, 54 Neb. 747, 74 N. W. Rep. 1066, it was held, following the *Burleigh Case*, that where the petition disclosed that the deceased left a widow or other relatives whose support devolved upon him as a legal duty, it would be presumed that pecuniary loss resulted from his death. In *Chicago, B. & Q. R. Co. v. Van Buskirk*, 58 Neb. 252, 78 N. W. Rep. 514, it was held that a petition alleging that the deceased left as his heirs and next of kin a father, mother, brother, and sister did not state facts sufficient to constitute a cause of action. The question was again presented in *Chicago, B. & Q. R. Co. v. Bond*, 58 Neb. 385, 78 N. W. Rep. 710.) The averments of the petition relative to damages were practically the same as in the *Van Buskirk Case*. In an opinion holding the pleading defective in substance the present chief justice, after referring to the earlier cases, said: "A re-examination of the matter has produced no change in our views on the subject of the sufficiency of the statement which was attacked." These decisions and *dicta* must be regarded as settling the rule of pleading in this state. Whether upon this question we are in line with the current of authority in other jurisdictions is not important. The rule we have adopted is not contrary to sound principle. It is reasonable and just, and after mature deliberation we have concluded to adhere to it. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

NORVAL, J.

Upon principle I am persuaded that while some of the averments of the petition might have been sucessfully assailed by a motion to make more definite and specific, it sufficiently appears from the facts pleaded, and the inferences properly to be drawn therefrom, that by the death of Morse his next of kin sustained a pecuniary loss, and that a cause of action is stated. I concede that *Chicago, B. & Q. R. Co. v. Van Buskirk*, 58 Neb. 252, and *Chicago, B. & Q. R. Co. v. Bond*, 58 Neb. 385, cited in the foregoing opinion, fully sustain the proposition that the petition filed in the cause in the court below does not state sufficient facts to constitute a cause of action. The writer dissented from the denying of motions for rehearing in those cases, believing the decisions unsound and against the great weight of the authorities in this country; but the opinions in those cases having become the settled law of this state I am constrained, although reluctantly, to agree to the entry of a judgment of reversal herein.

HENRY & COATSWORTH COMPANY, APPELLEE, V. ALEXIS HALTER, IMPLEADED WITH CHARLES W. HARE ET AL., APPELLEES, AND EATON & PRINCE COMPANY ET AL., APPELLANTS.

FILED JUNE 8, 1899. NO. 8897.

1. **Judgments:** ASSIGNMENT TO DEFENDANT: PAYMENT. One cannot, except under special circumstances, become the assignee of a judgment against himself. The rule is that when payment has been made by one who is primarily liable, it operates as an absolute satisfaction, even though an assignment be made to a third person with the intention of keeping the judgment alive.

2. ———: ASSIGNMENT BY ATTORNEY. An attorney cannot, without actual authority from his client, sell and assign his client's judgment.

3. ———: PAYMENT: REVIVOR. A judgment which has been paid and extinguished by the owner of land upon which it was a lien cannot be afterwards revived for the purpose of cutting out other liens.

4. **Exchange of Securities.** A contract providing for a conditional exchange of securities is valid, and will be enforced according to the mutual intention of the parties thereto.

5. **Principal and Agent:** RATIFICATION. An agent cannot bind his principal beyond the limits of his actual or apparent authority; and the declared willingness of a principal to ratify a conditional contract will not operate as a ratification of an unconditional contract of which he is ignorant.

6. **Election of Remedies:** ACTION ON CONTRACT. The doctrine of election between inconsistent remedies has no application to a case where a party declares upon an express contract and demands whatever relief he may be entitled to thereunder.

7. **Mechanics' Liens:** MORTGAGES: PRIORITIES. The lien of an ordinary mortgage is not subordinate to mechanics' liens, merely because the money which it was given to secure was loaned for the purpose of improving the mortgaged premises, and under an express contract that it should be so used.

8. ———: CONFLICTING EVIDENCE: REVIEW. A finding of the trial court upon conflicting evidence as to the amount due upon a mechanic's lien will not be disturbed unless clearly wrong.

9. ———: CLAIM OF ARCHITECT. An architect is entitled to a mechanic's lien upon a building which has been constructed in accordance with plans prepared by him under contract with the owner.

10. ———: SEPARATE CONTRACTS: TIME TO FILE CLAIM. Where labor or material has been furnished by a party under distinct contracts, the claim for a mechanic's lien under each contract must be filed within the time limited by the statute for that purpose.

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

The opinion contains a statement of the case.

Stewart & Munger and *Charles A. Robbins*, for Eaton & Prince Company and others, appellants:

The sale under the Tiernan judgment was void, because the judgment had been paid in full by the debtor. (*Shaw v. Clark*, 6 Vt. 507; *Pope v. Benster*, 42 Neb. 305.)

The execution sale was void because it was made at the instance of an intermeddler, without knowledge of any person interested in the judgment. (*Taylor v. Robinson*, 14 Cal. 396; *McCracken v. San Francisco*, 16 Cal. 591; *Cook v. Tullis*, 18 Wall. [U. S.] 332; *Wood v. McCain*, 7 Ala. 800.)

The execution sale was void because of a conspiracy which prevented bidding. (*Goble v. O'Connor*, 43 Neb. 49; *Hay's Estate*, 159 Pa. St. 381.)

The execution sale was void because the sheriff accepted securities for the purchase price instead of money. (*Hooper v. Castetter*, 45 Neb. 67.)

Defendants Boggs, the Clark & Leonard Investment Company, Hare, and Tyler were parties to the fraudulent sale under the Tiernan judgment, accepted interests and securities under that sale in place of the interests and securities they previously held, and have lost by their fraud all right to claim under those original securities as against appellants. (*Percau v. Frederick*, 17 Neb. 117; *Merriam v. Calhoun*, 15 Neb. 569; *Home Fire Ins. Co. v. Kennedy*, 47 Neb. 138; *Richmond v. Morford*, 4 Wash. 337; *Stanley v. White*, 160 Ill. 605; *Stevenson v. Crapnell*, 114 Ill. 19; *Worrall v. Munn*, 5 N. Y. 229; *Miller v. Fletcher*, 27 Gratt. [Va.] 403; *Ryan v. Cooke*, 68 Ill. App. 592; *Moss v. Riddle*, 5 Cranch [U. S.] 351; *United States School-Furniture Co. v. School District*, 56 Neb. 645; *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68; *Hughes v. Insurance Co. of North America*, 40 Neb. 627; *Esterly Harvesting Machine Co. v. Frolky*, 34 Neb. 110; *Morrow v. Jones*, 41 Neb. 867; *Farmers & Merchants Bank of Elk Creek v. Farmers & Merchants Nat. Bank*, 49 Neb. 379; *Hay's Estate*, 159 Pa. St. 381.)

Independent of their fraud, defendants Clark & Leonard Investment Company, Hare, and Tyler have elected to claim under the Clark mortgage, rather than under the Halter mortgage, and are bound by that election. (*First Nat. Bank of Chadron v. McKinney*, 47 Neb. 149; *Sanger v. Wood*, 3 Johns. Ch. [N. Y.] 416; *National Bank of Illinois*

v. First Nat. Bank of Emporia, 57 Kan. 115; *Terry v. Munger*, 121 N. Y. 161; *Lowenstein v. Glass*, 48 La. Ann. 1422; *Bach v. Tuch*, 126 N. Y. 53; *Bement v. Dow*, 66 Fed. Rep. 185; *Johnson v. Missouri P. R. Co.*, 52 Mo. App. 407; *Robb v. Strong*, 22 O. L. J. [U. S. C. C.] 338; *Merchants Bank v. Thomas*, 69 Tex. 237; *Compton v. Beach*, 62 Conn. 25; *Bailey v. Hewey*, 135 Mass. 172; *Dyckman v. Scratson*, 39 Minn. 132; *Geiber v. Littlefield*, 23 N. Y. Supp. 869; *Fowler v. Bowery Savings Bank*, 113 N. Y. 450; *Building & Loan Ass'n of Dakota v. Cameron*, 48 Neb. 124; *Yeomans v. Bell*, 151 N. Y. 230; *Strong v. Strong*, 102 N. Y. 69; *Pollock v. Smith*, 49 Neb. 864; *American Building & Loan Ass'n v. Rainbolt*, 48 Neb. 434; *Temple Nat. Bank v. Warner*, 31 S. W. Rep. [Tex.] 239; *Kingman v. Stoddard*, 85 Fed. Rep. 740; *O'Bryan v. Glenn*, 91 Tenn. 106; *White v. White*, 107 Ala. 417; *Moline Plow Co. v. Rodgers*, 53 Kan. 743; *Pensenneau v. Pensenneau*, 22 Mo. 27; *Lamon v. McKee*, 7 Mackey [D. C.] 446; *Trimble v. Doty*, 16 O. St. 118; *Seieroe v. Homan*, 50 Neb. 601; *Chicago Lumber Co. v. Anderson*, 51 Neb. 159; *Bohn Sash & Door Co. v. Case*, 42 Neb. 281.)

The original Halter mortgage is subject to the mechanics' liens of these appellants, because the mortgagees were joint promoters with Halter of the building enterprise, and were in privity with him in the making of the contracts with these appellants. (*Millsap v. Ball*, 30 Neb. 728; *Sheehy v. Fulton*, 38 Neb. 691; *Holmes v. Hutchins*, 38 Neb. 601; *Hoagland v. Lowe*, 39 Neb. 397; *Chappell v. Smith*, 40 Neb. 579; *Rogers v. Central Loan & Trust Co.*, 49 Neb. 677; *Patrick Land Co. v. Leavenworth*, 42 Neb. 715; *Cummings v. Emslie*, 49 Neb. 485; *Kilpatrick v. Kansas City & B. R. Co.*, 38 Neb. 620.)

It is not essential that the original Halter mortgage should have been surrendered or released by the holders. Mere payment by money, or property, or exchange of securities, destroys the lien of a mortgage without a formal act. (*Teaff v. Ross*, 1 O. St. 469; *Headlock v. Bullfinch*, 31 Me. 246; *Hodgman v. Hitchcock*, 15 Vt. 374; *Iowa County v. Foster*, 49 Ia. 676; *Joyner v. Stancill*, 12 S. E.

Rep. [N. Car.] 912; *Jaffray v. Crane*, 50 Wis. 349; *McGiven v. Wheelock*, 7 Barb. [N. Y.] 22.)

As bearing on the law justifying a finding that Folts was entitled to a lien, see: *State Sash & Door Mfg. Co. v. Seminary*, 47 N. W. Rep. [Minn.] 796; *Sprecht v. Stevens*, 46 Neb. 874; *Jeffersonville v. Riter*, 37 N. E. Rep. [Ind.] 652.

References to sustain the claims of the architects for a lien: *Albright v. Smith*, 51 N. W. Rep. [S. Dak.] 590; *Miller v. Batchelder*, 117 Mass. 179.

John S. Kirkpatrick, for Forburger, Speidell & Co., appellants.

Reference: *Pleasants v. Blodgett*, 39 Neb. 741.

George E. Hibner, Davis & Hibner, John P. Maule, Thomas Darnall, John B. Cunningham, Lambertson & Hall, and *E. H. Wooley*, for other appellants.

S. L. Geisthardt, for Charles W. Hare and John J. Tyler, appellees:

The execution sale under the Tiernan judgment was valid and binding on appellants. (*Harbeck v. Vanderbilt*, 20 N. Y. 395; *Anglo-American Land & Mortgage Co. v. Bush*, 50 N. W. Rep. [Ia.] 1063; *Roberts v. Bruce*, 15 S. W. Rep. [Ky.] 872; *Coburre v. Pearson*, 50 N. Y. Supp. 112; *Smith v. Foxworthy*, 39 Neb. 214; *Gulick v. Webb*, 41 Neb. 706; *Hopkins v. Ensign*, 25 N. E. Rep. [N. Y.] 306; *Neely v. McClure*, 1 Atl. Rep. [Pa.] 719; *Ritchie v. Judd*, 27 N. E. Rep. [Ill.] 682; *Barling v. Peters*, 25 N. E. Rep. [Ill.] 765; *Munson v. Magee*, 47 N. Y. Supp. 942; *Marie v. Garrison*, 83 N. Y. 14; *De Jarnette v. Verner*, 19 Pac. Rep. [Kan.] 666; *Butler v. Fitzgerald*, 43 Neb. 192.)

A judgment is a general lien and does not merge when the judgment creditor acquires title to the land. (*Matless v. Sundin*, 62 N. W. Rep. [Ia.] 662; *Caley v. Morgan*, 16 N. E. Rep. [Ind.] 790; *Seaman v. Hax*, 24 Pac. Rep. [Colo.] 461; *Shotwell v. Murray*, 1 Johns. Ch. [N. Y.] 512; *Moore*

v. Smead, 62 N. W. Rep. [Wis.] 426; *Vaughn v. Comet Consolidated Mining Co.*, 39 Pac. Rep. [Colo.] 422; *Sellers v. Floyd*, 52 Pac. Rep. [Colo.] 674; *Robinson Bank v. Miller*, 38 N. E. Rep. [Ill.] 1078; *Boos v. Morgan*, 30 N. E. Rep. [Ind.] 140; *Hanlon v. Doherty*, 9 N. E. Rep. [Ind.] 782; *Sutton v. Sutton*, 1 S. E. Rep. [S. Car.] 19.)

Tyler and Hare were not parties to the agreement relating to the Tiernan sale, nor did they by their subsequent acts become such; and neither by any fraud of their own nor upon the doctrine of election have they lost their right to be restored to their lien under the Halter mortgage, if upon any ground the Tiernan sale should be held void. (*City Bank v. Radtke*, 54 N. W. Rep. [Ia.] 435; *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207; *Taylor v. Pumphrey*, 32 S. W. Rep. [Tex.] 225; *Floyd v. Patterson*, 72 Tex. 207; *Compton v. Ashley*, 28 S. W. Rep. [Tex.] 224; *Harris v. Warlick*, 42 S. W. Rep. [Tex.] 356.)

It is the settled law of this state that a mortgagee under circumstances like those existing here is not a promoter of the building enterprise, and does not subject his security to mechanics' liens for work or materials which began to be furnished after the execution of the mortgage. (*Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207; *Holmes v. Hutchins*, 38 Neb. 601; *Hoagland v. Lowe*, 39 Neb. 397; *Chappell v. Smith*, 40 Neb. 579; *Patrick Land Co. v. Learenworth*, 42 Neb. 715; *Rogers v. Central Loan & Trust Co.*, 49 Neb. 677.)

The several items enumerated in the mechanic's lien claim were furnished not under a single contract, but under separate and distinct contracts, and the court will not merge them into one, merely to donate to a party the benefit of a lien when he failed to exercise the necessary precautions and comply with the statutory requirements for securing one. (*Central Loan & Trust Co. v. O'Sullivan*, 44 Neb. 834; *Hansen v. Kinney*, 46 Neb. 207; *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207; *Buchanan v. Selden*, 43 Neb. 559.)

The evidence does not warrant the court in allowing

anything for making plans, specifications, and details, because the value of the claimants' services under that item is not shown. (*Mitchell v. Packard*, 47 N. E. Rep. [Mass.] 113.)

An architect is not entitled to a mechanic's lien for making plans, specifications, details, and perspectives, unless these in some way are combined with superintendence or other actual labor furnished to the building. (*Fiske v. School District*, 58 Neb. 163; *Mitchel v. Packard*, 47 N. E. Rep. [Mass.] 113; *Rinn v. Electric Power Co.*, 38 N. Y. Supp. 345; *Foster v. Tierney*, 59 N. W. Rep. [Ia.] 56.)

The affidavit to a mechanic's lien must be properly authenticated. (*Byrd v. Cochran*, 39 Neb. 109; *Pitts v. Seavey*, 55 N. W. Rep. [Ia.] 480; *Colman v. Goodnow*, 29 N. W. Rep. [Minn.] 338; *Hill v. Alliance Building Co.*, 60 N. W. Rep. [S. Dak.] 752.)

Billingsley & Greene, John L. Doty, Reese, Gilkeson, Comstock & Reese, M. L. Easterday, Lamb & Adams, Abbott, Selleck & Lane, Stevens & Cochran, Fritz Westermann, and *Webster, Rose & Fisherdick,* for other appellees.

SULLIVAN, J.

This action, which was brought by Henry & Coatsworth Company to foreclose a mechanic's lien, resulted in a decree, from which a number of lien claimants, who were parties defendant, have appealed. The pleadings and evidence are voluminous, but we believe the following statement of facts will sufficiently develop the main questions presented for decision: Alexis Halter, being the owner of three business lots in the city of Lincoln, decided to erect thereon a five-story building. In June, 1892, he employed Tyler & Son, architects, to prepare plans, and in the following October commenced the work of construction. January 21, 1893, he borrowed of the Clark & Leonard Investment Company $35,000 to be used in carrying the structure to completion. To secure this

loan Halter and wife executed to the investment company a coupon bond for $35,000 and a first mortgage on the property in question. At the same time the borrower executed to the lender a commission mortgage for $1,500 on the same property. Both mortgages were immediately recorded, and five days later, on January 26, the $35,000 mortgage was sold and assigned to the appellee Charles W. Hare, who afterwards transferred it to the appellee John J. Tyler, as collateral security for a loan of $32,000. In his written application for the loan Halter stated that the money was to be used in completing the building then in course of construction, but there was no agreement requiring him to use it for that purpose. Halter did, however, as part of the transaction, execute a bond with sureties to indemnify the mortgagee and its assigns against possible loss resulting from the filing of the mechanics' liens. This obligation also provided that the investment company, or its successors in interest, might pay off any lien against the property when filed and established. In July, 1893, a portion of the building was ready for occupancy, but it was not entirely finished until December of that year. The appellants and others having contributed labor or materials toward the construction of the building, and not having been paid therefor, filed in the proper office their claims for liens. In August, 1893, the property in controversy, commonly known as the "Halter Block," was conveyed by Alexis Halter and wife to the Lincoln Business Block Company, a corporation. Some of the stock of this corporation issued to Halter was by him pledged to the German National Bank as collateral security for money loaned. In March, 1894, transcripts of two judgments in favor of the Hawarden Furnace Grate Company and against the Lincoln Business Block Company were filed in the office of the clerk of the district court of Lancaster county. Under executions issued on these judgments, the Halter Block was sold on May 1, 1894, the purchaser being Charles T. Boggs, who was acting in the interest of the German

National Bank, of which he was president. The sale was confirmed by the district court on May 5. In October, 1892, Christopher Tiernan recovered a judgment in the district court of Lancaster county against Alexis Halter for the sum of $385.40. This judgment was a lien on the Halter Block and was prior to the lien of the mortgages to the Clark & Leonard Investment Company, and also prior to most of the mechanics' liens. In October, 1893, Alexis Halter sent his brother Andrew to pay the Tiernan judgment. He gave him for the purpose $300 in cash and his personal check for the balance. This balance Andrew agreed to advance as an accommodation. He made the advancement according to his agreement and paid the full amount due on the judgment. Instead, however, of having it canceled, he caused it to be assigned to Leo Haben, his brother-in-law, who had no knowledge of the matter and no interest in it. The check given by Alexis to Andrew was afterwards paid, but the precise time of payment does not appear. In May, 1894, R. J. Greene, assuming to act as attorney for Haben, made a formal sale and assignment of the judgment to Boggs. Of this transaction Haben was entirely ignorant. He had only recently learned that the judgment stood in his name as assignee. He claimed no interest in it, and had conferred upon Greene neither actual nor apparent authority to sell it. It seems, however, that he afterwards advanced Andrew Halter some money on the judgment, and that in September, 1894, for a consideration of $250, he ratified in writing the assignment previously made by Greene to Boggs. Under an execution issued on the Tiernan judgment, Boggs, soon after obtaining the assignment from Greene, caused the Halter Block to be sold and became himself the purchaser. The purchase price was $35,000, which, according to the return of the sheriff, has been fully paid and is in his hands for distribution. On June 23, 1894, the sale was confirmed and a deed ordered. The following day Boggs and wife conveyed the premises to Charles C. Clark, who soon after

mortgaged the same to the Clark & Leonard Investment Company to secure his coupon bond for the sum of $35,000. Clark also executed a mortgage on the property to W. F. Meyer to secure the sum of $18,777.50. This mortgage was apparently made for the benefit of the German National Bank and the First National Bank of Lincoln, and represents an indebtedness due from Halter to those banks. Clark paid nothing for the property and was merely acting for Boggs in making the mortgages, the latter not wishing to appear of record as a borrower. When the transactions were concluded the premises were reconveyed to Boggs, who is now the fee owner of the same. Before the sale under the Tiernan judgment an arrangement was made between Boggs and J. W. McDonald, representing the investment company, which contemplated that Boggs should buy the property, pay off the liens and claims of the investment company, and execute to it a new mortgage for $35,000, to take the place of the mortgage held by Hare and Tyler. Whether the execution of this plan was to depend upon confirmation of the sale, or upon the acquisition by Boggs of a good title under the sale, is not very clear. In pursuance of this arrangement Boggs paid the investment company on July 26, 1894, the sum of $5,500, being the amount of its commission, mortgage, interest coupons paid to Hare and Tyler, and some other matters. He also caused Charles C. Clark to execute the $35,000 mortgage above mentioned. This mortgage has never been delivered to Hare and Tyler personally, and they have neither surrendered the Halter mortgage nor released it of record. Prior to November, 1894, they had no knowledge of the arrangement between McDonald and Boggs and were not aware that the property had become involved in litigation, or that there had been any change of ownership. Hare and Tyler were not originally parties to the action, but became such by intervention in February, 1895. The substance of their amended answer is that they delivered the Halter mortgage to the Clark & Leonard Investment

Company to be exchanged for the Clark mortgage in case the court should affirm the validity of the sale under the Tiernan judgment. They ask, in the event of the sale being adjudged void, for a foreclosure of the Halter mortgage. Boggs filed an answer asking that the title acquired by him under the Tiernan judgment be quieted and confirmed. The appellants filed pleadings, alleging that the sale to Boggs was void; that the Halter mortgage had been extinguished, and that their liens were superior to the lien of the Clark mortgage. The district court found and decreed that James P. Walton had a first lien on the premises; that Tyler & Son had a second lien; that the sale under the Tiernan judgment was valid and that the Clark mortgage was a third lien on the property; that William F. Meyer had a fourth lien; that the liens of the other parties to the action had been divested from the land by the execution sale and had attached to the proceeds of such sale in the hands of the sheriff. The decree then awards a first lien on the fund in the hands of the sheriff to Forburger, Speidell & Co., and applies the balance on the Halter mortgage.

The first question to be decided is the validity of the execution sale to Boggs under the Tiernan judgment. The appellees, Hare and Tyler, contend that the judgment was not extinguished in consequence of the payment made by Andrew Halter to the attorney for the judgment creditor. We think it was. Andrew Halter was acting as his brother's agent. All the money paid was really the money of the judgment debtor. It had been loaned to him upon his personal check and was shortly after repaid. The rule is that when payment is made by one who is primarily liable, it operates as an absolute satisfaction although an assignment is made to a third person with the intention of keeping it alive. One cannot, except under special circumstances, become the assignee of a judgment against himself. (*Shaw v. Clark*, 6 Vt. 507; *Head v. Gervais*, Walker [Miss.] 431; *Montgomery v. Vickery*, 110 Ind. 211; *Birke v. Abbott*, 103

Ind. 1; *Booth v. Farmers & Mechanics Nat. Bank*, 74 N. Y. 228; *Hogan v. Reynolds*, 21 Ala. 56; 2 Pomeroy, Equity Jurisprudence sec. 797; 2 Freeman, Judgments [4th ed.] sec. 466.) Had Andrew advanced the money with an understanding that he should take an assignment as security, there can be no doubt that the judgment would have continued in force until the check was paid. But there was no such arrangement, and if there had been, the security could not outlive the debt. That the check given by Alexis to Andrew was paid is proven conclusively. Just when it was paid does not appear, but the only warrantable inference is that payment was made long before the assignment to Boggs. It is true that Andrew told Haben that he had an interest to the extent of $200 in the judgment, but that evidence is not competent to establish the fact. The statement was a mere self-serving declaration. Besides, it appears that the assignment to Haben was for the benefit of Alexis, and not for the protection of Andrew. We quote from Andrew's testimony: "Q. What was the object of taking this assignment to Mr. Haben at the time you paid Pound & Burr? A. Why the judgment was satisfactorily paid, but after talking the matter over, Mr. Alexis Halter thought it would be better to take the assignment in some other person's name so if any trouble would arise he would be in a position to clear the matter." A circumstance to which McDonald testified also indicates that the assignment was made in the interest of Alexis. Whatever may have been the motive for the assignment to Haben, it is perfectly clear that the judgment was not a lien on the Halter Block at the time of the execution sale; and it is equally evident that Boggs did not at that time have even the apparent ownership of the judgment. In his haste to cut out the mechanics' liens he not only bought a lifeless judgment, but bought it from one who had no color of authority to make the sale. (*Head v. Gervais, supra; Wilson v. Wadleigh*, 36 Me. 496; Weeks, Attorneys sec. 239.)

Boggs having become the owner of the property by virtue of the execution sale under the Hawarden judgment, the liens paid off by him were intended to be, and are absolutely, extinguished. If he has redeemed the Halter mortgage with the Clark mortgage, then the lien of Hare and Tyler is subordinate to all of the mechanics' liens. Whether there has been such redemption is a question of fact, in the absence of circumstances to which the law would attach a conclusive presumption. Much space is devoted in the briefs of counsel to a discussion of an alleged conspiracy to defraud the appellants and other lienors, but we find in the record no evidence whatever of any fraudulent transaction in which either Hare or Tyler participated. Indeed, while there is abundant proof of shrewd tactics by Boggs and McDonald, we think neither of them has been guilty of any act which amounts to a legal fraud. There was, undoubtedly, an attempt to overreach the lien claimants, but the means employed to accomplish that end were not unlawful. The question, then, with which we have to deal in this connection is whether the Halter mortgage was exchanged absolutely for the Clark mortgage; in other words, it is a question of the mutual intention of the parties to the transaction. The pleadings, as we understand them, conclusively establish the fact that the Clark mortgage was delivered to the authorized agent of Hare and Tyler, and that they are the beneficial owners of the security. It is claimed, however, that the delivery of the Clark mortgage did not operate as a satisfaction of the Halter mortgage, because it was expressly stipulated that it should not have that effect. If such an agreement was made, we can perceive no reason why it should not be enforced. Certainly Boggs had a right to execute a mortgage to Hare and Tyler on such terms as he saw fit to accept. It was undoubtedly lawful for the parties to fix a condition on which such mortgage should become effective as a satisfaction of the prior mortgage. What then was the contract under which Boggs delivered the mortgage to the

Clark & Leonard Investment Company? The only testimony bearing upon the point is that given by McDonald and Boggs, which is to the effect that the Clark mortgage was to be received in satisfaction of the Halter mortgage only in case the validity of the Tiernan sale should be judicially established. While there are circumstances strongly tending to discredit these witnesses, we do not feel warranted in rejecting their evidence as entirely unworthy of belief, and accordingly hold that there has been no substitution of securities. The contract in relation to the exchange of mortgages being valid and enforceable between the parties, and not infringing the legal rights of appellants or other lien claimants, must be given full effect in this litigation. But if the agreement between McDonald and Boggs was for an unconditional exchange of securities, it is certainly not binding upon Hare and Tyler, for they neither authorized nor ratified such an exchange. They have proceeded on the assumption that the exchange was conditional, and neither expressly nor by implication have they affirmed any other. Manifestly Boggs could not on this record insist that they have, and the rights of appellants in this matter are no greater than his.

It was entirely proper for Hare and Tyler to file an answer alleging their contract and demanding the relief to which they were entitled under it. (*Compton v. Ashley*, 28 S. W. Rep. [Tex.] 224; *Taylor Cotton-Seed Oil & Gin Co. v. Pumphrey*, 32 S. W. Rep. [Tex.] 225.) The doctrine of election between inconsistent remedies has no application here. A proceeding by Hare and Tyler to obtain a decree affirming the validity of the sale under the Tiernan judgment would not operate in favor of Boggs to effect a substitution of securities. Neither can it produce that result for the benefit of others having liens on the property.

It is next contended that the Halter mortgage is subject to the mechanics' liens because the original owner, the Clark & Leonard Investment Company, was a joint

promoter of the building enterprise and therefore in privity with lien claimants. Under facts substantially identical with those in the case before us it was held in *Hoagland v. Lowe*, 39 Neb. 397, and in *Patrick Land Co. v. Leavenworth*, 42 Neb. 715, that the lien of the mortgage was superior to that of mechanics and material-men. Whatever may be the logic of the earlier adjudications in this state, we are, by the decisions just mentioned, irrevocably committed to the doctrine that the lien of an ordinary mortgage is not subordinate to mechanics' liens, merely because the money which it was given to secure was loaned for the purpose of improving the mortgaged premises and under an express contract that it should be so used. The rule of decision in this class of cases has been too long established to be now successfully assailed.

Some questions peculiarly affecting individual appellants remain yet to be considered. Forburger, Speidell & Co. furnished cut stone for the building and agreed to accept as part payment therefor two unincumbered city lots estimated to be worth $200. A quitclaim deed for said lots was executed by Halter and wife about May 1, 1893, and left with a member of the firm at their place of business. The instrument was not accepted, because the property was subject to judgment liens exceeding its value. Neither was it formally tendered back to Halter. Afterwards, according to the finding of the trial court, the parties came together and effected a settlement, in which the sum of $210 was agreed upon as the balance due. This finding, although questioned, is sustained by sufficient evidence and will not be disturbed.

The court awarded James Tyler & Son a mechanic's lien for the sum of $303.75 and adjudged the same to be prior to the Halter mortgage. It appears from the record that the claim of this firm embraces items under five separate contracts as follows: (1) For services on plans and specifications, details and contracts, $875; (2) for perspective drawing, $25; (3) for making bills of ma-

terials, $35; (4) for measuring excavations, concrete and brick work, $50; and (5) for superintending, $175. The contract for the first item was made in June, 1892, and the work on the plans was commenced soon after. The Tylers did not superintend the work on construction, but they furnished the details from time to time until the building was completed, which was not earlier than December 22, 1893. The claim for a lien was filed on February 24, 1894. The appellees contend that an architect who has prepared plans, specifications, and details for a building is not, except as an incident to superintendence, entitled to a lien for his services. In *Fiske v. School District*, 58 Neb. 163, 78 N. W. Rep. 392, there is an intimation that an architect is entitled to a mechanic's lien upon a building which has been constructed in accordance with plans prepared by him under contract with the owner. We now hold that the work of drawing such plans enters into the construction of the building which is afterwards erected in conformity therewith, and that the architect in such case is within the purview of section 1 of the mechanics' lien law. As the claim of the Tylers was filed within four months of the time the last details were furnished, they have a valid lien under the first contract and are entitled to recover $765, with interest thereon from February 20, 1894.

The trial court found that there was due F. E. Foltz the sum of $637.65, for materials and labor, and rendered against Halter a personal judgment for that amount. The question now in controversy is whether Foltz is entitled to a lien prior to the lien of the Halter mortgage. After a careful examination of the evidence we are entirely convinced that this appellant's claim is based upon two distinct contracts, and that the claim for a lien under the first contract, which was made in October, 1892, was not filed within the time limited by the statute and so never became effective. The other contract was made January 31, 1893, and the claim under it is, therefore, junior to the lien of Hare and Tyler.

The judgment is reversed and the cause remanded to the district court with direction to render a decree in conformity with the conclusions herein announced.

REVERSED.

FIRST NATIONAL BANK OF OMAHA, APPELLEE, V. EMMA GOODMAN, APPELLANT.

FILED JUNE 21, 1899. No. 8636.

Life Insurance: WIFE'S PLEDGE OF POLICIES: RELEASE. Policies of insurance on the life of her husband were pledged by the beneficiary, the wife, as security for the payment of the debt of the husband. The evidence *held* sufficient to support a finding that the contract of pledge was inclusive of extensions of times of payments, and that such extensions were made did not discharge or release the pledge.

REHEARING of case reported in 55 Neb. 418. *Judgment below reversed in part.*

Isaac Adams and *George W. Doane*, for appellant.

J. M. Woolworth and *Congdon & Parish, contra.*

HARRISON, C. J.

Certain policies of insurance on the life of Charles F. Goodman, during the main transactions which are involved in this suit were by the beneficiary of each policy, his wife, Emma Goodman, on March 8, 1893, pledged with the First National Bank of Omaha as security for the payment of the indebtedness of her husband to the bank. Subsequent to the death of the husband, which occurred January 11, 1895, the bank collected the amounts due on the policies of insurance and applied the proceeds to the payment of what was then due it of Mr. Goodman's indebtedness. In this action, in which the bank and Mrs. Goodman were parties, the right of the bank to apply the money derived

from the insurance policies as it had, was contested and resulted favorably to the bank, and on appeal to this court by the defendant party the judgment of the district court was affirmed. For opinion see *First Nat. Bank of Omaha v. Goodman*, 55 Neb. 409. A motion for a rehearing was granted, and on second submission and consideration of the cause the judgment of the trial court was reversed and judgment rendered in this court for the appellant. (See *First Nat. Bank of Omaha v. Goodman*, 55 Neb. 418.) A motion for a rehearing was filed for the bank, and for the appellant there was asked what was practically a rehearing or reconsideration of some at least of the matters involved. The second rehearing was granted, and the case has been again argued and submitted. For a full knowledge of the facts we refer the reader to the former opinions, especially the first, wherein the facts were stated in detail. A repetition or restatement of them herein we deem unnecessary.

The rules of law applicable to pledges for security for payments of debts and the reciprocal rights, duties, and liabilities of the respective parties are well established and defined. There was little or no appreciable conflict in the evidence. The main question is to ascertain what the evidence and the fair and allowable inferences therefrom disclose was the effect of the acts of assignment to the bank of the life insurance policies by Emma Goodman. That they were hers has been stated in the former opinions, and with such statement there can be no quarrel. That she is entitled, as is any surety, to a strict construction of her acts, and nothing is by implication to be added to their effect, is equally true. With all pertinent rules in view, we are to determine whether the evidence shows a contract of pledge in relation to specific debts then existent and not beyond the expressed or fixed maturity as stated, or shown in any evidence of the debts, or did it contemplate extensions of times of payments, and also future advances or debts created by loans made in the future. The last, we will say, was

clearly without the scope of the pledge, however effective or non-effective it may be determined as to other urged matters. The assignments of the policies, referring now to the writings,—the words were but general and indicate nothing save and except the mere transfers,—furnish no clues to any other or further purposes. This is, strictly speaking, not exactly true as to one. In the transfer of it there did appear a statement which would probably direct attention to the fact that the interest the bank would acquire would not be direct and independent, but contingent and dependent. The assignments were executed by Mrs. Goodman at the express solicitation of her husband, and only after expostulation and expressions of unwillingness during two occasions when the matters of such transfers were subjects of conversation did she finally go to his place of business for the purpose and there and then gave proof of yielding assent thereto by actual performance of the acts. It will be borne in mind that the date of the transfers of the policies was March 8, 1893. Mr. Goodman's indebtedness to the bank then was evidenced as follows: One note of date December 19, 1892, in the sum of $10,000, and due March 22, 1893, or fourteen days subsequent to the date of the assignments of the policies and their delivery in pledge. A note of date January 18, 1893, amount $10,000, due April 21, 1893, or forty-four days subsequent to the pledge of the policies. One note dated February 8, 1893, for $1,000, due May 12, 1893, or sixty-six days after the date of the pledge. One note dated February 20, 1893, for $9,000, due May 24, 1893, or seventy-seven days after the date of the pledge. One note dated February 20, 1893, for $10,000, due May 24, 1893, or seventy-seven days after the date of the pledge. One note dated February 23, 1893, for $2,000, due May 27, 1893, or eighty days after the date of the pledge. And one note dated March 1, 1893, for $2,000, due June 2, 1893, or eighty-six days after the date of the pledge.

It is true that Mrs. Goodman did not know, or the evi-

dence is silent on the subject, that the debt of her husband to the bank was divided as above indicated, or that any or all of it would become due in a few days or a very short time from the date of the pledge. To the extent disclosed by the evidence she knew very little, if anything, of the details of the business of her husband with the bank, or indeed any other of his business affairs. It is also true that the pledge was made, or rather obtained to be made, by Mr. Goodman because of his prior promises to the bank or to Mr. Kountz that it should be; but it is just as plain that what was desired by Mr. Goodman was further time within which to pay or attempt to meet his indebtedness to the bank; that it was an idle and futile act to pledge the policies to the extent Mr. Goodman's plans were to be advanced or furthered by it unless it was inclusive of extensions of time for payments as the notes matured, and the pledge was wholly ineffectual except to place the policies within the power and possession of the bank, and enable it, as soon as the debts matured, to realize from the pledge in any appropriate manner. Mrs. Goodman did, however, know something generally of her husband's business matters and transactions, and that he was financially embarrassed and owed the bank, that the bank required the pledge to be made, and that her husband desired it; that it was to be done, if done at all, to "keep Mr. Kountz quiet." This was the expression, she states, used by her husband to convey the necessity or reason for the pledge, and could have but one meaning, could be understood but in one sense, that it was to get more time to pay the bank the debt to it. She testified that she understood the purpose of the transfer and delivery of the policies to the bank, and that it was to be security for her husband's indebtedness. As Judge SULLIVAN expresses it in the second opinion in the case (55 Neb. 418), "Her intention was to help her husband extricate himself from the financial difficulties in which he was involved." There are other facts of the after conduct of Mrs. Goodman

which, we think, while none of them were of sufficient strength in and of themselves to bind her, yet are evidentially of much weight as tending strongly to show what she must have understood and believed the pledge to have been. This seems the only reasonable view that can be taken of some of these after actions on her part. After a careful review of the evidence and the arguments we are forced again to the conclusion expressed by Judge IRVINE in the first opinion filed (55 Neb. 409): "Her reluctance was to part with the policies at all. Having consented to part with them, she did so according to her husband's wishes, to fulfill his promises and to accomplish his purposes. His purpose was to obtain further extensions. Her mind and her acts must be read in this light. When she yielded to his importunities it was evidently by making his undertakings her own. * * * The more reasonable, the more obvious, the more probably true construction of this contract accords with the finding of the trial court. In a civil case we are not at liberty to reject the more reasonable, the more obvious, the more probably true view of the evidence, and accept the less reasonable and the less probable, because of any technical rule of proof by which the latter is fortified. Nor may we reject the more reasonable and the more probable from sentiment of sympathy which, if it could have sway, would here exert a strong influence in favor of the appellant." As we have hereinbefore stated, we do not think there is any evidence to sustain a finding that the pledge was to cover new loans or new debts of any future creation, but was for indebtedness existent at the time of the pledge, and time, by forbearance or extension, for its payment. It follows that the second opinion filed is disapproved and the judgment of the district court is reaffirmed to the extent it was for the bank relative to indebtedness in existence at the time of the pledge, and reversed as to the debts of subsequent creation.

JUDGMENT ACCORDINGLY.

SULLIVAN, J., dissenting.

I adhere to the views expressed in the second opinion.

NORVAL, J., concurring.

At the consultation had after the last oral argument in this cause I was of the opinion that the judgment of the district court should be affirmed to the extent it held that the policies were bound for the payment of the indebtedness in existence when they were pledged to the bank, and after a careful reading of the entire evidence, and a consideration of the same and of the several written and oral arguments of counsel for the respective parties, no reason is presented for the abandonment of the conclusion then reached. The writer does not say that the evidence would not justify a finding in favor of Mrs. Goodman, but he is convinced it was sufficient to sustain the conclusion of the district court to the extent already indicated, but does not support the judgment below as to the indebtedness of Mr. Goodman to the bank created subsequent to the pledging of the policies in question.

H. A. MERRILL, APPELLANT, V. WILLIAM H. IJAMS ET AL., APPELLEES.

FILED JUNE 21, 1899. NO. 8940.

1. **Tax Lien**: FORECLOSURE BY PURCHASER: NOTICE TO OCCUPANT. It is not essential to a foreclosure of a tax lien by a purchaser at a void tax sale that the notice provided for in the revenue law (Compiled Statutes, ch. 77, art. 1, secs. 123, 179) be served on the owner or occupant of the real estate to be affected.

2. **Taxation**: LIEN OF COUNTY: FORECLOSURE. The lien of a county for taxes assessed against real estate may be enforced by it in an action of foreclosure after the taxes have become delinquent and subsequent to the time of the liability of the property to sale because of the non-payment of the taxes. *Grant v. Bartholomew*, 57 Neb. 673, followed.

3. **Void Tax Sale:** LIEN OF PURCHASER. A tax sale, although void, assigns and transfers the lien of the public or county to the purchaser, also the rights and remedies, inclusive of the rights of action of foreclosure of the lien. *Grant v. Bartholomew*, 57 Neb. 673, followed.

4. ———: ———: INTEREST. The purchaser at a void tax sale is entitled to the same rate of interest on the taxes paid by him as they drew when he made the payments. *Grant v. Bartholomew*, 57 Neb. 673, followed.

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

Henry W. Pennock, for appellant.

W. J. Connell, contra.

HARRISON, C. J.

The appellant had purchased certain real estate at tax sale and instituted this, an action to foreclose the lien of the taxes. Issues were joined and a stipulation of facts was filed, on consideration of which the trial court dismissed the action. The plaintiff has appealed to this court. The stipulation of facts is as follows:

"1. That the levy and assessments of the taxes, general and special, mentioned and described in plaintiff's petition, were legally made, and that the several amounts of such taxes and special assessments are as set forth in the petition, and that the plaintiff paid said taxes and assessments as stated in said petition.

"2. That the defendants Ijams, at the time of such assessments and ever since, have been in the actual possession of the real estate in said petition described, and that said real estate was assessed in their name.

"3. That at no time has any notice of any character or description been served upon said defendants Ijams of the purchase of said land for taxes, or of the time of the expiration of the time of redemption on sale for taxes or in any manner making reference to taxes, tax sale or redemption, nor has any attempt been made to comply

with the provisions of section 123 or section 179 of chapter 77, article 1, entitled 'Revenue,' of the Compiled Statutes of the state of Nebraska, except by serving on defendant Creighton a certain notice of the purchase of real estate in Dodge county, Nebraska, of which notice the following is a copy:

"'NOTICE.

"'To the occupants of the real estate described below and to John A. Creighton *et al.:* You are hereby notified that on the 7th day of January, 1892, the undersigned bought at private tax sale of the treasurer of Dodge county the following described real estate: Lot 20, in Hascall & Rogers' Addition to the city of Omaha, situated in Douglas county, Nebraska, for the delinquent taxes of the year 1890, and taxed in the name of John A. Creighton for said 1890 and 1893, and that the time of redemption of same will expire on the 7th day of January, 1894. H. A. MERRILL.'

"4. That the said sale was a private sale, and that the proceedings relating thereto were irregular, and that by reason of irregularities such sale was not a valid sale; that in case plaintiff is allowed to recover any amount, such amount shall be the basis of subrogation to the respective liens of the county of Douglas and city of Omaha."

That no notice was served was not material in an action of foreclosure of the lien of the taxes. (*Van Etten v. Medland*, 53 Neb. 569; *Grant v. Bartholomew*, 57 Neb. 673.) That the certificate and sale were void did not deprive the plaintiff of the right to an action to foreclose the lien of the taxes. He had become invested with the rights of the public or the county and could maintain the action. (*Grant v. Bartholomew*, 57 Neb. 673.) The decision in the case just cited was by a majority of the court and is governable of matters of litigation which are within the doctrine announced as to the points which we have just adjudicated. Personally I adhere to the

views expressed in the dissenting opinion filed in *Grant v. Bartholomew, supra.* It was also established by the majority opinion to which we have hereinbefore referred that the purchaser at the void tax sale was entitled to interest at the rate the taxes drew at the time he paid them. This is applicable in the case at bar. The decree of the district court is reversed and the cause remanded, not for a second trial, but for entry of a decree in favor of the plaintiff for the amount of the taxes, with interest from dates of payments to date of decree at the rate the taxes bore, the decree to bear interest at seven per centum per annum.

REVERSED AND REMANDED.

MUSCATINE MORTGAGE & TRUST COMPANY, APPELLEE, V. JAMES F. MCGAUGHEY, IMPLEADED WITH NEBRASKA LAND, STOCK-GROWING & INVESTMENT COMPANY, APPELLANT, ET AL.

FILED JUNE 21, 1899. No. 8957.

Mortgage-Foreclosure Sale: WAIVER OF OBJECTIONS TO CONFIRMATION. A defendant in an action of foreclosure of a real estate mortgage, after decree of foreclosure and sale for its enforcement, secured a stipulation that in the event of performance of certain stated matters the decree was to be assigned to it, but if there was a failure to perform all or any of the conditions, confirmation of the sale was to be "without objection." *Held*, That objection to confirmation of a judicial sale may be waived, and also that there had been such a failure to perform the requirements of the stipulation as warranted the confirmation of the sale, and without consideration of the objections on the part of the defendant, a party to the stipulation.

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

F. G. Hamer, for appellant.

Dryden & Main, contra.

HARRISON, C. J.

