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ENGLISH & SCOTTISH AMERICAN MORTGAGE & INVESTMENT COMPANY V. GLOBE LOAN & TRUST COMPANY ET AL.

FILED DECEMBER 2, 1903. No. 13,072.

Promissory Note: SIGNATURE: LIABILITY. A note was signed "Globe Loan & Trust Co., H. O. Devries, Presdt., W. B. Taylor, Secy." *Held*, That such note on its face shows no personal liability on the part of Devries or Taylor.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Arthur C. Wakeley, for plaintiff in error.

L. D. Holmes, contra.

ALBERT, C.

This action was brought by the English & Scottish American Mortgage & Investment Co., against the Globe Loan & Trust Co., Emma O. Devries, as administratrix of the estate of H. O. Devries, deceased, and W. Beach Taylor, on a promissory note of which the following is a copy:

"$982.13. OMAHA, NEB., March 1, 1898.

"Globe Loan & Trust Co., Omaha, Nebraska.

"On or before two years after date, we promise to pay to the English & Scottish American Mortgage & I. Co., or order, nine hundred and eighty-two and 13-100 dollars, for value received; negotiable and payable at the office of the Globe Loan & Trust Company, Omaha, Nebraska, with interest at the rate of six per cent. per annum from date until maturity.

GLOBE LOAN & TRUST CO.,
"H. O. DEVRIES, *Presdt.*
"W. B. TAYLOR, *Secy.*"

Only the last named defendant is concerned in the litigation at this time. As a defense to the note, he pleaded that it was the note of the trust company alone, and that he signed as secretary in order to give it effect as the obligation of such company, and for no other purpose. On the

trial of the issues joined between the plaintiff and Taylor, the former offered the note in evidence, and it was excluded on the ground that it appeared on the face of the note that it was the obligation of the trust company, and not the personal obligation of such defendant. Judgment was given for Taylor, and the plaintiff brings error.

The sole question in this case is whether the note on its face shows a personal liability on the part of Taylor. If it does the judgment of the district court is wrong and should be reversed.

The plaintiff contends that the mere addition of the official title of an officer of a corporation to his signature on a note does not make it the note of the corporation, and that a note thus signed is the personal obligation of the officer thus signing it. Among the authorities cited in support of this contention are the following: *Andres v. Kridler,* 47 Neb. 585; *Hays v. Crutcher,* 54 Ind. 260; *Scott v. Baker,* 3 W. Va. 285; *Rendell v. Harriman,* 75 Me. 497; *Casco Nat. Bank v. Clark,* 139 N. Y. 307; *Tucker Mfg. Co. v. Fairbanks,* 98 Mass. 101. In none of the foregoing cases, however, is the name of the corporation itself attached to the note as maker, and those cases appear to rest on the familiar rule that where an agent signs a negotiable instrument in his own name, without disclosing on the face of the instrument the name of his principal, he is personally liable thereon. But, in the present case, the name of the corporation is attached to the note and is followed by that of Devries and Taylor with the designation of their respective titles. In *American Nat. Bank v. Omaha Coffin Mfg. Co.,* 1 Neb. (Unof.) 322, this court held that a note signed "Omaha Coffin Mfg. Co., C. A. Claflin, Pres., S. L. Andrews, Secy," was the note of the corporation, and that the officers whose names were attached thereto were not liable thereon. The doctrine announced in that case is supported by the following: *Liebscher v. Kraus,* 74 Wis. 387; *Reeve v. First Nat. Bank,* 54 N. J. Law, 208; *Draper v. Massachusetts Steam Heating Co.,* 5 Allen (Mass.), 338; *Castle v. Foundry Co.,* 72 Me. 167; *Falk v. Moebs,* 127 U. S. 597.

In the cases just cited, but one signature followed that of the corporation, and in the *American Nat. Bank v. Omaha Coffin Mfg. Co., supra,* the liability of the second officer signing the instrument was not necessarily involved, and, on that ground, the plaintiff undertakes to distinguish between those cases and the case at bar, and insists that, while it may be presumed that Devries, in signing the note, intended merely to indicate by whom the corporate signature was affixed to the instrument, no such presumption is to be indulged as to Taylor, because the signature of Devries, to which is attached his official designation, following the name of the corporation, is sufficient, of itself, to indicate by whom the corporate signature was affixed. The plaintiff's argument on this point is agreeably plausible, but not convincing. While the law would have presumed a corporate obligation, had the name of the corporation been followed by the official signature of the president alone, there is no presumption that such is the sole method of attesting the corporate signature. It is not unusual for corporations to require that instruments, intended to bind them, shall be executed by more than one of their officers. And where, as in this instance, the corporate name is followed by the signatures of two of its officers, to which are attached the respective titles of such officers, the presumption which attends the signature of the first officer should be held to attend that of the second as well. This view is in harmony with modern methods and common usage. Instruments thus signed pass current as corporate obligations only, and, outside of the courtroom, no one ever acts upon them in the belief that they bind, or were ever intended to bind, the officers thus signing them, or any person other than the corporation itself.

We have not overlooked *Heffner v. Brownell,* 70 Ia. 591, wherein the officers were held liable on a note signed precisely as the one in suit. But that case is contrary to the doctrine announced by this court in *American Nat. Bank v. Omaha Coffin Mfg. Co., supra,* and, as we think, to the weight of modern authority.

It is recommended that the judgment of the district court in favor of Taylor, and against the plaintiff, be affirmed.

GLANVILLE and BARNES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court in favor of Taylor, and against the plaintiff is

AFFIRMED.

JOSIAH LADD, APPELLANT, V. SCHOOL DISTRICT NO. 6 ET AL., APPELLEES.

FILED DECEMBER 2, 1903. No. 13,169.

1. **Injunction**: SCHOOL BOARD: POWERS. A school district board has no authority to purchase or lease a schoolhouse site, unless directed by the electors of the district at an annual or special meeting, and a purchase of such site by the school board, without being thus directed, is not binding on the school district.
2. **School Board**: PURCHASE OF SITE. That the electors of a school district have lawfully designated a particular site to which to move the schoolhouse is not an implied direction to the board to purchase or lease such site.

APPEAL from the district court for Hall county: JOHN R. THOMPSON, JUDGE. *Reversed.*

Thomas O. C. Harrison and *William S. Pearne,* for appellant.

Richard R. Horth, contra.

ALBERT, C.

This is an action to restrain the removal of a schoolhouse from its present site, which belongs to the school district, to another part of the district. The right to change the site is based on the action of the electors of the school district, taken at the annual school meeting held June 30, 1902. The record of that action is as follows: "Voted to

move the schoolhouse to N. E. corner N. E. ¼ of S. 19, T. 10, R. 10. 25 votes cast, 18 for and 7 against." At the time, the school district had no title or estate in fee, or otherwise, in the site to which it was proposed to move the schoolhouse, and the district board were not authorized by the electors at such school meeting, or at any other school meeting, to purchase or lease the new site. Subsequently, the district board, assuming to act for the district, bought one acre in the corner designated, and directed a warrant to be drawn on the treasurer of the district in favor of the grantor for the purchase price. The warrant had not been presented for payment nor had the deed to the site been recorded when this action was brought, and it would appear that there is an understanding between the members of the school board and the grantor that the warrant shall not be presented and the deed shall be withheld from the record pending this litigation.

After the purchase of the new site, the board made preparation for the removal of the schoolhouse thereto, and would have removed it, had they not been restrained by the order of the court made in this case. Upon a hearing had in the district court, plaintiff's bill was dismissed; and he brings the case here on appeal.

It seems to us the plaintiff was entitled to the relief prayed. It will be conceded that a school district board has no authority to remove a schoolhouse to a site to which the district holds no title either in fee or for a lesser estate. To attempt to do so would seem to be such a reckless disregard of public interest as to call for the interference of a court of equity, aside from the provisions of section 7, subdivision 5, chapter 79, Compiled Statutes (Annotated Statutes, 11081), which expressly provides that a school district shall not build a stone or brick schoolhouse upon any site, without first having obtained title in fee thereto, and that it shall not build a frame schoolhouse on any site to which it has not title in fee, without the privilege of removing the same, when directed by the votes of the district.

The case, then, narrows down to this question: Did the district acquire title to the site by the purchase thereof by the board without directions from the electors of the district? Section 8, subdivision 2, chapter 79, Compiled Statutes (Annotated Statutes, 11036), provides that the qualified voters of the school district, when lawfully assembled, shall have power to designate a site for a schoolhouse by a two-thirds vote of those present, and to change the same by a similar vote at any annual meeting. Section 10, chapter 79, provides that such qualified voters shall have power, at any annual or special meeting, to direct the purchasing or leasing of any appropriate site, and the building, hiring or purchasing of a schoolhouse.

In *Mizera v. Auten,* 45 Neb. 239, this court held that section 10, *supra,* was a limitation on the authority of the district board and that such board had no authority to build a schoolhouse, unless directed by the electors of the district at some annual or special meeting. There is nothing in the section to indicate that such limitation was intended to apply only to the building of schoolhouses. On the contrary, it is obvious that it applies equally to all the acts therein enumerated.

But the defendants rely on section 6 of subdivision 5, chapter 79, which is as follows:

"They (the board) shall purchase or lease such site for a schoolhouse as shall have been designated by the district, in the corporate name thereof, and shall build, hire, or purchase such schoolhouse out of the fund provided for that purpose, and shall make sale and conveyance of any site or other property of the district, when lawfully directed by the qualified voters at any annual or special meeting."

The section just quoted was not intended as a modification of the provisions of section 10, *supra.* Section 10 enumerates some of the powers of the electors at an annual or special meeting. Section 6, *supra,* enumerates some of the powers of the district board. The two sections are complementary of each other and *in pari materia,* and

should, therefore, be read together. Thus read, the qualifying clause in the latter, "when lawfully directed by the qualified voters at any annual or special meeting," not only limits the last power enumerated, but each and all of those preceding it. Besides, section 6 gives a school board no greater power in respect to buying or leasing a schoolhouse site than in respect to building schoolhouses. As we have seen, in *Mizera v. Auten,* 45 Neb. 239, it has no authority to build a schoolhouse unless directed by the electors of the district. School boards are creatures of the statute and their powers are limited. They can bind the district only within the limits which the legislature has fixed; beyond that, their acts are void. *School District v. Stough,* 4 Neb. 357; *Gehling v. School District,* 10 Neb. 239; *School District v. Randolph,* 57 Neb. 546; *Markey v. School District,* 58 Neb. 479.

It may be claimed that the vote of the electors to move the schoolhouse to the new site was an implied direction to the board to buy or lease such site. But we think the sections of the statute referred to exclude the idea of an implied directon of that kind. Besides, if the legislature had regarded the designation of a site by the electors as carrying with it implied authority to the board to purchase or lease the site designated, it is not probable that it would have made, as it did, the power to purchase or lease a site the subject of an express grant.

It follows, therefore, that the attempted purchase of the schoolhouse site was unauthorized and not binding on the district. The attempt, then, to remove the schoolhouse to the new site was, in fact, an attempt to remove it from a site belonging to the district to one in which the district had no title in fee, or otherwise. The removal under such circumstances, is unauthorized and a permanent injunction should have been granted.

It is therefore recommended that the decree of the district court be reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

GLANVILLE and BARNES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

REVERSED.

COUNTY OF DODGE V. COUNTY OF SAUNDERS.*

FILED DECEMBER 2, 1903. No. 12,367.

1. **Statute:** CONSTRUCTION. When the legislature speaks of "streams which divide counties," in section 87, chapter 78, Compiled Statutes, it must be taken as referring, not to the entire stream but to some part of or line therein.
2. **Streams:** BOUNDARY LINES. The banks of a river are essential parts thereof, and when a county boundary is fixed at "the south bank," the river may be said to divide the county from the one on the opposite side, within the meaning of section 87.
3. **Counties:** REPAIRS OF BRIDGES: The purpose of said section, and the ones immediately following, is to provide for bridges which are rendered necessary in order to travel from one county into an adjacent one, and to divide the cost between the two, and the statute should be construed, if possible, so as to give effect to the apparent intent of the legislature.
4. **Repairs of Bridges:** RECOVERY. The fact that a resolution, passed by the board of one of such counties, calling upon the other to join in making bridge repairs, designates two bridges, while, after the latter's refusal, a contract is let and recovery sought as to one only, is not fatal.

ERROR to the district court for Saunders county: BENJAMIN F. GOOD, JUDGE. *Reversed.*

Robert J. Stinson and *Grant G. Martin,* for plaintiff in error.

Manoah B. Reese, contra.

LOBINGIER, C.

This is an action by which Dodge county seeks to compel Saunders county to pay one-half of the amount expended

* Rehearing denied. See opinions, pp. 451, 454, *post.*

for repairs on a wagon bridge across the Platte river south of the city of Fremont. The petition alleges "that the Platte river intervenes between the said plaintiff and defendant counties and divides said counties;" that the bridge in question has been built for twenty-five years and generally used by a large portion of the inhabitants of both counties; "that the said plaintiff and said defendant, both, have been and are now equally interested in the building and the maintaining of said bridge and keeping the same in repair for public travel;" that in 1899, the bridge became unsafe for want of repair, and that the board of supervisors of Dodge county passed a resolution declaring that both said bridge and another at North Bend across the same river were out of repair and unsafe for public travel, and calling upon the board of commissioners of Saunders county to undertake such repairs, jointly, to fix a time and place for a meeting "and agree upon the amount and character of such repairs, and to provide for the advertisement for bids for such repairs." The resolution further recited that, in case of refusal or failure of the defendant county to respond, "this board will proceed to advertise for bids for such repairs and have the same made, and will hold said Saunders county liable for one-half of the costs for said repairs, as provided by law." It is alleged that a certified copy of this resolution was served on the chairman of the Saunders county board; that said county failed and refused to cooperate with plaintiff, and that thereupon it entered into a contract "in the manner provided by law" for the repair of the bridge south of Fremont. A copy of the notice for bids, the contractor's bid and specifications, and the written contract for the repair of the bridge in question are attached to the petition as exhibits. It is further alleged that the work was done according to contract; that plaintiff filed a bill with the defendant county's clerk for its half of the expenses, which was disallowed by its board of commissioners, and that plaintiff perfected an appeal to the district court. A general demurrer to this petition was sustained, and plaintiff,

electing to stand thereon, brings the case here by petition in error.

Defendant in error contends that the averment, "that the Platte river intervenes between * * * and divides said counties," is a mere conclusion of law and not admitted by the demurrer; that by reason of the statute (Compiled Statutes, ch. 17, art. 1, sec. 24; Annotated Statutes, 4329), which fixes "the south bank of the Platte river" as the southern boundary of Dodge county, no part of the river is in Saunders county; that, therefore, the latter was not liable for the repair of the bridge in question, and that, even if it were, since the resolution called for the repair of two bridges, and the contract was made for but one, there is such a departure and noncompliance with the law as to prevent a recovery, and that, therefore, the petition fails to state a cause of action.

Section 87, chapter 78, of the Compiled Statutes (Annotated Statutes, 6085), provides as follows:

"Bridges over streams which divide counties, and bridges over streams on roads on county lines, shall be built and repaired at the equal expense of such counties; Provided, That for the building and maintaining of bridges over streams near county lines, in which both are equally interested, the expense of building and maintaining any such bridges shall be borne equally by both counties."

The allegation, that the contract for the repair of the bridge was entered into "in the manner provided by law," coupled with the notice, bid and contract itself and the resolution calling upon Saunders county to join in advertising for bids, appear to show a sufficient compliance with the statute requiring the contract to be let to the lowest bidder. At least, we think it should be held sufficient as against a general demurrer, and in the absence of a motion for a more specific statement. Numerous authorities are cited in the able argument of the defendant in error to the effect that, where the bank of a stream is fixed as the boundary of land, no part of the bed of water of the stream is included. We do not understand that

Dodge county concedes to Saunders county any rights or jurisdiction over the bed or water of the Platte river.

When the legislature speaks of "streams which divide counties," does it mean the whole stream? If so, there is, probably, no stream in the state to which the statute could apply. In fixing the boundaries of counties bordering on streams, the legislature has used the phrase, "the middle of the channel," or "the south bank." In no case has it fixed the entire stream as a boundary line between counties. Indeed, a moment's reflection will demonstrate that it could not safely have done so. For, if the entire stream were made the boundary, there would be left a neutral zone subject to the jurisdiction of no county. When, therefore, the legislature, after fixing these boundaries, in the language above noticed, refers to "streams which divide counties," it must be understood as meaning streams in which are situated the boundary lines which divide counties. And this is the practical construction of the phrase, adopted by this court in *Cass County v. Sarpy County*, 63 Neb. 813. The statute (Compiled Statutes, ch. 17, art. 1, sec. 68; Annotated Statutes, 4379) fixes "the middle of the said main channel of said Platte river" as the south line of Sarpy county. Literally speaking, therefore, the Platte river, that is, the entire Platte river, does not "divide" the counties of Cass and Sarpy; it is only "the middle of the main channel" which divides them. Nevertheless, it was held, and we still think rightly, that section 87, above quoted, is applicable to these two counties, which are divided, not by the entire river, but only by an imaginary line in the river.

Such is also the construction placed upon a similar statute by another court of high standing. In *Keiser v. Commissioners of Union County*, 156 Pa. St. 315, a case which we shall have occasion to refer to again, the court so construed a statute which speaks of "a stream forming the boundary line between two counties," and it is said in the opinion:

"A stream is equally the boundary whether the line is

at its middle or its edge, and, on the other hand, a stream is equally between two counties whether it is all in one or half in each. Accurately speaking, as the learned judge below points out, there is no stream between counties, for that implies something interposed which is not part of either. But in the popular and ordinary use of language, which the legislature is presumed to intend, between two counties means having one on one side and another on the other, and that is exactly the meaning of forming the boundary line between counties."

If we are correct, then, in our conclusion that the phrase, "streams which divide counties," includes all streams which contain or in which are situated the boundary lines between counties, we are next to inquire whether the Platte river contains the boundary line between Dodge and Saunders counties? Or, in other words, whether that boundary line can be said to be situated in the river? The statute, as we have seen, fixes the line as the south bank. Is the bank, then, no part of the river? Mr. Gould, in his authoritative work on Waters (3d ed.), sec. 41, says: "Every river consists of: (1) the bed; (2) the water; (3) the banks or shores." Our attention is called to a distinction in some of the cases between "bank" and "shore," but it does not seem material to our present inquiry. Mr. Justice Wayne, delivering the opinion in *Alabama v. Georgia*, 23 How. (U. S.) 505, determining the precise boundary between two states which are separated by a river, says, quoting from Grotius:

"A river that separates two jurisdictions is not to be considered barely as water, but as water confined in such and such banks, and running in such and such channel. Hence, there is water having a bank and a bed, over which the water flows, called its channel, meaning, by the word channel, the place where the river flows, including the whole breadth of the river."

In *Starr v. Child*, 20 Wend. (N. Y) 149, Cowen, J., says:

"The bank and the water are correlative. You can not own one without touching the other."

The word "watercourse" is synonymous with stream, and in *Luther v. Winnisimmet Co.,* 9 Cush. (Mass.) 171, Bigelow, J., in a charge to the jury, afterwards approved on appeal, said:

"A watercourse is a stream of water, usually flowing in a definite channel, having a bed and sides or banks."

Indeed, it seems to us that the correct conclusion is well summarized in the argument for plaintiff in error in *Howard v. Ingersoll,* 13 How. (U. S.) 380, 391, as follows:

"A river, then, consists of water, a bed, and banks; these several parts constituting the river, the whole river. It is a compound idea; it can not exist without all its parts. Evaporate the water, and you have a dry hollow. If you could sink the bed, instead of a river you would have a fathomless gulf. Remove the bank, and you have a boundless flood."

We have not overlooked the cases where grants bounding on the bank are said to exclude the stream. The language thus used is invariably *dicta,* and is employed, incidentally, in discussing entirely different questions than whether the bank of a river is to be treated as a part of it. It seems to us more logical, and more in accordance with approved legal definitions, to hold that the south bank of the Platte river is to be treated as a part of the river; that "streams which divide counties" include any part of or point in such streams, and that, therefore, the Platte river divides Dodge and Saunders counties, quite as much as if the boundary was the thread of the stream, the *filum aquæ,* instead of the south bank.

We are strengthened, then, in this conviction, when we consider, as we must, the intent and purpose of the legislature in enacting this statute. The purpose, evidently, was to provide for the building and repair of bridges required in order to travel from one county into an adjacent one, and to impose the expense equally upon both, on the theory that the bridge would be used about equally by the inhabit-

ants of the two counties. It is apparent that, for this purpose, it is quite immaterial whether the boundary line is the thread of the stream or the bank. The bridge would be just as necessary in the one case as in the other, and there would be the same reason for dividing the cost. With the policy of such legislation, we are not here concerned. It may be true, as suggested in the argument of defendant in error, that the bridge in question is not a benefit to part of the inhabitants of Saunders county; that it is even detrimental, in diverting trade into Dodge county, though the demurrer admits the averment in the petition that the bridge is "used by a large portion of the inhabitants of both counties." It may also be true that the statute confers upon counties power in locating bridges which may be used, or rather abused, to the injury of neighboring counties. But, whether the policy of the act has proved beneficial, or otherwise, is a question for the legislature alone. Our duty is simply to ascertain its intent and permit it to be carried out, as far as possible. To hold that this case is not within the terms of the statute because the boundary is fixed at the south bank instead of the thread of the stream would, we think, be to disregard that intent. Dodge county is not the only one whose boundary is fixed at the south bank. Indeed, nearly one-third of the counties which border on streams flowing wholly within the state are so bounded. Can it be supposed that the legislature intended to exempt all of these from a policy which, on its face, appears to be uniform?

We prefer to think with the supreme court of Pennsylvania, in the case above referred to, that it is "the popular and ordinary use of language which the legislature is presumed to intend," rather than to adopt a construction which would nullify the statute in so large a proportion of the cases to which it was apparently intended to apply. In *Cass County v. Sarpy County,* 63 Neb. 813, 823, it is said that "Cass and Sarpy counties are divided by the Platte river," although we have seen that, technically speaking, they are divided only by the "middle of the main

channel" of the river. So, "in the popular and ordinary use of language," it may be said that the Platte river divides Dodge and Saunders counties, though the technical boundary line is the south bank of the river.

We have referred to *Keiser v. Commissioners of Union County,* 156 Pa. St. 315, and we close our discussion of this branch of the case with a further reference to it, because it seems to us so pertinent to the case at bar and so fully to support the foregoing views. It was an action to compel the commissioners of Union county to cooperate with the commissioners of Northumberland county in building a bridge across the Susquehanna river. The statute authorizes joint construction of bridges "where the stream or river runs between counties." There would seem to be more room in the Pennsylvania case than here for the contention made by defendant in error, for Union county is described as "lying on the west side of the river Susquehanna," thus indicating that it included no part of the river. And, yet, the court holds that the statute is applicable, and says also:

"A stream is equally the boundary line whether the line is its middle thread or its westernmost ripple. To find the boundary you must find the stream, and then the part of it defined as the line, but wherever that is it is the stream, and it is the boundary only because of that fact. No matter whether the boundary is the middle or the edge of the stream, the bridge must connect with both banks, and the moment it does so, even if only with an abutment, there is no longer any one county in which it is located. * * * The obvious meaning of the statute * * * is that * * * bridges over streams forming boundary lines between counties, or running between counties (that is, having one county on one side and another county on the other side), shall be rebuilt by the commissioners of the 'respective counties.' "

We find ourselves also unable to agree with the eminent counsel for defendant in error in his contention that there was a fatal departure in the fact that the resolution, call-

ing upon Saunders county to join in making the repairs, designated two bridges, while the contract was let and recovery sought as to but one. The statute points out no particular mode of procedure, and we can not see that defendant in error was in the least prejudiced by the course pursued. If Dodge county had been willing to accept one-fourth instead of one-half of the amount expended for the Fremont bridge, it would not be questioned, we presume, that only the taxpayers of Dodge county could complain. Moreover, had this been an ordinary action in the district court, and had the claims for the two bridges been divisible, as we think they were, plaintiff could have sued on its claim for the one bridge alone. On the other hand, had the claims been indivisible, it could still have sued for a part, on condition of being barred from any further action as to the remainder. We can not think that any stricter rule should be applied in a proceeding of this kind than in an ordinary action at law.

Having reached the conclusion that the Platte river "divides" the two counties appearing in this action, it is unnecessary to consider whether the other clauses of section 87, chapter 78, are also applicable, though that question is discussed in the briefs, and the petition avers, as we have seen, that both parties "are equally interested in the building and maintaining of said bridge." From our examination of the first clause of section 87, we are compelled to conclude that the demurrer should have been overruled, and we recommend that the judgment be reversed and the cause remanded with directions that such an order be entered.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance with said opinion.

REVERSED.

The following opinion on motion for rehearing was filed October 5, 1904. *Rehearing denied:*

1. **Counties**: REPAIRS OF BRIDGES. Under the provisions of section 87, chapter 78, Compiled Statutes, 1901, a county may be required to contribute toward the repair of a bridge abutting in such county although it is located mainly within the territorial jurisdiction of an adjoining county.
2. **Stream Defined.** The word "stream" as used in said section is used in a general sense, and includes rivers and smaller courses of running water.

SEDGWICK, J.

Some of the propositions discussed in the briefs and upon the oral argument upon the motion for rehearing seem worthy of further notice.

1. The bridge in question being confessedly located mainly in Dodge county, it is contended that the legislature would not have authority to require Saunders county to expend the funds of that county in repairing a bridge outside of its jurisdiction; but this proposition seems not to be supported by authority. The second paragraph of the syllabus of the opinion in *Washer v. Bullitt County,* 110 U. S. 558, 28 L. ed. 249, is:

"At the common law and also by statute, a county may be required and authorized to build and maintain, at its own expense, a bridge or highway across its boundary line, and extending into the territory of an adjoining county."

The opinion in *County of Mobile v. Kimball,* 102 U. S. 691, 26 L. ed. 238, which announces the same doctrine, is approved and followed, and in the opinion, quoting from the opinion in a Maryland case, it is said:

"A county is one of the territorial divisions of a state created for public political purposes connected with the administration of the state government, and being in its nature and objects a municipal organization, the legislature may exercise control over the county agencies, and require such public duties and functions to be performed by them as fall within the general scope and objects of the municipal organization."

2. If then, it is competent for the legislature to require a county to bear the expense of repairing a bridge that is not located within its boundaries, we have in this case only to consider what the intention of the legislature was. Of course, the same rules and principles are to be applied in ascertaining the boundaries of corporations such as counties, and in the construction of the statutes and other public acts, that should be applied in ascertaining correct boundaries between lands owned by individuals, whether established by public acts or private contract. Where a river, brook, stream or highway is mentioned generally as a boundary line, the same rule is to be applied to each; that is, the thread of the stream of the river or brook, and the center of the street or highway, is the boundary line. Again, if any particular place or specific line is mentioned as the boundary, that place or line becomes the monument and excludes all beyond. If a bank of a river or stream is mentioned as the boundary, then the body of the water in the river or stream is excluded from the territory nearest to the bank designated as such boundary. The fact that the body of the water of the river is in Dodge county, and that the bridge will therefore be mainly outside of the territorial limits of Saunders county, is not an important factor in determining the issue. The question is, what is the meaning of the expression, "Streams which divide counties."

The word "stream" which occurs in the statute has two distinct uses. The first and most important meaning of this word is "A course of running water, a river, rivulet, or brook." Century Dictionary. It is there also stated in connection with that definition, "All rivers and brooks are streams and have currents." Another and more technical use of the word "stream" is to distinguish the volume of water of a river, rivulet or brook from the banks and bed; thus, as suggested in the former opinion herein, a river is said to consist of three parts: the bed, the bank and the stream. In this latter sense of the word the stream in question is undoubtedly entirely in Dodge

county, since the boundary line is on the south bank and the stream is wholly north of the south bank. This meaning of the word "stream" is suggested in the brief as the one intended by the legislature, and it is therefore insisted, and undoubtedly correctly, if the word is used in this sense that, since the south boundary line of Dodge county is on the south bank, the stream or the water itself is wholly in Dodge county, and therefore can not be said to divide two counties. It seems clear to us that this is not the sense in which the legislature used the word stream in this statute. We think that the purpose of the legislature, as well as the language of the statute, would indicate a broader meaning. It was, we think, rather intended that the statute should apply to bridges over rivers and, also, to bridges over smaller water courses that did not carry a sufficient volume of water to cause them to be denominated rivers. In this statute, then, the legislature used the word in the sense of "a course of running water, a river, rivulet or brook;" and if, as is well pointed out in the former opinion, the bank of a stream used in this sense is as much a part of the stream itself as is the bed or the volume of water which it carries, then the stream divides counties, since the boundary line lies in a part of the river. The bank is that part of the river or stream which retains the water, and it seems, therefore, reasonable that the word stream as used by the legislature when applied to a river, as in this case, must be construed to mean the whole of the river, including the bank as well as the water and the bed, and, within that meaning, the boundary line here lies within a part of the river, to wit, the bank, so that the river divides the two counties in the sense intended by the legislature.

The whole question is not without difficulty, but the construction of the statute adopted in the opinion appears to be the more reasonable one, and the motion for rehearing is therefore overruled.

REHEARING DENIED.

The following opinion on second motion for rehearing was filed January 5, 1905. *Rehearing denied:*

PER CURIAM.

In the motion for rehearing it is said that, lying within the river, there is a large island situated wholly in Dodge county, and that a part of the Platte river on the north of this island is crossed by the bridge in question; and it is contended that it would be unjust and is not intended, by a fair construction of the statute in question, that Saunders county should be required to build, or share in building or in repairing, the bridge over the north part of the river. This question has not been presented to the court and is not determined.

The case is submitted upon a general demurrer to the petition. If the defendant raises the question by answer, its solution will, apparently, depend upon the intention of the legislature as to the application of the word stream, as used in the statute, to such conditions. The conditions may be such that each part of the river, that part lying on the north side and that part lying on the south side of the island, should be considered a stream, as that word is used in the statute, but we do not find it necessary to express an opinion upon this question in the present condition of the record. The motion for rehearing is overruled.

REHEARING DENIED.

GUSTAVE A. MANN, APPELLEE, V. GERMAN-AMERICAN INVESTMENT COMPANY, APPELLANT.

FILED DECEMBER 2, 1903. No. 12,701.

1. **Tontine Company: RECEIVER.** The holder of a contract, purporting to be for the purchase and sale of a diamond, issued by what is commonly called a tontine company, is not a stockholder in such company, and can not secure the appointment of a receiver for such company because of the mismanagement of its affairs by its officers.

2. ———: ———. The holder of such a contract who has not reduced his claim to judgment, and who has no lien upon the property of the company, has no standing in a court of equity in an action to sequester or impound the assets of such company.

3. ———: EQUITY. Whether the holder of such a contract can have "clean hands" as required of one who seeks the aid of a court of equity, *quære.*

4. Receiver: AUTHORITY TO APPOINT. An order of the district court appointing a receiver for a corporation, in an action wherein such relief is the only relief sought, will be vacated for want of authority in such court to make the same.

5. Petition: PRAYER. A prayer for general relief, coupled with one for the appointment of a receiver, only, will not be considered as a prayer for relief other than such appointment, unless the petition states a good cause of action for other relief.

APPEAL from the district court for Adams county: ED L. ADAMS, JUDGE. *Reversed and dismissed.*

Frank P. Olmstead, for appellant.

Robert S. Batty and *Harry S. Dungan, contra.*

GLANVILLE, C.

This action is one commenced by the plaintiff, appellee, by filing in the district court for Adams county his petition in equity; and the case may best be reasoned by first giving a copy of the petition in full. The petition is as follows:

"Plaintiff complains of the defendant and says:

"1. That at all times hereinafter stated the defendant is and was a corporation duly incorporated and existing under and by virtue of the laws of the state of Nebraska, with an alleged capital stock of $60,000, divided into shares of $100 each; and engaged in the business of issuing contracts, copies of which are hereto attached, and made a part of this petition, and marked exhibits 'A' and 'B,' and in no other.

"2. That the incorporators were, and are, Fred Lilljeberg, John C. Kay and John M. Doyle. That there has been issued by the said corporation, approximately, 200

contracts, the exact number being to this plaintiff unknown, a portion of which were of the same form as exhibit 'A,' the balance, being denominated a diamond contract, as exhibit 'C.'

"That various persons purchased said contracts, their names being unknown to this plaintiff, except as hereinafter set forth. That the said Fred J. Lilljeberg, John M. Doyle, and John C. Kay held the first nine contracts, and applied the first $900 received by the said corporation to the payment thereof, and that, thereafter, the tenth contract was paid by the defendant to the aforesaid president, secretary and treasurer thereof. That since the tenth contract was paid on or about the — day of ——, 1900, the said defendant has collected from the said contract holders a large sum of money, the exact amount being to this plaintiff unknown, and that, thereafter, to wit, on or about the 1st of February, 1901, the president and secretary of the defendant corporation attempted to sell and transfer the corporation and contracts, privileges and emoluments of the business and all rights and property interests therein, whatsoever, to one W. S. McAuley, and thereupon, pretended to resign their respective offices as president and secretary to the board of directors, who failed and refused to elect their successors, and have since refused and failed so to do. That the holders of the said alleged stock, if there be any, are to this plaintiff unknown. That, at the time of the said pretended transfer and sale, the said president and secretary had in their possession and under their control the sum of $369 belonging to, and forming a part of, the funds of the said defendant corporation, which they, the said secretary and president, failed and neglected to turn over to their alleged successor, or account for, but proceeded to draw from the bank the said sum, and appropriated the same to their own use and benefit, and have ever since refused and failed to account for the same, to the damage and prejudice of your petitioner. That since the pretended transfer, this plaintiff and various holders of contracts have paid to the said McAuley about $900, the

exact amount being to this plaintiff unknown, who received the said sum and holds the same for defendant's use. That, according to the provisions of said contracts shown in exhibits 'A' and 'B,' 80 per cent. of all the funds received by the said corporation were to be and remain the absolute property of the holders of said contracts, and were to be applied in the retirement and discharge of the said contracts, consecutively, and in the order of their issue; said contract being the stock or shares of defendant corporation.

"3. The plaintiff avers, and charges the facts to be, that the defendant corporation, and its above named officer, has wholly failed to apply the funds received by it under the provisions of the said contracts to the payment and discharge of the contracts issued by said corporation, as provided by its rules and articles.

"4. The plaintiff further charges that he is the holder and owner of contract number 35, being filed herewith, and marked exhibit 'C,' and made a part of this petition, being one of the 200 contracts issued as herein charged, and has paid in to said company the sum of $80, and holds the said contract which is fully paid up according to the provisions thereof. That the money paid by the plaintiff to the defendant, as aforesaid, constitutes a part of the funds herein charged to have been misapplied or in the hands of the pretended successor of the defendant corporation.

"5. Plaintiff further charges that the defendant has ceased to do business, has failed to elect officers or call an election for that purpose, has misapplied the funds, and attempted to convey all the corporate interests. All of which was done contrary to the power and authority invested in the said defendant corporation, and to the injury and damages of your petitioner.

"6. The plaintiff further alleges, and charges the facts to be, that defendant corporation has never had an election, has never issued certificates of stock other than the contracts herein set forth, and that there has never

been an election of directors or officers, nor a legal adoption of rules or by-laws by the said defendant, and that the said president, secretary and treasurer have, at all times, acted wholly without authority, as plaintiff verily believes.

"Whereupon, the plaintiff prays the court to appoint a receiver to take charge and control of defendant corporation and all property belonging thereto, to collect the funds and apply them *pro rata* among the holders of said contracts, as the court may direct, and have such other and further relief as to the court may seem just."

Exhibit "C" referred to in said petition, being the contract under which the plaintiff claims, is as follows:

"DIAMOND CONTRACT. NO. 35.

"Know all men by these presents: That if G. A. Mann, the holder hereof, shall first well and truly make each and all of the payments herein provided for, to be made by him at the times and in the manner herein specified, time, manner and the amount of payment being of the essence hereof, the German-American Investment Company, of Hastings, Nebraska, will deliver to him, or to his legal representatives or assigns, under and according to the terms and conditions and in the manner and order hereinafter set forth, a commercial white, clear and flawless diamond, of the weight of two carats, and of the value of $100 per carat.

"The holder hereof promises and agrees to pay to the company, at its home office, in the city of Hastings, the full sum of one hundred dollars in the following manner, to wit: Five dollars on the delivery hereof, the receipt of which is hereby acknowledged, and one dollar and twenty-five cents on or before the last day of each calendar week following the date hereof, for sixty consecutive weeks. If he shall fail to pay any of said instalments within the week in which it is payable, the said delinquent instalment, together with the additional sum of twenty-five cents, may be paid at any time before the end of the next succeeding calendar week; but if he shall fail or neglect

to pay any of said weekly instalments at the time and in the manner herein provided, and shall continue in such default for more than one week, then, and in that event, this contract shall, because of such default, become and be wholly null and void, and all payments theretofore made thereon shall be forfeited.

"The weekly instalments having been paid hereon to and inclusive of the sixtieth week, this contract shall be deemed fully paid up and nonforfeitable, and the holder shall be entitled to receive the diamond herein described, provided, however, that if, at such time, the amount in the hands of the company to the credit of this contract is not equal to the sum of $200 heretofore provided, then, the diamond shall not be delivered until the amount to the credit hereof shall equal that sum. Coincident with such delivery to the holder of a contract, of such diamond, he shall surrender his contract to the company for cancelation. The company shall employ one dollar of each weekly instalment of one dollar and twenty-five cents paid in on this and other contracts, together with all fines, lapses and forfeitures accruing thereunder, in the purchase and delivery of the diamonds required for the performance of such contracts; and may retain all other sums paid in thereon, including the remaining twenty-five cents out of each weekly instalment, for its own use and payment of all expenses. This contract is transferable, but no transfer will be recognized by the company unless first registered by the company, for which registration a fee of one dollar will be charged."

Exhibit "B" referred to is in the same form as exhibit "C," while exhibit "A" differs therefrom in that it provides for the payment of money to the contract holder, instead of the sale of a diamond.

The answer admits the allegations of paragraph 1 of the petition, and denies all others.

The judgment or order of the district court appealed from is as follows:

"It is therefore ordered that William Madgett be ap-

pointed receiver of the defendant corporation and all moneys, debts, effects, books and property of every description belonging to or forming a part of defendant corporation, its assets or effects. That its officers, their agents and employees are hereby directed to deliver the same to said receiver, and said receiver is authorized and required, without unnecessary delay, to sell and convert into money any such property or effects as do not consist of money, and to collect all funds due defendant, and to pay all debts due by defendant corporation, and distribute the funds collected or received by virtue of this order to the parties entitled thereto, under the further orders of this court. It is further ordered that, before he enters upon his duties as such receiver, he execute and deliver to the clerk of this court an undertaking, with approved sureties, to the defendant in the sum of one thousand dollars ($1,000), conditioned according to law. It is further ordered that said receiver make report to this court of his doings in this behalf at each term of this court hereafter held, until he be finally discharged."

In the view we take, it will not be necessary to discuss the evidence in the case further than to say, it does not better the case made by the petition. No demurrer to the petition was filed, but objection was made to the introduction of evidence, on the ground that the petition does not state facts sufficient to constitute a cause of action. This was overruled and exception taken.

We think that even under the liberal construction required to be placed on the petition, when attacked first in this manner, the petition does fail to state a cause of action.

By section 267 of our code, "No receiver shall be appointed except in a suit actually commenced and pending." And it is a familiar rule that the action pending must be an action for some relief, or to enforce some right, other than the mere appointment of a receiver.

In the case before us, no action was commenced by the plaintiff which can support the receivership, as a proceed-

ing ancillary thereto; the prayer of his petition conclusively shows this.

"A suit actually commenced and pending" that will support the appointment of a receiver must be one for relief that could be litigated between the parties, even if the application for the appointment be denied. See *Hottenstein v. Conrad,* 9 Kan. 435.

In *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.,* 68 Neb. 222, it is said:

"The suit which must be 'actually commenced and pending' as a condition precedent to an appointment of a receiver, must be one in which the main relief sought is independent of the receivership."

And from *Barber v. International Co. of Mexico,* 73 Conn. 587, 593, the following language is quoted with approval:

"It is not the office of a court of equity to appoint receivers as a mode of granting ultimate relief. They are appointed as a measure ancillary to the enforcement of some recognized equitable right."

And this court held that a receivership is a purely ancillary remedy and can not be maintained in a proceeding instituted solely for that purpose. It is clear that, judged by these authorities, there was no suit actually commenced and pending in the lower court that will sustain the appointment of a receiver in the case before us. The petition is not a good creditor's bill, for plaintiff is not shown to be a judgment creditor. It will not sustain a stockholder's suit, not being on behalf of all, or other stockholders; neither does it contain sufficient averments. See 2 Cook, Stock and Stockholders (3d ed.), sec. 646.

We think, also, the petition is fatally defective for other reasons. It is alleged that "at all times hereinafter stated, the defendant is and was a corporation duly incorporated and existing under and by virtue of the laws of the state of Nebraska."

While it may be possible to so liberally construe the petition as to hold that the plaintiff therein claims to be

a stockholder of the defendant corporation, yet, taking it in connection with the form of his contract, it clearly shows that he is not such a stockholder.

Cook in his work on Stock and Stockholders (3d ed.), says in section 12: "A share of stock may be defined as a right which its owner has in the management, profits and ultimate assets of the corporation. By the court of appeals of New York it is said that 'the right which a shareholder in a corporation has, by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts.'"

In *Neiler v. Kelley,* 69 Pa. St. 403, it is said:

"A share of stock is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of a corporation never realized except upon the dissolution and winding up of the corporation—with the right to receive in the meantime such profits as may be made and declared in the shape of dividends."

It is impossible to hold that the plaintiff is a stockholder in the defendant corporation, and therefore he has no standing in court as a stockholder to secure the appointment of a receiver for the corporation because of the mismanagement of its affairs by its officers under the holding of this court in *Ponca Mill Co. v. Mikesell,* 55 Neb. 98. Even if he were such stockholder, it is doubtful if he can maintain an action, as such, in a court of equity, for, where the real business of the corporation is illegal, courts will not aid a stockholder. *Le Warne v. Meyer,* 38 Fed. 191.

As one sustaining a mere contract relation with the defendant, he is in no better plight. His contract purports to be a contract for the sale of a diamond upon certain terms and conditions; no averment is made that his contract is not what it purports to be, and its terms may not be varied by parol; he does not allege that he has demanded and been refused the delivery of the diamond; he does not

allege damages sustained by him because of any breach of contract by the defendant; he has not recovered judgment against the defendant for any sum, and if the defendant has broken its contract with him, to his damage, he is merely a general creditor of the corporation and has no standing in a court of equity, because he has not pursued his remedy at law. Nowhere in his petition does he allege, in terms, nor does he show by proper averments, that he has no adequate remedy at law.

In *Missouri, Kansas & Texas Trust Co. v. Richardson,* 57 Neb. 617, it is held:

"A creditor whose claim has not been reduced to a judgment, and who has neither a general nor specific lien on his debtor's property, is not entitled to have such property impounded as security for the claim."

In *Merchants Nat. Bank v. McDonald,* 63 Neb. 363, this court hold:

"A creditor whose claim has not been reduced to judgment can not maintain an action against an insolvent corporation for the ratable distribution of its assets among its creditors."

The appellee in his brief uses this language:

"We deem it useless to discuss the only questions argued by the appellant, namely: (1) Is a holder of a contract in defendant's company, a stockholder? (2) A common contract creditor is not entitled to the appointment of a receiver. The controversy in this case presents a different question, one not dependent upon either of the above inquiries. It is this question: Is there a trust relation between plaintiff and defendant, and does plaintiff own jointly with defendant property, or a fund, which is in danger of being lost, removed or materially injured, and by reason thereof is plaintiff entitled to have a receiver appointed?"

By the terms of the contract upon which the plaintiff bases his claim, it is impossible for it to create a trust relation to any fund, any further than every debtor may be held to hold his property in trust for his creditors.

The money paid in by the plaintiff was not to remain in a fund in which he should eventually share, but was to be expended by the defendant in the purchase of a diamond, which clearly shows that the absolute title to the money was in the defendant, and there is no property jointly owned by the plaintiff and the defendant.

Blackstone, combating the proposition that every case is to be decided upon the circumstances, according to the arbitration or discretion of the judge, according to his own notions, says: "The system of our courts of equity is a labored, connected system, governed by established rules, and bound down by precedents, from which they do not depart." "The systems of jurisprudence in our courts, both of law and equity, are now equally artificial systems, founded in the same principles of justice and positive law; but varied by different usages in the forms and mode of their proceedings." "In short, if a court of equity in England did really act, as many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case." 3 Blackstone's Commentaries, 432-434.

Story in his work on Equity Jurisprudence (13th ed.), vol. 1, section 20, says:

"What has been already said upon this subject can not be more fitly concluded than in the words of one of the ablest judges that ever sat in equity. 'There are' (said Lord Redesdale) 'certain principles, on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have in this respect no more discretionary power than courts of law. They decide new cases, as they arise, by the principles on which former cases have been decided; and may thus illustrate or enlarge the operation of those principles. But the principles are as fixed and certain as the principles on which the courts of common law proceed.'"

The evil, somewhat prevalent of late, existing in the

form of such corporations as the defendant can, and should be abated by the courts in the proper form of action, as in *State v. Nebraska Home Co.*, 66 Neb. 349, recently decided by this court, and by legislative enactments such as have been made by the recent legislature of this state; and courts of equity need not do violence to the established rules governing the exercise of their rightful powers to relieve parties who, like the plaintiff, have, by their own deliberate acts, placed themselves in his unfortunate condition.

We are clearly of the opinion, that no action was pending in the lower court that justified, or will support, the appointment of a receiver; that the plaintiff can not, upon the facts pleaded, maintain a creditor's bill, neither can he maintain a stockholder's suit; and that the petition does not state a cause of action in favor of the plaintiff for any equitable relief.

We therefore recommend that the order of the district court appointing a receiver be vacated, and the action dismissed.

BARNES and ALBERT, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the order of the district court appointing a receiver is vacated and the action dismissed.

REVERSED.

GEORGE OELKE V. ALBERT THEIS, EXECUTOR OF THE ESTATE OF PETER HAUSCHILD, DECEASED.

FILED DECEMBER 2, 1903. No. 13,210.

1. **Verdict of Jury: EVIDENCE.** A verdict of a jury from conflicting evidence will not be disturbed in this court, because of being against the weight of evidence; and the weight and credibility of testimony is for their determination exclusively.

2. **Possession of Promissory Note.** The fact that a promissory note

was found in the possession of the payee at the time of his death, is evidence that he had not made a present of it to the maker.

3. **Instruction.** It is not error for the court to instruct a jury as to the legal significance of uncontradicted evidence or admitted facts.

ERROR to the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

Edwin F. Warren and *William F. Moran,* for plaintiff in error.

John C. Watson, contra.

AMES, C.

This is an action by an executor upon a promissory note given to his testator by the defendant. The note, by its terms, became due on January 2, 1885. The suit was begun in February, 1901. Among other defenses, the statute of limitations is pleaded. The defendant testifies positively that he never made any payment on the note, and gives as a reason therefor that the amount payable thereon was donated to him by the decedent. In rebuttal of this defense the plaintiff put in evidence certain indorsements of small credits written on the note by the deceased. Such evidence, standing alone, was clearly incompetent. They were equally so as if the suit had been brought by the testator in his own lifetime. They were not admissions against his own interest, and he could not manufacture testimony in his own behalf. In corroboration of these indorsements, or of one of them, the plaintiff produced a witness who testified that he saw one of them made in May, 1896, and at that time he saw the defendant make to the decedent a payment on the note to the amount of the indorsement. He was an interested witness and his testimony is somewhat vague and unsatisfactory, but its weight and credibity were for the jury, and, inasmuch as the jury have said by their verdict that they believed it, we are bound, under a well settled rule of this court, to believe it also.

As tending to support the issues on his behalf the defendant was asked, as a witness, this question: "At the time of Peter Hauschild's decease, were you indebted to him; did you owe him anything?" An objection to the question was properly sustained, if not for the reason that the witness was incompetent, then because it called for no statement of fact but for a conclusion of law only. Complaint is made because the court instructed the jury that possession of the note by the payee at the time of his death was "evidence tending to prove that there had been no gift of the note," as alleged by the defendant. It is not insisted that the instruction is not a correct statement of an abstract proposition of law, nor that it is not pertinent to the undisputed evidence in the case, but it is urged that it gave undue prominence to that evidence. This is equivalent to saying that the court must not instruct concerning the legal significance of undisputed evidence or admitted facts. Under such a rule, it would be difficult to try law suits.