In this, an appeal from an order of confirmation of a judicial sale made pursuant to a decree in an action of foreclosure of a real estate mortgage, it appears that subsequent to the sale and prior to confirmation thereof the following stipulation was made and filed in the cause: "It is hereby agreed and stipulated by and between the parties hereto that upon the receipt by the plaintiff of the sum of $50 cash in hand paid, to be applied by said plaintiff on coupons representing interest on the first mortgage on the premises involved in this action, which said coupons plaintiff, for its own protection, has been obliged to pay since the institution of this suit, and upon the payment of the further sum of $150 on or before the 25th day of May, 1894, to be applied as above, and upon the further receipt by said plaintiff on or before the 15th day of April, 1895, of an amount of money equal to said decree and costs, together with all interest accrued on said first mortgage, together with all taxes against said premises, either paid by plaintiff or then remaining unpaid, then this plaintiff agrees to assign said decree to the defendant, the Nebraska Land, Stock-Growing & Investment Company, or to whomsoever said defendant may direct, and upon the failure of said plaintiffs to receive said sums of money, or either of them, as aforesaid, then the said sale heretofore had is to be confirmed without objection." There was a motion to confirm the sale, filed February 23, 1894, and prior to the stipulation which we have quoted, which was filed May 24, 1894. Subsequent to the stipulation nothing further was done in regard to confirmation until June 9, 1896. When the matter was presented, objections to confirmation had been filed. It appears that in partial compliance with the stipulation there had been $50 paid, a second payment in amount $150, and another payment in the sum of $75; also, that there had been improvements of the real estate involved in the litigation. It is now urged that by reason

of the payments to which we have referred the appellant became partial owner of the decree of foreclosure; and further, that the fact of improvement of the land gives a claim or right to equitable relief. The payments of $50 and $150 are asserted as made in compliance with the terms of the stipulation, and while there is no evidence to show that the said payments were applied as it is set forth in the stipulation that they should be, there is also nothing to show that they were not, and we cannot presume to the latter effect. Of the payment of $75 this is shown: "J. N. Dryden, being first duly sworn, on oath says that the final payment of the $75 set forth in the affidavit of F. G. Hamer, filed herein, was made to apply upon interest on the first mortgage on the premises in controversy; that said payment had no connection whatever with the stipulation for the confirmation of the sale herein; that said first mortgage has never been foreclosed, and consequently was not, and is not, involved in the above entitled cause." And what is stated in the affidavit just quoted is not in any manner controverted or denied. There is not shown any payment on the decree under which the sale occurred, and there is disclosed a failure to comply with or fulfill the most important requirement of the stipulation,—a failure to make one, and the largest, of the payments agreed upon therein. The stipulation was plainly and directly to the effect that if there was a failure to pay either amount as agreed, the sale might be confirmed "without objection." Whether, if payment on the decree herein to a considerable sum had been shown, it would have entitled the appellant to relief on equitable grounds, we are not called upon to decide. There is no such showing, and, all things considered, we are forced to conclude that the district court could but decide as it evidently did, that by reason of non-compliance of appellant with the stipulation, the other party had become entitled to call for confirmation of the sale.

Relative to other objections to confirmation, they could

be waived; and it was the agreement that the confirmation was to be "without objection," and the appellee had become entitled to the enforcement of this portion of the stipulation. It follows that the order of confirmation must be.

AFFIRMED.

MICHAEL T. BOHMAN, APPELLANT, V. CHARLES H. CHASE ET AL., APPELLEES.

FILED JUNE 21, 1899. NO. 8954.

Transcript for Review. In an appeal to this court the certified transcript must include the judgment or decree of the trial court.

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

George R. Doughty and *George H. Thomas,* for appellant.

C. J. Phelps, contra.

HARRISON, C. J.

The record filed in this court in this action has attached a certificate of the clerk of the trial court to the effect that it contains copies of "all the pleadings" in the cause. There is no certified judgment or decree. This being true, it is not presented here in such a condition as will admit of an examination of the correctness of the decision in the district court. Section 675 of the Code of Civil Procedure reads as follows: "That in all actions in equity either party may appeal from the judgment or decree rendered or final order made by the district court to the supreme court of the state; the party appealing shall, within six months after the date of the rendition of the judgment or decree, or the making of the final order, procure from the clerk of the district court and file in the office of the clerk of the supreme court a cer-

tified transcript of the proceedings had in the cause in the district court, containing the pleadings, the judgment, or decree rendered or final order made therein, and all the depositions, testimony, and proofs offered in evidence on the hearing of the cause, and have the said cause properly docketed in the supreme court; and on failing thereof, the judgment or decree rendered or final order made in the district court shall stand and be proceeded in as if no appeal had been taken." This requires that there shall be embodied in a transcript in an appeal to this court the judgment or decree of the trial court, and the certificate to the transcript must generally or in terms embrace the judgment or decree. (*Moore v. Waterman*, 40 Neb. 498; *Bell v. Beller*, 40 Neb. 501; *McDonald v. Grabow*, 46 Neb. 406.) The appeal must be dismissed.

APPEAL DISMISSED.

JOSEPH G. SLOAN, SHERIFF, V. THOMAS MANUFACTURING COMPANY ET AL.

FILED JUNE 21, 1899. NO. 8942.

1. **Chattel Mortgages:** SEVERAL MORTGAGEES. A chattel mortgage may be to a number of persons and may be to each a separate and several security of his claim or debt against the mortgagor.

2. ———: ———: FORECLOSURE: ACTIONS. Each of the persons so secured may enforce a separate foreclosure of his interest in the property thus mortgaged, and also may maintain a separate action to recover from the wrongful taker thereof the possession of the mortgaged property.

3. ———: CONSTRUCTION: VOLUNTARY ASSIGNMENTS. "Instruments in the form of chattel mortgages will not be held to constitute an attempted assignment for the benefit of creditors because of the contemplated reciprocal trusts imposed on each mortgagee in favor of the others; because the mortgages provide that they shall prorate one with another; because at the time the mortgages were made the mortgagor was unable to redeem, conveyed

all his property by the mortgages to secure debts greater than the value of the property; and because the parties contemplated that the mortgagees should take immediate possession; nor does the fact that the mortgages contained a power of sale in accordance with the statutory provisions for foreclosure render the transaction an assignment." (*Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb. 863.)

4. **Voluntary Assignments:** CHATTEL MORTGAGES. "The act in regard to voluntary assignments refers only to assignments intended as such; that is, when a debtor undertakes to make an assignment under the statute he must make it in accordance with it, otherwise it is no assignment and is void. But the rules relating to the construction of mortgages and other instruments somewhat akin to assignments, but not intended as such, remain unchanged." (*Kilpatrick-Koch Dry Goods Co. v. Bremers, supra.*)

5. ———: ———. The instruments herein involved in litigation *held* not an attempted assignment under the act relative to voluntary assignments.

6. **Fraudulent Conveyances:** QUESTIONS OF LAW AND OF FACT. If the facts which render a transfer of property fraudulent as to creditors appear upon the face of the instrument of transfer or are undisputed, the question may be one of law for the court, but the question of fraud is in general one of fact for submission to the jury or trier of facts.

7. **Fraud:** QUESTION OF FACT. The question of fraud in the case at bar was one of fact.

8. ———: ———. The finding of the jury on the question of fraud *held* sustained by the evidence.

9. **Request for Immaterial Findings:** REVIEW. The refusal to submit a special finding, the answer to which will not be material in a decision of the issues in litigation, is not prejudicial.

10. **Property Subject to Attachment:** ACCOUNTS: DAMAGES FOR WRONGFUL SEIZURE. In general, accounts, in their substance, or the debts, are not subject to levy by attachment or execution, but the effect of section 214 of our Code of Civil Procedure is to subject them to the lien of a levy of a writ of attachment; and, in an action for a wrongful seizure and retention of possession of property under a writ of attachment, inclusive of accounts, the plaintiff may recover damages for the wrongful acts in regard to the accounts.

11. ———: ———: ———. The face value of the accounts may or may not furnish a measure of the damages.

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

J. H. Broady and *Story & Story*, for plaintiff in error.

Conley & Fulton, Francis Martin, G. E. Becker, and *Lindsay & Raper, contra.*

HARRISON, C. J.

The firm of Meek, Skinner & Co., in the retail hardware and implement business in Pawnee City, had during its career of several years become heavily indebted, and on February 16, 1895, executed a chattel mortgage in which was included the firm's stock of hardware and implements then on hand, and in terms secured the payment of amounts of indebtedness to sixty-five creditors, the name of each and the amounts due the creditors being stated in a schedule or list attached to and a part of the chattel mortgage. An instrument was at the same time executed by which the notes and accounts belonging to the firm were transferred to the creditors. These instruments were executed and filed in the office of the clerk of Pawnee county. Of the execution of the instruments but two of the creditors had any prior or contemporaneous knowledge. Some of the creditors accepted the action of the firm as set forth in the instruments to which we have referred, others refused to accept; of the latter was the First National Bank of Pawnee City, and for it and other creditors, respectively, suits against the firm were instituted in which writs of attachment were procured to issue and levies were made on the property described in the mortgage. There was also in the returns to the writs a statement that the levies extended to and included the notes and accounts. For some of the mortgagees who had accepted the actions of the firm as expressed in the mortgage and written transfer of the notes and accounts this, an action of replevin, was commenced. No bond was given, and the suit proceeded as one for damages and was prosecuted to judgment in the plaintiff's favor. The sheriff justified under his attach-

ment rights, and from the adverse determination an error proceeding to this court has been perfected.

The main instrument, the effect of which is involved in the controversy herein, was in form a chattel mortgage, was in favor of, as we have before stated, sixty-five persons, creditors of the firm, and to the extent the record discloses they were all the creditors. There was a provision that the parties grantees should prorate in the proceeds in the event of a foreclosure of the mortgage, and this was in contemplation of the parties who executed it at the time, but each grantee was specifically named, as was the amount due him, and the mortgage was clearly one joint and several as to the parties who were to take under it,—was as if sixty-five simultaneous mortgages had been executed on the same property to the parties with a provision that each should prorate in the proceeds of the property if foreclosures occurred. A mortgage which in terms runs to a number of different persons may be to cover a separate and several liability to each of the persons named. (Jones, Chattel Mortgages sec. 336; Pingrey, Chattel Mortgages sec. 104; *Adams v. Niemann*, 46 Mich. 135, 8 N. W. Rep. 719; 5 Am. & Eng. Ency. Law [2d ed.] 956.) And either mortgagee may enforce his claim by foreclosure. (*Adams v. Niemann, supra;* Herman, Chattel Mortgages 357; *Burnett v. Pratt*, 22 Pick. [Mass.] 556; *Gilson v. Gilson*, 2 Allen [Mass.] 115; *Lyon v. Balentine*, 29 N. W. Rep. [Mich.] 837; *Walker v. White*, 27 N. W. Rep. [Mich.] 554.) If the right to foreclose exists, it seems to logically follow that as against third persons one or more of the mortgagees may replevin the property and thus defend the right of possession which is with the right to foreclose.

A number of the creditors who were included in the mortgage did not and would not accept it and refused to recognize it. This did not invalidate it or render it any the less forceful in favor of those who did accept it. (1 Cobbey, Chattel Mortgages sec. 411; 1 Jones, Mortgages sec. 109.) Such a mortgage may be good as to one and

invalid as to another or others of the creditors named in it. (Pingrey, Chattel Mortgages sec. 104; 5 Am. & Eng. Ency. Law [2d ed.] 956.) The greater number of the mortgagees who did adopt the mortgage did not do so until after the writs of attachment were levied. Their asserted rights were held inferior and subject to the attachment liens. This was correct. (*Rogers v. Heads Iron Foundry*, 51 Neb. 39.) But this did not affect or disturb the rights of the prior acceptors of the mortgage against the subsequently acquired attachment liens. Against the latter the prior mortgagees had the right to the possession of the property and to subject it to the satisfaction of their liens.

It is argued that the transfer herein involved was an attempted evasion of assignment law, and therefore void. Within the doctrine of this court announced in *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb. 863, and kindred decisions, the instruments are not open to this attack.

On the point of the fraudulent character of the mortgage and bill of sale it is argued that the instruments themselves bore the stamp of and disclosed fraud, or quoting as does the writer of the brief, "Where the facts relied upon to render a mortgage fraudulent as to creditors appear upon the face thereof or are undisputed, the question of fraud is one of law for the court." (*Houck v. Heinzman*, 37 Neb. 463.) We complete the statement there made. "In all other cases it is a question of fact for the consideration of the jury." As we view the matters herein presented there was nothing disclosed by the face of the papers which rendered the transaction fraudulent and void, and on the evidence as a whole the character of the transfer was one of fact and for submission to the jury. The decision of the jury on the subject of fraud was sustained by sufficient evidence and must stand.

It is argued that the trial court erred in its refusal to submit to the jury a special finding requested for plaintiff in error. Within the view we have adopted of the

matter in litigation the finding to which we have just alluded could not have affected the disposition to be made of the cause,—would not have been material; hence the refusal did not prejudice the complainant.

Counsel for plaintiff in error asked questions, the object of which was to show by the answers the amount for which about three-fourths of the stock of the hardware and implements had been sold by the sheriff at private sale. To these objections were sustained and consistent offers to prove were overruled. The only service which this testimony could have performed for the party for whom it was offered would have been to reduce to the minimum the value of the goods to which it was sought to apply it, and this only as the value as thus shown of the three-fourths could be applicable relatively to the whole or to all, and if thus applied, it gives a value larger than that established by the verdict of the jury, which being true, the plaintiff in error has not been prejudiced by the suppression of the offered testimony.

What we state and have stated which in the words employed refers specifically to the chattel mortgage is just as applicable, and is and was intended to, and does, embrace the bill of sale.

The return of the sheriff on the writs of attachment disclosed that he had levied upon the stock of hardware and implements and the notes and accounts of the firm. Accounts are not the subject of levy so as to transfer the debt; that the return so stated was without effect, the original owner, or if the accounts, as in this case, had been transferred, the transferee, could have collected them. (1 Shinn, Attachment & Garnishment sec. 208, p. 402, citing *Lesher v. Getman*, 30 Minn. 321; *Goodbar v. Lindsley*, 11 S. W. Rep. [Ark.] 577, 51 Ark. 380; 20 Am. & Eng. Ency. Law 1062.) The foregoing is the general rule, but under the general subject of "Attachment" and disposition of the attached property in our Code of Civil Procedure the appointment of a receiver is provided, and in section 214 it is said: "Such receiver shall take pos-

session of all notes, due bills, books of accounts, accounts, and all other evidences of debt, that have been taken by the sheriff or other officer, as the property of the defendant in attachment, and shall proceed to settle and collect the same. For that purpose he may commence and maintain actions in his own name as such receiver; but in such actions no right of defense shall be impaired or affected." There seems to have been in the foregoing somewhat taken for granted by the legislators, but the only manner in which the portion which refers to accounts can be given force is to recognize that a levy by attachment on them is a lien on the debt and gives the exclusive right to collect, and this we will do.

The property was not returned, and its value, inclusive of the accounts, may have furnished the proper measure of the damages; none other was afforded.

What we have said fully meets the arguments on the objections to instructions given and those requested and refused; also the contention that the court erred in overruling the motion for judgment in favor of plaintiff in error notwithstanding the general verdict against him. The judgment of the district court must be

AFFIRMED.

FRANK WARD V. STATE OF NEBRASKA.

FILED JUNE 21, 1899. No. 10744.

1. **Jurors:** CHALLENGES: EVIDENCE. A challenge of a juror for cause raises a question which is to be decided by the trial judge from a consideration of all the facts developed during his examination, and any circumstances which tend to enlighten upon the matter; and of these are the appearance and actions of the juror while undergoing the examination.

2. ———: QUALIFICATION: OPINIONS. An opinion or impression of a juror formed from reading newspaper reports and hearing general rumors, of none of which he has a settled belief, but expresses rather disbelief or disregard, is hypothetical and does

not disqualify him if he also states that he can render a fair and impartial verdict based solely upon the evidence and wholly without the interference of such opinion or impression.

3. ———: ———: REVIEW. The determination of the trial judge in the decision of a challenge of a juror for cause will be sustained on review if not clearly wrong.

4. **Assault with Intent to Murder:** PROOF OF INTENT. A charge of an assault with intent to murder is of a crime of which the intent is an essential element, and its proof as indispensable as the proof of the act which it accompanies.

5. ———: ———. Where there is no bodily injury or result from the act or assault, the intent may not be presumed from the act; but as the intent is a process of the mind, and necessarily hidden or secret, it may not be susceptible of proof by independent evidence. It may be gathered or drawn from all the evidence, facts, and circumstances of the case, inclusive of the act, and is a matter of fact for the consideration and decision of the jury.

6. **Criminal Law:** SUFFICIENCY OF EVIDENCE. If a finding of a jury is attacked as not sustained by sufficient evidence, it will not be disturbed by the appellate court unless manifestly wrong.

ERROR to the district court for Jefferson county. Tried below before LETTON, J. *Affirmed.*

W. P. Freeman and *Heasty & Clapp*, for plaintiff in error:

One of the jurors stated on the *voir dire* that he had an opinion as to the guilt or innocence of accused, based on newspaper reports and on conversations, and that it would require evidence to change the opinion. The juror should have been excused upon accused's challenge for cause. (*Curry v. State*, 4 Neb. 548; *Miller v. State*, 29 Neb. 438; *Bayse v. State*, 45 Neb. 261; *Cowan v. State*, 22 Neb. 519; *Olive v. State*, 11 Neb. 11.)

In support of an argument in favor of the contention that there was not sufficient proof of the intent charged to sustain the conviction reference was made to the following cases: *Hairstone v. State*, 54 Miss. 689; *Crisman v. State*, 54 Ark. 283; *Curry v. State*, 4 Neb. 545; *Patterson v. State*, 85 Ga. 131; *Botsch v. State*, 43 Neb. 501; *Lacefield v. State*, 34 Ark. 275; *Smith v. State*, 52 Ga. 88.

C. J. Smyth, Attorney General, and *C. H. Denney, County Attorney,* for the state.

HARRISON, C. J.

An information was filed in the district court of Jefferson county in which the plaintiff in error was charged with an assault upon one Gregg Long with a deadly weapon, "a large knife, sometimes called a dirk knife," with the intent to kill and murder him. To this the plaintiff in error pleaded not guilty, and a trial resulted in his conviction and sentence to a term of imprisonment in the penitentiary. In an error proceeding in his behalf to this court two questions are presented, one that the trial court erred in overruling a challenge for cause of one of the jurors, and another that the evidence was insufficient to sustain the verdict, especially of the intent elemental of the crime charged. In regard to causes for challenge to jurors it is stated in section 468 of the Criminal Code: "The following shall be good causes for challenge to any person called as a juror on the trial of any indictment: * * * That he has formed or expressed an opinion as to the guilt or innocence of the accused; *Provided,* That if a juror shall state that he has formed, or expressed, an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor, or hearsay, and not upon conversations with the witnesses of the transactions, or reading reports of their testimony, or hearing them testify, and the juror shall say, on oath, that he feels able notwithstanding such opinion to render an impartial verdict upon the law and the evidence, the court, if satisfied that said juror is impartial, and will render such verdict, may, in its discretion, admit such juror as competent to serve in such case." We do not deem it necessary to quote the

statements of the juror who was challenged. His examination disclosed that if he had an impression or opinion relative to the subject of the trial, it was formed from newspaper reports which he had read or from rumors which he had heard repeated or discussed, and of the truth of either the newspaper reports or rumors he had no fixed belief, rather disbelieved or discredited them. If the juror had an opinion it was not unconditional or fixed, but conditional and hypothetical, and, within the doctrine of the decision in the case of *Basye v. State*, 45 Neb. 261, it was not error to overrule the challenge for cause. (See, also, *Murphy v. State*, 15 Neb. 383; *Curry v. State*, 5 Neb. 412.)

It is urged in this connection that the constitution and our laws demand that care be taken that the defendant in a criminal action be given a fair trial. The record herein discloses, we think, a well-sustained careful effort to afford the party charged an impartial hearing, a trial fairly conducted. To a comprehension of the question of intent elemental of the charge against the accused a careful examination of the evidence which bears upon the subject is necessary. The record discloses that Henry Ward, the father of the prisoner, was the owner of a farm on which the latter had resided for some time prior to the occurrences in which this prosecution had its origin, and further, that the latter had cultivated a portion of the farm and had planted and had grown thereon a crop of corn of which he testified he was entitled to a share. This was done during the crop season of 1898, prior to the time of the act which caused his arrest. In the fall of 1898 the farm was leased to Gregg Long for the year 1899, to be worked by him and one Frank Picha, Long's brother-in-law. They occupied the farm on or about December 1, 1898, and at some date during that month Henry Ward, who it seems was living with the renter, went to Kentucky and Illinois with the intention of being absent for a considerable and indefinite time. It was of the evidence that he in-

structed the renter that if his son came to the farm after certain specifically designated property, he was to be allowed to take it, but corn was not named. On this point there was a conflict in the evidence. There was some testimony to the effect that the directions to the renter were inclusive of corn. It also appeared that Henry Ward sold to Frank Picha a team of horses of which his son asserted ownership. On February 2, 1899, the accused, with a team and wagon, went to the farm and drove to a crib in which there was some "snapped corn," a portion of which he claimed, and took therefrom a wagon load of the corn. Gregg Long testified that he then had a conversation with the plaintiff in error. The testimony of Long on this point is as follows: "I told him that we had no right to let this corn go; that it was in my care. He said, 'It don't make no difference,' he was going to have it. I told him this corn was in my care, and I could not let it go. Mr. Ward holds me responsible for it; and he says, 'No, he wouldn't.' I told him I didn't want to let it go. He took that load, and when he took that load along I told him not to come back and bother me any more. He said he was going to get that corn, and corn was in the ear in the crib right aside of it, and he said after that he was going to get the shelled corn. I told him, 'No.' I told him I wanted him to stay off the place. He said, 'No,' and I warned him to stay off the place and not bother us any more." Two days later, or on February 4, 1899, the accused returned to the farm and proceeded with the team and wagon near to the crib and with the intention to get another load of corn therefrom. The wagon had on "the top box" or the "double" box. He was seen by Long and Picha, who then approached him and stopped near the wagon, Long about the hindmost portion of the rim of one front wheel of the wagon as it stood, and Picha nearer the front end of the wagon, but close to Long. The plaintiff in error was standing in the wagon bed or box near the center, probably a trifle toward the front. Gregg Long testified

of what then occurred as follows: "And I told him we didn't have no right to let no more of that corn go, and he said he was going to get it; it didn't make any difference, he was going to get that corn. After that he changed his subject, and he says, 'Those cobs there, I am going to take them, too.' I told him, 'No.' He said, 'They are worth $10'—he was going to take them and sell them. I told him, 'No,' the fuel was all to be mine for boarding the old gentleman; and he said, 'No,' he was going to sell them. And from that he changed his subject,—he said a little more before that, but I can't remember what it was,—from that he changed his subject, and he says, 'This black team there is yours, too.' (It belongs to my brother-in-law.) He says, 'Yes,' he says, 'I am going to take that, too,' and we said 'No.' He says, 'I am going to take them,' he says, 'I am going to take them right along,' and we both spoke up at the same time that the team belonged to us and you ain't going to take them. He jumped up and said, 'God damn you fellows, if you want to fight, I will fix you here.' He had a dirk knife in his hand."

Q. What did he do?

A. He jumped up from the wagon, and with his knife right this way (indicating) in his right hand, and made a lunge to stab me, and as he jumped I jumped right out from under him,—I stepped off a few steps pretty lively and looked over my shoulder. As he struck the ground he made a bow in that shape, and started after me. I broke and run. He was coming right after me. I had a gun by me. After I had run about ten steps, I pulled the gun; I couldn't do it any sooner, I had big rough mittens on; just as soon as I could I got them off, I pulled the gun and I turned around and I says, "Stop," and he stopped.

Also, that nothing further was said; that Ward got into his wagon and drove away.

Frank Picha stated:

He was going to take the team right along with him

that day, and we told him he wouldn't. He said he would. And then he got mad over it and jerked his overcoat off and jerked a knife out of his pocket and jumped out of the wagon and started after us.

Q. What did he say when he started to jump off of the wagon?

A. He said, "God damn you fellows, I will fix you right here," and he had the knife in his hand and as he jumped off he made a strike at us.

Q. At who?

A. At Mr. Long.

Q. Where did he light when he jumped off of the wagon with reference to where Gregg Long was standing at the time he started to jump?

A. Well, he jumped nearly in the same place where Mr. Long was standing.

Q. Now, when you started to run, what did he do?

A. Who, Gregg Long?

Q. No, you and Gregg Long started to run away?

A. Well, he followed us.

Q. Frank Ward followed you?

A. Yes, sir.

Q. How did he hold his knife then, when he was following you?

A. I think he held it this way (indicating); I know he did.

Q. What happened next?

A. Well, then as soon as Mr. Long got his mittens off and pulled the revolver out, why he stopped Frank.

Q. What did he say?

A. He told him to stop, and Frank turned around and jumped into his wagon and off he went.

Q. Did you see Frank's face at the time he was running?

A. Running toward us?

Q. Did you see Frank Ward's face at that time when he was running?

A. At us?

Q. Yes.
A. Yes, sir.
Q. How did he look?
A. He looked mad.
Q. Had there been anything said about fighting previous to the time that Frank said "I will fix you"?
A. No, sir.

Two boys, William and Thomas Larder, who were present throwing corn from a wagon into a crib near where the other parties were and heard and saw much or all of what was said and done, testified to the same effect and without material differences relative to the main facts as did Long and Picha. One of them said the accused struck at Long with the knife as he jumped from the wagon, the other stated that he did not see Ward strike at Long at the time of the jump from the wagon. The witnesses for the state described the knife used as a "dirk," with a pointed blade, sharp on both edges, and the blade about six or eight inches long. The accused testified that the blade of the knife was ten or twelve inches long. He stated in his testimony that the two parties threatened him, and on cross-examination said that the threat was to prosecute him if he took the corn. In relation to his intent the accused was asked, "What did you intend to do when you jumped out of the wagon?" and answered, "I thought I would scare them away." It will have been noticed that whatever the intention of the accused was, as a matter of fact it ended in an attempt; he inflicted no wound or bodily injury on the other party. This result was very probably more by force of circumstances and preventive conditions than from lack of purpose on his part, or such was the apparent conclusion of the trial jury.

It is argued that the words used by the accused just before or at the time he jumped from the wagon, "If you want to fight, I will fix you here," were conditional and show that he did not have an absolute intent in his mind to "fix" them or one of them. There had been no talk of

fighting or of personal violence, and whatever may have been in the mind of the plaintiff in error at the time he used the sentence we have quoted, it is clear that he did not care whether the other parties wanted to fight or not; he, as soon as he had prepared for action by getting his weapon from his overcoat pocket, immediately proceeded to carry out any intent he may have had, regardless of any conditions. The words employed cannot under the circumstances be given the force claimed for them, that of disclosing a conditional frame of mind or intent. The elements of the crime of murder were all present and active if there had been a killing, if the death of the party assaulted had resulted; but there was no killing, there was not even bodily hurt or injury, and the charge is of a crime of which the specific intent was an essential element, and its proof as indispensable as proof of the act (*Botsch v. State*, 43 Neb. 501); and in this case the intent cannot be presumed from the act. "A person is presumed to intend to do that which he voluntarily and willfully does in fact do. * * * But if the intent is to be carried beyond the result actually produced by the acts of the accused, it will be necessary to introduce evidence which would justify the jury in so finding." (*Curry v. State*, 4 Neb. 545.) But where there is, as in the case at bar, no result of the act, the intent of the act is to be gathered and measured by all the acts, facts, and circumstances of the occurrences upon which the charge is predicated, as was observed in *Botsch v. State*, 43 Neb. 503. "The intent is a mental process, and as such generally remains hidden within the mind wherein it was conceived, and is rarely, if ever, susceptible of proof by direct evidence, but must be inferred or gathered from the outward manifestations shown by the words or acts of the party entertaining it, and the facts or circumstances surrounding or attendant upon the commission of the assault with which it is charged to be connected." While a presumption may not arise from the act, an inference may. In the opinion in the case of *Krchnavy v. State*, 43 Neb. 337,

in which a reversal of a conviction and sentence on a charge of assault with intent to murder was sought, after quoting the rule announced in *Curry v. State, supra*, it was stated: "We do not, however, interpret the rule to require in every case independent evidence of the particular intention. On the contrary, the circumstances attending the principal act may be of such a character as alone to exclude every rational hypothesis except the existence of the specific intent charged. According to the modern and more reasonable view the test in all such cases is a rule of logic rather than a rule of law; and while a direction to the effect that men are presumed to intend the natural and probable consequences of their voluntary acts is generally held unobjectionable, what is meant thereby is that the jury are at liberty, if the circumstances warrant, to infer the intent from the act. Such inference, in the language of Dr. Wharton, is not one of law, but of probable reasoning, as to which the court may lay down logical tests for the guidances of the jury, but can impose no positive binding rule. (Wharton, Criminal Evidence secs. 735, 736.)" The question of the intent was one of fact for the jury to determine from all the facts and circumstances, the act and all the attendant facts. Although after the review of all the evidence as presented in the record we, as judges, might say that we have a doubt of its sufficiency on the subject of intent, we cannot say that the determination of the jury was manifestly wrong; hence we cannot disturb it. (*Monroe v. State*, 10 Neb. 448; *Whitman v. State*, 42 Neb. 841.) It follows that the judgment of the district court must be

AFFIRMED.

J. E. MELCHER V. J. L. HALEY.

FILED JUNE 21, 1899. NO. 8952.

Unauthenticated Transcript of Judgment: REVIEW. A petition in error will be dismissed when the final judgment or order assailed is not authenticated by the certificate of the clerk of the trial court.

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

McNish & Oleson, for plaintiff in error.

W. W. Young, contra.

NORVAL, J.

Attached to the record is the certificate of the clerk of the district court stating "that the foregoing is the original bill of exceptions in said cause, and also a true and perfect transcript of the petition, answer, reply, instructions, verdict, motion for a new trial, and order of extension of time in said action, as the same are on file and of record in my office." It will be observed that the final judgment in the cause is not authenticated, and for this reason the proceeding in error must be dismissed. (*Bailey v. Eastman*, 54 Neb. 416, and cases there cited; *Geneva Nat. Bank v. Donovan*, 53 Neb. 613; *Union P. R. Co. v. Young*, 52 Neb. 190; *First Nat. Bank of Pierce v. Noble*, 52 Neb. 507.)

DISMISSED.

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

FILED JUNE 21, 1899. No. 10600.

1. **Action on Sheriff's Bond:** EXECUTION AND APPROVAL: PLEADING. In an action on the official bond of a sheriff the petition should disclose the execution and approval of the bond, or facts showing a waiver of the approval of the bond, or facts which estop the sureties from urging its non-approval.
2. **Official Bonds:** NON-APPROVAL: ESTOPPEL. *Holt County v. Scott*, 53 Neb. 176, distinguished.
3. **Failure to File Instructions:** EXCEPTIONS: REVIEW. The omission to file instructions before they are read to the jury is not reversible error, where a specific exception was not taken on that ground before they were read.
4. **Sheriff:** AMERCEMENT: NOTICE. A judgment of amercement against a sheriff is of no validity if the officer had no notice of the proceeding to amerce prior to the entry of such judgment.
5. **Attorney and Client:** JUDICIAL SALE: PAYMENT OF BID. An attorney, by virtue of his employment to prosecute a case, has no authority to bind his client by an agreement that the purchaser at the judicial sale shall pay the amount of his bid to a third person instead of to the officer making the sale.

ERROR from the district court of Phelps county. Tried below before BEALL, J. *Reversed in part.*

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

S. A. Davo, *Rhea Bros. & Manatt*, *C. H. Roberts*, and *Clency St. Clair*, *contra*.

NORVAL, J.

For the second time this cause has made its appearance in this court, the former decision being reported in 49 Neb. 584. The action was upon the official bond of the defendant J. A. Ruby, as sheriff of Phelps county, to recover the sum of $435, which it is alleged came into the hands of Ruby as sheriff, as the proceeds of the sale of certain real estate under a decree of foreclosure, and

which he had neglected and refused to pay the plaintiff. Upon the first trial the main matter interposed by the officer as a defense was that he had paid the money to the clerk of the district court for the use of the plaintiff, which fact on the former hearing this court held constituted no defense, as it was the duty of a sheriff to pay the proceeds of sale derived from the sale of lands, under a decree of foreclosure, directly to the persons entitled thereto under the decree, unless it is otherwise ordered. Subsequent to the entry of the judgment of reversal new pleadings were filed, and the cause was again tried, resulting in a judgment in favor of the defendants. Plaintiff prosecutes error.

Before reviewing the assignments of error we will consider a proposition urged by the defendants, namely, that the amended petition of the plaintiff upon which the cause was tried does not state a cause of action, because the approval of the bond upon which the action was brought is not alleged. The only averments in the pleading relative to the matter are that the defendant Ruby "was duly elected and qualified as sheriff of Phelps county, Nebraska, for the term commencing January 1, 1890; that, being required by law to give bonds for the faithful performance of his duties, said J. A. Ruby, as principal, and the other defendants therein as sureties, entered into a bond in the sum of $10,000, as required by law, for the faithful performance of his duties as such sheriff. A copy of said bond is hereto attached, marked 'Exhibit A,' and made a part hereof." It will be observed that there is no allegation that the bond was ever approved by any officer or board, nor are facts averred from which the inference can be drawn that the bond was approved. It is averred that defendants "entered into a bond," which is equivalent to an allegation that they signed the instrument declared on and not that it had been approved. Had the plaintiff alleged that the defendants executed the bond, it might include, or cover, the performance of every act essential to the making and

approving of the bond; but the pleading contains no such averment, or a state of facts of like import. It is not even alleged that the bond in question was ever filed in the office of the county clerk of Phelps county, or that it was ever presented for approval to the county board. To create a liability against the defendant sureties it must appear that the bond was filed and approved, or facts disclosed which estopped the sureties from asserting that the bond was never approved, as was the case in *Holt County v. Scott*, 53 Neb. 176, where the bond of Scott, as county treasurer, was executed and delivered within the statutory period to the proper officer, was approved out of time, but Scott obtained possession of the office thereunder and received the fees and emoluments thereof; and it was held that the sureties were liable. The case at bar, as made by the pleading of the plaintiff, is entirely different. It is not alleged that this bond was ever filed, that Ruby took possession of the office thereunder, and discharged the duties thereof and received the fees and emoluments belonging thereto. A cause of action is not stated against the sureties, even though the copy of the bond attached to the amended petition as an exhibit be considered. It is not averred that the exhibit is a copy of the original and the indorsements thereon.

The instructions to the jury were not filed until after the return of the verdict, and for this a reversal is asked. While instructions should be filed with the clerk of the trial court before they are read to the jury, such omission will not work a reversal where a specific exception is not taken on that ground at or before the time they are read. (*Fry v. Tilton*, 11 Neb. 456.) The record under review affirmatively shows that no exception was taken to the charge until after the verdict was returned and filed, which, under the authorities, was too late to make the error available in this court.

It is asserted that the verdict and judgment were in favor of all the defendants, while under the former opinion filed when the cause was here before, owing to the

judgment of amercement against Ruby, the plaintiff was entitled to a judgment herein against him. It was then decided that the judgment of amercement against a sheriff is, in a subsequent action on his bond, indisputable evidence of the facts essential to a recovery. It there appears that the amercement order was made by consent of parties, but on the last trial there was evidence tending to show that Ruby did not consent to the rendition of the amercement order or judgment, and that he had no notice of the proceeding to amerce prior to the entry of the order against him therein. If Ruby had no notice of the proceeding, did not appear therein, or consent to judgment, it is very evident that the amercement order is not binding upon him.

On the last trial the defendants were permitted, over the objections of the plaintiff, to prove that after the sale was confirmed, no money having been paid by the purchaser, that the latter, on the verbal request of J. P. Hartman, one of the plaintiff's attorneys in the foreclosure suit, paid the purchase price to the clerk of the court below and not to the sheriff. The admission of this evidence, it is urged, was prejudicially erroneous, the argument being that the general employment of an attorney confers no authority upon him to direct that money due his client upon a judgment be paid to a person not authorized by law to receive it. The argument is convincing. It was the duty of the purchaser at the foreclosure sale to have paid the amount of his bid to the sheriff, and upon the approval and confirmation of the sale, the law imposed on him the obligation to pay the money, less costs, to the party entitled thereto. Hartman, by his general employment,—and no special authority was shown,—had no power to direct that the purchase-money be paid to the clerk of the court. (*Luce v. Foster*, 42 Neb. 818.) The judgment as to the sureties is affirmed, but as to the defendant Ruby it is reversed.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA V. CHERRY COUNTY.

FILED JUNE 21, 1899. No. 10814.

1. **County Bonds:** NOTICE OF ELECTION. Under section 27, article 1, chapter 18, Compiled Statutes, notice of a proposition submitted to the electors of a county to issue bonds to build a court house must be given "for four weeks in some newspaper published in the county," in case one is printed therein.

2. ———: ———. The word "for," as employed in said section, means "during," and the notice must be published for, or during, four weeks before the day of election. Four full weeks must elapse between the date of the first publication and the day fixed for the election.

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

C. J. Smyth, Attorney General, and *George F. Corcoran,* for the state:

The court should declare the bonds invalid on the ground that the notice of the election at which they were voted was insufficient. (*Lawson v. Gibson*, 18 Neb. 137; *State v. Cornell*, 54 Neb. 647; *Early v. Doe*, 16 How. [U. S.] 609; *Whitaker v. Beach*, 12 Kan. 492; *McCurdy v. Baker*, 11 Kan. 111; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91; *State v. Yellow Jacket*, 5 Nev. 415; *Savings & Loan Society v. Thompson*, 32 Cal. 347; *Bunce v. Reed*, 16 Barb. [N. Y.] 347; *Market Nat. Bank v. Pacific Nat. Bank*, 89 N. Y. 397; *Richardson v. Bates*, 23 How. Pr. [N. Y.] 516; *Bacon v. Kennedy*, 56 Mich. 329; *Boyd v. McFarlin*, 58 Ga. 208; *Williams v. Board of Supervisors*, 58 Cal. 237; *Hill v. Faison*, 27 Tex. 428; *Pisar v. State*, 56 Neb. 455; *Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 410.)

A. M. Morrissey, contra.

Cases cited by the county attorney are reviewed in the opinion.

NORVAL, J.

The electors of Cherry county, at the general election held in said county in November, 1898, voted upon, and carried, the proposition to issue $12,000 in county bonds for the purpose of erecting a court house. The bonds were issued by the authorities of the county, and were by the auditor of public accounts registered in his office. The board of educational lands and funds agreed with the county authorities to purchase the bonds as an investment for the permanent school fund in case the bonds were legal and valid obligations. A dispute having arisen between said board and the county with respect to the validity of said bonds, the matter was submitted to the district court of Lancaster county for adjudication, upon an agreed statement of the facts, under the provisions of section 567 of the Code of Civil Procedure. From the decision and judgment holding the bonds legal and valid the state has prosecuted error.

The single question presented by the record is whether the notice calling the election at which the proposition to issue the bonds was voted upon was published as required by the statute. The notice was inserted in four successive weekly issues of the *Republican*, and also in the *Western News Democrat*, newspapers published at Valentine, in the county of Cherry. In the *Republican* the first publication was October 14, 1898, and, on the day preceding, the election notice first appeared in the *Western News Democrat*. The election was held on November 8, or before the expiration of the four full calendar weeks after the first publication of the notice. The statute, section 27, article 1, chapter 18, Compiled Statutes, declares *inter alia*: "The mode of submitting questions to the people for any purpose authorized by law shall be as follows: The whole question, including the sum desired to be raised, or the amount of the tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect, or having operation, if it be

of a nature to be set forth, and the penalty of its violation, if there be one, is to be published for four weeks in some newspaper published in the county." The provisions quoted govern and control the submission, to the vote of the electors of Cherry county, of the proposition to issue the bonds in question. Of this there is no room for doubt. The present controversy arises over the meaning of the words in the portion of the section quoted above, "for four weeks in some newspaper published in the county," the contention of the county attorney being that the publication is complete upon the distribution of the newspaper containing the fourth weekly insertion of the notice, while the attorney general argues that the first publication must be made at least four weeks, and the last insertion one week, prior to the election; in other words, the notice is incomplete until four weeks have elapsed after the first publication. We are not aware that the precise point ever has been adjudicated by this court, although questions of a somewhat similar nature have been passed upon.

In *Lawson v. Gibson*, 18 Neb. 137, the court construed section 497 of the Code of Civil Procedure, which provides that notice of the sales of lands upon execution shall be given "for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county," etc., and it was held that the statute was not satisfied by one insertion of the notice at least thirty days before the day of sale, but that the word "for" in the section means "during," and that the notice is required to be published during the thirty days. *Whitaker v. Beach*, 12 Kan. 492, cited in the opinion in that case, fully sustains the doctrine.

In *State v. Cornell*, 54 Neb. 647, the word "for" in the phrase "for each fiscal year," in section 20, chapter 28, Compiled Statutes, was construed to be the equivalent of the word "during."

Section 2, chapter 50, Compiled Statutes, declares that no action shall be taken upon an application for a license

to sell intoxicating liquors "until at least two weeks' notice of the filing of the same has been given by publication in a newspaper published in said county having the largest circulation therein." In *Pisar v. State*, 56 Neb. 455, the notice of an application for a saloon license was published for two successive weeks, and the license was granted the fourteenth day after the first publication. In that case, in an opinion by IRVINE, C., carefully reviewing the authorities, it was held that action could be taken only after the expiration of two weeks, and that the license was prematurely granted and was void.

These three decisions are quite in point upon the question now under consideration. The construction placed upon the statute by the county attorney wholly ignores the word "for" in section 27 under consideration. That word was inserted for a purpose, and in construing statutes it is a cardinal rule to give, if possible, force and effect to each sentence and word contained therein. Tested by this rule, what meaning should be placed on the preposition "for"? Manifestly it is equivalent to the word "during," and such is its general signification. Had the lawmakers intended that notice of the proposition submitted to a vote of the people of a county should be complete upon the fourth weekly insertion in the newspaper, they doubtless would have expressed such purpose by omitting from the statute the word "for," or by the use of some appropriate language which would more clearly express what was in the legislative mind. The statute is not complied with unless the notice is published in a newspaper during four weeks preceding the election. Four weeks must intervene between the first publication and the election. This construction is not only in line with the decisions of this court, of which mention is made above, but is fortified by the adjudications of other courts in passing upon a similar question.

The statute of New York requiring that notice to the creditors of one insolvent to show cause must be published "for six weeks successively" was under considera-

tion in *People v. Judges of Yates Common Pleas*, 1 Wend. [N. Y.] 90, and it was determined that the publication must be made for six whole weeks,—that is, during forty-two days. To the same effect is *Bunce v. Reed*, 16 Barb. [N. Y.] 347.

The section of the Code of Civil Procedure of New York (section 440) requiring that the service of summons by publication shall be made for such length of time as may be deemed reasonable, not less than once a week for six weeks, was construed in *Market Nat. Bank v. Pacific Nat. Bank*, 89 N. Y. 397, and the court held that the service was not complete until the expiration of at least six full weeks from the time of the first publication. The court said: "It will be perceived that the publication must be made for a specified period of time, and when the statute provides for six weeks, it is obvious that this period will not elapse prior to its expiration. It does not provide for a publication six times within six weeks, but for a time not less than once a week for six successive weeks. The publication evidently means rather more than printing the notice. Its object is to give notice by means of the newspapers, and it cannot be claimed that such notice is given for six weeks before that time expires. Looking at the various provisions referred to, it is a reasonable construction that the law intended a full six weeks' publication and not six times in six different weeks." (See *Richardson v. Bates*, 23 How. Pr. [N. Y.] 516.)

Notice of a sale of real estate for taxes was published twelve successive weeks, the first insertion being eighty-two days prior to the sale, under a statute requiring the notice to be given by advertisement in a newspaper "once each week for at least twelve successive weeks." The supreme court of the United States, in an opinion by Justice Wayne, in *Early v. Doe*, 57 U. S. 609, said: "The preposition 'for' means of itself duration when it is put in connection with time, and as all of us use it in that way, in our every-day conversation, it cannot be pre-

sumed that the legislator, in making this statute, did not mean to use it in the same way. Twelve successive weeks is as definite a designation of time, according to our division of it, as can be made. When we say that anything may be done in twelve weeks, or that it shall not be done for twelve weeks, after the happening of the fact which is to precede it, we mean that it may be done in twelve weeks, or eighty-four days, or, as the case may be, that it shall not be done before."

In Michigan the statute requires that notice of a foreclosure sale shall be given "for twelve successive weeks," and in *Bacon v. Kennedy*, 56 Mich. 329, the notice was published twelve times in as many weeks, fixing the day of sale on a date less than twelve weeks from the first insertion of the notice. In that case it was adjudged that the statute was not complied with unless the full interval of twelve weeks has intervened between the first notice and the sale.

The Code of Georgia requires that a notice of sheriff's sale shall be published weekly for four weeks in a newspaper, and in *Boyd v. McFarlin*, 58 Ga. 208, the provision was construed, and it was ruled that the advertisement must be weekly for twenty-eight days, and if that number of days has not elapsed between the first publication of the notice and the sale, the publication is insufficient.

The fifth paragraph of the syllabus in *Hill v. Faison*, 27 Tex. 428, reads as follows: "The statute (Oldham & White, Digest, art. 1103) requiring the publication for three successive weeks of citation issuing from a justice court to an absent or transient defendant is not complied with by a publication in three successive issues of a weekly newspaper, unless the full term of three weeks, or twenty-one days, elapse between the date of the first publication and the day on which the judgment was rendered, exclusive both of the first day of publication and the return day of the writ."

The county attorney has cited three Nebraska decisions and one Nevada case. The Nebraska cases are easily dis-

tinguishable. In *Davis v. Huston*, 15 Neb. 28, was construed section 79 of the Code of Civil Procedure relative to publication of notice to non-resident defendants, which requires "the publication must be made four consecutive weeks in some newspaper." It will be observed that the preposition "for" is omitted from the language quoted, and it was correctly decided that the publication is deemed complete upon the distribution of the newspaper containing the fourth successive weekly insertion of the notice.

In *Fouts v. Mann*, 15 Neb. 172, service by publication in a mortgage-foreclosure was made by five successive weekly insertions in a newspaper, which was held sufficient. In that case the statute was neither quoted nor cited, but this court evidently had in mind section 79 of the Code of Civil Procedure, which was construed in the preceding case of *Davis v. Huston*.

In *Union P. R. Co. v. Montgomery*, 49 Neb. 429, we had under consideration section 51, article 2, chapter 14, Compiled Statutes, relating to the publication of ordinances in cities of the second class containing over 5,000 and less than 10,000 inhabitants, and which contained this language: "All ordinances of a general nature shall, within one month after they are passed, be published in some newspaper published within the city, * * * and every ordinance fixing a penalty or forfeiture for its violation shall, before the same takes effect, be published for at least one week in the manner above described." In that case the ordinance was inserted only once in a daily newspaper, and we held the publication incomplete, and that to meet the requirements of the statute the publication should have been continued in each issue of the paper for one week. In the opinion it was said: "Had the paper in question been published weekly, then one insertion therein doubtless would have been sufficient." This sentence, the county attorney insists, contains the doctrine that one publication in a weekly newspaper means one week. In this he has shot wide of the mark.

No such question was involved in that case, but rather the number of insertions of the ordinance it required to constitute a valid publication thereof, and it was announced that if the insertion was in a weekly newspaper one publication would suffice, but if in a daily paper it must appear in each issue for an entire week.

Nevada v. Yellow Jacket Silver Mining Co., 5 Nev. 415, supports the construction for which the county attorney contends. That case was decided by a divided court, and the argument of the majority is unsound and disregards the rule for the interpretation of statutes, which requires force and effect to be given each word.

The first publication of the proposition submitting to the electors of Cherry county to vote bonds to build a court house having been made less than four weeks prior to the day of the election, the bonds were not legally voted and issued. The judgment of the district court is

REVERSED.

HENRY B. SHULL, CORONER, ET AL. V. JOHN BARTON, SHERIFF, ET AL.

FILED JUNE 21, 1899. NO. 8377.

1. **Statutes**: ADOPTION: REPEAL. Where one statute refers to another, which is subsequently repealed, the statute repealed becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned.

2. **Replevin Bond**: JUSTIFICATION: STATUTES: CONSTRUCTION. The provisions of section 189 of the Code of Civil Procedure, which provide that when an officer is notified by a defendant in replevin that he excepts to the sureties on a replevin bond the sureties must justify "upon notice as bail on arrest," was not rendered inoperative by the repeal of title 8, chapter 1, Code of Civil Procedure.

3. ———: ACTION AGAINST APPROVING OFFICER: DEFENSE. In an action against an officer for approving an insufficient replevin bond, the fact that the plaintiff afterward seized the property on execution is a defense *pro tanto*.

4. ——: ——: PARTIES. When property was replevied from a sheriff who held under a writ of attachment, the sheriff, in his own name or by joining with the attachment creditors, may maintain an action against the replevying officer for negligently approving the replevin bond.

5. **Evidence:** DOCUMENTS. It is not reversible error to exclude documentary evidence when the same has already been introduced by the other party.

6. **Instructions:** ISSUES. It is error to give an instruction which withdraws from the consideration of the jury a material issue of fact in the cause.

REHEARING of case reported in 56 Neb. 716. *Judgment below reversed.*

W. H. Morris, for plaintiffs in error.

Hastings & Sands, contra.

NORVAL, J.

This cause was decided at the last term, when an opinion was filed reversing the judgment below. (56 Neb. 716.) A rehearing was allowed, and a second submission taken. The facts, with sufficient clearness and fullness, are stated in the former opinion and need not be restated at this time. Certain of the legal propositions enunciated on the former hearing are assailed by counsel for plaintiffs below in language quite forcible, and not entirely courteous to this court.

It was the judgment of this court that the failure of the coroner to require the sureties on the bond given by the plaintiffs in replevin to justify as "bail on arrest," pursuant to section 189 of the Code of Civil Procedure, was not conclusive evidence of the negligence of the coroner in approving such bond, for the reason said section became inoperative by the repeal of chapter 1, title 8, of said Code, relative to arrest and bail. Upon a consideration of the subject anew the court is satisfied that the doctrine stated is unsound, and it recedes therefrom. While it is true that the legislature of 1887 (Session

Laws 1887, ch. 99, p. 654) repealed the provisions of the Code of Civil Procedure on the subject of arrest and bail, it does not follow that such repeal rendered inoperative that portion of section 189 of said Code which requires that when a defendant in replevin shall except to the sureties on a replevin bond "the sureties must justify upon notice as bail on arrest,"—that is, justify in the same manner as was provided in case of bail given for the release of a debtor from arrest. Said chapter 1, title 8, of said Code was in force and effect when said section 189 became operative, and the latter having referred to the former, and by such references made its provisions a part thereof to the same extent as had the same been incorporated therein, we are satisfied, upon principle as well as authority, that the repeal of said chapter 1, title 8, had no effect upon said section 189. (Sedgwick, Construction of Statutory & Constitutional Law 229; *Turney v. Wilton*, 36 Ill. 385; *Sika v. Northwestern R. Co.*, 21 Wis. 370; *Wick v. Ft. Plain & R. S. R. Co.*, 50 N. Y. Supp. 479; *Ex parte Crow Dog*, 109 U. S. 556; *Viterbo v. Friedlander*, 120 U. S. 726; *In re Wilson*, 140 U. S. 578.) In Endlich on Interpretation of Statutes the author at section 492 states the rule thus: "Where the provisions of a statute are incorporated by reference in another, where one statute refers to another for the powers given or rules of procedure prescribed by the power, the statute or provision referred to or incorporated becomes a part of the referring or incorporating statute, and if the earlier statute is afterwards repealed, the provisions so incorporated, the powers given, or rules of procedure prescribed by the incorporated statutes obviously continue in force so far as they form a part of the second enactment." The text is fully sustained by the adjudicated cases, and we take the first opportunity of getting in line therewith by overruling what we said upon that subject in the former opinion filed herein. The sureties on a replevin bond, therefore, must justify "upon notice as bail on arrest." It is obvious that the conclusion reached on this point at

the former hearing did not control the determination of the cause, since it was held that the coroner was guilty of negligence in approving the replevin bond. Nevertheless it is important that we stand on the right side of the proposition.

We are now convinced that we fell into another grave error when we said in the fourteenth paragraph of the syllabus that "A sheriff, from whom attached property has been replevied, on the termination of the replevin suit in his favor, and the return unsatisfied of an execution issued on the judgment, cannot maintain an action against the officer, who served the replevin writ, for negligently approving an insufficient replevin bond, whereby the creditor for whom the sheriff acted lost his debt." By virtue of the seizure, under the writ of attachment, the sheriff acquired a special interest in the property replevied, and if he could have maintained a suit on the replevin undertaking or bond, as we said he might, it is difficult to perceive why he might not, in a proper case, recover for the approval, by the officer serving the replevin writ, of an insufficient bond. In 2 Freeman, Executions, section 268, the doctrine is aptly stated in the following language: "But the moment that a levy is made the rights and remedies of the officer are materially changed; or, more accurately speaking, he from that moment is vested with rights and entitled to remedies to which he could before urge no valid claim. He is entitled to retain such possession and control of the property as may be necessary to make it productive under the writ. The law, therefore, concedes to him, as to a bailee, a special property in the goods in his custody. It gives him all the legal remedies needed to maintain his rights and to secure him indemnity for their invasion. If the property is taken from him, or if, being left by him in the possession of another, it is taken from such possession by any one, or is converted by the custodian, the officer may sustain an action of replevin, trespass, or trover, just as the owner of an absolute title could do in like

circumstances. He may maintain either of these actions against the defendant as well as against a stranger to the suit. The officer's title is dependent for its continuance upon the continuing of the necessity of holding the property to answer the purposes of the writ. If the judgment should be satisfied, or if from any cause it should cease to be in force, or if the levy should be set aside, the officer would no longer have the right to withhold possession from the defendant. As against the general owner, the special property of the officer would be terminated; but as against strangers to the title, the special property continues until the officer can redeliver the property to the defendant." The foregoing statement of Mr. Freeman correctly enunciates the law, and applying the doctrine to the case at bar the conclusion is irresistible that the sheriff could maintain this action in his own name. The other plaintiffs, being the attaching creditors, were properly joined under sections 40, 42, and 50*a* of the Code of Civil Procedure. This court is committed to the doctrine that two parties having separate and distinct claims to the possession of the same property may join in an action of replevin therefor. (*Earle v. Burch*, 21 Neb. 702; *Jones v. Lorce*, 37 Neb. 816.) If joinder is permissible in replevin by plaintiffs who have successive interests in the same property, evidently the attaching creditors, whose interests and rights arise by virtue of the levy of the writs of attachment on the property, were properly joined with the sheriff as parties plaintiff.

That portion of the former opinion is assailed which held that error was committed by the trial court in not permitting the coroner to introduce the executions issued on the judgments in favor of the seven creditors. There were six instead of seven executions, as erroneously stated in the former opinion, and only three of them were in favor of parties to the record. In speaking of the exclusion of the executions the rule was stated to be that where attached chattels are replevied from the sheriff and delivered to the claimant, and the attaching

creditor, pending the replevin action, causes them improperly to be taken on executions to pay the debt for which the attachment issued, such seizure under the execution is a defense in favor of the officer who executed the replevin writ in a suit against him by the creditor for negligently approving an insufficient replevin bond. The retaking of the identical property by the sheriff under the executions might or might not be a competent defense in favor of the coroner for the approval of an insufficient bond. If the chattels were in the same condition and of the same value as at the time the same were seized under the replevin writ, the defense would be complete; otherwise it would not be. (*Rinker v. Lee*, 29 Neb. 783; *Otto v. Burch*, 50 Neb. 894.) The taking of the property by the sheriff would constitute a defense *pro tanto*, and we erred in holding on the former hearing that the levy of these executions defeated a recovery in the present action.

It is argued that the answer of the defendants below does not allege that any of the property retaken by the sheriff under the executions was finally held or sold by him. It was unnecessary to allege or prove the retention and sale of the property by the sheriff. The taking of it from the coroner constituted a defense *pro tanto* in an action by the former against the latter for approving an insufficient replevin bond. It is said that property, after it was taken under the executions, was subsequently turned over to the coroner under a second replevin writ. Whether this, if true, were material or not, it is unnecessary to decide, since no such issue was raised by the pleadings in the case. The answer set up the seizure of the property in question by the sheriff under the executions, and this averment was controverted by a general denial. There was no allegation in the reply that the coroner subsequently became possessed of the same property, but the issue was whether the sheriff had levied executions upon the property after it had been taken from him under the replevin writ. We are now persuaded that the exclusion of the executions, when offered in evidence by the

coroner, was not reversible error, for the reason copies of these writs had already been introduced in evidence by the plaintiffs below. (*Ford v. State*, 46 Neb. 390; *Barr v. City of Omaha*, 42 Neb. 341; *Hurlburt v. Rosenbalm*, 49 Neb. 498; *Denise v. City of Omaha*, 49 Neb. 750.)

The court below, at the request of plaintiffs, gave the following instruction, to which the defendants duly excepted: "Gentlemen of the jury: You are instructed that after the facts agreed upon by the parties in this case and the admissions of the pleadings, and the view taken by the court as to the law controlling this case, there are not many questions left for you to pass upon. The question will be whether or not the coroner, in the replevin action of Foster & Co. against Barton, took an insufficient bond, and that by reason of the insufficiency of such replevin bond the plaintiffs in this cause were unable to procure the return of the property or the value thereof. Your verdict will be for the plaintiffs if you find he did, from the evidence of the case, and you will assess the plaintiffs' damages at $2,200, with interest at seven per cent from the 10th day of July, 1891, to the 16th day of September, 1895, but your verdict not to exceed the amount of the coroner's bond, $5,000." The giving of this instruction was prejudicial error, for which the judgment must be reversed. It submitted to the jury whether the coroner took an insufficient replevin bond, and whether, by reason thereof, plaintiffs were unable to obtain a return of the property. It, in effect, withdrew from their consideration every other issue, and especially the conceded fact that the sheriff did obtain possession of the identical property under the executions. The instruction ignored the defendants' theory of the case based upon the pleadings and evidence. The judgment of the district court will stand

REVERSED.

ELLEN KLAMP, APPELLEE, V. CHARLES KLAMP, APPELLANT.

FILED JUNE 21, 1899. No. 10224.

1. **Res Judicata.** In *Klamp v. Klamp*, 51 Neb. 17, it was determined that Ellen Klamp owned in her own right the property in controversy herein. Upon that question said decision is conclusive upon the parties and their privies.

2. **Homestead:** HUSBAND AND WIFE. Under section 2, chapter 36, Compiled Statutes, a husband cannot acquire a homestead in the separate property of the wife except with her consent.

3. ———: ———: DIVORCE. The right of a husband to select a homestead in the separate property of the wife is a merely inchoate right, which becomes completely divested on the granting to her of a decree of divorce.

4. ———: ———. While by chapter 36, Compiled Statutes, the husband is described as the head of the family, or the person who may take the necessary steps to protect the homestead from forced sale, he is not thereby given the exclusive dominion over the homestead or the right to the proceeds and profits derived therefrom, when the property is the separate property of the wife.

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

Lamb & Adams, for appellant.

Sawyer & Snell, contra.

NORVAL, J.

This case is the aftermath of *Klamp v. Klamp*, reported in 51 Neb. 17. That action was instituted by appellant in this case, Charles Klamp, for the purpose of compelling a reconveyance to him by appellee, Ellen Klamp, of certain lands situate in Lancaster and Seward counties, this state, the title to which appellant claimed she held for him in trust. That case was decided against him, and it was further determined therein that said appellee owned said property in her separate right, but that ap-

pellant had a right of homestead in part thereof, by reason of the two having lived upon the same and made it their home for several years. Of the two causes brought before this court for consideration,—for there are two cases consolidated by stipulation of the parties, the same questions of law applying to both,—one was instituted by appellee Ellen Klamp for the purpose of securing a divorce from appellant, on the ground of adultery. A decree of divorce on that ground was duly entered in the lower court, and we must assume that it was right and just, for no appeal is taken from that part of the judgment. The other case was instituted by appellant against appellees Ellen Klamp and William Southam for the purpose of compelling an accounting for the proceeds of this homestead, over which he claims, as head of the family, to have the exclusive dominion and control, although the same is the separate property of appellee Ellen Klamp, as will be hereafter shown, which proceeds he claims said appellees have converted to their own use and benefit. It is unnecessary to give a detailed statement of the issues involved in this case, as the facts are identical with those in *Klamp v. Klamp*, 51 Neb. 17, the parties, except Southam, being the same, and it is agreed that if the action between appellant and appellee is decided adversely to either of the parties, the other case should follow the same course. To the action for divorce appellant set up an answer and cross-petition, in which he claims, among other things, that he has a right of homestead in the property in Lancaster county, by reason of having lived thereon with appellee Ellen Klamp, and also has a further interest therein by reason of labor bestowed thereon by way of improving and cultivating the same, and moneys of his own invested therein; that as a matter of fact said Ellen Klamp holds the title thereto in trust for him, he being the real owner thereof, and he claims further that said Ellen Klamp has, against his will, exercised the control and supervision over the same without his will and consent, and for a number of years has received and con-

verted to her own use a large part of the proceeds thereof; that she refuses to recognize his right of homestead therein, or any right which he may assert therein, but claims it as her individual and separate property, and wholly excludes him therefrom; and he asks a dismissal of appellee's petition, that he be granted a divorce (founded on allegations of cruelty and abandonment), that he may recover his homestead right in the premises, and that he may recover from appellee Ellen Klamp the rents and profits collected by her and withheld from him since 1893, that being the date on which he left or was excluded from the premises. There was also a general prayer for relief. In her reply to appellant's cross-petition appellee Ellen Klamp avers, among other things, that appellant abandoned the homestead, if any rights he had therein, in 1893, and further sets up the judgment in the former case of *Klamp v. Klamp* as a bar to his cause of action set up in said cross-petition. The lower court found against appellant upon all the issues in both cases, from which judgment and decree he has appealed, except, as before stated, he does not contest that part of the decree which grants her a divorce. No bill of exceptions is preserved, the case having been, on stipulation of parties, submitted on the findings of the court below, and on a printed abstract, as provided by the rules of this court.

Counsel for appellant, in a very able brief, argue strenuously and forcibly that the questions involved in appellant's cross-petition were not involved or adjudicated in the former case, and that it was not therein decided that the property in controversy was the separate property of appellee. To this argument we cannot assent. We are of opinion that both the right to a reconveyance of the title and the status of the title itself were in issue in that case, and that both questions were clearly decided in favor of appellee Ellen Klamp. Without quoting from the pleadings in that case, which amply sustain the language of the court, we call attention to a part of the decision, written by HARRISON, J. (51 Neb. 22): "The

evidence in the case at bar was not only not satisfactory and conclusive in establishing such a trust in favor of appellant, but was amply sufficient to warrant the conclusion of the trial court that all the property in controversy was the separate and individual property of the appellee." The language of the court in that case was based upon a finding of the lower court, from which finding of fact No. 22 of this case is drawn, wherein it is specifically found that the real estate in question is the separate and individual property of the appellee; and the third conclusion of law in this case, referred to in appellant's brief, to the effect that the adjudication in the former case is a bar to appellant's cause of action set forth in his cross-petition, is supported by said twenty-second finding of fact. For this reason it is impossible to assent to the proposition that the question of title to the property was not in issue and not decided in that case. We must therefore hold that it was decided, beyond question, in the former case, that the property in question in this action was the separate property of the wife, and it follows that it was also her separate property at all times covered by the pleadings in that case, and is a finality in the present case. If it were her separate property, the husband could acquire no homestead rights therein, except with her consent. The section of the statute under which he could acquire such right is section 2, chapter 36, Compiled Statutes, as follows: "Sec. 2. If the claimant be married, the homestead may be selected from the separate property of the husband, or with the consent of the wife from her separate property," etc. So, if the question decided in the former case, that the husband had a homestead interest and right by curtesy in this property, was a question in issue therein,—and it could only have been a question in issue by reason of the fact that appellee in her answer alleged that it was their homestead, for it was not so claimed by appellant in his petition,—it was evidently so decided in view of the fact that the parties were then man and wife, and that the

husband might thereafter acquire a homestead interest therein with the consent of the wife, as he might acquire title by curtesy in case of her demise before his death. The wife never having given her consent that the husband could select this property as a homestead,—and we do not think the facts are such as to bear out such a conclusion,—and he never having done so, his right to do so was at the time that judgment was rendered a merely inchoate right, but which could have vested at any time in the future, so long as the marriage relation existed between the parties. By the rendition of the decree of divorce in this case, his right to select a homestead, even with the consent of the wife, was divested as completely as was his inchoate right by the curtesy. It having already been decided that this property was the separate property of the wife, and that by the decree of divorce in this case his right to select the homestead therefrom has been cut off, it remains to decide whether, at any time before such decree was granted and entered, appellant had, by any act, omission, word, or contract of any kind on the part of appellee Ellen, acquired a homestead therein, and if he had, whether such fact would entitle him to an accounting for the proceeds and products, rents, and profits thereof at any time prior to the rendition of such judgment. It is not contended that any proceedings were ever instituted to set apart any part thereof as a homestead under the provisions of our statutes of exemptions.

The findings of the lower court as to the facts are binding upon us, as the evidence is not preserved in a bill of exceptions. The findings are, substantially, that the property in Lancaster county was purchased as a residence, with money the proceeds of property of appellee Ellen, and with the intent that the same should be a home of the family; that from the time they first went upon it down to 1893 it was the home of the parties and their children, since which time appellant has ceased to live upon it, but that appellee, with some of her children,

has continued to reside thereon ever since that time; that while appellant has contributed labor upon the place in the way of improving and cultivating it, no spoken or other consent was ever given by appellee to the selection of the place, or any part of it, as a homestead, except as shown by these facts,—that is, in the way of her permitting him to reside upon the property as a home and to labor upon and improve it, and his receipt of a part of the products from time to time. It is found that he has at times received considerable amounts of such products, more in fact than the $2,000 value allowed by law for homestead; also, that appellee has received large amounts of such products, and the moneys derived therefrom, and with them improved the place, supported the family, purchased the land in Seward county, and in other ways used them as her own. We take it that the receipt by appellant of the proceeds of crops and stock is controlled by finding No. 17,—which is as follows: "That the plaintiff Ellen Klamp has at all times claimed to own the premises and property, both real and personal, as her separate property, and has denied the right of defendant Charles Klamp to any dominion over it against her will,"—or at least to the extent that if he received any of such proceeds with her consent, it was not with the intent on her part that he should have them as a right, but as a matter of gift on her part. While it is found that he at times has bestowed labor upon the property, in the way of farming and improving it, such labor was so bestowed without any express understanding that appellee would account to him therefor; furthermore, during the years he lived upon the place he had a home and was supported from the proceeds of the farm, without any express contract that he would pay or account therefor. As to whether the mere fact that it was their home would give him a right of homestead and the right to the dominion and control over this her separate property, to her exclusion, we will discuss later on; for it is evident, from the findings so far, that the only way in which he could

have acquired any right of homestead in this property was by the fact of their having made it the home of themselves and family. Under the findings so far examined, we cannot hold that any right of homestead in this separate property of appellee had ever so vested in appellant as to now give him a right for an accounting for the proceeds thereof from any time in the past down to the time of the entering of the decree of divorce in this case. On the contrary, we are constrained to hold that at all times this was her separate property, as irrevocably decided in the former adjudication; that he at all times while living there had a home, but in the absence of her consent acquired no vested right of homestead therein; but that at all the times while the marriage relation existed between them he did have an inchoate right to select a homestead from this separate property, with her consent. That inchoate right never having vested, lapsed when the decree of divorce was entered in this case, and he now has no right of homestead, either vested or contingent, and no right to an accounting for any proceeds of this farm, even though it be conceded that a vested right of homestead in a wife's separate property confers upon the husband the exclusive right of control and dominion over the proceeds thereof.

We are aware of the fact that the second conclusion of law of the lower court states that by reason of the parties having made this property their home, and improved it, it became their homestead. It is possible that such a conclusion might follow, but we are not bound by such conclusion, and even though we were, was it the legislative intent that the husband should have the exclusive dominion and control of the homestead, which is also the separate property of the wife? We do not believe that either the statutes conferring rights upon wives to the control of their separate property, or the divorce statutes of this state, are in anywise modified or abridged by the statutes of exemptions and homesteads contained in chapter 36, Compiled Statutes. While our statute does desig-

nate the husband, when the parties are married, as the head of the family, it does not necessarily follow that he is thereby given exclusive dominion and control thereover, but it is evidently intended merely that in case an execution is levied on such homestead such head of the family may take the steps designated in section 5 to protect the same from forced sale. It does not follow, in our opinion, that because the husband is designated as the proper person to protect the homestead from forced sale, that he, and he alone, has exclusive dominion thereover, and that he alone is entitled to its proceeds and the profits derived therefrom, particularly when the property is the separate property of the wife. Such a holding would make it possible for a husband to select a homestead from the separate property of the wife and afterwards to drive and exclude her from it and enjoy it for the remainder of his life to her utter exclusion; nay, even after such exclusion, in case of her demise before that of himself, it would entitle him to convey his life estate in it to third persons, the remainder vesting in his heirs, even though such heirs might be the children of a subsequent wife, or collateral relatives, in case of failure of issue, as provided in section 17 of that chapter. Furthermore, should we hold that chapter 36 modifies either the statutes relating to the separate property of married women, or the divorce statutes, then appellant would be entirely remediless, in case it should be held that the latter act was unconstitutional, as amendatory of acts not designated therein. We are rather inclined to believe that chapter 36 can be so construed as to demonstrate that the legislature never intended that the husband should have the exclusive control of the homestead, it being the property of the wife, but that it was intended merely that in either case, whether it be his or her separate property, it was intended that the homestead should be for the benefit of the whole family, and that in a trial of a divorce proceeding the court should have the same right to dispose of the homestead as of the other prop-

erty; that the homestead right in the separate property of the wife is still her separate property, over which the husband cannot exercise exclusive dominion and control, even to the exclusion of the real owner, his wife, and that in this case it would be inequitable and unjust and clearly against the intent of the legislature in framing that very beneficent act, to hold that the husband in this case has a right to an accounting, as between himself and his wife, out of a homestead selected, if it was selected, from her separate property. The decree is right and is in all things

AFFIRMED.

DAWSON COUNTY V. S. H. H. CLARK ET AL., RECEIVERS.

FILED JUNE 21, 1899. No. 10560.

1. **Statutes:** REPEAL. Repeals of statutes by implication are not favored.

2. ———: GENERAL PROVISIONS: CONSTRUCTION. It is a cardinal rule of construction that an act whose provisions are general will not, unless unavoidable, be so interpreted as to affect more particular and positive provisions of a prior act on the same subject.

3. ———: CONSTRUCTION: PAYMENT OF JUDGMENTS AGAINST MUNICIPALITIES. The act of 1867, known as article 6, chapter 77, Compiled Statutes, is not repealed by section 69, article 1, chapter 14, Compiled Statutes.

4. ———: ———: ———. Statutes *in pari materia* should be construed together, and, if possible, effect be given to all of their provisions.

5. ———: ———: ———. By the provisions of article 6, chapter 77, Compiled Statutes, power is conferred to levy taxes upon the taxable property of a city, village, or school district to pay a judgment rendered against the corporation.

6. **Taxation:** PAYMENT OF JUDGMENT AGAINST CITY. A tax can be lawfully levied to pay a judgment against a city having less than 5,000 inhabitants, or a village, even though the maximum amount of taxes authorized by statute to be assessed for general corporate purposes has been imposed.

7. ———: LIMIT FOR SCHOOL PURPOSES. Section 11, subdivision 2, chapter 79, Compiled Statutes, limits the amount of taxes which may be imposed by a school district to twenty-five mills on the dollar of assessed valuation for all purposes, except the payment of bonds issued by the district and the purchase and lease of a schoolhouse.

8. ———: SCHOOL DISTRICTS: PAYMENT OF JUDGMENT. A tax to pay a judgment against a school district cannot be levied and collected where the maximum amount of taxes authorized by statute for all purposes has already been levied.

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

George C. Gillan and *Warrington & Stewart*, for plaintiff in error.

References: *Jackson v. Washington County*, 34 Neb. 680; *State v. Babcock*, 21 Neb. 599; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900; *State v. Hay*, 45 Neb. 321; *Hendrix v. Rieman*, 6 Neb. 516; *State v. Babcock*, 21 Neb. 599; *State v. Lancaster County*, 4 Neb. 540; *Darst v. Griffin*, 31 Neb. 668; *Chicago, B. & Q. R. Co. v. Klein*, 52 Neb. 258.

W. R. Kelly and *E. P. Smith, contra.*

References: *Leavenworth v. Norton*, 1 Kan. 432; *Supervisors v. United States*, 85 U. S. 71; *Grand Island & N. W. R. Co. v. Baker County*, 45 Pac. Rep. [Wyo.] 494; *Kemper v. McClelland's Lessee*, 19 O. 308; *Wright v. City of Chicago*, 20 Ill. 252; *Young v. Lone*, 43 Neb. 812; *State v. Sheldon*, 53 Neb. 365; *State v. Gosper County*, 14 Neb. 22; *Commissioners v. Blake*, 25 Kan. 356; *Wheeler v. City of Plattsmouth*, 7 Neb. 270; *Clark v. City of Davenport*, 14 Ia. 494; *Porter v. Thompson*, 22 Ia. 391; *Iowa Railroad Land Co. v. Sac County*, 39 Ia. 125; *Jeffries v. Lawrence*, 42 Ia. 498; *Mayor v. McGruder*, 34 Md. 381; *Burnes v. City of Atchison*, 2 Kan. 454; *Burlington & M. R. R. Co. v. City of York*, 4 Neb. 487; *State v. Weir*, 33 Neb. 35; *Union P. R. Co. v. Dawson County*, 12 Neb. 254.

NORVAL, J.

Dawson county sued the receivers of the Union Pacific Railway Company to recover $1,118.62, being the amount of certain taxes levied for the year 1895 upon the roadbed, rolling stock, etc., of said company in the hands of the defendants, as receivers, for the purpose of paying certain judgments against the city of Lexington, the village of Gothenburg, and school district No. 1, respectively. There was a trial to the court upon an agreed statement of facts, and, from a judgment in favor of the defendant, an error proceeding has been prosecuted by the plaintiff.

The facts stipulated by the parties are as follows:

"1. That the county commissioners of Dawson county, Nebraska, while sitting as a board of equalization in June, 1895, and while making the tax levy for said year, made the following levies, for county purposes, for 1895, to-wit: For county general fund, 9 mills on the dollar; for county road fund, 2 mills on the dollar; for county bridge fund, 3 mills on the dollar; for county insane fund, ½ of 1 mill on the dollar; and for the relief of indigent soldiers and sailors' fund, 1-10 of 1 mill on the dollar.

"2. That in addition to the above levies so made, and in accordance with resolutions, notices, and certificates from proper officers of the city of Lexington, the village of Gothenburg, and from school district No. 1, in said Dawson county, Nebraska, the following levies were made by said county commissioners of said Dawson county, Nebraska, for said year 1895:

"City of Lexington: For general revenue, 10 mills on the dollar; for water bonds, 12½ mills on the dollar; for electric lights, 3 mills on the dollar; and for judgment fund, 15 mills on the dollar.

"Village of Gothenburg: For general revenue, 10 mills on the dollar; for electric lights, 5 mills on the dollar; and for judgment fund, 5 mills on the dollar.

"School District No. 1: For school district, 25 mills on

the dollar; for bond tax, 10 mills on the dollar; for judgment fund, 20 mills on the dollar, the same being the judgment referred to in plaintiff's petition in said case.

"That the judgment against the city of Lexington was upon a valid claim for the sum of $3,998; that the judgment against the village of Gothenburg was upon a valid claim for the sum of $106.87; and that the judgment against school district No. 1 was upon a valid claim for the sum of $705.05; and that none of said judgments, or any part thereof, have been paid. And it is further stipulated and agreed that the amount of revenue derived from the taxes levied and collected for ordinary revenue purposes was insufficient to meet and pay the current expenses for said year 1895, and also to pay said judgments against the city of Lexington, school district No. 1, and the village of Gothenburg. It is admitted that part of the Union Pacific Railway, the same being included in the Union Pacific System, mentioned in said petition, runs through said city, village, and school district, and is located in Dawson county, Nebraska, being a part of the Union Pacific Railway System, in the hands of the receivers of said company, and that it is affected to the extent of its proportion of said levies. It is admitted that the amount due from these defendants, on said levies, if it shall be found that the same are valid and legal, and that said tax was legally assessed, and within the power of the proper officers of said city, village, and school district to make, amounts to the sum of $1,118.62, which sum the said defendants refuse to pay, and still refuse, for the alleged reason that the same was illegally levied and imposed by the officers so levying and imposing the same, the same being beyond the limit imposed by the statute for such taxation, as contended by the defendants herein; that the several judgments herein mentioned, were not founded on any bonds issued by said city, village, or school district, or any kind whatever, and that there had never been any special vote by the voters of said city, village, or school district recognizing these judg-

ments, and providing that they should be paid by a tax levy, but that said judgments were upon a valid claim, against said city, village, and school district."

The sole question presented for determination is this: Can a tax be levied to pay a judgment against a city of the second class having less than 5,000 inhabitants, a village, or school district when not empowered so to do by a vote of the electors, in addition to the amount of general tax authorized by law to be imposed for city, village, or school district purposes? If an affirmative answer be given to the proposition, the taxes sought to be recovered in this case were legal, otherwise invalid, and the judgment of the district court so holding should be affirmed.

The power conferred upon cities of less than 5,000 inhabitants and villages to levy taxes is contained in section 69, article 1, chapter 14, Compiled Statutes of 1895. The first and second subdivisions of said section are as follows:

"I. To levy taxes for general revenue purposes not to exceed ten mills on the dollar in any one year on all property within the limits of said cities and villages, taxable according to the laws of the state of Nebraska, the valuation of such property to be ascertained from the books or assessment rolls of the assessor of the proper precinct or township.

"II. To levy any other tax or special assessment authorized by law."

By subdivision 1 the authority is conferred to impose a tax not exceeding ten mills on the dollar within any one year for general revenue purposes, and if it were not for subdivision 2 of said section 69, or some other provision of statute, it could not be doubted that ten mills on the dollar valuation would be the maximum limit of taxes that could be imposed in a single year by cities of the second class and villages, since it is a familiar principle that municipal corporations can exercise only such powers as the legislature has granted. But the lawmakers

have by said subdivision 2 conferred upon such cities and villages the right "To levy any other tax or special assessment authorized by law." Therefore, if there exists a statute which permits the levy of a tax to pay a judgment obtained against the city of the class named, or a village, it would seem too plain to require argument that the taxes in question imposed for the purpose of paying the judgments against the city of Lexington and the village of Gothenburg, respectively, are valid and should be sustained. Plaintiff asserts the validity of said taxes upon the provisions of sections 1, 2, 3, and 4, article 6, chapter 77, Compiled Statutes of 1895, which are here reproduced:

"Sec. 1. That whenever any judgment shall be obtained in any court of competent jurisdiction in this territory for the payment of a sum of money against any county, township, school district, road district, town or city board of education, or against any municipal corporation, or when any such judgment has been recovered and now remains unpaid, it shall be the duty of the county commissioners, school district board of education, city council, or other corporate officers, as the case may require, to make provisions for the prompt payment of the same.

"Sec. 2. If the amount of revenue derived from taxes levied and collected for ordinary purposes shall be insufficient to meet and pay the current expenses for the year in which the levy is made, and also to pay the judgment remaining unpaid, it shall be the duty of the proper officers of the corporation, against which any such judgment shall have been obtained and remaining unsatisfied, to at once proceed and levy and collect a sufficient amount of money to pay off and discharge such judgments.

"Sec. 3. The tax shall be levied upon all the taxable property in the district, county, township, town or city, bound by the judgment, and shall be collected in the same manner and at the same time provided by law for the collection of other taxes.

"Sec. 4. The corporate officers whose duty it is to levy

and collect taxes for the payment of current expenses of any such corporation, against which a judgment may be so obtained, shall also be required to levy and collect the special tax therein provided for, for the payment of judgments."

It is insisted in the brief of counsel for defendants that these four sections merely impose a duty, without conferring any power, to levy a tax with which to pay judgments. To this we are unable to yield assent. It would be remarkable for the legislature to make it the duty of cities or villages and school districts to proceed at once to levy and collect a tax sufficient to pay any judgments recovered against the municipality and at the same time withhold the power so to do. The language of the sections will not admit of the construction placed thereon by counsel for the receivers, especially when due consideration, force, and effect are given to sections 3 and 4 above quoted. Section 3 specifies upon what property the levy to pay such a judgment shall be made, and when and in what manner the same shall be collected; and section 4 requires that the officers, upon whom is devolved the duty of levying and collecting general taxes of the corporation against which a judgment has been rendered, shall levy and collect the tax to pay such judgment. Section 5 of said article 6 not only makes the officers whose duty it is to levy the tax personally liable for the payment of the judgment if after due demand they shall refuse or neglect to make the levy, but authorizes the owner of the judgment to invoke the writ of mandamus to compel the levy and collection of the tax. The provisions of the several sections are mandatory. They were enacted by the legislature of 1867 (General Statutes 1873, p. 934), and were before the court for consideration in *Jackson v. Washington County*, 34 Neb. 680. In that case it was contended that the act of 1867 (Compiled Statutes, ch. 77, art. 6) was repealed by implication by the general revenue law pased in 1879, and especially by section 77 of said act (Session Laws 1879, p. 305), which makes pro-

visions for the levying of taxes for county purposes, but this court refused to sanction the doctrine, and expressly ruled that said article 6 was not thus repealed, the court in the opinion saying: "The rule is that repeals by implication are not favored, and when acts upon the same subject can be harmonized by a fair and liberal construction, it will be done. (Sedgwick, Construction of Statutory & Constitutional Law 98; *Lawson v. Gibson*, 18 Neb. 137; *State v. Babcock*, 21 Neb. 599.) And this rule has especial application to cases where the subsequent statute treats of the subject in general terms but not expressly contradicting the more particular and positive provisions with reference to the same subject in a prior act. (*Fosdick v. Village of Perrysburg*, 14 O. St. 486; *Brown v. County Commissioners*, 21 Pa. St. 43.) In *State v. Dwyer*, 42 N. J. Law 327, the court says: 'Where a general law and a special statute come in conflict, the general law yields to the special without regard to priority of date, and a special law will not be repealed by a general statute, unless by express words or necessary implication.' Applying these rules of construction to the statutory provisions in question it is possible to give effect to each." In the light of the doctrine recognized and applied in that case there is no escaping the conclusion that the said act of 1867 was not repealed by implication by the adoption of section 69, article 1, chapter 14, Compiled Statutes, inasmuch as there is no conflict between the two statutes, but the provisions thereof can, and should be, so construed as to give effect to each and all of them.

The conclusion reached is strengthened by a consideration of section 82, article 1, of said chapter 14, relating to city and village taxes and the certification thereof to the county clerk, which contains among others the following provision: "The amount which may be so certified, assessed, and collected shall not exceed ten mills on the dollar to defray its general and incidental expenses, together with any special assessments or special taxes, or amounts assessed as taxes under the provisions of this

chapter, and such sum as may be authorized by law to be levied for the payment of outstanding bonds and debts." This language is indicative of the legislative purpose that taxes other than those imposed in cities and villages of the class we have been considering, levied for the payment of outstanding debts or obligations against the municipality, such as a judgment rendered, could properly be certified to the county clerk. Why to be thus certified unless the amounts were to be levied and collected? To ask the question is to invoke an affirmative answer. Article 6 of chapter 77, Compiled Statutes, did not extend, nor was its purpose to do so, the limit of taxation fixed by section 69 of chapter 14, for the obvious reason that the first named act was in point of time first enacted. To sustain the taxes levied against the city of Lexington and village of Gothenburg, respectively, it was not necessary that the limit of taxation prescribed by said section 69 should be extended. As already stated, the legislature has in the second subdivision in express terms granted to the cities and villages governed by the act the absolute and unqualified right to levy taxes other than those for general revenue purposes authorized by statute. The legislature having empowered cities of the second class having less than 5,000 inhabitants, and villages, to raise by taxation an amount sufficient to pay any judgment obtained against the corporation, we are forced to the conclusion that the taxes in question levied against the property within the city of Lexington and the village of Gothenburg, respectively, are legal, and that the district court erred in holding the same invalid. That such taxes may be collected by an action at law seems to be conceded by the parties, and for present purposes we assume such to be the case, without expressing an opinion on the subject.

There remains to be considered the validity of the school district tax. Sections 11 and 12, subdivision 2, chapter 79, Compiled Statutes, relate to the levy and collection of taxes by school districts, which sections are as follows:

"Sec. 11. The legal voters at any annual meeting shall determine by vote the number of mills on the dollar of the assessed valuation which shall be levied for all purposes—except for the payment of bonded indebtedness and purchase or lease of schoolhouse—which number shall not exceed twenty-five (25) mills in any year. The tax so voted shall be reported by the district board to the county clerk, and shall be levied by the county board, and collected as other taxes.

"Sec. 12. The legal voters may also, at such meeting, determine the number of mills, not exceeding ten mills on the dollar of assessed valuation, which shall be expended for the building, purchase, or lease of schoolhouse in said district, when there are no bonds voted for such purpose, which amount shall be reported levied and collected as in the preceding section; *Provided*, That the aggregate number of mills voted shall not exceed twenty-five (25) mills."

These sections, it is very evident, contained two restrictions upon the taxing powers of a school district: First—Under neither section is authority given to levy a tax unless the same has been sanctioned by the legal voters at the annual school meeting. Second—The legislature has fixed the maximum of amount of such taxes that can be imposed, which under section 11 is twenty-five mills on each dollar of the assessed valuation for all purposes, except the payment of bonds and the purchase and lease of schoolhouse. Section 12 cannot be invoked here, as the taxes assailed were not levied under the provisions thereof or for the purposes therein specified. It appears from the agreed statement of facts that school district No. 1 of Dawson county in 1895 levied the maximum amount authorized by said section 11, and in addition thereto a tax of twenty mills was imposed to pay a judgment recovered against the district.

Reliance is also placed by plaintiff upon article 6, chapter 77, Compiled Statutes, already considered, to sustain said taxes. The provisions of said article authorize the

levy of a tax to pay a judgment obtained against a school district, but section 11 of the school law quoted contains no provision for the levy and collection of such tax in addition to the maximum amount named in said section of twenty-five mills. In this respect said section differs materially from section 69, article 1, chapter 14, Compiled Statutes. The provisions of said article 6, relating to the levy and collection of taxes to pay judgments, and section 11 must be construed together as if they were one law, and effect be given to both acts. When so read and construed it is plain enough that a school district may legally levy a tax to pay a judgment against it, but such tax, including those levied for all other purposes, except for the payment of bonds issued by the district and the purchase and lease of a schoolhouse, cannot in the aggregate exceed twenty-five mills on the dollar of the assessed valuation of the property within the school district. This interpretation gives effect to every clause in both acts, according to the rule for the construction of statutes. The other construction for which the county contends would do violence to the plain language of said section 11, and extend the taxing power of a school district beyond the limit therein prescribed. While school district officers may levy taxes to pay judgments, in doing so they must keep within the maximum limit of taxation authorized by statute. The tax in question imposed by school district No. 1 is illegal and void. (*United States v. City of Burlington*, 24 Fed. Cas. 1302; *Supervisors v. United States*, 85 U. S. 71; *Grand Island & N. W. R. Co. v. Baker*, 45 Pac. Rep. [Wyo.] 494; *Commissioners of Osborn County v. Blake*, 25 Kan. 356.) For reasons stated the judgment is

REVERSED.

AUGUST KASTNER V. STATE OF NEBRASKA.

FILED JUNE 21, 1899. No. 10634.

1. **Homicide:** DEGREES OF MURDER. In a prosecution under an information for murder in the first degree it is not reversible error for the court to properly advise the jury respecting the distinction between the different degrees of murder.

2. ———: ———: MALICE: EVIDENCE. Where the fact of killing is shown, and no extenuating or mitigating circumstance is proven, malice is presumed, and the crime of murder in the second degree is established.

3. **Criminal Law:** CIRCUMSTANTIAL EVIDENCE. The test for ascertaining the sufficiency of circumstantial evidence is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude, to a moral certainty, every rational hypothesis except that of his guilt. (*Morgan v. State*, 51 Neb. 672.)

4. ———: EVIDENCE. The state may introduce evidence to prove any number of facts and circumstances tending to connect the accused with the crime, and if they are sufficient to establish his guilt beyond a reasonable doubt, he is not entitled to an acquittal because of the failure of proof with respect to one or more of the facts relied upon for a conviction.

5. **Instructions:** NUMBERS. The failure of the trial court to number consecutively the instructions is not reversible error if no exception was specifically taken on that point at the time the charge was given to the jury.

6. ———: WITNESSES: DETECTIVES. Where police officers and detectives testify for the state in a criminal prosecution, their testimony should be weighed with greater care than that given by disinterested witnesses, and the jury should be substantially so instructed by the court in its charge.

7. ———: CRIMINAL LAW: EVIDENCE. In a criminal prosecution direct and circumstantial evidence adduced on the trial should be weighed in reaching a verdict, and it is not error in such case to so instruct the jury.

8. ———: ———: REPETITIONS. Error cannot be predicated upon the refusal of a request to charge, where an instruction, covering the same subject, as favorable to the complaining party, has been given by the court on its own motion.

9. **Criminal Law:** WITNESSES: REBUTTING EVIDENCE. Strictly rebutting testimony may be introduced by the state even though the

names of the witnesses giving such testimony are not indorsed on the information.

10. ———: ———: ———. The state may introduce rebutting evidence to meet any pertinent issue raised by the accused in making out his case.

11. ———: IMPROPER EVIDENCE. Evidence which does not tend to establish the guilt or innocence of the defendant of the crime charged should be excluded, even though its admission might afford the jury a remote "basis for a guess."

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

See opinion for statement of the case.

Albert S. Ritchie, James B. Kelkenney, and *Thomas A. Donohoe,* for plaintiff in error:

The nineteenth instruction, relating to malice and to the different degrees of murder, was erroneous. (*Vollmer v. State,* 24 Neb. 838; *Erwin v. State,* 29 O. St. 186; *People v. Freel,* 48 Cal. 436; *Morgan v. State,* 16 Tex. App. 593.)

Instruction 24, relating to circumstantial evidence, was erroneous. (*Morgan v. State,* 51 Neb. 672.)

A portion of instruction 25 is erroneous because it singled out and weakened a portion of the testimony. (*Horn v. State,* 15 So. Rep. [Ala.] 278; *Miles v. State,* 19 S. E. Rep. [Ga.] 805; *State v. O'Grady,* 65 Vt. 66; *Bolling v. State,* 54 Ark. 588; *Brassell v. State,* 91 Ala. 45.)

There was error in admitting testimony of the witness Stine, his name not having been indorsed on the information. (*Kelly v. State,* 51 Neb. 572; *People v. Quick,* 25 N. W. Rep. [Mich.] 302.)

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

NORVAL, J.

An information, consisting of two counts, was filed in the district court of Douglas county, charging, in the first count thereof, August Kastner, Joseph Kastner, and

Louis Kastner with murder in the first degree, by having unlawfully, purposely, and feloniously, and of their deliberate and premeditated malice, killed and murdered one Daniel Tiedeman; and in the second count charging the murder of Tiedeman by said Kastners while they were in the commission of a burglary. Each of the prisoners, to the information, entered a plea of not guilty, and August Kastner, at his request, was granted a separate trial. After a portion of the evidence had been adduced the county attorney was permitted to enter a *nolle prosequi* as to the second count of the information; and at the close of the trial a verdict was returned finding August Kastner guilty of murder in the second degree, under the first count. His motion for a new trial was overruled, and imprisonment in the penitentiary for life was the sentence imposed. By this proceeding he seeks a reversal of this sentence and judgment.

To assist in understanding the discussion of the assignments of error relied upon for reversal it is deemed advisable to briefly state at this time some of the principal facts disclosed by the voluminous record in the case. From the evidence contained in the bill of exceptions it appears that about 3 o'clock in the morning of June 9, 1897, burglars broke and entered the saloon of William Nelson, located at the corner of Thirtieth and Spaulding streets, in the city of Omaha, of which fact the police department was advised during the commission of the burglary, and in response to this information policemen Daniel Tiedeman and A. J. Glover, together with one Riley,—a reporter for one of the city papers,—proceeded at once to Nelson's saloon. On arriving there Tiedeman and Riley went to the rear of the saloon and Glover proceeded to the front of the saloon to prevent the escape of the burglars, and to apprehend them in case they were in the building. As Glover approached the rear of the saloon he discovered, although cloudy and not very light, three persons on the outside of the building; and when he was within a short distance from them one of the three

turned and shot Glover in the face with a revolver, and in the body with a shotgun, which rendered Glover unconscious for a time. He identified with reasonable certainty the person who fired these shots as being the accused, August Kastner. The officer also, while upon the witness-stand, described a portion of the clothes of the other two persons. Almost immediately thereafter Daniel Tiedeman came around the building, when he was shot in the abdomen with a shotgun fired by one of the three persons whom Glover had discovered going from the direction of the saloon. Tiedeman, shortly after receiving the wound, died from the effects thereof. He was unable to identify the person who fired the fatal shot, and no one else witnessed the shooting. The prosecution relied principally upon circumstantial evidence to fasten guilt upon the accused. The defendant denied the shooting and introduced evidence tending to establish an alibi. With this brief statement of the case we will proceed to a consideration of the assignments of error argued by counsel.