No other error of law is assigned, and the evidence upon all issues of fact was conflicting. There is therefore no ground for disturbing the verdict of the jury which was for the plaintiff, and it is recommended that the judgment of the district court be affirmed.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

RASMUS JOHNSON, APPELLANT, V. JAMES G. WEBER ET AL., APPELLEES.

FILED DECEMBER 2, 1903. No. 13,087.

1. Contract: VALIDITY. Merely indorsing by the notary on the back of a contract by husband and wife for the sale of the wife's real estate, of an extension of time for making the first payment, which

extension was not authorized by the wife, does not destroy the contract as really made, nor warrant the wife in repudiating it.

2. ———: PERFORMANCE. A payment which is to bind a bargain, and to be deposited with a contract in a bank, until a conveyance is made upon payment in full by a certain date, is in time if it gets into the bank before the contract is presented there, and both are left there together by the parties, though the payment is actually made three days after the time named in the agreement.

3. **Evidence:** WAIVER. Evidence *held* not to show any parol waiver or release of the contract by vendee.

4. **Sale of Homestead:** DURESS: SPECIFIC PERFORMANCE. The fact that the signature and acknowledgment of a wife to a contract of sale of a homestead was made under threat of her husband to "leave" her if she did not execute it, is not ground for refusing specific performance of the contract, where the vendee is entirely innocent of any participation in or knowledge of the threat.

APPEAL from the district court for Knox county: JAMES F. BOYD, JUDGE. *Reversed with instructions.*

Frank Dolezal, for appellant.

William A. Meserve and *W. L. Henderson, contra.*

HASTINGS, C.

This is an action brought to obtain specific performance of a contract for the sale of a farm. The defendants, James G. and Electa Weber, on September 7, 1901, entered into a written contract, agreeing to convey to the plaintiff the northeast quarter of section 30, town 29, range 5 east, for the sum of $6,400, $1,000 to be paid in cash, and deposited, together with the contract, in the bank of Creighton, and the remainder, $5,400, "by" March 1, 1902. In consideration of such payments the defendants were to convey the premises, and in case of a failure to pay the remainder of the purchase money, the $1,000 "so paid and deposited with this contract" should be forfeited. The wife seems to have entered into the contract with some reluctance and finally refused, altogether, to carry it out. The title to the farm was in her. The contract, by its terms, provided for payment of the $1,000 "on the signing

of this contract, and the same is paid for the purpose of binding said bargain." Defendants' answer alleged that the following clause indorsed on the back of the contract, "cash payment herein described to be paid by September 14, 1901," was placed upon the contract by agreement between Johnson and James G. Weber and without the assent of Electa Weber; that the latter was the sole owner of the premises, and that her husband had no authority to introduce any change into the contract; that the premises were occupied as a home, and that the wife never acknowledged the instrument after its terms were changed by the indorsement. Defendant, James G. Weber, says that the contract was annulled by mutual agreement between him and the plaintiff prior to September 21, 1901. Electa Weber's answer sets up the alteration of the contract by indorsement of an extension of time for payment of the $1,000, and that the $1,000 was not paid within the time stated in the contract, and she therefore elected to declare the contract at an end, and that such election was assented to by plaintiff. She also says that she was induced to sign the contract by threats on the part of her husband to desert her if she did not, and that she never acknowledged the instrument.

The reasons given, therefore, why specific performance of this contract should not be decreed, resolve themselves into three: (1) The indorsement upon the contract, without the assent of the wife, who is the owner of the property, of the extension until September 14 of the time for paying the $1,000; (2) the alleged annulment of the contract prior to September 21 by oral agreement between the plaintiff and John G. Weber; (3) the fact alleged in defendant's answer, and testified to in her evidence, that she was induced to sign the agreement by her husband's threats to desert her if she did not.

It seems unnecessary to discuss, at any great length, the proposition that the indorsement of an extension of time for the payment of the $1,000 is not sufficiently material to avoid the contract. This money, it is true, was origin-

ally agreed to be paid on the day of the contract's signing, which was September 7, 1901; but it appears clearly that it was understood between the parties that Johnson did not have the money with him; that he would have to get it from Fremont, and the money was to be paid, as the contract recited, for the purpose of binding the bargain, and was to be deposited with the contract in the bank at Creighton. It was actually deposited in the bank at Creighton three days later, and on the day following the contract was deposited. The latter had been, up to that time, retained by the notary who drew it, and who is since counsel for the defendants in this case. The money was actually in the bank before the contract was there; and whether or not the indorsement of consent, that it should be there by September 14, was by authorization of Electa Weber, does not seem material or offer any ground for refusing its specific enforcement.

The claim of an oral agreement to release and surrender the contract, between James G. Weber and the plaintiff, is not made out by the proof; and it is not necessary to discuss whether or not it would be valid in law. It is clear from the correspondence that an effort was made by the Webers, or at least, Mrs. Weber, to escape from the conditions of this contract. On the next day after its execution, James G. Weber wrote to the plaintiff at Fremont, telling him not to sell his farm as Weber's wife was declaring she would not sign any deed; also telling Johnson not to send the $1,000 "until you hear from me," that he was trying to get her to agree and nothing need be done until September 21; that he would write again the following week. Then on the 11th, three days later, he wrote Johnson again, saying that his wife was getting more contented all the time and he thought it would be all right; that he, himself, was going to Omaha the following Monday, and asked Johnson to meet him at Fremont at the 8:45 train. Again, on September 19, Weber writes: "I will do as I agreed along the line in this land deal, that I would let you know this week whether my wife would sell or not.

After considering the matter she says she would not sell, so you need not wait any longer for this place. I instructed the banker to return the money to you, which he will do tonight." In our opinion, the evidence of Mr. Weber, and the witness Vinker, if taken as wholly true, fails to establish any oral surrender or relinquishment of this contract, or an intention to surrender or relinquish on the part of the plaintiff:

It remains only to consider what effect is to be given of the allegations that the contract was executed under the threat of Weber to desert his wife if she did not sign it. There is no claim that there was any knowledge on the part of the plaintiff of any such duress by the husband. It does not seem necessary to examine as to whether or not the facts alleged amount to duress, inasmuch as no knowledge of, or responsibility for them, on the part of the plaintiff, is claimed. It seems clear that the wife can not defend against Johnson's claim, on the ground of any threats or imposition upon her by her husband of which Johnson was wholly innocent. *Ladew v. Paine,* 82 Ill. 221; *Biggers v. St. Louis Mutual House-Building Co.,* 9 Mo. App. 210; *Schrader v. Decker,* 9 Pa. St. 14, 49 Am. Dec. 538.

An earnest argument is made for the proposition that, the property in question being a family homestead, greater effect should be given to the husband's coercion of the wife than in other cases. Some Kansas decisions are cited in support of such a rule. They are founded upon the Kansas statute making the voluntary assent of both husband and wife necessary to such a conveyance or agreement. Probably the fact of the premises being a homestead should be taken into consideration in weighing the evidence and determining the soundness of this contract. There seems, however, no reason for adopting a different rule in such cases. The statute has simply required that all instruments affecting a homestead in this state be acknowledged. The effect of such acknowledgment is not supposed to be different from that in other instruments. Participation in the wrong by the purchaser should be shown in order to avoid the instrument.

It is recommended that the decree of the district court be reversed and the cause remanded with instructions to enter a decree for specific performance of the contract.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded with instructions to enter a decree for specific performance of the contract.

REVERSED.

ELIZABETH RIDDELL ET AL., APPELLEES, V. LILLIAN RIDDELL, APPELLANT, IMPLEADED WITH DORETHA RIDDELL.

FILED DECEMBER 2, 1903. No. 13,133.

1. **Witness:** EVIDENCE: COMPETENCY. "Since the amendment of 1883, section 329 of the code does not render a party adversely interested to the representative of a deceased person incompetent as a witness in the action, but only renders his testimony as to transactions and conversations with the deceased incompetent." *Sharmer v. McIntosh*, 43 Neb. 509.
2. **Relinquishment:** EVIDENCE. Evidence *held* to be sufficient to uphold finding of oral relinquishment of further share in father's estate by appellant's father.
3. ———: *Held*, That such a relinquishment to be effectual as to lands must be in writing signed by the party to be charged.
4. ———: STATUTE OF FRAUDS. Receipt and retention of lands from the father in consideration of such an agreement, is not such a part performance of it as to take it out of the statute of frauds.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed and dismissed.*

Henry H. Wilson and *Elmer W. Brown*, for appellant.

J. W. Deweese, Webster S. Morlan and *Frank E. Bishop, contra.*

HASTINGS, C.

In 1878, James Riddell and Elizabeth Riddell, his wife, of Lancaster county, Nebraska, by warranty deed, reciting a consideration of $600 "in hand paid," conveyed 80 acres of land in the same county to David D. Riddell, a son. In 1881, David D. Riddell died, leaving a daughter, Lillian. In 1882, the grandfather, James Riddell, died seized of the 120 acres of land in question in this action. The following year his widow married the other plaintiff, David A. Riddell. They have occupied the premises ever since.

James Riddell had five sons, of whom all but David D. survived him. The surviving sons have all conveyed their interest in the land to the mother. The granddaughter, Lillian, now 24 years old, refuses to convey; and this action is brought by the grandmother and her present husband to quiet title in the 120 acres of land against her. This is on the alleged ground that the conveyance to David D. in 1878 was not really for any money consideration but was, in fact, in conisderation of the relinquishment by David D. of all further share in his father's estate, and was in the nature of an advancement; that this agreement by David D. is binding upon his daughter, although her father died before the grandfather, and therefore without any right in the grandfather's estate vesting in him.

The granddaughter denied there was any such relinquishment, and claimed one-fifth interest in the land in right of her father. The trial court found the grandmother's allegations of the agreement to be true, and quieted title in her to the 120 acres of land. From this decree Lillian Riddell appeals. The sufficiency of the proof of an oral agreement by her father to relinquish any further share in the grandfather's estate is denied, and also the validity of such an oral contract, if it is found to be established.

As to the fact of the conveyance to David D. being in

the nature of an advancement, and in consideration of his being satisfied to give up any further share in his father's estate, there is first the testimony of Frank F. Riddell. He testifies that in 1878, when he was in his eighth year, it was talked over in his presence by his father and his brothers, David D. and William W., that the father, being in bad health, should make some arrangement of his affairs; that the father asked David D. if it would be satisfactory for the latter to take the property proposed to be deeded to him, 80 acres of land, in full of his share in the father's estate. He agreed to the arrangement and the land was conveyed to him. William W. also got 80 acres of land. The witness states that to his "best knowledge and belief" his brother David D. gave nothing for the land except the relinquishment of claim on the father's estate, and on the next day after this family conference David D. remarked, as he was about starting for Lincoln, that they were going to have the matter fixed up.

William W. testifies to the transaction, and to the same general effect, but more in detail, he being 17 years older than Frank. He knows that he and David D. each got 80 acres of land, which was to be in full of their share of the father's estate. His own he got by trading to his father for it another tract of land, toward whose purchase the father had helped him with $600.

Wiley Riddell, another brother, says he was only about 9 years old, and that he only knows, in a general way, that the father gave 160 acres of land to William W. and David D.—80 acres to each of them.

Newton N. Riddell, about 16 years old at the time, testifies to the same general state of facts as to the land conveyed to David D. and William W. He also testifies to various subsequent statements by the father as to what had been done, and to subsequent statements by David D. Riddell as to the arrangement by which the latter got his 80 acres of land.

The wife of this last witness testifies also to hearing David D. state the same things in 1879 as to the arrange-

ment by which he obtained the 80 acres of land. She also testifies to subsequent statements of the father, James Riddell, to the same effect. These latter statements are no doubt hearsay and incompetent.

All this evidence comes from the brothers and the wife of one of them. It is objected that they have an interest as heirs, and that, the action being against a representative of a deceased person, their testimony as to transactions with such person is incompetent.

This is an action to quiet title in land brought by the mother and her hlusband against this granddaughter. Before it was instituted all of these witnesses made quit-claim deeds to the mother. These deeds were never recorded, but the plaintiffs' attorney says that they were, some weeks before the commencement of this action, delivered to him, as her agent, and have been in his possession since. Can parties, who are disqualified from testifying because of interest, render themselves competent by transferring such interest after the death of the other party? If this can be done, then there is small force in the statute. By simply selling his claim, without recourse, the witness can always qualify himself to prove it up.

In *Magenau & Co. v. Bell,* 13 Neb. 247, the evidence of a member of a firm, who had assigned his interest pending the action, was excluded. In *Tecumseh Nat. Bank v. McGee,* 61 Neb. 709, a person, who had long before the death of the other party wholly severed his connection with a firm, was held competent as a witness for the remaining members of the firm against an administrator in whose name the action was revived. The court however, say:

"Had the transfer of interest been made subsequent to the death of the original plaintiff, we think the effect of the operation of the statute would be to disqualify the witness."

That is, it seems, where death has established a bar to an interested witness's testifying, such bar can not be removed by his merely assigning his interest.

In the present case David D. Riddell had been more than 20 years dead when the deeds were made, by which it was sought to render these witnesses competent to testify against his representative. It would seem then clear that, as to transactions and conversations had with him by these witnesses, their testimony should not be taken. There is not the same objection to their testifying to transactions in their presence between David D. Riddell and his father. *Sharmer v. McIntosh,* 43 Neb. 509.

In our opinion, there is enough competent testimony as to transactions between David D. and his father, to overthrow the recital of the deed, considered merely as a solemn statement and admission of the fact of a money consideration, and enough to establish the oral agreement claimed by plaintiff. Is that agreement valid and binding upon the daughter and heir of David D. Riddell?

Three reasons are advanced by the granddaughter's counsel why the agreement, even if found to exist, should not be upheld; that it is contrary to the statute of frauds, as an attempt to transfer an interest in the 120 acres of land in question by an oral agreement; that it is contrary to our statute as to advancements, which requires that advancements be stated in writing by the ancestor to be such, and no such writing exists; that it was an attempt to transfer a thing not *in esse,* a right in the father's property which had never vested in the son; and nothing passed by it in any event.

Dealing with the last named reason first, there seems no doubt that contracts of this kind are enforceable in equity. Though they relate to no existing right and convey nothing of themselves, yet, when the right does accrue, they are treated, in equity, as valid agreements to convey it, if they are clearly established and untainted with fraud. 3 Pomeroy, Equity Jurisprudence (2d ed.), sec. 1286. If they concern lands, however, they must be, like other agreements relating to lands, in writing or they are unenforceable. *Green v. Hathaway,* 36 N. J. Eq. 471.

This doctrine of the validity in equity of such an agree-

ment and of the necessity that it be in writing is reaffirmed in *Brands v. De Witt,* 44 N. J. Eq. 545, 6 Am. St. Rep. 909.

This contract, then, is of no force unless it is taken out of the statute of frauds by part performance. The part performance which is claimed is that the land which was conveyed to David D. Riddell, in consideration of the agreement, was placed in his possession at once in 1878, and has remained in him and his successors in title since. It is true that the 120 acres of land in question in this action have been, since the father's death, and are now, in the possession of the mother. This possession, however, is in no way referable to the contract, but to the widow's right by homestead and otherwise. The part performance claimed is only, that the full consideration for this agreement was delivered to and has been retained by the other party. But payment in full of the consideration is not part performance of a contract which will suffice to take it out of the statute of frauds. Browne, Statute of Frauds (3d ed.), secs. 461-465. This doctrine is stated by Mr. Browne as no longer open to question, and cases holding it in nearly all the states are cited in 23 Century Digest, col. 2408. In *Baker v. Wiswell,* 17 Neb. 52, it is said that the part performance necessary to take the contract out of the statute of frauds is delivery of possession in whole or in part. In that case, it is true, the only part performance found was payment of a portion of the purchase price which was judged insufficient. And in *Bigler v. Baker,* 40 Neb. 325, continued possession by a tenant is held to be not sufficient, but the possession must be referable to the contract, to take the latter out of the statute. The Nebraska cases, *Connor v. Hingtgen,* 19 Neb. 472; *Hanlon v. Wilson,* 10 Neb. 138, and *Dickman v. Birkhauser,* 16 Neb. 686, cited by appellees, indicate no different rule. In the first, the answer admitted the contract and was held to waive the statute. In the other two, full possession was given under the contract of the premises involved.

There are cases cited as holding that a contract to release or convey lands in consideration of other lands will be enforced, though resting in parol, if one party has conveyed and delivered the lands, on his side, and the other party is retaining them and refusing to convey. There are *dicta* in various cases that this is sufficient, as in *McClure v. Otrich,* 118 Ill. 320. In this last case, however, possession was given on the one side and was retained on the other, pursuant to the contract. We are not cited by appellees to any case where lands were conveyed and possession given, in reliance upon a mere verbal agreement, wholly future in its character, on the other side, to release or convey other lands, which is held enforceable. Where both conveyances were intended to be contemporary and part of one transaction, the making of one might be part performance of the whole. In the present case, however, the conveyance of the 80 acres to David D. was simply the consideration for the oral relinquishment. It was in no sense a part performance of such relinquishment.

It seems undesirable to introduce any fresh uncertainties into our laws of descent and distribution. To leave to interested parties, by oral testimony, to impeach the recitals of an ancestor's deed, after 25 years, and create, by parol evidence, a relinquishment by the father of this granddaughter, which shall bar her of participation in the grandfather's estate, seems to involve a dangerous relaxation of the statute of frauds. We do not think that courts of equity should go so far as the supreme court of Ohio in *Needles v. Needles,* 7 Ohio, St. 432, 70 Am. Dec. 85, and hold such an agreement absolutely unenforceable, even if in writing. But there seems no reason for departing from the requirement of the New Jersey cases, cited above, that the agreement, if it is to affect lands, must be in writing.

It is recommended that the decree of the district court be reversed and the action dismissed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the action dismissed.

REVERSED.

CITY OF SOUTH OMAHA V. CATHERINE O'ROURKE.

FILED DECEMBER 2, 1903. No. 13,218.

1. **Taxation**: PRECINCT. For purposes of taxation and revenue, a precinct actually formed and organized will be deemed a *de facto* organization, whether the meeting of the county commissioners at which it was made was lawfully adjourned and held or not.
2. **De Facto Assessor.** Where a precinct, as formed, embraced four wards of a city, each of which was by statute made a precinct for taxing purposes, an assessor elected for and exercising his office in all four of them, without objection and with the acquiescence of the people, is a *de facto* assessor in each ward.
3. **Taxes**: RECOVERY. City taxes paid under protest are not recoverable because based upon an assessment made by such a *de facto* assessor who was acting for all four wards.

ERROR to the district court for Douglas county: BENJAMIN S. BAKER, JUDGE. *Reversed.*

Arthur H. Murdock, for plaintiff in error.

Henry W. Pennock, Edward R. Duffie, James E. Kelby and *Frank H. Gaines, contra.*

HASTINGS, C.

Plaintiff below, Catherine O'Rourke, brought suit in the district court for Douglas county against the city of South Omaha, alleging that the latter is a city of the first class, duly organized; that it was, during the years from 1894 to 1899, inclusive, divided into four wards; that plaintiff owned certain real property described in the petition, and that during the years mentioned, a person, styling himself "assessor of South Omaha precinct," attempted to assess the property for taxation, and that no

other assessment of it was made; that, during each of these years, taxes were attempted to be levied against the property by virtue of such assessments; that on February 7, 1900, the city treasurer demanded payment of such taxes, and that on that date plaintiff paid the city taxes for these years, aggregating $762.12, under protest; and she brought the action to recover it. An answer was filed and an amended answer. The latter admits the corporate capacity of the city; denied that it was divided into four wards during the entire six years, and admits the ownership of the property; admits that, for the years 1894 to 1897, inclusive, the assessment was by an "assessor of South Omaha precinct," and that the taxation of the premises was based upon such assessments, and says that for the years 1898 and 1899 the assessment was made by an assessor of each ward. The answer further sets out that the assessment, during the years 1894 to 1897, was made by a duly elected assessor, whose legal authority was never previously questioned and was acquiesced in by all of the inhabitants of the city, and that the method of assessment has prevailed during all the time since the city was organized until 1898; that the taxation complained of, and protested against, was for the general public use and benefit of the city, was not excessive or out of proportion, and that the plaintiff was equitably bound to pay it. Payment, on the 7th day of February, 1900, of these said taxes is admitted; and that the treasurer's receipt had written upon its face: "These taxes paid under protest. Protest filed February 7, 1900;" and denies that any sufficient protest was filed, and denies the serving upon the treasurer of any written demand for the repayment of the money.

The trial court found in favor of the plaintiff as to the taxes for 1894, 1895, 1896 and 1897, and for the city as to the taxes for 1898 and 1899. Judgment was given the plaintiff for $650.36. To reverse this judgment the city brings error. The errors complained of are; that the trial court admitted in evidence, over the city's objection,

a recital in the receipts for taxes that the taxes were paid under protest; that the court erred in admitting the protest against the payment of these taxes and the demand for repayment, both of which were in writing, and on both of which the city treasurer had indorsed a receipt of a copy; and in admitting in evidence the original answer of the city, which contains certain admissions not in the amended answer. Complaint is further made of error in refusing to admit proof of the action of the county commissioners of Douglas county in forming the precinct of South Omaha; and that the finding and judgment are contrary to law and not supported by sufficient evidence.

Counsel for defendant, while declaring that he does not waive any errors in the admission or rejection of evidence, rests his case chiefly upon the latter complaint. There seems to have been no error by the trial court in admitting the several items of evidence mentioned, and, in any event, it seems clear that the evidence establishes the payment of these taxes under protest, and that they are based upon an assessment made by "the assessor of the South Omaha precinct." That the city consists of four wards is admitted. The plaintiff's counsel claims that her case rests upon these facts. If they are sufficient, errors in the admission or rejection of evidence can hardly avail the defendant anything, and if they are not sufficient to uphold the judgment, it can not stand.

The error complained of, in the refusal to allow the evidence of the proceedings of the board of county commissioners in establishing South Omaha precinct, only becomes important, as bearing upon the right of an assessor of that precinct to exercise that office as to this property. It would seem that the evidence was properly excluded. It is conceded that it fails to show that there was any properly adjourned meeting of which a record could properly be made at the time. No evidence, aside from the record, was tendered that there was an actual holding of a meeting, and an actual session, and actual establishment of South Omaha precinct. An apparent

record made of an apparently unauthorized meeting would hardly be evidence of the facts recited by it. The evidence in this case, however, indicates distinctly that there was an actual assessment by an officer assuming to act as assessor. The doctrine of *Norton v. Shelby County,* 118 U. S. 425, that there can be no *de facto* officer if there is no *de facto* office, seems to have no application to the facts in this case. There was an actual organization of South Omaha precinct, whether the record of its formation was admissible or not. There was a *de facto* precinct. In fact, the plaintiff's claim is that there were four of them, for each of which there should have been an assessor. The assessor who was acting was the *de facto* officer of each of the four wards, because he assumed to act for all of them.

It is true that in *Morton v. Carlin,* 51 Neb. 202, where an injunction was brought against the levy of a tax for the payment of bonds, this court held that a precinct which included the whole of Nebraska City with its four wards, as well as some lands adjoining, was not a precinct authorized in any manner to issue bonds. That holding does not seem necessarily decisive of this case. In the present case the sole question is, whether an actual and *de facto* organization of the whole of South Omaha into one precinct was superseded and rendered nugatory by the statutory provision, that each ward of that city, of which there were four, should constitute a precinct. And, as above suggested, whether the precinct consisted of the whole city of South Omaha, or whether there were four precincts; each precinct, whether an entire city or a single ward, was entitled to make assessments. If it was by a single officer, and he was making assessments for all of them, this would not prevent his being a *de facto* officer, and his acts valid, until he was deprived by lawful authority of such position. Of course, he could not *de jure* hold the position of assessor in a precinct where he did not live, but beyond question he could do so *de facto.* The assessments in this instance were valid. The fact

that they were made by one who styled himself "assessor of South Omaha precinct," but who was, in fact, exercising the office of assessor throughout the city, is no ground for the repayment of this money, which the plaintiff paid under protest for taxes so assessed.

The point urged at considerable length, that plaintiff failed to prove the filing of her claim with the city council for the refunding of these taxes, need not be discussed. The above conclusion disposes of the case, and in *City of Omaha v. Hodgskins, ante,* p. 229, it is held unnecessary to file an additional claim with the city council. The demand of the treasurer is held sufficient.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings in accordance with law.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED.

JAPTHA A. HUDDLESON ET AL. V. ORPHEUS B. POLK.*

FILED DECEMBER 2, 1903. No. 13,113.

1. **Assignment:** BOND. The sureties on the official bond of a sheriff are liable for his misconduct when acting as assignee under the provisions of section 7, chapter 6, Compiled Statutes.

2. ———: RECORDING DEED. The provisions of section 6, chapter 6, Compiled Statutes, 1899, requiring the filing of a deed of assignment for record in the clerk's office of the county in which the assignee resides, within 24 hours after its execution, is mandatory. *Miller v. Waite,* 60 Neb. 431, followed.

3. ———: ———. The fact that the assignor requests a sheriff, acting as assignee, to withhold a deed from record the statutory time, is no excuse for such neglect.

* Rehearing allowed. See opinions, pp, 489, 492, *post.*

4. **Assigned Claims:** ACTION. An attorney to whom claims are unconditionally assigned may prosecute an action in his own name for a recovery on such claims, without joining the original claimants.

5. **Assignment:** DISTRIBUTION. The claims of creditors who stand in a hostile attitude to an assignment can not be prorated with the claims of those who have complied with the act, in a distribution of the proceeds of the assigned property.

6. **Recording Deeds:** EVIDENCE. Evidence examined, and *held* not sufficient to show a compliance with the statute in the matter of recording an assignment deed.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

Willard E. Stewart, for plaintiffs in error.

Robert S. Mockett, Orpheus B. Polk, John M. Stewart and *Thomas C. Murphy, contra.*

OLDHAM, C.

This was an action instituted by Orpheus B. Polk, as assignee of numerous creditors of the firm of Muir-Cowan Company, a partnership, doing business in Lincoln, Nebraska, against the sheriff of Lancaster county and the sureties on his official bond, for the failure of the sheriff to file a deed of assignment, executed and delivered to him as sheriff of said county by the firm of Muir-Cowan Company, within the time required by law; the petition alleges that, by reason of such failure and neglect, property and effects of the insolvent firm, which had been delivered to such sheriff as assignee, were taken from his possession by attachment proceedings instituted by other creditors, and that the amount and value of the goods so taken were equal to, or in excess of, the claims assigned to plaintiff. The sureties on the sheriff's bond answered, alleging numerous defenses which will be considered in the opinion. Plaintiff replied with a general denial of the facts alleged in the answer; there was a trial to a jury; the court directed a verdict for plaintiff in the sum of

$2,839, which was accordingly returned, and judgment was rendered upon the verdict, and the defendant sureties bring error to this court.

The first contention is that the sheriff, when acting as assignee under the provisions of chapter 6, Compiled Statutes, acted under color of, but not by virtue of, his office, and hence the sureties on his official bond are not liable for such misconduct. This contention, however, flies in the face of the plain language of section 7, chapter 6, Compiled Statutes (Annotated Statutes, 3506), which says:

"Immediately upon the execution and delivery of any such assignment, the sheriff shall take possession of all the assigned estate, and preserve, insure, and safely keep the same for administration according to law, and the sheriff and his sureties shall be liable, upon his official bond, for the faithful execution of the trust created by such assignment, for the preservation of such assigned estate, and for the accounting for and paying over of all moneys derived therefrom."

The next question urged is that the deed of assignment is absolutely void, because made for the purpose of hindering and delaying creditors, and therefore conveyed no rights to the assignee, even had he recorded it as provided by law. The same objection to this deed was urged before this court in *Miller v. Waite,* 59 Neb. 319, and it was there held that the deed was not void upon its face, and that its execution and delivery conveyed the effects of the insolvent estate to the sheriff as assignee. On a rehearing of this case in *Miller v. Waite,* 60 Neb. 431, it was held that the provisions of the statute requiring the deed to be recorded within 24 hours were mandatory, and a failure to file such instrument within the time limited by statute avoids the assignment and renders it of no force and effect. It follows from these conclusions that, had the sheriff recorded the deed within the time prescribed by statute, he would have conserved the property and impounded it for the benefit of creditors who filed their claims for allowance as provided for by chapter 6,

supra; consequently, his failure to file the deed amounted to a neglect of official duty, for which he and his bond are liable to the extent to which creditors, who complied with the provisions of the assignment act, have been injured. It clearly appears from the record that each of the creditors, for whom plaintiff acted as assignee, had filed their claims with the county court, and that such claims had been duly allowed, and the proof in the record shows that there were sufficient assets of the bankrupt estate to have paid these claims, had the deed been recorded and possession of the property retained by the sheriff as assignee. It is urged, however, in extenuation of the action of the sheriff, that he failed to record the deeds for 10 days by request of the assignors and their attorney, and because no registry fee was paid him by the assignors, at the time the deed was delivered to him. We think there is little merit in this explanation. When the sheriff accepted the deed and took possession of the property as assignee, it was his duty to comply with the statute by having the deed recorded, and the provisions of the statute were ample to reimburse him for any recording fees expended from the assets of the bankrupt estate. When he accepted this trust he should have executed it faithfully for the benefit of creditors as well as for the benefit of the assignors.

It is also urged by defendants that the plaintiff in this cause of action is not the real party in interest, and that therefore the action should abate. The evidence, about which there is no dispute, shows that all the claims represented by plaintiff were unconditionally assigned to him by the various creditors which he represented; that the consideration of the assignment was the prosecution of the claims for one-half the amount which should be recovered as well as a release of attorney's fees already earned by him in the prosecution of other suits for these creditors growing out of the same failure. This assignment having been an unconditional conveyance of all title to, and right of action upon, each of the claims, was sufficient to authorize the maintenance of this suit in

plaintiff's name alone, without joining any of his beneficiaries. *Meeker v. Waldron,* 62 Neb. 689; *Allen v. Brown,* 44 N. Y. 228.

It is suggested that even if plaintiff were permitted to recover he should only have been allowed to recover a *pro rata* share of the entire indebtedness of the defunct firm; that the claims of adverse creditors, who proceeded by attachments and executions against and consumed the assets of the bankrupt estate, should be taken into consideration in fixing the amount of plaintiff's recovery. It will be remembered that the amount of the claims filed with the county court in compliance with chapter 6, *supra,* was shown by the testimony to have been less than the value of the property for which a recovery was sought. Now, had the sheriff done his duty in recording the deed within the time fixed by statute these were all the creditors who would have been entitled to participate in the proceeds of the assigned property, and, consequently, they were the only ones injured by his negligent act. This principle is well set forth in Burrill on Assignments (6th ed.), sec. 441:

"Those whose claims assume a hostile attitude to the assignment can not claim any interest under it or insist on standing as parties to it. Thus, where a creditor had attached assigned property claiming that the assignment was invalid, he was not allowed to enforce payment of his distributive share."

It is finally contended by counsel for defendants that there was evidence in the record tending to show a recording of the instrument with the county clerk of Lancaster county which should have been submitted to the jury, and that in the face of this testimony it was error to direct a verdict for plaintiff. We have examined the record carefully to see if there is merit in this contention. In the first place, each of the answers of defendants admitted that the deed was not filed for 10 days, and alleged, as an excuse, a request of the assignors to the sheriff, and the failure of the assignors to advance the fees necessary for

the recording of the deed. This defense we have already considered. In the next place, the sheriff himself testified and said that he did not record the deed for 10 days because the assignors requested him not to do so, and because no fees were advanced for paying the expense of the recording. The deputy sheriff who had the matter in hand for his principal, and was in charge of the assigned estate, testified, in the first instance, that on the morning after the receipt of the deed he went to the register of deed's office to record the same; that the register demanded a fee of $1.25; that he communicated with counsel for the assignors and was told that they would not advance the fees at that time as they did not want the deed recorded yet. Upon being recalled the deputy sheriff testified that, after leaving the office of the register of deeds, he took the deed of assignment to the county clerk's office; that some of the employees of the office were there when he entered; that he laid the deed down with 25 or 50 cents and told them to record it, and then communicated this to the attorney of the assignors who told him that they did not want the deed recorded then; that he took the deed away, and it was not offered for record for 10 days, when it was finally recorded with the register of deeds. We do not think there was anything in this testimony to submit to the jury on the question of a compliance with the statute in the matter of recording the instrument. While it is plain that the deputy sheriff went to the office of the county clerk with the intention of recording the instrument, it is equally plain that, by the advice of the attorney of the assignors, he abandoned this commendable purpose, and withdrew the deed before it was recorded in either the office of the register of deeds or of the county clerk. The deed conveyed both real and personal estate, and should have been recorded in both offices, and was recorded in neither until 10 days after its delivery to the sheriff.

We therefore conclude that the judgment of the district

court is right and should be affirmed, which we accordingly recommend.

HASTINGS and AMES, CC., concur.

By the Court: For the reasons given in the above opinion, the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed September 22, 1904. *Former judgment of affirmance adhered to:*

Assignment: FAILURE TO RECORD DEED: DAMAGES. Where, in an action on the official bond of a sheriff to recover damages for his neglect to file a deed of assignment under the provisions of section 7, chapter 6, Compiled Statutes, 1899, the defendants object to the introduction of the only evidence offered which would tend to mitigate the damages and reduce the amount of the plaintiff's recovery, thus causing its exclusion, they are not in a position to complain of the judgment as excessive.

BARNES, J.

This case was first submitted to the commission, and was decided in the defendant's favor. See opinion, *ante*, p. 483. On the plaintiffs' application a rehearing was allowed and the case was, thereupon, submitted to the court. The statement of facts contained in the opinion of the learned commissioner is quite full and complete, and as its correctness was not challenged on the rehearing, no other or further statement of the case is necessary.

It is strenuously urged that the deed of assignment in question herein was never delivered to sheriff Miller; that, for that reason, he was not required to file it for record, and thus protect the interests of the defendant, a creditor of the assignor, in the assigned estate. An examination of the authorities cited in support of this contention discloses that they treat of deeds or conveyances delivered in escrow, and therefore are not in point. It is not claimed, in this case, that the deed was not actually placed in the hands of the sheriff, but it is said that a

request was made of him not to record it immediately, for the reason that the assignor might be able to effect a settlement with his creditors. In *Wallace v. Berdell,* 97 N. Y. 13, it was held:

"Where a trust deed is actually delivered to the grantee the rights of the *cestuis que trustent* attach, and the effect of the delivery can not be impaired by any mental reservation on the part of the grantor, or oral condition, repugnant to the terms of the deed, attached to the delivery. It is not competent, therefore, to show, for the purpose of defeating those rights, that the delivery was with intent that the deed should not take effect unless again delivered, or unless the grantor afterwards determined that it should take effect, or upon any other contingency contrary to the terms of the instrument." Citing *Worrall v. Munn,* 5 N. Y. 229; *Lawton v. Sager,* 11 Barb. (N. Y.) 349; *Arnold v. Patrick,* 6 Paige Ch. 310.

It seems clear, therefore, that so much of the opinion of the learned commissioner as holds that there was a delivery of the deed, and that it was the duty of the sheriff to have it properly recorded, is right, and should be adhered to.

It is contended, however, that the assignor did not advance the recording fee; that the assignee was not required to pay the same or advance the money therefor, and that he was, therefore, legally excused from having the instrument recorded.

This question was discussed and fully disposed of in the opinion of the learned commissioner. It may be further said, however, that section 28 of the assignment act fixes the fee for recording the deed, and provides that it shall be paid out of the assigned estate. Therefore, the contention of the plaintiffs on this point must fail.

It is also claimed that the judgment of the trial court is excessive; that as a matter of fact the value of the assigned estate was much less than the claims against it, and therefore the defendant in error was only entitled to recover an amount equal to his *pro rata* share of the

value thereof. It appears from the record, however, that the plaintiffs are not in a position to avail themselves of this claim. The plaintiff below, defendant herein, on the trial in the district court, offered in evidence the records of the county court, for the purpose of showing the number and names of the creditors of the insolvent, together with the amount of their claims against the bankrupt. The plaintiffs herein objected to its introduction, and it was excluded. A party can not be heard to complain, in the appellate court, of an error which he has been instrumental in bringing about. *Farmers Mutual Ins. Co. v. Cole,* 4 Neb. (Unof.) 130. In *Knudson v. Parker, ante,* p. 21, it is said:

"A party who objects to evidence and causes it to be excluded can not obtain a reversal of the judgment as unsupported for want of the evidence so excluded."

It seems to be well settled that an appellant can not complain of the exclusion of evidence which his own objections have assisted in keeping out of the record. Neither can a party obtain the admission or exclusion of testimony on a trial and then assert, on appeal, that the ruling of the court in his favor was erroneous. It follows that if this evidence was erroneously excluded upon the objection of the plaintiffs in error, they must abide by the consequences, and can not, for that reason, ask that the judgment be reversed because there is no evidence to support it. If there were any other creditors entitled to share in the recovery on the sheriff's bond, that was a matter of defense to be pleaded and proved by the defendant. As soon as the sheriff failed to record the deed of assignment, a cause of action arose under the statute for damages for the value of the property lost. If there were others besides the plaintiff who were entitled to share in the recovery, it was a matter in mitigation of his damages, and hence a defense; and, as it was not pleaded or proved, can not now avail.

As stated in our former opinion, it appears that the amount of the claims filed, approved and allowed in the

county court, including the claims held by the defendant in error, were much less than the value of the assigned estate. Therefore, the judgment for the full amount of defendant's claim must be sustained.

For the foregoing reasons we are constrained to adhere to our former judgment, and it is so ordered.

AFFIRMED.

The following opinion on second rehearing was filed February 9, 1905. *Judgment of affirmance adhered to:*

1. **Failure to Record Deed: LIABILTY OF SHERIFF.** Where a deed of assignment of an insolvent person, executed in pursuance of the assignment laws in favor of the sheriff as assignee, is rendered void because of the latter's failure to have the same filed and recorded within the time required by law, and, because thereof, all of the property of the insolvent is lost to the general creditors, and there is no estate to administer under the provisions of the insolvent act, it is not a prerequisite to the maintenance of an action and the recovery of damages by a creditor, who has suffered loss by the neglect of the sheriff, to have his claim against the insolvent filed with, and approved by, the county court as though the estate was being administered in that tribunal.

(*a.*) **Measure of Damages.** Under such circumstances, the true measure of damage is the *pro rata* share of the creditor with all other creditors who would be entitled to participate in the assets of the insolvent estate had the assignment not been invalidated.

2. ———. Under the pleadings and the proof in the case at bar, it appearing that the amount of the debts owing by the insolvent to the plaintiff at the time the cause of action accrued was 68.9 per cent. of all the debts existing against the insolvent in favor of creditors entitled to participate in the assets of the insolvent estate: *Held*, That his recovery of damages against the sheriff should be limited accordingly.

3. **Damages: PLEADING.** In such an action, it may be shown by the defendant in mitigation of damages that there are other creditors entitled to participate in the assets of the insolvent estate, but, to be available, this fact must be affirmatively pleaded in the answer.

HOLCOMB, C. J.

It is our purpose, at this time, only to examine further into the question of the proper basis of recovery or true

measure of damage sustained by the plaintiff and which he is entitled to recover, and whether the peremptory instruction of the trial court, under which a verdict was directed, stated the correct rule. While other questions are presented and urged upon our attention by counsel for plaintiff in error, we are of the opinion that they have been correctly disposed of and sufficiently considered in the opinions heretofore handed down. *Ante,* pp. 483, 489. The action is one against the sheriff and the sureties on his official bond for alleged damages because of the former's failure to file, within the time required by law, a deed of assignment of an insolvent company, executed and delivered to him with the possession of the property thereby assigned, in pursuance of the assignment laws of the state. Because of the sheriff's failure in this respect to perform the duties of his office, the insolvent's property was seized by some of the creditors, to the exclusion of others, and the attempted assignment rendered nugatory and wholly void. There is no substantial conflict in the evidence regarding the question now under consideration. The plaintiff as the assignee of certain of the creditors of the insolvent company, in his petition, alleges, among other things, "that the following persons were the only creditors of the said Muir-Cowan Co. (the insolvent) at the time of the execution and delivery of said deed of assignment, as aforesaid, and the only persons entitled to participate in said assigned estate." Then follows the names of thirteen alleged creditors, and the amount due each respectively, aggregating the sum of $3,516.15, which were, it is further averred, "the only claims against said estate." It is also alleged, "that, by reason of the failure of the defendant Fred A. Miller, sheriff, as aforesaid, to file for record said deed of assignment, as required by law, and faithfully to perform the duties of the office of sheriff in that regard, said assignment was avoided as to all said property, and the said creditors were, thereby, deprived of all interest in said property and of all right to have the same applied to the

payment of their said debts, and the said creditors were each damaged to the amount of their said claims." The answer as to the number of creditors, and the amount of the debts owing by the insolvent, consisted of a general denial. There is no controversy regarding the value of the property of the insolvent company that the sheriff lost by reason of the wrongful acts complained of, which, it is agreed, was worth the sum of $1,800. During the trial, the plaintiff filed a disclaimer of any interest or right to recover for certain creditors set forth in the petition, and dismissed his action as to said claims, which were five in number, and aggregated the sum of $908.69. At the conclusion of the trial, by a peremptory instruction, the jury were directed to return a verdict for the plaintiff, and, accordingly, a verdict was returned, fixing the plaintiff's damages at the full value of the insolvent estate as proved, with interest from the time the alleged damages accrued. The question, therefore, is, can the plaintiff, under the allegations of his petition, as an assignee of debts of the insolvent, aggregating a sum in excess of the value of the estate, recover for the loss of the whole of it and for its full value, as his true measure of damage.

1. The plaintiff's petition, in the first instance, was drawn upon the theory that no creditor of the insolvent would have the right to prosecute an action, and recover damages, unless his claim had been first filed in the county court, and allowed as a just debt due from the insolvent company, and to be paid out of the insolvent estate. On the defendant's motion, this allegation was stricken from the petition, and it was, thereupon, recast in the form as heretofore quoted. It is still insisted by plaintiff's counsel that no creditor can maintain an action against the sheriff, or recover damages for his breach of duty, unless his claim against the insolvent company had been duly presented and allowed by the county court, as though the insolvent estate was being administered under the assignment laws of the state, by that tribunal. It is con-

tended there is no competent evidence of any lawful claims existing against the insolvent, save those held by the plaintiff, as assignee, and there being no proof of the filing of any claims in the county court and their allowance, this having been prevented by the defendant's objections, the plaintiff, as the case is made up, is the only one shown to be entitled to maintain an action for the damages occasioned by, and recoverable because of, the sheriff's neglect. If this contention is sound, then the peremptory instruction, which permitted a recovery, as damages, of the full value of the property included in the void deed of assignment, is correct. In the case at bar, the assignment was avoided *in toto* because of the act complained of. The property was all seized by some of the creditors of the insolvent. The assignment was invalidated at its very inception. The county court obtained no jurisdiction over the insolvent estate. There was no property of the insolvent, which passed by the void assignment, for it to administer. The filing and the allowance of claims against the estate, under the circumstances, was an idle ceremony, and a useless waste and expenditure of time and money. The law does not require vain and useless things. The only possible advantage that could be gained, by going through the form of filing and allowing claims against the insolvent, would be to qualify the creditors, thus securing the allowance of their claims, to sue the sheriff on his bond, in an action for damages for failure to perform his official duties, and this, it seems to us, is, under the circumstances, wholly unnecessary. The statute gives a right of action to the creditors who have been damaged by reason of the failure of the sheriff to discharge the duties thus cast upon him. It is not, therefore, in our judgment, a prerequisite to the enforcement of such liability, and the recovery of the damages sustained, to go to the unnecessary expense of having the county court approve the claim as a lawful demand against the insolvent in a proceeding carried on, in form only, under the assignment law. This can be

done in a direct action to recover the damages sustained. What the creditors lost, in such a case, would be what they were entitled to receive out of the insolvent estate, had the attempted assignment proved valid and effective. Had the assignment not been invalidated, the insolvent estate would have been administered for the equal benefit of all creditors of the insolvent. A creditor's *pro rata* share in the property of the insolvent, had it been legally impounded, is all that is lost by the wrongful act of the sheriff and this, of course, would be the just and equitable measure of his damage. This case is to be distinguished from those where, under assignment laws, an insolvent estate is being administered by the proper tribunal, and its proceeds distributed among those who prove themselves entitled to participate therein. The pleadings in the case at bar, as finally framed, went upon the theory that all the creditors could maintain an action and participate in a recovery of the damages sustained, according to their *pro rata* share, as evidenced by the amount of their respective demands against the insolvent, and to which they would be entitled from the proceeds of the estate, had the assignment been valid. This does not mean that a creditor could, by his action, seize the property, appropriate it to the satisfaction of his own demand, and then maintain an action for damages against the sheriff. This, of course, could not be done, but this does not, necessarily, affect the rule as to the true measure of damages of those creditors who secured nothing out of the insolvent estate, because of the sheriff's negligence.

2. The plaintiff, in making his case, proved that he was the assignee of creditors having valid claims against the insolvent, in sums aggregating $2,017.96. He also alleged in his petition that there were other claims against the insolvent estate, the holders of which were entitled to maintain an action, and recover damages from the sheriff and his sureties, which aggregated the sum of $908.69. The plaintiff, therefore, according to the allegations of his own pleading, had been damaged to the extent of

68.9 per cent. of the value of the estate lost by the negligent action of the sheriff. It is, however, contended that the plaintiff having dismissed and disclaimed any right to recover as to creditors representing $908.69 of the indebtedness against the insolvent, that amount can not be considered, in determining what is the measure of the damages sustained by the plaintiff. All that was done by the dismissal, was a disclaimer of any right, on his part, to recover for the damages sustained by these several creditors. The dismissal was not equivalent to an amendment, withdrawing from the petition allegations to the effect that they were creditors, the amount due each, and that they were entitled to participate in the recovery of damages, occasioned by the act of the sheriff complained of. The fact that they were creditors still stands as a solemn admission in the pleading of the plaintiff. It thus, so far as the plaintiff is concerned, became an established verity in the trial of the cause, as is unquestionably the fact, that, at the time of the wrongful act complained of, there existed creditors of the insolvent estate, who were entitled to share in the assets, having debts due therefrom, in the aggregate sum of $2,926.65, of which $2,017.96 were owing the plaintiff. It follows, from what has been said, that the plaintiff can recover only his ratable proportion of the total damages accruing to him and the other creditors, and that his recovery should be limited accordingly.

3. The defendants contend that the evidence shows that there are yet other creditors of the insolvent, and that the plaintiff's recovery should be further reduced. Relative to this contention, it is proper to observe that it is quite doubtful whether there is to be found in the record any competent evidence showing other creditors than those of whom mention has been made. It is sufficient, however, to say, as was said in the former opinion, this fact, if it existed, was a matter of defense, which could be urged in mitigation of the damages sustained by the plaintiff. To be available as a defense, however, it is neces-

sary that the same should be pleaded in the answer, in which, as we have seen, touching this issue, it consisted only of a general denial. Maxwell, Code Pleading, 481. The defendants, therefore, are not in a position to complain of the judgment of the court below, in respect of this phase of the case. Our conclusion is that, because of the error in fixing the measure of the damages assessed as the amount of plaintiff's recovery, the judgment of the district court, and the judgment of this court heretofore entered, affirming the same should be reversed, vacated, and set aside, and a new trial awarded, unless the plaintiff shall, within thirty days, file a remittitur of all in excess of 68.9 per cent. of the amount recovered, with interest on such excess from the date of the rendition of the judgment. If such remittitur is filed, the judgment of affirmance will be adhered to.

JUDGMENT ACCORDINGLY.

GEORGE MARVEL V. WILEY MARVEL.

FILED DECEMBER 2, 1903. No. 11,752.

1. **Trust:** PAROL AGREEMENT. A parol agreement, made at the time of executing a conveyance of real estate, that the grantee shall hold the property in trust for the grantor and, when sold, pay the proceeds to him, the conveyance not being obtained by fraud or undue influence, is void, as an attempt to create an express trust in real estate by parol, and the land and the money for which it is sold belong to the grantee.

2. **Contract:** PROOF. The evidence by which a contract shall be proved is no part of the contract itself, and is governed, therefore, by the *lex fori* and not by the *lex loci contractus*.

ERROR to the district court for Hamilton county: SAMUEL H. SORNBORGER, JUDGE. *Affirmed.*

Eugene J. Hainer and *Jerome H. Smith,* for plaintiff in error.

William Ledyard Stark and *John H. Grosvenor, contra.*

DUFFIE, C.