That portion of the charge of the court is assailed which defines the different degrees of murder. It is not contended, nor can it be successfully asserted, that this portion of the charge enunciated incorrect legal principles, but the argument advanced in favor of the accused is that it was improper to define to the jury the various degrees of murder, inasmuch as the evidence adduced disclosed that Tiedeman was killed by a person who at the time was committing a burglary, consequently the killing constituted murder in the first degree. Had the defendant been tried and convicted under the second count of the information, which charged murder in the commission of another felony,—a burglary,—there would be more force to the argument of his counsel relative to the question now under consideration. But the jury did not convict the accused of murder in the second degree under the second count. This count was eliminated by the county attorney's *nolle prosequi*, and the prosecution was

conducted, and conviction had, under the first count, which charged murder in the first degree and included also all the lesser degrees of homicide; and it was not only proper, but it was clearly the duty of the trial judge, to correctly define to the jury the different degrees of murder. Had he failed to have so instructed the jury, we have no doubt that defendant's counsel would be here complaining of the omission. The accused was not prejudiced by the jury having been advised respecting the distinctions which mark the different degrees of murder.

The court gave the following instruction on its own motion: "19. In case of homicide, the law presumes malice from the unlawful use of a deadly weapon upon a vital part, and when the fact of unlawful killing or shooting causing death is proved, and no evidence tends to show express malice on the one hand, or any justification, mitigation, or excuse on the other, the law implies malice, and the offense is then murder in the second degree. You are instructed that in law a loaded gun is a deadly weapon, and if you believe from the evidence, beyond a reasonable doubt, that defendant August Kastner wantonly and cruelly, and without justification or excuse, shot and caused the death of Daniel Tiedeman with a deadly weapon, then the law presumes such shooting was done maliciously, unless you believe from the evidence it was done without malice." The vice imputed to this instruction by counsel for the accused is that it was not applicable to the case made by the evidence. It is conceded by the same counsel that, where nothing but the killing is shown, malice is presumed, and that in such a case the instruction quoted would be a proper one to give the jury, but where all the circumstances surrounding the homicide, and which shed or cast any light upon the intent with which the act was committed, are proven, such an instruction is improper. This court has stated the rule in homicide cases to be this: Where the fact of killing is shown, and there is no explanatory circumstance proven, malice is presumed and murder in the sec-

ond degree is made out. (*Preuit v. People*, 5 Neb. 377; *Milton v. State*, 6 Neb. 136.) And in *Vollmer v. State*, 24 Neb. 838, it was ruled that an instruction similar to the one above quoted should not have been given, because all the circumstances of the killing had been fully detailed by those who witnessed the homicide, and the decision in the last named case is relied upon to secure a reversal here. In that case all the circumstances surrounding the transaction had been detailed before the jury by those who were present, and saw and heard what transpired. Extenuating facts were proven tending to show want of malice and that life was taken in self-defense. Manifestly the instruction given in that case, that malice was presumed from the facts of the killing and that the crime was murder in the second degree, was highly prejudicial to the defendant. But in the case at bar no person witnessed the shooting other than Tiedeman, whose life was taken. No one testified to any extenuating circumstance which would have warranted the jury in finding the killing was in self-defense, or that the offense was manslaughter. Had the proofs adduced been of such a character as to make it appear that the killing of Tiedeman was either justifiable or that the offense committed was below murder in the second degree, then the instruction criticised would have been misleading and prejudicial. As no mitigating circumstances were proven and no evidence was adduced tending to reduce the offense to manslaughter, it was perfectly competent for the court to inform the jury what facts and circumstances would justify them in finding the accused guilty of murder in the second degree. There is no merit in the suggestion of counsel that said instruction 19 was erroneous because there was no evidence that Tiedeman was shot by the defendant. The many circumstances developed on the trial point to the accused as the person who fired the shot which cost Tiedeman his life.

Complaint is made of the giving of instruction 24, which related to the subject of circumstantial evidence,

upon two grounds: First, because it did not inform the jury that "each circumstance necessary or essential to the conclusion of guilt must be proven beyond a reasonable doubt; and second, because each paragraph of the instructions is not separately numbered." In *Morgan v. State*, 51 Neb. 672, it was ruled that the test to ascertain the sufficiency of circumstantial evidence is whether the facts and circumstances tending to connect the accused with the crime are of such a conclusive character as to exclude, to a moral certainty, every rational hypothesis except that of his guilt; and further, that it is competent for the state to introduce evidence to prove any number of facts and circumstances tending to connect the prisoner with the crime charged, and if the facts so proven are sufficient to establish his guilt beyond a reasonable doubt, he is not entitled to an acquittal because of a failure of proof with respect to one or more of the facts relied upon for conviction. The instruction assailed in the case at bar is within the doctrine of *Morgan v. State, supra.* The instruction contained no erroneous direction to the jury, and if counsel for defendant desired a fuller statement of the rule governing circumstantial evidence, they should have tendered a request embodying the law as they understood it to exist, and, if refused, have presented the question to the lower court in the motion for a new trial, and made the same a basis for an assignment in the petition in error. (*Barr v. City of Omaha*, 42 Neb. 341; *German Nat. Bank of Hastings v. Leonard*, 40 Neb. 676; *Laing v. Nelson*, 40 Neb. 252.) The criticism that instruction 24 contains several propositions which are not separately numbered is unavailing, since no exception to this charge was taken on that ground at the time it was read to the jury. (*Smith v. State*, 4 Neb. 277; *Gibson v. Sullivan*, 18 Neb. 558; *Tagg v. Miller*, 10 Neb. 443; *Morgan v. State*, 51 Neb. 672.)

Instruction 25 was assailed upon the ground last stated, and for the reason already given this objection to the instruction is overruled.

Witnesses Mostyn and Vizzard called by the state testified to certain statements made by Tiedeman just prior to his death relative to the shooting. Instruction 25 related to the subject of dying declarations and is in this language:

"You are instructed that in prosecutions for murder or homicide the dying statements or declarations of the person with whose murder the accused stands charged, when material, and made under the sense of impending death, are admissible in evidence. Such declarations are made when the party making them is at the point of death, and when every hope of the world is gone, and when every motive for falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. The situation in law is considered as creating an obligation equal to that which is imposed by an oath administered in a court of justice.

"You are instructed that the declarations of Daniel Tiedeman offered in evidence in this case through certain witnesses were admitted under such rule of law. But the truth or falsity of such declarations of Daniel Tiedeman and the degree of accuracy or inaccuracy in the recital thereof by the witnesses are matters for you to weigh under the same tests as apply to other witnesses, considering all of the circumstances in evidence surrounding each case and each witness."

It is admitted in the brief of counsel for defendant that the first part or paragraph of this instruction correctly enunciates the law relative to dying declarations, but it is strenuously urged that the last portion of the instruction is erroneous, because it singled out the testimony concerning the subject covered by this part of the charge. The language of the court below is not susceptible of such interpretation placed thereon by counsel. The testimony of no witness is singled out or given undue prominence in the instruction, but the jury were properly advised that the testimony relative to dying declarations was to be weighed under the same rules or tests applicable to other testimony.

Instruction 29 reads as follows: "You are instructed that the information in this case, or the fact that an information has been filed against the defendant, is not to be taken or considered by you as evidence against him. Such information contains simply the charge or allegations made necessary under the law as a basis upon which an accused is to be tried. And you are further instructed that there is evidence in this case that at various times police officers visited the house of the Kastners, having with them a search-warrant or search-warrants. The evidence as to the search-warrants was admitted merely for the purpose of fixing, or aiding in fixing, the date or occasion on which the officers were there, and for giving in part reason for their recollection of other facts and circumstances in evidence which transpired then and there; and such evidence should be considered by you for the purpose only for which it was admitted." We are unable to discover any error prejudicial to the accused in the language quoted. The court confined the jury in the consideration of the evidence relative to search-warrants to the purposes alone for which evidence was admitted. Without this cautionary instruction the evidence on that subject would have prejudiced the minds of the jury against the prisoner. It is unfair to say that the language employed by the trial court assumed or asserted that anything in fact transpired at the Kastner house when the police officers visited it, or that such an impression was conveyed to the triers of fact in the case. Moreover, this instruction is substantially the same as the defendant's eighteenth request; and it is a familiar rule that one cannot complain of an instruction embodying the rule contained in an instruction he has himself requested.

The following instruction was given, of which the accused complains: "30. Certain police officers and detectives have testified in this case on behalf of the state, and you are instructed that under the law of this state, in weighing their testimony, greater care should be used

because of the natural and unavoidable tendency of such persons in procuring and stating evidence against the accused." This instruction is in harmony with the rule announced in *Pruit v. People*, 5 Neb. 378, and *Heldt v. State*, 20 Neb. 492.

It is also urged that instruction 31 is erroneous, a copy of which follows: "If the jury find from the evidence that all the circumstances upon which the prosecution relies for a conviction will as well apply to some other person or persons as to the defendant August Kastner, or if such facts and circumstances shown by the evidence are reconcilable with any reasonable hypothesis other than the guilt of the said defendant, or if such facts and circumstances, together with the direct evidence offered in this case, do not satisfy the minds of the jury beyond a reasonable doubt of the guilt of the defendant, then you should acquit him." The vice imputed by counsel for the accused to the foregoing is that there is not a scintilla of direct evidence in the case. This contention is not borne out by the record before us. While there is no direct evidence that the prisoner fired the fatal shot, ample, direct, and positive evidence was adduced on the trial to establish the *corpus delicti*, which it was the sworn duty of the jurors to consider in forming a verdict in the case, and therefore the criticism made on the instruction is not well taken.

The following request tendered by the defendant the court declined to give to the jury, and such refusal is assigned as error: "21. Evidence has been given of statements, acts, and conduct of defendant at the time of his arrest, which statements, acts, and conduct, it is claimed, tend to show the guilt of the accused. There is no rule of law or human experience by which it can be determined how an innocent man should or would likely act in such a case, or that he can be too little moved for an innocent man. A guilty man, under such circumstances, may appear calm and collected, while an innocent man may appear excited and nervous. The most that can be

said of such evidence is that, while it is receivable and is to be weighed by the jury, it should be received with caution and carefully weighed, and no hasty conclusion of guilt drawn from it by the jury, and in no case is such conduct alone sufficient to authorize a conviction." No reversible error was committed in refusing the foregoing request. The court, by proper instruction, had already properly advised the jury concerning their duty in the weighing of this evidence, and that they alone should determine the weight to be given the testimony of the several witnesses. It had been proven by the state that the defendant at the time of his arrest untruthfully denied having any guns in his possession, and had this instruction been given, the jury would have inferred that, as a rule of law, one innocent of crime would just as likely testify to an untruth about having guns in his possession as if he were guilty. To reverse the cause for the reason urged would be to sanction a doctrine which we deem unsound.

The defendant's thirty-first request, relating to the burden of proof and the *quantum* of evidence required to justify a conviction, was rightly refused, since the instruction given by the court fully covered that feature of the case, and in language quite as favorable to the prisoner. (*Korth v. State*, 46 Neb. 631.) The charge of the court was full and complete, embracing every feature of the case. As to the other requests tendered by the defendant, all that need be said is, so far as they correctly stated the law, the instructions given by the court embraced them.

E. D. Stine, on being called and examined on rebuttal by the state, testified that about March 10, 1896, he visited the Kastner residence and saw there a double-barrel, muzzle-loading shotgun. This testimony was objected to by the accused, because the name of said witness was not indorsed on the information. The general rule in this state is that in a criminal prosecution the names of the witnesses upon whom the state relies to

prove the offense charged must be indorsed on the information before the trial. (*Parks v. State*, 20 Neb. 515; *Gandy v. State*, 24 Neb. 716.) But this rule, like many others, is not without an exception. Rebutting testimony proper may be adduced by the state without having the names of the witnesses indorsed upon the information. (*State v. Huckins*, 23 Neb. 309; *Fager v. State*, 49 Neb. 439; *Kelly v. State*, 51 Neb. 572.) The state, in making out its case in chief, adduced testimony from witnesses whose names had been properly indorsed on the information conducing to show the possession by the defendant of a double-barrel shotgun about the time Tiedeman was murdered. Afterward, the defendant and his mother and sister testified that this gun had been sold by the mother prior to March 1, preceding the homicide. The testimony of Stein, already mentioned, was thereupon given, showing the same gun in possession of the defendant on a date subsequent to the time of the alleged sale thereof by Mrs. Kastner, the mother. The testimony of Stein was rebutting in its nature, as its introduction was made necessary by the testimony given on behalf of the prisoner; and the case comes clearly within the exception of the rule stated by the present chief justice in *Kelly v. State, supra*, in the following language: "Where it becomes necessary to call persons to testify in rebuttal of testimony introduced on behalf of an accused in his defense, or if it is rendered necessary by a material issue raised for the first time in the case by the evidence for the defense, and the evidence sought to be introduced on rebuttal is obviously and purely rebuttal in its nature, it may be given by witnesses whose names were not indorsed on the information."

The action of the trial court is assailed in admitting evidence offered by the state relative to holes in the roof of the Kastner barn. The state had introduced testimony to show that it rained the night the murder was committed and that the following morning when the officers went to the Kastner barn they found hanging up

therein a hat, cap, and wammus, that were wet, belonging to the Kastners, while other articles in the barn were dry. The contention of the state was that the articles of clothing named were worn by the defendant and his father and brother at the time Tiedeman was shot, and had become wet on that occasion. The defendant, for the purpose of overcoming any criminating inference to be drawn from the wet clothing, introduced evidence to show that there were holes in the roof of the barn, and therefore the hat, cap, and wammus may have become wet by the roof leaking. In rebuttal the state showed that while there were holes in the roof of the barn they had been made long subsequent to the commission of the crime charged. Such testimony was pertinent and proper, rebutting in its nature, and the defendant has no reasonable cause to complain of the admission thereof.

Jennie Christensen testified on behalf of the defense that she saw Hans Peterson at the Nelson saloon the Monday prior to the shooting, which testimony, on motion of the state, was stricken out as being incompetent, irrelevant, and immaterial, and complaint is now made of this ruling. We are unable to discover the relevancy of this testimony, and counsel have failed to point out sufficient grounds for its retention. It is said Peterson slept in the saloon, and as the Kastners were familiar with the premises they would not have attempted to feloniously enter the building. But Jennie Christensen did not testify that Peterson slept in the saloon, but merely stated that she saw him there the Monday preceding the killing. It was not shown that he was there the night of the murder, so the evidence excluded was entirely too remote to base an inference of the innocence of the accused.

The trial court excluded the offer of the defense to prove by one Hudson that Davis and Kramer, who lived near the Nelson saloon, went with a wagon in the neighborhood where the burglary was committed, and that the day following the murder they were found in Burt

county with shotguns in their possession. It is urged that this incident ought to have been received in evidence "as the basis of a guess that he, Kastner, was not guilty." The jury were not chosen to guess of the innocence or guilt of the defendant. They had a more sacred duty to perform,—to ascertain, by a consideration of competent evidence, whether or not the guilt of the accused of the crime charged was established beyond a reasonable doubt, and to return a verdict accordingly. The jurors, if they were at liberty to venture a guess in the case, could just as well have found that Kastner was innocent, without the offered testimony being before them, as if it had been received. There was no error in excluding the evidence to which reference has been made. It was not shown, nor did the defense tender proofs to establish, that Davis and Kramer were near the saloon during the night the burglary and murder occurred, much less at the hour those offenses were committed.

Policeman A. J. Glover, heretofore mentioned, and who was shot near the Nelson saloon just prior to the killing of Tiedeman, after detailing what transpired and the persons he saw, and especially the one who shot the witness, made answer to questions as follows:

Q. Did you then see the faces of the men as you turned around?

A. I saw it as he turned around to shoot me.

Q. Did you look at him long enough in the face so that you could recognize him?

A. I think I did.

Q. Did you look at him long enough so you could notice how he was dressed?

A. I could not notice him in particular how he was dressed, if he had not been dressed in light. I noticed that he was dressed in light and had on a light soft hat, but it was all as quick as that [witness snapping his finger]. I had to take it in all at a flash.

Q. Did you notice the man's face so that you are able to state who that man was?

A. Quite positive; yes, sir.

Q. Are you able to state who it was?

A. I think I am.

Q. You may state if you have ever seen that man since.

A. Yes, sir.

Q. You may state who it was.

A. My best judgment is it was August Kastner, the man sitting right there.

This last answer the defense moved to have stricken out as incompetent, which motion was denied; and upon this ruling is founded one of the assignments of error. It is argued that the answer of Glover is equivalent to "I think it was August Kastner," and therefore inadmissible. In the light of the prior and subsequent testimony of the witness, the criticism made upon it is unfair. It clearly appears that the best impression or recollection of Glover was that he recognized the defendant as the person who shot him. It was proper to allow the answer to remain in the record. We have examined the other assignments of error directed against the admission of testimony and do not find any ruling assailed worthy of serious consideration or specific notice at this time. The rules governing the admission of testimony were observed by the trial court and its action is approved.

Lastly, it is urged that the evidence is insufficient to support a verdict of guilty. We have, with that degree of care which the serious nature of the case demands, read and considered the evidence contained in the bill of exceptions, and the conclusion is irresistible that the defendant has no just cause to complain of the verdict returned. The bill of exceptions contains over 900 typewritten pages, and it would serve no useful purpose to summarize the evidence therein recorded. The defendant is indeed fortunate that a verdict in the first degree was not returned against him. He was accorded a fair trial; and no prejudicial error appearing, the judgment is

AFFIRMED.

JOSIAH W. CRAIG V. FRED W. WEAD.

FILED JUNE 21, 1899. No. 8941.

1. **Real Estate Agents:** COMMISSIONS. A real estate agent who has been instrumental in producing a purchaser for land listed with him for sale is entitled to his contract commission even though the owner of the property consummate the sale in ignorance of the services rendered by the agent.

2. ———: ———: EXCESSIVE RECOVERY: REMITTITUR. Evidence examined, and recovery *held* to be excessive.

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

Weaver & Giller, for plaintiff in error.

E. C. Page, contra.

SULLIVAN, J.

Wead sued Craig to recover a broker's commission claimed to have been earned in negotiating a sale of a city lot. The jury found in favor of the plaintiff, and judgment having been rendered on the verdict the defendant brings the record here for review.

The principal contention is that the evidence does not warrant a recovery. We think it does. It is conceded that defendant owned the property and listed it with the plaintiff for sale. That a sale was effected and the lot conveyed to Thomas, who afterwards deeded it to Frank, is established beyond controversy. But it is denied that Wead did anything to bring about the sale, and it is also denied that Thomas was the real purchaser. The court charged the jury that there could be no recovery if Thomas bought the lot acting, not for himself, but as the agent of Frank and with the view of making a commission on the sale. Assuming for the purposes of the case that the instruction is a correct statement of the law appli-

cable to the facts disclosed on the trial, we proceed to inquire whether the jury were justified in finding that Thomas was himself the purchaser and not merely the agent of Frank in the transaction. The evidence, although somewhat conflicting, tends to prove, and does to our satisfaction show, that the plaintiff first brought to the notice of Thomas the fact that the property was for sale and that the owner's price was $4,400; that on numerous occasions he talked to Thomas about buying it; that Thomas, at the suggestion of Frank, and dealing directly with Craig, bought the lot and gave in payment therefor his own money and his own property; that Thomas dealt with Craig instead of Wead, because he at first hoped he would be able in so doing to secure better terms; that before Thomas made the purchase he had assurance from Frank that the latter would buy the lot from him for $4,700. These facts certainly show that Thomas was the real purchaser; that he did not act in the capacity of an agent; that he did not invest Frank's money in the lot nor hold the title in trust for him. The requirements of the instruction were fully met by the proof. But it is said that the defendant dealt with Thomas on the assumption that he was the agent of Frank and that the agency of the plaintiff in producing the purchaser was unknown at the time the bargain was concluded. This is true, but it is not material. According to the rule established by the decisions of this court, a real estate agent who has been instrumental in producing a purchaser is entitled to his contract commission even though the sale be made by the owner of the property in ignorance of the service rendered by his agent in the matter. (*Potvin v. Curran*, 13 Neb. 302; *Anderson v. Cox*, 16 Neb. 10; *Butler v. Kennard*, 23 Neb. 357.) In the last mentioned case REESE, C. J., delivering the opinion, said: "It is a well established rule in this, as well as other states, that where a broker is employed to sell real estate, it is not necessary that the whole contract should be completed alone by him in order to entitle him to his

commission, but if through his instrumentality the purchaser and owner are brought in contact and a sale is made through the instrumentality of the agent, he is entitled to his compensation, and this without reference to whether the owner, at the time the sale was perfected, had knowledge of the fact that he was making the sale through such instrumentality."

It is further contended on behalf of defendant that there should be a reversal of the judgment because the verdict is contrary to the second paragraph of the court's charge to the jury. It is argued that the instruction means that the plaintiff was not entitled to a finding in his favor unless it appeared that he had disclosed the purchaser to Craig before the sale was consummated. We think the language in question will not bear that construction, and it is evident the jury did not so understand it. The thought which the court intended to convey was afterwards expressed in these words: "If the plaintiff did obtain a purchaser, and if that purchaser, through the instrumentality of the plaintiff, was brought to the defendant, and if that purchaser was ready to pay the agreed price the defendant was to take for his lot, the plaintiff would be entitled to his commission whether the defendant sold the lot or not to the party."

The final contention that the recovery is excessive seems to be well grounded. Evidently, in the view of both Craig and Thomas, the real consideration paid for the lot was $4,400, and only upon this sum should the commission have been allowed. The judgment will be affirmed if there be filed in this court within thirty days a remittitur for the sum of $6.45; otherwise the judgment will be reversed.

JUDGMENT ACCORDINGLY.

CHARLES A. SIBLEY V. WILLIAM W. RICE ET AL.

FILED JUNE 21, 1899. No. 8936.

1. **Open Account:** CHARGES. An item in an open account which includes not only a disbursement of the debtor's money in the hands of the creditor, but also a disbursement of the creditor's private funds for the debtor's use and benefit, is a legitimate and valid charge.

2. ———: LIMITATION OF ACTIONS. Evidence examined, and *held* sufficient to sustain the finding and judgment of the trial court.

ERROR from the district court of Lincoln county. Tried below before NEVILLE, J. *Affirmed.*

T. Fulton Gantt, for plaintiff in error.

Wilcox & Halligan, contra.

SULLIVAN, J.

This action was instituted by William W. Rice, Henry W. Ring, and Charles Rice, as partners, to recover of Charles A. Sibley a sum of money alleged to be due upon an open account. The items constituting the account arise out of a connected series of transactions covering a period of several years. The answer presented among other defenses the statute of limitations. A trial to a jury in the district court of Lincoln county resulted in a verdict and judgment in favor of the plaintiffs. The defendant prosecutes error.

The last item on the debit side of the account was entered October 9, 1890, and is as follows: "To cash paid M. S. Ayer & Co., $882.20." Whether this item is a proper charge—whether it represents an actionable demand in favor of the plaintiffs and against the defendant—is the only question discussed by counsel and, therefore, the only one which we are called upon to decide. The contention of counsel, as we understand it, is that the entry, as elucidated by the evidence, represents merely a dis-

bursement by the plaintiffs of Sibley's money for Sibley's use. This view of the matter is quite plausible, but altogether incorrect, as we shall now proceed to show. The plaintiffs are lawyers engaged in the practice of their profession in the state of Massachusetts. They were employed by the defendant in an action brought against him and another by M. S. Ayer & Co. to recover for goods sold and delivered. While the cause was pending, and in a proceeding ancillary thereto, the court, by an appropriate order, impounded in their hands the sum of $1,145.02, which they had received from the foreclosure of a chattel mortgage belonging to their client. Ayer & Co. afterwards recovered a judgment in the action for $1,224.21 and obtained an order for the application thereto of the impounded fund, except so much thereof as should be necessary to pay the costs of the foreclosure. Sibley appealed to the supreme judicial court, but the proceeding was eventually abandoned and the judgment of the trial court affirmed. While the appeal was pending these plaintiffs applied $399.98 of the money in their hands to the payment of the expenses of the mortgage-foreclosure. This, of course, was the application of the defendant's money to the payment of items of indebtedness for which he was justly liable. He raises no question whatever as to the authority of plaintiffs to make the disbursement, and does not deny the correctness of the items paid. After the affirmance of the judgment in favor of M. S. Ayer & Co. the plaintiffs accounted to the superior court for the sum of $745.88 as the balance in their hands belonging to Sibley. The court, however, rejected some of the items of expense incurred in the foreclosure of the chattel mortgage, and on October 9, 1890, made an order requiring plaintiffs to pay into court the sum of $882.20. They complied with this order, but in doing so were obliged to pay out of their own funds the sum of $137.06. This was money paid for Sibley's benefit. Consequently there was included in the charge of $882.20 the sum of $137.06, which was a perfectly legitimate

debit item. The action having been commenced October 4, 1894, was not barred by the statute of limitations. The judgment is

AFFIRMED.

GEORGE E. DRAPER V. WILLIAM Z. TAYLOR ET AL.

FILED JUNE 21, 1899. NO. 8933.

1. **Quieting Title:** PLEADING. In an action to quiet title to real estate the plaintiff may allege in his petition as many claims of ownership as he may have.
2. ———: COLOR OF TITLE: SOLDIER'S ADDITIONAL HOMESTEAD. A person who has purchased a soldier's "additional homestead right" and has, under proper powers of attorney, located the same and entered into possession of the land upon which the location was made, has color of title to the entire tract described in the receiver's receipt.
3. **Ruling on Motion.** It is not error to deny a motion which cannot be allowed *in toto*.
4. **New Trial:** AFFIDAVIT: NEWLY-DISCOVERED EVIDENCE. A motion for a new trial on the ground of newly-discovered evidence should ordinarily be supported by the affidavit of the party making the application, as well as by the affidavit of his attorney.
5. ———: ———: ———. The affidavit of the new witness should also be produced or its absence satisfactorily accounted for.
6. **Impeaching Evidence:** FOUNDATION. It is not error to reject impeaching evidence, where no proper foundation has been laid therefor.
7. **Possession of Land.** Possession of land is notice to the world of the possessor's rights therein.
8. **Quieting Title:** DECREE FOR PLAINTIFF. Evidence examined, and *held* to sustain the finding and judgment.

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

L. H. Blackledge and *W. S. Morlan*, for plaintiff in error.

William O. Woolman, contra.

SULLIVAN, J.

William Williams, who had been a private soldier in the civil war, took up a homestead of 120 acres in the state of Arkansas and occupied the same until 1887, when he exchanged it for other lands. In 1878 he sold his "additional homestead right" to Gilmore & Thomas, of the city of Washington, for a consideration of $50 and executed irrevocable powers of attorney authorizing them to locate the scrip and empowering them to substitute the name of the person who should by assignment of the right become entitled to receive the final receipt and patent for the land located. William M. Everetts, acting for Taylor, the plaintiff herein, purchased the right of Williams from Gilmore & Thomas, and in May, 1878, located the scrip in Hitchcock county near the village of Culbertson. After doing so he delivered the powers of attorney and receiver's receipt to Taylor, who took immediate possession of the land and occupied it in connection with his adjoining homestead. The first year he plowed several acres and planted it to corn. He also plowed several furrows along two sides of the tract to serve as a fire-guard. The next year and for several years thereafter he tried to crop a portion of the land, but the crops seem to have been complete failures. The greater portion of the land was used for pasturage, and sometimes range cattle and town cows mixed with Taylor's cattle and grazed upon this and other lands in the vicinity. It was generally known in the neighborhood that Taylor was occupying the premises under a claim of ownership. Taylor lived in Culbertson. In 1882 his residence was burned and all his valuable papers, including his muniments of title, were lost in the fire. In the same year one Joe Hunter went upon the land in question with a load of timbers and commenced to build a "dug-out," but upon being informed by Taylor that the property was his, he abandoned his purpose and moved off. The land was taxed by the county authorities, and from 1878 to

1887, with the exception of one year, Taylor paid the taxes. It seems that in 1884 the land was sold for the non-payment of the taxes of 1883. Taylor was the purchaser at the tax sale, and in 1886 obtained from the county treasurer a tax deed in the usual form, but which, in consequence of a mistake, did not correctly describe the premises. Taylor's object in allowing the taxes to become delinquent for 1883 was to obtain a tax deed and thus repair the loss sustained by the destruction of his title papers. By reason of the misdescription in the tax deed it was not recorded, and Taylor, according to his testimony, never claimed any right or title under it. March 20, 1884, the patent, which was issued in the name of Williams, was forwarded to Taylor, who caused it to be recorded in the office of the county clerk on October 28, 1886. A. D. King located in Culbertson in December, 1885, and soon after became acquainted with Taylor, who proposed to sell him the forty-acre tract. King testified that Taylor based his claim of ownership on a tax title. This Taylor emphatically denies, and his account of the matter is probably correct, as the defective tax deed had not been issued at the time the negotiations for a sale of the land were pending. The taxes for the year 1888 became delinquent, and the land was sold at private tax sale to King, who afterwards paid the taxes charged against it for the years 1889, 1890, 1891, and 1892. December 14, 1891, a tax deed was issued to King and was recorded on the same day. In 1888 Taylor leased a portion of the land for a brick yard and probably renewed the lease for the following year. Fred D. Pitney discovered the defect in Taylor's title and through his brother-in-law, an attorney named Boyle, obtained from Williams, without consideration, a quitclaim deed to the land. This deed was executed by Williams under the impression that Pitney was the owner of the land located under the scrip which he sold to Gilmore & Thomas. The deed to Pitney was recorded in November, 1888. Afterwards Pitney and wife conveyed the land to

Boyle, who reconveyed it, by deed containing a special warranty, to Mrs. Pitney. After these deeds were recorded the Pitneys executed a mortgage on this and other lands to J. W. Dolan, as trustee, to secure an indebtedness of $1,300 due to the Hitchcock County Bank, of which King was president. This mortgage was afterwards purchased by George E. Draper, a director of the bank. In 1892 Draper obtained a decree foreclosing the mortgage in an action to which Taylor was not a party. To prevent the decree from being executed by a sale of the forty-acre tract and to quiet his title and possession Taylor brought this action and obtained in the district court the relief demanded. Draper by this proceeding in error brings the record here for review.

Taylor, in his petition, bases his claim of ownership on (1) adverse possession, and (2) the transfer to him of the rights of William Williams as the original owner of the scrip under which the land was located. The objection to the form of the pleading being raised for the first time in this court is not entitled to be considered. But if the question were properly before us for decision, we would be compelled, on the authority of *Gregory v. Langdon*, 11 Neb. 166, to resolve it in favor of the plaintiff.

It is claimed that the court erred in refusing to sustain a joint motion made by King and Draper to set aside the submission of the cause and for leave to introduce additional testimony. The motion was made more than six months after the cause was submitted. King had already before the court sufficient evidence to entitle him to a decree for the taxes which he had paid. This relief he afterwards obtained, and it was the only relief to which he would have been entitled if his application had been sustained. Clearly then the court did not err in denying the motion. If a motion is not good in the form in which it is presented, it is not error to overrule it. (*Hudelson v. First Nat. Bank of Tobias*, 56 Neb. 247, 76 N. W. Rep. 570.) But aside from this technical reason for sustaining the ruling, we think it was an entirely just and proper exercise of judicial discretion.

Immediately after the court announced its findings and rendered its decree Draper and King, each for himself, filed a motion for a new trial based in part on a claim of newly-discovered evidence. Each motion was supported by the affidavit of the attorney representing the parties and was in substance the same as the affidavit previously filed in support of the motion to re-open the cause. Both motions were overruled, and Draper assigns this action of the court for error. His contention is that he made a showing of newly-discovered evidence which ought to have procured for him a new trial of the issue. Without deciding whether there was a sufficient showing of diligence, and without discussing the character of the new evidence and its probable influence as a factor in another trial, we think the district court made no mistake in refusing to vacate its decree. It is our understanding of the rule that not only must counsel not have known of the evidence upon which the application is based, but the applicant himself must have been ignorant of its existence. To be sure the affidavit states that "neither defendants nor their counsel, by reason of the nature of the evidence, * * * were able sooner to discover said evidence," and "because knowledge of the existence thereof could be but very indefinitely known to any of the parties to the action except the plaintiff." No affidavit was filed by Draper or King, and how their attorney could know that they were ignorant of the facts set out in his affidavit is something we are not quite able to comprehend. At best his statement in regard to the matter is the merest hearsay. (14 Ency. Pl. & Pr. 823; Hilliard, New Trials [2d ed.] 499; *State v. Kellerman*, 14 Kan. 135; *Broat v. Moor*, 44 Minn. 468; *State v. Campbell*, 115 Mo. 391.) There should also have been presented in support of the motion the affidavit of the new witness stating the facts to which he would testify, or there should have been a satisfactory reason given for not obtaining such affidavit. (*Hand v. Langland*, 67 Ia. 185; *Quinn v. State*, 123 Ind. 59; *McLeod v. Shelly Mfg. Co.*, 108 Ala. 81; 14 Ency. Pl. & Pr. 825.)

For the purpose of impeaching Fred D. Pitney, who testified for plaintiff, the defendants offered in evidence the deposition of the witness taken in the foreclosure case. The offer was rejected, and of this ruling Draper complains. The attention of the witness had not been directed to the matters contained in the deposition. No opportunity had been given him to explain, and, therefore, the evidence was properly excluded. (*Hanscom v. Burmood*, 35 Neb. 504; *Wood River Bank v. Kelley*, 29 Neb. 590; 3 Jones, Evidence secs. 848, 849.)

The theory of the defense that Taylor's possession was not continuous, exclusive, and adverse as to all of the land is supported by some evidence, as is also the claim that he had not succeeded to the equitable rights of William Williams; but we think the finding of the trial court is clearly the only one warranted by the evidence in the record. Taylor's possession of the land was notice to the world of the extent and character of his interest therein. Pitney acquired nothing more than the naked legal title. This was all he pledged to the bank, and it was all the bank assigned to Draper. The judgment is

AFFIRMED.

CHARLES B. RUSTIN V. STANDARD LIFE & ACCIDENT INSURANCE COMPANY.

FILED JUNE 21, 1899. No. 8956.

1. **Accident Insurance:** OVEREXERTION. The term "voluntary overexertion" in a policy of accident insurance, means conscious or intentional overexertion, or a reckless disregard of consequences likely to ensue from great physical effort.

2. ———: ———. It cannot be said as a matter of law that the slight elevation of a 300-pound weight by a strong man accustomed to lifting is voluntary overexertion.

3. ———: UNNECESSARY LIFTING. A condition in a contract of casualty insurance forbidding unnecessary lifting is not broken by

an act of lifting which was apparently reasonable and performed in the line of duty.

4. ———: QUESTION FOR JURY. Evidence examined, and *held* to be sufficient to entitle the plaintiff to have the case submitted to the jury.

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

James H. McIntosh and *Charles A. Goss*, for plaintiff in error:

Where the terms of a life insurance policy will bear two interpretations, that one will be adopted which sustains the claim for indemnity. (*Goodwin v. Provident Savings & Life Ass'n*, 66 N. W. Rep. [Ia.] 157.)

It was for the jury to say what conclusion should be drawn from the facts,—that is, whether or not the lifting, which caused the injury to the plaintiff, was unnecessary, or whether the lifting was in fact overexertion under the circumstances, and if overexertion, whether the overexertion was voluntary. The court could not draw these conclusions of fact from the testimony, and it was error to have done so. (*Grant v. Cropsey*, 8 Neb. 205; *Eaton v. Carruth*, 11 Neb. 231; *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332; *Huff v. Ames*, 16 Neb. 139; *City of Lincoln v. Gillilan*, 18 Neb. 114; *Johnson v. Missouri P. R. Co.*, 18 Neb. 690.)

L. F. Crofoot, contra.

References: *Lent v. Burlington & M. R. R. Co.*, 11 Neb. 201; *Burns v. City of Fairmont*, 28 Neb. 866; *Chicago, B. & Q. R. Co. v. Barnard*, 32 Neb. 306; *Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 557; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 643; *Slayton v. Fremont, E. & M. V. R. Co.*, 40 Neb. 844; *Young v. Mutual Accident Ass'n*, 25 Chicago Legal News 143.

SULLIVAN, J.

This action was brought by Charles B. Rustin to recover on a policy of accident insurance issued to him by

the Standard Life & Accident Insurance Company. The injury upon which the claim for indemnity is grounded was the result of an effort on the part of plaintiff to raise a heavy dumb-bell from the ground. The contract contained a stipulation exempting the company from liability for injuries occasioned by unnecessary lifting and voluntary overexertion. The action was defended on the theory that the accident was within the exemption clause. The trial court, at the conclusion of plaintiff's testimony, instructed the jury to return a verdict in favor of the defendant. The correctness of this instruction is the single question presented by the record for decision. The facts being undisputed, we are only required to determine whether they are, under the most favorable construction, sufficient to sustain a verdict in favor of the insured. Rustin was described in his application for insurance as a captalist. After the issuance of the policy he became president of the Courtland Beach Association, a company owning and conducting a pleasure resort near the city of Omaha. This company was arranging to give an exhibition representing the destruction of Pompeii, and the plaintiff was on the ground superintending the preparatory work. While thus engaged he sustained the injury in question. His own account of the accident is as follows: "Construction was going on for giving the show called 'Pompeii,' and I was out there superintending the building of the seats, and so on; and at noon I took my lunch, and after dinner I went out in the shade of a tree, and was lying down, smoking. There had been an arrangement made for the commencement of a performance by Miller,—I have forgotten what Miller,—a strong man, who was going to give an exhibition with dumb-bells. These dumb-bells were on a bar or handle, each five or six feet long, and purported to weigh 225 and 450 pounds. While lying there smoking, I noticed some boys fooling with the lighter dumb-bell,—the 225 weight. It was very apparent to me they were a little shy in weight, and so I got up from where I had been reclining,

and went upon the platform where the bells had just been delivered, and picked up the large dumb-bell, said to weigh 450 pounds; picked it up with apparent ease, but had it out of balance. It was down on the right side. I didn't get it in the center of gravity. In bringing it to a level, I raised my right arm, and something gave away with a loud report,—one of the ligaments of my back." Rustin further testified that he was in good physical condition at the time he was injured; that he was accustomed to lifting and believed he could lift 450 pounds without injury to his system; that in his opinion the heavier dumb-bell did not weigh more than 300 pounds, and that his primary purpose in lifting it was to test its weight with the view of protecting his company and the public from an imposture which he suspected the professional athlete was about to perpetrate. This evidence, we think, was sufficient to warrant a recovery and should have been submitted to the jury. Rustin's injury, it is true, was the natural result of overexertion while attempting to raise the dumb-bell and bring it to a horizontal position; but that fact is not of itself conclusive in favor of the company. The contract right to indemnity was not lost because the injury resulted from overexertion, unless the overexertion was conscious and intentional. (*Manufacturers Accident Indemnity Co. v. Dorgan*, 58 Fed. Rep. 952; *Johnson v. London Guarantee & Accident Co.*, 72 N. W. Rep. [Mich.] 1115.) Surely it cannot be said as a matter of law that the plaintiff was aware of the probable result of his act, or that he acted with a reckless disregard of consequences likely to ensue. That he failed to accurately gauge his own strength, or else to correctly estimate the weight of the dumb-bell, is evident; but accident insurance is not designed to furnish indemnity only in cases where the policy-holder orders his conduct with grave circumspection and a provident foresight of consequences. Mere contributory negligence is no answer to an action on a contract of insurance. Neither is there any absolute inference that the lifting

was unnecessary. According to the plaintiff's testimony, the act was the product of a reasonable motive and was performed in the line of duty. An accident policy undoubtedly contemplates that even a capitalist will do some lifting without physical or moral compulsion. Circumstances in evidence discredit the reason given for the lifting, but they do not indisputably condemn it as false. The question was for the jury to determine. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMAS SULLIVAN V. STATE OF NEBRASKA.

FILED JUNE 21, 1899. No. 10641.

1. **Instructions:** OBJECTIONS: REVIEW. Objections to instructions not brought to the attention of the district court by a motion for a new trial cannot be successfully urged in this court.

2. **Criminal Law:** CONFESSIONS: CORROBORATION. One cannot be convicted of a felony upon his own unsupported extra-judicial confession that a crime has been committed. Such confession may be sufficient to prove the defendant's connection with the criminal act, but there must in all cases be proof *aliunde* of the essential facts constituting the crime.

3. ———: ———: ———. But, while a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may, with slight corroborative circumstances, be sufficient to warrant a conviction.

4. ———: ———: CIRCUMSTANTIAL EVIDENCE. Circumstances capable of an innocent construction may be interpreted in the light of the defendant's confession, and the fact under investigation be thus given a criminal aspect.

5. ———: DECLARATIONS. A declaration may be a part of the *res gestæ* without being precisely coincident with the main transaction. It is sufficient that there was between the two an immediate casual relation, and that the statement was a spontaneous characterization of the act.

6. ———: ———: RES GESTÆ: HOMICIDE. The accused procured a revolver in a saloon, went about fifty feet, fired a shot and killed a man, ran back to the saloon, threw the revolver on the floor, and exclaimed, "My God! I have killed Tom Kirkland, my best friend," then hurried back to the dying man, raised his head, and again declared that he had shot his best friend, and that he would be hanged. *Held*, That such declarations constituted parts of the *res gestæ*, and were legitimate, independent evidence of the homicidal act.

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

William F. Gurley and *Lee S. Estelle*, for plaintiff in error:

Confession without proof of *corpus delicti* will not support a conviction. (*Commonwealth v. Ackert*, 133 Mass. 402; *Matthews v. State*, 55 Ala. 187; *Williams v. People*, 101 Ill. 382; *Priest v. State*, 10 Neb. 393; *People v. Hennessey*, 15 Wend. [N. Y.] 147; *Stringfellow v. State*, 26 Miss. 157.)

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

SULLIVAN, J.

On an information charging him with the crime of murder Thomas Sullivan was tried, convicted, and sentenced to imprisonment in the penitentiary for a period of eleven years. Of the errors assigned the sufficiency of the evidence to sustain the verdict is the only one properly before us for consideration. The action of the court in giving and refusing certain instructions is called in question and discussed by counsel at considerable length, but the point was not raised in the motion for a new trial and cannot be successfully urged for the first time in this court. The substance of the accusation against the defendant is that, with premeditation and malice, he shot and killed one Thomas Kirkland. On the trial the truth of the charge was shown by the prisoner's voluntary confessions made to police officers on the night of the tragedy.

It is now contended that such confessions were the only proofs of the *corpus delicti*, and that they were not competent evidence of that fact. We do not assent to either proposition. Independent of the deliberate and voluntary confessions, the salient facts disclosed by the record are: That on the night in question Sullivan became involved in a quarrel with some colored men near the Tenth street viaduct, in the city of Omaha; that while the broil was in progress he ran into the saloon of Walter Brandise, obtained a revolver, and ran out again, declaring that he intended to kill "a black nigger;" that he ran north to the alley; that just across the alley a man, who afterwards proved to be Kirkland, was seen walking south; that there was the flash and report of a pistol; that the man walking south fell on the sidewalk, where he was immediately after found dead; that just after the shot was fired Sullivan ran back to the saloon, threw the revolver on the floor, and exclaimed, "My God! I have killed Tom Kirkland, my best friend," or words to that effect; that he then hurried back to the dying man, raised his head, and again declared that he had shot or killed his best friend and that he would be hanged. No person, other than Kirkland and Sullivan, was seen on the street or in the vicinity at the time the shot was fired. There was no direct evidence of any wound upon the body of the deceased, and the circumstances above detailed, together with the prisoner's subsequent confession that he shot him under the impression that he was a negro, constitute the whole of the evidence tending to show that death was the result of a gunshot wound.

In this case the elements of the *corpus delicti* are, first, the death of Thomas Kirkland; and second, the criminal agency of some one, not necessarily the defendant, in causing such death. (*People v. Palmer*, 109 N. Y. 113; *Carlton v. People*, 150 Ill. 181; *State v. Jones*, 106 Mo. 302; *People v. Simonsen*, 107 Cal. 345; *Johnson v. Commonwealth*, 29 Gratt. [Va.] 796.) The uniform doctrine of the American courts is that a conviction for felony will not be sus-

tained when the only evidence of guilt is the extra-judicial confession of the defendant that a crime has been committed. His confession may be sufficient to prove his own connection with the alleged criminal act, but there must in all cases be proof *aliunde* of the essential facts constituting the crime. (*Priest v. State*, 10 Neb. 393; *Smith v. State*, 17 Neb. 358. See, also, 6 Am. & Eng. Ency. Law [2d ed.] p. 581, where the cases are collected.) But while a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, with slight corroborative circumstances, establish the *corpus delicti* as well as the defendant's guilty participation. Discussing this question Nelson, C. J., in *People v. Badgley*, 16 Wend. [N. Y.] 53, said: "Full proof of the body of the crime, the *corpus delicti*, independently of the confession, is not required by any of the cases; and in many of them slight corroborating facts were held sufficient." The doctrine of this case was distinctly approved in *People v. Jaehne*, 103 N. Y. 182, where it was held that equivocal circumstance offered as proof of the *corpus delicti*, might be interpreted in the light of the prisoner's confession and the fact under investigation be thus given a criminal aspect. In *State v. Hall*, 31 W. Va. 505, the court, considering this question, said: "We know of no decisions anywhere that hold the admissions of the defendant are not competent evidence tending to prove the *corpus delicti*, but they certainly are competent evidence tending to prove that the crime charged has been committed." It has often been held in cases where there was no direct proof of the crime, as in prosecutions for adultery and trials for homicide where the body of the deceased had not been found, that the defendant's extrajudicial confession, in connection with other incriminating circumstances, would warrant a conviction. (*Ryan v. State*, 100 Ala. 94; *State v. Lamb*, 28 Mo. 218; *State v. Patterson*, 73 Mo. 695; *Commonwealth v. McCann*, 97 Mass. 580; *United States v. Williams*,

1 Cliff. [U. S.] 20; *United States v. Gilbert*, 2 Sum. [U. S.] 19; *Commonwealth v. Tarr*, 4 Allen [Mass.] 315.) We think that if every statement and declaration of Sullivan were regarded as being nothing more than a confession of his criminal agency in producing the death of Kirkland, the verdict would still be sustained by sufficient proof. But some of the declarations of the defendant were certainly substantive evidence of the fact declared, considered entirely apart from the circumstance that they were admissions against interest. They were parts of the *res gestæ*, events incident to the main transaction; they were concomitant acts speaking through the principal actor. In point of time they were closely related to the homicide, and between it and them there was an immediate casual relation. "*Res gestæ*," says Wharton, "are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants, under the immediate spur of a transaction, becomes thus part of the transaction, because it is then the transaction that thus speaks." (Wharton, Criminal Evidence [8th ed.] sec. 262.) To determine what declarations come properly within the *res gestæ* is sometimes a matter of great difficulty. There appears to be no arbitrary time limit, but the authorities are agreed that competency in all cases depends upon the declaration being substantially coincident with the fact from which it springs and of which it is explanatory. (2 Jones, Evidence sec. 351.) That the language used is narrative in form and refers to past events is not alone sufficient to condemn it as hearsay. In *Commonwealth v. Hackett*, 84 Mass. 136, the declaration of a man after leaving his room where he had been stabbed was received in evidence, although his assailant had fled before the declaration was made. In *Lambert v. People*, 29 Mich. 71, the complaint of a person who had been robbed was held to be competent, although made in the absence of the defendant some three minutes after the robbery. In

People v. Simpson, 48 Mich. 474, which was a homicide case, it appeared that a woman had been shot while walking on the street. A person living a block distant on the opposite side of the street heard the report and ran to her immediately. What the deceased then said implicating the defendant was held to be part of the *res gestæ*. In *State v. Walker*, 78 Mo. 380, the excited utterance of a by-stander, made the moment after a shot was fired which killed one of the parties to an affray, was held to be admissible as illustrative of the act which gave rise to the exclamation. In *Missouri P. R. Co. v. Baier*, 37 Neb. 235, the court received as part of the *res gestæ* an account of a railroad accident given immediately after its occurrence by the person whose injuries were the subject of the suit. The doctrine of the case is stated in the syllabus as follows: "A declaration to be part of the *res gestæ* need not necessarily be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause." Tested by the rule thus stated, especially when such rule is considered in connection with the facts to which it was applied, it is quite clear that the declarations of Sullivan in the saloon and while holding the dead body of Kirkland were parts of the *res gestæ* and so legitimate independent evidence of the homicidal act. While the failure of the public prosecutor to make strict proof of the fatal wound merits judicial reprobation, it is not alone sufficient to require a reversal of the sentence. Every material averment of the information is supported by competent and adequate proof; and the judgment is, therefore,

AFFIRMED.