In October, 1878, the plaintiff, George Marvel, conveyed a tract of about three and a half acres of land, situated adjacent to the village of Waynesville in the state of Illinois, to his brother, Wiley Marvel, the defendant. The land is known as the "Mill property." In the year 1881 the plaintiff removed to the state of Nebraska. His brother sold the land on the 24th day of December, 1884, for $400, and the plaintiff brought this action in the district court for Hamilton county to recover the proceeds of that sale. The district court found generally for the defendant, and the plaintiff has prosecuted error to this court. His theory of the transfer of the land to his brother is stated in his brief as follows:

"Property was dull sale and he had small capacity to dispose of it. His brother, Wiley Marvel, finally said to him that if he (Wiley) had the mill property he could get some money out of it for him (George), and, acting on this suggestion, on October 9, 1878, George Marvel and wife conveyed the mill property to Wiley Marvel, under the express agreement that Wiley should in turn sell the property and pay the proceeds to George. The conveyance was made wholly without consideration. Wiley Marvel entered into occupation of the mill property immediately on delivery of the conveyance to him, using it to pasture stock, and on December 24th, 1883, sold it for $400. No part of this sum was paid over to George Marvel, though often requested."

The defense is: First, the statute of frauds; second, that there were other transactions between these parties, from which the plaintiff was owing the defendant, at the time the defendant sold the land, more than the amount received for the land, so that in an accounting in equity there was nothing due the plaintiff.

There was no written evidence of a contract on the part of the defendant to hold the title in trust for the plaintiff and to dispose of the same for his benefit. There

is no allegation in the petition that any fraud or deceit was practiced upon the plaintiff, by the defendant, to procure a conveyance of this land. The doctrine, therefore, established in *Brison v. Brison,* 75 Cal. 525, 7 Am. St. Rep. 189; *Gregory v. Bowlsby,* 115 Ia. 327, 88 N. W. 822; *Larmon v. Knight,* 140 Ill. 232, and *Pollard v. McKenney,* 69 Neb. 742, does not apply.

The plaintiff makes no such claim, but, on the other hand, says in his brief:

"This is not an action to establish any right of George Marvel in the land described in the pleadings. It is simply an action brought to recover the price for the conveyance of the lands, in accordance with the terms of the trust which Wiley Marvel assumed. The title to the premises passed irrevocably to Wiley Marvel by the deed of George Marvel and wife. It is not sought to disturb that title in any respect."

The plaintiff relies upon the principle announced in *Bork v. Martin,* 132 N. Y. 280. He says that the proceeds of the land should be paid by the defendant to the plaintiff; that is, the plaintiff has a claim against the defendant for that amount. It seems to be held in *Bork v. Martin, supra,* that although "the land was conveyed to the defendant upon an oral trust, invalid under the statutes of frauds and of uses and trusts, yet it was lawful for him to perform it;" and if he sells the land and retains the money, he has performed the trust so far that he may be compelled to fully perform it by paying over the proceeds in accordance with the oral agreement. It seems to hold that when the trustee has sold the trust estate, a suit against him for the proceeds does not in any manner involve the trust character of the estate which was sold. It concedes that the title of the so-called trust could not be impeached, and that he could not be required to reconvey to his grantor. It acknowledges that the court is powerless to compel him to proceed one step in the execution of his trust by making a sale of the land, and yet holds that he can not retain the proceeds of the

sale of the lands to which they concede he holds a perfect and indisputable title; that one who has no standing in court to question his title to the land, or to claim any beneficial interest in it for himself, may have the assistance of the court to impress a trust upon the proceeds of the sale, if one is made.

This rule would defeat the purpose of the statute of frauds in every case in which the supposed trustee has sold the lands and kept the proceeds. It establishes an arbitrary rule that the statute shall not apply in such cases; and we can not concur in such a doctrine.

Another question relating to the statute should be noticed: The statute of Illinois relating to the creation of an express trust in land was pleaded by the defendant. That statute is not as broad as our own, and some decisions of the supreme court of Illinois relating to that statute are called to our attention as authority for maintaining this action. It is said that, as the agreement was made in Illinois, the laws of that state must govern the contract so far as its nature, application and interpretation are concerned. While this is true in relation to the *lex loci contractus,* it is equally true that the *lex fori* must govern the course of procedure in giving redress upon the contract. The evidence by which a contract shall be proved is no part of the contract itself, and is governed, therefore, by the rule of the jurisdiction where the action is tried and not of that in which the contract was made. This is well illustrated in *Leroux v. Brown,* 14 E. L. & Eq. 247, in which it was held that an action can not be maintained in the courts of England upon a parol contract made in France, which was not to be performed within one year from the making thereof, although the contract was valid by the laws of France. The case turned upon the question whether the statute made void such contracts. If it made them void, then, inasmuch as the law of France governed the contract, the suit could be maintained, but if the statute applied to the remedy merely, then, inasmuch as the law of England governed

the course of procedure, no recovery could be had. Lord Brougham said in *Bain v. Whitehaven & Furness Junction R. Co.*, 3 H. L. Cas. 1:

"Whether a witness is competent or not, whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not; that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it."

The cases all agree that the statute requiring an express trust to be evidenced by writing does not render a trust void but requires, only, that the proof of the creation of such a trust shall be evidenced by writing. The statute does not strike at the contract itself but at the manner and method of proving such a contract, and the proof must conform to the laws of the state where the action is tried.

But conceding the law to be as claimed by the plaintiff, we can not see that the second defense is not made out by the evidence. It will be remembered that the defendant held the land for five years after it was conveyed to him by his brother, and then, having sold it, retained the proceeds for fourteen years before this action was begun. The evidence shows conclusively that there were at this time, and at about the time of the conveyance of the land, other transactions between the parties from which the plaintiff became indebted to the defendant. The defendant's right to retain the proceeds of the land, on account of those transactions, was not questioned by the plaintiff for many years after the transactions occurred, and there is substantial evidence in the record from which the trial court might have found that the defendant's claim against the plaintiff equalled the plaintiff's claim against him, and were so considered by both parties for many years. We do not think that the evidence is so wanting upon this point that it can be said that the judgment of the trial court is clearly wrong.

We think that the judgment of the district court should be affirmed, and so recommend.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ARTHUR A. HYDE, EXECUTOR OF THE LAST WILL AND TESTAMENT OF MARY T. HYDE, DECEASED, APPELLEE, V. HARTFORD FIRE INSURANCE COMPANY ET AL., APPELLANTS.

FILED DECEMBER 2, 1903. No. 13,059.

1. **Mortgage**: INSURANCE: EQUITABLE LIEN. Where the owner of real estate binds himself, in a mortgage executed thereon, to keep the premises insured for the protection and indemnity of the mortgagee, such mortgagee will have an equitable lien upon the money due on a policy taken out by the mortgagor, although the policy may run to the mortgagor alone.
2. **Assignment**: RIGHTS OF ASSIGNEE. Where a mortgagee assigns a mortgage, containing a covenant on the part of the mortgagor to keep the premises insured as further security, and agreeing that the mortgagee may procure such insurance if the mortgagor fails to do so, and in his assignment guarantees the payment of the mortgage indebtedness, and, thereafter, such assignor of the mortgage becomes the owner of the mortgaged premises, and takes out insurance thereon in his own name to the full amount of the insurable interest of the mortgaged property, and a loss occurs while his liability as guarantor of the mortgaged debt is still in full force, the then owner of the mortgage will have an equitable lien on the proceeds of the policy to the extent of his interest in the property destroyed by the fire.
3. **Statute of Limitations.** The fact that the statute of limitations had barred a personal action against the assignor on his guarantee of payment when suit was commenced by the assignee to establish her claim to the proceeds of the policy, does not in any manner release or impair her equitable lien upon such proceeds.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

Halleck F. Rose and *Flansburg & Williams*, for appellants.

Ames & Ames, contra.

DUFFIE, C.

December 26, 1885, one Van Aukin, being the owner of lots 313 and 314 in the village of Orleans, Harlan county, Nebraska, made to the appellant L. H. Kent his note for $1,000, due December 26, 1890, and secured the same by mortgage upon the lots above named. The mortgage contained the following stipulation:

"And we hereby agree to keep the buildings upon said premises insured from the date of this mortgage until it is paid, for the sum of one thousand five hundred ($1,500) dollars, and make the policy payable and deliver it to said mortgagee or his assigns, and if we fail to keep said buildings insured as above agreed, said mortgagee or his assigns may so insure them, and the premiums therefor shall be added to and made a part of the principal sum hereby secured and shall bear the same rate of interest."

Before the maturity of the note, L. H. Kent sold the same to Mary T. Hyde and indorsed the same as follows: "I hereby guarantee the payment of this note and all coupons attached." He also assigned the mortgage, which assignment was duly recorded in Harlan county. In December, 1892, Mary T. Hyde brought an action in the district court for Douglas county, seeking to recover the amount of the note from Kent on his guaranty of payment, but no summons was properly issued or served upon Kent until April, 1896, and judgment went in favor of Kent, the court holding that the statute of limitations had barred the action. After his sale of the note to Mrs. Hyde, Kent purchased and became the owner of the mortgaged premises, his deed reciting that he took the same subject to the mortgage. After becoming the owner in fee of the mortgaged premises, and on the 15th day of August, 1895, Kent insured the building on said lots in

the sum of $2,000, $1,000 of which were in the Hartford Fire Insurance Company, the policy being payable to himself. November 6, 1895, the buildings covered by the policy were totally destroyed, and December 30, 1895, the company paid him $1,000, the full amount of the policy. At the time of making payment the company took from Kent a bond of indemnity, to the effect that he would save the company harmless in case it were compelled to pay the amount of the policy to another party. July 18, 1898, Mary T. Hyde, the owner of the note and mortgage, departed this life in the state of Connecticut, and Arthur A. Hyde, plaintiff and appellee, is the duly appointed executor of her estate. December 12, 1899, the plaintiff commenced this action against the insurance company, claiming, as the owner of the mortgage, to have an equitable lien upon the amount due upon the policy issued to Kent, and asking judgment against the company for the sum of $1,000, with interest from November 11, 1895. Upon the suggestion of the company that Kent had been paid the amount of the policy, he was made a party defendant to the action, and Kent and the company filed their separate answers setting up the facts above set forth, and in addition thereto the company set out the bond of indemnity made to it by Kent at the time of payment to him of the loss under the policy, and concluded with a prayer as follows:

"Wherefore this defendant prays to be dismissed hence without day and to recover its costs herein expended, or, in the alternative that the court finds, on the hearing, that there is a subsisting liability on account of the cause of action set forth in the petition on the part of this defendant and defendant Kent to plaintiff, then, as between the defendants, the liability of defendant Kent be held primary and that of this defendant secondary only; and for such other, further and different relief as to the court may seem just and equitable."

The case was tried upon a stipulation of facts which, in addition to the matters above stated, contains the following:

"It is agreed that, at the time of the destruction of the buildings situated upon the premises herein described, the same had been and were by said L. H. Kent insured in the sum of $2,000 and that the value of said buildings did not exceed the sum of $2,000; that all of said insurance was collected by said L. H. Kent and retained by him."

It was further stipulated that, at the time the buildings were burned, Kent was personally liable upon the Van Aukin note by reason of his guarantee, and that said note was not five years past due, and that, at the time of the loss of the buildings and the payment of the amount of the policy to Kent, the insurance company had actual knowledge of the existence of the mortgage to the plaintiff's testatrix and that the same was wholly unpaid. Upon the hearing the court entered a decree, finding that the insurance company had due notice of the provisions of the mortgage and that, by its terms, the loss under the policy in controversy was payable to the mortgagee; that Kent, in obtaining the policy of insurance mentioned in the petition, had due notice of the mortgagee's rights and should be held to have insured for her benefit; that the defendant insurance company paid the policy to Kent, and that Kent, at the time of the loss and payment of the money, was personally liable to the plaintiff for the debt mentioned in the petition: "That, by reason of the premises, the obligation of the defendant, the Hartford Insurance Company, to the plaintiff is that of principal debtor, but that such liability to the plaintiff, as herein found, is, as between said insurance company and the estate of Lewis H. Kent, that of surety only, and the primary and ultimate liability therefor is upon the estate of said Lewis H. Kent; and the said fire insurance company, in case of its payment of the sum due to plaintiff, as found by this decree, is entitled to exoneration and to be reimbused by the estate of Kent for any sum so by it paid, including interest and costs." From this decree the defendants have appealed.

It is well established that if a mortgage contains a covenant or condition that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and the mortgagor takes out a policy in his own name and does not assign it or make it payable to the mortgagee, and a loss occurs, such a covenant creates an equitable lien in favor of the mortgagee to the extent of his mortgage interest upon the money due under the policy, and this too, even if the mortgage contains also a provision that the mortgagee, in default of an insurance by the mortgagor, may effect an insurance at the expense of the mortgagor. *Nichols v. Baxter,* 5 R. I. 491; *In re Sands Ale Brewing Co.,* 3 Biss. (U. S.) 175; *Carter v. Rockett,* 8 Paige Ch. (N. Y.) 436; *Thomas' Administrators v. Von Kapff's Executors,* 6 Gill & J. (Md.) 372; *Giddings v. Seevers,* 24 Md. 363; *Providence County Bank v. Benson,* 24 Pick. (Mass.) 204; *Miller v. Aldrich,* 31 Mich. 408; *Chipman v. Carroll,* 53 Kan. 193. Some of these cases hold that a covenant to insure made in a mortgage is a covenant which runs with the land, and, wherever that holding obtains, it is plain that a subsequent purchaser of the land would be bound by the covenant, and any insurance obtained by such subsequent purchaser would inure to the benefit of the mortgagee. There are other cases holding that the agreement to insure is personal in its character, and does not affect the land or run with it, and is merely collateral and incidental. *Cromwell v. Brooklyn Fire Ins. Co.,* 44 N. Y. 42; *Dunlop v. Avery,* 89 N. Y. 592. In the states where this doctrine is held it is probable that a grantee of the land would not be bound by his grantor's agreement to insure for the benefit of an existing mortgagee, and that any insurance obtained by him would inure to his own benefit, in the absence of circumstances which would make it his duty to protect the mortgagee. In the case at bar, Kent was the mortgagee. For his own benefit, and the benefit of any party to whom he might assign the mortgage, he had inserted therein an agreement upon the part of the mortgagor to insure the buildings on the

property to the amount of $1,500 and to keep them so insured until the mortgage was fully paid. This agreement was intended as additional security, and to protect the mortgagee against a species of waste which accident might produce. It is apparent that the lots upon which the buildings stood were inadequate security for the amount of the loan, and that the buildings, or, in case of their destruction, the insurance provided for, constituted the principal security. The note secured by this mortgage Kent sold to a good faith purchaser and, by his indorsement, guaranteed the payment. After this, and while still liable upon his guarantee, he purchased the mortgaged premises and became the owner of the fee. He then took out insurance payable to himself to the full value of the buildings. Upon their destruction by fire he claimed and obtained payment from the companies. The Hartford company, with full knowledge of the plaintiff's claim and with such apparent appreciation of its justice as to require Kent to indemnify against it, paid him the loss. Whether or not the agreement to insure was a covenant which would run with the land in this state, where a mortgage does not convey the legal title but is a mere security, we need not discuss. The facts are that Kent, after having sold a mortgage requiring the mortgagor to insure as further security and to protect against waste which a fire should occasion, and providing that the mortgagee might do so in case the mortgagor failed to carry out his agreement, purchased the mortgaged property, and took out insurance in his own name, and for his own benefit, to the full value of the insured property, thus preventing the then holder of the mortgage from obtaining any insurance, and cutting off her right to protect herself in this way from a loss which must occur in case the buildings covered by the mortgage were destroyed by fire. We do not think that a court of equity can sanction the claim now made by Kent, that this insurance was entirely for his own benefit and that he is entitled to the entire proceeds. To do so would be to offer a premium on the conduct of a mortgagor who vio-

lates his agreement to insure for the benefit and protection of his mortgagee. After executing a mortgage like the one in question, he could save to his family the insurable value of his improvements, by the easy process of refusing to take out a policy for the benefit of the mortgagee, and then, by transferring the title to his wife or some other relative, enable them to effect an insurance to the full amount which the property will bear, and to recover the insurance in case of loss. It would also afford temptation to collusive action between the original parties to the mortgage, as the case under consideration fully illustrates. The mortgagee, after selling his mortgage, presumably for the full amount of his loan, arranges with the mortgagor to take a conveyance of the premises, to effect insurance on the improvements, and to divide the proceeds of the policy in case of loss. We do not wish to be understood as intimating that such an agreement was made in this case. There is nothing in the record to cast suspicion on the good faith of the parties, but we refer to what might be accomplished as a reason for holding that Kent, who transferred this mortgage to the plaintiff and who made himself liable for its payment, should be held to have effected the insurance for her benefit. Kent being the vendor of the mortgage, and the guarantor of its payment, can not, in equity, become the owner of the mortgaged premises and, by securing insurance in his own name, claim the proceeds of the policy as against the holder of the mortgage, for the payment of which he had made himself liable. If, when he became the owner of the mortgaged premises, he had assumed and agreed to pay this mortgage, no one would question the right of the plaintiff to an equitable lien on insurance effected in his own name; and we can see no reason why the same rule should not apply when he made himself liable for the mortgage debt by his contract guaranteeing its payment.

Another fact which, to our minds, adds strength to the plaintiff's claim is this: When he transferred the mortgage to Mrs. Hyde, he not only transferred the mortgagor's

agreement to keep the property insured for the security of the mortgagee, but also the further agreement to allow the mortgagee to make such insurance in case the mortgagor failed to do so. Can it be said that, under these circumstances, there is any principle of equity which will justify Kent in securing to himself insurance to an amount which prohibits further insurance for the benefit of the holder of the mortgage which he himself negotiated and for which he stands sponsor. We can not agree that such a holding would be equitable or just, or that a court of equity ought to countenance a transaction bearing on its face so palpable a wrong to the appellee. The fact that the statute has barred a personal action against Kent on his guarantee of payment of the note, does not in any way release or impair the plaintiff's equitable lien on the proceeds of the insurance policy taken out by Kent. This subject is fully discussed in *Connecticut Mutual Life Ins. Co. v. Dunscomb,* 108 Tenn. 724.

We recommend an affirmance of the judgment.

KIRKPATRICK, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

C. F. BLANKE TEA & COFFEE COMPANY V. REES PRINTING COMPANY.

FILED DECEMBER 2, 1903. No. 13,187.

1. **Proof of Agency.** Agency can not be proved by the acts or declarations of the alleged agent not brought home to the principal.
2. **Evidence.** Evidence examined, and *held* not to support the finding and judgment.

ERROR to the district court for Douglas county: WILLARD W. SLABAUGH, JUDGE. *Reversed.*

Stillman & Price, for plaintiff in error.

Nelson C. Pratt and *Edward M. Wellman, contra.*

DUFFIE, C.

Plaintiff in error is a corporation organized for the purpose of dealing in teas, coffees and other like articles, with its principal place of business in the city of St. Louis, Missouri. Defendant in error is a corporation conducting a printing and lithographing business in the city of Omaha, Nebraska. Sometime prior to the year 1901, plaintiff in error contracted with Charles Spies & Co., a partnership doing business at Kansas City, Missouri, to give them the exclusive sale of its goods in certain states, including the state of Nebraska. Spies & Co. were not acting as the agent of the Blanke Tea & Coffee Co., but purchased goods from them direct, and sold them on their own account, the Blanke Tea & Coffee Co. agreeing not to sell to any other parties in the territory given to Spies & Co., while Spies & Co. agreed to buy all of their goods of the Blanke Tea & Coffee Co., their business of jobbing such goods in the territory set apart to them being, as we understand from the evidence, entirely at their own risk and expense. About February, 1901, Spies & Co. employed one J. W. Johnson to sell goods for them in Nebraska on commission. His power extended no further than to take orders for goods, which were submitted to Spies & Co. for acceptance or rejection, as they might find the sale desirable or not. In August, 1901, Johnson gave the Rees Printing Co. a written order for five thousand advertising pamphlets called "Rinehart's Indian Books," which Rees & Co. were publishing, and in which a number of the business men of Omaha had ordered advertisements. One page of this pamphlet was to contain an advertisement of the Blanke Tea & Coffee Co. and the portrait of C. F. Blanke, the president. The order is as follows: "Omaha, August 21, 1901. Rees Printing Co. Please furnish me five thousand

Indian Books for which we agree to pay the sum of $100 upon delivery of goods. Your advertisement to run in fifty thousand books. J. W. Johnson, Agt. C. F. Blanke Tea & Coffee Co."

On account of some trouble between them, Johnson was discharged by Spies & Co., and the books not having been paid for, the Rees Printing Co. commenced an action in attachment to recover the amount. Judgment went in favor of the plaintiff below, and the Blanke company has taken error to this court.

The evidence is clear and undisputed that Johnson was never in the employ of the Blanke Tea & Coffee Co., either as agent or otherwise; but it is sought to hold that company upon the ground that it, through Spies & Co., knowingly permitted Johnson to be placed in a situation in Omaha, as agent, so that persons of ordinary prudence, conversant with business usages and the nature of the particular business in which Johnson was acting, were justified in presuming that he had authority to perform the acts done by him and to bind the Blanke company thereby. The facts upon which the claim is based are as follows: Johnson used two forms of letterheads. One form gave the location of branch houses of the Blanke Tea & Coffee Co., as follows: 118 East 14th St., New York; 42 & 44 Michigan Ave., Chicago; and 522 Delaware St., Kansas City; and the name of J. W. Johnson, agent in Nebraska. The other form gave the location of branch houses the same as above, together with the name of J. W. Johnson, Gen. Agt., Office 508-510 Bee Bldg., Omaha, Nebraska. These letterheads were in use by Johnson in his correspondence with Spies & Co., of Kansas City, and on one or two occasions he wrote to the Blanke Tea & Coffee Co., at St. Louis, using the paper having this letterhead. The door of his office room in the Bee building bore his name, and described him as general agent of the Blanke Tea & Coffee Co., of St. Louis, Mo., and this was all the evidence, aside from Johnson's own declarations, tending to establish an agency or to show that the Blanke Tea &

Coffee Co. knew that he was holding himself out as their agent in Nebraska. Is this evidence sufficient to support the verdict? We think not. The law is well established that agency can not be proved by the the acts or declarations of the alleged agent not brought home to the principal. *Richardson & Boynton Co. v. School District No. 11, Nuckolls County,* 45 Neb. 777; *Stoll v. Sheldon,* 13 Neb. 207; *Nostrum v. Halliday,* 39 Neb. 828; *Burke v. Frye,* 44 Neb. 223.

If knowledge had been brought home to the Blanke Tea & Coffee Co. that Johnson was dealing with parties in Omaha as their agent and attempting to bind them as such, it may be that the law would require them to disavow his acts and to inform the parties of his want of authority; but, until they had some knowledge that he was so conducting himself, the law is not so unreasonable as to charge them with his acts, or to bind them by contracts made on their behalf, when he had no authority to do so. The order for advertising was taken in August, 1901. The evidence is entirely barren of any notice brought home to the Blanke Tea & Coffee Co. that this order had been given, and the only attempt made to show knowledge on its part is two letters written by Johnson to the Blanke company on paper containing the letterheads above referred to, but of a date subsequent to the making of the contract. The fact that these letterheads described Johnson as its agent could not, in the nature of things, give the company notice that he had contracted with the Rees Printing Co. for advertising, nor will the law assume, from the receipt of such a letter, that the company intended to ratify and confirm whatever Johnson had done or might do as their pretended agent. Can the fact that Spies & Co., of Kansas City, knew or had reason to believe that Johnson was holding himself out as the agent of the Blanke Tea & Coffee Co. serve to bind the latter company? Spies & Co. were not the agents of the Blanke company. They were acting wholly on their own behalf in selling the merchandise of that company, and, while the evidence shows that they ad-

vertised themselves as a branch of the Blanke company, this would not make the company liable for the acts of Spies & Co.'s employees, with which the Blanke company had no connection and of whom it had no knowledge, and this is especially true where the party dealing with Johnson had no knowledge of the fact that Spies & Co. were claiming to be a branch house of the Blanke Tea & Coffee Co.

The verdict of the jury was wholly unsupported by the evidence, and we recommend that the judgment entered thereon be reversed and the cause remanded.

KIRKPATRICK, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

HERMAN RUSSELL, TRUSTEE, APPELLANT, V. M. H. MCCARTHY ET AL., APPELLEES.

FILED DECEMBER 2, 1903. No. 12,946.

1. **Tax Lien: FORECLOSURE.** Where, in foreclosure proceedings instituted by a county for the purpose of enforcing its lien for taxes against real estate, it appears that no sale for such taxes has been made by the county treasurer in the manner provided by law, a decree entered in favor of the county, while erroneous, is not void, and, if unappealed from, will be sufficient to devest the owner of his title.

2. **Pleadings.** Pleadings examined, and *held* sufficient to sustain the judgment of the trial court.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

H. M. Uttley, Flansburg & Williams and *M. J. Sweeley*, for appellant.

M. F. Harrington, contra.

KIRKPATRICK, C.

This is a suit brought by Herman Russell, trustee, against M. H. McCarthy and others, in the district court for Holt county, to remove a cloud from certain real estate in that county, and to quiet the title in plaintiff. Trial was had, which resulted in a finding and judgment in favor of McCarthy, quieting title to the premises in him, and dismissing the petition of appellant at his costs. From the judgment so entered, the cause is brought to this court upon appeal. Since the cause has been pending in this court, the bill of exceptions has been quashed, and the only question left for determination is the correctness of the judgment upon the pleadings. It is disclosed by the petition that in the year 1895, and subsequent thereto, appellant was the owner of certain lands in Holt county, and such lands were duly assessed and taxes levied thereon for the years 1895, 1896, 1897, 1898 and 1899; that these taxes remained unpaid and became delinquent; and that in August, 1899, the county of Holt instituted proceedings to foreclose its general lien for taxes, no sale for taxes having been made; that on February 17, 1900, a decree of foreclosure was entered in favor of the county of Holt, determining the amount of taxes due upon each tract of land. It is further alleged that, after the rendition of the decree, appellant paid the decree and all taxes involved therein, and all interest, costs and penalties; but that notwithstanding such payment, the county attorney of Holt county caused an order of sale to be issued upon the decree, and placed the same in the hands of the sheriff, who proceeded to, and did sell all of the premises, and for much more than was necessary to satisfy the decree to appellee McCarthy. Other matters alleged in the petition, tending to show that the sale was void, need not be noted.

To this petition appellee McCarthy answered, denying generally matters not admitted, and pleaded the foreclosure proceedings commenced and had by the county of Holt against appellant, being the same proceedings men-

tioned in the petition, the entry of the decree of foreclosure, and sale thereunder to himself; alleged the regularity of all such proceedings, and the issuance and delivery of a sheriff's deed for the premises; that by such proceedings he had acquired a fee-simple title to the premises. In addition to these allegations, the answer pleaded "that by such action, decree and proceedings, the plaintiff was foreclosed and barred of all equity of redemption or other interest in said premises, and the plaintiff has no interest whatever in said premises; that plaintiff's assertion of title and interest in said land casts a cloud upon defendant's title thereto, and tends to depreciate the value thereof to defendant," the answer closing with a prayer that appellant's action be dismissed, and for a decree quieting title in the answering defendant, appellee.

No reply seems to have been filed to this answer, and the only question requiring determination is whether this answer justified the decree under review. We are of opinion that the effect of the answer filed by McCarthy is to admit in appellant the title to the premises before the commencement of the foreclosure proceedings by the county. The answer then proceeds to set out the foreclosure proceedings in detail, and pleads that as a result of such proceedings appellant was foreclosed of all right, interest or title to the premises. Did the foreclosure proceedings instituted by the county of Holt devest appellant of title? We are of opinion that they did. In the case of *County of Logan v. Carnahan*, 66 Neb. 685, in an opinion on rehearing, 66 Neb. 693, this court say: "Where the court has jurisdiction over the parties and the subject matter of the action, a judgment rendered by it is not absolutely void and subject to collateral attack even though error is committed in holding the petition on which the judgment is based sufficient, as stating a good cause of action. The sufficiency of a petition is not the test of jurisdiction."

Measured by the doctrine announced in the case just cited, it seems clear that while the action of the district

court in the foreclosure proceedings upon which the title of appellee depends was clearly erroneous, yet it is not void. The attack made in the case at bar upon the foreclosure proceedings and sale thereunder upon which appellee based his title, is collateral and not direct, and it follows that in this proceeding, if the judgment attacked was erroneous, merely, the court having jurisdiction of the parties and the subject matter, its judgment must stand as valid and binding unless reversed on error or appeal.

Again, this court in the case of *Logan County v. McKinley-Lanning Loan & Trust Co., ante,* p. 399, speaking upon the same question by HOLCOMB, J., said:

"The district courts are the tribunals having general jurisdiction over actions of this character. In determining whether, in a given case, the county is authorized to maintain a suit to foreclose a tax lien, the court acts upon a matter confessedly within its jurisdiction, and its judgments and decrees become final, unless appealed from or reversed, even though the rendition of the decree is erroneous because no tax-sale certificate has been issued by the county treasurer to the county bringing the suit, as is required to be done in the regular exercise of the power thus conferred on such counties."

The bill of exceptions in this case having been quashed, we are unable to determine the respective equities of the parties, but upon the authority of the cases cited, we conclude that the action of the district court in the foreclosure proceedings mentioned in the petition of appellant, while erroneous, were not void, and that for that reason the judgment of the trial court herein is right and should be affirmed. It is recommended that the same be done.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the trial court is

AFFIRMED.

EDWIN R. MOCKETT V. STATE OF NEBRASKA, EX REL. GEORGE J. WOODS ET AL.

FILED DECEMBER 2, 1903. No. 13,158.

1. **Mandamus: OFFICER: ESTOPPEL.** Where one assumes to fill a public office, although without being regularly appointed thereto, by his conduct inducing others to believe that he is the officer, he is amenable to process commanding him to perform any act which the duties of his office dictate, and is estopped to plead a private contract inconsistent with his duty to all.

2. ———: BOARD OF EQUALIZATION: REPORTER. M. was employed by one of the parties to a proceeding had before the city council of the city of Lincoln sitting as a board of equalization, to appear at such hearing and take down the evidence in shorthand. The clerk of the board, who claimed the right to employ a reporter, and others interested, relying on the presence of M., who was a competent reporter, made no further arrangements for a record of the proceedings, regarding him as the official reporter, to whom stipulations between the parties were dictated, and exhibits in the case delivered, and by whom all the evidence was taken down. *Held*, That mandamus would lie to compel M. to deliver a transcript of the evidence to the complainant in the proceeding, notwithstanding a secret agreement by the terms of which he was to deliver a transcript to only one of the parties.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

Paul Clark and *Charles S. Allen*, for plaintiff in error.

Allen W. Field, Addison S. Tibbets and *Walter L. Anderson, contra.*

KIRKPATRICK, C.

This proceeding is prosecuted from a judgment of the district court for Lancaster county, awarding to relators a writ of mandamus commanding the respondent, Edwin R. Mockett, to transcribe and deliver to relators a transcript of the testimony introduced at a hearing had before the city council of the city of Lincoln, sitting as a board of equalization, which testimony was taken down by Mockett in shorthand. The issues as joined in the lower court, as well as the contentions now made, will appear from a

brief statement of the facts giving rise to the controversy. From the record it is made to appear that in June, 1902, the relators filed with the city council of Lincoln, sitting as a board of equalization, a complaint relative to the assessment of taxes for municipal purposes against the Lincoln Traction Company. Thereafter, a hearing was had before the board, consuming several days, at which much oral and documentary evidence was introduced, objections made to the introduction of testimony, rulings thereon and exceptions taken; both the Lincoln Traction Company and relators being represented by counsel. All the testimony so taken was reduced to shorthand notes by Edwin R. Mockett, who is by the record shown to be one of the official reporters of the district court for Lancaster county. At the conclusion of the hearing, and after entry of the findings and judgment of the board, the parties were given sixty days within which to prepare a bill of exceptions. In due time, the relators commenced preparations to prosecute an appeal from the decision of the board, and Addison S. Tibbets, one of the relators, made a demand upon Mockett for a transcript of the evidence, tendering the usual fees therefor, and was told by Mockett that he had been employed by counsel for the Lincoln Traction Company to take the testimony on its behalf, and that he could not furnish relators with a transcript, as to do so would be inconsistent with his obligations to his employer. An application was thereupon made to the district court for Lancaster county for a writ of mandamus commanding respondent to furnish a transcript of the evidence to relators, resulting in the issuance of the writ.

On behalf of respondent it is claimed that this judgment is erroneous, because it appears that Mockett was employed solely by counsel for the traction company to take down the testimony; that in doing so he acted only on their behalf; that as a result of this arrangement he owed no duty to relators to furnish a transcript; and that therefore mandamus will not lie.

It appears from the record that at about the time of the

filing of the complaint mentioned there was also a similar proceeding pending, in which relators were complainants, affecting the assessment of the Lincoln Gas Company. Before the hearing of either of these cases, the matter of making a record of the proceedings and taking down the testimony was talked over by the relators and the city clerk, who was ex-officio clerk of the board, and it was understood by all parties to the proceedings that the clerk claimed the right to make the record, and to select a stenographer to take down the testimony. There was mention made in a conversation between the clerk and one of the relators, Mr. Tibbets, as to who the stenographer should be, and the clerk stated that he had been informed by Mr. Rose, an attorney for the gas company, that respondent had been selected to take the testimony, and would appear at the hearing for that purpose. With his selection both relator and the clerk signified their satisfaction. The evidence shows that counsel for the traction company and the gas company had conferred with reference to the employment of a stenographer on their own account, agreeing upon respondent, and upon the equal payment by them of his fee. It is without doubt true that respondent appeared in response to this latter arrangement, and that his stipulated pay or wage per diem was paid to him by the companies. It is further clearly shown that, during the hearing before the board, the respondent was present and took all of the testimony in shorthand. During the progress of the hearing in the gas company's case, much documentary and oral evidence was introduced, and a stipulation entered into by the attorneys for the companies and the relators, that certain testimony taken in the gas company case should be used in the traction company's case to save duplication. This stipulation was dictated to respondent as reporter. In the course of the hearing of the traction company case exhibits were introduced, and, in the presence of respondent, the clerk of the board asked one of the attorneys for relators whether he should take charge of the exhibits and place his filing mark on them, and was told that it would

be sufficient to give them to the reporter, respondent, who thereupon took them, as he did all other exhibits, placing his filing marks on them, retaining their possession. At the hearing members of the council asked questions of the witnesses, and these questions were taken down, with the answers thereto, by respondent. It appears from the record that some time during the course of the hearing, the question occurred to counsel for the traction company and respondent whether relators would rely upon respondent for a transcript of the testimony should they desire one, and counsel for the company thereupon told respondent that if he was asked for a transcript by relators his duty would be to refuse, as he was employed solely by the companies. There was no other reporter present at the hearing, and the only record made of the proceedings and the evidence is that now in possession of respondent. There is nothing to show that at any time until demand was made upon respondent for a transcript, relators were aware that respondent considered himself the employee of the companies involved in the proceedings, rather than the official of all parties—the board, relators and the companies—concerned in the hearing.

The question we are called upon to determine is whether the writ should issue under the facts stated. The trial court found that the respondent, in assuming the duties as stenographer in taking the testimony before the board, acted in an official capacity, even though privately employed by the companies, and would therefore be bound to furnish a transcript of the proceedings upon application of any party interested therein upon the payment of the usual fee therefor; and that, having entered upon the duties as stenographer, he would be estopped to plead a private employment attended with duties to one of the parties inconsistent with his duty to all. We are very clearly of the opinion that the judgment of the trial court is correct. The proceeding was one held before a public tribunal, the public at large being interested therein. In the very nature of the proceeding, it would seem to be

obvious that a record would and should be made of the hearing, a record available to all whose rights were involved. It is clear that the presence of respondent, without reference to the arrangment privately made by which he was induced to come, induced relators, as well as the clerk, to omit to employ a reporter to make a record available to all the parties. Respondent is an official court reporter, and must have known that the evidence being introduced, relating to matters of such considerable importance, when reduced to written form, could not well be permitted to become the exclusive property of only one of the parties to the proceeding. In our opinion, therefore, it becomes immaterial what was the private agreement he had with the companies. This agreement was unknown to all except respondent and his employers. His conduct was well calculated to mislead the board, its clerk, and relators, all of whom manifestly regarded respondent as the reporter for all. In the absence of his private agreement with the traction company, and if he had appeared at the hearing in response to an arrangement with the clerk, there can be no question that this writ would issue. He would under such circumstances have been the *de jure* officer of the board, whose duty would be to furnish the transcript. He was, under the facts stated, none the less a *de facto* officer, assuming all the duties that would have devolved upon an officer regularly appointed and qualified, and as such is amenable to the process of the court commanding him to perform the duties of that office. He is, therefore, clearly estopped to plead his private employment. In *Kelly v. Wimberly,* 61 Miss. 548, it is said:

"A *de facto* officer can not remain undisturbed in office and claim that he is not a *de jure* officer. While in office he can be compelled to perform every official act in behalf of another which the duties of such office dictate. *Mead v. Treasurer of Ingham County,* 36 Mich. 416."

It is recommended that the judgment of the district court be affirmed.

DUFFIE, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. RALPH W. BRECKENRIDGE, V. WILLIAM FLEMING, TAX COMMISSIONER OF THE CITY OF OMAHA.

STATE OF NEBRASKA, EX REL. HENRY E. PALMER, V. WILLIAM FLEMING, TAX COMMISSIONER OF THE CITY OF OMAHA.

FILED DECEMBER 16, 1903. NOS. 13,495, 13,496.

1. **Taxation:** FOREIGN CORPORATIONS. The state may impose such conditions and limitations as it sees fit upon foreign corporations seeking the privilege of doing business in this state.
2. **Revenue Law:** CONSTITUTIONALITY. A general revenue law will not be declared unconstitutional on account of discriminative provisions if such provisions may be rejected and the law enforced without them.
3. **Mandamus:** COURTS: LIMITATIONS. This court can not attempt, prior to an actual controversy arising, to direct the officers charged with the enforcement of a law relating to their duty in putting it in operation.

ORIGINAL applications for writs of mandamus to the tax commissioner of the city of Omaha. *Writs denied.*

Charles J. Greene, Ralph W. Breckenridge, James C. Kinsler, John L. Webster and *Timothy J. Mahoney,* for relator.

Carl C. Wright, John M. Stewart, Thomas C. Munger, Leander M. Pemberton and *Halleck F. Rose, contra.*

SULLIVAN, C. J.

The question to be decided in these cases is not whether particular provisions of chapter 73 of the laws of 1903 are valid or ideally just, but whether the act, considered as a

whole, is a constitutional expression of the legislative will. Objection is specially urged against those sections of the act defining the manner in which insurance companies are to be taxed, and it is said that the law discriminates against the property of foreign insurance companies and in favor of domestic corporations of that character. Relating to the provisions of sections 59 and 60, it is plain that the tax of 2 per cent. upon the gross earnings of the companies mentioned in these sections is a tax imposed, not upon their property, but upon their privilege of doing business in this state. That the state may impose such conditions and limitations upon foreign corporations seeking the privilege of conducting their business in this state as it sees fit, is not a question open to discussion. Such companies have no authority to transact business in this state without the consent of the state, and, when they seek the privilege, they must comply with the conditions imposed. After coming here, their property must be dealt with on terms of equality with the property of the citizen. It is subject to no further burden in the way of taxation than is imposed upon the resident, but, for the privilege of doing business here, they must submit to such conditions as the legislature sees fit to impose. *Philadelphia Fire Ass'n v. New York,* 119 U. S. 110; *Paul v. Virginia,* 8 Wall. (U. S.) 168; *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania,* 125 U. S. 181; *Scottish Union & National Ins. Co. v. Herriott,* 109 Ia. 606. The tax complained of is not in any sense a tax upon the property of these corporations, but a privilege tax and, as such, is wholly unobjectionable.

Section 58 of the act relates to fire insurance companies organized under the laws of any other state or country and transacting business in this state. These companies are required to report the gross amount of premiums received by them, for insurance written upon property within the state, during the preceding year, and such gross receipts are to be taken as an item of property of that value, which is to be assessed and taxed on the same percentage as other

property. Section 61 relates to life, fire or accident insurance, and surety companies organized under the laws of this state and doing business on the premium plan. These companies are to report the gross amount of premiums received for all Nebraska business done within the state, during the preceding calendar year, less the amount ceded to other companies as reinsurance, through regularly authorized agents in this state, and less premiums returned on canceled policies; such gross receipts, less the deductions allowed, to be taken as an item of property of that value, and assessed and taxed on the same percentage as other property. It is claimed that the law, in so far as it allows the domestic companies to deduct from their gross receipts the amount paid for reinsurance and returned on canceled policies, discriminates in favor of the domestic company and imposes an undue burden upon the property of the foreign corporation. Without, at this time, stopping to construe these two sections and determine their exact meaning, we are of opinion that the foreign companies, if discriminated against, may successfully contend that the discriminative provisions are invalid, and that the law must be enforced without them. Such companies can easily obtain redress in a proper proceeding, and, in any view of the matter, we are not, we think, required either by sound reason or legal necessity to declare the whole law unconstitutional. It is not every defect in a law, and especially in a statute of this importance, devised for the purpose of producing revenue for the state, where the business of the state and of every municipality therein is at stake, that requires a court to declare the whole law inoperative and void, if, by proper proceedings, the citizen prejudiced by the operation of the law may secure redress. It is far better that he should be required to take these proceedings than that the very life of the government should be imperiled. This seems to be the current of authority. The federal banking act allows the state authorities to tax the shares of national banks, "subject only to the two restrictions, that the taxation shall not be at a greater rate than

is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere." Sec. 5219, 3 U. S. Compiled Statutes, p. 3502. The revenue laws of New York allowed parties in that state to deduct from the value of their personal property all just debts owing by them, but provided that no deduction should be made on account of debts from the value of national bank shares owned by the party. This law was sustained by the New York court of appeals, but the supreme court of the United States in *Supervisors v. Stanley,* 105 U. S. 305, held the law void so far as it refused the owner of national bank shares the same privilege extended to other owners of personal property, namely: to deduct their just indebtedness from the assessed value of such shares, but expressly held that the law was valid and enforceable in all of its other features, and that the illegal provision relating to the assessment of national bank shares did not have the effect of vitiating the whole law, as the complaining party might obtain redress by other proceedings. In *Levi v. City of Louisville,* 97 Ky. 394, it was held that, under the constitution of Kentucky, taxes on property must be by valuation. The city of Louisville, by an ordinance, had directed the levy of a valuation tax upon all real estate in the city, but imposed a license tax upon those owning personal property in lieu of the valuation tax imposed upon real estate. It was held that, while the license tax imposed upon personal property was invalid and not authorized, this did not have the effect to destroy the ordinance so far as it authorized the levy of a legal tax, and that those who were unjustly burdened by the operation of the ordinance might, in a proper proceeding, obtain the proper relief.

The constitution of Louisiana required a tax to be levied upon all movable and immovable property in the state, to pay interest becoming due annually on all bonds issued by the state. By an act of the legislature a tax was im-

posed upon all property in the state, for the payment of interest on bonds, with the exeception of "household goods, silver plate, jewelry and mechanics' and laborers' tools to the amount of five hundred dollars in each household." In *State v. Maxwell,* 27 La. Ann. 722, defendant in error sought to enjoin the collection of a tax, upon the ground that the statute was unconstitutional in exempting from taxation any of the property of the state. The court said:

"This court can not perceive how a taxpayer can justly complain that the levying of a tax is unequal, because some property in the state has been omitted in the assessment, either through inadvertence or because it is supposed to be exempted by an unconstitutional law; for the effect would be the same. Probably there never has been an assessment which embraced *all* the property of the state, but that fact did not render the assessment unconstitutional. When the omission is discovered, the property must be assessed, for the constitution and laws require that all property shall be assessed."

It has been held in this state, that the omission of the assessor to list taxable property does not invalidate the tax levied on other property. *Burlington & M. R. R. Co. v. Saline County,* 12 Neb. 396.

It is further objected that this act provides different rules for ascertaining the value of the franchises of many of the corporations doing business in this state; that, in some instances, a tax is imposed upon the gross receipts of the corporation in lieu of an *ad valorem* tax levied upon the value of the franchises of other companies, and that these features of the law are so objectionable that it ought not to be enforced. We are all agreed that under the constitution of this state the franchise of a corporation is regarded as property, and must be assessed and taxed as other property. That the same method of arriving at the value of different classes of property is not pursued or not required by the statute, is not an objection to the law, if equality of taxation is finally attained. The vast varieties of property that exist require different rules for the as-

sessment of different classes, but if the legislature has provided a means by which the assessment, when made, can be equalized, so that no one person or interest is called upon to pay an undue proportion of the public burden, that is all that the taxpayer can demand. It may be true that, by the different rules provided for arriving at the taxable value of the franchises of the different classes of corporations doing business in this state, the franchise of one company may be assessed at a higher valuation than that of another, but, as all corporations are assessed in the county, precinct and city where their business is carried on, it is the business of the county and city boards of equalization to fairly and impartially equalize the valuation of all personal property assessed in their respective jurisdictions, and to raise or lower the same as the justice and equity of the case may require. Whatever directions the law may give to the assessor in valuing the property in the first instance, and whatever result these directions may produce in the assessment of franchises or other property of the taxpayer, the work of the board of equalization is to equalize the valuations made, so that every one, as nearly as that may be attained, shall stand upon an equal footing, and pay an equal proportion of the tax laid, according to the real value of his property. For this purpose, it may compel the attendance before it of any person, with books, records and papers; witnesses may be summoned and an investigation made to discover and redress any wrong or inequality suffered by any party from the work of the assessor. In this way, equality is attained and every interest protected.

Counsel have requested, if we sustain the law, that we shall point out in our opinion the proper manner in which the assessment of certain particular property is to be made, and to give directions as to the special manner in which the law shall be put in force. A court is not an administrative board to direct the officers appointed to put a law in operation, and direct the particular method of procedure, in advance of any controversy actually existing.

When a controversy arises and the question is properly before us, then, and not until then, can we undertake to determine it. It was stated in argument that something like three hundred cases had been brought to this court involving questions arising under the old revenue act. The questions which may arise under this, or any revenue act that could be passed, are innumerable, but, until they are brought here in a proper proceeding and we have had the benefit of argument and examination, we can not undertake a duty, which the law itself imposes upon those appointed to administer it, or lay down rules in advance of any controversy for the enforcement of the provisions of the law. It is sufficient, at this time, to say that no objections to the law have been raised, of such serious import as to require us to declare the whole act unconstitutional. As a whole, we believe the law to be a good one, and to have been framed with the object of reaching all property in this state, and to impose upon all taxable property its due share of the public burden. That it may fail in some instances does not require us to condemn it as a whole, and the writs applied for are accordingly denied.

WRITS DENIED.

The following opinion was filed in these cases with the opinion of the court:

FILED DECEMBER 16, 1903.

1. **Taxation**: RETURN. In making a return of his taxable property under the provisions of chapter 73 of the laws of 1903 the taxpayer may deduct from the credits due him all just debts by him owing at the time of such return.

2. **Revenue Law**: CONSTRUCTION: CORPORATE STOCK. Section 56 of said chapter 73 is a provision, not for taxing the corporations therein named on their capital stock, but for taxing the shareholders on the value of the stock held by them, and requiring the corporation to pay the tax assessed against the shareholders.

3. ———: ———: UNEARNED PREMIUMS. Unearned premiums returned to the insured on the cancelation of a policy of insurance do not constitute any part of the gross receipts of the company by

which the policy was issued, and need not be included in its return of gross receipts under the provisions of section 58 of the act.

4. ———: ———: GROSS RECEIPTS. The tax imposed on the gross receipts of the insurance companies named in sections 58 and 61 of the act is not in lieu of all other taxes; but such companies should be taxed on any real estate or other taxable property owned by them, the same as other parties.

5. ———: CORPORATIONS AND AGENTS: LIABILITY. The law is not objectionable in that it makes a bank responsible for the payment of the tax levied upon the shares of stock held by its stockholders, or an agent for the tax levied on the property of his principal.

6. ———: GROSS RECEIPTS. The gross receipts, required by the provisions of section 78 to be returned for taxation by express, telegraph and telephone companies, refers to gross receipts for business done in this state, and does not include receipts for interstate business.

7. ———: APPEAL: JURY. It is no objection to the act that, on an appeal from the board of equalization, no jury is provided or allowed on the trial of such appeal.

DUFFIE, C.