GEORGE GRAVES, APPELLANT, V. J. D. MACFARLAND ET AL., APPELLEES.

FILED JUNE 21, 1899. No. 8926.

1. **Summons:** SHERIFF'S RETURN. An officer's return, within the meaning of the statute relating to the service of process, includes not only the certificate of service, but also the delivery of the writ to the office from which it issued.

2. ———: SERVICE: TIME TO MAKE RETURN. If a summons be served within the time limited by the statute, the court from which it issued acquires jurisdiction of the person of the defendant, and may render a valid judgment against him, notwithstanding the officer's failure to make his return during the life of the writ.

3. **Mortgage-Foreclosure:** DEFICIENCY JUDGMENT. In an action brought to foreclose a real estate mortgage the district court, prior to 1897, was authorized to render a deficiency judgment against a purchaser who had assumed and agreed to pay the incumbrance in suit.

4. ———: ———: NOTICE. The jurisdiction of the district court to render a deficiency judgment under the provisions of section 847 of the Code of Civil Procedure did not depend upon the service of any notice other than the original summons.

5. ———: ———: ———: PLEADING. A deficiency judgment against a purchaser of mortgaged premises is not void because the personal liability of such purchaser is not shown by the petition. It is sufficient if the fact is disclosed by the answer of the mortgagor who, claiming to stand in the attitude of a surety, demands exoneration.

6. **Service of Summons:** INSUFFICIENCY OF EVIDENCE. Evidence examined, and found insufficient to support the finding of the trial court.

APPEAL from the district court of Antelope county. Heard below before ROBINSON, J. *Reversed.*

J. F. Boyd, for appellant.

S. D. Thornton, contra.

SULLIVAN, J.

This is an appeal by George Graves from a judgment of the district court of Antelope county. The facts es-

sential to an understanding of the questions presented for decision are these: The appellant, who was plaintiff below, purchased of Lyman Seiler, in August, 1890, a lot in the city of Lincoln subject, according to the recital of the deed, to an incumbrance of $1,600. In January, 1892, the mortgagee, J. D. Macfarland, brought an action in the district court of Lancaster county to foreclose his mortgage, making Seiler and Graves and wife parties defendant. Mr. and Mrs. Graves resided in the city of Neligh, in Antelope county, and process was sent to the sheriff of that county for service upon them. The writ was issued on January 10 and was made returnable January 18. It was not in fact returned and filed in the office of the clerk of the district court until January 23. The sheriff's certificate, which is dated January 16, recites that on January 15 the summons was personally served upon Mrs. Graves and a copy left at the usual place of residence of George Graves. Seiler appeared in the action and in due time filed an answer, in which he alleged that Graves had agreed to pay the mortgage in suit and asked that he be required to perform his contract. While Macfarland in his petition demanded a deficiency judgment against Graves, he did not allege an assumption by him of the indebtedness or state any other fact upon which to base his claim to that relief. Mr. and Mrs. Graves made no appearance in the case and were defaulted. The court rendered a decree of foreclosure, and made a finding to the effect that the appellant had assumed the payment of Macfarland's mortgage. Afterwards, without notice, a deficiency judgment for $1,102.23 was rendered against Graves alone. This judgment was then assigned to Seiler, who was attempting to enforce it when the appellant brought this action against him to obtain a perpetual injunction.

It is contended that the summons not having been returned within the time limited by the statute, the court acquired no jurisdiction over the person of the appellant, and that the judgment rendered against him was there-

fore void. We think counsel is right in asserting that the file-mark of the clerk is the proper and primary evidence of the time when the summons was returned by the sheriff. And it must, under the authorities, be conceded that the return contemplated by the law includes not only the officer's certificate of service, but also the delivery of the writ to the office from which it issued. (Alderson, Judicial Writs & Process sec. 184; *Nelson v. Cook*, 19 Ill. 440; *Carlker v. Anderson*, 27 Ill. 358.) It does not follow, however, that a service which is valid when made becomes a nullity because the officer fails to make due return of the writ. When the summons is served the action is pending; the court has jurisdiction of the parties and cannot be divested of the authority over them by any fault or omission of the sheriff. It is not the officer's return that gives the court power to hear and determine the cause, but the fact of service during the life of the writ. The return is, of course, the appropriate evidence of the jurisdictional fact, but it is not conclusive. There is no good reason why a defendant who has been duly served should complain because the court was not possessed of the proof of service within the time fixed by the statute. (*Smith v. Payton*, 13 Kan. 362; *Clough v. McDonald*, 18 Kan. 114; *Miller v. Forbes*, 49 Pac. Rep. [Kan.] 705.)

The next question for consideration is the power of the court to render a personal judgment in favor of Macfarland and against Graves in the absence of an allegation in the petition showing that Graves had assumed the mortgage debt. It is the settled doctrine of this court that one who purchases mortgaged premises and assumes as part of the consideration to pay the mortgage debt becomes personally liable for any deficiency that may remain after applying the proceeds of the foreclosure sale. (*Cooper v. Foss*, 15 Neb. 515; *Stover v. Tompkins*, 34 Neb. 465; *Rockwell v. Blair Savings Bank*, 31 Neb. 128; *Hare v. Murphy*, 45 Neb. 809.) The purchaser in such case is regarded as the principal debtor, and the mort-

gagor stands as to him in the situation of a surety. The answer of Seiler, then, was in the nature of a cross-action to compel the purchaser to perform his alleged agreement and to compel the plaintiff to obtain satisfaction from a principal debtor. The relief demanded was germane to the action to foreclose and for a deficiency judgment, and the court, if Graves was before it, acquired jurisdiction to determine the issue which Seiler presented for decision. It is true that Graves never did assume or agree to pay the mortgage and that the allegations of Seiler's answer were absolutely false, but it was nevertheless appellant's duty, if served with summons, to appear and by a proper pleading put such allegations in issue; otherwise they would stand confessed. Considering the counter-claim in the nature of an action for the exoneration of a surety, we think on the face of the record the court had jurisdiction to render the deficiency judgment. (1 Brandt, Suretyship & Guaranty secs. 192, 206; 9 Ency. Pl. & Pr. 468.)

Counsel for appellant insists that the court was not authorized to render a deficiency judgment without special notice of the application therefor. The usual practice undoubtedly was to serve such notice when practicable; but the statute which gave the right to a deficiency judgment in an action to foreclose a mortgage did not require it. Section 847 of the Code of Civil Procedure, which was repealed in 1897, clearly contemplated no other notice than that imparted by the original summons.

We come now to the question of the sufficiency of the evidence to sustain the finding of the trial court that there was due service of the summons in the foreclosure suit upon George Graves. In our judgment the proof completely warrants the claim of appellant that he was never served, and that the officer's return of service was false. The district court was, of course, in a better position than we are to determine the credibility of witnesses. We do not lose sight of that fact. We take it

into account and give it proper weight, but we are still utterly unable to avoid the conviction that the trial judge in his conclusion upon this point was wrong, entirely and manifestly wrong. It is claimed that the service was made at the residence of Graves in Neligh on the 15th of January by delivering copies of the writ to Mrs. Graves. The sheriff testified to this and stated that one of the members of the county board was with him at the time; but this gentleman being called as a witness was not able to confirm the sheriff's statement. There was no explanation of the fact that the summons was not returned on the day the certificate of service is alleged to have been written, nor for several days after the return day. Upon this point the sheriff was strangely silent. If service had really been made, it would seem, in the natural and orderly course of business, that the summons would have been mailed to the clerk of the district court at Lincoln as soon as the certificate of service had been indorsed upon it. And if service had really been made, it seems quite remarkable that Graves should give no attention whatever to the suit. Three witnesses, all apparently credible and one entirely disinterested, testified in the most explicit and positive manner that on January 15 the sheriff did not visit the Graves' residence. The date is definitely fixed by the fact that a daughter of Mr. and Mrs. Graves who had been recently married was expected home on that day in accordance with her wedding card announcement. It also appears that Mrs. Graves was seriously sick at the time. We think the plaintiff in this action has shown by the requisite *quantum* of proof that he was not served with summons in the foreclosure suit. Wherefore the judgment of the district court is reversed and a judgment rendered in this court making the temporary order of injunction perpetual.

REVERSED.

HARRISON, C. J., expressed no opinion as to the doctrine stated in fifth paragraph of the syllabus.

NORVAL, J., dissenting.

I find myself unable to reach the conclusion that the evidence adduced on the trial is insufficient to sustain the finding of the court below that service of summons was not duly made upon George Graves in the foreclosure cause. In addition to the sheriff's return indorsed on the summons in that suit, and the presumption which must be indulged in favor of its truthfulness, there is the clear, positive, and direct testimony of that officer that he served the summons on Graves at his residence in Neligh on the date named in the return by leaving a true copy of the writ for him with Mrs. Graves. Certainly this evidence was sufficient to support the finding of the district court. There was a large mass of evidence introduced tending to show that the summons was not served upon Graves, which would have warranted the court below in deciding this point in favor of Graves. There was a sharp conflict in the evidence, and to disturb the judgment of the district court is to disregard the rule time and again asserted and applied by each member of this court that a finding of fact based on conflicting evidence will not be disturbed on review.

JOHN DUNN V. STATE OF NEBRASKA.

FILED JUNE 21, 1899. No. 10705.

1. **Assault with Intent to Rape:** CONVICTION. Evidence examined, and found sufficient to sustain the verdict.

2. **Information:** VENUE. An information whose caption is "State of Nebraska, Greeley County, ss.," and which charges that a designated crime was committed "in said county and state aforesaid," alleges the venue with sufficient certainty.

3. ———: CRIMINAL ASSAULT: NAME OF VICTIM. Identity of name ordinarily affords a presumption of identity of person; and where the name of the victim of a criminal assault is the same in two

counts of an information, the law presumes that the reference in both counts is to the same person.

4. ———: COUNTS: INSTRUCTIONS. An instruction is not erroneous which, in substance, informs the jury that a conviction on either count of an information would be warranted only by proof beyond a reasonable doubt of the essential elements of the crime charged in such count; and that there might be a conviction on one count and an acquittal on the other.

5. **Rape:** RESISTANCE: INSTRUCTIONS. For the purpose of illustrating the proposition that in prosecutions for rape the measure of the woman's resistance need not be in all cases the same, it is not error for the court to say to the jury, irrespective of the facts of the particular case, that "a strong, able-bodied woman could protect herself when a girl fourteen years old could not."

6. ———: CORROBORATIVE EVIDENCE: INSTRUCTIONS. It is not essential, in a trial for the crime of rape, that the prosecutrix be corroborated by direct evidence of the particular fact constituting the crime. Proof of incriminating circumstances and corroborative facts is sufficient, and an instruction which so states the law is not erroneous.

7. **Assault With Intent to Rape:** EVIDENCE. To warrant a conviction for an assault with intent to commit a rape the evidence must show beyond a reasonable doubt that the accused at the time intended to use whatever force might be necessary to overcome all resistance and accomplish his purpose.

8. **Instructions:** CONSTRUCTION. Two paragraphs of a charge to the jury, one immediately following the other, will be considered together, and treated as one, when they relate to a particular phase of the case, and each is plainly complemental of the other.

9. ———: REPETITIONS. After a jury in a criminal case has been once informed that there can be no conviction without proof beyond a reasonable doubt, and that their conclusion should be based on the evidence, the failure to reiterate such statements in other paragraphs of the charge is not error.

10. **Witnesses:** OBJECTION TO QUESTIONS. A party cannot reserve his objection to a question calling for incompetent testimony until the answer of the witness has been received. Such reservation is deemed a waiver of the right to object.

11. **Rape:** EVIDENCE. In a prosecution for rape evidence of the conduct and exclamations of the prosecutrix, tending to show that she was sick and lame for several days after the assault, is competent.

ERROR to the district court for Greeley county. Tried below before THOMPSON, J. *Affirmed.*

Doyle & Lanigan, for plaintiff in error.

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

SULLIVAN, J.

There are two counts in the information. In the first the defendant John Dunn is charged with the ravishment of Louise I. Lund; in the second he is charged with a felonious attempt to ravish her. The trial resulted in an acquittal on the first count and a conviction on the second. We will not discuss the evidence, for it would serve no useful purpose to do so. That it is sufficient to sustain the verdict in favor of the state, we entertain no sort of doubt; and we may add that if the defendant had been found guilty of rape, we should not disturb the verdict on account of any weakness in the proof.

The first count of the information was unsuccessfully assailed by a motion to quash and a general demurrer. It is now contended that there was no averment that the crime therein alleged was committed within the territorial jurisdiction of the court. The caption of the information is: "State of Nebraska, Greeley County, ss." Then follows a recital that James R. Swain is county attorney of Greeley county, and an allegation that the defendant, "in said county and state aforesaid," committed the offense. This was sufficient to fix the venue. The caption was by reference incorporated into and made a part of the information. The precise point was raised and decided in *Bartley v. State*, 53 Neb. 310. In that case NORVAL, J., delivering the opinion, said: "Whether the caption is or is not a part of an information, it is unnecessary to determine. The venue given at the top of this information, it is very evident, was made a part thereof by reference had thereto in the third count of the information. This doctrine was recognized and applied, with respect to a criminal complaint before a justice of the peace, in *Rema v. State*, 52 Neb. 379."

By special demurrer, and also by a motion to require the state to elect upon which count it would proceed to trial, the defendant challenged the authority of the court to try him on both charges. The argument is that the information contains no direct averment that the victim of the felonious assault and the victim of the rape was the same person. The evidence given on the trial having shown conclusively that both counts relate to the same transaction, the point is not of real importance; but if it were, the identity of name would afford a presumption of identity of person and justify the ruling of the district court. (1 Jones, Evidence sec. 99; *State v. Kelsoe*, 76 Mo. 505; *State v. McGuire*, 87 Mo. 642; *People v. Rolfe*, 61 Cal. 541; *Campbell v. Wallace*, 46 Mich. 320.)

It is asserted that the third paragraph of the court's charge to the jury assumes that the defendant committed the crime described in the second count. The language in question is as follows: "You are instructed that the burden rests upon the state to prove every material allegation in each count in the information beyond a reasonable doubt, and unless the allegations are so proven you cannot find the defendant guilty upon such count as is not so proven; but if you should find that it was not so proven upon the first count, but was so proven upon the second count, in that case your verdict would be guilty upon the second count of the information." This instruction is not artistically framed, but its plain import is that conviction of the crime charged in either count would be warranted only by proof beyond reasonable doubt of the essential elements of such crime, and that there might, according to the finding of the jury, be a conviction on one count and an acquittal on the other. To extract any other meaning from it requires a ruthless distortion of the text.

Exception is taken to the following language found in the tenth paragraph of the charge to the jury: "A strong, able-bodied woman could protect herself when a girl fourteen years old could not." The statement is criti-

cised as being inapplicable, because the evidence disclosed no striking disparity of age, intelligence, or physical development between the prosecutrix and the accused. The sentence quoted, standing alone, would seem to be incapable of mischief. Being the suggestion of a common-place fact, it is difficult to see how it could have beguiled an intelligent jury into error. It was designed merely to illustrate the proposition that the measure of resistance required of the woman is not necessarily the same in all cases. In its proper environment it was certainly harmless. (*Richards v. State*, 36 Neb. 17; *Thompson v. State*, 44 Neb. 366; *People v. Connor*, 27 N. E. Rep. [N. Y.] 252.)

The court said to the jury in the eleventh paragraph of the instructions: "You are instructed that in the case of rape it is not essential that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense, and if the jury believe from the testimony of the prosecutrix and the corroborating circumstances and facts testified to by other witnesses, that the defendant did make the assault as charged, * * * the law would not require that the testimony of the prosecutrix should be corroborated by other witnesses as to what transpired at the immediate time and place when it is alleged the assault was made." The vice imputed to this instruction is that it told the jury that they might convict the defendant without any evidence corroborating the testimony of the prosecutrix in regard to the alleged criminal act. While the law in this class of cases requires that the prosecutrix shall be corroborated, it does not demand that the corroboration shall be by direct evidence of the particular fact constituting the crime. Proof of incriminating circumstances is sufficient. (*Krum v. State*, 19 Neb. 728; *Fager v. State*, 22 Neb. 332; *Hammond v. State*, 39 Neb. 252.) This is exactly the idea which the instruction conveys. It is not susceptible, we think, of any other reasonable interpretation.

The giving of the twelfth and thirteenth paragraphs of the charge is assigned for error. They are as follows: (12.) "To constitute the crime charged in the second count of the information, there must have been an attempt to commit rape, and that intent must have been manifested by an assault for that purpose upon the person of the prosecutrix, Louise I. Lund, and in order to convict the defendant the jury must be satisfied beyond a reasonable doubt that he did use force, and that against the will of the said Louise I. Lund, in an attempt to have sexual intercourse with her." (13.) "You are instructed that to sustain a conviction for assault with intent to commit rape the evidence must show that the accused had a purpose, not only to have sexual intercourse with the prosecutrix, but must have intended also to use whatever degree of force might be necessary to overcome her resistance and accomplish his object." To entitle the state to a verdict on the second count it was necessary that there should be, not only sufficient proof of the alleged assault, but also proof beyond a reasonable doubt that the accused at the time intended to use whatever force might be necessary to overcome all resistance and accomplish his purpose. (*Krum v. State, supra; Johnson v. State*, 27 Neb. 687; *Skinner v. State*, 28 Neb. 814.) In the first of these instructions the jury were told that they could not convict the defendant without finding that he intended to use force to execute his will. In the second they were plainly informed that a conviction could not be sustained unless he intended to employ a specific degree of force. These two instructions are practically one; they deal with a particular phase of the case, and, being in juxtaposition, were undoubtedly considered together by the jury and each interpreted in the light of the other. In view of the evidence, which tends to show that the prosecutrix was a willing and active participant in the affair, or else the victim of a brutal and determined assault, we think it impossible that the jury were misled by the instructions.

A further complaint against the twelfth paragraph of the charge is that it did not tell the jury that their verdict must be based on the evidence. In *Elliott v. State*, 34 Neb. 53, it was held that the failure of the court to advise the jury that their finding must rest upon actual proof is reversible error. That case is differentiated from this by the fact the court there gave no direction at all in regard to the matter. In this case, in another part of the charge, the court told the jury that there could be no conviction without proof beyond a reasonable doubt, and that the proof should be deemed to be beyond a reasonable doubt when the evidence impressed them with a conviction upon which they would act without hesitation in the more important affairs of life. Furthermore, the jury were by the fifteenth instruction directed to carefully consider all the evidence and bring in their verdict accordingly. The objection to the instruction is without merit.

The fourteenth instruction relates to the complaints made by the prosecutrix that an outrage had been perpetrated upon her. It seems to be a perfectly accurate statement of the law on that subject and, as an abstract proposition, is not questioned by counsel for defendant. It is insisted, however, that its practical effect was to permit the jury to consider incompetent evidence received over defendant's objection. It appears that Garfield Luse, being called as a witness, testified that the prosecutrix told him of the assault immediately after it was committed. He was then asked, "Did she say that Barney Dunn had thrown her out of the buggy?" She answered, without objection, "Yes, sir." After the answer was received an objection was interposed and the court overruled it. The defendant tendered an instruction stating that the prosecutrix might be asked whether an outrage had been committed on her and that she might answer yes or no; but that the particulars of the complaint were not competent evidence, and that the testimony of Garfield Luse as to the particular facts of the

complaint should not be considered in reaching a verdict. The question propounded to Luse was manifestly improper. It plainly called for incompetent evidence, but the right to object to it was waived. A party cannot reserve his objection until his adversary's question has elicited an unsatisfactory answer. (*Oberfelder v. Kavanaugh*, 29 Neb. 427; *Brown v. Cleveland*, 44 Neb. 239; *Western Home Ins. Co. v. Richardson*, 40 Neb. 1.) The evidence being before the jury, they were entitled to consider it. The defendant's instruction was rightly refused for another reason. The rule stated in the introductory part would exclude from consideration the testimony of the prosecutrix touching the complaints made by her, notwithstanding the fact that the whole of such testimony was received without objection.

The fifth instruction requested by the defendant was properly refused, for the reason that the substance of it was included in the general charge, and because it contains an unwarranted assumption that the mother of the prosecutrix had accused her of lewdness.

Evidence of the conduct and exclamations of the prosecutrix tending to show that she was sick and lame for some days after the assault was properly received.

There is no material error in the record and the judgment is

AFFIRMED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1899.

PRESENT:

HON. T. O. C. HARRISON, CHIEF JUSTICE.
HON. T. L. NORVAL, }
HON. J. J. SULLIVAN, } JUDGES.

GEORGE W. DOANE, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED SEPTEMBER 21, 1899. No. 8968.

Statutes: MEANING OF "MAY": MUNICIPAL CORPORATIONS: SPECIAL ASSESSMENTS: INJUNCTION. The word "may," when used in a statute or enactment to impose a duty or delegate a power, the performance of which involves the protection of public or private interests, will be read as "must," and construed as mandatory.

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

The facts are stated in the opinion.

W. J. Connell and *E. H. Scott*, for appellant:

In absence of a statutory requirement, appellee was not entitled to notice, either personal or by publication,

of the passage of resolutions requiring the construction of a sidewalk in front of his premises. (*State v. Commissioners*, 29 Atl. Rep. [N. J.] 429; *Morris v. Comptroller*, 54 N. J. Law 268; *Oil City v. Lay*, 164 Pa. St. 370.)

When the charter or ordinances of a city require the giving of notice by publication, no other or different notice is necessary. (*In re Bassford*, 50 N. Y. 509; *Miller v. Mayo*, 88 Cal. 568; *Chambers v. Satterlee*, 40 Cal. 497; *Ives v. Irey*, 51 Neb. 136.)

George W. Doane, pro se:

Where the statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as "shall." (*People v. Buffalo County*, 4 Neb. 159; *Hurford v. City of Omaha*, 4 Neb. 336; *Supervisors v. United States*, 4 Wall. [U. S.] 435; *People v. Supervisors*, 51 N. Y. 405; *Johnston v. Pate*, 95 N. Car. 71.)

Reference as to notice: *Merritt v. Village of Portchester*, 71 N. Y. 309.

HARRISON, C. J.

This action was instituted to obtain an injunction against the levy of a special assessment by the city of Omaha to pay the expenses of making a sidewalk on or near the property or premises owned by the plaintiff. A trial of the issues resulted in a decree in favor of the plaintiff, and the city presents this appeal.

There are but two questions raised and discussed, both of which relate to the notice which was given, or which it was necessary to give or for the owner of the property to have, of the resolution or action of the city authorities by which the sidewalk was ordered to be made. It was and is asserted that the owner of the property had actual notice of such order. Whatever significance might have attached to actual notice, if it had existed, it must be said that the evidence on this subject was directly in conflict, and that there was none is supported by the evi-

dence, and the apparent finding thereon will not be disturbed.

At the time the city council passed the resolution which required the construction of the sidewalk in question there was in force an ordinance which provided for the publication of any such resolution during a prescribed period of time, the same to be notice to any and all property-owners to be affected; also, that on residents of the city "a copy of the resolution may be personally served," etc. The original section of the ordinance in relation to notice was of publication alone, but had been amended, the amendatory portion being applicable to notice to residents of the city. The contention herein is in regard to the construction to be given the ordinance, or, specifically, the word "may." Is it to be given its ordinary permissive signification, or is it to be read as "must," and mandatory? Within the rule for construction of statutes and enactments of the nature of the one under consideration the word "may" will be read as "must," and as mandatory. (*People v. Commissioners of Buffalo County*, 4 Neb. 150; *Hurford v. City of Omaha*, 4 Neb. 336; Sedgwick, Statutory Construction [2d ed.] 375, 14 Am. & Eng. Ency. Law 979; *State v. Mayor of Jersey City*, 30 Atl. Rep. [N. J.] 531; *People v. Commissioners of Highways*, 22 N. E. Rep. [Ill.] 596; *State v. Mayor*, 28 Atl. Rep. [N. J.] 713.) It follows that the decree of the district court must be

AFFIRMED.

HENRY W. YATES, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED SEPTEMBER 21, 1899. NO. 8969.

Statutes: MUNICIPAL CORPORATIONS: SPECIAL ASSESSMENTS: INJUNCTION.

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

W. J. Connell and *Lee S. Estelle*, for appellants.

George W. Doane, contra.

HARRISON, C. J.

It is stipulated that the decision in this cause shall be governed by that in the case of *Doane v. City of Omaha*, 58 Neb. 815, in which an opinion is filed of this date. The decree of the district court is

AFFIRMED.

STATE OF NEBRASKA V. BANK OF HEMINGFORD ET AL., APPELLEES, AND HAMILTON-BROWN SHOE COMPANY ET AL., APPELLANTS.

FILED SEPTEMBER 21, 1899. No. 8964.

1. **Insolvent State Banks:** DUTIES OF RECEIVERS. A receiver of a state bank appointed in proceedings under the provisions of section 34, chapter 8, Compiled Statutes, takes possession and holds the assets of a bank in favor of, and to assert and guard the claims of, the depositors and other creditors as the paramount and superior claims against the assets.

2. ———: PREFERRED CLAIMS. In the adjustment and settlement of claims, those of depositors and other general creditors who trusted the bank in the course and transaction of its legitimate business may be preferred over claims which originated in the pursuit and conduct of a business by the bank in which it had no legal authority or power to engage.

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

Charles B. Keller, for appellants.

Smith P. Tuttle, for receiver.

HARRISON, C. J.

The Bank of Hemingford, a corporation formed under the laws of this state, and located and in business at Hemingford, purchased a store building and lots upon

which it stood, also the stock of merchandise contained in the store, of all of which the bank afterward made a conditional sale to Mary E. Jones. The vendee defaulted in fulfillment of the conditions of the sale, and the bank took possession of the property on or about March 7, 1893, from which time until October 2, 1895, when the bank was closed and taken in charge by the state banking board, the bank had conducted the mercantile business. In the due course of proceedings to "wind up" the affairs of the bank a receiver was appointed, who took possession of the assets of the bank, inclusive of the store building, the real property upon which it was situated, also the stock of merchandise. The appellant had sold merchandise to the bank during the time the latter was running the store, and which had been placed therein as a part of the stock for sale, and sold in the course of the retail trade; and for the unpaid portions of the bill or accounts due and unpaid claims were duly presented to the receiver, each of which was returned indorsed: "Not filed, for the reason it is not a legal claim against the Bank of Hemingford. Dated December 20, 1895. Ira E. Tash, Receiver Bank of Hemingford." The appellants, by petition of intervention in the proceeding in district court wherein the receiver had been appointed, set up and asserted their respective claims, and after trial a decree was rendered by which certain claims for parties of amounts collected by the bank on accounts against a party who had owned and conducted the store (it was the conditional vendee of the bank and the debt contracted by her) were preferred, the depositors of the bank ordered paid in full, and if any assets remained they were to be applied in payment of the claims of appellants and others who had similar claims and who had also asserted them in the same manner as appellants had their claims. Appellants claim that they should have been accorded preferred claims against any amount in the hands of the receiver derived or realized from the sale of the store property, inclusive of the merchandise,

or at least should not have been postponed in favor of the other creditors of the bank. It is conceded by all parties, and is true, that the bank was not authorized to engage permanently or as a venture in the business of selling merchandise at retail, or to use the common general expression, "in keeping a store," and in so doing it proceeded without warrant in its articles of incorporation and hence without legal right. It has been decided that if a bank not authorized by its articles of incorporation engages in a business other than banking, an account for articles furnished it in and about the conduct of such business may be collected from it, and that it had no power to make the contract out of which the debt arises is of no avail to it as a defense in an action against it to recover the amount of the account. (*American Nat. Bank v. National Wall Paper Co.*, 77 Fed. Rep. 85.) But a receiver appointed, as in this case, under the provisions of our banking act will answer in such matters as herein in controversy, not alone for the bank or as representing or "standing in the shoes of the bank," but will guard, protect, and preserve the rights and interests of creditors, and look to and secure their proper adjustment relatively to all claims and each to the other. (*Barrington v. Connor*, 51 Neb. 214.)

In the absence of evidence to the contrary, and there is none, it will be presumed that the depositors dealt with the bank as a bank and not as a store-keeper, and believed it to be and trusted it as engaged in legitimate banking and not in ventures or transactions not contemplated in the articles of its incorporation, and in which its capital and funds, or a portion thereof, must be used, and they are entitled to demand of right that the funds diverted and employed for purposes other than the banking business, if such funds have been returned to or are in the possession of the bank, or, in the event of its insolvency, have been taken by its duly appointed receiver, together with any funds or property which in the course of the outside dealing have been mingled with what were

originally put to the unauthorized use by the bank, be appropriated to the payment of their just claims against the bank to the exclusion of parties who have accounts against the bank which originated exclusively in the unauthorized business. The parties who trusted the bank as a store-keeper knew that it was an incorporated bank, and must have known, or will be charged with the knowledge, that it was not properly in the retail mercantile business.

It is urged with considerable stress that quite a large percentage of the goods, the accounts or bills for which were presented to the receiver as claims by the appellants, was in the stock in the store at the time it passed into the possession of the receiver of the bank; also, that there was an account in the books of the bank in which the store figured as a party and by or from which it was possible to ascertain what money had come to the bank from the store business as a source, and in this connection that the creditors of the bank, as a store-keeper, ought to be preferred as to funds or property which came from the store to the bank or its receiver, or at least to share equally in them with the other creditors of the bank. There was evidence to the effect that "ninety per cent" of one bill of goods, the account for which was the basis of the claim of one of the appellants, remained unsold and in the stock in the store when the receiver took possession, and relative to some others of the claims of appellants similar conditions prevailed, except the per cents of goods named were smaller; but here it must be said that this is not an action to recover the specific articles or goods or their proceeds, but is in the nature of an action to recover on an account against the bank, and the evidence to which attention has been directed can have but little, if any, weight, except as it might avail to awaken and move the equitable feelings and powers of the court; but the appellants are in no position to invoke the equity powers of the courts as against the rights of the depositors and general creditors of the bank.

There was also testimony to the effect that in the books of the bank an account had been kept with the store, and the record states that some pages of the books of the bank were introduced in evidence to show portions at least of the account with the store, but these are not in the record presented here, and from all that is before us on the subject it cannot be said that there is evidence which in any degree tends to show that funds taken from the bank to the store business had been fully repaid and that there were funds or profits from the store business to which the appellants might possibly, equitably, be said to have any right to demand they be paid on their claims as distinctively and specifically, to coin an expression, store funds. The decree of the district court was right and must be

AFFIRMED.

RICHARDSON DRUG COMPANY ET AL. V. SIMON OBERFELDER.

FILED SEPTEMBER 21, 1899. NO. 8982.

Conditional Sale of Goods: FUTURE PURCHASES: AGENCY. The agreement on which this action was based *held* one of conditional sale, and not of agency; that purchases of goods made by the vendee of the contract were not, by virtue thereof, for the benefit or in behalf of the vendors. (*Richardson Drug Co. v. Teasdall*, 52 Neb. 698, 72 N. W. Rep. 1028; *Richardson Drug Co. v. Plummer*, 56 Neb. 523, 76 N. W. Rep. 1086.)

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

John P. Maule, for plaintiffs in error.

George E. Hibner, contra.

HARRISON, C. J.

The defendant in error instituted this action in the district court of Lancaster county against the Richard-

son Drug Company, the Lincoln Paint & Color Company, Thomas L. Teasdall, and Alice M. Teasdall to recover an amount alleged to be his due on an account for goods and merchandise sold and delivered to the two last-named parties, who, it was pleaded, purchased as agents for and in behalf and for the benefit of the two stated companies. The defendants in error were given a judgment against the drug company and paint and color company, grounded on the proposition that the Teasdalls were, by an agreement entered into by them and the drug company and paint and color company prior to the purchases, the charges for which were embodied in the account in suit, constituted the agents of the companies and the purchases were for them and their benefit.

The contract to which we have referred was construed by this court in an opinion in the case of the *Richardson Drug Co. v. Teasdall*, reported in 52 Neb. 698, 72 N. W. Rep. 1028; also in the decision in the case of the *Richardson Drug Co. v. Plummer*, 56 Neb. 523, 76 N. W. Rep. 1086, and in each was determined to be one of conditional sale and not one of agency, and in the latter opinion it was stated by SULLIVAN, J., who wrote it for the court, that the agreement "did not contemplate that the Teasdalls should possess any agency to purchase goods, and pledge the credit of the plaintiffs in error for their payment." This is directly in point in the present case, and conformably to the views then expressed the judgment in the case at bar is erroneous and must be reversed.

REVERSED AND REMANDED.

NEBRASKA TELEPHONE COMPANY, APPELLANT, V. JOHN F. CORNELL ET AL., APPELLEES.

FILED SEPTEMBER 21, 1899. No. 10417.

Petition for Injunction: INVALID STATUTE. A petition for equitable relief by injunction, where the allegations are of the unconstitutionality of the law or laws under which acts are threatened

or being done of which the complaint is made, is not sufficient to invoke the equity powers of the court, unless there are other allegations which complete a statement of a case for equitable relief.

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

W. W. Morsman and *A. R. Talbot*, for appellant.

C. J. Smyth, Attorney General, contra.

HARRISON, C. J.

In an act of the legislature which became by its terms of effect July 10, 1897, it was in substance provided that the board of transportation should have the power to regulate certain rates of charges of telephone companies, the power and manner of procedure by the board to be the same as possessed by it in regard to railroads. After the time stated in the act at which it should become effective a complaint was made and filed with the board in which it was alleged that the appellant company had established, or was exacting, rates for services in the state of Nebraska and the city of Omaha which were too high, unjust, and extortionate. The board was asked to investigate the charges of the complaint, and grant relief. The appellant was served with a notice issued by the board to appear and answer the complaint. The appellant presented to the board objections to its jurisdiction on the grounds that it was an unconstitutional body and the unconstitutionality of the act of 1897, to which we have before referred and under the provisions of which the complaint had been filed. The board, by its secretaries, heard arguments on the objections, overruled them, and held the matter for hearing on the merits. The appellant then commenced this action in the district court of Lancaster county, the relief sought being to enjoin further proceedings by the board or its secretaries in the matter of the complaint. It was asserted in the petition

filed that the act by which the legislature had provided for a board of transportation and its secretaries was without constitutional authority or in direct defiance, or was at least an evasion, of the constitution of the state; also, that the law of 1897, which purported to give the board power over telephone companies, was unconstitutional and void. It was further alleged that the board and its secretaries pretended to have authority to hear the complaint, to call the petitioner (appellant) before it, inquire into its business and business methods, make it produce its books and give the information apparently demanded by the complaint, and to fix rates of charges for services performed by the company for the public; that, unless restrained, the board and its secretaries would do these things, for the doing of which it pretended to have the power, to the "great expense, loss of time, annoyance, and unjust exposure of the petitioner's business, and will proceed to establish and fix the rates to be charged by your petitioner in the prosecution of its business, as hereinbefore set forth, to the great and irreparable injury of your petitioner." A temporary injunction was granted. A demurrer was filed to the petition, which on hearing was sustained and the action dismissed. The company has appealed to this court.

The finding of the district court in sustaining the demurrer was that "the petition does not state a cause of action." The question of those argued which we deem proper to examine is of the sufficiency of the facts alleged in the petition to show an injury, present or threatened, which would warrant or uphold an application to a court for the equitable remedy of injunction. It has been said by this court: "The test of equity jurisdiction is the absence of an adequate remedy at law; but an adequate remedy at law is one that is as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity" (*Richardson Drug Co. v. Meyer*, 54 Neb. 319, 74 N. W. Rep. 575. See, also, *Welton v. Dickson*, 38 Neb. 767, 57 N. W. Rep. 559); also, that

"where public officers are proceeding illegally under claim of right, they may be enjoined." (See *Morris v. Merrell*, 44 Neb. 30, and cases cited.) In each of the cases cited it fully appeared from the petition that the acts sought to be enjoined would result in injury to the complainant, and for which he had no adequate remedy. No doubt the execution of a law which is unconstitutional, if probable or necessary material injury will result for which there is no adequate remedy at law, will be enjoined, but a petition is not sufficient which merely alleges the unconstitutionality of the law under which the proceedings or acts of which there is complaint are being threatened, had, or committed; there must be other allegations which make a case for equitable relief. (*Thomas v. Rowe*, 22 S. E. Rep. [Va.] 157.) There must be further allegations which disclose some recognized ground of equity jurisdiction, such as a reasonable apprehension of irreparable injury to the complainant, no adequate remedy at law, or a resultant multiplicity of suits to be avoided. (Beach, Modern Equity Practice sec. 758.) There are allegations in the petition in the case at bar that the board of transportation is an unconstitutional body; that the laws under which it was acting and proposed to act were unconstitutional; and that a complaint against the appellant had been filed with the board, that its jurisdiction had been attacked, and the constitutional right to its existence and of the legislative acts under which it was acting presented and overruled. It is also stated that the appellant had been required to answer the complaint, and a time has been fixed for the hearing. Whether the hearing will result in an order and whether favorable or unfavorable to the appellant are matters of pure speculation or conjecture, and if made, it could not be enforced except by action in the courts, in which the objections now urged would be of as much avail as in the present suit. The only further allegations of the petition are to the effect that to be subjected to a hearing will cause the appellant business disturbances, inconvenience,

and expense. These are but statements of possible incidental results of a hearing, if one should take place. There was no statement of an actual material injury, but rather of something possible or conjectural. This was not sufficient. (*Business Men's League v. Waddill*, 45 S. W. Rep. [Mo.] 262; *People v. Canal Board of New York*, 55 N. Y. 390; 10 Ency. Pl. & Pr. 950, and note 2.) It follows that the district court was right in its finding. The conclusion reached on this branch of the case renders unnecessary the consideration of the other questions presented. The judgment is

AFFIRMED.

SULLIVAN, J., concurring specially.

I agree to the judgment of affirmance, but not to the reasoning of the foregoing opinion.

GAGE COUNTY ET AL. V. GEORGE E. KING BRIDGE COMPANY.

FILED SEPTEMBER 21, 1899. No. 8975.

1. **Claim Against County:** APPEAL BY TAXPAYER. A taxpayer may appeal from the allowance by a county board of a claim against a county. (Compiled Statutes, art. 1, ch. 18, sec. 38.)

2. ———: ———. Such appeal is not entirely a personal and private matter of the appellant, but is of public interest and concern.

3. ———: ———: PARTIES. The county is a party to the suit in the appellate court, but may not by any action therein rob the appeal of its significance or hinder or prevent the hearing of the appeal.

4. ———: ———: DISMISSAL. A court, in the exercise of the power it possesses over its process and proceedings, may dismiss an appeal from the allowance by a county board of a claim against the county, if it be shown that the appeal was not taken in good faith, but to make its dismissal the subject of sale to the claimant.

5. ———: ———: ———. The attack upon the appeal may be by motion to dismiss.

6. **Motion to Dismiss Appeal:** MISCONDUCT OF APPELLANT: LACHES. The motion to dismiss an appeal, if based on occurrences subsequent thereto or on the ground that the process and proceedings of the court are being used to further corrupt practices or purposes, should be presented as soon as may be after the facts have become known to the mover, but will be entertained at any time during the proceedings before trial on the merits, and after, if the reasons for the motion were not discovered before; and any delay in the presentment of the motion before trial will not constitute its waiver, unless it appears that the delay was purposely or without excuse.

7. **Trial Without Jury:** EVIDENCE: REVIEW. In a hearing to the court without a jury it will be presumed that none but competent and proper evidence was considered, and the reception of incompetent or improper evidence will not suffice to reverse a judgment based upon findings sustained by the evidence with the objectionable matter eliminated.

8. **Appeal From County Board:** DISMISSAL. The findings herein upon which the order of dismissal of the appeal was predicated were sustained by the evidence.

9. **Harmless Error.** Errors of the district court which were without prejudice to the rights of a plaintiff in an error proceeding to this court are of no avail.

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

L. W. Colby, for Julius A. Smith, plaintiff in error.

Samuel Rinaker, for Gage county.

E. O. Kretsinger and *J. R. Barcroft*, for defendant in error.

HARRISON, C. J.

On August 1, 1894, the board of supervisors of Gage county allowed claims in favor of the George E. King Bridge Company in the aggregate the sum of $18,438.56, and in the month of August, 1895, allowed a claim of the same company to the amount of $4,854.45, and disallowed a claim of the company for $1,409.56. From the first mentioned allowance there was an appeal to the district court by Julius A. Smith as a taxpayer of the county,

and from the second there were separate appeals by Julius A. Smith, J. H. McDowell, and Daniel Freeman as taxpayers of the county. There was also an appeal by the bridge company from the disallowance of the claim for $1,409.56. After the appeals to the district court had been perfected the bridge company filed a petition, to which Julius A. Smith filed an answer. These were filed in the appeal of the latter from the allowance of the claim of the former for $18,438.56. For Gage county there was filed an amended answer in which there appeared the following: "The said defendant further says that the said George E. King Bridge Company, for the purpose of compromising all of the claims and controversies embraced in said several suits and arising and growing out of said transactions, has agreed to receive and accept from said defendant the sum of $18,000 in full satisfaction and discharge of all claims in all said suits now pending in this court, being for the aggregate sum of $24,985.96, and release and convey all his right or interest in said bridges, approaches, and material for which said claims are made to the said county of Gage, in consideration of which the said county of Gage, by its said board of supervisors, has agreed to accept said proposition as full settlement and compromise of all such claims, demands, controversies between the said plaintiff and the said Gage county of every kind and nature, and said defendant hereby consents that judgment may be rendered in this cause accordingly. Judgment to be entered against the George E. King Bridge Company for all costs in all suits now pending." To this answer of the county the bridge company presented what was styled a "Reply and Acceptance," in which there was stated its agreement to the settlement between it and the county, as set forth in the amended answer of the latter. There is in the record on this same subject the following: "We, the undersigned, members of the Gage county board of supervisors, being informed that the honorable judge of the district court directed that the members of the board

should sign a statement as to what they were willing to do in settlement of the claims now pending in said court in favor of the George E. King Bridge Company and against Gage county, in compliance with said directions hereby state: That it is the judgment of the said supervisors that the settlement proposed by the King Bridge Company, wherein said company agree to accept warrants for $18,000 in full settlement of said claims and pay all costs in said actions, that said proposition is a fair and just settlement, and that, in the opinion of these supervisors, the county is justly indebted to the said King Bridge Company in said amount." On December 17, 1896, the bridge company filed a motion, from which we now quote:

"Now comes the plaintiff, the George E. King Bridge Company, by its duly authorized attorneys, and moves the court to strike from the files the transcript of appeals in said actions from the county clerk of said county, and dismiss said appeals, and deny said appellants J. A. Smith, Daniel Freeman, and J. H. McDowell the right and privilege to appear further in this court, for the following reason, to-wit:

"1. Said appeals have been taken by the said Smith, McDowell, and Freeman for the sole purpose of exacting money from this plaintiff, and not in good faith for the purpose of protecting their rights as taxpayers or the rights of any other of the citizens of said county as taxpayers.

"2. For the reason that said appeals were taken for a mercenary purpose and for the purpose of blackmailing this plaintiff and extorting money from him unlawfully, and not for the purpose of advancing justice or protecting the interests of any of the taxpayers of said county.

"3. For the further reason that the affidavits supporting this motion show that said Smith, McDowell, and Freeman have taken said appeal and used the process of this court for the purpose of unlawful extortion and blackmail, and that said appeals are not being prose-

cuted in good faith, but for the sole purpose of extorting money unlawfully from this plaintiff, and to the personal advantage of said appellant."