These two cases were argued and submitted together. The legislature, at its last session, passed an act to provide a system of public revenue and to repeal certain sections of article VII, chapter 77, Compiled Statutes of Nebraska for the year 1901. This act is known as chapter 73 of the laws of 1903. The legislature, by this act, evidently intended to provide an entire and complete system of taxation; its provisions, in many respects, being a radical departure from the law heretofore in force. The respondent, who is the tax commissioner for the city of Omaha, was proceeding under the provisions of this act to assess the property within said city, being governed in said assessment by the provisions of the act as he understood and construed it. The relators, citizens and taxpayers of the city, have brought these actions, asking this court to award a mandamus commanding the respondent to proceed, in the assessment of the taxable property within said city, under the provisions of chapter 77 of the Com-

piled Statutes of 1901, claiming that the new act is in many of its provisions unconstitutional, and that these provisions were an inducement to the legislature in the passage of the act, and that it should therefore be held inoperative as a whole. That the act may not be symmetrical in all of its provisions, is to say nothing more than can be said of any new revenue measure attempted by any legislative body. A revenue act is a matter of growth, and often requires many amendments and the careful attention of many legislatures, before it can be freed from ascertained defects and imperfections. As was truly remarked by one of the counsel on the submission of the case, the legislature which attempts to formulate a new system of revenue becomes a storm center, where all the conflicting interests of the state meet to secure the protection of their own particular business. All taxable property in this state is directly affected by the system of taxation which may be adopted, and all of the greater property interests are, as a rule, seeking to press upon the legislature such measures as will be most favorable to them. Under these circumstances, it is not surprising that in the act now under consideration may be found some matters to which objection may be made, and, taking into consideration the fact that no act ever yet devised has been found equal to the equitable distribution among the property holders of the state of the burden of taxation, it would be still more surprising if the present act were one in which perfect equity, with all classes of property and every business interest in the state, was attained.

Section 1, article IX of our constitution, is as follows:

"The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-keepers, liquor dealers, toll bridges, ferries, in-

surance, telegraph and express interests or business, vendors of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

Section 4 of said article is as follows:

"The legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

The principal objections urged against the act are that, in many of its provisions, it conflicts with these two sections of the constitution, in that uniformity is not preserved in the taxation of certain business interests, and that, in many cases, property which should bear its fair proportion of the tax escapes altogether. It is manifest that where a tax is to be levied by valuation, uniformity and equity in the valuation of the property of the individual or corporation must be preserved; and it is further evident that any law, which sanctions the exemption from its share of the public burden of any class of taxable property, would be an evasion of section 4 of the constitution above quoted. In considering the objections raised and discussed, the rule which also obtains, that the judiciary will not declare an act of the legislature unconstitutional unless it is clear that it infringes upon the fundamental law, must be kept in view. This rule is so well known, and so universally recognized, that a citation of authorities is unnecessary, and especially should this rule be fully observed in construing the provisions of a revenue law; and, unless it is impossible to avoid it, a general revenue law should never be declared inoperative in all its parts because a particular part, relating to a distinct subject, may be invalid. A different rule might be disastrous to the financial operations of the government and produce the utmost confusion in the business of the entire country. 1 Cooley, Taxation (3d ed.), 464; *Field v. Clark*, 143 U. S.

649, 696; *State v. Poynter,* 59 Neb. 417. Section 1 of the act in question contains a definition of the words and phrases used therein. First, it defines the term "real property and real estate." Second, the term "personal property." Third, the word "property," which is defined to include "every kind of property, tangible or intangible, subject to ownership." Fourth, the word "money" is defined as including "all kinds of coin, all kinds of paper issued by or under authority of the United States circulating as money, whether in possession or deposited in bank or elsewhere." Fifth, the word "credit" is defined to include "every demand for money, labor or other valuable thing, whether due or to become due." Section 12 of the act provides, among other things, that "all property in this state not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value, which shall be entered opposite each item and shall be assessed at twenty per cent. of such actual value." One objection made to the law is that it requires the listing for taxation of all "credits" due to the individual taxpayer or mercantile and other corporations or partnerships, whereas by the provisions of section 56 of the act the stockholders of a bank are taxed only upon the value of the shares thereof.

By the provisions of section 27, article I, chapter 77, Compiled Statutes of 1901, the law formerly in force, it was provided that in making up the amount of credits which any person is required to list for himself or for any other person, company or corporation, he shall be entitled to deduct from the gross amount of credits the amount of all *bona fide* debts owing by such person, company or corporation to any other person, company or corporation for a consideration received, and, as there is no provision in the act under consideration for deducting the amount of the taxpayer's indebtedness from the amount of his gross credits, it is said that the law, if literally construed, would operate to ruin many of the business interests of the state, aside from compelling such taxpayers to contribute an undue proportion of the revenues required to be raised as

compared with banking and some other interests. Instances are cited where wholesale and other merchants are indebted for a large proportion of the stock carried. At the same time, their books show credits due them from retail merchants and customers for amounts approximating the value of their stock. These merchants, under this construction, would be taxed upon their goods in stock as tangible property, although they were largely indebted for such stock, and, at the same time, they would be taxed for the amount due them on account of goods sold to retailers and patrons and not yet paid for; whereas the banks of the state, or rather the stockholders of such banks, are taxed upon the value of the shares by them owned, while the money on hand, notes and bills receivable, and all other credits of the bank are not subject to taxation. This argument may be true in part, but not altogether so. If a bank has a capital stock of $100,000 fully paid in, and $100,000 reserve, and $50,000 of undivided profits, the stock of such a bank would, under ordinary circumstances, be worth $250,000 in the market, and a tax upon the shares of stock would be a tax not only upon the capital invested but upon the reserve and undivided profits as well. The amount of cash on hand and evidences of debt held by the bank for money loaned would not, of course, be represented in this assessment for taxation, but, in a practical view of the situation, the money on hand, aside from the reserve and profits undivided, would be money due depositors, the legal title to which is in the bank, it is true, but which, in equity, is the property of those who made the deposit. We think, however, that the word "credit" as used in this act may be fairly said to mean "net credit." In section 58 of the act the legislature speaks of the "gross receipts" of insurance companies, and in section 77 of the gross receipts of express, telephone and telegraph companies, and there are other indications that the legislature used the word "gross" when intending to include the whole of any particular item; and it is fair to presume that, in speaking of credits, especially with the practice heretofore in vogue in

this state of taxing only net credits, the words "gross credits" would have been used had it been intended by the legislature to require the taxpayer to pay on all of his credits without deducting therefrom his *bona fide* indebtedness. But even in the absence of the language used, authority is not wanting in support of the view that the legislature, in providing for the taxation of credits, meant net credits. The constitution of Indiana authorizes the law making power to "provide by law for a uniform and equal rate of assessment and taxation," and that it "shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes, as may be specially exempted by law." The legislature of that state, in providing for the taxation of credits, provided, as did our former law, that the taxpayer might deduct from his gross credits all *bona fide* indebtedness due from him to other parties. In *Florer v. Sheridan,* 137 Ind. 28, the point was made that the act, so far as it allowed a deduction of debts from gross credits, was unconstitutional in that credits were property and the constitution required the taxation of all property. The supreme court said:

"Credits are, by the constitution, property, and as such are to be taxed. Their just value is to be ascertained by subtracting *bona fide* indebtedness from the gross amount of the notes, accounts and other choses in action, and the balance is to be returned as belonging to the individual. Surely, the difference thus found is the precise amount and just value of the credits of the party in the legal and proper sense of the term. Section 1, article 10, of the constitution of Indiana, does not say the gross amount of all notes, accounts and other choses in action shall be taxed, and we can not so construe it without perverting its language and obvious meaning. Consider for a moment its practical operation under such a construction. A has an account against B for $1,000, or a debt against him for a like amount, evidenced by a promissory note. B holds

an account or promissory note, evidencing a *bona fide* indebtedness against A for the same sum of money. Equity, except where one of the parties is insolvent, treats these claims as compensating each other. Neither owes nor could recover, in an action against the other, and yet, if appellant's theory is right $2,000 must be placed upon the tax duplicate, because the holders never met and settled or surrendered their claims. In such case, each is a chose in action held by the party to whom it belongs, and must, under the contention of counsel, be returned to the assessor, and yet it is obvious that neither as against the other has a penny of credit either in money or just value. If the owner is taxed upon such credit it is upon fiction. The tax duplicate, in this way, would be increased, but not from property of value in the state. We think the constitution requires that property, wealth, substantial values, shall be taxed, but not imaginary values. As against an insolvent maker, the true value in money of the credit can only be taxed and so it is where a man has both credits and debts, if there is no balance there is no sum of money due, however large the items of account upon each side may be."

We are entirely satisfied with this exposition of the meaning of the word "credit" as found in the act under consideration, and can not bring ourselves to believe that it was the intention of the legislature to tax what is aptly and properly denominated by the Indiana court as a "fiction." The following cases may also be cited as supporting this construction: *People v. Hibernia Bank,* 51 Cal. 243; *Bank of Mendocino v. Chalfant,* 51 Cal. 369; *Treasurer of Fayette County v. Bank,* 47 Ohio St. 503.

Referring again to the method provided by section 56 for the taxation of banks, it is evident that all property of the same kind or class should be taxed in the same manner. There are numerous banks in this state of the class known as national banks. These banks are authorized and chartered by the national government. By the law of their creation their capital stock can not be taxed, but the in-

dividual shareholders may be taxed upon the value of the shares held. Section 56 provides that the president, cashier or other accounting officer of every bank or banking association, loan and trust, or investment company, shall, on the first day of April of each year, make out a statement under oath showing the number of shares comprising the actual capital stock of such bank or company, the name and residence of each stockholder, the number of shares owned by each, and the value of said shares on the first day of April, and shall deliver such statement to the proper assessor; that such capital stock shall thereupon be listed and assessed by him, and return made, in all respects the same as similar property belonging to other corporations and individuals. It further provides that in case the bank shall have real estate or other tangible property which is assessed separately, then the assessed value of such real estate or tangible property shall be deducted from the valuation of the capital stock of such association or company, and that the assessor shall determine and settle the true value of each share of stock after an examination of such statement, and that in case of national banks an examination of the last report called for by the comptroller of the currency may be made, and in case of state banks the last report called for by the state banking board. Provision is also made for further examination by the assessor, if the report is not satisfactory to him. The last clause of the section is as follows: "Such asociation, bank or company shall pay the taxes assessed upon its stock and shall have a lien thereon for the same." This clearly contemplates an assessment, not upon the capital stock of the bank itself, but upon the value of the shares held by the stockholders and against the stockholders. This is the only method in which a revenue may be derived from national banks. It is the only procedure authorized by the laws of the national government. It surely can not be made an objection to this act that other banks and banking associations are taxed in the same manner and method provided for the taxation of national banks. Neither is

it an objection that the bank is required to pay the tax due from its shareholders. The supreme court of the United States, in *National Bank v. Commonwealth of Kentucky,* 9 Wall. (U. S.) 353, in considering a similar provision in the statutes of Kentucky, said:

"If the state of Kentucky had a claim against a stockholder of the bank who was a nonresident of the state, it could, undoubtedly, collect the claim by legal proceeding, in which the bank could be attached or garnisheed, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the state on the bank shares. It is no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it, and it in no manner hinders it from performing all the duties of financial agent of the government."

This, we think, is a full answer to the objection made, and we speak of it here because another objection to the law is that it requires the agents of insurance and other companies to pay the tax levied upon property of their principals in their possession or under their control, and makes them personally liable therefor. The agent or other party holding property of a nonresident may be made personally liable by being garnisheed, and that the act contemplates that such agent should keep in his possession money of his principal sufficient to discharge the tax against his property, can not, in our opinion, be urged as an objection against this law. As was said by justice Miller in the case last above referred to:

"The mode under consideration is the one which congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or nonresident; and, as we have already stated, it is the mode which experience has justified in the New England states as the most convenient and proper, in regard to the numerous wealthy corporations of those states."

Section 58, refers to fire insurance companies organized under the laws of any other state or country. It provides that such companies are to be taxed in the county, town, village and school district where the agent conducts the business, upon the gross amount of premiums received by it for insurance written upon property within the state during the preceding year, "such gross receipts to be taken as an item of property of that value, and to be assessed and taxed on the same percentage of such value as other property." Section 61 refers to life, fire or accident insurance companies and surety companies organized under the laws of this state, excepting fraternal beneficiary associations and mutual companies that operate on the assessment plan, having no capital stock, and making no dividends, and whose scheme of insurance does not contemplate the return of any percentage of earnings or profits to the policy holders. These domestic companies are also to be taxed in the county, town, city, village and school district, where the agent conducts the business, upon the gross amount of premiums received for all Nebraska business done within the state during the preceding calendar year, less the amount of such receipts ceded to other companies as reinsurance through regularly authorized agents in this state, and less premiums returned on canceled policies. The objection to these sections is that foreign companies are to be taxed upon their gross receipts, whereas domestic companies are exempt from taxation on such part of their gross receipts as has been used for reinsurance through agents operating in this state, and upon the amount of such premiums returned on canceled policies. All property in this state is, by the constitution, required to be taxed by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchise. It must be conceded that property, whether belonging to the citizen or nonresident, must be equitably valued for taxation. When dealing with the taxation of property the legislature can not discriminate in favor of the resident against a nonresident. Each

are to be treated alike, and each is to pay a tax in proportion to the value of his property.

The question whether unearned premiums actually refunded upon canceled policies constitute any part of the gross receipts of an insurance company, was before the supreme court of Illinois in the *German Alliance Ins. Co. v. Van Cleave,* 191 Ill. 410, and it was held that such returned premiums were not to be counted as gross receipts. Under our statute the insurer has a right, at any time during the life of his policy, to surrender it to the company and demand the return of the unearned premium. It is apparent, therefore, that all policies issued are upon the condition that they may be canceled at any time on demand of the person insured and that, in such case, the unearned premium must be returned. In the case referred to, the court, in dealing with the argument made in support of the proposition that gross premiums included premiums returned on canceled policies, said: "According to the argument which would include premiums returned on canceled policies, if an insurance company should issue a policy and receive a premium and at once cancel the policy and return the premium it would have done the amount of business represented by the policy and the amount received would be a premium for insurance business done. We do not think the language used will bear that construction. The merchant would not think of including in the gross receipts of his business any sales of goods with the privilege of return on the part of the purchaser, where they are in fact returned. In such a case there is in the end no sale and no business done, in any proper sense. So in the case of an insurance policy for a definite period with an agreement that it may run any portion of that period and then cease; if the policy is canceled and the insurance ceases there is no insurance business for the remaining portion of the period. The premiums returned are not paid as a liability of the insurance company or as a charge or expense of conducting the business, but because one party or the other avails of the option and terminates the insurance."

We are entirely satisfied with the reasoning and with the holding that unearned premiums returned to the insurance companies on canceled policies can not be included in the term "gross premiums," and that foreign insurance companies, in their report required by the provisions of section 58 of the act, are not required to include such returned premiums as a part of their gross receipts. So far, then, we do not think that there is any discrimination made in favor of domestic companies.

A general objection is lodged against sections 58, 59, 60 and 61 to the effect that, by taxing the gross receipts mentioned therein, all other property that may be owned by the companies named is exempt from taxation, and therefore their provisions are unconstitutional. It is to be observed that no mention is made of any exemption in either of said sections. No mention is made of any property other than the gross receipts. In this respect these sections are very different from the provisions of the Weaver law which the court declared unconstitutional in *State v. Poynter,* 59 Neb. 417, as that law expressly exempted all personal property from taxation except the gross receipts from premiums received. This, as we understand, was one of the main reasons for holding the law invalid. The sections under consideration simply provide that the gross receipts shall be taxed, under certain conditions, and say nothing about other property. These sections, taken in connection with other sections of the law, in our opinion, require insurance companies to list all their property, both real and personal. We do not think it can be consistently claimed that because section 58 makes no mention of real estate, the consequence of such omission is to exempt from taxation the real property of the companies named in that section which is held by them in this state. There is no requirement that all the law relating to the taxation of real and personal property should be contained in any one section of a statute. Section 12 of the act declares that "all property in this state, not expressly exempt therefrom, shall be subject to taxation"; and section

29 declares that "personal property, except such as is required in this chapter to be listed and assessed otherwise, shall be listed and assessed in the county, precinct, township, city, village, and school district where the owner resides, except that property having a local situs, like grain elevators, lumber yards, or any established business, shall be listed and assessed at the place of such situs." This section further provides: "The capital stock and franchise of corporations and persons, except as otherwise provided, shall be listed and taxed in the county, precinct, township, city or village, and school district where the principal office or place of business of such corporation or person is located within this state."

It is evident therefore, from a reading of section 29, that the words "assessed" and "taxed" were used in interchangeably by the legislature and were intended to express the same meaning. It may be true that, in listing and assessing the personal property of insurance companies, the particular mode or scheme of such assessment is not given, but this, we do not understand, can be urged as an objection to the law. It has been the custom, heretofore, for the legislature to provide general rules for the assessment of property, but this was undoubtedly because the assessment is committed to a large number of persons, whose judgment as to the value and method of arriving at the value of property would naturally differ in many radical respects, if no general rules were provided by the legislature, and these rules were undoubtedly adopted with a view to arriving at a more equitable and uniform valuation of all the property in the state, and not because it was deemed necessary to provide these rules in order to make the assessment valid, or the tax laid on such assessment a valid tax. The failure of the legislature to provide specific rules for the valuation of all or any part of the property in this state can not, we think, be held to be an objection to the law.

The other features of the law to which objection is made are contained in sections 16, 55, 67, 78, 122, 124 and 188.

Section 16 gives the agent, or one holding property in a representative capacity, and to whom the property is assessed, a lien upon the property of his principal in his possession for the amount of the taxes, to indemnify against the payment thereof; or, if he has paid the taxes, until he is reimbursed therefor. This is a copy of section 140 of the old law which we are asked to reinstate, but, aside from this, we can see no objection to the law on constitutional grounds. By the common law an agent has a lien on the property of his principal for all expenditures, losses sustained, services in and about the property or thing entrusted to his agency, whenever they are proper or necessary or incident thereto. A similar law was sustained by the supreme court of Iowa in *German Trust Co. v. Board of Equalization of the City of Davenport,* 121 Ia. 325, and *Heinz & Fisher v. Board of Equalization of the City of Davenport,* 121 Ia. 445.

Section 78 provides for the taxation of the tangible property of express, telegraph and telephone companies, and, in addition thereto, upon the gross receipts of such companies for the year next preceding the first day of April in which the tax is levied. The objection to this is that it is a taxation of interstate commerce, as the receipts of such companies arise largely from the transaction of interstate business. The presumption obtains that the legislature intended to pass a constitutional law, and, in this view of the case, the gross receipts of these companies must be limited to include only the gross receipts arising from business transacted in this state. This view of the case is supported by *Ratterman v. Western Union Telegraph Co.,* 127 U. S. 411, and *State v. United States Fidelity & Guaranty Co.,* 98 Md. 314. The state board of equalization can prepare schedules to meet this construction, so that the law may be easily carried out.

Sections 122, 123 and 124 relate to the equalization of valuations, and to appeals from the decision of the equalization board. The particular objection urged is that the taxpayer can not have a jury on the trial of an appeal,

It is sufficient to say, in answer to this objection, that it was within the discretion of the legislature to award an appeal or not at its pleasure, and that no constitutional objection can be sustained to a law denying a jury trial in appeal cases, where the appeal itself might be denied.

Section 188 is substantially the same as section 174 of the law heretofore in force, and which the relator seeks to have reinstated. Any objection which obtains to this section would certainly obtain to the law which he desires to have enforced.

KIRKPATRICK and LETTON, CC., concur.

CARL TESKE, APPELLEE, V. MARTHA DITTBERNER ET AL., APPELLANTS.*

FILED DECEMBER 16, 1903. No. 10,901.

1. **Devise:** AGREEMENT TO MAKE. An agreement upon sufficient consideration to devise or bequeath property is valid and enforceable.
2. **Trust.** In such case, equity will impress a trust upon the property, which will follow it into the hands of personal representatives of the promisor or grantees without consideration.
3. **Validity.** The agreement need not be in express terms to make a will; a promise that the promisee shall receive the property, or that it shall be left him at the death of the promisor, is sufficient.
4. **Fraud:** ACTION. If the promisor, after performance by the promisee, conveys the property in fraud of the latter, an immediate cause of action to cancel the conveyance arises.
5. **Performance:** STATUTE OF FRAUDS. Performance of services of such a character that their value can not be estimated by a pecuniary standard, so that the court can not restore the promisee to the situation in which he was when the contract was made, or compensate him in damages, is sufficient to take such an agreement out of the statute of frauds.
6. **Specific Performance.** While, in general, a contract for personal service, where full performance rests upon the will of the contracting party, is not specifically enforceable at suit of either

* See former opinions, 63 Neb. 607; 65 Neb. 167.

party, when such services have been rendered or there has been a substantial performance of his contract on the part of the person agreeing to render them, the reason of the rule ceases, and the contract may be enforced.

7. **Performance by Promisee.** A contract to leave property by will is not ambulatory or revocable, as being testamentary in character, after the promisee has performed his part of the contract.

8. **Homestead:** CONVEYANCE. Where real estate, the legal title to which is in the husband, has been selected and is occupied as a family homestead, it can not be conveyed or incumbered except the instrument conveying or incumbering the same be signed and acknowledged by the wife, as is provided by section 4, chapter 36, Compiled Statutes, entitled "Homesteads."

9. ———: ———. A contract to convey the property embraced in a homestead, which reserves to the homestead claimants the right of use and occupancy until the death of the parties, or until abandonment, is an incumbrance of the title thereto within the meaning and purview of said section 4 of the homestead act.

10. ———: ———: AGREEMENT TO DEVISE: SPECIFIC PERFORMANCE. A parol agreement made by the husband with a third party to devise property embraced within a homestead, like an agreement to convey the reversionary estate, is in conflict with the provisions of the homestead act and is not specifically enforceable, even though substantial performance of the contract by the promisee may have taken place.

11. **Lands Included With Homestead.** When such an agreement includes other land than that included within the homestead, the contract may be specifically enforced except as it affects the homestead property.

APPEAL from the district court for Madison county: JOHN S. ROBINSON, JUDGE. *Reversed.*

William V. Allen and *Willis E. Reed,* for appellants.

Patrick E. McKillip, W. A. McAllister, James G. Reeder and *Ralph W. Hobart, contra.*

HOLCOMB, J.

In the last opinion filed by Mr. Commissioner AMES, it is shown that the agreement in question is testamentary. We entirely agree, and do not consider it necessary to say more upon that head. The validity of such agreements,

when made upon consideration and free from objections that may be urged against all contracts, is beyond question. They have been upheld and enforced from an early period. Note to *Johnson v. Hubbell,* (10 N. J. Eq. 332), 66 Am. Dec. 773, 784; *Howe v. Watson,* 179 Mass. 30; *Bird v. Jacobus,* 113 Ia. 194; *Whiton v. Whiton,* 179 Ill. 32. It is also well established that agreements of this character, in proper cases, may be enforced specifically. Equity will fasten a trust upon the property in the hands of the person who has promised to dispose of it by will, in favor of the promisee, which will follow it into the hands of personal representatives or grantees without consideration. *Howe v. Watson, supra; Smith v. Pierce,* 65 Vt. 200; *Bruce v. Moon,* 57 S. Car. 60; *Duvale v. Duvale,* 54 N. J. Eq. 581, 56 N. J. Eq. 375; *Fogle v. St. Michael Church,* 48 S. Car. 86; *Price v. Price,* 111 Ky. 771; *Burdine v. Burdine,* 98 Va. 515. Nor is it necessary that the agreement be in express terms to make a will. A promise that the promisee shall receive the property, or that it shall be left to him, at the death of the promisor, is sufficient. *Kofka v. Rosicky,* 41 Neb. 328. Counsel make a vigorous assault upon the latter decision. So far as it relates to cases of imperfect adoption, it chooses between two conflicting lines of authority, each well supported by reason and by adjudications. It ought not to be disturbed simply because some other courts have taken a different view. But, in any case, so far as general agreements to dispose of property by will are concerned, when the letter or intent of the statute as to adoption is not involved, we do not think the soundness of the decision is open to question. These principles established, it follows of necessity that if the person, who has promised to leave his estate or some part of it to another, conveys the property in question to third persons, without consideration, or with notice, the conveyance may be set aside at suit of the promisee who is defrauded thereby. *Kastell v. Hillman,* 53 N. J. Eq. 49. And as clearly shown in the last opinion of Mr. Commissioner AMES, the fact that the promisor is still living is no neces-

sary obstacle to relief against the conveyance. There can be no specific performance till he is dead. But the conveyance whereby he attempts to put compliance out of his power, in fraud of the promisee, creates an immediate right of action. *Synge v. Synge,* 1 Q. B. (Eng.) 1894, 466; *Duvale v. Duvale, supra.*

It is contended further that no sufficient performance is shown to take the case out of the statute of frauds. To the writer, this contention appears well founded and altogether correct, but a majority of the court is disposed to the contrary view and to hold that the contention can not be sustained. It seems to me quite clear that the appellee can be amply compensated for the part of the contract performed by him, assuming its existence, and that there is no occasion for invoking the authority of a court of equity to decree specific performance on the ground that otherwise a fraud would be perpetrated upon him. I think there is far greater danger, by the establishment of a precedent of decreeing specific performance under conditions and facts similar to those disclosed by the record, of making it possible that a fraud may be perpetrated on the aged, and the weak, and those closely connected by ties of blood, than of perhaps slight injustice to one who claims under so uncertain an agreement, which is only partially performed and for which, because of the particular facts and circumstances, ample compensation may be awarded by a money judgment. The authorities cited and relied upon by this court in *Kofka v. Rosicky, supra,* are regarded as warranting the decree prayed for, under the pleadings and the evidence in support thereof. In *Rhodes v. Rhodes,* 3 Sandf. Ch. (N. Y.) *279, the court said:

"Where the services to be rendered were of such a peculiar character that it is impossible to estimate their value * * * by any pecuniary standard, * * * it is out of the power of any court, after the performance of the services, to restore Henry Rhodes (the promisee) to the situation in which he was before the contract was made, or to compensate him in damages. The case is clearly within

the rule which governs courts of equity in carrying parol agreements into effect, where possession has been taken, or moneys laid out in improvements upon the land sold."

This statement was approved in *Van Tine v. Van Tine,* 15 Atl. (N. J. Eq.) 249, and quoted from a note (p. 789) to *Johnson v. Hubbell, supra.* It was repeated in substantially the same form in *Shahan v. Swan,* 48 Ohio St. 25, and *Sutton v. Hayden,* 62 Mo. 101, also approved by this court in the *Kofka* case. It is true several courts have criticized *Rhodes v. Rhodes,* and declined to follow it.

But it is held the question must be regarded as coming within the rule and settled in this state by *Kofka v. Rosicky, supra.* There are numerous other recent decisions which are believed to be in accord therewith. *Winne v. Winne,* 166 N. Y. 263; *Svanburg v. Fosscen,* 75 Minn. 350; *Owens v. McNally,* 113 Cal. 444; *Carmichael v. Carmichael,* 72 Mich. 76. On principle, none of us doubt the soundness of the proposition being discussed. Where the situation is such that the promisee can not be restored to his original position, to permit the promisor to repudiate his agreement under cloak of the statute of frauds, having received a substantial and valuable consideration, would be highly inequitable. Courts of equity, from the very beginning, have striven to maintain the statute in its integrity as a preventive of fraud, while strenuously repressing its use as a means of working frauds. A defendant will not be allowed to shelter his own fraud behind the statute of frauds, nor to use that statute as an instrument of fraud and wrong. When the statute is invoked to sanction a palpable fraud upon one who has performed his agreement and can not be restored to his original position, a court of equity must interpose its authority. *Ryan v. Dox,* 34 N. Y. 307; *Wilber v. Paine,* 1 Ohio, 251; *Hidden v. Jordan,* 21 Cal. 92; *Union Mutual Life Ins. Co. v. White,* 106 Ill. 67; *Whitson v. Smith,* 15 Tex. 33.

It is stated in the last opinion in this case (65 Neb. 167), the plaintiff "has spent many of the best years of his life in the performance in good faith of the testamentary agree-

ment, which the referee has found upon sufficient evidence, to have been entered into between himself and his parents. It does not appear to us that for a repudiation of the agreement by his father he could be adequately compensated in damages." The grantee not only took with notice, but has no equities whatever. Her grantor is amply protected under the terms of the agreement. Repudiation of the agreement, assuming the facts to be as stated, is a fraud upon the plaintiff and will work an irreparable injury. A court of equity ought to interfere in such cases, if possible, and we think it has the power.

But we are told the agreement is one for personal service, and hence is not specifically enforceable. To this there are two answers. In the first place, the contract provides for the care and maintenance of the promisor, or the allowance to him of a stipulated sum in lieu thereof, at his option. This feature of the agreement removes the objectionable features involved in an ordinary contract for support. Second, the agreement for service, as has been hereinbefore held, was substantially performed. If the agreement were newly made and the plaintiff were seeking specific performance, there would be another matter. Here, he has not only performed the services for many years, but has executed other portions of the contract, involving no little expenditure and labor. After performance, an objection of this character comes too late. The rule that contracts for personal service will not be enforced specifically, where full performance rests upon the will of the contracting party, is based on the consideration that the court can not make an efficient decree for specific performance in such cases nor enforce its decree when made. 3 Pomeroy, Equity Jurisprudence (2d ed.), sec. 1405. When the service has been rendered, the reason of the rule fails and the rule ceases to operate. In almost all of the cases above cited personal services were the consideration of the contract.

It is also argued that a testamentary agreement, being testamentary, must needs be ambulatory and revocatory.

Until performance on the part of the promisee, this might be true. But after the promisee has substantially performed all things to be done on his part, the contract to leave the property to him at the death of the promisor ceases to be wholly executory, and revocation would be an intolerable fraud, which a court of equity could not permit. *Bruce v. Moon,* 57 S. Car. 60. With the exception noted, the members of the court and of the commission, hearing oral arguments at the last submission of this cause, are all entirely agreed on the question hereinbefore discussed and decided. What has been said is to be regarded as applying to the doctrine of specific performance of contracts of the nature of the one under consideration as they relate to real estate generally. A very important feature of the case at bar, and one of the chief points of controversy, bears upon the operation of the homestead law and its effect on the parol agreement as pleaded and proved. The subject has demanded no little research, investigation and consideration. It is a fact established by the record that a portion of the real estate involved in the present litigation was, at the time of the making of the alleged agreement, the family homestead of the promisor and his wife, and occupied by them as such. Regarding the homestead, a question of prime importance arises, and that is, whether the agreement comes within the purview and inhibition of section 4 of the homestead act (Compiled Statutes, ch. 36; Annotated Statutes, 6200-6216), which declares that the homestead can not be conveyed or incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife. In speaking of the homestead, we wish to be understood as having reference to that part of the real estate in controversy which consists of the dwelling house, in which the promisor, Frederick Teske, and his family, at the time, resided, and its appurtenances and the land on which the same are situated, not exceeding 160 acres in area, nor $2,000 in value. Regarding the proper interpretation and construction of homestead statutes similar in

terms to ours, there is a sharp conflict in the authorities, and it is incumbent on us to adopt and hold to that doctrine which seems consistent with our former decisions, and in harmony with the purposes and object of our homestead act. While the agreement, as has been determined, is testamentary in character, yet its enforcement, by decreeing specific performance, must rest upon equitable rules and principles applied generally to executory contracts for the sale and conveyance of real property. If a person may bind himself by contract to bequeath by will a certain estate in land, then, by the application of the same principle, he may be bound by an executory contract to convey the same estate by deed. In either event the promisee obtains an equitable right or interest which is recognized by courts of equity. The right of the plaintiff to the specific performance of the contract relied upon, rests upon the alleged fact that he has substantially performed his part of the agreement, and that, thereby, an equitable right to and interest in the land in controversy has arisen in his favor; that the enforcement of the agreement upon the part of the promisor, by a court in the exercise of its equitable jurisdiction, is the only method by which he can obtain full and complete satisfaction, and thereby avoid an injury which otherwise would be the result. It is upon these same considerations that the specific performance of contracts generally for the sale of real estate by courts of equity is decreed. It is quite obvious, that if the agreement in the present case may be specifically enforced by resort to a court of equity as to the homestead of the promisor, then the doctrine is established in this jurisdiction that all executory contracts for the sale of real estate, even though a homestead, and in which the wife took no part, which are made subject to the rights and interest of the homestead claimants, may be specifically enforced, and the whole estate and legal title pass, when the homestead right and interest become extinguished by death of the parties or by abandonment. In those states in which this doctrine obtains, the homestead

and reversionary estate are regarded as distinct and separate estates, the latter of which can be dealt with by the owner of the fee by contract, specifically enforceable, and which, it is held, does not violate the law granting and regulating the homestead right.

The argument is advanced, in the present case, that because the owner of the fee may, under the provisions of the homestead act, devise the homestead as he may elect, there exists no good reason for holding to the view that an agreement to will impinges on any of the provisions of the act, and that such agreements should, therefore, be specifically enforced in a proper case by a court of equity. To this it may be said that section 17 of the homestead act simply provides for the course of descent of the homestead after the homestead estate becomes extinguished, by directing its devolution on the heirs at law, subject to the right of disposition by will. In neither event does the course of descent and succession to the realty become fixed and certain till the death of the owner of the fee. As has been seen, the agreement to will loses its ambulatory and revocatory character after substantial performance by the promisee, while the disposition by will, under the provisions of section 17, is subject to revocation or annulment by proper conveyance of the homestead at any time before the death of the holder of the legal title. It can hardly be doubted that an agreement to devise property in a certain way, and on certain conditions, thereby subjecting it to a trust for the benefit of the promisee, is an incumbrance of the title, of the same nature and character as would be an agreement to convey the reversionary estate, reserving to the homestead claimants their homestead rights. Both agreements would rest upon the same general principles of law and equity for their enforcement and validity. To hold to the doctrine that such contracts are valid and enforceable, is to restrict and limit the homestead estate to a mere matter of privilege of occupancy, and this, we are of the opinion, was not in contemplation by the legislature when it enacted the homestead law. Our views in this

respect are strengthened by a reading of section 16, which exempts to the homestead claimant, and protects against legal processes for the time stated, the full value of the homestead, and provides that the disposition of one homestead shall not be held to prevent the selection or purchase of another. Argument seems unnecessary in stating that the homestead, as viewed by the legislature, and which it provided for, was not simply the right to occupy as a place of abode, real estate, not exceeding the quantity and value mentioned, during the life of the homestead claimants. That which was evidently intended is that the physical property, including all and every interest and estate of the homestead claimants, should in no way be conveyed, encumbered or alienated, except by consent of both husband and wife in the manner pointed out by the act. If an agreement to will, which leaves the homestead right unaffected so far as the use and occupancy of the homestead is concerned, is specifically enforceable, then it must follow, by the application of like principles, that an agreement to sell, reserving to the homestead claimants rights of the same character, is valid and may also be enforced, in a proper case, by a court of equity. And, carrying the doctrine to its logical conclusion, a conveyance absolute in form of the entire estate, by the owner of the legal title, would give to the grantee at least an equitable title to the reversionary estate, cognizable by a court of equity in a suitable proceeding when the homestead right becomes extinguished. This is clearly inconsistent with our prior expression as to the true rule which should govern in such cases. A construction of the act leading to the result indicated would deprive the law of much of the wholesome and beneficent aims and purposes intended by the legislature, and leave it a mere shadow of its former self as heretofore construed. If the reversionary estate is encumbered by contract, or conveyed to a third party by the holder of the title without the consent of the other claimant, every one must know that the homestead, that is the property, is materially and substantially diminished in

value and has lost its character for salability. The homestead, as a species of property, has lost all value except for the right and privilege of use and occupancy during lives of the claimants. It could not then be sold and another homestead acquired with the proceeds, as is plainly contemplated may be done by the provisions of section 16. Many authorities of weight, and which are entitled to respectful consideration, are cited by appellee in support of his contention as to the validity of the agreement in so far as it affects the family homestead. Among these is *Ferguson v. Mason,* 60 Wis. 377, which is a leading case, and which, without question, fully supports the doctrine contended for. It is there held that a conveyance of land in fee to take effect at a future time, in which it is stipulated that the grantor shall have the possession and absolute use and control of the land during the life of himself and wife, is valid, and vests the fee in the grantee, although the land was a homestead and the wife did not join. The opinion further holds that the wife has no interest in the homestead except that derived from the power to prevent an alienation thereof, and that at the death of the husband, the wife surviving, she becomes a tenant for life, and at her death, or second marriage, all her homestead rights cease. That decision, it will be observed, although supported by authorities in many other jurisdictions, is not in harmony with the doctrine heretofore expressed by this court on the same subject. In a later case, *Jerdee v. Furbush,* 115 Wis. 277, it is held that a conveyance of the homestead by the husband, without the wife's signature, conveys an equitable right to the legal title, enforceable on the extinguishment of the homestead by the death of the wife or otherwise. In the latter decision, *Ferguson v. Mason, supra,* was, as we read the opinion, reluctantly followed to its logical consequences. It is said, in the course of the opinion, that the court, in the prior case (*Ferguson v. Mason*), followed judicial decisions made under statutes more or less similar to those of Wisconsin, citing a number of such decisions, in preference

to decisions to the contrary under like statutes, citing another line of decisions, in which is included from this state the case of *Clarke v. Koenig,* 36 Neb. 572. After discussing the subject further, it is observed by the court:

"The law has thus stood for nearly a quarter of a century, and whether the court's construction of the statute was right or wrong it must now be considered the law the same as if the idea involved were literally expressed in the statute. It relates to property. It has become, by the lapse of time, a rule of property, which, by well-settled principles, can only be rightly changed by a legislative enactment."

It is obvious that the court regards the later case as being ruled by *Ferguson v. Mason,* solely by reason of the application of the doctrine of *stare decisis,* and it is followed with apparent hesitation.

On the other side it is held, in *Weitzner v. Thingstad,* 55 Minn. 244, that the contract of the husband, without his wife joining therein, to convey his homestead is void for all purposes, and the husband is not liable in damages for its nonperformance. To the same effect is *Barton v. Drake,* 21 Minn. 299. The supreme court of Alabama, in *Alford v. Lehman, Durr & Co.,* 76 Ala. 526, holds that an attempted conveyance of the homestead, not executed in the manner provided by statute by both husband and wife, is a nullity, neither passing any estate to the grantee nor operating by way of estoppel against the grantors. After quoting from several other decisions of that court, it is observed by the court:

"These decisions have failed to recognize any distinction between the conveyance of the homestead *premises,* and the mere *right* of homestead, which is recognized by some respectable authorities, and in support of which the appellants' counsel have made a most earnest and forcible argument. It is manifest that, if the owner were permitted to encumber the fee or reversion of his homestead, as distinguished from the mere right of undisturbed occupancy—and by a mode of alienation dispensing with the voluntary

assent and signature of the wife—the provision of the constitution under discussion would have little more binding efficacy than a rope of sand, and its policy could be evaded by the husband with fatal facility. All that would be necessary, to effect such alienation, would be for the husband alone to convey or mortgage the premises one day, and abandon them the next; all of which might be done against the most earnest protest of an unwilling wife."

See also *Phillips v. Stauch,* 20 Mich. 369; *Hall v. Loomis,* 63 Mich. 709; *Pipkin v. Williams,* 57 Ark. 242, 38 Am. St. Rep. 241; *Thimes v. Stumpff,* 33 Kan. 53.

In so far as this court has heretofore expressed itself regarding the scope and effect of our homestead statute, its decisions have generally been favorable to a liberal construction of the act, such as would grant the fullest measure of protection to the rights and interests of the homestead claimants. The trend of the decisions has been toward a construction which would render an agreement or contract affecting the homestead, not executed in the manner provided by the act, void for all purposes. Generally it is held, as we view the several utterances on the subject, that a contract relating to the homestead, not signed and acknowledged as required by the act, is a nullity, and incapable of creating any rights, or affording a basis for the granting of relief either legal or equitable in its nature, not only in the homestead estate, but in the property itself embraced in the homestead. It is very true that most of these decisions apply to contracts affecting directly the homestead right and estate, and yet, if the reversionary estate is to be regarded as separable from the homestead estate, and capable of alienation by contract, executory in form or substance, then there is no reason why the doctrine obtaining in Wisconsin, as announced in *Jerdee v. Furbush, supra,* should not be held applicable here, and a conveyance or contract to convey, purporting to convey all and every estate in the land, held to create an equitable right to the legal title, enforceable on the extinguishment of the homestead by the death of the wife

or by abandonment of the homestead. All of our prior utterances, we are satisfied, are inconsistent with this view and with such a construction of the homestead act. The very first utterance of this court on the subject is to the effect that a mortgage on the homestead, signed by the husband alone, is void. It is said: "The law proceeds upon the theory that both husband and wife are entitled to the benefit of the homestead act, and this right can not be waived except by the consent of both." *Bonorden & Ranck v. Kriz,* 13 Neb. 121; *Aultman & Taylor Co. v. Jenkins,* 19 Neb. 209. It is held in *Swift v. Dewey,* 20 Neb. 107, that a mortgage of a tract of land including a homestead, executed by a married man without the concurrence and signature of the wife, is invalid for the purpose of impairing, dismembering, or in any manner affecting such homestead or its appurtenances. To the same effect is *McCreery v. Schaffer,* 26 Neb. 173. *Larson v. Butts,* 22 Neb. 370, is a case wherein it is decided that a contract to convey a homestead, entered into by a wife in her own name, will not be specifically enforced because not signed and acknowledged by both husband and wife. "The title to a homestead," say the court in another case, "can not be devested, or encumbered, by deed, unless such deed be executed and acknowledged by both husband and wife." *Betts v. Sims,* 25 Neb. 166. *Whitlock v. Gosson,* 35 Neb. 829, was a case where a mortgage had been executed on a homestead without the signature of the wife and under circumstances which appeal strongly to a court of equity for the granting of any relief which could be extended by the application of legal or equitable principles, and yet the court said, after quoting the statute, that it was a plain provision against incumbrance of any kind and refused relief altogether. *Clarke v. Koenig, supra,* cited by the supreme court of Wisconsin, was a case regarding the specific performance of a contract for the sale of a homestead and it is said in substance: It is the settled law of this state that the courts will not specifically enforce such contracts not executed in the manner

pointed out by the act, and it is also held that the value of the property would not change the rule. In this case the subject matter of the controversy was a house and lot occupied as a homestead in a city. The doctrine thus announced is clearly inconsistent with and in opposition to that obtaining in Wisconsin and other jurisdictions holding similar views. We may cite also *Violet v. Rose,* 39 Neb. 660; *Prout v. Burke,* 51 Neb. 24, as being in entire harmony with the cases preceding. But the court has gone further and committed itself to the doctrine that such a contract creates no rights either legal or equitable, but is a nullity for all purposes as declared by the statute. In *Meek v. Lange,* 65 Neb. 783, it is held that because of the provisions of section 4 of the homestead act, an executory contract for the sale of the homestead to which the wife is not a party is invalid and its nonperformance does not furnish a basis for recovery of damages for the loss of the bargain. In the opinion it is said:

"The doctrine that the contract was totally void, and would support no action for damages, is certainly supported by text-writers and many decisions." Citing numerous authorities in support of the proposition. Of like effect are *Solt v. Anderson,* 63 Neb. 734; *Buettgenbach v. Gerbig,* 2 Neb. (Unof.) 889.

An examination of these several decisions and considerations of the homestead statute convinces us that the operation of the statute, and especially section 4, nullifies the parol agreement relied on by the appellee in so far as it relates to and affects the homestead property of the promisor and that specific performance of the contract as to such real estate should not be decreed by a court of equity.

No valid objection, it would seem, from the foregoing discussion, can be urged against the authority of a court of equity to compel specific performance as to that part of the real estate involved in the present controversy not embraced within the family homestead. *Swift v. Dewey, supra; Weitzner v. Thingstad, supra.*

An examination of the evidence leads to the conclusion that the findings of fact and the views as expressed with reference thereto in the last opinion, except as the homestead is affected, are sufficiently sustained, and for that reason should be adhered to. The former opinion is modified as herein indicated, and the parole agreement on which the action is based, in so far as it relates to the homestead, is held to be a nullity and of no force and effect. The judgment last entered is set aside and vacated and the cause remanded to the district court for further proceedings in harmony with the views herein expressed.

It has been suggested that since the submission of this cause on rehearing, Frederick Teske, one of the appellants herein, has died. The rule is that where one of the parties dies between the date of submission of the cause in this court and the filing of an opinion therein, judgment may be entered as of the day on which the cause was submitted. *Black v. Shaw,* 20 Cal. 68; *Danforth v. Danforth,* 111 Ill. 236; *Jeffries v. Lamb,* 73 Ind. 202; *Bank of United States v. Weisiger,* 2 Pet. (U. S.) 481; *Bergen v. Wyckoff,* 84 N. Y. 659.

The judgment entered in this court on this rehearing will, therefore, be entered as of the first day of January, 1903.

REVERSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL. v. LOUIS OLSEN.*

FILED DECEMBER 16, 1903. No. 12,961.

1. **Remedies: ELECTION OF.** One who is entitled to a choice of remedies, and takes such action as in law amounts to an election, is, by such election, precluded from pursuing the other remedy, but a mistaken and unsuccessful attempt to do so will not annul the former election, nor bar the right to pursue the remedy first selected.

2. **Application of Rule.** The right given a member, by the regulations

* Rehearing denied. See opinion, p. 570, *post.*

of the relief department of the defendant company, to "elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company," when construed with the contract and regulations as a whole, requires the application of the well settled rule of law in regard to election of remedies.

3. **Railroad:** RELIEF DEPARTMENT: DISABILITY. The contract was for "payment for each day of disability by reason of accident," and the regulations provide that "the word 'disability' shall be held to mean physical inability to work." The decision of the medical examiner that plaintiff, who had suffered amputation of a leg by reason of his injury, was "able to work," will not be construed to mean that plaintiff has recovered from his disability, when it is shown by the evidence that the examiner at the same time declared plaintiff "able to do light work at present, * * * but he is still disabled."

4. **Disability:** DECISION OF EXAMINER. The decision of the medical examiner that plaintiff is "not entitled to any further disability benefits" is a mere conclusion, and is not binding upon the parties.

ERROR to the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

J. W. Deweese, Byron Clark and *Frank Bishop,* for plaintiff in error.

Matthew Gering, contra.

SEDGWICK, J.

The plaintiff in the court below was in the employ of the defendant company as a carpenter in its shops at Plattsmouth, Nebraska. He was also a member of the voluntary relief department of the company. The nature and terms of the contract of such membership are set forth in former opinions of this court. *Chicago, B. & Q. R. Co. v. Wymore,* 40 Neb. 645; *Chicago, B. & Q. R. Co. v. Bell,* 44 Neb. 44.

On the 14th day of August, 1896, while the plaintiff was engaged in his work for the company, he was injured by one of the company's locomotives, from the effects of which he suffered an amputation of one of his legs, below the knee. He applied to the company for relief benefits

under his membership contract, and received one dollar a day for fifty-two weeks, and fifty cents a day thereafter until the 16th day of September, 1897. He then applied to the company for work, stating that he was ready to work again, and the medical director of the department reported to the department that the plaintiff had recovered from his disability to work. A misunderstanding arose between the plaintiff and the defendant in regard to the terms of his reemployment with the company, and the plaintiff began an action in the district court for Cass county against the defendant to recover damages on account of his injury, which he claimed was the result of the negligence of the defendant. That action was tried by a jury, and a verdict rendered in favor of the defendant company, from which no appeal has been taken. Afterwards, the plaintiff brought this action in the district court for Cass county against the defendant company to recover relief benefits, claimed to be due the plaintiff from and after the 16th day of September, 1897, at fifty cents a day. Upon the trial by the court without a jury there were findings and judgment in favor of the plaintiff, which judgment the company seeks to have reviewed by these proceedings.

1. The first defense is that the plaintiff, by the commencement of his action for damages, has forfeited his right to relief benefits under the contract. It is insisted that the rule of law, that "One who is entitled to a choice of remedies, and takes such action as in law amounts to an election, is, by such election, precluded from pursuing the other remedy, but a mistaken and unsuccessful attempt to do so will not annul the former election, nor bar the right to pursue the remedy first selected," does not apply in this case.

In the brief upon this point it is said:

"It should be borne in mind that the plaintiff, independent of his contract of membership, has no claim whatever on the relief fund, and under his contract he has no other or different right than what he contracted for. The relief benefit is governed by the terms of the contract.