On hearing, which was of date December 18, 1896, a motion filed by the plaintiff in error to strike the amended petition of the county from the record was overruled. Judgment was rendered against the county in accordance with the statements filed by it and the bridge company, and of date December 19, 1896, an entry was made of the dismissal of the appeals of the taxpayers. The journal entry of this action, after some preliminary statements of the hearing, etc., continues as follows: "And the court, upon consideration whereof, and being fully advised in the premises, finds as follows, to-wit: That the said Julius A. Smith and the said J. H. McDowell and the said Daniel Freeman, appellants, begun and prosecuted their said appeals in bad faith, and that said appeals were begun and instituted by said Smith and McDowell and Freeman for the sole and only purpose of exacting money from the said George E. King Bridge Company, in this case, and that the said appellants have wrongfully and corruptly used the processes of this court for the purpose of levying blackmail upon the said George E. King Bridge Company, and that the said appellants were willing and anxious to dismiss their said appeals at any time the said George E. King Bridge Company would pay them their prices, to-wit, the said Julius A. Smith, $4,000, the said J. H. McDowell, $500, and the said Daniel Freeman, $500; that the said appellants did not at any time appeal said cases for the interest or benefit of themselves as taxpayers or for any other taxpayers in the county of Gage, but the sole and only inducement, motive, and object that the said appellants had in taking said appeals was for the unlawful and corrupt purpose of extorting money from the said George E. King Bridge Company for a release or dismissal of their said appeals; that the said appellants were willing, at any time from the time of the institution of their said

appeals, to sell and dispose of their pretended right in their said affiants for money so unlawfully exacted and attempted to be extorted from the said George E. King Bridge Company. The court therefore finds that the said extortion, bad faith, attempted corruption and blackmail of the said appellants have destroyed and annulled their said appeals, and that they do not exist in good faith and should not be permitted to be continued, prosecuted, or carried on further, and that the processes of this court should not be used by said appellants for base, corrupt, or unlawful purposes, and that the conduct of the said appellants in prosecuting their said appeals, if permitted to continue for the said purposes of corruption, extortion, and blackmail, will bring the court into disrepute and be a scandal upon justice and the dignity of the court. Said motion is therefore sustained and the appeals of the said Julius A. Smith, J. H. McDowell, and Daniel Freeman are hereby dismissed at their costs, taxed at $——."

Julius A. Smith presents the case to this court by petition in error.

We will first give our attention to the motion to dismiss the appeals to the extent it attacked the one taken by the plaintiff in error. During the course of the hearing the following letters were introduced:

"J. A. SMITH, ATTORNEY AT LAW,
"BEATRICE, NEB., December 13, 1895.

"*Hon. J. R. Barcroft, Des Moines, Iowa*—DEAR SIR: Yours of yesterday at hand. It, so far as I am concerned, is desired that some action should be taken at this term in all of my appeals. In the first appeal the county attorney has filed an answer for the county. He has done the same thing in my last appeal, and I think also Freeman's, but not McDonald's. Judge Bush, now holding court, holds 'that a dismissal of an appeal is the end of a case, and that it does not require an order affirming a judgment.' This ruling was in an appeal of my own from judgment of the county board. I think it would

be, if possible, better that you be here a day or two sooner than 20th. I shall in my first appeal confess your motions, and if case is not settled, ask leave to file demurrer. Our old judges both go out of the judicial harness this year, and I want these bridge matters determined before one of them if possible and convenient to you.

"Resp. yours, J. A. SMITH."

"J. A. SMITH, ATTORNEY AT LAW,
"BEATRICE, NEB., December 25, 1895.

"*Hon. J. R. Barcroft, Des Moines, Iowa*—DEAR SIR: Yours 23d inst. at hand. I am willing to dismiss appeals upon the following terms and manner: Terms $3,500, $800 to be paid from last appeal, which is to be first dismissed and money secured, when the balance, $2,700 may be deposited in Beatrice Nat. Bank by certificate in my name and indorsed in blank condition that it is to be delivered to me when you secure warrants for first appeal. I think the other appellants can be settled with for the balance of the $4,000, which you offer. I have seen Mr. Freeman. He will take $300. Have not seen McDowell, but presume his attorneys will settle for not exceeding $250. Mr. Freeman is one of the largest taxpayers in the county, and I have no doubt he could go to the supreme court should his appeal be dismissed upon your idea that but one appeal can be entertained under our statute. I want matter of settlement settled at once, or rather this term, and I think it can be done, and would suggest that you again come out notwithstanding employment of local attorney.

"Yours truly, J. A. SMITH."

"J. A. SMITH, ATTORNEY AT LAW,
"BEATRICE, NEB., December 27, 1895.

"*Hon. J. R. Barcroft, Des Moines, Iowa*—DEAR SIR: Yours 26th at hand. I have no doubt but what last appeal can be disposed of any day and money paid. As plainly indicated in my last letter, I want simply in cash, when that is done, what the last appeal leaves proportion-

ately to the total amount of both appeals, and the balance of the money deposited as indicated to await your receipt of warrants for first appeal, which I think can be accomplished, if your attorney so desires, at this term. These terms are reasonable and secures every one. I have no idea other appellant will settle with settlement contingent upon result of my first appeal,—a matter in which they have no earthly interest. I trust you will be convinced of the reasonableness of the above proposition and instruct Mr. Kretsinger to that effect. Our court will be in session, I understand, some time and I believe all appeals can be disposed of if properly pushed and presented.

"Resp. yours, J. A. SMITH."

There were also some affidavits read in support of the motion. That the letters had been written and sent was admitted, or not denied. In an affidavit Julius A. Smith stated: "That while negotiations have been entered into in the cases for the payment of a consideration for the dismissal of these appeals, they have never amounted to anything and have never been instituted or suggested in the first instance by this defendant, but always by agents or attorneys of plaintiff."

A consideration of the evidence leads to the conclusion that the court was warranted thereby in its findings, and its judgment of dismissal of the appeal, in response to the motion, was a righteous one. The decision of the motion upon the "merits" was right. It is urged in this connection that courts will not or cannot dismiss appeals on the grounds and for the reasons which sufficed for the dismissal of this one. A court will endeavor to do what is just and right, and if to effectuate its purpose calls for the dismissal of an appeal, it will be done. It is the exercise of a power inherent in the court. Where it is entirely apparent that an appeal is frivolous, the appellate court will dismiss it (*Johnson v. St. Paul R. Co.*, 71 N. W. Rep. [Minn.] 619), and we have no hesitancy in saying that where it is shown that the appeal of a matter

like the present one was for the purpose of selling the dismissal to the adverse party the appeal may be dismissed. For a discussion of the power of courts over actions or appeals and to dismiss them see *Stewart v. Butler*, 59 N. Y. Supp. 573.

It is also argued that an appellant may dismiss his appeal for a consideration. This may be true where the matter in controversy is his own private affair. We will say here that while an appeal of the nature of this one is by the one person, the taxpayer, and apparently solely for him and his benefit, it is in reality for himself and other persons of his community or the public. The only possible tenable ground which we can discover upon which the appellant might rest his right to dismiss such an appeal for a consideration is that he is only interested in the event of the suit or appeal to the extent the allowance of the claims from which the appeal was taken would increase his taxes and thereby he be damaged in such amount, and if paid his damages as a consideration, would dismiss the appeal; but herein there was, or so the court determined, an attempt to make the dismissal of the appeal a regular matter of bargain and sale. It was not that the party felt that he would be injured by the allowance of the claims or that the public would suffer, but the question was, the appeal being perfected, how much would the bridge company give to get the appeal dismissed,—a course which cannot be too strongly condemned.

At the hearing on the motion the testimony of one I. J. Frantz was received, from which it appeared that prior to the occurrences which are involved in the case at bar the county board of Gage county had allowed the witness a claim, and Julius A. Smith, as a taxpayer, had appealed from the allowance, had told the witness he would dismiss the appeal if paid $100, that the money demanded was paid, and the appeal dismissed. If the reception of this testimony was error, it is not available. The hearing was to the court, and it is presumed to consider none but

competent evidence, however much be introduced, and there was ample evidence to sustain the substantial findings regardless of this testimony of the witness Frantz.

It is further argued that the motion to dismiss the appeal came too late, that the mover had recognized the appeal by pleading and acting therein, and thus waived the right to move the dismissal. A motion to dismiss an appeal on the ground that it was not properly taken, or for defects or irregularities therein, is too late, if not presented until after pleadings filed and the cause assigned for trial. (*Claflin v. American Nat. Bank of Omaha*, 46 Neb. 884.) The motion in the matter at bar was not to dismiss the appeal because of any inherent defect in the proceedings or the invalidity of the appeal, but for the improper conduct in regard thereto of the appellant subsequent to the perfection. The right to make the motion was not waived by any participation on the part of the mover shown of record in the proceedings in the district court. The motion was filed before the case on appeal was called for trial. The question raised was not one which, in the main, affected the interests of the parties, but was more directly of the right of a party to use the court and its proceedings in a matter of public concern and make them the subjects of bargain for his own private gain. We will not now decide when a motion of the nature of this may be overruled for delay in its presentment. Under all the facts and circumstances disclosed on the hearing of the one herein, no such delay appeared.

It is also urged that inasmuch as the motion raised a question or issue of fact it was an improper, and not allowable, manner or method of procedure. The motion did not raise any issue which required an examination of the merits of the cause, but involved an inquiry relative to the acts of the appellant, in regard to which there was no conflict in the evidence. These things being shown, the determination, on motion and affidavits and other evidence, of the matter of the further hearing of

the appeal was entirely proper practice. (2 Ency. Pl. & Pr. 347.)

It is insisted that the trial court erred in its refusal to strike from the files or record the amended answer of the county, for the reason that it was not the proper party to the action on appeal and could not be heard therein to admit or confess the validity of the claim in question or any part of it, and could not, in the suit on appeal, settle or compromise with the claimant, the bridge company; and in this connection it is also urged that the court erred in rendering the judgment predicated on the settlement or compromise made and stated between and by the county and the bridge company. There is statutory authorization of an appeal by the claimant from a whole or partial disallowance by a county board of a claim against a county (Compiled Statutes, chap. 18, art. 1, sec. 37), and the method of practice is provided, bond exacted, etc. The next section of the same chapter provides as follows: "Any taxpayer may likewise appeal from the allowance of any claim against the county by serving a like notice within ten days and giving a bond similar to that provided for in the preceding section." Section 39 provides: "The clerk of the board, upon such appeal being taken, and being paid the proper fees therefor, shall make out a complete transcript of the proceedings of the board relating to the matter of their decision thereon, and shall deliver the same to the clerk of the district court; and such appeal shall be entered, tried, and determined the same as appeals from justice courts, and costs shall be awarded thereon in like manner." It seems entirely clear that the appeal by the taxpayer contemplated by the legislator was one, to a certain extent, or entirely, antagonistic to the claimant and the county by reason of being aggrieved by the action of the latter in the allowance of the claim. The county is a party to the suit after its appeal, but cannot by any action therein, by way of admission of the claim in whole or in part, rob the appeal

of its significance or rather deprive the appellant of the right to a hearing of the appeal. If it could, then the provision for an appeal by the taxpayer would be but meaningless words, and the appeal a useless and empty proceeding. Whether the judgment rendered was void or not, or whether the court could entertain or notice in the suit the compromise between the county and the bridge company, we need not now determine. Such action and judgment could in nowise abridge the right of appellant to a hearing on his appeal, nor did they. The court heard and decided the appeal matter wholly in substance separate from any other question, and adjudged, rightfully, that the appeal should be dismissed, and so ordered, and the errors, if any, in retaining the answer of the county of record and rendering the judgment on the settlement were without prejudice to the appellant.

It appears that on the applications of the appellant there had been issued orders restraining the county, its board, and the bridge company from acts in regard to the claims of the latter and the appeals from their allowances, and it is argued that the court should have stricken the answer of the county from the record because its filing was contrary to the orders of injunction, and also that the judgment of the court was based upon matter which appeared of record in contempt of said orders. The orders of injunction, even if in any manner properly within the attention or notice of the district court, were not so, or so made, in the hearing of the appeal, and could not and did not hinder or prejudice the appellant in such hearing. The order of dismissal of the appeal is affirmed. The portion of the decree which purported a judgment or adjudication of the claims against the county is not herein before this court for any action.

ORDER OF DISMISSAL AFFIRMED.

J. RALSTON GRANT, APPELLANT, V. WILLIAM O. BARTHOLOMEW, APPELLEE.

FILED SEPTEMBER 21, 1899. No. 8534.

1. **Lien of Special Taxes:** FORECLOSURE: BURDEN OF PROOF. The party who asserts and seeks the foreclosure or enforcement of the lien of special assessments or taxes has the burden of the proof or establishment of their validity.
2. **Municipal Corporations:** PAVING TAXES. Joining in a petition for the paving of a street is not a waiver of the compliance with statutory prescriptions relative to the mode of assessments and levies of taxes to pay for the work.
3. ———: EQUALIZATION: CONSTRUCTION OF STATUTE. Statutes in regard to powers and duties of boards of equalization are to be strictly construed, and in the exercise of their powers and duties the mode of procedure prescribed must be followed.
4. ———: SPECIAL TAXES: VOID LEVY: EVIDENCE. *Held*, That there was a failure of proof to show a compliance with stated statutory pre-requisites to the assessments and levies of certain special taxes involved herein.

REHEARING of case reported in 57 Neb. 673. *Judgment below affirmed in part.*

Saunders & Macfarland, for appellant.

D. L. Thomas and *William O. Bartholomew, contra.*

HARRISON, C. J.

In this, an action by the assignee of a tax-sale certificate to foreclose the lien of taxes, the relief sought was denied in the district court, and on appeal to this court the decree was reversed and the cause remanded, not for a retrial, but with directions for a decree. A rehearing was granted on motion of the appellee, not for reargument and further examination of questions involved in regard to the general taxes, but to adjust the contentions relative to some special assessments. For statement of the case and former adjudications see *Grant v. Bartholomew*, 57 Neb. 673, 78 N. W. Rep. 314.

It has been decided that he who asserts and seeks the enforcement of a lien of special assessments or taxes has the burden of the proof or establishment of their validity. (*Equitable Trust Co. v. O'Brian*, 55 Neb. 735; *Smith v. City of Omaha*, 49 Neb. 883; *Leavitt v. Bell*, 55 Neb. 57; *Merrill v. Shields*, 57 Neb. 78, 77 N. W. Rep. 368.) It has also been determined that the fact that a party joins in a petition for the paving of a street does not constitute a waiver of compliance with statutory requirements prescribing the method of assessment and levy of taxes to pay for the work. (*Wakeley v. City of Omaha*, 58 Neb. 245, 78 N. W. Rep. 511.) There were ten items of special taxes declared upon in the petition in the action,—two for paving in district No. 35, two for curbing and guttering in district No. 35, one for paving in district No. 234, two for curbing and guttering in district No. 234, and two for sidewalks, all in the city of Omaha. In respect to the two items for paving in district No. 35, the assessments were in proportion to "foot front," and it was provided by statute that it was the duty of the council to sit as a board of equalization after giving notice of the session, which should continue for not less than two days; the notice was to be published a stated number of days. The record before us discloses that there was an offer of the proof of publication of the notice, and that it was marked Exhibit 31. A reference to the exhibit named discloses a copy of a notice, but no proof of publication, and, according to the record, there was a failure to show the requisite notice. The council or board of equalization had no jurisdiction, and the assessment was void. (*Wakeley v. City of Omaha*, 58 Neb. 245, 78 N. W. Rep. 511; *Leavitt v. Bell*, 55 Neb. 57.) The notice which it is claimed was given, of which, as we have seen, there was a failure of proof of service, contained a statement that the council would be in session as a board of equalization "in the office of the city clerk on Thursday and Friday, July 15 and 16, 1886, between the hours of 9 A. M. and 12 M. and 1 P. M. and 5 P. M." In the record of the proceedings of

the council or board there appears a statement that a "recess" or adjournment was had to Saturday, July 17, 1886, at 8 o'clock P. M., and no notice of the adjourned meeting was given. It was at the latter session that the assessments were made. It was a questionable proceeding, if not fatal, though we do not decide, so to adjourn over to the evening or night-time of the day succeeding the last one designated in the notice. A somewhat similar adjournment of a county board in session as a board of equalization was held unwarranted in *Sioux City & P. R. Co. v. Washington County*, 3 Neb. 30. The notice fixed the place of meeting at the "office of the city clerk" and the record of the proceedings recited "that the council met in the council chamber." This would indicate that the meeting was at a place other than the one stated in the notice. If so, any action of the board would not be effective.

What has been said in regard to paving is equally applicable to the items of taxes for curbing and guttering in district No. 35. In this connection it further appeared that the curbing and guttering were ordered prior to the paving, and the law then in force on the subject was to the effect that "curbing and guttering shall not be ordered or required to be laid on any street, avenue, or alley not ordered to be paved, except on the petition of a majority of the owners of the property abutting along the line of that portion of the street, avenue, or alley to be curbed and guttered." There was no proof that such a petition had been presented. The petition was a necessary element of the proceedings. (*Hutchinson v. City of Omaha*, 52 Neb. 345, 72 N. W. Rep. 218; *Harmon v. City of Omaha*, 53 Neb. 164, 73 N. W. Rep. 671; *Leavitt v. Bell*, 55 Neb. 57.)

Relative to the one item of taxes for paving in district No. 234 and the two items for curbing and guttering in the same district there was proof of publication of a notice in one daily newspaper of the city, but the law required it in three. The proof was insufficient to show

legal notice, and the council had no jurisdiction. (*Wakeley v. City of Omaha*, 58 Neb. 245, 78 N. W. Rep. 511; *Leavitt v. Bell*, 55 Neb. 57.) The copy of the notice which appears in the record was of a session of the council as a board of equalization to be held "at the office of the city clerk, in Douglas county court house, on Thursday, the 17th day of October, 1889, from 9 o'clock A. M. to 5 o'clock P. M." The record disclosed a meeting in the council chamber on October 22, 1889, at 8 o'clock, an entirely different time and place. This did not show jurisdiction. There was another meeting of December 5, 1889, which figures here, but of the notice of this there was no publication shown. The assessments and levies were, under the evidence adduced, without jurisdiction. What has just been said applies with equal force to the item of taxes for sewer district No. 95.

There were two items for sidewalks. The law in force at the time these came into being contemplated that the owners of property be notified and allowed to construct the sidewalks ordered. It was not shown that such a notice had been given and the privilege of construction accorded. Unless these things were done the council could not proceed. It was without jurisdiction. (*Horbach v. City of Omaha*, 54 Neb. 83, 74 N. W. Rep. 434.)

It follows that the decree of the district court in regard to the special taxes involved in the action was correct and must be affirmed. The decree as to the general taxes is reversed and the cause remanded to the trial court to proceed in regard to the general taxes as directed in the former opinion.

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3. In sec. 5, art. 9, of the constitution the exception permitting a levy of taxes in excess of 15 mills on the dollar valuation in certain cases prohibits such levy in other cases. *Chase County v. Chicago, B. & Q. R. Co*..... 278
4. The act of June 22, 1867 (Session Laws, p. 88), making railroad companies liable, in absence of negligence, for injuries to passengers neither deprives carriers of property without due process of law, nor denies them the equal protection of the laws. *Chicago, R. I. & P. R. Co. v. Young*..... 678

Contracts. See BUILDING AND LOAN ASSOCIATIONS. CORPORATIONS, 12. INFANTS. REFORMATION OF INSTRUMENTS. SALES. SCHOOLS AND SCHOOL DISTRICTS, 3, 4.

1. Consideration for agreement by Associated Press to furnish news reports. *Western Union Telegraph Co. v. Call Publishing Co*..... 152
2. One consideration is sufficient to support all the stipulations of a contract, where such was the intention of the parties. *Boughn v. Smith*..... 590
3. A man cannot allege his wife's recalcitrance to avoid the consequence of failing to perform a lawful contract made on the assumption that she would join him in executing a conveyance. *Frenzer v. Dufrene*..... 432
4. Where stipulations of parties are dependent, and to be performed concurrently, mutual readiness to perform is an essential prerequisite to performance. *Id*..... 433
5. The doctrine of tender, where the relation of debtor and creditor exists, is not applicable to mutual and concurrent promises, but in this class of cases a party who has signified his readiness and willingness to perform has done all that he is required to do, until the other party is also ready and willing to perform. *Id.*
6. Contract *held* to bind the parties thereto to account to each other for the net profits derived from the purchase and sale

Contracts—*concluded.*

of lands under the contract, though such real estate was not specially described therein. *Boughn v. Smith*..... 590

7. Construction of a contract relating to the operation of a canning factory. *McWaid v. Blair State Bank*..... 622

8. A contract providing for a conditional exchange of securities is valid, and will be enforced according to the mutual intention of the parties thereto. *Henry & Coatsworth Co. v. Halter* 686

Corporations. See BANKS AND BANKING. SALES, 6.

Purchase of Stock.

1. One who purchased stock is not bound to examine the books of the corporation to see if he was defrauded. *Gerner v. Mosher*..... 135

Officers. Abuse of Trust. Preferences.

2. A director of an insolvent corporation cannot use his position to obtain a preference over other creditors, but a judgment obtained by him without such advantage may be upheld, though working a preference of his debt. *Nebraska Nat. Bank v. Clark*..... 183

3. Evidence *held* to show that an administrator of a deceased director did not take advantage of the position of such directorship to obtain a judgment giving the administrator a preference over other creditors of the corporation. *Id.*

4. Agreement by directors loaning money to the corporation that no one of them should have a preference *held* annulled by further action whereby notes were given for the loans. *Id.*

Discrimination in Rates.

5. Common law rules against discrimination in rates for services may apply to public service corporations. *Western Union Telegraph Co. v. Call Publishing Co*..... 192

Incorporation.

6. A general denial does not put in issue the pleaded existence of a corporation. *Fletcher v. Co-operative Publishing Co*.... 511

7. Where plaintiff's name imports a corporation, it is not essential to aver its corporate existence or to plead the act of incorporation. *Id.*

8. An unincorporated bank, exclusively owned by a private individual, is not a legal entity, though its business be conducted by a president and cashier. *Longfellow v. Barnard*.. 612

Assessment of Stock.

9. In absence of statutory authority or power given by articles of incorporation there can be no assessment against paid-up stock. *Enterprise Ditch Co. v. Moffitt*..... 642

10. Articles of incorporation and laws of the state cannot be

Corporations—*concluded.*

so amended by the legislature as to make paid-up stock subject to assessment and forfeitable for non-payment thereof. *Id.*

Stock. Laws.

11. Paid-up stock of a corporation is the personal property of the owner. *Id.*

12. Articles of incorporation and laws of the state are parts of the contract between a corporation and the owner of stock. *Id.*

Costs. See REVIEW, 5.

In a suit on a contract for payment of money, where the defense of usury is established, plaintiff is not entitled to costs. *Interstate Savings & Loan Ass'n v. Strine*..... 133

Counter-Claim. See SET-OFF AND COUNTER-CLAIM.

Counties. See BRIDGES. COUNTY JUDGE. TAXATION.

County Board.

1. Section 37, art. 1, ch. 18, Comp. Stats., regarding the audit and allowance of claims against a county is not a grant of power to the county board, but is a provision regulating the exercise of the power granted in sec. 23 of said chapter. *Perkins County v. Keith County*..... 323

New County. Division of Property.

2. Where a new county is formed out of territory of a county previously organized, the county boards of the two counties are authorized by sec. 16, art. 1, ch. 18, Comp. Stats., to meet and agree upon a division of the corporate property and of the corporate liabilities. *Id.*

3. Where a county has been divided and a new one formed, and the balance due one from the other has been definitely settled, the claim may be made the subject of an original suit in the district court without having been presented to the county board for examination and allowance. *Id*..... 324

Treasurer. State Funds.

4. The treasurers of the several counties are required to pay into the treasury of the state twice each year, and at such other times as the state treasurer may require, all funds in their hands belonging to the state. *State v. Meserve*.... 451

5. The duty of a county treasurer to pay funds into the state treasury is not discharged by his paying such funds to an express company for transmission. *Id.*

6. A county treasurer who sends state funds by express to the state treasurer, without prepayment of express charges, is entitled to receipts only for the amount received by the state treasurer after deducting the cost of carriage. *Id.*

Bonds. Notice of Election.

7. Under sec. 27, art. 1, ch. 18, Comp. Stats., notice of a propo-

Counties—*concluded.*

sition submitted to the electors of a county to issue bonds to build a court house must be given "for four weeks in some newspaper published in the county." *State v. Cherry County* 734

8. The word "for," as used in sec. 27, art. 1, ch. 18, Comp. Stats., relating to published notice of an election to vote county bonds, means "during;" and four full weeks must elapse between the date of the first publication and the day fixed for the election. *Id.*

Appeal from County Board. Fraud. Dismissal.

9. A taxpayer may appeal from the county board's allowance of a claim against the county. *Gage County v. King Bridge Co.* 827

10. A taxpayer's appeal from the county board's allowance of a claim against the county is a matter of public interest. *Id.*

11. On appeal by a taxpayer from an order of a county board allowing a claim against the county, the county is a party in the appellate court, but may not hinder or prevent the hearing of the appeal. *Id.*

12. A taxpayer's appeal from a county board's allowance of a claim against the county may be attacked by motion to dismiss. *Id.*

13. A taxpayer's appeal from a county board's allowance of a claim against the county may be dismissed when taken in bad faith or for corrupt purposes. *Id.*

14. Where a taxpayer's appeal from a county board's allowance of a claim against the county is assailed on the ground that the appeal was taken for corrupt purposes, the motion to dismiss may be entertained any time before trial of the appeal, and afterwards in case there is good excuse for the delay. *Id.* 828

15. Order dismissing a taxpayer's appeal from a county board's allowance of a claim against the county *held* sustained by the evidence. *Id.*

County Judge.

1. Failure of a county judge to pay over to his successor in office, or to the person entitled thereto, money deposited in condemnation proceedings is a breach of his official bond, for which a cause of action accrues in favor of the the person damaged. *Clark v. Douglas* 571

2. In an action on the bond of a county judge to recover money paid to him in a condemnation proceeding, evidence *held* sufficient to authorize a peremptory instruction for plaintiff. *Id.* 572

3. In an action on the bond of a county judge to recover

County Judge—*concluded.*

money paid to him in a condemnation proceeding, evidence in regard to his habits of life after receiving the funds *held* properly excluded. *Id.*

County Officers. See OFFICE AND OFFICERS.

County Treasurers. See COUNTIES, 4-6.

Courts. See TRIAL, 3.

1. The jurisdiction of the courts is not co-ordinate with that of the mob, and an accused, though a confessed bigamist, is entitled to a fair and impartial trial. *Reynolds v. State*.. 53
2. Judge's construction of rules of court will generally be accepted as conclusive. *Hunter v. Union Life Ins. Co*..... 198
3. Constitutional changes in organization of courts and in conditions have changed sec. 899 of the Code so as to make rules of the supreme court inapplicable to the district courts. *Id.*
4. By sec. 25, ch. 19, Comp. Stats. 1897, a judge of the district court is authorized to appoint and hold a special term in any county in his district for the transaction of any business that may properly come before such court. *Nelson v. Farmland Security Co*..... 604
Nelson v. Alling..... 606

Creditors' Bill. See FRAUDULENT CONVEYANCES, 7.

Criminal Law. See FALSE IMPRISONMENT. HOMICIDE. INDICTMENT AND INFORMATION. INSTRUCTIONS, 5, 7, 8, 12, 20-22. REVIEW, 60.

1. An erroneous conviction will not be affirmed on the ground that "outraged Justice has laid her avenging lash on the back of one who honestly deserves the scourge." *Reynolds v. State*..... 52

Insanity.

2. One suffering under a defect of reason to such an extent that he was incapable of distinguishing between right and wrong with respect to a particular act is not amenable to the laws against crime for having committed such act. *Knights v. State*..... 225

Verdict.

3. A verdict omitting a finding as to an essential element of the crime charged will not support a sentence, and a judgment rendered on such a verdict is void. *Holmes v. State*.. 297

Reasonable Doubt.

4. If the jury entertain a reasonable doubt as to the truth of any material allegation of the indictment, the prisoner is entitled to an acquittal. *Atkinson v. State*..... 356

Evidence.

5. Where a person is charged with the commission of a spe-

Criminal Law—*continued.*

cific crime, testimony may be received of other similar acts, committed about the same time, for the purpose only of establishing the criminal intent of the accused. *Knights v. State*..... 226

6. The state may introduce evidence to prove any number of facts and circumstances tending to connect accused with the crime, and if they are sufficient to establish his guilt beyond a reasonable doubt, he is not entitled to an acquittal because of the failure of proof with respect to one or more of the facts relied upon for a conviction. *Kastner v. State*..... 767

7. Evidence which does not tend to establish the guilt or innocence of defendant should be excluded. *Id.*

8. The state may introduce rebutting evidence to meet any pertinent issue raised by the accused in making out his case. *Id.*

9. In a criminal prosecution direct and circumstantial evidence adduced on the trial should be weighed in reaching a verdict, and it is not error in such case to so instruct the jury. *Id.*

10. Testimony purely rebuttal in its nature may be given by a witness whose name is not indorsed on the information. *Id.*

11. The test for ascertaining the sufficiency of circumstantial evidence is whether the facts and circumstances tending to connect accused with the crime charged are of such a conclusive nature as to exclude, to a moral certainty, every rational hypothesis except that of his guilt. *Id.*

Confessions.

12. One cannot be convicted of a felony upon his own unsupported extra-judicial confession that a crime has been committed. *Sullivan v. State*..... 796

13. A confession may be sufficient to prove the defendant's connection with the criminal act, but there must in all cases be proof *aliunde* of the essential facts constituting the crime. *Id.*

14. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may, with slight corroborative circumstances, be sufficient to warrant a conviction. *Id.*

15. Circumstances capable of an innocent construction may be interpreted in the light of the defendant's confession, and the fact under investigation be thus given a criminal aspect. *Id.*

Declarations.

16. A declaration may be a part of the *res gestæ* without being

Criminal Law—*concluded.*

precisely coincident with the main transaction, and it is sufficient that there was between the two an immediate causal relation, and that the statement was a spontaneous characterization of the act. *Id.*

Crops. See CHATTEL MORTGAGES, 2-4.

Damages. See ATTACHMENT, 9. BANKS AND BANKING, 10. CARRIERS, 4. DEATH BY WRONGFUL ACT. EMINENT DOMAIN. INFANTS. NEGLIGENCE. SALES, 8-10. TRESPASS.

Days of Grace. See NEGOTIABLE INSTRUMENTS, 2.

Death by Wrongful Act.

1. Under Lord Campbell's act (Comp. Stats., ch. 21) an action may be maintained by a personal representative of a decedent who left surviving one belonging to the class for whose benefit the statute was enacted and who sustained pecuniary loss. *Chicago, B. & Q. R. Co. v. Oyster*..... 1

2. Under ch. 21, Comp. Stats., the legal representative of one who died in consequence of an injury sustained through the wrongful act of another has a right of action where the injured person might have maintained a suit had he survived the injury. *Chicago, R. I. & P. R. Co. v. Young*.... 678

3. An action for death by wrongful act is for the benefit of the widow and next of kin of the deceased person, and the recovery authorized is compensation for the pecuniary loss suffered. *Id.*

4. In an action for damages the petition should disclose the names of all beneficiaries, but where the names of dependent minor children of decedent are averred, omission to allege whether he left a widow does not make the petition demurrable. *Chicago, B. & Q. R. Co. v. Oyster*..... 1

Where the facts alleged in the petition do not show that the persons, for whose benefit the suit was instituted, had a pecuniary interest in the life of the deceased person the pleading is defective. *Chicago, R. I. & P. R. Co. v. Young*.. 678

6. Damages recovered under Lord Campbell's act are assets for distribution to the widow and next of kin of decedent. *Chicago, B. & Q. R. Co. v. Oyster*..... 1

7. In a suit for damages for death by wrongful act a petition is fatally defective which discloses no survivor entitled by law to support by the person deceased, and in which, with reference to such survivor as is described, there is no averment of pecuniary injury. *Chicago, B. & Q. R. Co. v. Van Buskirk*..... 252
Chicago, B. & Q. R. Co. v. Bond..... 385

Deceit. See FRAUD.

Deeds. See ACKNOWLEDGMENTS. MORTGAGES.

1. Delivery of a deed to an agent appointed by vendee to receive it is delivery to vendee. *Sowards v. Moss*..... 119
2. Evidence *held* to sustain a finding that a deed was forged. *Lindsay v. Palmer*..... 168
3. A reservation in a deed is ineffectual to create title in a stranger to the conveyance, but may, when so intended by the parties, operate as an exception to the grant. *Burchard v. Walther*..... 539
4. A deed, though recorded, is not effective to the prejudice of third persons who acquired rights in the property before delivery of the deed. *Barnes v. Cox*..... 675

Default. See JUDGMENTS, 4. REVIEW, 4.

Deficiency Judgments. See MORTGAGES, 9-13.

Demurrer. See PLEADING, 6.

Depositions.

An exception on grounds other than incompetency or irrelevancy must be filed before trial, but need not be ruled on prior to trial, unless there is a demand for a ruling. *Union P. R. Co. v. Vincent*..... 172

Deputy Sheriff. See EXECUTIONS, 19.

Descent and Distribution.

"Baker's Decedent's Law" was never in force, and notwithstanding its adoption by the legislature and approval by the governor, it did not change, or affect in any way, the statutes regulating the descent and transmission of testate or intestate estates. *Finders v. Bodle*..... 58

Description. See CHATTEL MORTGAGES, 4.

Discrimination. See CORPORATIONS, 5.

Dismissal.

Where a taxpayer's appeal from a county board's allowance of a claim against the county has been prosecuted for corrupt purposes, the appeal may be dismissed. *Gage County v. King Bridge Co*..... 827

Divorce.

1. To prove a divorce the record of the decree, or a duly authenticated copy thereof, is the appropriate and only competent evidence. *Reynolds v. State*..... 49
2. The right of a husband to select a homestead in the separate property of the wife is a merely inchoate right, which becomes completely divested on the granting to her of a decree of divorce. *Klamp v. Klamp*..... 748

Easements. See PARTY WALLS.

Ejectment. See STATE INSTITUTIONS, 5.

1. Defendant cannot avail himself of the provisions of the occupying claimants' act (Comp. Stats., ch. 63), where all his interests in the improvements have been divested by judicial sale prior to the request for a jury to assess the value of the improvements. *La Bonty v. Lundgren*..... 648
2. In proceedings under the occupying claimants' act the successful claimant may recover rents and profits subsequent to the commencement of suit, but not those which accrued prior to that time. *Id.*

Election of Remedies.

The doctrine of election between inconsistent remedies has no application to a case where a party declares upon an express contract and demands whatever relief he may be entitled to thereunder. *Henry & Coatsworth Co. v. Halter*.. 686

Elections. See COUNTIES, 7, 8.

Eleemosynary Institutions. See STATE INSTITUTIONS.

Eminent Domain. See RAILROAD COMPANIES, 2.

1. The citizen is entitled to the use and enjoyment of the light and the air over, and the water beneath, the surface of his premises, and, in order that his neighbor may devote his property to a particular use, cannot be compelled to surrender those rights, even if fully paid therefor. *Lowe v. Prospect Hill Cemetery Ass'n*..... 94
2. Neither the court nor the legislature, except on demand of the state for its use, can compel one to sell property, even for its full value, to another for the latter's use. *Id.*
3. When a railroad has been constructed and operated, an adjacent landowner may sue at once for consequential damages to his property and recover compensation for all injuries sustained, or which will afterward accrue, from a prudent and careful operation of the road. *Chicago, R. I. & P. R. Co. v. O'Neill*..... 239
4. One intending to sue a railroad company for damaging his property by constructing and operating a railroad may wait, within the period of limitation, until the extent and character of the injury has been ascertained by experience and made susceptible of absolute proof. *Id.*
5. An abutting owner is entitled to recover as compensaton the difference between the value of the property immediately before and immediately after the completion of the improvement from which the injury results. *Id.*
6. In fixing the damages to property taken or injured the jury may take into account every element of annoyance and disadvantage resulting from the improvement, which would influence an intending purchaser's estimate of the market value of such property. *Id.*

Equalization. See MUNICIPAL CORPORATIONS, 1. TAXATION, 11.

Equity. See INJUNCTION. REVIEW, 61-63.

Error Proceedings. See REVIEW.

Estoppel. See RECEIVERS, 2.

1. Heirs, on becoming of age, are not estopped from questioning the validity of a sale of their real estate made by their guardian because he applied the proceeds of such sale to their maintenance and education. *Bachelor v. Korb*, 122 *Bachelor v. Schlautman*..... 132

2. Where a party gives a reason for his decision and conduct touching anything involved in a controversy, he is estopped, after litigation has begun, from changing his ground and putting his conduct on another and different consideration. *Frenzer v. Dufrene*..... 433

3. Where sureties execute an official bond containing a recital that the appointment has been duly made, they will not be permitted afterward, when sued on such bond, to deny the validity of the act creating the office. *Blaco v. State*... 557

Evidence. See ARSON. BANKS AND BANKING, 10. CARRIERS, 3. COUNTY JUDGE, 3. CRIMINAL LAW, 5-16. EMINENT DOMAIN, 6. FORGERY, 3. HOMICIDE, 1-4, 6. MASTER AND SERVANT, 3, 4. MORTGAGES, 16, 17, 31. PAYMENT, 2-4. RAPE. REVIEW, 29-43. SALES, 1, 8, 10. TRUSTS, 3. WITNESSES.

1. Where misrepresentations relied upon as the basis of a counter-claim were alleged to have been made to one person, proof of facts showing the misrepresentations to have been made to another person is irrelevant. *Blue Valley Lumber Co. v. Neuman*..... 80

2. Proof that use of ground for cemetery purposes would probably result in contaminating wells. *Lowe v. Prospect Hill Cemetery Ass'n*..... 94

Admissions. Pleadings.

3. Admissions of a party against interest may be proved without laying the foundation necessary in impeaching a disinterested witness. *Churchill v. White*..... 22

4. Admissions made by a litigant in his pleading are competent evidence against those who subsequently come into the suit as his successors in interest. *Miller v. Nicodemus*.. 353

5. A pleading inconsistent with an amended one subsequently filed is competent evidence as an admission of the pleader, but is not conclusive. *Id.*

Documents. Indorsements. Book Accounts. Letters.

6. Introduction of note will not carry with it an indorsement unless the offer is broad enough for that purpose. *Grant v. Clarke*..... 72

Evidence—*concluded.*

7. It is error to admit in evidence a book account or a letter until the proper foundation therefor has been laid. *Norberg v. Plummer*..... 410

8. It is not reversible error to exclude documentary evidence which has already been introduced. *Shull v. Barton*..... 742

Judicial Notice.

9. Courts will not take judicial notice that certain land is arid and, for agricultural purposes, requires irrigation. *Slattery v. Harley*..... 575

Ownership. Possession.

10. Exclusive possession of personal property is merely *prima facie* evidence of ownership. *Bookman v. Clark*..... 610

Parol Evidence.

11. It is competent to prove the ownership of a store building by parol evidence when it does not appear that such building is real estate. *Knights v. State*..... 226

12. Where both parties to an action testified to a conversation in regard to the execution of the note in suit, and plaintiff testified to admissions by defendant, rejection of the latter's offer to state what he said at the conversation *held* erroneous. *Johnson v. Opfer*..... 631

Presumptions. Officers.

13. When a rebuttable presumption possessing no inherent probative force is met by opposing evidence, it is entirely destroyed and ceases to be a factor in the trial, unless it be required to turn an evenly balanced scale. *Reynolds v. State*..... 49

14. The presumption that a public officer performed his official duties with fidelity is an arbitrary rule which loses its force when met by opposing proof. *Blaco v. State*..... 558

15. There being evidence that an inspector of oils was indebted to the state when he went out of office, and the answer containing an implied admission that he had not lawfully disbursed all moneys received for inspecting gasoline, the presumption of official faithfulness does not obtain. *Id.*

Values. Witnesses.

16. In a suit for services rendered it is error to exclude testimony of a witness who has shown himself qualified and competent to testify to the character and value of the services. *Cate v. Hutchinson*..... 232

17. To lay a foundation for testimony as to the value of goods in common use it is sufficient to show that witness, by purchasing and by pricing similar goods, is in a general way familiar with their value, the weight of his opinion being for the jury. *Langdon v. Wintersteen*..... 278

Exceptions. See BILL OF EXCEPTIONS. DEPOSITIONS. INSTRUCTIONS, 15-19. REVIEW, 44-49.

Exchange. See CONTRACTS, 8. MORTGAGES, 29.

Executions. See ATTORNEY AND CLIENT, 2. PLEDGES, 1.

Appraisement. Valuation. Liens.

1. The statutory provision for deduction of prior liens in appraising lands is solely for the benefit of plaintiff, and the failure to observe the law in that regard cannot be successfully urged by defendant as a ground for vacating the appraisement, or as an objection to confirmation. *Ballou v. Sherwood*..... 20
2. The owner of the equity of redemption cannot object to confirmation of a sale of realty on the ground that a lien prior to that under which the sale was made was not deducted from the appraiser's valuation. *Wood v. Clark*... 116
3. Where incumbrances are deducted in appraising realty under mortgage foreclosure, certificates of liens must be obtained and the copy of the appraisement, inclusive of applications for certificates of liens and the certificates, filed with the clerk of the district court prior to the advertisement of notice of sale. *Doak v. Reynolds*..... 393
4. Where no incumbrances are deducted in appraising realty the owner of the equity cannot defeat confirmation of mortgage-foreclosure sale on the ground that no certified list of liens was filed. *Id.*
5. Section 491*d* of the Code, requiring a copy of appraisement of realty to be filed in the office of the clerk of the district court, is mandatory, and a violation of its provisions is ground for vacating the sale. *Globe Loan & Trust Co. v. Wood*..... 395
6. The honest valuation of appraisers should not be set aside because other persons differed in opinion as to the value of the realty seized. *Wood v. Clark*..... 115
7. When realty has been sold, it is not for the courts to say whether the price bid was two-thirds of the fair cash value, it being the duty of the appraisers to ascertain the value of the property before it is sold. *Id*..... 116
8. The appraised value of property made under an order of sale can only be assailed for fraud. *Ballou v. Sherwood*.... 20
9. The valuation of appraisers upon realty is conclusive unless set aside for fraud, for their failure to qualify legally, or for some other equally potent reason. *Wood v. Clark*... 116
10. Low valuation fixed by appraisers is not ground for attacking appraisement. *Lockwood v. Cook*.....302, 304
11. To make low valuation fixed by appraisers a ground of attack the appraisement must be assailed for fraud. *Id.* *Michigan Mutual Life Ins. Co. v. Richter*..... 463

Executions—*continued.*

12. It is too late, after a sale of real estate under a decree of foreclosure, to question the correctness of the appraisement except for fraud. *Security Investment Co. v. Sizer*.... 669

13. An order denying a motion to vacate a judicial sale on the ground that the appraisement was too low will not be set aside when based on substantially conflicting evidence. *Nelson v. Alling*..... 606

14. An appraisement of real estate for the purposes of a judicial sale cannot be successfully assailed on the ground that the appraisers were mistaken in their valuation of the property. *Id*..... 607

15. Objections to the appraisement of property for the purpose of judicial sale must be made in the district court prior to the sale. *Scottish-American Mortgage Co. v. Nye*.... 661

16. It is error for a sheriff to cause real estate to be reappraised before he has twice advertised and offered it for sale, unless the first appraisement has been set aside. *Beardsley v. Higman*..... 257

17. An order setting aside a sale, but retaining the appraisement and directing an alias order of sale, is not void, and is not erroneous where the property has only been once offered for sale. *Id.*

18. But one appraisement of real estate is required to be made until the property has been twice advertised and twice offered for sale. *Scottish-American Mortgage Co. v. Nye*..... 661

Deputy Sheriff.

19. A deputy sheriff may perform any act for his principal in making a foreclosure sale. *Id.*

Misrepresentation of Sheriff.

20. A creditor is not responsible for erroneous representations made by an officer conducting a sale under process issued on a judgment in his favor, unless he has either authorized such representations or acquiesced therein. *Hammond v. Chamberlain Banking Co*..... 445

Sheriff's Return.

21. A sale is not void because the sheriff in his return made a mistake in stating when he received the writ. *Beardsley v. Higman*..... 257

Purchaser. Prior Liens. Injunction.

22. If one who has bought property at a judicial sale under a mistake of fact in regard to the title, discovers his error before confirmation, his ordinary remedy is an application to the court to be released from his bid. *Hammond v. Chamberlain Banking Co*..... 445

23. A purchaser at judicial sale cannot, in the absence of special circumstances, maintain an original action to enjoin

Executions—*concluded.*

the enforcement of a prior lien of which he was ignorant at the time he acquired his title. *Id.*

24. Evidence *held* to sustain findings for defendant in an action by a purchaser at judicial sale for injunction against enforcement of prior lien. *Id.*

Sale of Separate Tracts.

25. On appeal from confirmation of a judicial sale of realty it will be presumed that the sheriff did his duty in selling the property as one piece in absence of evidence that it consisted of separate tracts or lots. *Michigan Mutual Life Ins. Co. v. Richter*..... 463

26. Sale of mortgaged premises under a decree of foreclosure in the inverse order of alienation approved. *Bradfield v. Sewall*..... 637

Objections to Confirmation.

27. That a mortgagee who held the first lien and foreclosed his mortgage bought the realty at judicial sale without paying the full amount of his bid in money to the sheriff *held* not a valid objection to confirmation. *Lockwood v. Cook* 302, 304

28. Objections to confirmation of a judicial sale may be waived. *Muscatine Mortgage & Trust Co. v. McGaughey*..... 709

29. Defendants, by failing to make payments according to the terms of a stipulation, *held* to have waived objections to confirmation of a mortgage-foreclosure sale. *Id.*

Executors and Administrators. See DESCENT AND DISTRIBUTION.

1. To constitute a valid administrator's bond some person or officer must be named therein as obligee. *Tidball v. Young*, 261

2. A writing purporting to be an administrator's bond, signed by principal and sureties, approved and filed by the probate court, in which no person or officer is named as obligee is void. *Id.*

3. Evidence *held* not sufficient to sustain a finding that any sum of money was due appellant from his father and mother's estate. *Moore v. Moore*..... 238

4. An administrator cannot maintain a suit under sec. 211, ch. 23, Comp. Stats., to recover property fraudulently transferred by decedent unless there are unpaid debts and insufficient assets to pay them, and ordinarily the claims must have been allowed against the estate. *Hofmann v. Tucker* 457

5. In a suit by an administrator to charge land conveyed by decedent to his sons with claims against the estate, evidence *held* insufficient to sustain a judgment for plaintiff. *Id.*

Factors and Brokers. See MORTGAGES, 29.

1. Under a contract to find a purchaser a real estate agent may be entitled to commission, where he has been the efficient cause of the parties assuming the relation of vendor and vendee. *Hambleton v. Fort*..... 282
2. Evidence *held* sufficient to sustain a recovery by a broker on a *quantum meruit*. *Id.*
3. A real estate agent who has been instrumental in producing a purchaser for land listed with him for sale is entitled to his contract commission though the owner of the property consummate the sale in ignorance of the services rendered by the agent. *Craig v. Wead*..... 782
4. Agent's recovery in a suit for commission *held* excessive. *Id.*

False Imprisonment.

To recover the penalty prescribed by sec. 361, Crim. Code, for rearresting one discharged on habeas corpus it is only required that the conditions described in the section be shown to exist, the amount of recovery being fixed by statute. *Hier v. Hutchings*..... 334

False Representations. See SALES, 7.