When he made the contract he knew, in case of injury, that he had a right, as between himself and the company, to look to the company for damages if he believed that the injury was caused by the company's fault; and he had a perfect right to agree that, in case he brought suit to enforce a claim for damages, he would have no claim upon the relief fund mentioned in his contract. As he had no right to the relief fund prior to the making of the contract, he is in no position to urge a claim not in accord with the terms of the contract; so he must take his rights to the benefits under the contract, with the conditions imposed in that contract, or not at all."

That is, by the contract for relief benefits, the plaintiff has agreed that his right to these benefits depends upon the condition named in the contract, that he shall not commence suit against the company for damages on account of injury, and it is, therefore, not a case of the election of remedies.

The contract under which the plaintiff claims relief benefits limits his right to maintain an action on that contract. It also imposes conditions upon the plaintiff, limiting his right to maintain an action for damages on account of the negligence of the defendant resulting in the injury.

Rule 63, which is expressly made a part of the contract, was amended in 1894, before this cause of action arose, as follows:

"In case of injury to a member, he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company.

"The acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the company * * * for damages arising from or growing out of such injury. * * * And further, if any suit shall be brought against the company for damages arising from or growing out of injury or death occuring to a member, the benefits otherwise pay-

able and all obligations of the relief department and of the company, created by the membership of such member in the relief fund, shall thereupon be forfeited without any declaration or other act by the relief department or the company."

This expressly makes the right to do the one depend upon his forbearing to do the other. By the terms of this contract, the acceptance by the member of relief benefits operates as a release and satisfaction of all claims against the company for damages arising from or growing out of such injury. Both remedies are thus brought within the purview of the contract.

If an employee, who is a member of the relief department, is injured in the service of the company, his claim for relief benefits is a contract right. The provisions of the contract are clear and explicit. The amount due him is not subject to serious debate. His injury may or may not have been due to the negligence of the company. His supposed claim for damages may be doubtful, but his right to the benefits from the relief department is fixed and certain. He may have, as is said in defendant's brief, "the sure benefits of relief funds under his contract without any expense or litigation." After he has elected to avail himself of this contract and, by so doing, has thereby given the company an absolute defense against any suit for damages, shall he be held to have forfeited these "sure benefits" by an ill advised and wholly desperate suit against the company? Must he pay the company a specified amount (in this case $750) as a penalty for his hopeless action? If the contract were so worded as to preclude any other meaning, it is doubtful whether such a forfeiture would be enforced. While he has a doubtful claim for damages for the injury he has sustained, he may prosecute that claim, and, by so doing, abandon his claim for relief benefits. After he has elected to accept the relief benefits, in pursuance of his contract, he has thereby "released and satisfied" all claims against the company for damages from or growing out of the injury.

The rights of the parties are then absolutely fixed. He no longer has any claim against the company for damages, and the proposed penalty for attempting to assert one may well be thought too unconscionable to be enforced by a court of justice.

The provision that, "If any suit shall be brought against the company for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable, and all obligations of the relief department of the company, created by the membership of such member in the relief fund, shall thereupon be forfeited," must be construed in the light of the whole contract, and its effect is to designate what acts will be considered as an election to rely upon such claims as he may have at law against the company for damages.

This language, construed with the leading clause in the same rule, "In case of injury to a member he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have against the company," provides for the application of the well settled rules of law in regard to election of remedies. This must be the fair construction of the rule when taken as a whole.

There is no doubt that, if the plaintiff had elected to pursue one of the two courses, and had thereby fixed his rights under the contract, and he should afterwards desire to renounce that election and to take the other course, the defendant might consent to his so doing, and after such consent and action taken pursuant to such change of election, both parties might treat the latter course as the one elected by the plaintiff.

This seems to have been the condition in *Clinton v. Chicago, B. & Q. R. Co.*, 60 Neb. 692. In that case the plaintiff had received relief benefits under his contract. Afterwards, he attempted to renounce that election by prosecuting an action for damages for the injury sustained. The company paid him damages under this latter claim, and it was held that the plaintiff could not

afterwards allege that he had not elected to prosecute his action for damages; and that his claim for the relief benefits of the contract was abandoned and forfeited.

In the case at bar, the company insisted that the plaintiff had made his election to rely upon his relief benefits under his contract, and that he could not be allowed to abandon that election and make a claim for damages for the injuries sustained. This contention of the company was sustained by the court. It was held that the plaintiff had elected to take the relief benefits and must abide by that election, and both parties must be now held to be bound by that determination.

2. The remaining question controverted between the parties, is as to the meaning of the word "disability" as used in the contract between the parties. The contract provides for "payment for each day of disability by reason of accident occurring while the party is in the discharge of duty in the service." The rule of the department, in force at the time the plaintiff became a member, defines the word "disability" as follows: "Wherever used in these regulations, the word 'disability' shall be held to mean sickness or injury by reason of which an employee is unfit for duty in the service." Afterwards, this rule was amended to read: "The word 'disability' shall be held to mean sickness or injury by reason of which, in the opinion of the superintendent of the relief department, a member should not work." And still later the rule was again amended and provided: "The word 'disability' shall be held to mean physical inability to work by reason of sickness or accidental injury; and the word 'disabled' shall apply to members thus physically unable to work. The decision as to when members are disabled and when they are able to work, shall rest with the medical officers of the relief department."

The plaintiff contends that it does not sufficiently appear that these amendments were made in such manner as to be binding upon him, but, in our view of the matter, it is unnecessary to determine that question. What,

then, is the meaning of the word "disability" as used in the regulations of the department, as finally amended? Upon the evidence contained in the record in this case, was the plaintiff disabled as the result of his injury, and did that disability continue during the time for which he seeks, in this action, to recover relief benefits?

The plaintiff, as we have already seen, was paid benefits during the first year after his injury at the rate of one dollar a day, and for about one month thereafter at one-half that rate. The rule of the department, in that regard, provided for the payment to a member of the class to which plaintiff belonged of one dollar a day for a period of no longer than fifty-two weeks, and at half that rate thereafter during the continuance of the disability."

It is stipulated between the parties: "That on the 16th day of September, 1897, the medical examiner of said relief department, and who had had medical charge of the plaintiff during his disability, reported, to the railroad company, the plaintiff, in accordance with the requirements of the relief department, as able to work on said day; and decided and reported that the plaintiff was not entitled to any further disability benefits."

It also appears from the evidence that the plaintiff then applied to the company for work, and the company offered him employment, but the plaintiff insisted upon a guaranty of continued employment, or, as he stated it, he "thought he ought to have a guaranty for a life job." This the company refused, and the company, on its part, required him, as a condition of his employment, to release the company from further claims on account of his injury.

The medical examiner testified upon the trial:

Q. What conclusion did you come to with reference to his ability to work?

A. I had seen Mr. Olsen almost every week since the time of his injury, and, after he was not confined to the house, he met me at the office of Dr. Livingston on Tuesdays. When we had talked in regard to his condition,

off and on, I told Mr. Olsen I thought he was about able for work soon. He said, "Yes, sir, I think I am." I said, "I will see Mr. Helps, when I am at the shops some time, and see him in regard to work for you." * * * He was wearing his artificial limb and said he was anxious to get to work, and I told him I thought he was able to work. And, after I made arrangements with Mr. Helps in regard to getting work, I saw him at Dr. Livingston's office. * * * After examination, I came to the conclusion he was able to do light work at present.

And upon cross-examination he was questioned and answered as follows:

Q. Then you think, Doctor, do you, that a man who has his leg cut off is fit for service?

(The witness.) What kind of service?

Q. Any kind of service which requires manual labor?

(The witness.) I think there are lots of jobs he could do.

Q. Do you think he could do carpenter's work?

A. It depends on what kind.

Q. You know what kind of work he was engaged in—car repairing, climbing ladders about cars; you know about this?

A. Yes, sir. I don't think he could climb cars. No, sir.

Q. Do you think he could perform service as carpenter, in the same way or any where near in the same manner as he did before the injury?

A. I don't think he could have filled the position he occupied at the time he was injured, at the time I reported him for work.

Q. Do you mean to be understood as saying, upon your reputation as a professional man, that this man is not injured now the same way as he was during the early days of September, 1897?

A. He has recovered from his injury, but he is disabled.

Q. He will be disabled constantly?

A. Yes, sir.

Q. Isn't he just as much disabled now, and wouldn't

you say, Doctor, upon your professional knowledge, as he was on the 1st day of September, 1897?

A. I have not examined him, but I should say, "No."

Q. State to the court in what particular there is any difference.

A. He had been sick for a long while and was run down and had performed no exercise. I spoke of his condition then. He was not seasoned up, so to speak.

Q. For instance, on or about the 15th of September, he was much more disabled than he is now?

A. His injury was healed. Perhaps not from his injury.

Q. From what then?

A. From lack of exercise.

Q. He was being paid for disability?

A. Yes, sir.

Q. He was receiving disability benefits?

A. Yes, sir.

Q. That disability you were allowing him because he had lost his leg?

A. Yes, sir.

Q. And it is still gone?

A. Yes, sir.

Q. Explain to the court where there is any difference in his injury, in his general health now and what it was then.

A. He may get over the injury; recover. He can recover from that injury, but still he is disabled.

Q. He is still disabled?

A. For some things.

Q. He is not disabled from running a bowling alley and billiard hall?

A. I should think not.

It appears from the above quoted stipulation that the decision of the medical examiner was, "That the plaintiff was able to work" and "was not entitled to any further disability benefits." Of course, if he were still disabled, he would still be entitled to benefits. In that case, the

statement, that he was not entitled to benefits, would be a conclusion only, and would be erroneous. What the examiner decided, then, was that the plaintiff was able to work, from which he concluded that he was not entitled to relief benefits. The evidence of the examiner shows, in what sense it could be said that plaintiff was able to work: "He was able to do light work at present;" "He has recovered from his injury, but he is disabled." The contention of the defendant appears to be, that the meaning of the rules of the department is that the decision of the medical examiner is binding upon both parties, and that the point to be decided by the examiner was, whether plaintiff had so far recovered that he could work. How much or what kind of work he could do, was immaterial. If the decision was that he had so far recovered that he could do any act that could fairly be denominated work, his right to benefits was thereby terminated. This would seem to be the literal meaning of the words used, if taken by themselves. No doubt this construction must be adopted unless the language, taken in connection with the remainder of the contract, is held to mean that inability to work is inability to perform his ordinary duties, in the employment in which he was engaged at the time of his injury.

There seems to be no middle ground of construction of the contract. We can not give it the former meaning. The circumstances would be rare indeed, when the medical examiner of the company could not find something that the injured man might do, which could fairly be called work. These contracts for relief benefits are plainly not conceived in such a spirit. The latter construction is in harmony with the spirit and purpose of the contract, and we prefer to adopt it. Whether the meaning of the contract is that the decision of the medical examiner shall be conclusive upon the parties as to the question of disability, and whether such provision would be enforced, are questions not necessary to the determination of this case, and are not decided.

There is no error in the record, and the judgment of the district court is

AFFIRMED.

The following opinion upon motion for rehearing was filed May 18, 1904. *Rehearing denied:*

SEDGWICK, J.

In the brief upon this motion for rehearing it is insisted that:

"The hard and fast rule of determining the meaning of the words, 'physical inability to work,' by holding that they mean the same kind of work at which he was engaged at the time of the accident, * * * seems unreasonable and unwarranted."

There seems to be force in the argument that, if the plaintiff had recovered from the injury so as to be able to perform labor similar and equivalent to that required in the employment in which he was engaged at the time of the accident, or was able to perform the duties of an engagement that was open and available to him, whereby he could support and maintain himself as he was able to do before the accident, he was "able to work" within the meaning of that expression in the contract.

The conclusion in this case would not be affected by such construction. The fact in this case as to whether he had recovered from his disability, as pointed out in the opinion, is to be determined upon the stipulation of the parties to the effect that the medical examiner decided "that the plaintiff was able to work" and "was not entitled to any further disability benefits," and upon the evidence of the examiner himself showing in what sense, and to what extent, the plaintiff was "able to work." Under that stipulation and evidence, the plaintiff was still disabled under either construction of the contract. It is therefore unnecessary, in this case, to decide whether "inability to work is inability to perform his ordinary duties in the employment in which he was en-

gaged at the time of his injury," or the word inability should be construed as above indicated.

Upon the other point urged in the motion and brief, no authority is cited supporting the proposition that the defendant could, in the first action, take the position that it was not liable for damages because plaintiff had elected to receive relief benefits, and, having defeated plaintiff's action for damages upon that contention, then insist that it was not liable for relief benefits because of the bringing of the action which it had so defeated.

We are satisfied with our conclusion upon this point, for the reasons stated in the opinion.

The motion for rehearing is, therefore, overruled.

REHEARING DENIED.

HERMAN KIELBECK, ADMINISTRATOR OF THE ESTATE OF CHARLOTTE BARTENBECK, DECEASED, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED DECEMBER 16, 1903. No. 13,180.

1. **Trial:** EVIDENCE. The trial court is not required to submit a case to the jury unless the evidence supporting it is of such a character that it would warrant the jury in basing a verdict upon it, and a fact may be so conclusively established that slight evidence, suspicious and uncertain, will not be allowed to overthrow it.
2. **Verdict:** INSTRUCTIONS. If a verdict is the only one justifiable by the evidence, instructions to the jury will not be examined.

ERROR to the district court for Furnas county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Ernest B. Perry, Thomas S. Allen, Addison S. Tibbets and *Walter L. Anderson,* for plaintiff in error.

J. W. Deweese, Frank E. Bishop and *J. T. McClure, contra.*

AMES, C.

The track of the defendant company extends easterly and westerly from a point in this state where there is a passenger station, and an unincorporated village called Holbrook. Immediately to the westward of the station the track is crossed at right angles by a public road. About 180 feet north from the crossing, begins a scattered row of houses on the east side of the highway, merging some distance further northward in a cluster of buildings constituting the hamlet. The station house stands on the opposite or south side of the track. From the crossing eastward along the track, 23 feet from it on the north side, measuring from center to center, extends a side track. Strung along the north side of the side track and beginning 74 feet east of the east side of the public road, are the following buildings upon the defendant's right of way: First, a small coal shed, not so large or high as to obstruct a view from the highway of a locomotive headlight; second, at a distance of 208 feet eastward from the coal shed, the intervening space being open and unobstructed, and at about 300 feet from the highway, is a grain elevator, 48 feet in length, along the track; and third, eastward from the elevator, after an interval of 204 feet, or about 600 feet from the crossing, some low, fenced, open cattle pens, commonly known as stock yards. The northern boundary of the defendant's right of way along this space is 150 feet from the main track, and along this northern boundary, adjacent to a public road or street, are standing at intervals some ordinary corn cribs. There was also, at the time below mentioned, a box car standing on the side track immediately east of the crossing. There are ten or more regular trains passing this point daily, but often not on schedule time, and there are occasional special or extra trains, so that the passage of a train, at any time, may reasonably be expected.

At 6:38 o'clock P. M., on the 10th day of October, 1900, one of the defendant's passenger trains arrived from the

east, halted at the station to discharge and receive passengers and express matter, and passed on westward. It was followed shortly afterwards by what is called a "lone engine," that is, a locomotive not hauling any cars except its own tender. There are several guesses by the witnesses as to the interval between the passage of the train and that of the engine, varying between 5 and 20 minutes. The only definite testimony on the point is that of one of the witnesses of the plaintiff, that he arrived at the scene of the accident, below mentioned, at 15 minutes after it occurred, which was 15 minutes past 7 o'clock. The consensus of opinion of all the witnesses is that the train and engine were running at about the same rate of speed, which was estimated at 30 miles an hour. This being, as we are bound to presume it to have been, the fact, the interval of time was 22 minutes, and the train was 11 miles away when the engine arrived at the crossing. Just before the arrival of the latter, a witness named Jaynes drove with a team and buggy from the village toward the track, and when within two or three rods of the crossing saw the headlight, and heard the whistle and bell of the locomotive, and stopped in the road to permit of passage of the latter unobstructed. Immediately afterwards a lumber wagon drawn by two horses, and containing three women and three small children, came on from the north and, turning to one side, drove past him. Once as they were passing, and once afterwards, he cried out to them to "hold on there, a train is coming," or words of that import; but they drove on heedlessly, at a trot, until they collided with the engine. Whether they heard the warning is not known. All the women and one of the children were instantly killed.

The plaintiff, who is administrator of one of the deceased women, contends for four propositions: First, that the structures along the north side of the side track and the right of way were so built as wrongfully or negligently to obscure the approach of trains from the east to persons traveling along the highway, but there is not shown to be

anything unusual about their structure or situation; the approach of the locomotive in question was seen in due season by every witness who was on or near the highway at the time of the casualty, and no one complains of having suffered any inconvenience from this cause at any other time. The complaint is, therefore, clearly without evidence in its support. Second, that the engine was driven at a too great and negligent rate of speed. It does not appear that there was any peculiar or unusual circumstance or condition attending the scene of this accident, and it has been uniformly held, both in this state and elsewhere, that a railway company is not liable in damages resulting from the usual and ordinary operation of its trains, and that outside of thickly populated neighborhoods in and near considerable cities and villages, the rate of speed of a train or locomotive is not, of itself, evidence of negligence. If the law were otherwise, and a rate of 30 miles an hour were adjudged to be such evidence, the so-called "limited" trains and "flyers," in use between the principal centers of population, would be compelled to go out of service. We think that so revolutionary a regulation ought to be left to legislation other than judicial. Third, that the engine and the train were run so near together that the noises of the two were confounded and confusing. Granting the plaintiff's rate of speed, and taking the guess of his lowest witness as to the interval of time, the distance could not have been less than two and a half or three miles, while his other witnesses would make it from five to seven and a half or ten miles; and, besides, no one testifies to having been confused in this manner; one witness merely testifying to the effect that when he first heard the engine nothing had occurred to arrest his attention; and he did not notice but what the noise was that of the train.

Finally, it is said there is a conflict in the evidence as to whether the approach of the engine was duly signaled. We are unable to discover it. All are agreed that a headlight, denoting a "special," was burning, and that a blast

from the whistle was blown at or about the usual place, 80 rods east of the station. Some of the witnesses testify to having heard subsequent blasts, and others that they did not hear them or did not take notice. Similarly with respect to the bell. Jaynes, the witness above mentioned, who alone of all those sworn was in a situation clearly to observe the fact and to have it indelibly stamped upon his memory, testifies, without hesitancy, that it rang continually until the instant of the collision. He is corroborated by two or more others, who testify to having heard the ringing. All the witnesses are, so far as appears, disinterested. One of those who remembers having heard the whistle more than once was called by the plaintiff, but for the plaintiff there are several who say they did not hear, or did not notice the bell. They were not at the time near the crossing, and before the collision there had nothing occurred to attract their particular attention or to fix any circumstance upon their minds, and none of them is willing to go so far as to say that the whistle was not blown repeatedly, or that the bell was not rung continuously.

We do not think that such testimony, though, in this case, no doubt truthful, can be dignified by the name of evidence. There are millions of people in this country who did not see the last partial eclipse of the sun, although it was visible from all parts of the United States, and the sky was clear over nearly the whole territory. People sit for hours in their own quiet homes without hearing the clock strike. Few of the dwellers in the larger cities hear the alarms from the fire department stations, or the whistling of tugs in the harbors. But the clock strikes every hour or oftener; the alarms are sounded frequently, and the tugs blow their blasts almost constantly. There is no class of occurrences which people are less likely to notice or remember than those with which, from frequent repetition, they are familiar, or those which, happening at stated intervals or in connection with other familiar happenings, are expected.

But it is unnecessary to pursue the subject further. This

court seems to us to have set the matter at rest in a recent decision pronounced, after mature deliberation, in *Chicago, R. I. & P. R. Co. v. Sporer,* 69 Neb. 8: "The trial court is not required to submit a case to the jury unless the evidence supporting it is of such a character that it would warrant the jury in basing a verdict upon it," and "A fact may be so conclusively established that slight evidence suspicious and uncertain will not be allowed to overthrow it;" citing to the same effect *Commissioners of Marion County v. Clark,* 94 U. S. 278, 24 L. ed. 59. We think that the rule thus announced applies with accuracy to the case at bar.

It would be possible to presume that that which the plaintiff's witnesses say, merely, that they did not hear, or did not take notice of, did not happen, and that the defendant's witnesses, who testify positively to the clearest recollection of hearing it, and who, therefore, can not be mistaken, are perjured; but surely such a presumption would be supported only by the slightest, most uncertain and most suspicious of testimony. A verdict having so flimsy a foundation could not, under the authorities cited, be upheld. It is unnecessary to discuss the evidence of contributory negligence, which is without conflict and, as it seems to us, conclusive.

At the conclusion of the trial, the court submitted the case to the jury by a series of instructions, which, from a cursory reading, appear to be objectionable only for the reason that they were unnecessary, and the jury returned a verdict for the defendant, upon which a judgment was entered, which the plaintiff seeks to reverse by this proceeding. The plaintiff asks a reversal for the sole reason that, as he contends, the instructions, or some of them, are erroneous, but, even if they be so, the verdict being the only one justifiable by the evidence, he has suffered no prejudice.

It is recommended that the judgment of the district court be affirmed.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

WILLIAM SCHMIDT, JR., A MINOR, BY WILLIAM SCHMIDT, SR., HIS NEXT FRIEND, V. CITY OF FREMONT.

FILED DECEMBER 16, 1903. No. 13,233.

1. **Cities:** NOTICE. The maxim that physical incapacity to perform a duty enjoined by law excuses nonperformance, is not available to extend the time, or afford an opportunity, for the fixing of a statutory liability upon another.

2. ———: DEFECTIVE SIDEWALKS: LIABILITY. Unless the notice required by section 39, article 3, chapter 13, of the Compiled Statutes of 1901, governing cities of more than 5,000 and less than 25,000 inhabitants, has been given within the prescribed time, there can be no recovery from such a city of damages arising from the causes therein mentioned.

ERROR to the district court for Dodge county: JAMES A. GRIMISON, JUDGE. *Affirmed.*

Frank Dolezal, for plaintiff in error.

Charles E. Abbott, contra.

AMES, C.

The plaintiff in error, when a boy ten years of age, fell on a sidewalk in the city of Fremont and broke his arm. This action was brought to recover damages from the city, for alleged negligence in permitting the sidewalk to be dangerously out of repair, and thereby causing the fall. After the introduction of evidence by both parties, the jury were instructed to return a verdict for the defendant, which they did; and a judgment was rendered accordingly. The statute governing the city at the time of the accident contained the following section:

"No city shall be liable for damages arising from defec-

tive streets, alleys, sidewalks, * * * within such city, unless actual notice in writing of the accident or injury complained of, with a statement of the nature and extent thereof, and of the time when and the place where the same occurred, shall be proved to have been given to the mayor or city clerk within thirty (30) days after the occurrence of such accident or injury."

No notice conformable to the statute was served upon the mayor or city clerk, or attempted so to be, until the 37th day after the accident complained of. The plaintiff contends that he is excused for failure to give such notice sooner, by reason of incapacity caused by his injury. Whether he is so or not is the only question presented for review. The plaintiff cites no authority directly in point supporting his contention, but urges that physical inability to comply with the law, without fault on his part, is, like the act of God, a sufficient excuse for noncompliance. The validity of the general rule is not doubtful, but we apprehend that it is available only as an excuse for the nonperformance of a legal duty by the party pleading it, but not to extend the time, or afford an opportunity, for the fixing of the statutory liability upon another.

This court held in *Goddard v. City of Lincoln,* 69 Neb. 594:

"The liability of a city, for injuries resulting from defective streets or sidewalks, rests exclusively upon express or implied provisions of the statute, and it is competent for the legislature to limit such liability or remove it entirely. Where a duty is imposed by the legislature, that body may qualify and limit it, and one complaining of an omission to discharge such duty will not be heard to complain of the qualifications and limitations accompanying it."

The notice required by this statute, like the three days' notice required in forcible detainer proceedings, is in the nature of a process by which the action to recover damages is begun, and the statute itself is in the nature of a special statute of limitations without exceptions. We are of opin-

ion that the court can not engraft an exception upon it by construction.

It is recommended that the judgment of the district court be affirmed.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

CORN EXCHANGE NATIONAL BANK, APPELLANT, V. PETER JANSEN ET AL., APPELLEES.

FILED DECEMBER 16, 1903. No. 13,252.

1. **Contract:** VALIDITY. The validity of a contract assailed for illegality is not determined by its formal incidents but by the nature of the transaction and the intent of the parties.
2. ———: ———. A contract, void for illegality in its inception, is not validated by being sued upon in a foreign jurisdiction.
3. **Findings:** EVIDENCE. From an examination of the record it appears that the evidence sustains the findings and judgment of the trial court.

APPEAL from the district court for Jefferson county: JOHN S. STULL, JUDGE. *Affirmed.*

Arnott C. Ricketts and *Lowe A. Ricketts,* for appellant.

Frank M. Hall and *John Heasty, contra.*

AMES, C.

In and prior to the year 1893 Peter Jansen was engaged, through the agency of Congdon & Co., commission dealers in Chicago, in gambling in grain options on the board of trade in that city. That the transactions in which he was engaged, the buying and selling of options to be settled at future dates, by ascertainments and adjustments

of differences in market prices, without the delivery of the commodities nominally dealt in, was gambling, within the meaning of that word at the common law, is agreed by counsel and need not be discussed. It is, indeed, contended by counsel for the plaintiff that, at the time the several purchases and sales were made, there was no agreement that grain should not be delivered pursuant to them, and that, in fact, either party to any such transaction was lawfully entitled to such delivery. But we are of opinion that the intent of the parties, as disclosed by a long course of transactions, is more indicative of the real nature of the latter than are the forms observed in effecting their purpose, and that illegal practices are not purged of their vice because of a superficial resemblance to legality.

Moneys required for the prosecution of these undertakings were furnished by Congdon & Co. to Jansen, from time to time, and charged to him upon a pretended book account, upon which he was supposed to be credited with his winnings at the game. It does not appear that he ever owed them any lawful debt, but, at the time mentioned, he had been charged by them on this account with a sum of money largely exceeding the aggregate amount of the securities in dispute in this action. Jansen was the owner and payee of three negotiable promissory notes, secured by as many several mortgages upon lands situate in this state. These notes he indorsed and delivered to Congdon & Co. at Chicago, as partial security for the sums charged against him on this account. Two of the notes became due January 2, 1896, and were returned to Jansen for the purpose of enabling him to procure, in substitution for them and the mortgages, new notes and new mortgages on the same lands. This he did, indorsing the new notes and forwarding them, together with the new mortgages, through the mails to Congdon & Co. These doings were all so evidently parts of a single transaction that it does not seem to us that the suggestion of counsel, that a different principle applies to the new securities from that which governs those for which they were substituted, calls for com-

ment. Subsequently, Jansen acquired the title to all the mortgaged lands, and this suit was begun for the foreclosure of the mortgages. The plaintiff claims to be the *bona fide* holder of the paper, by delivery from Congdon & Co. as collateral security for indebtedness by the latter to it.

The defenses pleaded are two in number: First, that the indorsements are without consideration and void, both at common law and under statutes of the state of Illinois, because of having been made on account of gambling transactions; second, that the paper was acquired by the plaintiff after maturity and with the knowledge of the lack of consideration for the indorsements. The reply consists of a general denial and a plea of estoppel, to the effect that Jansen indorsed and delivered the paper to Congdon & Co. for the express purpose of enabling the latter to pledge it as collateral for their indebtedness to the plaintiff. In our opinion, if the first mentioned defense is valid, the matter pleaded in estoppel is ineffectual as an avoidance of it. The evidence makes it entirely clear that even if the purpose, or one of the purposes, of the transfer was to enable Congdon & Co. to make the specified use of the paper as collateral, still the consideration therefor was the pretended indebtedness upon gambling account, and both at common law and by the statute, it is the consideration of the contract, and not the purpose for which it is intended to be used, that affects its validity.

Jansen lived in this state, and he indorsed the new notes and deposited them in an envelope addressed to Congdon & Co., in a post office here; and counsel for plaintiff therefore claim that the delivery of them was made here, and his indorsements of them, Nebraska contracts. In support of this proposition, they cite authorities to the effect that the depositing in the post office of a postage paid, properly addressed letter, or the delivery of goods to a common carrier, is a delivery to the consignee or to the person named in the address. The correctness of this rule, subject to certain well known exceptions and limita-

tions, is not doubted; but its applicability to the case in hand will not, in our opinion, bear analysis. There are two aspects in which the matter may be viewed. If the old securities were lawfully in the possession of Congdon & Co., they lost neither their possession nor their right of possession by intrusting them to Jansen, as their agent, for the purpose of obtaining renewals or substitutions, and both attached to the new instruments the moment they came into existence. On another branch of the case, and with respect to an alleged similar transaction between the plaintiff and Congdon & Co., counsel contend for this doctrine with forceful and convincing logic. But if, on the other hand, Congdon & Co., on account of the illegality of consideration, never had rightful or lawful possession of the old papers, or if their right was so infirm that it was lost by intrusting the documents to Jansen, then it must be admitted that the return of the new papers, upon the same invalid consideration, created no greater right in them than did the former transaction, which, at most, was that of a mere naked bailee without interest. In that view, it is evident that the only valid contract between the parties was that of bailment, and the relation of bailor and bailee did not come into existence until the articles came into the actual possession of the latter. In such a case the sender would have an undoubted right to stop the documents in transit, or, after their delivery, to demand them of the bailee, and, if refused, recover their possession by replevin. The only defense Congdon & Co. could have offered would have been the indorsement, but the signature on the back of the note is not the contract of indorsement but only evidence of it, and consideration being wanting or illegal, the bailees would have suffered defeat. In either aspect of the case, therefore, the rights of the parties must be ascertained and governed by the laws of Illinois. That under the laws of that state the contract of indorsement was absolutely void, even in the hands of a subsequent *bona fide* transferee for value before due, is settled beyond controversy by the decisions of its own

courts, and of the supreme court of the United States. *Pope v. Hanke,* 155 Ill. 617; *Tenney v. Foote,* 95 Ill. 99; *Pearce v. Foote,* 113 Ill. 228; *Cothran v. Ellis,* 125 Ill. 496; *Soby v. People,* 134 Ill. 66; *Schneider v. Turner,* 130 Ill. 28; *Pearce v. Rice,* 142 U. S. 28, 40; *Bibb v. Allen.* 149 U. S. 481; *Embrey v. Jemison,* 131 U. S. 336; *Clews v. Jamieson,* 96 Fed. 648.

We do not regard the objections of counsel, that to uphold this defense would be to enforce the criminal laws of a sister state, as having any weight. As already said, the signature on the back of the note is not a contract of indorsement, but merely evidence of one. If a contract is void at its inception, it does not acquire validity by a suit in a foreign jurisdiction upon the instrument by which it is evidenced.

It is further objected that the decisions of the Illinois court, not having been regularly introduced in evidence, this court is not bound by them. Granting this to be so, we are satisfied with the interpretation of the statute which that court has given to it, and are willing to adopt it as our own.

The foregoing views suffice for a disposition of the case, but we have looked into the facts as far as, with the limited time at our command, we have been able to do so by the examination of a voluminous bill of exceptions, and concur with the district court in the opinion that the burden of proof, which is upon the plaintiff to establish its *bona fides,* is not satisfied. Its claim of ownership was not made known to the defendant until after the termination of a tedious and expensive litigation in the United States circuit court for this district, of which it must have had knowledge, and in which Congdon & Co. appeared as plaintiffs and owners of the paper; and the testimony of its officers, in this action, lacks that degree of certainty and apparent candor essential to inspire confidence in their innocence as beneficiaries of a transaction surrounded by many suspicious circumstances. On the other hand the testimony on behalf of the defense is wanting in neither of

these particulars, and the findings of the trial judge, who made a thorough and painstaking original investigation, although no longer conclusive, are entitled to respectful consideration, if not to considerable evidential weight, in this court.

The trial court found the issues, both of fact and of law, in favor of the defendant, and dismissed the action. We recommend that the judgment be affirmed.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be

AFFIRMED.

ESTATE OF GUSTAF DAVIDSON V. ANDREW DAVIDSON ET AL.

FILED DECEMBER 16, 1903. No. 13,335.

Instruction: PROOF. The expression "unequivocal evidence," in the syllabus and opinion in *McCoy v. Conrad*, 64 Neb. 150, was intended as the equivalent of "evidence of an unequivocal act or conduct." A simple preponderance of the evidence is all that is required to maintain an issue of fact in a civil action.

ERROR to the district court for Phelps county: ED L. ADAMS, JUDGE. *Reversed.*

Hector M. Sinclair and *Shafer & Clay*, for plaintiff in error.

John L. McPheeley, William P. Hall and *E. W. Reed*, *contra.*

AMES, C.

This proceeding is a contest of the probate of an alleged will of one Gustaf Davidson, deceased. It is not contended that the name of the decedent, which is subscribed to the instrument, was written by him or by his direction. But there is a cross mark with pen and ink between his

Christian and surname which one party alleges, and the other denies, that he made himself, intending the same as his signature. The jury were instructed, in substance and without exception, that such a mark, so made, with such intent, would be a sufficient signing within the meaning of the law; but the court also gave the following instruction, which was excepted to and of which complaint is made in this proceeding in error:

"You are further instructed that it is incumbent upon Caroline Davidson, the proponent, to establish by unequivocal evidence that Gustaf Davidson, deceased, gave directions to the witness, P. O. Hedlund, to write his signature to the instrument in controversy, or to make his mark thereto for him, consciously and explicitly, and in the free and voluntary exercise of his faculties, or you must find by such preponderance of the evidence that the said Gustaf Davidson made the mark, and for his signature, intending the same as his signature to said instrument, before you would be warranted in bringing in a verdict for the proponents."

This instruction, which is copied in part from the opinion of this court in *McCoy v. Conrad,* 64 Neb. 150, is criticised upon two grounds; the first being because of the use of the phrase, "unequivocal evidence." Whether there is a notable difference in meaning between that phrase and the expression "evidence of an unequivocal act or conduct," such that the former would presumably mislead a jury, we are in doubt. The latter more accurately conveys the idea which, it is apparent from the context, the writer of the opinion had in mind. Literally it is doubtless true that equivocal evidence and evidence of an equivocal act, are not the same things, though practically and colloquially they often are. Doubtless the latter expression would be better chosen.

A more serious objection to this instruction is that it confuses the subscription of the testator's name, which was not in controversy, with the making of his mark, which was so, and indicates by the words, "such prepon-

derance," that more than a simple preponderance of the evidence is required to establish that he made his mark, "intending the same as his signature to the instrument." If he made the mark himself, and of his own volition, there would, in ordinary circumstances, be no less presumption that he intended it for his signature than if he had subscribed his own name. The instruction, however, seemed to cast some suspicion upon the mere fact that he made his mark, if he did so, instead of writing his name, and to call for some evidence to overcome it. This we think was error.

It is recommended that the judgment of the district court be reversed and a new trial granted.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED.

FARMERS BANKING AND LOAN COMPANY v. H. H. MAUCK ET AL.

FILED DECEMBER 16, 1903. No. 13,240.

1. **County Court: PRACTICE.** Section 11, chapter 20, Compiled Statutes, providing that "the rules of practice concerning pleadings and processes in the district court shall be applicable so far as may be, to pleadings in the county court," when the amount involved exceeds a justice's jurisdiction, *held*, to authorize a summons in the form allowable in district court in such cases.
2. **Summons.** It is not necessary to state the nature of the action in a district court summons. *German Ins. Co. v. Frederick*, 57 Neb. 538. Consequently it is not necessary in county court cases above a justice's jurisdiction.

ERROR to the district court for Nuckolls county: LEE S. ESTELLE, JUDGE. *Reversed with instructions.*

E. P. Hotchkiss, for plaintiff in error.

F. H. Stubbs, contra.

HASTINGS, C.

This is an action brought by the plaintiff against the defendants, H. H. Mauck and G. W. Stubbs, upon two promissory notes, in the county court of Nuckolls county, asking for a judgment in the sum of $415.50 with interest, and costs of suit. The defendants filed separately a motion to quash the summons issued by the county court, on five grounds: (1) That the summons was not served on the defendants in the time provided by law. (2) Plaintiff has no legal capacity to sue. (3) Summons does not apprise the defendant of the nature of the action against him. (4) No legal capacity to sue in this court. (5) Summons was not issued according to law. The motion was overruled. Defendants filed no answer and judgment by default was rendered against them. Defendants prosecuted error to the district court, alleging as grounds of error the five points raised by the motion to quash.

The district court reversed the judgment and taxed costs to plaintiff, to which the plaintiff excepted. Motion for new trial was filed, which was overruled, and plaintiff prosecutes error to this court.

The error relied upon is that the district court was wrong in quashing the summons served upon the defendants. The summons was as follows:

"To the sheriff or any constable in said county, Greeting:

"You are hereby commanded to summons H. H. Mauck and G. W. Stubbs to appear before me, the undersigned county judge of Nuckolls county, on the 3d day of February, 1902, to answer the action of the Farmers Banking and Loan Company (a corporation), who sues to recover the sum of four hundred fifteen & 50-100 dollars and interest at 10 per cent. per annum from the 19th day of February, 1897.

"You will make due return of this writ on the 3d day of February, 1902.

"Witness my hand and seal of said court this 16th day of January, 1902.

"(SEAL.) J. T. DYSART, *County Judge.*"

It was indorsed as follows:

"County court, Nuckolls county, Farmers Banking and Loan Company (a corporation) v. H. H. Mauck and G. W. Stubbs.

"If defendant fails to appear, plaintiff will take judgment for $415.50 with interest thereon at 10 per cent. per annum from the 19th day of February, 1897.

"Filed this 20th day of January, 1902.

"J. T. DYSART, *County Judge.*"

It was duly served and return made thereon.

The only one of defendants' five objections, which was sustained by the district court, and is now urged by defendants to sustain the judgment of the district court, is that this summons did not apprise the defendants of the nature of the action pending against them.

Under section 910 of the code, the plaintiff's cause of action in justice court is to be described in such general terms as to apprise the defendant of the nature of the claim against him. Under this section it is necessary to designate, in a general way, the plaintiff's cause of action. In this summons the cause of action is described, only, as being "for $415.50 with interest thereon at 10 per cent. from the 19th day of February, 1897." This would be sufficient if the process in this case is governed by the provisions relating to process in the district court. *German Ins. Co. v. Frederick,* 57 Neb. 538. It is insufficient, if the summons is governed by section 910 as to justice courts.

Plaintiff in error says that as this action is beyond the jurisdiction of a justice of the peace, a method of procedure prescribed for him can have no application, and further that defendants' complaint of no capacity to sue makes their motion a general appearance. Taking the last contention first, it would seem not well founded. The only thing asked by defendants in their motion was to quash the summons. It is true that they allege, among the grounds for doing so, that plaintiff had no capacity to sue, which would be no reason for quashing the summons,

but is made a ground of demurrer. Code, sec. 94. But, while this point is made, it is not made by way of obtaining a dismissal of plaintiff's action, but a quashing of the summons. The powers of the court are invoked, as it seems to us, only as to the question of jurisdiction in a motion to quash summons, no matter what reasons are assigned for doing so.

It remains to consider the other attack upon the judgment of dismissal in this case, the claim that process in this case is governed by the rules of the district court. As we have seen, if that is true, no statement of the action was necessary. The assertion of the defendants rests upon the provision in section 2, chapter 20, Compiled Statutes (Annotated Statutes, 4786):

"The provisions of the code of civil procedure relative to justices of the peace, shall, where no specified provision is made in this subdivision, apply to the proceedings in all civil actions prosecuted before said county court."

Is there any other provision in that subdivision? Plaintiff says there is, and that it is in section 11 of the same chapter (Annotated Statutes, 4795), which provides:

"In actions before said court, where the amount claimed exceeds the jurisdiction of a justice of the peace, motions and demurrers shall be allowed, and the rules of practice concerning pleadings and processes in the district court shall be applicable, so far as may be, to pleadings in the county court."

It is objected that this section, by its terms, applies only to pleadings, and that no court is authorized to extend its terms.

In *Moline, Milburn & Stoddard Co. v. Curtis,* 38 Neb. 520, section 11 is styled, "A specific provision changing the general rule established by section 2 only in regard to pleadings and processes." The question before the court was, whether the county judge was empowered by law to sign a bill of exceptions embodying evidence of an attachment as to the dissolution of an attachment. It was concluded that there was no such right, and that the pro-

visions of section 11 applied "only to pleadings and processes."

The question of whether or not "processes" were, within the terms of section 11, included in the matter in which the practice should be assimilated to that of the district court, was not raised and could not be decided in the *Moline, Milburn & Stoddard Co.* case. The declaration that they are, is therefore a dictum. It is a dictum, however, that no doubt expresses the general view and practice as to county courts of this state. Those courts, we think, have generally conformed their "processes," in cases outside the justice's jurisdiction, to that of the district court, except as they are prevented by the directions in section 8, chapter 20, Compiled Statutes (Annotated Statutes, 4792).

It hardly seems to us that the word "processes" should be read out of the section. The effect of the district court's holding is certainly to make section 11 bear precisely the meaning it would have with that word wholly omitted. Is it the same thing to say that the rules of practice in district court concerning pleadings and processes shall be applicable, as far as may be, to pleadings in county court, that it would be to say, merely, that the rules of practice concerning pleadings in district court shall be so applicable? "Processes" issue upon pleadings, orders and judgments, and must be conformable to such pleadings, when issued on them. Rules of practice, when controlling the form of process to be issued on a pleading, are "applicable" to it. It is no strained construction, which makes the rules governing summons on the petition in this case, for $415.50 with interest, if it had been filed in the district court, *applicable* to it when filed in county court. At all events, not so strained as a construction that throws the word "processes" wholly out.

It is to be said, too, that section 8 of the same statute makes a clear distinction between the service in county court and in justice court. It provides for at least ten days' notice, and the summons to be served as in other civil cases, and to be returnable on the first Monday of the

ensuing month. No express mention is made as to its contents, outside of the words, "as in other civil cases." These words, by their juxtaposition, would apply to the manner of serving alone, but could readily be taken to indicate the contents as well.

It seems clear that the intention was to assimilate the practice in these county court cases to that of the district court, in the particulars mentioned, and among these is processes. We think, therefore, that the district court was wrong in holding that the summons in this case should have been a justice court's summons, and in quashing the summons and dismissing the action for that reason.

It is recommended that the judgment of the district court be reversed, and its action in reversing the county court's judgment set aside and such judgment restored and affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and its action in reversing the county court's judgment set aside and such judgment restored and affirmed.

REVERSED.

OMAHA STREET RAILWAY COMPANY v. NELS LARSON.

FILED DECEMBER 16, 1903. No. 13,226.

1. **Street Railway: NEGLIGENCE.** Negligence of plaintiff in driving across a street railway track without stopping to look and listen, will not excuse the company from its duty to use reasonable diligence to stop its car after discovering the perilous situation, and if its failure to do so, after seeing the danger, directly and immediately causes an injury to him, the company may be held liable for such injury.
2. **Question of Fact for Jury.** Where the evidence is fairly conflicting, the question as to the direct and proximate cause of an alleged injury is one of fact for the determination of the jury.
3. **Experiments: EVIDENCE.** Proof of an experiment, without establish-

ing the fact that the person who made the experiment is competent to do so, and that the apparatus used was of the kind and in a condition suitable for the experiment, and that it was honestly and fairly made, is without probative force.

4. **Witness:** COMPETENCY. A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed at which the car was moving.

5. **Pleading:** EVIDENCE. Evidence of an ordinance of a city, regulating the rate of speed of street railway cars, is admissible under a general averment of negligence.

ERROR to the district court for Douglas county: PAUL JESSEN, JUDGE. *Affirmed.*

John L. Webster, for plaintiff in error.

Frank H. Gaines, James E. Kelby and *John A. Storey, contra.*

OLDHAM, C.

This is an action to recover damages alleged to have been sustained by reason of the negligence of the Omaha Street Railway Company. The allegations of the petition that are material to an understanding of this controversy are:

"On September 16, 1899, plaintiff with his horse and wagon was driving northward on Military avenue in Omaha and, when about half way between Parker and Decatur streets in said city on the east side of Military avenue, desiring to cross to the west side of said Military avenue, turned his horse to do so, but, as the horse stepped between the two east rails of defendant's tracks on said street, a motor car belonging to defendant, propelled by electricity and running at a dangerously and negligently high rate of speed, and without any warning to plaintiff, negligently ran into and struck plaintiff's horse, which was hitched to the wagon in which plaintiff was riding, and said horse became entangled in the fender on the front end of defendant's said motor car.

"Plaintiff says that when defendant's motor car struck

his horse, as aforesaid, the motorman in charge of said car, both seeing and knowing the imminent danger in which plaintiff was placed by the negligence of said defendant, and having the power to stop said car, in absolute disregard of defendant's duty to stop said car and avoid injury to plaintiff, negligently failed even to diminish the speed of said car, but on the contrary said motorman continued to run said car at great speed for about the total distance of a block, pushing, dragging and carrying plaintiff's horse and wagon for the entire distance.

"Plaintiff says that, after defendant's motor car struck his horse as aforesaid, defendant's motorman who was in charge of said car, and who could have stopped said car, and whose duty it was to stop said car, negligently continued to run it at great speed, whereby plaintiff was greatly and seriously injured, without the fault of plaintiff, for, after defendant's motor had, as aforesaid, pushed, dragged and carried plaintiff's said horse and wagon for about 120 feet, plaintiff was forcibly and violently thrown from his wagon, and hurled to the pavement, and was seriously and severely cut, injured and bruised about his head, back, spine and legs, his right leg being so badly broken that it was necessary, in order to save plaintiff's life, to amputate his leg, which was accordingly done, whereby the plaintiff was made to suffer great pain, and physical and mental anguish, and has become a cripple for life, and plaintiff still suffers from the injuries sustained by him in his head and spine."

Defendant answered with a general denial, coupled with a plea of contributory negligence. The reply was a general denial. There was a trial to a jury; verdict for plaintiff; judgment on the verdict, and the defendant brings the case to this court on error.

It will be observed that the charge of negligence in the petition was the failure of the defendant to check the speed of the car and stop it, after the impact of the car with the horse and wagon, and that, by its want of care in this

particular, the injury was occasioned. This is the sole issue of negligence tendered by the petition. At the outset it is insisted by the defendant Street Railway Co. that plaintiff has no right to maintain an action for defendant's failure to use diligence in stopping its car, without showing himself free from negligence in going on the track; that the subsequent negligence, if any, of the company is indivisible from the negligence of Larson in the first instance, and if as alleged by defendant he drove on the track without stopping to look and listen, such contributory negligence on his part constitutes a complete defense to the action. On the question as to whether the defendant used ordinary diligence in attempting to stop the car, after the impact with defendant's horse and wagon, the testimony is fairly conflicting. Plaintiff's evidence tends to show that defendant was drageed about 116 feet after the impact, before the vehicle was overturned and the injury inflicted. Defendant's testimony, on the other hand, tended to show that the injury was inflicted within a few feet of the place of contact, and that reasonable efforts were used to stop the car after the collision.

The question then arises as to whether plaintiff's evidence tends to show an intervening efficient cause, which of itself directly and immediately occasioned the injury. The test is: Was the failure to stop the car a new and independent force, acting in and of itself in causing the injury? If so, it superseded the alleged contributory negligence complained of, so as to make plaintiff's want of proper care in driving on the track remote in the chain of causation. This view is supported by numerous decisions of this court. In *Dailey v. Burlington & M. R. R. Co.*, 58 Neb. 396, the court, speaking through HARRISON, C. J., say:

"It is a well established doctrine that notwithstanding a person may have so placed himself as to be liable to injury, yet if another, after knowledge of the fact, inflict injury because of the failure of the latter to exercise ordinary care to avoid it, the former may recover damages." The same doctrine is announced in *Union P. R. Co. v.*

Mertes, 35 Neb. 204; *St. Joseph & G. I. R. Co. v. Hedge,* 44 Neb. 448; *Omaha Street R. Co. v. Martin,* 48 Neb. 65. The petition is framed in accordance with this doctrine and, in our view, states a good cause of action, and whether or not the failure to use diligence in stopping the car after the collision was the direct cause of the injury, was a question of fact to be determined by the jury. *St. Joseph & G. I. R. Co. v. Hedge,* 44 Neb. 448; *Milwaukee & St. P. R. Co. v. Kellog,* 94 U. S. 469; *Purcell v. St. Paul City R. Co.,* 48 Minn. 134; *Railroad Co. v. Kassen,* 49 Ohio St. 230, 16 L. R. A. 674.