Fees. See STATE AND STATE OFFICERS, 6-8.

Final Orders. See INTOXICATING LIQUORS. REVIEW, 50.

Findings. See TRIAL, 4.

Foreclosure. See EXECUTIONS. TAXATION, 5, 8.

Forfeiture. See INSURANCE, 7-14.

Forgery. See DEEDS, 2.

1. Under a charge of uttering a forged instrument there should be set forth a copy, or the purport of each material portion, of the instrument. *Davis v. State*..... 465
2. Under a charge of uttering forged instruments evidence of similar acts on the same day may be received to show the guilty knowledge or intent of accused. *Id.*
3. Record in a forgery case *held* to show that there was a material variance between the instrument pleaded and the one proved. *Sutton v. State*..... 567

Fraud. See SALES, 6. TRUSTS, 3.

1. In an action for false representations it is not necessary to aver or prove that the party making them knew they were untrue. *Gerner v. Mosher*..... 136
2. One who makes a false representation under circumstances which would render him liable if it were made voluntarily is not excused by the fact that the law required him to make a true statement of the character counted upon. *Id.*

Fraud—*concluded.*

3. The rule whereby one seeking to recover property obtained from him by fraud need not reimburse the guilty party for moneys expended in pursuit of the fraudulent scheme, will not relieve the party seeking to recover from discharging such burdens as would rightfully have devolved upon him if the transaction had been carried out in good faith. *Bourgeois v. Gapen*..... 364

4. Fraud is never presumed but must be proved. *Knapp v. Fisher* 651

Fraudulent Conveyances. See EXECUTORS AND ADMINISTRATORS, 4.

1. A fraudulent vendee of property may mortgage it to secure a *bona fide* creditor of vendor, consent of the latter to such disposition of the property being implied in the conveyance by which he invested vendee with the title. *Longfellow v. Barnard*..... 612

2. A private individual who owns an unincorporated bank may lawfully dispose of its assets to pay or secure the just claims of any of his creditors, though the business of the bank is conducted by a president and cashier. *Id.*

3. An assignment of a fraudulent mortgage to secure a creditor of mortgagor is valid without any consideration moving from assignee to assignor, such a transaction being in substance a release of the fraudulent mortgage and the execution of a new mortgage by debtor to creditor. *Id.*

4. Whether or not a transfer of property is fraudulent as to the creditors of the vendor is a question of fact to be determined from the evidence. *Knapp v. Fisher*..... 651

5. Question of fraud involving the validity of a transfer of hardware, notes, and accounts, *held* one of fact for the jury. *Sloan v. Thomas Mfg. Co*..... 714

6. Where facts rendering a transfer fraudulent as to creditors appear on the face of the instrument, or are undisputed, the question may be one of law for the court. *Id.*

7. In a petition in the nature of a creditors' bill to annul a fraudulent conveyance the facts of the asserted fraud must be specifically stated, general allegations not being sufficient. *Kemper v. Renshaw*..... 513
Turner-Frazer Mercantile Co. v. Renshaw..... 515

8. Evidence *held* to sustain a finding that the conveyance assailed was not fraudulent. *Barnes v. Cox*..... 675

9. Finding that a transfer of hardware, notes, and accounts was not fraudulent, *held* sustained by the evidence. *Sloan v. Thomas Mfg. Co*..... 714

Guaranty. See LIMITATION OF ACTIONS, 2.

Where the guarantor of a note tenders the holder the amount due, which the latter declines to accept, stating that he

Guaranty—*concluded*..

will not hold the guarantor for the debt, but will look to the maker alone for payment, and the guarantor, in reliance on such promise, omits to obtain indemnity, or otherwise changes his position with reference to the maker or suffers damages, he is discharged to the extent he has been thereby damaged. *McAllister v. Pitts*..... 424

Guardian and Ward.

1. *Caveat emptor* applies to a purchaser at a guardian's sale of realty. *Bachelor v. Korb*..... 122
2. The statutory requirement that a guardian shall give bond before selling his ward's realty is mandatory, and the courts have no discretion in regard to such requirement. *Id.*
   Bachelor v. Schlautman..... 132
3. A guardian's sale of realty is void unless the guardian first executed to the judge of the district court a statutory bond which the judge approved. *Bachelor v. Korb*..... 122
   Bachelor v. Schlautman..... 132
4. In sec. 64, ch. 23, Comp. Stats., the clause, "in case any bond was required by the court upon granting the license" has reference to sales of realty by foreign guardians who have given bonds to the courts appointing them. *Id.*
5. Before fixing the time and place of sale of the ward's realty the guardian must take and subscribe the oath prescribed by statute, or the sale will be void. *Id.*
6. The date of the first publication of the notice of the guardian's sale of realty is the date on which the guardian fixes on the time and place of sale. *Id.*

Habeas Corpus. See FALSE IMPRISONMENT.

Hallowe'en. See ASSAULT, 1.

Harmless Error. See REVIEW, 51-56.

Highways.

1. When a highway is vacated the land reverts to the abutting proprietor. *Clark v. Mossman*..... 92
2. Under sec. 46, ch. 78, Comp. Stats., declaring section lines to be public roads, a county board may open such roads for travel and remove obstructions therefrom. *Demary v. Carlson* 546

Home for the Friendless. See STATE INSTITUTIONS.

Homestead. See ADVERSE POSSESSION. MORTGAGES, 25. QUIETING TITLE, 1.

1. When a homestead is selected from the property of the husband, it vests on his death in his widow for life and afterwards in his heir or devisee in fee simple. *Finders v. Bodle*..... 58

Homestead—*concluded.*

2. Homestead of husband and wife can only be conveyed by an instrument acknowledged by both. *Interstate Savings & Loan Ass'n v. Strine*..... 133

3. Under sec. 2, ch. 36, Comp. Stats., a husband cannot acquire a homestead in the separate property of the wife except with her consent. *Klamp v. Klamp*..... 748

4. While by ch. 36, Comp. Stats., the husband is described as the head of the family, or the person who may take the necessary steps to protect the homestead from forced sale, he is not thereby given the exclusive dominion over the homestead or the right to the proceeds and profits derived therefrom, when the property is the separate property of the wife. *Id.*

Homicide.

1. Proof of intent is necessary to sustain a conviction under a charge of assault with intent to murder. *Ward v. State*.. 720

2. Under a charge of assault with intent to murder, the intent may not be susceptible of proof by independent evidence. *Id.*

3. Under a charge of assault with intent to murder, the intent may not be presumed from the assault, where it did not result in bodily injury. *Id.*

4. Under a charge of assault with intent to murder, the intent may be gathered from all the evidence and circumstances including the assault, and is a matter of fact for consideration of the jury. *Id.*

5. In a prosecution for murder in the first degree it is not reversible error for the court to properly advise the jury respecting the distinction between the different degrees of murder. *Kastner v. State*..... 767

6. Where the fact of killing is shown, and no extenuating or mitigating circumstance is proven, malice is presumed, and the crime of murder in the second degree is established. *Id.*

7. Where accused procured a revolver in a saloon, went fifty feet, fired a shot and killed a man, ran back to the saloon, threw the revolver on the floor, and exclaimed, "My God! I have killed Tom Kirkland, my best friend," then hurried back to the dying man, raised his head, and again declared he had shot his best friend, and that he would be hanged, it was held that such declarations constituted parts of the *res gestæ*, and were legitimate independent evidence of the homicidal act. *Sullivan v. State*..... 797

Husband and Wife. See CONTRACTS, 3. DIVORCE. HOMESTEAD, 3, 4.

1. A married person will not be absolved from the bonds of

Husband and Wife—*concluded.*
matrimony by believing, even upon information apparently reliable, that the marriage has been dissolved by death or divorce. *Reynolds v. State*..... 49

2. Public policy forbids that the permanence of the marriage relation should depend upon anything so precarious as the mental state of one of the parties. *Id.*

3. A mortgage executed by a married woman upon her separate property, other than a homestead, to secure her husband's debt constitutes a valid and enforceable lien, though not acknowledged as required by law. *Fisk v. Osgood*..... 486

4. A married woman may own and control both real and personal property. *Booknau v. Clark*..... 610

5. There is no presumption that chattels in possession of husband and wife belong to the husband. *Id.*

Improvements. See EJECTMENT.

Indemnity. See PRINCIPAL AND SURETY, 4.

Indians. See INTOXICATING LIQUORS, 1.

Indictment and Information. See ASSAULT, 5. FORGERY, 3.

1. An information will sustain a conviction of a lower offense involved in that charged. *Mulloy v. State*..... 204

2. Under sec. 487 of the Criminal Code, where the crime charged embraces different degrees, accused may be convicted of any one of the lesser degrees. *Id.*

3. Section 487 of the Criminal Code, authorizing a conviction for an offense of a less degree than that charged in the information extends to prosecutions for offenses subsequently created. *Id.*

4. An information for an assault with intent to commit great bodily injury, framed under sec. 17*b* of the Criminal Code, will sustain a conviction for an assault and battery, where proper averments disclose that such minor offense was included in the commission of the one charged. *Id.*

5. An information containing the caption, "State of Nebraska, Greeley County, ss.," and charging that a designated crime was committed "in said county and state aforesaid," alleges the venue with sufficient certainty. *Dunn v. State*... 807

6. Where the name of the victim of a criminal assault is the same in two counts of an information, the law presumes that the reference in both counts is to the same person. *Id.*

7. Where it is necessary to allege an intent to defraud it is sufficient to allege that accused did the act with intent to defraud, without alleging an intent to defraud any particular person or body corporate. *Davis v. State*..... 465

Indorsements. See NEGOTIABLE INSTRUMENTS, 1.

Infants.

An infant who hires a team of horses for a specified journey, and injures them by driving to another place, is liable in damages for the tort, though it was connected with the contract; and his infancy is no protection. *Churchill v. White* 22

Injunction. See EXECUTIONS, 23. JUDGMENTS, 22. RAILROAD COMPANIES, 2. TAXATION, 5. WATERS, 3.

1. A court of equity has jurisdiction to enjoin a threatened injury whenever its nature is such that it cannot be adequately compensated in damages and its continuance would occasion a constantly recurring grievance. *Lowe v. Prospect Hill Cemetery Ass'n*..... 94
2. Under facts stated in opinion, *held* that plaintiffs were without an adequate remedy at law for redress of apprehended injuries from defendants' use of land for cemetery purposes. *Id.*
3. A petition alleging the unconstitutionality of a statute under which certain acts are threatened is insufficient unless there are other allegations which complete the statement of a case for equitable relief. *Nebraska Telephone Co. v. Cornell*..... 823

Insanity. See INSTRUCTIONS, 20-22.

Inspector of Oils. See STATE AND STATE OFFICERS, 2-8.

Instructions.

1. An instruction is not prejudicially erroneous, though awkward in phraseology, and ungrammatical, provided its meaning is clear. *Langdon v. Winterstein*..... 279
2. In a felony case it is reversible error for a court to charge the jury that it may find the defendant guilty if it entertain a reasonable doubt of the truth of each or all of the material allegations of the indictment. *Atkinson v. State*.. 356
3. Where the conclusion reached by the jury is right and is the only one permissible under the pleadings and proofs, it is immaterial whether the instructions of the court correctly stated the law applicable to the issues. *Booknau v. Clark*..... 610
4. Where instructions correctly state the propositions they assume to cover and fairly submit to the jury the only controverted question in the case, the verdict will not be disturbed. *Holbert v. Chilvers*..... 665
5. An instruction is not erroneous for stating that a conviction on either count of an information would be warranted only by proof beyond a reasonable doubt of the essential elements of the crime charged in such count; and that there might be a conviction on one count and an acquittal on the other, *Dunn v. State*..... 808

Instructions—*continued.*

Agency.

6. In a proper case failure to instruct the jury that agency cannot be established by mere declarations of an alleged agent may be error. *Norberg v. Plummer*..... 410

Assuming Facts.

7. There is not an assumption of any fact in an instruction plainly professing to be a mere statement of the material averments of the information. *Knights v. State*..... 225

8. In the trial of a criminal case the court is not ordinarily justified in assuming the existence of any material fact put in issue by the plea of not guilty. *Id.*

9. It is not error to refuse a proffered instruction which assumes the existence of a fact not proved. *Ottens v. Fred Krug Brewing Co*..... 331

Construction.

10. Upon review instructions should be considered as an entirety. *Chicago, B. & Q. R. Co. v. Oyster*..... 2

11. Instructions must be considered together. *Philamalee v. State* 321

12. Two paragraphs of a charge to the jury, one immediately following the other, will be considered together, and treated as one, when they relate to a particular phase of the case, and each is plainly complemental of the other. *Dunn v. State*..... 808

Contradictions.

13. An erroneous instruction is not cured by merely giving another instruction stating the law correctly on the subject. *Chicago, B. & Q. R. Co. v. Oyster*..... 2

14. An erroneous instruction is not cured by merely giving another instruction on the same subject stating the rule correctly. *Williams v. McConaughey*..... 656

Exceptions and Objections.

15. There must be an exception to an instruction when given, to obtain a review. *Omaha Brewing Ass'n v. Bullnheimer*.... 387

16. An instruction will not be reviewed where no exception was taken thereto at the time the charge was read to the jury. *Walker v. Allen*..... 537

17. Failure to file instructions before they are read to the jury is not reversible error, where a specific exception was not taken on that ground before they were read. *Fire Ass'n of Philadelphia v. Ruby*..... 730

18. The failure of the trial court to number consecutively the instructions is not reversible error if no exception was specifically taken on that point at the time they were given. *Kastner v. State*..... 767

Instructions—*continued.*

19. Objections not raised by motion for a new trial cannot be successfully urged on review. *Sullivan v. State*..... 796

Insanity. Burden of Proof.

20. It is prejudicially erroneous to inform the jury in a criminal case, where the defense is insanity, that want of capacity on the part of the prisoner to understand the nature of the act in question, at the time of its commission, is necessary to render him irresponsible. *Knights v. State*.... 225

21. The court in its charge may properly say that when the presumption of sanity encounters opposing proof the burden is upon the state to satisfy the jury, by evidence beyond a reasonable doubt, that the accused was sane at the time he committed the alleged criminal act. *Id.*

22. In a criminal prosecution it is reversible error to instruct the jury upon the question of insanity that the burden of proof shifts from the prisoner to the state during the progress of the trial. *Id.*

Issues.

23. Instructions should be confined to the issues in the case. *Williams v. McConaughey*..... 656

24. It is error to give an instruction which withdraws from the consideration of the jury a material issue of fact in the cause. *Shull v. Barton*..... 742

Negligence.

25. Instruction on contributory negligence *held* not prejudicially erroneous when considered in connection with the entire charge. *Omaha Brewing Ass'n v. Bullnheimer*..... 392

Repetitions.

26. It is not error to refuse an instruction the substance of which has been already given. *Langdon v. Wintersteen*..... 279

27. After a jury has been informed that there can be no conviction without proof beyond a reasonable doubt, and that their conclusion should be based on the evidence, failure to reiterate such statments in other instructions is not error. *Dunn v. State*..... 808

Requests.

28. A party cannot predicate error upon the giving of a vague instruction, unless he has requested a proper one. *Chicago, B. & Q. R. Co. v. Oyster*..... 2

29. A party cannot predicate error upon an instruction in harmony with one given at his own request. *Shiverick v. Gunning* 29

30. One cannot complain of an instruction stating the rule contained in an instruction requested by himself. *Kastner v. State*..... 767

Instructions—*concluded.*

31. A litigant should not be heard to complain that the trial court did not present particular features of a case to the jury, where he has not requested an appropriate instruction. *Philamalee v. State*..... 321

32. One requesting an instruction on a specific point cannot complain that the court, on its own motion, gave an instruction on the same subject. *Smith v. State*..... 531

Theory.

33. It is not error to refuse an instruction which, in its theory, has no support in the proof adduced. *Shiverick v. Gunning*, 29

Insurance. See PLEDGES, 2.

Accident Insurance. Overexertion. Lifting.

1. It cannot be said as a matter of law that the slight elevation of a 300-pound weight by a strong man accustomed to lifting is "voluntary overexertion," within the meaning of an accident policy exempting assurer from liability for injuries resulting from such a cause. *Rustin v. Standard Life & Accident Ins. Co*..... 792

2. The term "voluntary overexertion" in a policy of accident insurance means conscious or intentional overexertion, or a reckless disregard of consequences likely to ensue from great physical effort. *Id.*

3. A condition in a contract of casualty insurance forbidding unnecessary lifting is not broken by an act of lifting which was apparently reasonable and performed in the line of duty. *Id.*

4. In a suit on an accident policy evidence introduced by plaintiff *held* to require submission of case to the jury. *Id.*

Assignment of Policy.

5. Evidence *held* insufficient to show an assignment of a policy of life insurance or of rights conferred by its provisions. *Norfolk Nat. Bank v. Flynn*..... 253

Change of Title.

6. Where insured and wife conveyed insured realty to their son, and the latter conveyed it to his mother to be held in trust for her husband, the insurance was terminated under a provision of the policy forbidding a change of title. *Farmers & Merchants Ins. Co. v. Jensen*..... 522

Forfeiture. Waiver. Premium.

7. When an insurer has taken advantage of a forfeiture and has elected to treat the policy as void, the contract is at an end and cannot be revived, except by mutual consent of the contracting parties. *Home Fire Ins. Co. v. Kuhlman*.... 488

8. An inference of waiver may be drawn from any declaration or conduct of the insurer which fairly indicates that it has,

Insurance—*concluded.*

with full knowledge of the facts, freely chosen to treat the policy, and deal with it, as a valid and subsisting contract. *Id.*

9. Where insurer declines to take advantage of a forfeiture after obtaining knowledge of a breach of the policy, the contract remains in force. *Id.*

10. A policy providing that it shall be null if the house become vacant is not void upon violation of the condition, unless insurer chooses to take advantage of the forfeiture. *Id.*

11. An agent of a corporation, acting within the scope of his authority, may, by his declaration or conduct, waive his principal's right to take advantage of a forfeiture. *Id.*

12. A waiver, to be effective in defeating a forfeiture, need not rest on either a new agreement or an estoppel; and when once made it is irrevocable. *Id.*

13. When an insurer has elected to treat a policy of insurance as void for breach of condition providing for a forfeiture, the assured has no claim upon the company for any unearned premium. *Id.* 489

14. Forfeitures are not favored, and to be available as a defense to an action must be pleaded and strictly proved. *Farmers & Merchants Ins. Co. v. Norman* 504

Incumbrances. Litigation.

15. A condition in a policy of fire insurance against an increase of incumbrances is not broken by a mere change in the form of an existing incumbrance. *Id.*

16. An action to foreclose a mortgage on insured property *held* not a violation of a provision of the contract forbidding litigation involving such property without consent of insurer indorsed on the policy. *Id.*

Interest. See MORTGAGES, 22. TAXATION, 12. USURY.

1. Where parties have agreed upon a rate of interest less than seven per cent for forbearance of a debt, a judgment predicated upon the contract will bear interest at seven per cent. *Connecticut Mutual Life Ins. Co. v. Westerhoff* 379

2. Where parties have contracted for a rate of interest greater than seven per cent, a judgment which has for its basis said contract will bear the rate fixed by the contract. *Id.*

Interlocutory Order. See BILL OF EXCEPTIONS, 1, 2. REVIEW, 45.

Interstate Commerce. See CORPORATIONS, 5.

Intoxicating Liquors.

1. In a prosecution for selling intoxicating liquor to an Indian evidence *held* to sustain a conviction, instructions to be founded on the evidence, and certain evidence to be material and its admission not error. *Tate v. State* 296

Intoxicating Liquors—*concluded.*

2. Where a license was issued, an appeal taken, license suspended, appeal determined in favor of applicant, and the license reissued, the licensee was entitled to repayment of the proportion of the license fee for the time the license was suspended. *City of Auburn v. Mayer*..... 161

3. Under sec. 4, ch. 50, Comp. Stats., an unsuccessful remonstrator may appeal from an order granting a license to sell intoxicating liquors, but cannot appeal from an order overruling his protest against the issuance of a license. *Moores v. State*..... 608

4. The provision of the statute requiring every license board to reduce to writing all the testimony taken on the hearing of any remonstrance and file the same in the proper office is for the benefit of those entitled to have such testimony reviewed in the district court. *Id.*

Irrigation. See WATERS.

Judgments. See CORPORATIONS, 2. INTEREST. MORTGAGES, 9-13. MUNICIPAL CORPORATIONS, 10, 11. PRINCIPAL AND SURETY, 2. RES JUDICATA. SCHOOLS AND SCHOOL DISTRICTS, 7. SHERIFFS AND CONSTABLES, 3.

Assignments. Payment.

1. One cannot, except under special circumstances, become the assignee of a judgment against himself. *Henry & Coatsworth Co. v. Halter*..... 685

2. Where payment has been made by one who is primarily liable, it operates as an absolute satisfaction, though an assignment be made to a third person with the intention of keeping the judgment alive. *Id.*

3. A judgment which has been paid and extinguished by the owner of land upon which it was a lien cannot be afterwards revived for the purpose of cutting out other liens. *Id*..... 685

Default.

4. The default of a defendant admits the truth of each averment of the petition aside from those of the amount of value or damages. *Grant v. Clarke*..... 72

5. Defendant against whom judgment has been rendered by default may, during term, and after three days from date of judgment, as a matter of judicial grace, ask for a new trial, and the request may be granted regardless of the form in which it is made. *Bradley v. Slater*..... 554

Dormant Judgment.

6. A judgment becomes dormant on which no execution has been issued and levied before the expiration of five years next after its rendition. *Dillon v. Chicago, K. & N. R. Co.*.. 473

Judgments—*continued.*

Judgment on Pleadings.

7. Where defendant pleaded part payment, and plaintiff admitted the payment and demanded and recovered judgment on the pleadings, it was *held* that the record supported the judgment. *Omaha Loan & Trust Co. v. Kitton*..... 114

Lien.

8. A judgment lien binds only the debtor's actual interest in land. *Chicago, B. & Q. R. Co. v. First Nat. Bank of Omaha*.... 548

Modification.

9. Jurisdiction of a district court to modify its judgment after the term is limited to the grounds enumerated in sec. 602 of the Code. *Dillon v. Chicago, K. & N. R. Co*..... 472

10. A district court has no power to vacate or modify its judgment after the term, on the ground that error of law had been committed by it in rendering such judgment. *Id*.... 473

11. A court of general jurisdiction possesses inherent power to vacate or modify its own judgments at any time during the term at which they are pronounced. *Bradley v. Slater*..... 554

12. The inherent power of a court over its own judgments is not abridged by sec. 314 of the Code relating to new trials. *Id.*

13. A decree of foreclosure, after final adjournment of the term, cannot be changed in any essential particular without due notice to parties interested and an opportunity to be heard. *Anderson v. McCloud-Lore Live Stock Commission Co*.. 670

14. After adjournment of the term the court retains jurisdiction for the purpose of enforcing the decree, not for the purpose of destroying it. *Id.*

Parties.

15. Persons not parties to the action *held* not entitled to the enjoyment of personal privileges accorded by the decree to those who were impleaded. *Slattery v. Harley*..... 575

Presumption of Payment. Revivor.

16. Lapse of fourteen years after entry of judgment and before proceeding to revive it, without issuance of execution, raises presumption of payment, but the presumption may be overcome by proof of non-payment. *Wittstruck v. Temple*, 16

17. The presumption of payment arising by the lapse of time cannot be invoked by the judgment debtor when he has not tendered the issue of payment in the proceeding to revive. *Id.*

18. In a proceeding to revive a dormant judgment the defendant may interpose as a defense that such judgment is void on the ground that the court entering it had no jurisdiction over his person. *Id.*

Judgments—*concluded.*

Supersedeas. Set-Off.

19. A judgment which has been superseded and is pending for review cannot be pleaded as a set-off in another action between the same parties. *Spencer v. Johnston*..... 44

Void Judgments. Injunction.

20. A judgment which the court had no authority to render in any case, under any circumstances, is void for want of jurisdiction. *Finders v. Bodle*..... 58

21. A decree of the county court assuming to vest in a widow the absolute title to a homestead selected from the lands of her deceased husband is void. *Id.*

22. A court of equity will not grant relief against an irregular or void judgment unless it appears that there is a defense to the action in which the judgment was rendered. *McBride v. Wakefield*..... 442

23. Where summons was served on defendant within the time limited by statute, a judgment against him is not void because the sheriff failed to make his return during the life of the writ. *Graves v. Macfarland*..... 802

Judicial Notice. See EVIDENCE, 9.

Judicial Sales. See EXECUTIONS, 23. GUARDIAN AND WARD.

Jurisdiction. See JUDGMENTS, 18. REMOVAL OF CAUSES. REVIEW, 57-59.

Jury. See REVIEW, 29.

1. Misconduct of jurors in visiting and examining the locality of an accident, without permission of the court or knowledge of the parties, is not ground for setting aside the verdict, where it is disclosed that such view did not influence the finding. *Chicago, B. & Q. R. Co. v. Oyster*..... 2

2. An opinion formed from newspaper reports and general rumors may not disqualify a juror who states that he can render a fair and impartial verdict upon the evidence. *Ward v. State*..... 719

3. In ruling on a challenge for cause the court may consider, *inter alia*, the appearance and actions of the juror during the examination. *Id.*

4. A ruling on a challenge for cause will not be disturbed on review unless clearly wrong. *Id*..... 720

Laches. See EMINENT DOMAIN, 4.

Landlord and Tenant. See PAYMENT, 3.

Larceny.

1. A general verdict of guilty of larceny from the person is fatally defective where the value of the property is not stated. *Holmes v. State*..... 297

Larceny--*concluded.*

2. While an instruction defining larceny is erroneous which omits to charge that the taking must be with a felonious intent, the instruction need not use the word "felonious," if words of equivalent import or meaning are employed. *Philamalee v. State*..... 320

Letters. See EVIDENCE, 7.

Liens. See ATTACHMENT. CHATTEL MORTGAGES. JUDGMENTS. MORTGAGES. TAXATION.

Limitation of Actions. See EMINENT DOMAIN, 4. MECHANICS' LIENS, 3.

1. The statute of limitations begins to run against a contract of guaranty the moment an action accrues thereon. *Cummins v. Tibbetts*..... 318
2. An action on contract set out in the opinion, guarantying the payment of a note, *held* barred in five years from the maturity of such note. *Id.*
3. An action to recover on an implied assumpsit is barred at the expiration of four years after the cause of action arose. *Markey v. School District*..... 480
4. Action to recover a sum of money alleged to be due upon an open account *held* not barred by the statute of limitations. *Sibley v. Rice*..... 785

Mandamus.

1. A litigant's right to the allowance of a bill of exceptions embracing the evidence on application for an interlocutory order may be enforced by mandamus. *State v. Dickinson*.. 56
2. A judge may be ordered to fix the amount of a supersedeas allowed by statute. *State v. Fawcett*..... 371
3. A judge will not be mandamused to allow a supersedeas resting in his discretion. *Id.*
4. It is reversible error to grant a peremptory writ upon the pleadings alone, where a material averment of the application has been denied by the answer. *Woodward v. State*.. 598
5. Approval of an official bond will not be enforced by mandamus where the application fails to show that the bond was executed by sufficient competent sureties. *Id.*
6. Where it does not appear that a saloon license was granted over remonstrator's protest, he cannot by mandamus compel the license board to reduce to writing and file in their office the testimony taken on the hearing of the remonstrance. *Moores v. State*..... 608

Marriage. See HUSBAND AND WIFE.

Master and Servant.

Appliances. Machinery. Road-bed.

1. A railroad company is only required to exercise reasonable

Master and Servant—*concluded.*

and ordinary care and diligence in furnishing its employés a reasonably safe road-bed, machinery, and appliances. *Chicago, B. & Q. R. Co. v. Oyster*..... 2

2. The law does not impose upon a railroad company the absolute duty of providing a reasonably safe roadway, but makes the company liable for negligence in that regard. *Id.*

Injury to Servant. Evidence. Negligence.

3. Testimony describing positions of decedent and an engine, shortly after the accident, *held* admissible as *res gestæ*. *Id.*

4. In an action against a master for personal injuries testimony in relation to transactions between plaintiff and defendant after the injury, and the opinion of a third person as to defendant's mistreatment, *held* incompetent. *Omaha Brewing Ass'n v. Ballnheimer*..... 387

5. That a section-crew remained on a railway track to remove their hand-car and thus prevent a collision with an approaching train will not alone establish contributory negligence on part of the crew. *Dailey v. Burlington & M. R. R. Co*..... 396

Rules of Master.

6. A railroad company's rules of which an employé had no notice *held* not binding on him. *Chicago, B. & Q. R. Co. v. Oyster*..... 2

Fellow-Servants.

7. Where a master insists that a servant was injured through negligence of a fellow-servant the burden is on the master to prove it. *Id.*

8. In a suit for damages for death by wrongful act it is doubtful whether a master's claim that the accident was occasioned by the negligence of a fellow-servant of decedent is available without being pleaded. *Id.*

9. Evidence *held* not to show that an employé causing an accident was a fellow-servant with plaintiff's intestate. *Id.*

Risks of Employment.

10. An employé assumes the ordinary risks of his employment. *Dailey v. Burlington & M. R. R. Co*..... 396

Mechanics' Liens.

1. A finding of the trial court upon conflicting evidence as to the amount due upon a mechanic's lien will not be disturbed unless clearly wrong. *Henry & Coatsworth Co. v. Halter*..... 686

2. An architect is entitled to a mechanic's lien upon a building which has been constructed in accordance with plans prepared by him under contract with the owner. *Id.*

3. Where labor or material has been furnished by a party

Mechanics' Liens—*concluded.*

under distinct contracts, the claim for a mechanic's lien under each contract must be filed within the time limited by the statute for that purpose. *Id.*

Merger.

Whether a merger results from the possession by the same person at the same time of two estates of different rank in the same property depends generally on the intention of the owner. *Longfellow v. Barnard*..... 612

Mistake. See EXECUTIONS, 21.

Mob. See ASSAULT, 1.

Mortgage Foreclosure. See EXECUTIONS.

Mortgages. See FRAUDULENT CONVEYANCES, 1, 3. HUSBAND AND WIFE, 3. INSURANCE, 16. MERGER. PLEDGES, 1. USURY, 5.

Consideration.

1. A pre-existing debt already due is a sufficient consideration for the execution of a mortgage securing the same. *Longfellow v. Barnard*..... 612

Conveyance of Land. Assuming Debt. Deeds.

2. Where a deed recites that grantee assumes a mortgage against the premises, he is personally liable to mortgagee for the amount of the mortgage debt. *Martin v. Humphrey*, 414

3. Mortgagee contracting with mortgagor to take care of other liens on the property may purchase and take an assignment of a lien thereon and on other property, and may afterward assert such lien against the other property, though mortgagor was legally bound to discharge the lien against it. *McBride v. Wakefield*..... 442

4. A deed, for which no valuable consideration has been given, is not entitled to take precedence of a prior unrecorded mortgage of which the grantee in such deed had no actual notice. *Fisk v. Osgood*..... 486

5. Evidence *held* sufficient to sustain a finding that the parties to a deed absolute in form intended it as a mortgage. *Wilde v. Homan*..... 634

Default. Right to Declare Debt Due.

6. When authorized by the terms of the mortgage, mortgagee, after default in payment of interest, may declare the entire debt due and foreclose without previous notice to mortgagor of the election to do so. *Connecticut Mutual Life Ins. Co. v. Westerhoff*..... 379

7. Mortgagor's failure to pay taxes *held* such a breach of the mortgage as to authorize foreclosure, though the debt, by the terms of the mortgage, had not matured and mortgagee had himself paid the taxes. *Hartuff v. Hall*, 417

8. Where a mortgage note provided that the entire debt

Mortgages—*continued.*

should become due, at the option of the holder, in case a negotiable interest note should remain unpaid for ten days after its maturity on May 1, such option was *held* prematurely exercised May 13. *Id.*

Deficiency Judgments.

9. Failure to determine by decree of foreclosure an issue tendered as to defendant's liability for a deficiency judgment does not render the decree interlocutory or erroneous, or invalidate the sale. *Brown v. Johnson*..... 222

10. Defendant's liability for a deficiency judgment may be litigated after the coming in of the report of sale. *Id.*

11. A deficiency judgment against a purchaser of mortgaged premises is not void because the personal liability of such purchaser is not shown by the petition, but it is sufficient if the fact is disclosed by the answer of the mortgagor who, claiming to stand in the attitude of a surety, demands exoneration. *Graves v. Macfarland*..... 802

12. Prior to 1897 the court, in a foreclosure suit, was authorized to render a deficiency judgment against a purchaser who had assumed and agreed to pay the mortgage. *Id.*

13. Jurisdiction to render a deficiency judgment under sec. 847 of the Code did not depend on notice other than that of the original summons. *Id.*

Foreclosure. Pleading. Evidence.

14. The owner of a mortgage debt may foreclose the mortgage for the unpaid interest coupons, subject to the unmatured principal of the debt. *Omaha Loan & Trust Co. v. Kitton* 113

15. In foreclosure for failure to pay an interest coupon, an averment in the petition that plaintiff had assigned the unmatured principal note is immaterial, and need not be proved. *Id*..... 114

16. Note and mortgage when introduced in evidence are not sufficient to sustain an allegation that no action at law has been instituted. *Kirby v. Shrader*..... 316

17. Where the answer in a foreclosure suit is a general denial, plaintiff is not entitled to relief without proof that no action at law has been brought for recovery of the debt. *Id. Miller v. Nicodemus*..... 352

18. In foreclosure default in payments *held* admitted by the answer. *Connecticut Mutual Life Ins. Co. v. Westerhoff*..... 379

19. In foreclosure an essential averment of the petition is that no proceedings at law have been instituted for collection of the debt. *Miller v. Nicodemus*..... 352

20. In mortgage foreclosure postponement of further litiga-

Mortgages—*continued.*

tion of an asserted lien *held* not improper or erroneous. *Bradfield v. Sewall*..... 637

Interest.

21. An interest coupon providing for higher interest from maturity than is exacted on the principal may be enforced. *Connecticut Mutual Life Ins. Co. v. Westerhoff*..... 379

22. In a note and mortgage a provision that the debt shall bear a higher rate of interest in case of default in payment of a coupon is in the nature of a penalty and will not be enforced. *Id.*

Mechanic's Lien. Priority.

23. The lien of an ordinary mortgage is not subordinate to mechanics' liens, merely because the money which it was given to secure was loaned for the purpose of improving the mortgaged premises, and under an express contract that it shall be so used. *Henry & Coatsworth Co. v. Halter*.. 686

Payment.

24. Evidence of payment. *Miller v. Stevenson*..... 305

Receivers.

25. The remedy of appointing a receiver to take charge of mortgaged realty in a foreclosure suit is not applicable where the property is the homestead of mortgagor. *Chadron Loan & Building Ass'n v. Smith*..... 469
Laune v. Hauser..... 663

26. A receiver will not be appointed on foreclosure when the debtor is insolvent, merely because the property at some future time may become insufficient to pay the mortgage debt. *Laune v. Hauser*..... 663

Redemption. Accounting.

27. On a bill to redeem from a mortgage on vacant land which has no rental value, the mortgagor cannot, in the accounting, receive credit for either use and occupation, or for interest in lieu thereof. *Bourgeois v. Gapen*..... 364

28. On a bill to redeem from a mortgage, mortgagor will not be credited on the accounting for a depreciation in value of the mortgaged property during a period when the mortgagee was resisting redemption and claiming absolute ownership. *Id.*

29. In a suit to redeem land conveyed by deed intended as a mortgage to secure grantee's advances and expenses in protecting the property while it remained in his control for sale or exchange, it was *held* that plaintiff was chargeable with sums paid by defendant in satisfying liens, in making repairs, and in efforts to sell and rent, and with commissions for exchange of property and with taxes paid on property received in exchange. *Id.*

Mortgages—*concluded.*

30. A junior incumbrancer is entitled to redeem a senior incumbrance and to an assignment of the security redeemed. *Anderson v. McCloud-Love Live Stock Commission Co*..... 670

Release.

31. A release of a mortgage which recites that the entire debt has been paid, but releases only a portion of the mortgaged property, is not conclusive evidence of the fact recited. *Id.*

32. Release by a senior mortgagee of a portion of the mortgaged property will, if made with notice of a junior mortgage, operate in favor of the junior mortgagee as a satisfaction of the senior mortgage to the extent of the value of the property released. *Id.*

Motions.

A motion which cannot be sustained substantially as made may be overruled. *First Nat. Bank of Chadron v. Engelbrecht*, 639
Dobry v. Western Mfg. Co..... 667
Draper v. Taylor..... 787

Municipal Corporations. See SCHOOLS AND SCHOOL DISTRICTS.

Equalization. Notice.

1. Notice of the sitting of the city council as a board of equalization under section 21, chapter 13, Session Laws 1889, by publication for at least six days prior thereto is an indispensable prerequisite to legal action. *Wakeley v. City of Omaha*..... 245

Mayor. Ineligibility.

2. In case of ineligibility of the person receiving the highest number of votes at the first general election for mayor, under the Omaha charter of 1897, the president of the council should exercise the office, and not the former incumbent. *State v. Moores*..... 235

Ordinances.

3. An ordinance imposing an occupation tax, but providing only an illegal method for its enforcement, *held* inoperative. *City of Omaha v. Harmon*..... 339

4. The word "may," in an ordinance providing that notice to build a sidewalk may be personally served on the property owner, should be construed as "must." *Doane v. City of Omaha* 815
Yates v. City of Omaha..... 817

Taxation. Illegal Assessments. Sales. Judgments.

5. In absence of statutory authority a city of the metropolitan class cannot be required to refund money received from a purchaser of real estate at a sale made thereof by the county treasurer for illegal special assessments or taxes imposed by the city. *McCague v. City of Omaha*..... 37

Municipal Corporations—*concluded.*

6. Sections 69, 94, ch. 12*a*, Comp. Stats. 1889, and sec. 144, ch. 77, do not authorize the recovery from a metropolitan city of moneys received by it under a tax sale made to enforce the collection of illegal special taxes levied by the municipality. *Id.*

7. That an owner of adjacent property signs a petition for paving a street in a prescribed manner does not furnish grounds for the presumption that petitioner assents to irregular or void proceedings of the city council in the performance of such duties as may devolve upon it after the pavement shall be completed. *Wakeley v. City of Omaha*.... 245

8. A void special assessment is not validated by the mere fact that payments thereon have been voluntarily made. *Id.*

9. One enforcing the lien of special assessments must establish their validity. *Hartsuff v. Hall*..... 417
Grant v. Bartholomew..... 839

10. By art. 6, ch. 77, Comp. Stats., power is conferred to levy taxes upon the taxable property of a city to pay a judgment rendered against the corporation. *Dawson County v. Clark*.. 756

11. A tax may be levied to pay a judgment against a city having less than 5,000 inhabitants, or a village, though the maximum amount of taxes authorized by statute to be assessed for general corporate purposes has been imposed. *Id.*

12. Proof *held* insufficient to show that certain special taxes were assessed and levied as directed by statute. *Grant v. Bartholomew*.....839

13. Joining in a petition for paving a street does not waive the statutory mode of assessing and levying taxes to pay for the improvement. *Id.*

Murder. See HOMICIDE.

Names. See CORPORATIONS, 7.

Identity of name ordinarily affords a presumption of identity of person. *Dunn v. State*..... 807

Negligence. See CARRIERS, 6. DEATH BY WRONGFUL ACT. MASTER AND SERVANT.

1. In an answer a general allegation of contributory negligence is good as against a demurrer *ore tenus*. *Chicago, B. & Q. R. Co. v. Oyster*..... 2

2. A general averment that defendant was negligent, without setting out the negligent acts or omissions, is sufficient, unless the petition is attacked by motion. *Union P. R. Co. v. Vincent*..... 172

3. One negligently exposing himself to danger may recover damages from another who negligently injured the former

Negligence—*concluded.*

after discovering his exposed position. *Dailey v. Burlington & M. R. R. Co*..... 396

4. One injured in prudently attempting to avoid the negligent and dangerous act of another may recover from the latter damages for the injury. *Ellick v. Wilson*..... 584

5. Rulings in giving and in refusing instructions *held* not erroneous. *Id*..... 585

6. Whether an injury is directly caused by an act or arises or flows from the act proximately or naturally is a practical question rather than a theoretical one. *Id*..... 584

7. Whether negligence and peril existed, and whether an attempt to avoid such peril was prudent and reasonable, *held* questions for the jury. *Id*..... 585

Negotiable Instruments. See GUARANTY. PLEDGES, 1. SET-OFF AND COUNTER-CLAIM. USURY.

1. Where plaintiff's averment of ownership by indorsement is denied in a suit on a note, introduction of the note in evidence, without referring to the indorsement, does not establish plaintiff's right to recover. *Grant v. Clarke*..... 72

2. A debtor is entitled to days of grace on a negotiable coupon interest note. *Hartsuff v. Hall*..... 417

3. When the owner and holder of a past due negotiable note receives payment thereof from the maker or other person liable thereon, the obligation is extinguished, and if it be afterwards transferred to another, the transferee will acquire no better title or greater right than the transferrer possessed. *Root v. Fast*..... 498

4. Evidence *held* to sustain a finding that plaintiff and his assignor purchased the note in suit after maturity, and that nothing was due on the note when the action was brought. *Davis v. Culver*..... 266

5. Evidence *held* to sustain a finding that a note had been paid before an alleged assignment of the note had been made. *Root v. Fast*..... 498

6. Evidence showing defendant stated in a conversation with plaintiff that defendant did not execute the note sued on, *held* erroneously excluded. *Johnson v. Opfer*..... 631

Newspapers. See TELEGRAPH COMPANIES.

New Trial. See REVIEW, 60-68.

1. In an action for damages for death by wrongful act misconduct of jury in examining the place of the accident without permission of the court or knowledge of the parties, *held* not sufficient cause for granting a new trial. *Chicago, B. & Q. R. Co. v. Oyster*..... 8

2. Where parties jointly move for a new trial the court will

New Trial—*concluded.*

overrule the motion unless all are entitled to the relief demanded. *Spencer v. Johnston*..... 44

3. Sufficiency of petition to state a cause of action may be raised on motion for a rehearing. *State v. Moores*..... 285

4. A motion filed after final adjournment of the term is without force. *Doolittle v. American Nat. Bank*..... 454

5. It is not error for the court to strike from the files a motion for a new trial filed after the time limited by the statute for that purpose. *Nelson v. Farmland Security Co.*. 604

6. A motion for a new trial on the ground of newly-discovered evidence should ordinarily be supported by the affidavit of the party making the application, as well as by the affidavit of his attorney. *Draper v. Taylor*..... 787

7. In support of a motion for a new trial on the ground of newly-discovered evidence the affidavit of the new witness should be produced or its absence accounted for. *Id.*

Notice. See BILL OF EXCEPTIONS, 3, 4. GUARDIAN AND WARD, 6. SUMMONS. TAXATION, 9.

Nuisance.

1. The object of an action to enjoin a private nuisance is to prevent defendant from using his property in such a manner as to disturb the plaintiff in the reasonable use and occupancy of his property, and a tenant for life may maintain such a suit. *Lowe v. Prospect Hill Cemetery Ass'n*..... 94

2. A use of property whereby the owner works an irreparable injury to property of a neighbor, or violates the laws of decency, or deprives another of the reasonable and comfortable use of his property, or endangers health and life, is a private nuisance, and may be enjoined. *Id.*

3. To enjoin a private nuisance it must be established by satisfactory evidence that the injury threatened would probably result. *Id.*

4. Evidence *held* to sustain a finding that appellants' use of grounds for cemetery purposes would probably result in contaminating the wells of appellees, thus endangering their health and lives. *Id.*

Oath. See GUARDIAN AND WARD, 5.

Objections. See WITNESSES, 4.

Occupying Claimants. See EJECTMENT.

Office and Officers. See COUNTY JUDGE. EVIDENCE, 14, 15. MUNICIPAL CORPORATIONS, 2. SHERIFFS AND CONSTABLES. STATE AND STATE OFFICERS.

1. A public officer is required to perform the duties of his office, however onerous they may be, for the compensation fixed by law. *State v. Meserve*..... 451

Office and Officers—*concluded.*

2. The law authorizing the appointment of an officer and requiring him to give a bond is constructively incorporated into the bond when executed, and the validity of such law is affirmed by the signers of the bond. *Blaco v. State*..... 557

3. Bonds of county officers must be joint and several in form. *Clark v. Douglas*..... 571

4. In an action on an official bond for damages for breach of the obligation it will not be adjudged void because joint alone, but will be held good to the extent it complies with statutory requirements in regard to form. *Id.*

5. Where an officer holding for two terms fails to account for money received during the first term, the date of the misappropriation not being shown, the presumption prevails that the money continued in his official custody until proof is adduced to the contrary. *Id*..... 572

6. Under sec. 17, ch. 10, Comp. Stats., an officer having public funds or property in his control, who is re-elected, should not have his bond approved until he has produced and fully accounted for such funds and property. *Woodward v. State*, 598

7. Section 17, ch. 10, Comp. Stats., providing that an officer who has been re-elected shall not have his bond approved until he has accounted for the public funds in his control, is mandatory, and applies to a county treasurer elected as his own successor. *Id.*

Oil Inspector. See STATE AND STATE OFFICERS, 2-8.

Orders. See ASSIGNMENTS, 1.

Ordinances. See MUNICIPAL CORPORATIONS, 3, 4.

Parties. See ATTACHMENT, 1. CHATTEL MORTGAGES, 5-7. DEATH BY WRONGFUL ACT, 3, 4. DEEDS, 3. EVIDENCE, 4. JUDGMENTS, 15. REPLEVIN, 5. SCHOOLS AND SCHOOL DISTRICTS, 6.

1. An action should be brought in the name of the real party in interest,—the person entitled to the avails of the action. *Union P. R. Co. v. Vincent*..... 173

2. Where plaintiff in his petition makes a person a defendant and alleges that he refuses to join as plaintiff, the reason for such refusal need not be stated. *Id.*

3. Defect of parties plaintiff, appearing on the face of the petition, is waived unless raised by demurrer. *Id*..... 174

Party Walls.

Owners of a party wall, built at joint expense, are not tenants in common, but each owns in severalty the part thereof situated on his own land, with an easement of support from the other part. *Shiverick v. Gunning*..... 29

Payment. See JUDGMENTS, 16, 17. MUNICIPAL CORPORATIONS, 8. NEGOTIABLE INSTRUMENTS, 3. USURY, 2, 3.