It is further urged by the company that the court erred in refusing to permit it to prove the result of an experiment made in stopping this same car at the place of the accident. This experiment was made by one Rollo during the first trial of this case. Rollo was not offered as a witness to prove this, but the company offered to prove the result of this experiment by onlookers. While experiments are sometimes admitted to illustrate a given subject, we are not aware of any rule that permits onlookers to testify as to the result, without laying the foundation and showing that the result of the experiment can be relied on as a substantive fact. This means that, as a foundation for this testimony, it must be shown that the person who makes the experiment is competent to do so; that the apparatus used was of the kind and in the condition suitable for the experiment, and that the experiment was honestly and fairly made. Without these facts established, "the result" is without probative force.

It is claimed that the court erred in permitting plaintiff's witnesses to testify as to the speed the car was running. The objection is based upon the theory that they were incompetent for lack of experience in such matters. We think that a witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate at which the car is moving. In *Detroit & Milwaukee R. Co. v. Van Steinburg,* 17 Mich. 99, Cooley, J., in rendering the opinion, says:

"The point to which the attention of the witnesses was directed was the speed of a passing object. The motion of the train was to be compared to the motion of any other moving thing, with a view of obtaining the judgment of the witness as to its velocity. No question of science was involved, beyond what would have been, had the object been a man or a horse. It was not, therefore, a question for experts. Any intelligent man, who had been accustomed to observe moving objects, would be able to express an opinion of some value upon it, the first time he ever saw a train in motion. The opinion might not be so accurate and reliable as that of one who had been accustomed to observe, with time-piece in hand, the motion of an object of such size and momentum; but this would only go to the weight of the testimony, and not to its admissibility. Any man possessing a knowledge of time and distances would be competent to express an opinion upon the subject." *Chipman v. Union P. R. Co.*, 12 Utah, 68; *Walsh v. Missouri P. R. Co.*, 102 Mo. 582; *Covell v. Wabash R. Co.*, 82 Mo. App. 180, 187.

It is also contended that the trial court erred in admitting in evidence an ordinance of the city of Omaha, limiting the speed of street cars upon certain streets of the city, including Military avenue. This was objected to on two grounds: (1) That it was not pleaded in the petition that the car was being run in violation of the ordinance; (2) that it was immaterial under the issues. As to the first ground of objection, we think that evidence of an ordinance, and its violation, is admissible under a general averment of negligence, where this question is material in a case. The reason is stated in *Faber v. St. Paul, M. & M. R. Co.*, 29 Minn. 465:

"The fact that the rate of speed at which the train was run was prohibited by the municipal law, was competent evidence going to prove negligence, and, being evidence of the fact pleaded, it might be proved, although the existence of the ordinance had not been alleged in the complaint." *Union P. R. Co. v. Rassmussen*, 25 Neb. 810;

Omaha Street R. Co. v. Duvall, 40 Neb. 29; *Davis v. Gaurnier,* 45 Ohio St. 470; Watson, Damages for Personal Injuries, sec. 277.

This brings us to the second ground of objection. As a matter of fact, the speed at which the car was running before it struck the wagon has nothing to do with this case, except as a circumstance tending to show a want of proper care in stopping the car. The only act of negligence charged was the failure to check the speed, and stop the car, after the car had struck the horse and wagon, and, for this reason, this evidence had only an indirect bearing on the issues, and in the very able brief of the eminent counsel for the company there is nothing pointed out that suggests prejudice to defendant in its admission. The law does not condemn error in the abstract, but only such as is prejudicial.

The defendant company also complains of instructions numbered 1, 5, 6 and 7 given by the court on its own motion. The principal objection to each of these instructions is that they were drafted upon the theory that the plaintiff could recover, if the motorman was negligent in not stopping the car after it had struck the horse and wagon, notwithstanding the fault of plaintiff in negligently driving upon the track of the company. What has already been said disposes of these objections. We think the instructions as a whole, fairly and fully directed the jury on each material fact at issue, and were as favorable to defendant as the law and evidence warranted.

There was no dispute as to the extent of the injury, nor is there any claim that the damages awarded are excessive.

We find no prejudicial error in the record, and it is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

PHŒBE R. E. E. LINTON ET AL. V. JOHN T. CATHERS.

FILED DECEMBER 16, 1903. No. 13,246.

Settlement: AVOIDANCE: BURDEN OF PROOF. The burden of proof is upon the party admitting a settlement to establish the facts relied on in avoidance thereof.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

John O. Yeiser, for plaintiffs in error.

John T. Cathers and *Byron G. Burbank, contra.*

OLDHAM, C.

This was an action by plaintiff against the defendants for attorney's fees. It appears that the cause was originally instituted in the district court for Douglas county, Nebraska, on November 5, 1900, the amount then claimed being in excess of $5,000. The cause appears to have lingered on the docket until October 6, 1902, when defendants each filed a second amended and supplemental answer alleging, among other things, that since the issues were joined in the cause, and on May 18, 1901, the plaintiff and defendants entered into a full and complete settlement of the pending cause and all claims and demands stated therein; that a memorandum of said agreement was reduced to writing, signed by plaintiff and delivered to defendants, a copy of which was attached to and made a part of the answer, and that the services were unskillfully performed and of no value. There were other things in the answer which need not be discussed.

Plaintiff, in his reply to the amended answers, alleged that the memorandum set up in defendants' answers referred to another suit and not to the one now pending; admitted that there was a settlement between plaintiff and the defendants in which plaintiff, on certain conditions set forth, did agree to dismiss the case now pending. He then

pleads in avoidance of the settlement, that it was procured by fraud, and that the conditions have not been fully performed by the defendants; that the money actually paid at the time of the settlement was less than the amount then due him on a certain judgment included in the settlement, and asks that his cause of action be continued for the sum of $2,650 attorney's fees. Under issues thus joined the cause was tried to a jury; verdict was returned for plaintiff for $1,100; there was judgment on the verdict, and defendants bring error to this court.

At the trial of the cause defendants offered in evidence the written memorandum of the settlement pleaded in the answer, which was admitted without objection, and is as follows:

"In the District Court for Douglas County, Nebraska.

"JOHN T. CATHERS
v. } Doc. 65. No. 261.
P. R. E. E. LINTON.

"Received from Mrs. Phœbe R. E. E. Linton, one of the above defendants, two thousand six hundred sixty dollars ($2,660) in full of judgment in the above entitled cause, as follows: Five hundred dollars ($500) cash, one thousand dollars ($1,000) by check at thirty days from date hereof, and the mortgage on Argyle Place for one thousand one hundred sixty dollars ($1,160) for one year. May 18, 1901.

"Also I agree to dismiss the cause now pending in the district court for Douglas county.

"This to settle all old matters up to date.

"JOHN T. CATHERS."

They also offered in evidence a letter from plaintiff to defendant, Phœbe R. E. E. Linton, which was admitted to have been signed by plaintiff and mailed to the defendant, and contains the following reference to the settlement of May 18, 1901:

"I supposed you knew of the settlement between Mr. Linton and myself of your matters, last May. I had ceased

to be your attorney, and Mr. Linton came and reemployed me, and we made an agreement whereby all matters in dispute between us were settled up in this way: I was to be your attorney exclusively in all matters here in Nebraska on condition that I settle up all matters then in dispute, and this was agreed to."

Plaintiff in rebuttal introduced evidence tending to impeach the settlement for misrepresentation and fraud alleged to have been practiced upon him by defendants in procuring such settlement. This perhaps is all that need be stated from a very voluminous record to reach a conclusion necessary to dispose of this case.

In this state of the evidence and the pleadings, defendants requested the court to instruct the jury, that the burden of proof was upon plaintiff to establish facts necessary to avoid the effect of the settlement. This the court refused and instructed the jury that:

"The burden of proof is on the defendants to show that there had been a settlement of the claim for services set forth in plaintiff's petition; and if, by a preponderance of the evidence, you find that said claim had been settled as alleged in defendants' answer, it would then be your duty to find for the defendants."

We think the court was wrong in casting the burden upon defendants to establish a settlement, which was admitted by the pleadings and by undisputed evidence to have been entered into, and that an instruction similar, in substance, to that asked by defendants should have been given.

It is therefore recommended that the judgment of the trial court be reversed and the cause remanded for further proceedings.

HASTINGS and AMES, CC., concur.

By the Court: for the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

PHŒBE R. E. E. LINTON ET AL. V. JOHN T. CATHERS.

FILED DECEMBER 16, 1903. No. 13,247.

1. **Error:** CONTINUANCE. Action of the trial court in refusing a continuance examined, and *held* not error.
2. **Judgment:** BAR. Judgment in *Linton v. Cathers, ante,* p. 598, *held* not a bar to the action in the instant case.
3. **Error:** RULINGS. Action of the trial court in the admission and exclusion of evidence examined, and *held* not error.

ERROR to the district court for Douglas county: PAUL JESSEN, JUDGE. *Affirmed.*

John O. Yeiser, for plaintiffs in error.

John T. Cathers and *Byron G. Burbank, contra.*

OLDHAM, C.

This is a suit between plaintiff and defendants for attorney's fees and money advanced by plaintiff in paying costs and in paying delinquent taxes for the benefit of defendants. The petition was filed in February, 1902, about a year after the alleged settlement between these parties, a memorandum of which was set out in the opinion between the same parties, *ante,* p. 598. In plaintiff's amended petition he carefully itemized each case in which services are alleged to have been rendered by the request and for the benefit of defendants, and in the second count of the petition, moneys alleged to have been expended at the request and for the use of defendants are itemized and set forth. The petition also sets forth the settlement of May 18, 1901, commented upon in the opinion, *ante,* p. 598. Some of the items for services alleged were rendered prior to this settlement and a number were rendered after the settlement had been agreed upon. In his petition plaintiff assumes the burden of showing facts necessary to avoid the effect of the settlement. Defendants' answers pleaded the settlement of May 18, and denied that the

services rendered since such settlement were of any value, and charged mismanagement of the cases intrusted to plaintiff; and defendants also filed a counterclaim for damages on account of plaintiff's mismanagement of the cases. On issues thus joined there was a trial to a jury, judgment for plaintiff, and defendants bring error to this court.

From the 116 allegations of error called to our attention in the petition in error, we shall only consider such as present questions worthy of serious attention, for most of the allegations are vexatiously frivolous. One of the numerous errors alleged is as to the action of the trial court in refusing defendants' application for a continuance because of the filing of an amended petition. The amended petition on which the case was finally tried was but a more detailed statement of the facts contained in the original petition and set up no new cause of action. This pleading was filed December 4, and the defendants were given until December 17 to answer, which we think afforded reasonable time for defendants to plead to the new petition. There is no showing in the record which remotely suggests an abuse of discretion reposed in the trial judge in refusing the application for a further continuance.

When the case, *ante,* p. 598, was reached for trial, the instant case was pending before another judge of the same court on defendants' application for a continuance. Defendants filed a motion to consolidate the two cases. The court after an examination of the pleadings in each of the cases denied the request; and the rule of the court in denying the application for consolidation is now urged in bar of further proceedings in the instant case. We think it was not error, in refusing the consolidation of these cases; they were not pending at the same time; the former case having been filed November 5, 1900, and also Adolphus F. Linton, as trustee, was not a party to the former cause, and much of the services sought to be recovered for in this case were not rendered till more than a year after

the filing of the former petition, and the items sought to be recovered in the present suit are plainly divisible from the items of services alleged in the former case; consequently the judgment in the former case was not a bar to the action for the services alleged to have been rendered in the present suit. *Beck v. Deveraux,* 9 Neb. 109; *Weeks v. Wheeler,* 41 Neb. 200.

This cause of action presented little but disputed questions of fact, which it was the peculiar province of the jury to determine. Plaintiff, as above stated, assumed the burden of showing facts in avoidance of the alleged settlement of 1901, in so far as it might have been taken to have affected any of the services performed by him for defendants prior to that date. The instructions of the court clearly and fairly submitted every disputed question to the jury. There are numerous errors alleged on the admission and exclusion of testimony. We have examined these allegations patiently and in doing so have plodded through a burdensome record of 630 pages, but we find nothing in the action of the trial court on the admission or exclusion of evidence that was in any wise prejudicial to defendants.

It is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WILLIAM STANSBURY, APPELLANT, V. M. F. STORER ET AL., APPELLEES.

FILED DECEMBER 16, 1903. No. 13,206.

1. **Judgment: REVIEW: PRESUMPTION.** The judgments and orders of the district court are presumptively right, and will not be reversed unless error affirmatively appears in the record.

2. **Bill of Exceptions:** AFFIDAVITS. Affidavits used as evidence on a hearing in the district court can not be considered by the supreme court unless they are made a part of the record by being embodied in a bill of exceptions.

3. **Appeal:** RECORD: REVIEW. Where, on an appeal in equity from a judgment of the district court, the record contains no bill of exceptions and the pleadings are sufficient to support the judgment, it will be affirmed.

4. **Amendments.** An application on the part of appellant to amend his petition, having been made after the entry of the final judgment dismissing the case, came too late and was properly refused.

APPEAL from the district court for Nuckolls county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Cole & Brown, for appellant.

S. A. Searle and *C. E. Adams, contra.*

BARNES, C.

This action was a suit in equity originally commenced in the district court for Nuckolls county to perpetually restrain the appellees from doing certain acts to the alleged irreparable injury of the appellant. When the action was commenced, a temporary injunction was allowed. On the final hearing, the defendants demurred to the plaintiff's petition; the demurrer was sustained; and plaintiff declined to further plead, but brought the action to this court by a petition in error. On the hearing, it was found that the record contained no final judgment, and for that reason the petition in error was dismissed. See *Stansbury v. Storer & Ellis,* 3 Neb. (Unof.) 100. When the mandate was returned to the district court, the defendants filed a motion to correct the record by entering the final judgment rendered by the court at the previous hearing. This motion was supported by affidavits on the one hand, and opposed by them on the other. The court, on consideration of the evidence, found for the defendants, and entered the final judgment from which the plaintiff now appeals. An examination of the record discloses

that it contains no bill of exceptions, and the certificate of the clerk of the district court to the transcript, which is all there is before us, does not include or mention the affidavits used on the hearing in that court. It has been so frequently held by us that affidavits presented as evidence on a hearing in the district court will not be examined in the supreme court, unless made a part of the record by being embodied in a bill of exceptions, that this is no longer an open question. *McMurtry v. State,* 19 Neb. 147; *Burke v. Pepper,* 29 Neb. 320; *McCarn v. Cooley,* 30 Neb. 552; *Beard v. Ringer,* 41 Neb. 831; *Beers v. State,* 24 Neb. 614; *Korth v. State,* 46 Neb. 631; *Norfolk Nat. Bank v. Job,* 48 Neb. 774.

The judgments and orders of the district court are presumptively right, and will not be reversed unless error affirmatively appears in the record. *Hobbs v. Warman,* 63 Neb. 703; *Carter v. Gibson,* 61 Neb. 207; *First Nat. Bank v. Stockham,* 59 Neb. 304. In an equity case, where there is no bill of exceptions preserved, the only question presented by the record is whether the decree is supported by the pleadings. *Pettibone v. Fitzgerald,* 62 Neb. 869. The pleadings in this case seem to be sufficient to sustain the judgment of the district court. Therefore there is nothing further for our consideration.

The appellant contends, however, that the court should have permitted him to amend his petition in accordance with the request presented for that purpose. If the judgment of the district court dismissing the action was right, as we must assume it was, the application to amend came too late and was properly denied.

For the foregoing reasons, we recommend that the judgment of the district court be affirmed.

GLANVILLE and ALBERT, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. BOARD OF COUNTY COMMISSIONERS OF COUNTY OF LANCASTER V. PAUL HOLM.

FILED DECEMBER 16, 1903. No. 13,273.

1. **County Officer:** ACCOUNTING. A county officer is not required to account for and pay over to his county money received by him in payment for services performed for another, by private agreement, which are no part of the duties of his office, and which are not incompatible with, and are not included within, his official duties.
2. ———: DUTIES. It is no part of the official duties of a register of deeds to search the records of his office, to ascertain whether persons signing a petition to obtain a liquor license are freeholders.
3. ———: COMPENSATION. Such officer may, by agreement, perform such services for persons who, under the rules of the excise board of a city, are required to make proof of the qualifications of such signers by his certificate, and may collect and receive such compensation as may be agreed upon therefor.
4. ———: ACCOUNTING. In such a case, he must place the fee for his certificate and seal on his fee book, and account for and pay the same over to the county, if in excess of the salary allowed him by law; but he can not be compelled to account for and pay over the amount received by him for his labor in searching the records.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

James L. Caldwell and *William T. Stevens,* for plaintiff in error.

John M. Stewart and *Thomas C. Munger, contra.*

BARNES, C.

The plaintiff in error filed its petition in the district court against the defendant, praying for a writ of mandamus to compel him, as register of deeds of Lancaster county, to enter certain sums of money, received as hereinafter stated, on his fee books, and to account for and pay the same over to said county. Defendant filed his answer to the alternative writ, and on the issues thus joined,

together with a stipulation or agreed statement of facts, the court rendered a judgment denying the writ and dismissing the relator's action. From that judgment the county prosecuted error.

It appears from the record that, during the time the defendant was the register of deeds of Lancaster county, the excise board of the city of Lincoln required every person applying for a saloon license in said city to obtain a certificate of the register of deeds, to the effect that the persons signing his petition were freeholders; that, during the defendant's two terms of office, he made search of the records and furnished such certificates for 224 applicants; that he charged each of such persons, for his investigation of the records, $3.50 and 50 cents for his certificate as register of deeds; that, in each case, he reported the 50 cents for the certificate, as fees, placed the same upon his fee book and duly accounted for and paid the same over to the county.

It further appears that his salary fixed by law was $2,500 a year; that he received and retained that sum for each fiscal year, which included the sums so reported for certificates as aforesaid; that he refused to enter the amount paid him for searching the records on his fee book, and refused to pay it over to the county, claiming that such service was no part of his official duties; that he had the right to contract with the applicants for his work in examining the records, and receive from each of them such a sum as they should agree to pay him for the services so performed. It is contended, however, on the part of the relator, that the sums so received by the defendant were collected and received by him by virtue of his office; that he was entitled to receive only $2,500 a year from all sources, and that, therefore, the court erred in denying the writ and dismissing the action. This is the sole question presented for our consideration.

It may be stated at the outset that, if the services, for which respondent received the money in question, were any part of the duties of his office, he would be required

to account for and pay the same over to the relator; and it would make no difference whether the statute prescribing such duties fixed the amount of compensation therefor, or whether the amount was fixed by the agreement of the respondent and the person for whom he performed the service. Counsel for the relator contends that the money was received because of respondent's official position, and the judgment should be reversed because of the rule announced in *State v. Sovereign,* 17 Neb. 173. In that case the acts performed by Sovereign were a part of his official duties, and it was held that he could not, by making his certificate as a notary public instead of county clerk, avoid accounting for the fees which were fixed by law for the performance of those duties. We are also cited to the well known case of the *State v. Leidtke,* 12 Neb. 171. In that case Leidtke, who was the auditor of public accounts, performed certain duties in administering the law relating to insurance companies. Those duties were required of him by virtue of his office, and the fees therefor were fixed by law. The statute further provided that such fees should be paid to him as auditor. It was contended that, for that reason, he was entitled to retain those fees in addition to the amount of his salary as fixed by law and the constitution. It was held that the constitution required these fees to be paid to the state treasurer, and Leidtke was, for that reason, ordered to account for and pay the same over to the state.

Counsel also calls out attention to the case of the *State v. Wallichs,* 16 Neb. 110. The only question involved in that case was whether or not a county, presenting its refunding bonds to the auditor for registration, must pay one fourth of one per cent. on the dollar for each bond registered as provided by law. Our attention is also called to *State v. Kelly,* 30 Neb. 574. In that case it was held that, where a county clerk, who was also a notary public, took acknowledgments of deeds, mortgages, affidavits and depositions, as a notary public, it was his duty to enter upon his fee book, as county clerk, and report to the

county board, every item received by him for such services, under the rule laid down in *State v. Sovereign, supra.* It was further held that he could not retain the fees received by him for making and certifying abstracts of title, which was a part of the duties of his office, although he was at that time a bonded abstracter. The relator relies also on the case of *State v. Hazelet,* 41 Neb. 257. In that case the county clerk insisted that he was entitled to receive, retain, and not account for and pay over to the county, the fee of $2 for furnishing the sheriff with a certificate of liens and incumbrances, in cases of appraisals and sale under decrees of foreclosure and on execution. It was held that it was a part of the official duties of the clerk to furnish such certificates, when requested to do so by the sheriff; that he was entitled to collect therefor the sum of $2 in each case, which he must enter upon his fee book and account for, notwithstanding the duty was performed by his deputies outside of regular office hours. *State v. Silver,* 9 Neb. 85, is also relied on by the relator. Silver was the county clerk of Lancaster county, and claimed that extra compensation should be allowed him by the board of commissioners for making the tax list and duplicates; his claim was disallowed, and it was held that a public officer must discharge all of the duties pertaining to his office for the compensation allowed by law, and that he can not be allowed compensation for extra work unless it is authorized by statute. We are further cited to *Bayha v. County of Webster,* 18 Neb. 131. The only question presented in that case was whether or not the clerk was entitled to extra compensation for making out the tax list, and it was again held that a public officer must discharge all the duties pertaining to his office for the compensation allowed by law; that he can receive no compensation for extra work unless it is authorized by statute. Lastly, our attention is called to the case of *Heald v. Polk County,* 46 Neb. 28, where the same question was involved and was decided in the same way as in the case last above mentioned.

It is further contended that, even if it was not the official duty of the respondent to perform these services, yet he was the county's officer, and the custodian of its books and seal, and that he can not be heard to say that he performed them as an individual. To sustain this view the relator cites *Blaco v. State,* 58 Neb. 557. An examination of that case discloses that the decision is based, as in all of the foregoing cases, on the fact that the fees were received on account of official services provided for by law, and the particular point decided was, that the respondent must account for such fees whether he performed the services regularly or irregularly; and that his bondsmen could not escape liability on the claim that the services were irregularly performed.

So it would seem that our decision must be based upon the sole question as to whether or not the services rendered for the applicants, as above stated, were a part of the official duties of the respondent. If they were, then he must account for and pay over the money received therefor to the relator. If, however, they were no part of his official duties, then the question falls within the rule announced in the case of the *State v. Obert,* 53 Kan. 106, 36 Pac. 64, where it was held that a county treasurer who, for compensation, made searches and answered letters of inquiry and charged therefor, without a statute authorizing a charge, did not have to report such fees except for his certificate alone. The law of Kansas on this question, is the same as the law of this state. It was provided by the Kansas statutes that, in counties having a population of more than five thousand and not over ten thousand, the treasurer should receive $1,500 per annum; and that he should account for and pay over to the county, all of the money collected by him as fees in excess of that amount. It was stated in the body of the opinion that, under the general statutes relating to fees and salaries, county officers are entitled to no more compensation than the salaries fixed by law; and that all fees received by them for official services should be accounted for, and deducted

from each quarterly allowance of salary. The court further said:

"We do not think that the fees Obert collected for making and certifying abstracts of title, and in writing letters and giving information therein as to taxes, etc., should be reported or accounted for. Such services are no part of the official duty of the county treasurer, as that duty is defined by statute," citing *Mallory v. Ferguson,* 50 Kan. 685, 32 Pac. 410.

The same rule was announced in the case of the *County of San Bernardino v. Davidson,* 112 Cal. 503, 44 Pac. 659. In that case it was shown that it was a custom of miners to have the county recorder record notice of mining claims. There was no statute requiring such work, but the clerk kept a record and charged for it. It was held that it was no duty imposed by law and no fees were fixed by law for it, and hence he need not account for such fees. The case of *Cornell v. Irvine,* 56 Neb. 657, seems to throw some light on this question. There it was said that where a state officer has rendered services outside of, and not incompatible with, his duties as such officer, it is not proper for the auditor of public accounts to refuse to issue a warrant in payment of such extra services, merely because the salary of such officer was already paid for the period during which said extra services were rendered. And so it was held that judge Irvine was entitled to receive compensation for lectures delivered to a law class of the state university, and that such services were not incompatible with, and were not included within the scope of, his duties as supreme court commissioner. We have recently held, in *Shepard v. Easterling,* 61 Neb. 882, that a county judge might be allowed the sum of $300 by the county board, for docketing several hundred old cases, and for making an index to the records of the probate court, because such services were extra official; in other words, that the county judge could not be required, as a part of the duties of his office, to perform the services which should have been performed by his predecessor, and, although no fees were fixed

by law for the performance of such services, he could contract with the commissioners to do that work, and would be entitled to receive the amount agreed upon, over and above the amount of fees which he could retain during his current term. In the case at bar, it can not be contended that the respondent was obliged to perform the services in question as a part of his official duties. The rule of the excise board of the city of Lincoln was in no manner binding upon him. He could not be compelled to perform any duties or services, except such as the statute enjoined upon him. As a strict matter of law, there seems to be no reason why he could not contract with the persons applying for saloon licenses, to search the records for them and receive such compensation therefor as might be agreed upon. The fact that such services were performed by his deputies, who had received payment from the county for their services, or that they were performed by himself personally, we are not at liberty to consider, because no competent offer to prove that fact was made by the relator. While the conduct of the respondent may be of doubtful propriety, and while, perhaps, from an equitable standpoint, the money in question ought to be paid to the relator, yet these matters can not be taken into consideration by us in deciding this case. The question presented is whether or not, as a matter of law, the respondent can be compelled to account for and pay over the money in controversy herein. It appearing that the services rendered by respondent were no part of the duties of his office, we are constrained to hold that the money paid him therefor, under private contract or agreement, can not be recovered by the relator, and, therefore, the district court did not err in denying the writ and dismissing the action.

For the reasons above given we recommend that the judgment of the district court be affirmed.

ALBERT and GLANVILLE, CC., concur.

By the Court: for the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ALFRED HAZLETT, RECEIVER OF THE AMERICAN BANK OF BEATRICE, NEBRASKA, V. ESTATE OF WILLIAM BLAKELY, DECEASED, ET AL.

FILED DECEMBER 16, 1903. No. 13,165.

1. **Administrator:** DISCHARGE. An executor or administrator may resign or may be removed for cause, but a county court has no authority to discharge such officer from his trust, merely upon the settlement of what is called a final account.
2. ———: ———: TRUST. The trust of such officer is a continuing one, and his formal discharge, in a decree upon final accounting, does not destroy the relation, but merely discharges him from liability for the past.
3. **Contingent Claim.** A contingent claim does not become absolute, within the meaning of the decedent's act, until it becomes a claim proper to be presented to the county court for final adjudication as a claim against the estate.

ERROR to the district court for Gage county: CHARLES B. LETTON, JUDGE. *Reversed.*

G. M. Johnson and *Fulton Jack,* for plaintiff in error.

N. K. Griggs, Samuel Rinaker and *Robert S. Bibb, contra.*

ALBERT, C.

On the 8th day of April, 1901, Alfred Hazlett, as receiver of the American Bank of Beatrice, Nebraska, whom we shall hereafter call the plaintiff, filed a petition in the county court of Gage county against Cornelia D. Blakely, administratrix of the estate of William Blakely, deceased, and his heirs at law, whom we shall hereafter call the defendants, which, omitting the formal parts, is as follows:

"Comes now Alfred Hazlett, receiver of the American Bank of Beatrice, Nebraska, and represents and shows to the court that he is the duly appointed, qualified and acting receiver of the American Bank of Beatrice, Nebraska, a corporation organized under the laws of the state of Nebraska. That on or about January 2, 1898, the said

William Blakely died in Gage county, Nebraska, and was a resident of said county and state at the time of his death. That on the 4th day of February, 1898, Cornelia D. Blakely, widow of said William Blakely, was duly appointed as administratrix of said estate of William Blakely, deceased, and qualified as such and entered upon the duties of such appointment. That on the 28th day of August, 1898, the said Alfred Hazlett, as receiver of the American Bank of Beatrice, Nebraska, began an action in the district court for Gage county, Nebraska, against Danforth E. Ainsworth and others, stockholders of the American Bank of Beatrice, Nebraska, to enforce against the persons defendant in such action their liability, under the statutes and constitution of the state of Nebraska, as such stockholders of said bank. That the said Cornelia D. Blakely, administratrix of the estate of William Blakely, deceased, was made a party in such action, the said William Blakely having been a stockholder of said bank at the time the said bank became insolvent and also at the time of his death in, to wit, the amount of $1,000 in stock. That the said Cornelia D. Blakely as such administratrix of said estate was duly served with summons in said action, and appeared and defended in said action as administratrix of said estate. That afterwards, to wit, on the 13th day of April, 1900, judgment and decree were rendered in said action against the said Cornelia D. Blakely, as such administratrix, as follows:

"That said plaintiff recover of and from Cornelia D. Blakely, as administratrix of the estate of William Blakely, deceased, the sum of $1,000, but that no execution issue therefor, the said plaintiff being hereby authorized and instructed to proceed in the county court of Gage county, Nebraska, and take such other steps as may be necessary to enforce the collection of said amount from the said estate of said William Blakely, deceased, and his legal representatives. That the claim herein set forth and for which said decree and judgment were rendered was a contingent claim and of such a nature that the same could

not, in the first instance and prior to the rendition of said judgment and decree, be allowed or adjudicated by the county court of Gage county, Nebraska, for the reason that, under the laws of the state of Nebraska, it was necessary that an action to enforce the stockholders' liability in favor of all creditors be brought in the district court as an action in equity and against all stockholders within the jurisdiction of said court. That the said Cornelia D. Blakely, as administratrix of the estate of William Blakely, contested the action of the plaintiff in the said district court upon the ground, and for the reason, that the same had not been presented to and filed in the county court, within the time prescribed by order of said county court for presenting claims. And, upon the hearing of said cause in the said district court, the court held adversely to said contention of said administratrix and entered judgment and decree as aforesaid, and that the said liability then, on April 13, 1900, for the first time became absolute. And that after the said Cornelia D. Blakely had been served with summons in and had appeared in said action in the district court for Gage county, Nebraska, and knowing that said cause was pending and undetermined, and having full knowledge and notice of the existence of said claim and the liability of said estate therefor, she procured an order for the settlement of said estate and for the discharge of herself as administratrix. That the said decree and judgment, and liability of said estate thereon, have not been paid or satisfied, either in whole or in part. That at the time said action was commenced against said Cornelia D. Blakely, the estate of said William Blakely, deceased, was solvent, and she had in her hands and possession sufficient property to pay said claim, and that her said discharge as administratrix was procured without any notice to plaintiff, or knowledge thereof on plaintiff's part, until said settlement and discharge had been procured. This claimant therefore prays that this his claim be allowed in the sum of $1,000 and interest at 7 per cent. per annum from April 13, 1900, that the order closing said

estate and discharging said administratrix be set aside, and that the order of distribution of said estate be vacated, and that the said Cornelia D. Blakely be required, by notice served upon her, to appear and answer this application, and that she be required to pay said claim of this petitioner, and for such other and further relief as may be proper in the premises."

Among the written objections interposed by the defendants to the granting of the prayer of the petition are the following:

"1. Because the said estate of the said William Blakely, deceased, has been fully administered upon and settled within the time and in the manner provided by law, and a final order and decree of distribution has been made therein dividing and distributing said estate, and the administratrix of said estate has been discharged and said estate fully closed up, upon the 9th day of November, 1898.

"2. Because the time limiting the filing of claims against said estate expired upon the 3d day of August, 1898, as per the order of the probate court of Gage county, Nebraska, made upon the 4th day of February, 1898, and more than two years and eight months have elapsed since the time for filing claims against said estate expired."

Upon a hearing had in the county court, the relief asked by the plaintiff was denied and the proceedings dismissed. The plaintiff then prosecuted an appeal to the district court, where the cause was submitted on the same record. The parties stipulated that the facts stated in the petition, as well as those included in the objections filed, were true. The only evidence offered was an order of the district court showing the plaintiff's authority as receiver to institute proceedings of this character. The district court found in favor of the defendants, and gave judgment accordingly. The plaintiff brings the case here for review.

It will be observed that a portion of the relief sought by the plaintiff was the vacation of a decree of final settlement and an order discharging the administratrix. But we do not think such relief is essential to the ultimate

relief sought, namely, the examination and allowance of the claim against the estate. The law appears to be that the formal discharge contained in the decree on final accounting applies only as to the accounts of the parties up to that period. The trust of an administrator or executor is a continuing one, and a decree of final accounting does not destroy the relation of such officer, but only discharges him from liability for the past. 2 Woerner, American Law of Administration (2d ed.), sec. 571. In *Diversey v. Johnson,* 93 Ill. 547, cited by the author above, the former decisions of that state on this point are reviewed. In referring to one of these decisions the court say:

"In *Cutright v. Stanford,* 81 Ill. 240, the claim was presented and allowed in the probate court after two years from the grant of administration, and after the administrator had distributed the residue in his hands to the heirs, and his final report had been approved by the court and he finally discharged from all duties and liabilities on account of his said administration, and yet the claim was held to be a valid one against the estate."

In *Weyer v. Watt,* 48 Ohio St. 545, it appears that the executor had made what he called a final accounting, upon which the probate court made an order, that the account be made final, and the executor discharged from his trust. The court said:

"The only further inquiry, then, is whether the plaintiff, at the commencement of the action, had ceased to be executor; and that depends entirely upon the legal effect of the order of the probate court discharging him from the trust. Under our legislation, as we have already seen, an executor or administrator may be removed by the probate court, for cause, or he may resign his trust, with the consent of the court. But we find no power conferred upon that court to discharge an executor or administrator from his trust, upon the settlement of what is called a final account, and thus extinguish his authority as trustee."

Our statute in respect to the discharge of an executor or administrator is substantially the same as that construed

by the court in the case cited. It follows, therefore, that decree of final settlement, and the discharge of the administratrix, is, of itself, no obstacle to the presentation and allowance of the plaintiff's claim.

This brings us to the principal question in the case, namely, whether the claim is barred by the provisions of the decedent's act in respect to the time allowed for filing claims against an estate. The claim falls within the definition of a contingent claim, given in *Stichter v. Cox*, 52 Neb. 532. In 1901, section 226 of that act (ch. 23, Compiled Statutes; Annotated Statutes, 5091), limiting the time for the presentation of claims proper to be allowed by the county court, to the executor or administrator, within the time limited by the court for that purpose, was amended to include contingent claims. The amendment was passed without an emergency clause, and did not take effect until after these proceedings were instituted; hence it may be disregarded in the further consideration of this case.

The act, so far as relates to contingent claims, and as it stood when these proceedings were begun, is as follows:

(Sec. 258.) "If any person shall be liable as security for the deceased, or have any other contingent claim against his estate, which can not be proved as a debt before the commissioners, or allowed by them, the same may be presented, with the proper proof, to the probate court or to the commissioners, who shall state the same in their report, if such claim was presented to them.

(Sec. 259.) "If the court shall be satisfied, from the report of the commissioners, or by the proof exhibited, said court may order the executor or administrator to retain in his hands sufficient to pay such contingent claim, when the same shall become absolute; or, if the estate shall be insolvent, sufficient to pay a proportion equal to the dividends of other creditors.

(Sec. 260.) "If such contingent claim shall become absolute, and shall be presented to the probate court, or to the executor or administrator, at any time within two

years from the time limited for other creditors to present their claims to the commissioners, it may be allowed by the probate court upon due proof, or it may be proved before the commissioners already appointed or before others to be appointed for that purpose, in the same manner as if presented for allowance before the commissioners had made their report; and the persons interested shall have the same right of appeal as in other cases.

(Sec. 261.) "If such contingent claim shall be allowed, as mentioned in the preceding section, or established on appeal, the creditors shall be entitled to receive payment to the same extent as other creditors, if the estate retained by the executor or administrator shall be sufficient for that purpose; but if the claim shall not be finally established, as provided in the preceding section, or if the assets retained in the hands of the executor or administrator shall not be wholly exhausted in payment of such claim, such assets, or the residue of them, shall be disposed of, by order of the probate court, to the persons entitled to the same according to law.

(Sec. 262.) "If the claim of any person shall accrue or become absolute at any time after the time limited for creditors to present their claims, the person having such claim may present it to the probate court, and prove the same at any time within one year after it shall accrue or become absolute; and if established in the manner provided in this subdisivion, the executor or administrator shall be required to pay it, if he shall have sufficient assets for that purpose, and shall be required to pay such part as he shall have assets to pay, and if real or personal estate shall afterwards come to his possession, he shall be required to pay such claim, or such part as he may have assets sufficient to pay, not exceeding the proportion of the other creditors, in such time as the probate court may prescribe.

(Sec. 263.) "When a claim shall be presented within one year from the time when it shall accrue and be established, as mentioned in the preceding section, and the ex-

ecutor or administrator shall not have sufficient to pay the whole of such claim, the creditor shall have the right to recover such part of his claim as the executor or administrator has not assets to pay, against the heirs, devisees, or legatees, who shall have received sufficient real or personal property from the estate."

The first four sections provide a remedy whereby the holder of a contingent claim may place himself on terms of approximate equality with the holders of absolute claims. There can be no doubt that such remedy was open to the plaintiff in this case, had he seen fit to invoke it. Had he done so, the limitation fixed by section 260, which applies exclusively to claims in respect to which such remedy is invoked, would have been the test in the present case. Not having availed himself of that remedy, the provisions of the first four sections have no application, and the plaintiffs rights must be measured by section 262, which limits the time for filing contingent claims to one year from the date it becomes absolute.

This brings us down to the single question: Was the claim filed in the county court within one year from the date it became absolute?

The defendants contend that the claim became absolute on the 27th day of June, 1898, when all the assets of the bank were exhausted, and the order was made by the district court directing the plaintiff as receiver to bring suit against the stockholders. To sustain this contention, we should be obliged to give a different meaning to the terms absolute and contingent than that which, from an examination of the entire act, we are satisfied the legislature intended to convey. Section 214 provides that it shall be the duty of the county judge to receive, examine, adjust and allow all claims and demands of all persons against the deceased. In *Huebener v. Sesseman,* 38 Neb. 78, it was held, that an executor or administrator has no authority to pay a claim until it has been allowed by the county judge. It is manifest, therefore, that the act contemplates that all claims shall be passed upon and allowed by the county

judge; under our practice the orderly administration of an estate and an equitable distribution of the assets would be hardly possible otherwise.

But while the act contemplates that all claims shall be allowed by the county judge, it also contemplates that certain claims may be presented in the first instance in some other court, because section 227, impliedly authorizes actions to be brought against an executor or administrator, as such, for the recovery of real or personal property, and for relief other than for the recovery of money only, etc. The claim in this case was the liability of a stockholder of an insolvent bank. It was, in the first instance, exclusively within the jurisdiction of the district court. *German Nat. Bank v. Farmers & Merchants Bank*, 54 Neb. 593, and did not become a claim "proper to be allowed by the county judge," until it had passed to judgment. There can be no doubt, as already intimated, that it might have been filed as a contingent claim against the estate at any time before judgment. But had it been thus filed, the county judge would have had no authority to pass upon it finally before the rendition of judgment in the district court. Until that was done, the claim was not absolute or certain, but dependent upon an event which might or might not happen, namely, judgment against the administratrix in the district court. In other words, the claim did not become absolute until judgment had been rendered thereon in the district court. We think this is in harmony with the definition of a contingent claim in *Stichter v. Cox*, *supra*.

As we have seen, section 262 provides that a claim, which becomes absolute at any time after the time limited for creditors to present their claims, may be presented and proved in the probate court, at any time within one year after it becomes absolute. This claim became absolute after the time limited for creditors to present their claims, and was presented to the probate court within one year after it became absolute within the meaning of the statute, and was not, therefore, barred.

It follows that the judgment of the district court is erroneous, and we recommend that it be reversed and the cause remanded for further proceedings according to law.

BARNES and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

UNITED STATES FIDELITY AND GUARANTY COMPANY v. HARRY B. RIDGLEY.

FILED DECEMBER 16, 1903. No. 13,193.

1. **Fidelity Bond: EXECUTION: VALIDITY.** A fidelity bond for the indemnity of an employer against the dishonesty of an employee, issued on the application of the latter who pays the premium and by him delivered to the former, which contains on its face, in addition to the contract of an indemnity, an undertaking of the employee to the obligor, and a provision that it shall not be binding on the obligor unless signed by the employee, is not binding on the obligor unless thus signed, in the absence of a showing that the signature of the employee had been waived by the obligor.
2. ———: **AGENCY: WAIVER.** The signing of the bond by the obligor, and its delivery to the employee, does not constitute the employee the agent of the obligor, with authority to bind the latter by a waiver of such signature. Insurance contracts and contracts of this character distinguished.
3. **Retention of Premium.** The fact that the obligor retained the premium paid by the employee does not, under the circumstances shown in this case, constitute a waiver of the signature of the employee to the bond.
4. **Application: WARRANTIES.** Statements made by an employer in support of his employee's application for such bond, as to the nature of the duties of the employee, the extent of his authority, etc., are in the nature of warranties, and a breach thereof will avoid the bond.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed.*

Mockett & Polk, for plaintiff in error.

Lionel C. Burr and *Elmer E. Spencer, contra.*

ALBERT, C.

Harry B. Ridgley, whom we shall call the plaintiff, for present purposes, may be said to have been the owner of several stores and engaged in selling goods on the instalment plan, with headquarters at Des Moines, Iowa; one whom we shall call the employee was in his employ as manager of such stores, in the city of Lincoln. The plaintiff required the employee to furnish a fidelity bond, in the sum of $500, whereupon the employee made application therefor to the defendant company, whose home office is in the city of Baltimore, through its agents at Lincoln. The application was supported by certain statements in writing made by the plaintiff, in response to questions propounded by the defendant, as to the nature of the employee's duties, extent of his authority in the conduct of the business, etc. The questions were on a printed blank furnished by the defendant and were preceded by these words: "The company desires to have answers to the following questions, and these answers will be taken as the basis of the bond if issued."

Among such questions and answers are the following:

Q. What will be the title of applicant's position?

A. Manager Branch Store.

Q. Will he be authorized to pay out of the cash in his custody any amounts on your account?

A. Commission to agents, and his salary, and salary of his collector, and remit balance to me.

Q. Is he required to make deposits in bank; if so how often?

A. Yes.

Q. State whether he is allowed to indorse checks drawn to your order and for what purpose.

A. Only for remittance to me.

Q. Will he be authorized to sign checks on your behalf?

A. No, sir.

Q. How frequently will he make settlement?

A. Every Saturday.

Q. What means will you use to ascertain whether his accounts are correct?

A. A perfect report system.

Q. How frequently will they be examined?

A. Every Monday morning.

The defendant accepted the application and forwarded the bond, duly signed and sealed, to its agents through whom the application was made, who delivered it to the employee upon the payment by him of the premium thereon.

Among other conditions, appearing on the face of the bond, are the following:

"And the said employee doth hereby, for himself, his heirs, executors and administrators, covenant and agree to and with the said company, that he will save, defend and keep harmless the said company from and against all loss and damage of whatever nature or kind, and from all legal or other costs and expenses, direct or incidental, which the said company shall or may, at any time, sustain, or be put to (whether before or after any legal proceedings by or against it to recover under this bond and without notice to him thereof) or for or by reason or in consequence of the said company having entered into the present bond."

The employee did not sign the bond but forwarded it, without his signature thereto, to the plaintiff who, when he received it, examined it no further than to ascertain the amount, which was satisfactory, and accepted it without knowing that the employee had not signed it or that his signature thereto was required.

This is an action on the bond brought by the plaintiff against the defendant to recover for money, securities and other personal property of the plaintiff which, it is alleged, the employee unlawfully converted to his own use.

The bond is made a part of the petition, and in avoid-

ance of the omission of the employee's signature from the bond the plaintiff alleges:

"That said bond was not so signed and witnessed by said Frank L. Kelsey the employee, but that said defendant corporation had full knowledge that said bond was not so signed and witnessed and, with full knowledge thereof, the president and secretary of said corporation signed the same and (caused) to be affixed thereto the seal of the corporation, delivered said bond to the plaintiff, who then and at all times herein mentioned was a resident of the city of Des Moines, Iowa, and from him received and has ever since retained the premium required to be paid therefor. That, by reason of the foregoing acts and conduct of the defendant, it has waived said stipulations and provisions of said bond and is therefore estopped to deny its liability to plaintiff on said bond by reason of said omission."

The defendant answered, putting in issue the allegations of the petition in avoidance of the omission of the employee to sign the bond. The answer also contains the following allegations:

"The defendant further alleges that the plaintiff had full knowledge of the delinquencies of the said Frank L. Kelsey, long prior to the 1st day of May, 1901, that the bank account of the plaintiff, kept by the said Kelsey in the city of Lincoln, was frequently overdrawn by said Kelsey with the full knowledge of the plaintiff, although from exhibit "A" hereto attached he was not authorized to draw against said bank account except for the purpose as shown by the weekly reports.

"The defendant further alleges that the statements made and subscribed to by the defendant in Exhibit "A" were warranties. That the answers to questions 9 C, 10 A, 11, 12 A & B, 14, 15 in said exhibit "A" are wholly false and were known to be false by the plaintiff at the time the same were made, and that the duties of and check upon the said Kelsey were not as set out in said answer, and that the liability under said bond was enlarged and varied from that contained in said written statement, and that no

check whatever was had upon the said Kelsey during the life of said alleged bond, that he was authorized to and did draw checks upon the said bank account, that settlements were not made once a week as warranted, that there was not a perfect report system or any other system which would ascertain the condition of the accounts of the said Kelsey once a week. That there has been a breach of all of said warranties and that instrument is absolutely void."

The foregoing allegations were put in issue by the reply.

There was a verdict for the plaintiff, and judgment was given accordingly. The company brings error.

At the close of the testimony the company asked the court to direct a verdict in its favor, and the overruling of its motion in that behalf is now assigned as error. There are, perhaps, technical objections to a consideration of that particular assignment, but as the same questions are presented in some other form, in other parts of the record, the objections that might be urged against their consideration under this assignment will be disregarded.

It is tacitly conceded that the omission of the employee's signature from the bond is fatal to a recovery in this case, unless it appear that the defendant has waived this omission or is estopped to urge it as a defense. The plaintiff contends that, by the delivery of the bond to the employee without requiring him to sign it, the defendant thereby made him its agent for the delivery of the bond to the plaintiff, and that such delivery, taken in connection with the receipt and retention by the defendant of the premium, was a waiver of the condition that the bond should be signed by the employee. In support of this contention the plaintiff cites *Billings v. German Ins. Co.*, 34 Neb. 502; *Burlington Voluntary Relief Department v. White*, 41 Neb. 547; *German-American Ins. Co. v. Hart*, 43 Neb. 441; *German Insurance & Savings Institutions v. Kline*, 44 Neb. 395; *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537. These cases are all insurance cases, and the rule underlying them and which is invoked in the present case is that, where an insurer is informed of defects in the

contract of insurance which would avoid the policy but thereafter continues to treat it as binding and thereby induces the insured to act in the belief that it is binding, it will be held to be a waiver of such defects. This rule is founded on the doctrine of estoppel and its application is by no means limited to insurance cases. The same principle underlies the rule that a bond, perfect on its face, apparently duly executed by all whose names appear therein and actually delivered to the principal without stipulation, reservation or condition, can not be avoided by the sureties on the ground that they signed it on the condition that it should not be delivered unless executed by other persons who did not execute it, when it appears that the obligee had no notice of such condition and that he had been induced, on the faith of such bond, to act to his prejudice. A surety who signs a note upon an agreement with the maker that it shall not be delivered to the payer until signed by other sureties can not plead, against an innocent payer without notice of the agreement, the fraud of the maker in delivering it without the additional sureties. It will be observed that one of the essential elements of the rule, whether applied to a policy of insurance, a bond or commercial paper, is a lack of knowledge on the part of the person for whom the indemnity was intended of the defects in the contract. The importance of this element will be better understood in the light of other rules of the law of suretyship, one of which is that, if the surety signs an obligation in the body of which another is also named as surety, on the condition that he shall not be bound unless such other also sign, and delivers the bond to the principal who delivers it to the obligee without complying with the condition, the surety is not bound. Another is that, if the instrument in its body purports to be signed by the principal but is not so signed, this is sufficient notice to the obligee that it is imperfect, and the sureties may show as defense that they signed on condition that the principal should also sign. 2 Brandt, Suretyship and Guaranty, secs. 408, 409, 411. The importance

of this element of the rule is further shown by the following cases: *Nash v. Baker,* 40 Neb. 294; *Brant v. Virginia Coal & Iron Co.,* 93 U. S. 326; *Pettit v. Johnson,* 15 Ark. 55; *Huse v. Den,* 85 Cal. 390; *Rockwell v. Coffey,* 20 Colo. 397; *Carroll v. Turner,* 54 Ga. 177; *Holcomb v. Boynton,* 151 Ill. 294; *Wolfe v. Sullivan,* 133 Ind. 331; *Clark v. Coolidge,* 8 Kan. 189; *Mountain Lake Park Ass'n v. Shartzer,* 83 Md. 10; *Norman v. Eckern,* 60 Minn. 531; *Blodgett v. Perry,* 97 Mo. 263.

There is a total lack of evidence in this case that the defendant had knowledge that the employee had failed to sign the bond. The plaintiff contends that knowledge of that fact is to be imputed to the defendant because its agents delivered the bond to the employee without requesting him to sign it, and he was thereby made the agent of the defendant to deliver the bond to the plaintiff. We do not think the transaction will admit of that construction. It is true a contract of this character is a form of insurance, as was held in *People v. Rose,* 174 Ill. 310; *People v. Fidelity & Casualty Co.,* 153 Ill. 25; *Shakman v. United States Credit System Co.,* 92 Wis. 366; *Robertson & Sons v. United States Credit System Co.,* 57 N. J. Law, 12. But it is something more than a contract of insurance. A contract of insurance is usually based on the application of the insured who pays the premium, and is between him and the insurer alone. The bond in suit was issued on the application of the employee who paid the premium, and, as drawn, contemplates not only a contract of indemnity between the plaintiff and the defendant but also a contract between the defendant and the employee. By the express terms of the instrument the validity of the defendant's undertaking to the plaintiff is made to depend on the formal execution of the instrument by the employee also. When the defendant delivered the bond to the employee, duly signed and completed so far as it was then in its power to complete it, the obligation of the defendant to the employee to furnish him the bond in consideration of the premium paid was fully discharged. By the delivery of the bond to

the employee the defendant did not make him its agent with authority to change the terms of the bond, or for the delivery of the bond in its then condition to the plaintiff, but merely gave him what he had bought and paid for, with the authority to make it effective by the addition thereto of his signature and its delivery to the plaintiff. Such authority was limited by the express provisions of the instrument itself, and the instrument therefore carried with it notice to the plaintiff of such limitation. When it was tendered to the plaintiff it showed on its face that it was incomplete and not a binding contract. That he omitted to read it and for that reason failed to discover its defects does not relieve him from the consequence of such defects. To hold otherwise would be to place a premium on wilful ignorance. Much stress is laid on the fact that the defendant retained the premium. It is argued that the defendant thereby waived the signature of the employee to the bond. The premium was paid by the employee, and in consideration thereof the bond was delivered to him as completely executed as it was within the power of the defendant to execute it. The fact that the employee did not see fit to sign the bond and thereby make it effective would not, of itself, entitle him to a return of the premium. To hold otherwise would be to say that a party to a contract, upon changing his mind, is entitled to a return of the consideration paid by him. Besides, there is no evidence tending to charge the defendant with knowledge of the failure of the employee to sign the bond. In the absence of such knowledge there could be no waiver, because the term waiver implies knowledge of the thing waived on the part of the person bound by the waiver. *Hoxie v. Home Ins. Co.,* 32 Conn. 21, 85 Am. Dec. 240; *Shaw v. Spencer,* 100 Mass. 382, 97 Am. Dec. 107; *Stewart v. Crosby,* 50 Me. 130; *Dawson v. Shillock,* 29 Minn. 189. The court should have directed a verdict for the defendant. What has been said seems to dispose of this case, but it may not be out of place to notice some other questions raised. It is conceded that the statements made by the

plaintiff in support of the employee's application for the bond are in the nature of warranties, and that a breach of any of such warranties would defeat a recovery on the bond. See *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427, and cases cited. One of such warranties is that the employee should not be authorized to sign checks on behalf of the plaintiff. There is evidence at least tending to show that the employee had such authority, and the defendant tendered the following instruction based on such evidence:

"You are instructed that the statements made by the plaintiff to the defendant on May 28, 1900, as a basis for the issuing of this bond amount to warranties. If you find from the evidence that the employee Kelsey was authorized to sign checks on behalf of the plaintiff, said authorization would be a breach of the warranties made by plaintiff and he could not recover on this bond."

The court refused to give the instruction, and its refusal is now assigned as error. The plaintiff insists that the statements of the plaintiff show that the employee had authority to draw checks on the bank for remittance to him, and that the instruction is therefore too broad. We are unable to find anything in the plaintiff's statements that shows that the employee was to have authority to draw checks for any purpose. One of the statements is to the effect that the employee would be allowed to indorse checks drawn to the plaintiff's order, "only for remittance" to the latter. But when it comes to the specific question, whether the employee would be authorized to sign checks in the name of the plaintiff, the answer is an emphatic negative. But the plaintiff contends that the defendant must have known from the statements, taken together, that the employee was authorized to sign checks in behalf of the plaintiff for remittance to him, because they show that the funds were to be deposited in a bank by the employee, who was required to make remittances thereof from time to time to the plaintiff. We are unable to adopt that view. The authority to sign checks on behalf of the plaintiff, for any purpose, would be almost if not quite equiva-

lent, in the hands of a dishonest person, to authority to sign checks for all purposes, and would materially increase the risk the defendant intended to assume, and we do not think it can reasonably be inferred from the statements that the defendant understood that such authority was included.

It may be true, as plaintiff claims, that the parties must have contemplated that the remittances should be made by draft, and that the bank would issue such draft only on a check drawn against the plaintiff's account. But it does not follow that it was contemplated that this particular employee should draw the checks. The plaintiff may have had, or the defendant may have supposed he had, some other person in his employ whom he was willing to trust with authority to draw checks in his name, or that some other plan would be adopted which would not require this particular employee to sign the plaintiff's name. The instruction, in our judgment, should have been given.

A number of other questions are discussed but it does not seem that they are necessary to a disposition of the case either in this court or the court below and, for that reason, they will not be considered.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings acording to law.

BARNES and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

EDGAR D. PRESTON V. MABEL A. STOVER, ADMINISTRATRIX OF THE ESTATE OF GEORGE W. STOVER, DECEASED.

FILED DECEMBER 16, 1903. No. 13,212.

1. **Directing Verdict:** REVIEW. In reviewing the action of a trial court in directing a verdict, this court will regard as conclusively established every fact favorable to the unsuccessful party which the evidence proves or tends to establish.
2. **Statutes:** AMENDMENT. Under the old as well as under the present constitution, where the title to a bill is to amend a particular section of an act, no amendment is permissible which is not germane to the subject matter of the original section.
3. **Unconstitutional Law.** Previous to the act of 1903, section 1021 of the code, as amended by an act of 1875, p. 43, entitled "An act to amend section 1021 of the code of civil procedure, Revised Statutes, 1873," was obnoxious to the foregoing rule, and unconstitutional.
4. **Lease:** ACTION. Where a lease provides, in effect, that, upon failure of the lessee to keep and perform certain covenants and agreements therein contained the lessor may terminate the lease and recover possession by action of forcible entry and detainer, such action may be maintained upon a breach of such covenants and agreements by the lessee, although the lease has not terminated by efflux of time.

ERROR to the district court for Hamilton county: SAMUEL H. SORNBORGER, JUDGE. *Reversed.*

E. J. Hainer and J. H. Smith, for plaintiff in error.

John H. Whitmore, contra.

ALBERT, C.

The record in this case is of an action of forcible entry and detainer brought in the county court on the 4th day of December, 1902, and thence carried on appeal to the district court. At the close of the plaintiff's evidence in the district court, the court directed a verdict for the defendant, and the plaintiff brings the record here for review.

It is a familiar rule that, in reviewing the action of a

trial court in directing a verdict, the reviewing court will regard as conclusively established every fact favorable to the unsuccessful party which the evidence proves or tends to establish. Applying that rule, it is conclusively established in this case that at the commencement of this action the plaintiff was the owner in fee of the premises, and that the defendant had entered upon and retained possession thereof under a written lease between him and the plaintiff, executed on the 13th day of February, 1902, whereby the premises were let to the defendant for the term of one year from the first day of March, following the execution of the lease. Among other terms and conditions of the lease are these:

"Said second party shall take good care of all buildings, fences, structures, trees of every kind, shrubbery, or other improvements upon said premises and shall keep the ground about the same free from weeds. The said party of the second part further covenants with the said party of the first part that, at the expiration of the time menioned in this lease, peaceable possession of the said premises shall be given to the party of the first part in as good condition as they now are, the usual wear, inevitable accidents, and loss by fire excepted; and that upon the nonpayment of the whole or any portion of the said rent at the time when the same is above promised to be paid, or a failure to perform any other agreement herein contained on his part to be done or performed, then the said party of the first part may, at his election, either distrain for said rent due, or declare this lease at an end and recover possession as if the same was held by forcible detainer, the said party of the second part hereby waiving any notice of such election or any demand for the possession of said premises."

"And it is further covenanted and agreed between the parties aforesaid, that the said second party is to pay cash rent for the use of pasture land and hog yard, at the rate of $2.50 an acre, payable on the 1st day of November, and it is expressly understood and agreed that this lease

operates as a lien upon said crops for the payment of said cash rent as above described."

It is also established that on the first or second day of November, 1902, the plaintiff demanded payment of the cash rent reserved in the lease, that the plaintiff failed to pay the same, and that the same was unpaid at the time the case was tried in the district court; that without the consent of the plaintiff, during the defendant's occupancy under the lease, he had cut down some forty trees which had been planted on the premises and were growing there, and burned them for fuel; and that due notice to vacate the premises had been given the defendant more than three days before the commencement of this action. Section 1021 of the code, as it stood when this action was brought, was as follows:

"A tenant shall be deemed to be holding over his term whenever he has failed, neglected, or refused to pay the rent, or any part thereof, when the same was due, and judgments, either before the justice or in the district court, under this chapter, shall not be a bar to any after action brought by either party."

That section was passed in 1875 as amendatory of section 1021 of the Revised Statutes, which was as follows:

"Judgments, either before the justice or in the district court, under this chapter shall not be a bar to any after action brought by either party."

The amendatory act was passed under the old constitution. Section 19, article II, of which provided:

"No bill shall contain more than one subject, which shall be clearly expressed in its title; no law shall be revived or amended, unless the new act contain the entire act revived, and the sections amended; and the section or sections so amended shall be repealed."

This provision, so far as it bears on the present case, is substantially the same as the constitutional provision now in force relating to the same subject. In construing the latter, this court has frequently held that, where the title to a bill is to amend a particular section, no amendment is

permissible which is not germane to the subject matter of the section sought to be amended. *Trumble v. Trumble,* 37 Neb. 340; *State v. Tibbets,* 52 Neb. 228; *Armstrong v. Mayer,* 60 Neb. 423. A comparison of the amendatory act with that sought to be amended clearly shows that the former is obnoxious to the foregoing rule of construction, and is therefore unconstitutional and void. This view of the amendatory act has been entertained by the profession for some time, and in consequence an act covering the same subject was passed, with an emergency clause, at the last session of the legislature. Sec. 1020 of the code. From the foregoing it follows that, when this action was commenced, there was no statute in force whereby "a tenant should be deemed to be holding over his term when he failed, neglected or refused to pay the rent, or any part thereof, when the same became due."

This brings us to the question, whether, upon a breach of the covenant to pay cash rent at the stipulated time, and that against waste, the plaintiff had a right to terminate the lease and maintain an action of forcible entry and detainer to recover possession of the premises. There are authorities on both sides of this question. 18 Am. & Eng. Ency. Law (2d ed.), 442 and notes. But an examination of those authorities will disclose that they are based on laws which differ materially from our own, consequently they are of little aid in the present inquiry. In *Stevenson v. Brodahl,* 49 Neb. 703, this court held that a provision in the lease, that the lessee should give a chattel mortgage on the crop each year to secure a note given for the rent, though supplemented with another stipulation that the nonperformance of any of the terms of the lease would, at the election of the lessor, end the lease, did not entitle the lessor to maintain the action of forcible entry and detainer. But in that case the provision in the lease in regard to the chattel mortgage was that it was to be given each year to secure the note due for that year. The breach relied on for maintaining the action was that no mortgage had been made on the crop of 1891, though de-

manded about October 31 of that year, to secure the note falling due February 1, 1892. The decision as to that point is placed on the ground that there is nothing in the lease which required the lessee to give a chattel mortgage at the particular time it was demanded, the rent for 1891 having been paid and that for 1892 not being due. The implication is that, if a mortgage had been demanded at the time the lessee was required by the terms of the lease to give it, and he had refused to give it, the action could have been maintained. But, while such is the implication, the question was not before the court, nor are we aware of any case in which it has been directly presented to this court, consequently we treat it as an open one. We believe it should be answered in the affirmative. We think that parties should be permitted to make their own contracts, and that so long as such contracts are lawful, and not in violation of some established rule of public policy, they should be enforced. The lease in this case was for one year, but at the same time it was stipulated that, upon the failure of the lessee to keep and perform certain covenants of the lease on his part to be kept and performed, the lessor should have the right, at his option, to terminate it. We can see no good reason why this part of the contract should not be enforced. It is one that can work no hardship on the tenant if he performs his part of the contract. If he elects not to do so, we are unable to see that he has any just ground for complaint if the lessor accepts the alternative offered by the lease.

Proceedings in forcible entry and detainer lie in all cases against tenants holding over their terms. Sec. 1020 of the code. On the breach of the covenants as to the payment of rent and against waste, the term in this instance terminated upon the election of the lessor to terminate it. Thereafter the tenant was holding over his term, and the action would lie. The plaintiff therefore made a *prima facie* case, and the direction of a verdict against him was error.

It is recommended that the judgment of the district

court be reversed and the cause remanded for further proceedings according to law.

BARNES and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

NELS I. NIELSEN V. CEDAR COUNTY.

FILED DECEMBER 16, 1903. No. 13,237.

1. **Rulings:** REVIEW. Certain rulings of the trial court rejecting offered testimony held to be reversible error.
2. **Witness:** IMPEACHMENT: INSTRUCTION. Where an effort has been made to impeach the plaintiff as a witness by showing that he has made statements elsewhere at variance with those made on the witness stand, and the jury are told: "You are instructed that if a witness in the case has at another time and place made statements, material to the issue in this case, at variance with his testimony while on the witness stand, before you, then you are at liberty to disregard the whole of such witness's testimony, except in so far as he is corroborated by other credible evidence," a verdict against the plaintiff will be set aside.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Reversed.*

James C. Robinson, for plaintiff in error.

R. J. Millard and *F. E. Snyder, contra.*

GLANVILLE, C.

This is a proceeding in error seeking to reverse a judgment of the district court for Cedar county, dismissing plaintiff's action with costs against him. The parties stand here in the same relation as below, and will be designated as plaintiff and defendant. Plaintiff com-

menced an action in the county court of Cedar county which, after judgment, was taken to the district court on appeal, where a verdict was returned against him. The action was for damages alleged to have been occasioned by a defective culvert and fill, constituting a part of the public highway in that county, the defect causing plaintiff's buggy, in which himself and wife were riding, to be overturned while he was attempting to drive across the culvert in the main traveled road in the night-time. He claimed damages for injuries to his property, cost of medical attendance for his wife, and for loss of his wife's services. The action was brought within thirty days under section 117, chapter 78, Compiled Statutes (Annotated Statutes, 6135). Cedar county is not under township organization. The answer was a general denial.

It is urged that there is error in the rulings of the court rejecting certain offered testimony, and in certain instructions given to the jury.

The evidence shows that plaintiff's wife was injured by the fall when the buggy was overturned at the time and place stated in the petition; that plaintiff consulted a practicing physician and obtained medicine. The doctor visited Mrs. Nielsen, and was called upon by her, and he treated her for the injury and result of the injury. The error assigned is that testimony of the physician as to the value and amount of the services so rendered, offered by plaintiff, was ruled out. There is prejudicial error in this regard shown by the record, but, as the judgment must be reversed on other grounds, we will pass this assignment without further discussion. The error will undoubtedly be guarded against at another trial without more specific criticisms now.

The first instruction herein complained of, which was duly excepted to, is one which gave the jury a copy of section 117, chapter 78, Compiled Statutes (Annotated Statutes, 6135). This section forms the basis of plaintiff's right to recover for the damage alleged and, while parts of it have no application to the case on trial, we are disposed

to think there is no prejudicial error in giving the section in full.

Instruction numbered 5, assigned as error, defines the term "public highway" in accordance with section 3 of the same chapter. The culvert and fill where this injury occurred were, by the parties during the trial, stipulated to be a part of the public highway. The definition taken from the statute, though correct, was unnecessary. While we would not reverse this case because of the giving of this instruction alone, yet, when the jury had been told that the answer was a general denial, and that the burden was upon plaintiff to prove every material allegation contained in his petition, without any attempt to instruct them as to what allegations were material, this instruction might easily do harm. The plaintiff did not prove the culvert in question to be a part of such public highway, because of a stipulation to that effect. This instruction was calculated to lead the jury to suppose that such fact was still in issue, there being otherwise no possible need therefor.

A most serious complaint is made against instruction numbered 10, which reads as follows:

"You are instructed that if a witness in the case has at another time and place made statements, material to the issue in this case, at variance with his testimony while on the witness stand, before you, then you are at liberty to disregard the whole of such witness's testimony, except in so far as he is corroborated by other credible evidence."

The only fact appearing from the bill of exceptions upon which any instruction of this nature could be proper is that the plaintiff's testimony before the jury at this trial was sought to be discredited by testimony tending to prove that, upon presenting his claim to the county commissioners and also upon the trial of the cause in the county court, he had made statements which showed that he knew of the bad condition of the culvert in question, and had even directly admitted that he knew it was in a dangerous condition before he attempted to cross it on the night in question, and that such statements and admissions were at

variance with his testimony before the district court. We are of the impression that the preponderance of the testimony in this regard shows that his statements before the commissioners and before the county court were consistent with his last testimony, but there is some direct and positive evidence to the contrary. This instruction, therefore, had direct reference to plaintiff as a witness and to his testimony. That it is a gross misstatement of the law, and prejudicial to the plaintiff is too apparent to need argument. It allowed the jury to reject the plaintiff's entire testimony without even finding any of it false, when, before they may do so, they must find some of it false, and knowingly and wilfully false. In *Omaha & R. V. R. Co. v. Krayenbuhl,* 48 Neb. 553, it is held:

"The maxim, *falsus in uno, falsus in omnibus,* applies only where a witness has knowingly and wilfully testified falsely as to a matter of fact."

Defendant contends that the error is cured by instruction numbered 12, which reads:

"The jury are instructed that, in determining the question of fact in this case, they should consider the entire evidence introduced by the respective parties; but the jury are at liberty to disregard the statements of all such witnesses, if any there be, as have been successfully impeached, either by direct contradiction or proof of having made different statements at different times, or by proof of bad reputation for truth and veracity in the neighborhood in which they lived, except in so far as such witnesses have been corroborated by other credible evidence or by facts and circumstances proved on the trial. Still it is only in a case where it is palpable that a witness has intentionally and deliberately testified falsely as to some material matter, and is not corroborated by other evidence, that a jury is warranted in disregarding his or her entire testimony."

This instruction was also excepted to by plaintiff, and is assigned as error. The positive statement of bad law contained in instruction numbered 10 can not be cured by inconsistent or contradictory statements in other instruc-

tions. Such contradiction or inconsistency leaves the entire instructions uncertain, confusing and misleading, and liable to do all the damage that could be done by the positive bad statements standing alone. Instruction numbered 12 is also inconsistent with itself and is liable to confuse and mislead.

The record shows prejudicial error in the rejection of testimony and giving instructions, as above pointed out.

We therefore recommend that the judgment of the district court be reversed and a new trial awarded, and that the cause be remanded for further proceedings.

BARNES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, a new trial awarded, and the cause is remanded for further proceedings.

REVERSED.

CHARLES SPIES ET AL. V. PAUL F. STEIN.

FILED DECEMBER 16, 1903. No. 13,188.

1. **Principal and Agent:** UNAUTHORIZED ACTS OF AGENTS. The unauthorized acts and representations of an agent, not within the apparent scope of his authority, and in the absence of ratification by the principal, either actual or constructive, can not bind the principal.
2. **Replevin:** AGENCY: EVIDENCE. An agent was sent by his principal in possession of certain goods, to a distant city, where he falsely represented himself as the general agent of another principal, and a creditor of the latter attached the goods in the agent's possession. In an action by the owner to recover the possession of the goods from the constable who held them under the writ of attachment, in the absence of a showing that the owner knew of or acquiesced in the false representations of the agent, *held*, that such representations could not be shown to disprove the plaintiff's evidence that he owned and was entitled to the possession of the goods.

ERROR to the district court for Douglas county: WILLARD W. SLABAUGH, JUDGE. *Reversed.*

Stillman & Price, for plaintiff in error.

W. A. Foster, contra.

KIRKPATRICK, C.

Plaintiffs in error, a copartnership (hereinafter plaintiff), instituted a replevin action in the district court for Douglas county against Paul F. Stein, a constable (hereinafter defendant), to recover possession of certain property consisting of cans of coffee held by defendant under and by virtue of a writ of attachment. The petition contained the usual averments of ownership in plaintiff and the wrongful detention by defendant. The answer filed by defendant was a general denial. There was a trial to a jury, resulting in a verdict and judgment for defendant for $104.07; the value of the goods taken by plaintiff under its writ and retained by it, with interest and costs. The case is presented to this court by plaintiff, who alleges error in the proceedings in the lower court: First, in the admission of incompetent evidence; second, in the giving of oral instructions to the jury; third, in the submission of the case to the jury, the evidence being insufficient to sustain a verdict and judgment for defendant.

By the record, it is shown that one J. W. Johnson, some time prior to the commencement of this action, opened up offices in the Bee building in the city of Omaha, representing himself as the general agent of the C. F. Blanke Tea & Coffee Company of St. Louis, Missouri. He had in his possession the cans of coffee which are the property involved in this action. He engaged actively in the advertisement of his goods and in his business of securing orders for coffee; and, in the course of his business conduct, contracted many obligations in the name of the C. F. Blanke Tea & Coffee Company, as a result of which an attachment was sued out by the Rees Printing Company of Omaha and, under this writ, the defendant seized the goods in controversy and removed them to a warehouse for storage. Another writ by another creditor was also

levied upon the same goods. These attachments were subsequently released upon the filing of bonds by the C. F. Blanke Tea & Coffee Company. By the testimony in this record, an explanation of the release of these attachments upon bonds given in the name of the Blanke company is given. That explanation is that the Blanke company disavowed all connection with, or responsibility for, or knowledge of the acts of Johnson, and disclaimed any interest in or title to the goods levied upon; but that those goods had been purchased of the Blanke company by Charles Spies & Company, plaintiff, and had been at the time of the levy of the attachments, and prior thereto, in possession of Johnson as sample goods, to be used by him for the purpose of soliciting orders for plaintiff. When the goods were levied upon for claims against the Blanke company, that company authorized Charles Spies & Company to appear in the cases, using their own discretion as to whether to defend in the name of the Blanke company or otherwise. At all events, it seems that after the release of the attachments, the goods were at the disposal of Charles Spies & Company, remaining in the warehouse, where they had been taken by the constable.

It is shown by the evidence that Charles Spies & Company, plaintiff, is a copartnership, located at Kansas City, Missouri, and engaged in the wholesale trade in tea and coffee. They have a contract with the Blanke company, by which the latter is to sell tea and coffee to plaintiff at a certain price, and by which the Blanke company is not to sell any of its teas or coffees in a limited territory, including Nebraska. Pursuant to this arrangement, plaintiff sent Johnson to Omaha to solicit orders for tea and coffee, his compensation to be a commission payable on the basis of accepted orders.

After the release of the two attachments in the manner heretofore indicated, the goods being in the warehouse subject, as plaintiff contends, to its disposal, defendant again seized the goods under a writ of attachment sued out by the Orchard & Wilhelm Carpet Company of Omaha,

on a claim against the C. F. Blanke Tea & Coffee Company. To recover the goods held under this last attachment, plaintiff instituted this action.

It is elementary that, in replevin actions, the burden of showing that the right of possession at the commencement of the action was in the plaintiff is on the plaintiff. *Moore & Cozine v. Herron*, 17 Neb. 697. The jury were properly instructed that the sole question for them to pass upon was whether or not at the commencement of the action the plaintiff was the owner and entitled to the possession of the property. Unless modified by testimony hereinafter considered, admitted over objections of plaintiff, the proof is very clear that the property in controversy belonged to plaintiff, who originally purchased it from the Blanke company, who, however, never owned it after it was placed in the possession of Johnson. The property was placed in the possession of Johnson to be used by him as samples in his work of soliciting orders for coffee sold by plaintiff. If this testimony is uncontradicted by competent testimony, it would follow that the judgment should have gone for plaintiff.

We now come to a consideration of that part of the testimony in the record upon which it is sought to sustain the judgment for defendant. It relates wholly to acts and declarations of Johnson, showing that he represented himself as the general agent of the C. F. Blanke Tea & Coffee Company of St. Louis. The purpose of this testimony was apparently to show that Johnson was the general agent of the C. F. Blanke Tea & Coffee Company, upon which to base an inference that the coffee in his possession was the property of the Blanke company and, therefore, not the property of plaintiff. This testimony, plaintiff contends, was inadmissible under the rule that acts and declarations of one claiming to be an agent, which are not shown to have been known to or ratified by the principal, can not be received in evidence against the latter. *Burke v. Frye*, 44 Neb. 223. It is further contended that, if this evidence was introduced to prove an estoppel against plaintiff to deny

that the property was that of the Blanke company, it was inadmissible for failure to show knowledge on the part of the principal of the alleged acts of the agent, and an opportunity to disavow such acts, as, in the absence of such showing, ratification will not be presumed. *Columbia Nat. Bank v. Rice & Co.,* 48 Neb. 428. On behalf of defendant it is contended that the testimony was properly admitted, as being statements or declarations of a person in possession of personal property, explanatory of such possession. *Nodle v. Hawthorn,* 107 Ia. 380; *Altschuler v. Coburn,* 38 Neb. 881.

To affirm the judgment upon the evidence in the record as to declarations of Johnson would be tantamount to saying that, where an agent is sent by his principal to a distant city in possession of property to be used for a specific purpose, such agent may represent himself as the agent of a wholly different principal, whose creditors may seize and hold the property against the real owner, notwithstanding the latter may have promptly disavowed the unauthorized representations of his agent. To so hold would be to contravene the rule that the unauthorized acts of an agent, not within the apparent scope of his authority, and in the absence of ratification by the principal, either actual or constructive, can not bind the principal. If there were evidence in this record justifying an inference that there had been an arrangement between plaintiff and Johnson, by which the latter should hold himself out as the agent of another than plaintiff, for the purpose of preventing creditors of plaintiff from seizing the property in Johnson's possession, or for any other purpose, the evidence admitted would have been admissible. But the case made is without any such evidence. The evidence relied upon to sustain the judgment is that Johnson represented himself as the general agent of the Blanke company. The property was taken under an attachment sued out by a creditor of the latter company. We do not think that evidence of the declarations of Johnson, that he was the general agent of the attachment defendant, can justify the seizure of prop-

erty otherwise overwhelmingly shown to be that of a stranger to the attachment proceedings, in the absence of any showing that the claimant to the property knew and acquiesced in the false representations of the agent. If such were the law, it would hold out a strong temptation to dishonest creditors, whose debtors lived in distant places, to induce agents holding in their possession property of others to represent themselves as the agents of such debtors, in order to supply such creditors with the basis for an attachment of the property.

It is conceded in brief of defendant that the evidence now under consideration would not have been competent in the attachment suit against the Blanke company for the purpose of proving an indebtedness against that company, but inasmuch as the sole issue in this case is, whether the plaintiff is the owner and entitled to the possession of the property, evidence as to the declarations of one in possession of the property is admissible, not as declarations of an agent offered for the purpose of binding the principal, but as declarations explanatory of the possession, whether he held in his own exclusive right, or as tenant of another, or in the capacity of partner, trustee, agent, etc. There is an absence of harmony in the decisions wherein this rule has been applied, but we are confident that none can be found which would furnish authority for the reception of this testimony, or for holding it sufficient to sustain the judgment in this case. But two cases are cited and relied on by defendant.

In *Nodle v. Hawthorn,* 107 Ia. 380, an execution was levied upon property in the possession of one Ainsworth, the property consisting of the products of a mill being run by Ainsworth. Nodle brought an action of replevin to recover this property from the sheriff. Declarations of Ainsworth were admitted to the effect that he had leased the mill from Nodle, that he was running it on his own account, and that the property was his. Nodle had caused to be printed on the sacks in which the meal seized was contained, "Manufactured by A. D. Ainsworth, Ute, Iowa,"

and he had said that he had nothing to do with the mill, that Ainsworth was running it. This evidence was held sufficient to sustain a judgment for defendant, although there was in evidence a written contract between Nodle and Ainsworth, employing the latter to run the mill for Nodle. The reason and justice of admitting evidence of the declarations of Ainsworth explanatory of his possession of the property, in an action against the sheriff holding the property under an execution against him, showing that he held the property as his own, with the knowledge and acquiescence of the plaintiff in the replevin action, are accordingly apparent. There is no similarity in the case cited to the case at bar.

In the other case, *Altschuler v. Coburn,* 38 Neb. 881, Altschuler brought an action of replevin to recover property taken by the sheriff from the possession of McGrath under an execution against Freyhan. Evidence on behalf of the defendant was admitted as to declarations made by McGrath, while in possession of the property, to the effect that Freyhan was the owner, but that McGrath was invested with the title because Freyhan was involved in debt. The admission of the testimony as to McGrath's declarations was sustained by this court, upon the ground that a sufficient foundation therefor had been laid by evidence in support of the theory of the defendant that there was a conspiracy between the plaintiff and Freyhan and McGrath, the object of which was to defraud the creditors of Freyhan. The admission of the testimony was by this court sustained expressly upon the ground indicated. But no element of fraud or conspiracy enters in this case. The unauthorized declarations of Johnson, not shown to have been brought to the knowledge of plaintiff, nor ratified by it, and which were repudiated by it upon discovery, were not admissible against plaintiff for the purpose of showing that it was not the owner of the property in controversy. The judgment is accordingly wanting in sufficient competent evidence to support it, and it is therefore

recommended that the same be reversed and the cause remanded.

DUFFIE, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

BANKING HOUSE OF A. CASTETTER V. BERTHA M. DUKES ET AL.

FILED DECEMBER 16, 1903. No. 13,197.

1. Judgment: PRESUMPTIONS: COLLATERAL ATTACK. All presumptions are in favor of the regularity of the proceedings of courts of record, when collaterally assailed, and even though the jurisdiction of the court was irregularly or erroneously exercised, the judgment will be final as between the parties and their privies.

2. ———: JURISDICTION: RECORD. Where the steps by which a court of general jurisdiction is supposed to have acquired jurisdiction are all shown by the record, and it appears from an examination of the face of the record, without recourse to extraneous matter, that the court acted without jurisdiction, then the judgment is a mere nullity and may be attacked collaterally.

ERROR to the district court for Washington county: GEORGE A. DAY, JUDGE. *Reversed.*

Albert W. Jefferis and *Frank S. Howell,* for plaintiff in error.

Lysle I. Abbott, contra.

LETTON, C.

This action was brought by Bertha M. Dukes, formerly Bertha M. Stewart, against the defendants Stockton and Cook and the Banking House of A. Castetter, to recover rents for the undivided one-half of lots 1 and 2, in block 46, in the town of Blair. She states the lots were at one

time the property of her former husband, Edgar A. Stewart, and were decreed to her as alimony in an action for divorce brought by her in said court against him. The defendants Stockton and Cook answered, admitting their liability to pay rent for the premises and their readiness to pay the same, but allege there are diverse claimants for the same, and asking the court to adjudge to whom the rent belongs. The Banking House of A. Castetter answered, setting up title in Edgar A. Stewart, and an assignment of the rent to it by him, and further asserting that the decree in which the property is sought to be set apart to plaintiff as alimony was rendered without jurisdiction and is void, and by cross-petition asks judgment for the rent against Stockton and Cook. The court found for the plaintiff and against defendants Stockton and Cooke, and dismissed the answer and cross-petition of the bank.

The decision of the case rests upon the question, whether or not the district court for Washington county had jurisdiction in a certain action for divorce to render a decree setting over in fee to the plaintiff therein certain real estate as alimony. The petition in the divorce case contained the following allegations relating to the real estate of the defendant and no others:

"Plaintiff further alleges that the defendant is seized in fee simple of lot 17, in block 57, in the city of Blair, Nebraska, on which is situated a dwelling, and other buildings, in which this plaintiff now resides, and has for many years resided, with the defendant, and it is their homestead, and has been such homestead for years, under the laws of the state of Nebraska. The defendant is also seized in fee simple of the undivided one half (½) of lots 1 and 2, in block 46, in the city of Blair aforesaid, and also owns ten acres well improved adjoining the city of Blair. And plaintiff further alleges that the defendant is heavily in debt, as affiant has been informed and believes to the full value of said property other than the homestead upon which plaintiff resides."

Personal service was made upon the defendant, and default was made by him. The prayer and the decree, so far as concerned the real estate, were as follows:

"And the court further finds that at the time of the commencement of this action the defendant was seized in fee simple of lot 17, in block 57, in the city of Blair, Nebraska, and also the undivided one-half of lots 1 and 2, in block 46, including the buildings thereon and their appurtenances, also the east ½ of the west ½ of the southwest ¼ of the northwest ¼ of section 13, township 18 north of range 11 east, in Washington county, Nebraska. And the court further finds that the plaintiff now resides upon lot 17, in block 57, aforesaid, and that the same is her homestead. And the court further finds that the defendant is not a suitable person to have the care, custody and education of their said daughter and that the plaintiff is in all respects suitable and competent to have such care, nurture, education and custody of such minor child. It is therefore considered, adjudged and decreed by the court that the bonds of matrimony heretofore existing between plaintiff and defendant be wholly canceled, annulled and set at naught and the plaintiff be and she is hereby divorced from the defendant, that the plaintiff have the care, custody and education of their minor child, to wit, Bessie Stewart, that all the property mentioned in this decree be decreed to this plaintiff for the support and maintenance of plaintiff and her said child, and that a copy of this decree may be spread upon the records of Washington county, Nebraska, and the same when so spread shall operate as a conveyance of all of said property from the defendant to the plaintiff, and that all personal property now in the possession of the plaintiff, such as household furniture and all other articles, be decreed to plaintiff."

Mrs. Stewart afterwards married one Dukes. The controversy in this case is over the right to collect the rents of the undivided one-half of lots 1 and 2; this, of course, depending upon the question as to whether or not the title

of Edgar A. Stewart was devested by the decree in the divorce proceeding and passed thereby to Bertha M. Stewart, now Dukes.

This is a collateral attack upon the judgment of a court of general jurisdiction. The rule is elementary that all presumptions are in favor of the regularity of the proceedings of courts of record, when collaterally assailed, and, even though the jurisdiction of the court was irregularly or erroneously exercised, the judgment will be final as between the parties and their privies. *Hilton v. Bachman,* 24 Neb. 490; *Chase v. Miles,* 43 Neb. 686; *Stenberg v. State,* 48 Neb. 299, 316. Unless the district court for Washington county was absolutely without jurisdiction to set the property, the title to which is in controversy, over to Mrs. Stewart, as alimony, the decree must stand as final and Mrs. Stewart, now Dukes, be entitled to recover the rent of the same from the defendants Stockton and Cook.

To what extent may the jurisdiction of a court of general jurisdiction be inquired into collaterally? We think that the true rule is laid down by a majority of the cases and adopted and approved by this court, namely, that, where the steps by which the court is supposed to have acquired jurisdiction *are all shown by the record,* and it appears from an examination of *the face of the record,* without recourse to extraneous matter, that the court acted without jurisdiction, then the judgment is a mere nullity and may be attacked collaterally. Black, Judgments, sec. 218; *Chicago, B. & Q. R. Co. v. Hitchcock County,* 60 Neb. 722; *Fogg v. Ellis,* 61 Neb. 829. The record must recite all the jurisdictional facts for, if silent, jurisdiction is presumed, and the facts recited must be insufficient to confer jurisdiction. In this case, as shown by the face of the record, the court acquired jurisdiction of the defendant by personal service of process and the subject matter of divorce and alimony was within its jurisdiction.

It has often been somewhat loosely stated that, if a

court had jurisdiction of the person and of the subject matter, its judgments were not subject to collateral attack. While in a general sense this is true, there is a qualifying principle that is often overlooked, which is, that the court must also have jurisdiction of the particular question which it assumes to decide. Mr. Black states the rule as follows:

"In order to the validity of a judgment, the court must have jurisdiction of the persons, of the subject matter, and of the particular question which it assumes to decide. * * * It can not adjudicate upon a subject which does not fall within its province as defined or limited by law. Neither can it go beyond the issues and pass upon a matter which the parties neither submitted nor intended to submit for its determination." 1 Black, Judgments (2d ed.), sec. 215.

It is quite difficult to reconcile the cases bearing upon this subject. Some courts give a liberal construction to the rule and others are strict constructionists, and it is not seldom that the decisions of the same court are not reconcilable in principle with each other. But in this state the question seems to be foreclosed. In *State v. Haverly,* 62 Neb. 767, Judge HOLCOMB says (p. 781):

"It is fundamental that a judgment or final order made in the trial of a case must be founded upon and within the issues as made by the pleadings."

Says SULLIVAN, J., in *State v. Dickinson,* 59 Neb. 753:

"It is a rule everywhere recognized by courts administering our system of jurisprudence that the relief awarded by a court must respond to the issues—must be within the case made by the pleadings"; citing *Kitchen Bros. Hotel Co. v. Hammond,* 30 Neb. 618; *Whitney v. Levon,* 34 Neb. 443; *Lincoln Nat. Bank v. Virgin,* 36 Neb. 735; *Rockford Watch Co. v. Manifold,* 36 Neb. 801; *Ross v. Sumner,* 57 Neb. 588. See also *Alter v. State,* 62 Neb. 239. Also in *Lincoln Nat. Bank v. Virgin,* 36 Neb. 735, the court by POST, J., say:

"This case rests upon an entirely different principle

from those cases in which the court had acquired jurisdiction over the subject of the judgment or decree. In such cases the determination of the court, however erroneous, can be called in question only by direct proceedings. We are aware that Mr. Freeman in his work on Judgments, section 135*a*, expresses a preference for the view that a judgment is erroneous merely, and not necessarily void, although not responsive to any issue of law or fact. We are, however, unable to perceive wherein a judgment entered by a court confessedly outside of the issues submitted for its determination can be said to rest upon any other or different principle than one in which the subject matter is entirely foreign to the jurisdiction conferred upon it." Citing *Spoors v. Coen,* 44 Ohio St. 497; *Sheldon's Lessee v. Newton,* 3 Ohio St. 494; *Strobe v. Downer,* 13 Wis. 11; *Straight v. Harris,* 14 Wis. 553; *Lewis v. Smith,* 9 N. Y. 502; *Williamson v. Probasco,* 8 N. J. Eq. 571; *Steele v. Palmer,* 41 Miss. 88; *Armstrong v. Barton,* 42 Miss. 506; 1 Black, Judgments (4th ed.), 183, 184; *Ex parte Lange,* 18 Wall. (U. S.) 163; *Seamster v. Blackstock,* 83 Va. 232; *Anthony v. Kasey,* 83 Va. 338; *Munday v. Vail,* 34 N. J. Law, 418.

The reasoning applies with greater force where, as in this case, the defendant makes default. The general rule is that a default is an admission of such facts only as are properly alleged in the petition or complaint. 1 Herman, Estoppel, sec. 52; *Russell v. Shurtleff,* 28 Colo. 414, 65 Pac. 27.

We conclude, therefore, that if an examination of the entire record in the divorce case shows that the attempted conveyance of the lots in question to the plaintiff therein as alimony was in excess of the jurisdiction of the district court, the decree so far is void and may be attacked collaterally.

The petition, so far as it relates to real estate, alleges that the defendant is the owner of lot 17, in block 57, in the city of Blair, that it is the family homestead. That the defendant also owned an undivided one-half of lots 1 and

2, in block 46, of the city of Blair, and also ten acres of land adjoining that city. The prayer, so far as relates to the title to real estate is "That the defendant may be enjoined from in any way or manner interfering with the possession of said homestead by the plaintiff * * * and that, upon the final hearing, she may be decreed and given, as permanent alimony, the articles of household furniture and other effects in said dwelling and also the house and lot above referred to, being lot 17, in block 57, aforesaid, free and clear of any debt owing by the said defendant." The finding and decree, so far as they relate to real estate, were as follows:

"And the court further finds that at the time of the commencement of this action the defendant was seized in fee simple of lot 17, in block 57, in the city of Blair, Nebraska, and also the undivided one-half of lots 1 and 2, in block 46, including the buildings thereon and their appurtenances, also the east ½ of the west ½ of the southwest ¼ of the northwest ¼ of section 13, township 18 north of range 11 east, in Washington county, Nebraska. And the court further finds that the plaintiff now resides upon lot 17, in block 57, aforesaid, and that the same is her homestead. * * * It is therefore considered, adjudged and decreed by the court * * * that all of the property mentioned in this decree be decreed to this plaintiff for the support and maintenance of plaintiff and her said child, and that a copy of this decree may be spread upon the records of Washington county, Nebraska, and the same when so spread shall operate as a conveyance of all of said property from the defendant to the plaintiff."

It will be seen that neither in the allegations of the petition nor in the prayer is there any lien, title or interest in the undivided one-half of lots 1 and 2, in block 46, claimed by the plaintiff. She asks specifically to have the homestead set apart to her, but seeks no action affecting the title to the other real estate except so far as a judgment for temporary alimony might affect it. She alleges the defendant is heavily in debt to the full value of "said

property other than the homestead," and she does not pray for any permanent alimony whatever. The petition does not seek to set the powers of the court in action in any respect as to any property but the homestead. Upon an inspection of the allegations of the petition, the defendant would see that the only property, the title to which was called in question, was the homestead, and would further see that no judgment for permanent alimony was prayed for.

Under this state of facts, can it be said that the court ever acquired jurisdiction to take from him the title and ownership of his property not sought to be affected by the pleadings? He has never had his day in court with reference thereto. He apparently was willing to let his wife obtain a divorce, the custody of the child and the title to the homestead and household property, but he was not advised of any intention on her part to interfere with his other property. Without placing any weight upon the fact that in divorce proceedings in this state a court has no power to set aside specific property as alimony unless, perhaps, by consent of the parties (*Segear v. Segear,* 23 Neb. 306; *Nygren v. Nygren,* 42 Neb. 408; *Leeder v. State,* 55 Neb. 133), it seems to us that the court clearly exceeded its jurisdiction in so far as it attempted to deal with the real estate in controversy. That, while it had jurisdiction of the person and the subject matter, it lacked "jurisdiction of the particular matter that it sought to decide," and that the general prayer for relief could not aid it in extending its action beyond the field covered by the allegations of the petition and the specific portions of the prayer.

To hold otherwise would be to allow a court, upon a default, to enter judgments or decrees vitally affecting the property rights of individuals without their knowledge or consent, and thus deprive them of their property without "due process of law."

We are of the opinion that, in so far as the decree in the divorce case purported to set over and convey to the plaintiff Bertha M. Stewart the title to the undivided one-

half of lots 1 and 2, in block 46, including the buildings thereon and their appurtenances, in the city of Blair, it is absolutely void, and that it in no wise affected the title thereto. This being the case, the plaintiff Bertha M. Dukes had no title to the property and no right to recover the rents. No question is made in this case as to the action of the court in decreeing the homestead to the plaintiff, and no opinion is expressed as to this.

We recommend that the judgment of the district court be reversed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

ESTATE OF ELIAS P. DEVRIES, DECEASED, V. LAURA HAWKINS, GUARDIAN OF LOIS DEVRIES, A MINOR.

FILED DECEMBER 16, 1903. No. 13,272.

1. **Parol Trust.** A trust in personal property may be created by parol.
2. **Assumpsit.** Wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit.
3. **Trust: ACTION AGAINST ESTATE.** Where a son constituted his father beneficiary in a fraternal life insurance beneficiary certificate for the purpose of indemnifying the father against loss by reason of having signed an obligation for the son, and afterwards the liability of the father is discharged by the son, and a request made by the son that the money named in the certificate go to his infant daughter, which was agreed to by the father, and after the death of the son the father collects the money as beneficiary, and after its receipt declares that it is for the child and that it is to go to her, these facts constitute the father a trustee of the fund for the use and benefit of the child. The fund still being in his possession at the time of his death, the same may be recovered from his estate by the child in an action for money had and received.

ERROR to the district court for Washington county: GEORGE A. DAY, JUDGE. *Affirmed.*

W. C. Walton, D. Z. Mummert and *Frank Dolezal,* for plaintiff in error.

T. W. Blackburn, contra.

LETTON, C.

The evidence in this case shows that in 1902 Henry O. Devries, who was then engaged in business in Omaha, Nebraska, carried three benefit certificates in the Bankers Life Association of Des Moines, Iowa, in the sum of $2,000 each, payable to his then wife, Flora Devries. That soon after that time his wife Flora Devries departed this life, and that afterwards he procured a change of beneficiary in each of the three certificates, ultimately making one of said certificates payable to his son, Wallace Olin Devries, another one payable to his second wife, Emma O. Devries, and a third to his father, Elias P. Devries. Some time prior to the change by which his father, Elias P. Devries, was made beneficiary of one of the certificates, Henry O. Devries had procured from the president of the Randolph National Bank of Vermont, a loan of $2,000, upon a note signed by Elias P. Devries and indorsed by Henry O. Devries; the money realized upon the note being for the use and benefit of Henry O. Devries. In order to secure Elias P. Devries against liability upon said note, Henry O. Devries caused his name to be inserted as beneficiary in the $2,000 certificate, before mentioned, and it was agreed that this was to be held by his father as security for his liability upon said note. Subsequently the affairs of the Globe Loan & Trust Company of Omaha, of which Henry O. Devries was president, became somewhat involved. The father became anxious and uneasy for fear he would be compelled to pay the note to the Randolph National Bank and, in order to quiet his father's mind and satisfy the debt, Henry O. Devries made a conveyance of certain real estate in the city of Omaha to the Randolph National Bank, and turned over certain collateral paper, and by this means procured the cancelation of his father's

note. Soon after this the health of Henry O. Devries gave way and in February, 1900, he died. Prior to his death, however, he had a conversation with his father in which he reminded his father of the insurance money being given him as collateral and said, "It has not been changed back yet but, if I don't get well, you remember that that money must go to the baby"; and his father said, "Yes, he would see that it went there." In June, 1897, a daughter, Lois Devries, the ward for whom Laura Hawkins, guardian in error, is acting, was born to Henry O. and Emma O. Devries. After the death of Henry O. Devries, the Bankers Life Insurance Company paid the full amount due upon each of the certificates to Wallace Orin Devries, Emma O. Devries and Elias P. Devries, respectively. After the payment of the amount due upon the certificate, to wit, $2,029 to Elias P. Devries, Emma O. Devries testifies that in a conversation with Elias P. Devries he spoke of Oscar's (Oscar being the usual family name of Henry O. Devries) life insurance going to him, temporarily, and another time stating that he had received $2,000 and adding, "you know, of course, it is to go to the baby at my death." Mrs. Emma O. Devries further testifies that she saw Elias P. Devries several times about it and that he never failed to mention the same. He always spoke of it either as Oscar's life insurance or as the baby's money. That he consulted with her with reference to the investment of part of the $2,000, and said that he did not want to make any investment with the money, because it was for the baby, and he said, "I want your approval first, because the money will ultimately go to her." After the death of Elias P. Devries in September, 1901, his son, J. S. Devries, was appointed administrator of his estate in the county court of Washington county. A claim was filed against the estate by Emma O. Devries, as guardian of Lois Devries, for the sum of $2,000 for money had and received, being the proceeds of the $2,000 certificate. The administrator objected to the allowance of the claim, for the reason that said claim "as filed is not a proper and

legal charge against said estate and denies that said estate is indebted to said claimant in any sum whatever." A hearing was had, and the claim was rejected. An appeal was taken to the district court for Washington county. Pleadings were filed and the case was tried upon the same issue as raised in the county court, to wit, as a claim for money had and received, with a general denial for answer. Pending the proceedings in district court, Emma O. Devries resigned as guardian of Lois Devries, and Laura Hawkins was substituted as plaintiff. The district court found for the plaintiff and directed the county court to enter an order allowing the claim. The case is brought to this court upon error from the district court for Washington county.

It is urged by the plaintiff in error that the decision of the court in favor of the defendant in error is not sustained by sufficient evidence. As to this, it is sufficient to say that the findings of the trial court are entitled to the same weight as the verdict of a jury, and that its findings of fact will not be disturbed unless clearly unsupported by the testimony. We have no doubt the evidence is sufficient to support the findings.