1. Evidence as to payment of mortgage. *Miller v. Stevenson*.. 305
2. Where payment is pleaded in an action on an account, the jury may consider evidence in regard to prior related transactions between the parties, to aid in determining whether the plea is sustained. *Ottens v. Fred Krug Brewing Co*.....331
3. A receipt for rent for a particular month is presumptive evidence that the rent which previously accrued has been paid. *Id.*
4. A bank check in the usual form is not, even when paid and returned to the drawer, an acknowledgment that the money therein mentioned has been received for, and applied to, a particular purpose. *Id.*

Penalty. See FALSE IMPRISONMENT.

Physicians and Surgeons. See EVIDENCE, 16.

Pleading. See CARRIERS, 4, 5. DEATH BY WRONGFUL ACT, 5, 7. EVIDENCE, 4, 5. FRAUDULENT CONVEYANCES, 7. INJUNCTION, 3. JUDGMENT, 7. MANDAMUS, 5. NEGLIGENCE, 2. PARTIES. SALES, 1. SHERIFFS AND CONSTABLES, 2. VENDOR AND VENDEE, 3.

1. Ultimate or issuable facts to be established should be alleged in a pleading. *Markey v. School District*..... 479
2. To "set out" means to recite or state in full. *First Nat. Bank of Chadron v. Engelbercht*..... 639

Accord and Satisfaction.

3. Answer in the nature of a plea of accord and satisfaction *held* not to state a defense. *Van Housen v. Broehl*..... 348

Allegations Undenied.

4. It is not necessary to prove undenied allegations. *Bradfield v. Sewall*..... 637

Amendments.

5. An amendment may be allowed, where it does not change the issues, nor affect the *quantum* of proof. *Cate v. Hutchinson* 232

Conclusions of Law.

6. The averment of a mere conclusion of law in a pleading will not be taken as admitted by the filing of a general demurrer. *Markey v. School District*..... 479
7. Conclusions of law in a pleading will be disregarded. *Woodward v. State*..... 598

Confession and Avoidance.

8. A defense in the nature of a confession and avoidance, to be available, must be pleaded. *Lowe v. Prospect Hill Cemetery Ass'n* 95

Pleading—*continued.*

Copy of Instrument.

9. The proper method to require plaintiff to attach to his petition a copy of the instrument sued on is by motion. *First Nat. Bank of Chadron v. Engelbrecht*..... 640

10. A petition disclosing a cause of action is not open to attack by general demurrer, or to the objection that it is insufficient to support a decree, because plaintiff failed to attach to the pleading a copy of the instrument upon which the action is based. *Id.*

Definiteness and Certainty.

11. One cannot predicate error on the refusal to require the pleading of the opposite party to be made more definite and certain where prejudice has not resulted from the ruling. *Chicago, B. & Q. R. Co. v. Oyster*..... 2

Demurrer.

12. A demurrer admits all that may be implied, by reasonable and fair intendment, from statements of the pleading assailed. *Dailey v. Burlington & M. R. R. Co*..... 397

Inconsistency.

13. In a suit on an account for services an answer containing a general denial and averring that the charges are unreasonable and unjust does not present inconsistent defenses. *Cate v. Hutchinson*..... 232

14. A defendant may plead as many grounds of defense as he may have, provided they are not so repugnant that if one be true another must be false. *Id.*

15. A motion to compel a defendant to elect upon which of two inconsistent defenses he will proceed to trial comes too late after issue has been joined by filing a reply. *Vernon v. Union Life Ins. Co*..... 494

Petition. Sufficiency.

16. Failure of plaintiff to show a right of action in himself may go to the sufficiency of the pleading to state a cause of action, and may not be waived by failure to demur for want of capacity to sue. *State v. Moores*..... 285

17. Sufficiency of a petition to state a cause of action, when the defect is substantial, is open for consideration throughout the proceeding, and may be raised on motion for rehearing. *Id.*

18. Insufficiency of a petition to state a cause of action may be raised for the first time in the appellate court. *Kemper v. Renshaw*..... 513
Turner-Frazer Mercantile Co. v. Renshaw..... 515

Separate Statements.

19. Where distinct causes of action are blended in the petition, the only appropriate remedy is a motion for an order re-

Pleading—*concluded.*

quiring a separate statement and designation. *Chicago, R. I. & P. R. Co. v. O'Neill*..... 239

Variance.

20. There is a variance between allegations that claims were allowed against an estate and proof that the claims were presented but not adjusted. *Hofmann v. Tucker*..... 457

Pledges. See USURY, 5.

1. Where notes secured by mortgage are pledged as collateral security and the mortgage is foreclosed by pledgee, who purchases the realty at the judicial sale with intent to acquire title thereto, pledgor may affirm the sale, demand credit for the amount bid, and, if in excess of the debt, recover the balance. *Ross v. Barker*..... 402

2. In a case involving a wife's pledge of policies of insurance on the life of her husband to secure his debts, the evidence was *held* sufficient to support a finding that the contract authorized extensions of time for payments, and that the extensions when made did not release the pledge. *First Nat. Bank of Omaha v. Goodman*..... 701

Police Powers. See CARRIERS, 6.

Possession. See VENDOR AND VENDEE, 7.

Preferred Claims. See BANKS AND BANKING, 12.

Preferring Creditors. See CORPORATIONS, 2-4.

Presumptions. See EVIDENCE, 13-15.

Principal and Agent. See FACTORS AND BROKERS. INSURANCE, 11. MORTGAGES, 29. VENDOR AND VENDEE, 5.

1. Evidence *held* to present a case for the jury, on the theory of an agent's implied or apparent authority. *Houghton v. Todd*..... 360

2. The rule that an agent's knowledge is imputed to his principal does not apply where the agent is engaged in an independent fraudulent scheme without the scope of the agency. *Id.*

3. Agency cannot be established by mere declarations of an alleged agent. *Norberg v. Plummer*..... 410

4. A principal cannot adopt the beneficial part of his agent's unauthorized contract and repudiate the remainder. *Martin v. Humphrey*..... 414

5. An agent cannot bind his principal beyond the limits of his actual or apparent authority; and the declared willingness of a principal to ratify a conditional contract will not operate as a ratification of an unconditional contract of which he is ignorant. *Henry & Coatsworth Co. v. Halter*.... 686

Principal and Surety. See ESTOPPEL, 3. REPLEVIN, 4.

1. In an action on the bond of a public officer the sureties

Principal and Surety—*concluded.*

cannot successfully defend on the ground that the money which their principal missappropriated was received by him for official acts irregularly performed. *Blaco v. State*.. 557

2. Failure of the clerk of the district court in entering judgment against principal and sureties to make the entry show who are sureties is reversible error. *Id*..... 558

3. Failure of a creditor to prosecute a claim against the estate of a deceased surety does not release co-sureties. *Clark v. Douglas*..... 572

4. A mortgage given to indemnify a surety or guarantor is in legal effect a security to the owner of the debt, even though he did not originally rely on it or know of its existence. *Longfellow v. Barnard*..... 612

Process. See SUMMONS.

Property. See NUISANCE.

Public Policy. See HUSBAND AND WIFE, 2.

Questions for Court. See FRAUDULENT CONVEYANCES, 6.

Questions for Jury. See FRAUDULENT CONVEYANCES, 5.

Quieting Title.

1. Pleadings and findings *held* to support a judgment against one seeking to have a cloud removed from the title to her homestead. *Holmes v. Lincoln Salt Lake Co*..... 74

2. Evidence *held* to sustain a finding that a mortgage had been paid. *Miller v. Stevenson*..... 305

3. Plaintiff may allege in his petition as many claims of ownership as he may have. *Draper v. Taylor*..... 787

4. Finding for plaintiff *held* to be sustained by the evidence. *Id.*

Quo Warranto. See PLEADING, 17.

Railroad Companies. See CARRIERS. EMINENT DOMAIN. MASTER AND SERVANT.

1. Construction of a fenced lane across the right of way of a railroad company and beneath a bridge carrying tracks, so as to provide a subway for the passage of live stock, is not so foreign to the purposes of a grant of land for railroad purposes that grantor can complain thereof as an abandonment of the right of way or as a trespass upon his reversionary rights. *Reichert v. Keller*..... 178

2. Under facts stated in opinion it was *held* that a company should not be enjoined from operating its road until after payment of a dormant judgment rendered in a condemnation proceeding. *Dillon v. Chicago, K. & N. R. Co*..... 473

Rape.

1. To warrant a conviction for an assault with intent to com-

Rape—*concluded.*

mit a rape the evidence must show beyond a reasonable doubt that accused at the time intended to use whatever force might be necessary to overcome all resistance and accomplish his purpose. *Dunn v. State*..... 803

2. It is not essential that prosecutrix be corroborated by direct evidence of the particular fact constituting the crime, proof of incriminating circumstances and corroborative facts being sufficient. *Id.*

3. An instruction that "a strong, able-bodied woman could protect herself when a girl fourteen years old could not," *held* not erroneous. *Id.*

4. Evidence *held* sufficient to sustain a verdict against one charged with a felonious assault. *Id*..... 807

5. Evidence of the conduct and exclamations of the prosecutrix, tending to show that she was sick and lame for several days after the assault, is competent. *Id*..... 803

Ratification. See ASSIGNMENTS, 3. PRINCIPAL AND AGENT, 4, 5. SCHOOLS AND SCHOOL DISTRICTS, 4.

Real Estate Agents. See FACTORS AND BROKERS.

Receipt. See PAYMENT, 3.

Receivers. See BANKS AND BANKING, 11. MORTGAGES, 25, 26.

1. An insolvent bank in the hands of a receiver may resist an application for an order on the receiver to sell realty. *State v. Fawcett*..... 371

2. An insolvent bank by consenting to the appointment of a receiver is not thereby estopped from resisting an application for an order requiring him to sell realty. *Id.*

3. The appointment of a receiver is in the nature of an execution, and by it the court is able to reach only the actual interest of the debtor in the property impounded. *Longfellow v. Barnard*..... 612

Redemption. See MORTGAGES, 27-30.

Reformation of Instruments.

Under facts stated in opinion, a purchaser of land *held* not entitled to a decree reforming the bond for a deed so as to make it express his own understanding of the effect of the contract of purchase. *Clark v. Mossman*..... 87

Rehearing. See NEW TRIAL.

Release. See MORTGAGES, 31, 32.

Remittitur.

1. Defendant in error may be permitted to file a remittitur where his recovery was excessive. *Craig v. Wead*..... 784

2. Where plaintiff's recovery was excessive he was permitted

Remittitur—*concluded.*
to remit the excess as a condition of affirmance of the judgment. *Albright v. Peters*..... 535

Removal of Causes.
An order of a federal court remanding a cause to the state court for want of jurisdiction is, as to that question, conclusive in the state court. *Gerner v. Mosher*..... 135

Rents and Profits. See EJECTMENT, 2.

Replevin. See CHATTEL MORTGAGES, 5.
1. Under a general denial defendant may prove any fact which amounts to a defense to plaintiff's cause of action. *Daris v. Culver*..... 265
2. In a suit for mortgaged chattels securing a note owned by plaintiff, defendant, under a general denial, may show that plaintiff is indebted to him for labor in an amount equal to the amount due on the note. *Id*..... 266
3. Rulings in giving and in refusing instructions *held* not erroneous. *Summers v. Simms*..... 579
4. Section 189 of the Code providing when an officer is notified by defendant that he excepts to the sureties on a replevin bond the sureties must justify "upon notice as bail on arrest," was not rendered inoperative by the repeal of secs. 152-180 of the Code relating to arrest and bail. *Shull v. Barton* 741
5. Two persons having separate and distinct claims to the possession of the same property may join in an action of replevin therefor. *Id*..... 745

Res Gestae. See HOMICIDE, 7.

Res Judicata. See TAXATION, 6.
1. A judgment rendered by a court having jurisdiction of the parties and of the subject-matter, as between such parties, conclusively settles all questions litigated, unless subsequently reversed or modified in the manner provided by law. *Dillon v. Chicago, K. & N. R. Co*..... 472
2. Decision on former appeal as to ownership of property *held* conclusive upon the parties and their privies. *Klamp v. Klamp* 748

Review. See COUNTIES, 9-15. INSTRUCTIONS. INTOXICATING LIQUORS, 3, 4.
1. To secure a reversal error must affirmatively appear. *Union P. R. Co. v. Vincent*..... 172
2. Error will not be presumed, but must affirmatively appear. *Mercantile Trust Co. v. O'Hanlon*..... 482
3. To warrant a reversal it must affirmatively appear from the record that the ruling with respect to which error is

Review—*continued.*

alleged was prejudicial to the rights of the party complaining. *Dobry v. Western Mfg. Co.* 667

4. The overruling of a motion to vacate a decree rendered upon default regularly entered will not be disturbed, unless it is made to appear that there has been an abuse of discretion by the court below. *Mercantile Trust Co. v. O'Hanlon*.. 483

5. Mere payment of costs by an unsuccessful litigant is not a waiver of the right to appeal from the judgment rendered on the merits. *Woodward v. State*..... 598

Abstracts of Record.

6. Where a cause brought up on error is submitted under section 1 of rule 2, the printed abstract must include the petition in error, or an abstract of assignments of error, and a failure in that regard will work an affirmance. *O'Neill v. Flood*..... 218

7. The printed abstract must include the petition in error, or an abstract of the assignments of error therein contained. *Manning v. Freeman*..... 485

8. In a cause submitted under section 1 of rule 2 on an agreed printed abstract the court will not look beyond the abstract, and unless error affirmatively appears therefrom the judgment below will be affirmed. *O'Neill v. Flood*..... 218

9. Where a case is submitted on an agreed printed abstract, the court will not look beyond the abstract. *Manning v. Freeman* 485

Appeal and Error.

10. Where a party files a petition in error within the time limited by law for prosecution of error, he thereby abandons the appeal previously docketed in the case. *Slobodisky v. Curtis*..... 211

Assignments of Error.

11. In a petition in error an assignment that the verdict is not sustained by sufficient evidence, and is not in accordance with the evidence and instructions, is specific enough to require a review of the evidence to ascertain whether it supports the finding and judgment. *Chicago, B. & Q. R. Co. v. Oyster*..... 2

12. To obtain a review of the rulings of the trial court on the admission of evidence the particular rulings assailed must be specifically assigned in the petition in error. *Churchill v. White*..... 22

13. Alleged error in admission of evidence will be disregarded unless pointed out by an assignment in the petition in error. *Vix v. Whyman*..... 190

14. Where error is assigned to the admission of a number of written instruments *en masse*, the assignment is bad unless all were improperly admitted. *Langdon v. Wintersteen*..... 278

Review—*continued.*

15. An assignment in a motion for a new trial, of "errors of law occurring at the trial, and duly excepted to," is sufficient to entitle a party to review the rulings of the trial court on the admission of evidence. *Albright v. Peters*..... 535

16. An assignment alleging error in denying a new trial is too indefinite, where the motion contains several different grounds. *Walker v. Allen*..... 537

17. An assignment of error that the court erred in denying a motion for a continuance is without merit where the record does not disclose that the motion was ever presented to the court for decision, or that there was any action or refusal to act thereon. *Nelson v. Farmland Security Co*..... 604

Bill of Exceptions. Affidavits.

18. Where a bill of exceptions has been quashed the evidence cannot be considered by the supreme court. *Johnson v. Klein* 243

19. Where questions relied on for a reversal cannot be determined without reviewing the evidence, and the bill of exceptions has been quashed, the judgment will be affirmed. *Id.*

20. Questions requiring an examination of the evidence will be disregarded in absence of a bill of exceptions. *Doolittle v. American Nat. Bank*..... 454
Walker v. Allen..... 537

21. Affidavits used on motion for a new trial will be disregarded on review unless embodied in a bill of exceptions. *Langdon v. Wintersteen*..... 278
Willits v. Arena Fruit Co..... 659

22. Affidavits used on hearing of a motion, to be available on review, must be embodied in a bill of exceptions. *Mercantile Trust Co. v. O'Hanlon*..... 482

23. An unauthenticated bill of exceptions will not be considered. *Murphey v. Illinois Trust & Savings Bank*..... 428

24. A bill of exceptions will be disregarded in the appellate court unless authenticated by the certificate of the clerk of the court below. *Id.*

25. An order refusing to extend the time for preparing a bill of exceptions cannot be reviewed where the order does not appear of record. *Doolittle v. American Nat. Bank*..... 454

Dismissal. Transcript.

26. Failure to file a motion for a new trial below is not alone sufficient reason for dismissing from the supreme court a petition in error. *Slobodisky v. Curtis*..... 211

27. A petition in error will be dismissed in absence of an authenticated transcript of the judgment. *Littell v. Cross*... 594

28. A petition in error will be dismissed when the final judg-

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ment assailed is not authenticated by the certificate of the clerk below. *Melcher v. Haley*..... 729.

Evidence.

29. That the jury ignored irrelevant proof, *held* not ground for reversing a judgment based on the verdict. *Blue Valley Lumber Co. v. Neuman*..... 80

30. A judgment based upon a verdict which is supported by sufficient competent evidence will not be disturbed on the ground that the apparent preponderance of the evidence is on the side of the losing party. *Home Fire Ins. Co. v. Kuhlman*..... 489

31. It is not error to reject proffered evidence which has no material bearing upon the facts in dispute. *Id.*

32. A finding contrary to the clear and decisive preponderance of the evidence may be reversed. *Symns Grocery Co. v. Snow*..... 516

33. The admission of immaterial evidence is not ground for reversal where it does not prejudice the party complaining. *Albright v. Peters*..... 535

34. Where a cause was tried to the court without a jury, it will be presumed that only competent evidence was considered in reaching a conclusion. *Chicago, B. & Q. R. Co. v. First Nat. Bank of Omaha*..... 548

35. A ruling on motion to strike out testimony, when within the discretion of the trial judge, will not be reversed except for an abuse of discretion. *Clark v. Douglas*..... 572

36. Evidence *held* sufficient to sustain the verdict. *Summers v. Simms*..... 579

37. A finding assailed as not sustained by sufficient evidence will not be disturbed unless clearly wrong. *Ward v. State*.. 720

38. In the trial of a case without a jury the admission of incompetent evidence is not ground for reversal of a judgment supported by sufficient competent evidence. *Gage County v. King Bridge Co*..... 828

39. Where no question of law is presented, a judgment supported by sufficient evidence may be affirmed. *Lanham v. First Nat. Bank of Crete*..... 162

40. Where no question of law is presented, a judgment supported by sufficient evidence may be affirmed. *Palmer v. Howard*..... 264

41. Conflicting evidence will not be examined further than to ascertain whether it justifies the finding below. *Holbert v. Chilvers*..... 665

42. The judgment may be affirmed where the only question presented is one of fact which was determined below on conflicting evidence. *Winchester v. Roys*..... 182

Review—*continued.*

43. 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. *Chicago, M. & S. P. R. Co. v. Johnston*..... 236
McAllister v. Pitts..... 424
Doolittle v. American Nat. Bank..... 454
Folsom v. Pailing..... 478
Albright v. Peters..... 534
Demary v. Carlson..... 546
Chicago, B. & Q. R. Co. v. First Nat. Bank of Omaha..... 548
McWhid v. Blair State Bank..... 618
Willits v. Arena Fruit Co..... 659

Exceptions and Objections.

44. In the absence of an exception a ruling made by the district court during the progress of the trial cannot be reviewed. *Reynolds v. State*..... 49

45. An interlocutory order to which no exception has been taken cannot be reviewed. *Estep v. Schlesinger*..... 62

46. Where exceptions to depositions were filed the day trial began, it will not be presumed they were filed after commencement of trial, though they were not called to the attention of court until jurors had been called. *Union P. R. Co. v. Vincent*..... 172

47. Objections not urged below may be disregarded. *Chicago, R. I. & P. R. Co. v. O'Neill*..... 239

48. Misconduct of counsel in his argument to the jury, to be available on review, must be objected to at the time, a ruling obtained, an exception taken, and the proceedings incorporated into the bill of exceptions. *Summers v. Simms*..... 579

49. An objection to the admissibility of testimony cannot be raised for the first time in the supreme court. *Willits v. Arena Fruit Co*..... 659

Final Order.

50. An insolvent bank in the hands of a receiver may appeal from an order on the receiver to sell the bank's realty. *State v. Fawcett*..... 371

Harmless Error.

51. Immaterial variance between allegations of petition and the proof is not ground for reversal. *Vix v. Whyman*..... 191

52. Where evidence improperly received is afterwards stricken out and expressly withdrawn from the consideration of the jury, the error is ordinarily cured. *Chicago, R. I. & P. R. Co. v. O'Neill*..... 239

53. Where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed, errors occurring at the trial being harmless. *Vernon v. Union Life Ins. Co*..... 494

Review—*continued.*

54. Where a petition fails to state a cause of action and a trial results in a judgment in favor of the defendant, no error committed by the court in submitting the issues to the jury will warrant a reversal. *Chapel v. Franklin County*.... 544

55. A judgment should not be reversed for harmless error. *Booknau v. Clark*..... 610

56. Errors not prejudicial to plaintiff in error are not ground for reversal. *Gage County v. King Bridge Co*..... 828

Jurisdiction. Transcript. (See, also, Review, 26-27.)

57. It is indispensable to jurisdiction that there should be filed with the petition in error, within the time fixed by statute, a transcript of the proceedings containing the judgment sought to be reviewed. *Slobodisky v. Curtis*..... 211

58. The supreme court is without jurisdiction to determine an equity cause on appeal when the transcript is not filed within six months from the entry of the decree sought to be reviewed. *Smith v. Silver*..... 429

59. A proceeding in error cannot be commenced after one year from the overruling of the motion for a new trial. *Clark v. McDowell*..... 593

New Trial.

60. Effectiveness of a verdict omitting a finding as to an essential element of a crime charged may be examined on review though not assigned in the motion for a new trial. *Holmes v. State*..... 297

61. The time for taking an appeal begins to run from the date of the entry of the decree or final order, and not from the overruling of the motion for a new trial. *Smith v. Silver*... 429

62. A motion for a new trial is not essential to a review of an equity cause. *Id.*

63. The filing of a motion for a new trial will not extend the the time for prosecuting an appeal. *Id.*

64. To review a refusal to direct a verdict the attention of the trial court must have been challenged thereto in the motion for a new trial. *Albright v. Peters*..... 534

65. Where defendant who asks as a matter of judicial grace to have a default set aside makes his application in the form of a motion for a new trial, it will be presumed that the court in sustaining it acted within its authority and not in violation of law. *Bradley v. Slater*..... 554

66. Errors in trial of a law action cannot be reviewed unless the record for review shows that a motion for a new trial was overruled. *Chicago, R. I. & P. R. Co. v. Young*..... 678

67. In absence of a motion below for a new trial the supreme court, in a proceeding in error, will only examine the record to ascertain whether the pleadings support the judgment assailed. *Holmes v. Lincoln Salt Lake Co*..... 74

Review—*concluded.*

68. A ruling of the district court on motion to require its clerk to pay out moneys in his hands may be reviewed, though there was no motion for a new trial. *Slobodisky v. Curtis* 211

Offer of Proof.

69. Assignments of error based on the exclusion of testimony are unavailing, unless, when the ruling was made, the party complaining made a tender of the proof he expected to elicit. *Union P. R. Co. v. Vincent* 172

70. Ruling sustaining an objection to a question put to a witness *held* not reviewable in absence of an offer of proof. *Johnson v. Opfer* 633

71. Exceptions to the exclusion of testimony are unavailing unless there be tender made of the proof which it is sought to elicit. *Hambleton v. Fort* 282

Parties.

72. Relief demanded by parties jointly will be denied unless it can be granted as to all. *Spencer v. Johnston* 44

73. Where parties join in a motion for a new trial and in a petition in error, relief denied to one must be denied to all. *Hier v. Hutchings* 334

Pleading and Proof.

74. It is not prejudicial error to deny plaintiff permission to file a supplemental petition, where he subsequently obtains the benefit of all matters therein pleaded. *Bourgeois v. Gapen* 364

75. In a cause brought to the supreme court by appeal the judgment will not be reversed if it responds to, and is warranted by, the pleadings and proof. *Estep v. Schlesinger* 62

Supersedeas.

76. An order directing the receiver of an insolvent bank to sell its realty is supersedable under sec. 677 of the Code. *State v. Fawcett* 372

Transcript. (See, also, Review, 26-28, 57-59.)

77. The supreme court will not assume there was error in the overruling of a motion to require a party to make his pleading in the district court comply with a former pleading in the county court, where the record for review fails to show what pleading was filed in the county court. *Krebbs v. Holway* 65

78. A ruling on a motion not included in the transcript will not be considered. *Brown v. Johnson* 222

79. Alleged error in striking out portions of a pleading omitted from the transcript for review will be disregarded. *Doolittle v. American Nat. Bank* 454

80. The certified transcript must include the judgment or decree of the trial court. *Bohman v. Chase* 712

Revivor. See JUDGMENTS, 3, 16-18.

Riparian Rights. See WATERS.

Roads. See HIGHWAYS.

Rules of Court. See COURTS, 2, 3.

Sales. See BANKS AND BANKING, 1. CHATTEL MORTGAGES, 1-3. EXECUTIONS.

1. Allegations of a failure to deliver cattle upon demand pursuant to a contract of purchase and sale are not sustained by proofs of a failure to return earnest money paid upon an agreement, at the time of purchase, that, if conditions not then known, but subsequently to be ascertained, should not prove to be satisfactory, the earnest money would be refunded. *Krebbs v. Holway*..... 65
2. Evidence *held* to sustain a verdict for plaintiff in an action for groceries sold and delivered to defendant. *Hubbard v. Seitz* 351
3. A sale made on faith of the entire report of a commercial agency as to the financial standing of the proposed buyer, and not particularly in reliance of a statement made by him to the agency, cannot be rescinded because such statement was false. *Berkson v. Heldman*..... 595

Construction of Contract.

4. Contract construed as one of sale and not of suretyship. *Houghton v. Todd*..... 360
5. Contract *held* one of conditional sale, and not of agency. *Richardson Drug Co. v. Oberfelder*..... 822

Fraud. Pleading. Instructions.

6. In a suit on a note given for part of the purchase price of corporate stock, the answer *held* not to charge actional fraud in the sale. *Spencer v. Johnston*..... 44
7. Where the petition contained averments of erroneous representations honestly made and other averments of like representations dishonestly made, an instruction to meet the latter theory *held* not erroneous when given in connection with one based on the former theory. *Blue Valley Lumber Co. v. Neuman*..... 80

Warranty. Breach. Damages. Evidence.

8. In a suit for the purchase price of goods, answer *held* to plead a warranty, breach thereof, and damages, making admissible proof of general damages and evidence showing that the property was less valuable than represented. *McConnell v. Lewis*..... 188
9. Where sale of a warranted article is executed, the purchaser may retain the property and, in a suit by the seller for the purchase price, recover damages for plaintiff's breach of warranty. *Id.*

Sales—*concluded.*

10. In establishing a breach of warranty in a suit for purchase price admission in evidence of pieces of leather, in connection with testimony of competent witnesses as to its value, *held* not error. *Id.*

Overpayment.

11. Evidence *held* sufficient to sustain a judgment for plaintiff in a suit by a purchaser of hogs to recover overpayment. *Vix v. Whyman*..... 191

Schools and School Districts.

1. A board of education has power to contract with an architect to prepare general drawings and specifications for a schoolhouse, though, for want of funds, the board may not have power to erect the building; and the preparation of such preliminary drawings is no part of the work of construction. *Fiske v. School District*..... 163
2. A recovery cannot be had on a contract with a district board providing for payment in time warrants. *Markey v. School District*..... 479
3. A school district has no authority to purchase school furniture and issue a warrant therefor payable in the future. *Id.*
4. A school district cannot ratify a void contract entered into by its officers, at least when it has not observed the conditions as prerequisites essential to make a valid contract in its inception. *Id.*
5. An individual member of a school district board cannot bind his district by acts not authorized by the board. *Id.*. 480
6. A taxpayer who has voluntarily paid taxes levied at the instance, and for the benefit, of one school district cannot maintain an action to compel the county treasurer to hold such taxes for the benefit of another school district. *Fox v. Kountze*..... 439
7. A tax to pay a judgment against a school district cannot be levied and collected where the maximum amount of taxes authorized by statute for all purposes has already been levied. *Dawson County v. Clark*..... 756
8. Section 11, sub. 2, ch. 79, Comp. Stats., limits the amount of taxes which may be imposed by a school district to twenty-five mills on the dollar of assessed valuation for all purposes, except for payment of bonds issued by the district and for purchase and lease of a schoolhouse. *Id.*

Section Lines. See HIGHWAYS.

Set-Off and Counter-Claim. See REPLEVIN, 2.

1. In absence of equitable considerations defendant can only plead as a set-off a claim or judgment upon which, at the commencement of the action, he might have maintained an independent suit against plaintiff. *Spencer v. Johnston*..... 44

Set-Off and Counter-Claim—*concluded.*

2. In an action against the maker of a promissory note he cannot plead as a set-off an amount due from plaintiff to a society, of whose funds the defendant, as an officer, is custodian. *Lewis v. Pickering*..... 63

3. A claim against a member of a partnership cannot be set off against a debt due the firm. *Folsom v. Pailing*..... 478

4. Where the evidence would have sustained a verdict for the entire amount claimed by plaintiff, the allowance of a counter-claim, if error, *held* not an error of which defendant could complain. *Blue Valley Lumber Co. v. Neuman*..... 80

Sheriffs and Constables. See EXECUTIONS. SUMMONS, 2-4.

1. Upon confirmation of a mortgage-foreclosure sale it is the duty of the sheriff to pay the amount of the bid, less costs, to the person entitled thereto. *Fire Ass'n of Philadelphia v. Ruby*..... 733

2. In an action on the official bond of a sheriff the petition should disclose the execution and approval of the bond, or facts showing a waiver of the approval, or facts which estop the sureties from urging non-approval. *Id.*

3. A judgment of amercement against a sheriff is of no validity if the officer had no notice of the proceeding to amerce. *Id.*

4. In an action against an officer for approving an insufficient replevin bond, the fact that the plaintiff afterward seized the property on execution is a defense *pro tanto*. *Shull v. Barton*..... 741

5. When property was replevied from a sheriff who held under a writ of attachment, the sheriff, in his own name or by joining with the attachment creditors, may maintain an action against the replevying officer for negligently approving the replevin bond. *Id.*..... 742

Society of the Home for the Friendless. See STATE INSTITUTIONS.

Special Findings. See TRIAL, 8.

State and State Officers. See STATE INSTITUTIONS.

Treasurer. Receipts.

1. The state treasurer is required to issue receipts to county treasurers only for state warrants actually delivered to him and for money actually paid into the treasury of the state. *State v. Meserve*..... 451

Oil Inspector. Duties. Fees.

2. Under art. 2, ch. 64, Comp. Stats. 1887, it is the duty of the inspector of oils and his deputies to inspect every oil which is a product of petroleum and which is intended by the owner to be put upon the market and sold for illuminating purposes. *Blaco v. State*..... 557

State and State Officers—*concluded.*

3. The act providing for the inspection of oils recognizes gasoline as a product of petroleum and contemplates its inspection when kept for sale as an illuminant. *Id.*
4. The fact that no grade or quality of gasoline will bear the statutory test does not exempt it from inspection, if the owner intends to offer it for sale as an illuminant. *Id.*
5. The design of the law providing for inspection of oils was not merely to prescribe a test for those products of petroleum which might or might not be dangerously inflammable, but rather to require an effective inspection of every product of petroleum intended to be sold for illuminating purposes. *Id.*
6. One owning gasoline, kept for sale as an illuminating oil, is, under the law providing for inspection of oils, legally bound to submit it for inspection and to pay the inspector's fees. *Id.*
7. Fees paid for inspecting gasoline are paid for official services within the purview of the oil inspector's bond. *Id.*
8. When the inspector of oils examines and condemns gasoline he performs official acts, and the fees received for his services are officially received, though the dangerous character of the illuminant has not been determined by the statutory test. *Id.* 558

State Institutions.

1. The Home for the Friendless established under the act of 1881 (Sess. Laws, p. 247, ch. 52) is a state institution. *Society of Home for the Friendless v. State* 447
2. By sec. 4 of the act establishing the Home for the Friendless (Sess. Laws 1881, p. 247, ch. 52) the Society of the Home for the Friendless was given supervision of the institution subject to the paramount authority of the board of public lands and buildings. *Id.* 448
3. The supervision given by statute (Sess. Laws 1881, p. 247, ch. 52, sec. 4) to the Society of the Home for the Friendless over such home was a mere privilege, and not a vested right, and was extinguished when sec. 4 of the statute was repealed in 1897 (Sess. Laws, p. 243, ch. 37). *Id.*
4. In establishing a home for the friendless under the act of 1881 (Sess. Laws, p. 247, ch. 52) the board of public lands and buildings could not lawfully purchase a building site and take title in the state in trust for the Society of the Home for the Friendless. *Id.*
5. Where realty purchased by the board of public lands and buildings upon which to erect a home for the friendless was conveyed to the state for the use and benefit of the home for the friendless, *held* that the clause "for the use and benefit of the home for the friendless" was not designed

State Institutions—*concluded.*
to create a trust, but was merely descriptive of the use to which the property should be devoted by the state. *Id.*

State Treasurer. See STATE AND STATE OFFICERS, 1.

Statute of Frauds. See TRUSTS, 3. VENDOR AND VENDEE, 4.

Statute of Uses.
The statute of uses is not in force in Nebraska. *Farmers & Merchants Ins. Co. v. Jensen*..... 522

Statutes. See TAXATION, 7.
1. Curative legislation does not operate against persons acquiring title to property in good faith and for value before its enactment. *Finders v. Bodle*..... 58
2. The word "for," as used in a statute, *held* to mean "during." *State v. Cherry County*..... 734
3. The word "may," when used in a statute to impose a duty or delegate a power relating to public or private interest, should be construed as "must." *Doane v. City of Omaha*... 815
Yates v. City of Omaha..... 817
4. General provisions will not, unless unavoidable, be so interpreted as to affect more particular and positive provisions of a prior act on the same subject. *Dawson County v. Clark*, 756
5. Where one statute refers to another, which is subsequently repealed, the statute repealed becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned. *Shull v. Barton*..... 741
6. Repeal by implication is not favored. *Dawson County v. Clark*..... 756
7. Article 6, ch. 77, Comp. Stats., relating to payment of judgments against municipalities, was not repealed by sec. 69, art. 1, ch. 14, Comp. Stats., relating to the power of cities and villages in regard to taxation. *Id.*
8. Statutes *in pari materia* should be construed together, and, if possible, effect be given to all of their provisions. *Id.*

Subrogation.
Pleadings and issues joined *held* to be inconsistent with and not to present the question of the right to subrogation. *Miller v. Stevenson*..... 305

Summons.
1. A summons must be served by delivering a copy thereof to the defendant personally, or by leaving a copy for him at his usual place of residence, service by leaving a copy at his usual place of business being insufficient. *Wittstruck v. Temple*..... 16
2. Permission to an officer to amend his return on a summons is not equivalent to an actual amendment. *Id.*

Summons—*concluded.*

3. The granting of permission to a sheriff to amend his return on a process to conform to the facts, upon proper showing and notice, is discretionary with the trial court. *Id.*..... 17

4. An officer's return includes not only the certificate of service, but also the delivery of the writ to the office from which it issued. *Graves v. Macfarland*..... 802

5. Where a summons is served within the time limited by statute, the court acquires jurisdiction, and may render judgment against defendant, though the sheriff failed to make his return during the life of the writ. *Id.*

6. Evidence *held* insufficient to support a finding that a summons had been served. *Id.*

Supersedeas. See JUDGMENTS, 19. MANDAMUS, 2, 3. REVIEW, 76.

Taxation. See COUNTIES, 4-6. MUNICIPAL CORPORATIONS, 5-13. SCHOOLS AND SCHOOL DISTRICTS, 7, 8.

Caveat Emptor.

1. *Caveat emptor* applies to purchasers of real estate at tax sales. *McCague v. City of Omaha*..... 37

Excessive and Unlawful Levies. Judgments.

2. When taxes levied by a county exceed the maximum permitted by the constitution, the excess is levied for an illegal and unauthorized purpose. *Chase County v. Chicago, B. & Q. R. Co*..... 274

3. Unless authorized by a vote of the people taxes in excess of 15 mills on the dollar valuation cannot be levied to pay judgments rendered against a county for debts contracted after adoption of the constitution. *Id.*..... 275

4. Construction of constitutional provisions permitting taxes to be levied in excess of 15 mills on the dollar valuation. *Id.*

5. A court of equity has power to enjoin the taxing authorities from making an unlawful levy which will result in casting a cloud upon land titles; but such power will not be exercised where it does not appear that such a levy is either threatened or contemplated. *Fox v. Kountze*..... 439

6. Where one complaining of an excessive assessment presents his grievance to the county board of equalization, he is conclusively bound by the order of such board fixing the value of his property for the purposes of taxation, unless he secures a reversal or modification of such order by the district court. *Chapel v. Franklin County*..... 544

Enforcement. Statutes. Liens.

7. Where the law imposing a tax provides a special remedy for enforcing it, the method so provided is generally exclusive, and if the only method adopted be illegal, the courts cannot substitute a different and legal method. *City of Omaha v. Harmon* 339

Taxation—*concluded.*

8. The lien of a county for delinquent taxes may be enforced in an action of foreclosure after the realty becomes liable to sale for non-payment. *Merrill v. Ijams*..... 706

9. A purchaser at a void tax sale, in foreclosing his lien, is not required to give statutory notice (Comp. Stats., ch. 77, art. 1, secs. 123, 179) to the owner or occupant of the realty. *Id.*

10. A tax sale, though void, transfers the lien of the public to the purchaser, including the right to maintain an action to foreclose the lien. *Id.*..... 707

Equalization.

11. Boards of equalization must pursue strictly the procedure directed by statute. *Grant v. Bartholomew*..... 839

Interest.

12. The purchaser at a void tax sale is entitled to the same rate of interest on the taxes paid by him as they drew when he made the payments. *Merrill v. Ijams*..... 707

Irregularities.

13. Mere irregularities in conducting a sale of real estate for delinquent taxes legally assessed will not defeat the lien of the purchaser at such sale. *Sanford v. Moore*..... 654

Recovery of Illegal Taxes Paid.

14. Methods of recovering back illegal taxes paid under protest. *Chase County v. Chicago, B. & Q. R. Co*..... 274

15. One who has paid personal taxes under protest cannot maintain an action to recover back the money so paid on the ground that the levy was made upon an excessive assessment. *Chapel v. Franklin County*..... 544

Tender of Payment.

16. A tender to a tax purchaser of a less sum than is due will not discharge his lien. *Sanford v. Moore*..... 654

Telegraph Companies.

Evidence *held* to justify a finding that the difference in rates charged by a telegraph company for furnishing news reports to two newspapers was disproportionate to the difference in conditions. *Western Union Telegraph Co. v. Call Publishing Co*..... 192

Telephone Companies.

Petition *held* not to state a cause of action for an injunction to prevent the state board of transportation from acting under an alleged void statute giving the board power to regulate telephone rates. *Nebraska Telephone Co. v. Cornell*.. 823

Tenants in Common. See PARTY WALLS.

Tender. See CONTRACTS, 5.

Terms of Court. See COURTS, 4.

Time. See BILL OF EXCEPTIONS, 2. REVIEW. 61.

Torts. See INFANTS.

Trade Names.

1. A right to the exclusive use in a particular locality of a trade name or sign may be acquired. *Miskell v. Prokop*.... 628

2. A sign or trade name is not an infringement of another, if ordinary attention of persons or customers would disclose the difference. *Id.*

Transcript. See REVIEW, 77-80.

Trespass.

Where one enters upon the premises of another and obliterates a display advertisement, he is liable to the owner for the costs and expenses of replacing or restoring the sign to its former condition. *Shiverick v. Gunning*..... 29

Trial. See JURY. REVIEW, 46, 52, 71.

1. Where only one conclusion can be drawn from the evidence, the court may direct a verdict consistent therewith. *Shiverick v. Gunning*..... 29

2. Right of attorney to appear and take part in trial after the jury has been impaneled. *Knights v. State*..... 230

3. Error of the trial judge in examining witnesses and in making remarks *held* cured by an admonition to the jury to disregard such conduct. *Omaha Brewing Ass'n v. Buhlmeier*.. 391

4. A request of the trial judge to state separately his conclusions of fact and of law must be made not later than the final submission of the cause. *Ross v. Barker*..... 402

5. A trial of the merits of a case should not be delayed on account of an attempt to review on error an interlocutory order. *Doolittle v. American Nat. Bank*..... 454

6. The party who would be defeated if no evidence were introduced on either side should be allowed to open and close the evidence and the arguments. *Summers v. Simms*..... 579

7. In an action of replevin *held*, under facts stated in the opinion, that plaintiff was entitled to open and close. *Id.*

8. A request for an immaterial special finding may be refused. *Sloan v. Thomas Mfg. Co*..... 714

Trover and Conversion.

Conversion of improvements on realty. *Slobodisky v. Curtis*.., 218

Trusts. See FRAUD, 3. STATE INSTITUTIONS, 5.

1. The statute of uses is not in force in Nebraska. *Farmers & Merchants Ins. Co. v. Jensen*..... 522

2. Where one buys land in his own name, but with the money, and for the use, of another, the latter is the equitable owner and the former holds the title in trust. *Chicago, B. & Q. R. Co. v. First Nat. Bank of Omaha*..... 548

Trusts—*concluded.*

3. A resulting trust is not within the statute of frauds, and parol testimony is admissible to prove the purchase for, and payment of the consideration by, the beneficiary, though the deed recites that the consideration was paid by grantee. *Id.*

4. One purchasing property from a trustee and having at the time notice of the trust is charged therewith. *McWaid v. Blair State Bank* 618

5. Transfer of property to a bank with knowledge of an apparent disclosed trust, *held* to have been under such circumstances that it was without notice, actual or constructive, of a secret trust, and was not placed upon inquiry further than was made of any existent or undisclosed trust. *Id.*

Ultra Vires. See SCHOOLS AND SCHOOL DISTRICTS, 3.

Uses. See STATUTE OF USES.

Usury.

1. In a suit on a contract for payment of money, where the defense of usury is established, plaintiff is not entitled to interest on the judgment awarded him. *Interstate Savings & Loan Ass'n v. Strine* 133

2. Payments on a note which include usurious interest should be credited upon the principal, whether such payment be in the form of cash or of an independent note. *Tomblin v. Higgins* 336

3. Where the note sued on is one which was given to obtain a credit actually indorsed upon a note which included usurious interest, this credit should be deemed to be upon the principal, rather than in extinguishment of the usurious interest on the note whereon said payment was indorsed, and accordingly it is *held* that the usury referred to does not render invalid the note sued upon. *Id.*

4. The exemption of national banks from the penalties of usury prescribed by statute of the state owes its existence to laws enacted by congress, and such exemption should not, by implication, be extended beyond the import of the federal statute. *Gadsden v. Thrush* 340

5. In an action to foreclose a mortgage securing a note made to be used as collateral to a note owing to a national bank the mere fact that the proceeds of such collateral, when collected by the payee thereof, are to be used to discharge the said principal note to the bank does not justify the extension of the federal exemption of national banks from penalties for usury to such foreclosure proceedings. *Id.*

Variance. See PLEADING, 20, REVIEW, 51.

Vendor and Vendee. See CONTRACTS, 3. FACTORS AND BROKERS, 1, 2. GUARDIAN AND WARD. MORTGAGES, 2, 11, 12. STATUTES, 1. TRUSTS, 2, 3.

1. A purchaser of land is bound to take notice of the existence of a public highway. *Clark v. Mossman*..... 92
2. Evidence *held* to support a finding that vendor executed and delivered the deed within the time fixed by the contract. *Sowards v. Moss*..... 119
3. In a suit to recover the purchase price of realty sold and conveyed by plaintiff to defendant, it is not essential to allege in the petition that the contract was in writing. *Id.*
4. In a suit to recover the purchase price of realty, the statute of frauds was *held* no defense where plaintiff established that he executed the deed and delivered it to defendant. *Id.*
5. Where vendee has appointed an agent to receive the deed, the latter's neglect to notify his principal of its receipt is no defense to an action for the purchase price. *Id.*
6. Evidence *held* not to establish the existence of an oral contract between appellant and his father and mother that on the death of the survivor of them the title to their real estate should vest in appellant. *Moore v. Moore*..... 268
7. Possession of land is notice to the world of the possessor's rights therein. *Draper v. Taylor*..... 787

Venue. See INDICTMENT AND INFORMATION, 5.

Verdict. See LARCENY, 1. TRIAL, 1.

Voluntary Assignments.

1. A voluntary assignment is void unless made according to the provisions of the statute. *Sloan v. Thomas Mfg. Co*.... 714
2. Instrument in form of a chattel mortgage *held* not an attempted voluntary assignment. *Id.*

Waiver. See INSURANCE, 8.

Warranty. See SALES, 8-10.

Waters. See BRIDGES.

1. The common-law rules relative to rights of riparian proprietors are in force, except as changed by statute. *Slattery v. Harley*..... 575
2. Right of a riparian owner to take water from the stream and use it for irrigation. *Id*..... 577
3. Right of plaintiff to an injunction restraining upper riparian proprietors from directing water from the stream. *Id.*

Witnesses. See CRIMINAL LAW, 10. EVIDENCE, 3. TRIAL, 3.

1. In a criminal prosecution the jury may take into consideration the interest of defendant in the result of the trial in determining the weight to be accorded his testimony. *Philamalee v. State*..... 321

Witnesses—*concluded.*

2. Where police officers and detectives testify for the state in a criminal prosecution, their testimony should be weighed with greater care than that given by disinterested witnesses, and the jury should be so instructed. *Kastner v. State* 767
3. It is not error to reject impeaching evidence, where no proper foundation has been laid therefor. *Draper v. Taylor*, 787
4. A party cannot reserve his objection to a question calling for incompetent testimony until the answer of the witness has been received. *Dunn v. State*..... 808

Words and Phrases.

1. "Attest." *Gerner v. Mosher*..... 136
2. "Assault." *Smith v. State*..... 531
3. "Set out." *First Nat. Bank of Chadron v. Engelbrecht*..... 639
4. "For." *State v. Cherry County*..... 734
5. "Voluntary overexertion." *Rustin v. Standard Life & Accident Ins. Co*..... 792
6. "May." *Doane v. City of Omaha*..... 815

Writs. See SUMMONS.