Defendant in error insists: First, that no recovery can be had under the facts in the case upon a claim for money had and received. Second, that, even if the money were not the property of the estate of Elias P. Devries, no one but the administrator of the estate of Henry O. Devries could recover. Third, that Henry O. Devries had no property or title, during his life, in the money named in the certificate, but had only the right to have his contract with the association carried out as to assessment of members and payment of resulting money to his beneficiary.

We agree with the plaintiff in error that Henry O. Devries had no vested interest in the money provided for by the beneficiary certificate, and we further assent to the proposition that, assuming that the money was not the property of the estate of Elias P. Devries but was the property of the estate of Henry O. Devries, no one but the

administrator of the estate of Henry O. Devries could recover.

But the case, as we view it, can not be decided upon these principles. It is a well settled principle that wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit. *School District v. Thompson,* 51 Neb. 857; Clarke, Contracts, sec. 317; *Lockwood v. Kelsea,* 41 N. H. 185; *Walker v. Conant,* 65 Mich. 194. The action, though falling under the common law class of assumpsit, is really in the nature of a bill in equity and lies whenever the party should by equity and natural principles of justice refund the money. *Merchants' & Miners' Nat. Bank v. Barnes,* 18 Mont. 335, 56 Am. St. Rep. 586, and cases cited in note; *Lanford v. Lee,* 119 Ala. 248, 72 Am. St. Rep. 914.

It appears from the evidence that Elias P. Devries was constituted the beneficiary in the insurance certificate, for the sole purpose of indemnifying him from any loss which he might suffer by reason of his having signed the $2,000 note of his son to the Randolph National Bank, and that, after he was released from all liability upon this obligation and during his son's lifetime, he recognized the fact that his son desired the money to go to the child and assented to the request that the money should go to "the baby." Sufficient time intervened, between the time of this declaration upon his part and the death of his son Henry O. Devries, for his son to have changed the name of the beneficiary from that of Elias P. Devries to that of Lois Devries, had he been informed by the father that he would not hold the money for the child. But, upon the assent of the father that the money should go to the child, he apparently dismissed the matter from his mind and took no further steps to secure the fund to his daughter.

After the death of Henry O. Devries, and after he had received from the Bankers Life Insurance Company the full amount of the certificate, Elias P. Devries recognized

the moral and equitable obligation he was under to pay this fund to Lois Devries, by agreeing with her mother that the money should go to Lois, and by consulting and advising with the mother in regard to the investment of the fund.

In September, 1901, Elias P. Devries died with part of the money and the securities in which the remainder had been invested still in his hands. The statute of frauds has no application since the trust fund was personalty. *Eipper v. Benner,* 113 Mich. 75, and cases cited. In the case of *Woodruff v. Tilman,* 112 Mich. 188, the facts were, that Tilman borrowed of one Reh the sum of $150. Tilman was a member of the Ancient Order of United Workmen, in which he held a beneficiary certificate of $2,000. He made a will devising the beneficiary certificate to his wife, the defendant in the case, and providing that his wife should pay to Charles Reh out of the $2,000 certificate the amount due Reh. Payment of the amount being refused, Reh brought a bill in equity to compel the payment of the amount due. The defendant's answer admitted substantially the allegations of the bill, but claimed that no change in the beneficiary named in the certificate was ever made by Tillman and that she was the beneficiary. Under these circumstances, the court held that the creditor was entitled to maintain his action and entered a decree in his favor. See also *Hainer v. Iowa Legion of Honor,* 78 Ia. 245. In this case, as in the case at bar, the creditor could claim no right to the fund while in the hands of the insurance company. He did not claim that any relations existed between himself and the company that gave him a right to the fund as against it, but based his recovery on an equitable right to the fund after its receipt by the beneficiary.

Lois Devries has no rights against the insurance company; her only right to the fund arises by reason of the manner of its acquirement by Elias P. Devries and his actions and declarations with reference to it when it reached his possession.

In *Calder v. Moran,* 49 Mich. 14, the facts were: Thomas Moran held a piece of land by a deed absolute in form; he sold the same and received and held the proceeds; the complainants alleged that he held the land in trust for them by a parol agreement and that, both before and after he sold it, he made repeated oral declarations of the trust and also that, by his words and conduct after the sale, he acknowledged he held the proceeds in trust for the complainants. The court say:

"The fact that defendant held the land on an oral understanding that the whole benefit of it should inure to complainants' father and his family, and that the defendant repeatedly declared and acknowledged the trust, would avail nothing. Neither would the fact of holding the proceeds subsequent to the conversion have been of any consequence to render the defendant liable. Yet the conversion having actually taken place, and the defendant having fully and distinctly declared the proceeds to be in trust for complainants, and having recognized his duty and their right by his acts, may not the antecedent fact that the land, according to his own statements and confessions, was taken and held in the same way, be allowed to operate as a good consideration in conscience to uphold his declarations and admission by conduct relative to the personal proceeds of the land, and fix upon him the character of a responsible trustee of that personalty? No writing is required for a trust in such property and no good reason is perceived for a negative reply to this question."

Upholding the same principle is *Eipper v. Benner,* 113 Mich. 75, and cases cited therein.

This principle applies to the case under consideration. Elias P. Devries had no vested interest in the certificate, but a mere expectancy, liable to be defeated at any time by a change of beneficiary made by Henry O. Devries with the consent of the insurance company. Henry O. Devries had the right of disposal of the fund to any one within the class of relatives allowed by the rules of the

insurance company, among whom was his daughter Lois Devries. He could have taken the right to receive the fund from Elias P. Devries at any time during his lifetime, but apparently relying upon his father's promise, and perhaps induced thereto by the close family relations existing betwen himself and his father, he made no written request to the insurance company for a change of beneficiary. Only a few months intervened between his conversation with his father as to the change of beneficiary and his death, and he was suffering from his last illness at the time of the conversation.

These facts, together with the acknowledgment and declaration by Elias P. Devries, after the receipt of the money, that it belonged to the child, determine the relation of Elias P. Devries to the fund in question, and whatever the status of the case might have been before the acknowledgment by Elias P. Devries that the money received from the insurance company belonged to the child, we are of opinion that the entire transaction, together with the declarations, constituted him a trustee of the fund for the use and benefit of the child, and that his estate is liable to account for the same under a claim for money had and received to the use and benefit of Lois Devries.

For these reasons, we recommend that the judgment of the district court be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1904.

LORENZO WOODRUFF v. GEORGE W. WELTON.

FILED JANUARY 6, 1904. No. 13,287.

1. **Counties:** CONTRACT. Unless the statute regulating the letting of contracts for the furnishing of county supplies is strictly complied with, the proceeding and consequent contract will be void.
2. **Injunction:** ILLEGAL EXPENDITURE. A resident taxpayer, without showing any interest or injury peculiar to himself, may enjoin illegal expenditures by a public board or officer.
3. ———: ———. In an action by a resident taxpayer to enjoin an illegal expenditure by a public board or officer, the plaintiff will not be required to show what the amount of the expenditure would have been if the law had been obeyed.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed. Decree for plaintiff.*

John M. Stewart and *Thomas C. Munger,* for plaintiff in error.

James L. Caldwell, Frank M. Hall and *C. C. Marlay, contra.*

AMES, C.

Sections 149, 150 and 151, article I, chapter 18, Compiled Statutes (Annotated Statutes, 4498-4500), are the following:

"Sec. 149. In all counties where the cost of furnishing the officers with books, blanks and stationery shall exceed the sum of $200 per year, the supplies for such purposes

shall be let in separate contracts to the lowest competent bidder, who shall give bond for the faithful performance of his contract with at least two good and sufficient sureties, residents of the state. The bond required by this section shall be approved by the county board, and the sureties therein shall justify in the same manner as sureties on official bonds.

"Sec. 150. It shall be the duty of the county clerk on or before the first day of December, annually, to prepare separate estimates of the books, and blanks, and stationery required for the use of the county officers during the coming year, and which by law are not required to be furnished by the state, and during the first week in December he shall publish a brief advertisement in one newspaper published in his county, stating the probable gross number of each item of books, blanks and stationery required by such county during the year following the first day of January next ensuing, and inviting bids therefor, which bids shall be filed with said clerk on or before the said first day of January.

"Sec. 151. The county board shall, at their first meeting in January in each year, open said bids, and award the contract for the furnishing of all such books, blanks and stationery as may be required by county officers, to the lowest bidder competent under the provisions of this subdivision, and who complies with all its provisions; *Provided,* That the county board may reject any or all bids."

In the year 1902 the county clerk of Lancaster county made and filed in his office an estimate of the books, blanks and stationery required for the use of the county officers during the then coming year. Whether the classifications in this estimate were such as to be in compliance with the law is disputed, but in our opinion the question is not material in this case. The only advertisement for bids for the furnishing of the supplies mentioned, which was published by the clerk in that year, was the following:

"On or before January 1, 1903, I will receive sealed bids for the furnishing of supplies the county of Lancaster may

use during the ensuing year, consisting of books, blanks and stationery, to be furnished as per specification on file in my office."

In the light of the decisions of this court in *State v. York County,* 13 Neb. 57, and *State v. Saline County,* 19 Neb. 253, it can not be contended for a moment that this procedure was not entirely void. Notwithstanding this fact, the State Journal Company and the Woodruff-Collins Printing Company both presented bids for the furnishing of the supplies mentioned in the estimate, and a contract therefor was entered into, or attempted so to be, between the county board and the Journal company. The plaintiff, who is a resident citizen and taxpayer of the county, as well as a member of the Woodruff-Collins Printing Company, begun this action against the members of the county board and the State Journal Company to enjoin the performance of the contract or the furnishing of the supplies by the latter named company. Previous to bringing the action, the Woodruff-Collins Printing Company had made an unsuccessful application to the district court for a mandamus to compel the letting of the contract to it. This suit was also dismissed, and the plaintiff prosecutes error. The defendant in error first objects that the connection of the plaintiff with the Woodruff-Collins Printing Company estops him of the exercise of his right, if any, to complain as a citizen and taxpayer. This is an attempt to carry the doctrine of estoppel somewhat beyond its usual limits and, in the absence of authority therefor, we refrain from sanctioning it. The plaintiff and the corporation to which he belongs are, in law, two distinct persons, and mutuality, one of the essential elements of a valid plea of estoppel, is lacking. We are not called upon to criticise the plaintiff's motives, but to ascertain whether he has a cause of action.

Somewhat contradictory to the foregoing contention, the defendant urges that the plaintiff ought not to be permitted to prosecute his suit because it is not shown that he has suffered, or will suffer, any special or peculiar

damage by reason of the conduct of which he complains; but in this jurisdiction the law has long been settled beyond debate that a resident taxpayer, as such, and without proof of peculiar interest or injury to himself, may enjoin the illegal expenditure of money by a public board or officer. *Follmer v. Nuckolls County,* 6 Neb. 204; *Grand Island Gas Co. v. West,* 28 Neb. 852; *McElhinney v. City of Superior,* 32 Neb. 744; *Poppleton v. Moores,* 62 Neb. 851, reaffirmed 67 Neb. 388.

In such cases, says Judge Dillon, 2 Municipal Corporations (4th ed.), sec. 922, the court should regard the action as "in the nature of a public proceeding to test the validity of the corporate acts sought to be impeached, and deal with and control it accordingly." It is evident that, if, in such cases as the present, a taxpayer can not intervene, no one else can except one who is a participant in the illegal proceedings, and who, according to the defendant's first contention, will be estopped from so doing.

Finally, it is insisted that the action ought not to be entertained, because it is not made to appear that the public has suffered, or is in danger of suffering, any injury from the proceeding complained of, it not being shown that, if the statute had been obeyed, a lower bid for furnishing the supplies in question would have been obtained. So to hold would be, practically, to repeal the statute. No one can say what would have happened if something which did not occur had taken place.

It is recommended that the judgment of the district court be reversed and a judgment pursuant to the prayer of the petition be entered in this court.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a judgment pursuant to the prayer of the petition be entered in this court.

REVERSED: DECREE FOR PLAINTIFF.

GEORGE W. MENKE V. STATE OF NEBRASKA.

FILED JANUARY 6, 1904. No. 13,461.

Constitutional Law: PEDDLERS: LICENSE. Sections 62, 63 and 64, article I, chapter 77 of the Compiled Statutes of 1903, providing for the licensing of peddlers, and denouncing a penalty for their violation, are not void as being in contravention either of the constitution of this state, or of the constitution of the United States, but they are inapplicable to transactions constituting interstate commerce.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed and dismissed.*

John S. Kirkpatrick and *George E. Hager,* for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown and *J. L. Caldwell, contra.*

AMES, C.

Section 62, article I, chapter 77 of the Compiled Statutes of 1903, enacts that peddlers plying their vocation in this state shall pay a license tax for the privilege of so doing, and subsequent sections provide the manner of procuring such a license and a penalty for disobedience to the enactment. The validity of this statute was questioned as being violative of the constitution of this state, but upheld by this court in *Rosenbloom v. State,* 64 Neb. 342.

The plaintiff in error herein, George W. Menke, was prosecuted for alleged violation of the statute, and the prescribed penalty was assessed against him by the lower courts. The facts upon which the conviction was had are recited in an agreed statement thereof, preserved in the record, as follows:

"That said George W. Menke called at the home of Henry Wrighter with samples of groceries and a price list, and solicited and took an order in writing for certain goods, a copy of said order being left with the said Henry Wrighter, and thereafter sent said order, along with nu-

merous other orders solicited and received in the same manner from divers other persons, by mail to Loverin & Browne Company, a corporation at Chicago, in the state of Illinois, to fill. That said corporation, by its agents and servants, put up the several items of goods named in each order, separately, and then packed the goods thus packed into a large shipping box, and shipped the same to its order to the city of Lincoln, Nebraska. That the said George W. Menke received the same, the said box, and as the agent of the said Loverin & Browne Company, opened the same and delivered the goods therein contained to the said Henry Wrighter and to the several other persons from whom orders had been solicited and taken, receiving the money therefor, and remitted the same to the said Loverin & Browne Company. That each and every of said orders, above mentioned, were taken and said goods delivered within Lancaster county, Nebraska, and outside of an incorporated village, city or town."

The plaintiff in error renews the contention that the law is violative of the constitution of this state, but we regard the decision of this court, above cited, as having set that matter at rest, and decline further to consider it. He further urges that the business in which he was engaged was not that of a peddler within the meaning of the statute, citing several authorities in support of that contention. We are inclined to think it was so, within the common and popular understanding of the meaning of that word, but do not find it necessary to decide that question. Finally, it is argued that the statute is an attempt to regulate intersate commerce, and is void because of contravening the provisions of the constitution of the United States concerning the subject. We can find nothing in the statute having reference to that business, and are therefore unable to sustain this objection. Nevertheless, the conviction will, in our opinion, have to be reversed.

The supreme court of the United States, in *Caldwell v. North Carolina,* 187 U. S. 622, 23 Sup. Ct. Rep. 229, held that transactions substantially identical with those de-

scribed in the above quoted statement of facts, constituted interstate commerce within the meaning of the federal constitution, and are withdrawn by that instrument from state taxation or regulation. That court is the final authority upon the question, and an adverse criticism of its views, even if we differed from them, which we do not, would be not less presumptuous than futile. It does not follow, however, that the statute is void, but that transactions such as those under discussion are not within its operation.

It is recommended that the judgment of the district court be reversed and the action dismissed.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the action dismissed.

REVERSED AND DISMISSED.

F. B. CARLY V. FRANCIS M. BONER ET AL., APPELLEES. BENJAMIN F. PITMAN, APPELLANT.*

FILED JANUARY 6, 1904. No. 13,396.

Mortgage: FORECLOSURE: REDEMPTION. Redemption from a decree of foreclosure and from a sale thereunder for taxes, by a mortgagor who has covenanted that, upon his default in the payment of taxes, his mortgagee may pay them and add the amount to the mortgage debt, will both discharge the decree of foreclosure and the sale pursuant to it, and satisfy the lien of the tax. Redemption by the holder of such mortgage will discharge the decree of foreclosure and the sale thereunder; but a lien for the redemption money and interest will subsist for the protection of his security in accordance with the covenants of the instrument.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

* Rehearing allowed. See opinion, p, 674, *post.*

Albert W. Crites, for appellant.

Allen G. Fisher, contra.

AMES, C.

The facts in this case are undisputed as they are recited in the brief of counsel for the appellant, Pitman, as follows:

"The Boners, husband and wife, mortgaged the husband's real estate to Ball to secure their negotiable bond. The mortgage contained covenants in substance to the effect that they would seasonably pay all taxes levied on the land during the existence of the mortgage debt, and, in case of their default, the mortgagee might do so, and tack such payment to the mortgage debt. They neglected to pay any of these taxes, and allowed the mortgaged real estate to go to tax sale, at which the plaintiff Carly became a purchaser, and thereupon brought this suit to foreclose his tax certificate, making the Boners and Ball defendants. The latter was served by publication, and never appeared in the cause. On February 26, 1900, a decree by default was given in the cause, and, six days thereafter, Ball indorsed, assigned and delivered the bond and mortgage to the appellant, Pitman. A sale was had, and the land struck off to Dunn. He paid the bid, and sale was confirmed. The Boners appealed to this court from the order of confirmation, but filed no brief, and, when the case was reached for submission, suggested their desire to redeem, and moved for the issuance of a satisfaction certificate. Pitman intervened and filed an objection to the granting of leave to redeem, unless allowed without prejudice to his mortgage, and he also asked leave to redeem under his mortgage. No specific action was ever taken on either of these applications, but this court prepared and filed a memorandum opinion, holding that the Boners were entitled to redeem from the sale, while Pitman was entitled to redeem from the taxes. On April 30, 1902, Alexander paid into the court below the amount of the bid, with

twelve per centum interest from the date of sale, as assignee and grantee of the Boners, *pendente lite,* and for a redemption from such sale. He never filed any pleading of any sort. No notice of such payment was given to Pitman. However, Susan E. Boner, the wife, on March 1, 1902, filed a motion below in her own behalf for leave to redeem, but never paid any money into court. On May 3, 1902, Pitman filed in the court below objections to any redemption by either Boner or Alexander, unless it be done without prejudice to his mortgage, and on May 31, 1902, he also filed an application for leave to redeem, himself, and paid into court the amount necessary to pay the decree with interest and costs. At the January term, 1903, this court dismissed the appeal, and a mandate of such dismissal was filed in the court below, on February 27, 1903. Boner filed an answer to Pitman's application below for leave to redeem, and all of said motions and said payment coming on to be heard together before Judge Westover, he held that the payment into court by said Alexander was a good and sufficient redemption from said taxes and from said sale, and was operative to free the land from the lien of said mortgage, and to transfer said lien to the surplus arising on said sale; and it is from this decision that this appeal is taken. Separate findings of fact and conclusions of law were made by the court, upon which the appeal is taken, and from which the foregoing condensation is made."

The foregoing decree is manifestly erroneous. The right of redemption of both the mortgagor and the mortgagee was established by the former judgment of this court. Redemption by the mortgagor or his grantee, Alexander, would discharge the decree of foreclosure, and the sale pursuant to it, and satisfy the lien for taxes. Unless it would have that effect it would have none at all. The consequence of such redemption would be that the land would remain subject to the lien of the mortgage in all respects as though the mortgagor had paid the taxes to the county treasurer at the time of their accrual. Re-

demption by the mortgagee, or his assignee Pitman, would also discharge the decree of foreclosure and the sale pursuant to it, but a lien for the redemption money and interest would subsist in favor of the holder of the mortgage for his protection in accordance with the covenants of the instrument.

It is recommended that the judgment of the district court be reversed and that the cause be remanded for further proceedings in conformity with law.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and that the cause be remanded for further proceedings in conformity with law.

REVERSED.

The following opinion on rehearing was filed March 8, 1905. *Judgment of reversal adhered to and decree entered:*

1. **Right of Redemption: RES JUDICATA.** An interlocutory order entered on a former appeal of this case considered, and *held* not to be *res judicata* as to the rights of the parties to redeem land from a decree rendered in the action and sale made in pursuance thereof so as to become the law of the case.

2. ———. The statutory right of redemption from sale differs essentially from the equity of redemption proper; it is usually self executing, and to enjoy the benefit thereof, no proceedings are ordinarily required to be had in the courts to make such right effective. This right or privilege is given by statute to the owner of the equity of redemption or his grantee.

3. **Rights of Assignee of Mortgagee Not in Issue.** Whether or not the redemption of real estate by the owner of the equity of redemption or his grantee from the decree and the sale made thereunder, as effectuated, is with or without prejudice to the rights of one claiming as the assignee of a mortgagee, is not determined. This question is not within the issues raised by the application to redeem, nor is it involved in the exercise of the statutory right of redemption from a decree and a sale of real estate made in pursuance thereof.

HOLCOMB, C. J.

This action is pending in this court on appeal. The only question in controversy is with reference to the right of redemption of certain real property sold under a decree duly rendered in a proceeding begun in the district court for the purpose of foreclosing a tax lien existing on and against certain real estate, and directing a sale thereof for the satisfaction of the lien thus established.

After a sale of the land under and in pursuance of the decree rendered in the foreclosure proceedings, and pending an appeal from an order of the district court confirming the sale and directing the sheriff to execute a deed to the purchaser, the owner of the equity of redemption or his grantee asked to be allowed to redeem the property from the decree and sale rendered and made, as above stated. This application to be allowed to redeem was resisted by the appellant in this action, who claims an interest in the property as an assignee of a mortgagee, who was made a party defendant in the tax foreclosure proceedings and served by publication, but who failed to appear or plead in the action, and whose default was duly entered of record. The appeal was thereupon dismissed and the cause remanded to the district court, so that redemption from the decree and sale might be effectuated. In the district court it was held that the appellee had effected a redemption of the land from the decree and the sale had thereunder, and it was adjudged that he took the land free from the lien created by the mortgage executed by the owners of the land in favor of the appellant's assignor, a party defendant in the foreclosure proceedings as aforesaid. This decree was on a former hearing reversed. *Carly v. Boner, ante,* p. 671.

1. Some confusion apparently has arisen in respect of an interlocutory order or memorandum opinion entered by this court in the appeal proceedings from the order of confirmation of sale under the tax foreclosure decree, with reference to the question of the right of redemption. When

application to redeem was made in this court during the pendency of the appeal proceedings and objections interposed it was announced that the owner of the equity of redemption (or his grantee) had the right to redeem the property from the decree and sale thereunder; and this whether the tax lien was owned by the tax purchaser or had been transferred to the mortgagee or her assignee. It was further found that the mortgagee or her assignee was entitled to redeem from the tax lien, but was not entitled to redeem the property sold under the decree of foreclosure. It was especially stated that as to the jurisdiction of the court to make an order on the questions raised by the record—that is with reference to the right of redemption—the question of jurisdiction, not having been discussed, is not determined, and no adjudication of the rights of the parties is made at this time.

It will thus be seen that there was no such adjudication on the question of the right of redemption as to make the interlocutory order *res judicata* as to the rights of the respective parties to redeem so as to become the law of the case. The order entered is to the effect that the right of redemption of the land from the decree and sale belonged to the owner of the equity of redemption, and that a mortgagee's right of redemption is restricted to redeeming or discharging the tax lien for the purpose of preserving and protecting his security, by adding the amount thus required to redeem the tax lien to his indebtedness, or by being subrogated to the rights of the owner of the tax lien as thus redeemed. The right of the owner of the equity of redemption to redeem the real estate from the decree and sale was deemed paramount, and it was so stated.

2. The right to redeem the property from the decree and sale is a right belonging to the owner of the equity of redemption or his grantee, and is given by statute. Sec. 497*a* of the code. It is a right of redemption which differs essentially from the equity of redemption proper. The statutory right of redemption from sale, as distinguished from the equity of redemption, is usually self executing,

and, to enjoy the benefit thereof, no proceedings are ordinarily required to be had in the courts to make such right effective. The appellee has taken advantage of this statutory right of redemption from sale, and has redeemed the property, and the order confirming such redemption to the extent that it recognized the right as being in the appellee, was right and proper and the only one which ought to have been entered.

3. The appellant objects to the appellees' being allowed to redeem the land from the decree and sale thereunder, unless it be without prejudice to his alleged rights as the assignee of the mortgagee of the land thus sought to be redeemed. Whether the redemption be with or without prejudice to the appellant would, it seems, depend upon the question of the force and effect of the decree under which the sale was made. If the lien of the mortgage is merged in or barred by the decree, the judgment in the action is an adjudication of the appellant's rights and interest in the land, from the consequences of which he can not escape. But this question is not properly before us, nor is it within the issues raised by the appellees' application to redeem. In the exercise of his statutory right with reference to redemption, the scope and effect of the decree as to appellant's lien by virtue of the mortgage under which he claims is not properly involved, and this question has never been fairly nor fully presented, and we do not, therefore, herein undertake to determine it. The reversal of the decree of the district court heretofore entered is adhered to, and a decree will be entered herein confirming and establishing the appellees' right of redemption heretofore effectuated.

JUDGMENT ACCORDINGLY.

J. W. DAVIS v. W. O. HALL.

FILED JANUARY 6, 1904. No. 13,281.

1. **Judgment:** VERDICT. Where a verdict exceeds the amount claimed in his pleadings, by the party gaining it, it is error to enter judgment for the full amount found.
2. **Remittitur.** Where such a verdict has been rendered, and the evidence would support one for the correct amount, the party should be allowed to remit the excess.
3. **Instructions:** REVIEW. Instructions to the jury, not complained of in the motion for a new trial, will not be examined.
4. ———: ———. Refusal of an instruction whose contents are fully covered by others given is not error.
5. **Payments:** BURDEN OF PROOF. The burden of proof is on defendant to establish payments, and on plaintiff to show that an admitted payment was properly applied on another debt.
6. **Instructions.** Instructions given *held* applicable to the evidence.

ERROR to the district court for Adams county: ED. L. ADAMS, JUDGE. *Affirmed if remittitur made.*

L. J. Capps, for plaintiff in error.

Batty & Dungan, contra.

HASTINGS, C.

Defendant in error, hereinafter styled the plaintiff, on October 9, 1901, filed in the district court for Adams county a petition upon two promissory notes; one originally for $3,573, on which there was alleged to be due, October 1, 1901, $2,321.44, and the other originally for $800, on which there was alleged to be due, October 1, 1901, $1.73. The defendant Davis answered, admitting the execution of the two notes, and alleged that both were part of the same transaction, and his only notes to the plaintiff; alleged an oral agreement that the interest should not exceed seven per cent. per annum; alleged an indebtedness by the plaintiff to himself of $6,065 for money had and received, in amounts and at dates set out in a

tabulated statement, and alleged a balance in his own favor of $1,164.15, for which he asked judgment. Plaintiff's reply set up the statute of limitations against the first charge of $1,050 in the defendant's account, and denied indebtedness on it; denied the verbal agreement as to interest; admits the receipt of $700 about September 1, 1895, and says at that time he held another note against defendant amounting to $620; that he canceled this note and sent it to defendant and indorsed the $80 remaining upon the $800 note sued on; that of the item charged by the defendant as $420 paid January 1, 1896, he received only $390, not upon the date alleged but at various times and in various amounts prior to that time; the other amounts claimed by defendant to have been paid are admitted, with some variations in dates. The questions in the case therefore arise upon the answer and the reply, and are as to the item of $1,050; the existence of the other note amounting to $620, and whether only $390 were actually paid of the $420 claimed by the defendant. The jury rendered a verdict, on February 16, 1903, for the plaintiff in the sum of $2,687.44, on which judgment was rendered thereafter, after the overruling of defendant's motion for new trial. This motion was for the following reasons: The verdict was contrary to law; errors of law occurring at the trial; the verdict was contrary to the first and second instructions of the court; error in giving instructions three and four on the court's own motion and number one asked by plaintiff; error in refusing the first and second instructions asked by defendant, and the verdict is excessive.

The first error urged in the brief is the last one. The allegations of the petition are that there are due on the notes $2,323.22 and ten per cent. interest from October 1, 1901. The first day of the term of court, at which the judgment was rendered, seems to have been February 16, 1903. The interest on $2,323.22, at ten per cent. per annum from October 1, 1901, to February 16, 1903, is $319.44, making the total $2,642.66. The verdict therefore is for the sum of $44.78 more than the amount alleged in the

pleadings, and the judgment should at least be reduced that amount.

The next complaint made in the brief is the refusal of instruction numbered one asked by defendant. This instruction told the jury that it was their province to decide upon the weight of testimony; that it was to be harmonized, so far as could be done, and, in case of conflict, the jury were to decide which to believe, giving the usual tests. This matter was fully covered by the second instruction offered by the defendant, which was given by the court, and the giving of this instruction would have been a mere repetition. Its refusal was not error.

The next complaint is the refusal of instruction numbered four asked by defendant. This is not mentioned in the motion for new trial. It seems to relate to allegations in the petition, and the issues in this case are altogether in the answer and reply.

The next complaint is of instruction numbered one given by the court on its own motion. No complaint is made of this in the motion for a new trial and there is no occasion to examine it. The same is true with regard to instruction numbered two given on the court's own motion.

Number three is complained of, in the motion for new trial, only on the ground that it fails to properly instruct the jury relative to the burden of proof. The instruction was that the burden of proof rests on the defendant to show that the defendant expended the $1,050 at plaintiff's request and on plaintiff's behalf; that on the defendant also rested the burden of proof to show that he paid the additional $30 which was denied by plaintiff, and that the burden rested upon the plaintiff to prove proper application of the $620 to the payment of another separate note, as claimed by him. We see no error in this instruction.

The next complaint is of the giving of instruction one offered by the plaintiff. This is complained of in the motion for new trial on the ground that there was no testimony as to a settlement. The instruction, in fact, told the

jury that, if they found that the claim of $1,050 had been settled and, under such settlement, the defendant gave his promissory note for $612 for a remainder due plaintiff, they should allow the defendant nothing on this $1,050 item. We see no error in this instruction. There was evidence that the whole $1,050 had been settled between the parties. Both Hall and his wife testified to such a settlement. The preponderance of the evidence seems to support the findings of the jury.

It is recommended that the defendant in error be allowed to remit from his judgment, within 20 days herefrom, the sum of $44.78, and, in the event of such remission, that judgment be affirmed for the sum of $2,642.66, and, in default thereof, that the judgment be reversed and the cause remanded for further proceedings according to law.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the defendant in error is allowed to remit from his judgment, within 20 days herefrom, the sum of $44.78, and in the event of such remission, judgment is affirmed for the sum of $2,642.66, and, in default thereof, the judgment will be reversed and the cause remanded for further proceedings according to law.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA v. WINFIELD S. SCOTT.*

FILED JANUARY 6, 1904. No. 13,441.

Quo Warranto: DUTIES OF COUNTY SURVEYOR. An information in the nature of quo warranto will not lie to inquire into the right of county surveyors, in counties having more than 50,000 population, to perform and exercise the duties of county engineer, as provided for by chapter 32 of the laws of 1903.

ORIGINAL proceeding in the nature of quo warranto to

* Rehearing allowed. See opinion, p, 685, *post.*

determine the right of respondent to exercise the duties of county engineer. *Dismissed.*

Frank N. Prout, Attorney General, and *Jesse B. Strode,* for the state.

Arnott C. Ricketts, contra.

OLDHAM, C.

This is an original information in the nature of quo warranto, filed by the attorney general for the purpose of determining the right of respondent to exercise the duties of county engineer in Lancaster county, Nebraska. The information alleges that the respondent is the duly elected, qualified and acting surveyor of the county of Lancaster; that, as such officer, he is performing and threatens to exercise the duties of the office of county engineer, under and by virtue of chapter 32, laws of 1903, entitled "An act to constitute the county surveyor ex officio county engineer in addition to his powers and duties of county surveyor, and to define his powers and describe his duties as county engineer, and to repeal all acts and parts of acts inconsistent or in conflict with this act." The information sets forth that Lancaster county is a county of more than 50,000 population; that the act of the legislature of 1903, providing for the duties of county engineer, was passed in violation of section 15, article 3 of the constitution of Nebraska. The respondent, for answer, admits that he is the duly qualified and acting surveyor of Lancaster county; that, as such surveyor, he has exercised and intends to exercise the duties of county engineer of said county as provided for by the act of 1903, *supra.* He further alleges that there is no such office as that of county engineer; that the provisions of the act of 1903 did not create an additional office, but only imposed additional duties upon the office of the county surveyor, in counties having more than 50,000 population; that quo warranto will not lie to question his right to exercise the duties of county engineer.

The dispute arising upon the information of the relator and answer of the respondent is one of law and not of fact. Informations in the nature of quo warranto are provided for in but two sections of our statute; one is found in section 1, chapter 71, Compiled Statutes (Annotated Statutes, 1706). This section applies exclusively to claimants of the office which is usurped, invaded or unlawfully exercised by another, and plainly has no application to the case at bar, because no one else is claiming the right to exercise the duties of the office. The only provision on which this action could be grounded is found in section 704 of the code, and is as follows:

"An information may be filed against any person unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation created by the laws of this state, or when any public officer has done or suffered any act which works a forfeiture of his office, or when any persons act as a corporation within this state without being authorized by law, or if, being incorporated, they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law."

The provisions of the above section applicable to public officers warrant an information "against any person unlawfully holding or exercising any public office" within the state, "or when any public officer has done or suffered any act which works a forfeiture of his office." There is no charge in the information that the respondent is unlawfully exercising the duties of the office of county surveyor, or that he has been guilty of any official misconduct which would work a forfeiture of that office; but the information is directed solely at his right to exercise the duties of county engineer, in addition to those attaching to the office of county surveyor prior to the act of 1903. The question then to be determined is, did the act of 1903 attempt to create a new and independent office of county engineer, in counties having more than 50,000 population, or did it merely prescribe additional duties to be performed by

county surveyors in counties containing this population? An inspection of the provisions of chapter 32, *supra,* shows that the intent of the legislature was that county surveyors, in counties having more than 50,000 inhabitants, shall be "ex officio county engineer," and that it shall be their duty to prepare plans, specifications and details for the use of county boards in aiding and letting contracts for the building or repairing of bridges, culverts and improvements upon public roads, and to make estimates for the costs of contemplated improvements, and to superintend such improvements, and to inspect the work and materials placed therein, and to report in writing to the county board as to whether the same comply with the plans, specifications, etc. It also provides that the county engineer shall perform such services for the county as the county board may from time to time require and direct, and make his reports in writing to the county board. These are the essential provisions of the act. There is nothing in the act that requires the county surveyor to qualify as county engineer by taking an official oath or by giving a bond, nor is there any provision in the act allowing any compensation for the services performed as county engineer. We do not think, after an examination of the act, that it was the intention of the legislature to create a new and independent office, in counties having the required population, but all that was attempted was the imposition of new duties upon the office of county surveyor in such counties. It has been repeatedly held by this court that the imposition of new duties upon executive officers of this state does not create new executive officers. *In re Railroad Commissioners,* 15 Neb. 680; *Nebraska Telephone Co. v. Cornell,* 59 Neb. 737. Since the remedy by information in the nature of quo warranto is employed to test the actual right to an office or franchise, it seems that it can not be extended to relieve against official misconduct which does not work a forfeiture of the office. High, Extraordinary Legal Remedies (3d ed.), sec. 618. The original writ of quo warranto, which has been largely superseded by

informations in the nature of quo warranto, was a high prerogative writ and, like all other extraordinary processes, it generally would only lie when no other adequate remedy would afford the required relief. The rule appears to even go further with reference to quo warranto than with reference to extraordinary proceedings by injunction or mandamus. In the latter, it being the rule that they may be invoked where there is no adequate remedy at law, but in quo warranto it is held that it will not lie where there is even an adequate remedy by bill in equity. *People v. Whitcomb,* 55 Ill. 172; *Dart v. Houston,* 22 Ga. 506. If, then, as alleged in the information, the respondent is the legally qualified and acting county surveyor of Lancaster county, and if he is attempting without authority to exercise the duties of county engineer of said county, injunction would afford an adequate equitable remedy to restrain his contemplated illegal acts.

We are therefore of the opinion that quo warranto will not lie in the case at bar, and recommend that the proceedings be dismissed.

HASTINGS and AMES, CC., concur.

By the Court: For the reasons stated in the opinion, the proceedings are

DISMISSED.

The following opinion on rehearing was filed September 22, 1904. *Judgment of dismissal adhered to:*

1. Constitutional Law: SPECIAL LEGISLATION: COUNTY SURVEYOR. An act of the legislature which regulates a county office, and which by its terms limits its operation to counties having a population of 50,000 "according to the census of 1900," is local and special in its application, since it can never apply to any other counties than the two which were in the class at the time of the passage of the act.

2. ———: ———. Chapter 32, laws of 1903, entitled "An act to constitute the county surveyor ex officio county engineer in addition to his powers and duties of county surveyor," etc., is in violation of section 15, article 3 of the constitution, which prohibits the

passage of local or special laws regulating county or township offices, and further provides that, in all cases where a general law can be made applicable, no special law shall be enacted, and is void.

LETTON, C.

At the former hearing of this case (*ante,* p. 681), we held that an information in the nature of quo warranto would not lie in the case. At that time our attention was mainly directed to the question of practice as to whether or not the remedy of quo warranto was a proper one to be applied under the circumstances. At this hearing, however, our attention has mainly been called to the question whether or not the law of 1903, chapter 32 (sec. 131*a*, art. 1, ch. 18, Compiled Statutes, Annotated Statutes, 9224), by which the county surveyor is made, ex officio, county engineer, is in violation of the constitution. It seems clear to us that this act is a clear and palpable violation of section 15, article III of the constitution of Nebraska, which prohibits the passage of local or special laws regulating county and township offices, and further provides that in all cases where a general law can be made applicable no special law shall be enacted. By the provisions of the act under consideration, it is provided that, in all counties of the state of Nebraska having over 50,000 inhabitants according to the census of 1900, the county surveyor shall be, ex officio, county engineer, etc. The operation of the act is limited to counties having over 50,000 inhabitants according to the census of 1900. The court takes judicial notice of the fact that there are only two counties in the state of Nebraska which had over 50,000 inhabitants according to the census of 1900. These are the counties of Douglas and Lancaster, and the act might as well have stated in express terms that in the counties of Douglas and Lancaster the county surveyor shall be, ex officio, county engineer, as to limit the class of counties to which it is applicable to a class which plainly and inevitably contains only the two counties named. The object of the law may be wise, and the reform sought to be accomplished

may be salutary. It may be that the heavier burden placed upon the roads and bridges of the counties named, by reason of the greater density of population and consequently increased amount of travel and intercourse carried on upon the public highways, renders it necessary that a skilled officer shall have the general charge and supervision of road work and of the selection of materials for, and the construction and repair of, bridges. But this end is as necessary to be attained in all counties which may in the future reach the population prescribed by this act, as in those which are now in the class. This act is so framed that it can not in the future apply to other counties which may attain the requisite population. The classification therefore is arbitrary and points out the two counties named as clearly and specifically as if they had been designated by their proper names. The effect of the statute is to remove the counties of Douglas and Lancaster from the operation of general laws applying to all counties in the state. A general law can plainly be made applicable to all counties having the required population, without the limitation to those which had 50,000 population by the census of 1900. It is clear, therefore, that this is a local and special act applying only to these two counties, that a general law may be made applicable, and that the act therefore is in violation of the constitutional restrictions. *State v. Mitchell,* 31 Ohio St. 592, 607; *State v. Anderson,* 44 Ohio St. 247; *City of Topeka v. Gillett,* 32 Kan. 431; *Woodard v. Brien,* 14 Lea (Tenn.), 520.

The act which imposes the additional duties upon the county surveyor being void, he has acquired no duties or privileges other or further than those prescribed for the office of county surveyor, and, so far as he may undertake to transcend those duties, he has no greater right than any other private citizen. This being the case, the relators have a full and adequate remedy at law. The former decision dismissing the case is right and should be adhered to.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former decision dismissing the case be adhered to.

DISMISSED.

PUNTENEY-MITCHELL MANUFACTURING COMPANY V. T. G. NORTHWALL COMPANY.

FILED JANUARY 6, 1904. No. 13,291.

1. **Evidence.** Evidence examined, and *held* sufficient to sustain the finding of the trial court.
2. **Action: BREACH OF WARRANTY: DAMAGES.** In an action to recover the purchase price of cultivators sold by a manufacturer to a jobber in agricultural implements for the express purpose of resale to the trade, the jobber may, on a counterclaim for damages for a breach of warranty, recover the profits on resales actually made and completed, where such profits are fixed, certain and capable of accurate proof, and were evidently contemplated by the parties when the contract was made.
3. **Case Distinguished.** The case of *Silurian Mineral Springs Co. v. Kuhn & Co.*, 65 Neb. 646, distinguished and approved.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed.*

Thomas D. Crane and *J. J. Boucher,* for plaintiff in error.

Thomas W. Blackburn and *George W. Spurlock, contra.*

BARNES, C.

During the season of 1898 the plaintiff, Punteney-Mitchell Manufacturing Company of Kansas City, Missouri, sold and delivered to the defendant, the T. G. Northwall Company of Omaha, Nebraska, ten Diamond corn cultivators at $10 each, and forty-three Diamond disc cultivators at $15 each. The defendant was a jobber of agricultural implements, and the evidence shows that the goods were

bought for the sole purpose of resale to retail dealers, which purpose was known to the plaintiff at the time of said purchase and sale. The cultivators were warranted to be first class in quality and construction, and it was represented that they would do the work for which they were intended, as well as any other first class cultivators. It was also understood, at the time the contract was made, that the disc cultivators should be resold to the trade at from $19 to $20 each. A considerable number of these cultivators were, at the defendant's request, shipped direct to retail dealers, while the others were delivered to the defendant at Omaha; and it appears that all of them were resold to retail dealers at $19 each. It was soon discovered that the disc cultivators were defective in material and construction, and would not do the work for which they were designed, and they were all returned to the defendant, who, in turn, tendered back forty-two of them to the plaintiff. The Diamond corn cultivators gave entire satisfaction to the persons purchasing them, and for these the plaintiff was entitled to receive from the defendant the sum of $100. This suit was brought in the district court for Douglas county to recover the full price of all of the cultivators. The defendant, in its answer, alleged a credit of $25.64 on account of an overcharge of freight, which was conceded by the plaintiff. It also pleaded, as a counterclaim, damages to the amount of $35.50 for freight charges, which were agreed upon, and the further sum of $168 loss of profits on the resale of forty-two disc cultivators by reason of a breach of warranty. The case was tried to a jury and resulted in a verdict and judgment for the defendant for $62.40. The plaintiff prosecuted error, and on the hearing in this court the judgment was reversed and the cause remanded for a new trial. *Punteney-Mitchell Mfg. Co. v. Northwall Co.*, 66 Neb. 5. By our former decision, all questions relating to the breach of warranty and the sufficiency of the offer to return the cultivators in question were disposed of, so nothing was left for trial but the question of damages.

After the mandate was returned, the cause was again tried in the district court for Douglas county, without the intervention of a jury, and the defendant had judgment for $149.47, from which the plaintiff again prosecutes error.

But one question is presented for our consideration and that is the correct rule of damages to be applied to the facts above stated. The trial court found that "It was expressly understood that the Diamond disc cultivators were to be sold by defendant to retailers at $19 to $20 a cultivator, and the same were so sold and delivered to the retail dealers at the price of $19 each," and the court thereupon held that the defendant was entitled to recover the sum of $4 as his profit on the resale of each of the cultivators. It is now contended by the plaintiff that the evidence does not sustain the finding of the trial court above quoted, and that the profits above mentioned were not a proper element of damages. We will dispose of the first point before we determine the question of the measure of damages.

T. G. Northwall, the president of the defendant company, testified as follows:

Q. You may describe, in your own way, the conversation you had with Mr. Peacock, the agent of the plaintiff, and the time when you had the conversation.

A. My recollection is that it was in January of 1898, early part of January; the exact words of the conversation I could not give; it was in reference to the contract, or the making of a contract with Punteney-Mitchell Manufacturing Company for some disc cultivators and some Diamond listing cultivators; the details were gone over about the work they would do, and the work they would do in comparison with any other first class goods of the same class; also in reference to the selling price, which was agreed on to be from $19 to $20 to the dealer, which was based on the average price of the same class of goods of other make.

Q. How many of these Diamond disc cultivators did your firm sell to the dealers in the spring of 1898?

A. Forty-three.

Q. At what price?

A. $19. I wish to add that there might possibly have been some sold at $20, but if there were it was some single case; none were sold for less than $19.

Q. And none were bargained to be sold at less than $19?

A. No, sir.

Q. It was stipulated and agreed between you and the Punteney-Mitchell Manufacturing Company that none should be sold for less than $19?

A. It was not provided in the contract; it was gone over the same as is always done with the factory in making a contract with the factory what the goods should be sold at.

Q. There was no contract made except the verbal contract you speak of?

A. No contract made on the price; no.

Q. It was agreed between you and the Punteney-Mitchell Manufacturing Company that you should sell none for less than $19?

A. It was agreed that the price they should be sold at should be $19 or $20. If we chose to sell for $15 I presume we *could* have done so, or sold for $25. It was agreed that the profits should be based on $19 to $20.

Q. All these forty-three cultivators which were returned to you were sold for $19 each?

A. They were sold for $19 or more, possibly some went at $20.

This evidence is not disputed or questioned in any manner, and it seems to be sufficient to sustain the finding complained of.

We come now to the question of damages. It may be stated at the outset, that we are firmly committed to the rule that "Damages in the nature of anticipated profits on conjectured, expected or hoped for sales can not be recovered. Such damages are too speculative, remote and consequential; they lack the element of certainty necessary to authorize a recovery therefor." *Silurian Mineral Springs Co. v. Kuhn & Co.*, 65 Neb. 646. This is our latest expression on this question, and is the result of our holdings in numerous other cases of a like nature. We approve of

these decisions, and shall not attempt to question the correctness of this rule in the present opinion. We are also committed as firmly to another rule, that what are sometimes denominated consequential damages, but which were in contemplation of the parties when the contract was made, may be recovered in an action for a breach of warranty, if they are certain and determinate in their nature or amount, or can be rendered so by evidence, and are directly attributable to the breach of the contract as their cause. This question was before the court in *Burr v. Redhead, Norton, Lathrop Co.*, 52 Neb. 617. In that case the company sold Burr a lot of bicycles and warranted them to be properly made of good material, to be of the highest possible grade, and that they would give the purchasers thereof every satisfaction. They proved to be of inferior quality, of a poor grade, and failed to give satisfaction. A part of them were sold by Burr to his customers, but were returned on account of their worthless condition. An action was instituted by the company in the county court of York county to recover a balance claimed to be due from Burr on account of such sale. On appeal, in the district court, an answer was filed setting up the warranty and the breach thereof, together with a counterclaim for damages. In this claim there was an item of $100 for loss of profits on the sales of the machines returned by the purchasers because unsatisfactory and defective, and, on motion, this item was stricken out. The case came to this court on error, and on that question the court made use of the following language:

"A portion of the answer referred to loss of profits on 'wheels' which had been purchased of plaintiffs in error and returned by purchasers because defective. This was a proper element of damages, having its origin in the breach of warranty and must have been in contemplation of the parties when the contract was made, as a probable consequence of its breach. The court should not have stricken out the portion of the answer in which this claim of damages was made, or excluded the offered evidential facts of

this claim of damages. Both this and the claim in relation to repairs were certain in their nature, or could be rendered reasonably so by the evidence, and were also certain in respect to what caused them, hence were proper elements of damages."

In *Russell v. Horn, Brannen & Forsyth Mfg. Co.*, 41 Neb. 567, this question was before the court in another form. The company in that case made a contract with Russell whereby he was to have the exclusive right to sell its manufactured goods in certain territory; another agent of the company sold goods in such territory, and Russell claimed damages in the nature of profits on such sales. It was held that the measure of damages, because of such sales, was the profits which Russell might, with reasonable certainty, show he was prevented from realizing by reason of the breach of contract. In *Wittenberg v. Mollyneaux*, 55 Neb. 429, it was held that "A party injured by a breach of contract may recover for gains prevented, provided they are within the established rules permitting consequential damages, and provided they can be proved to a reasonable degree of certainty."

In *Western Union Telegraph Co. v. Wilhelm*, 48 Neb. 910, where, by reason of the failure of the company to deliver a certain telegram, Wilhelm was prevented from consummating the exchange of a piece of land for a stock of goods, and thereby lost the profits he would have made had such exchange been effected, it was held that the telegraph company was liable to him for such profits. In the body of the opinion we find the following language:

"Since it appears from the evidence that the message delivered to the telegraph company for Wilhelm was never delivered; that by reason of the failure of the telegraph company to deliver the message the exchange of properties was not consummated, and he thereby lost the profits he would have made upon that exchange; and since the evidence warrants the conclusion that had the message been delivered the exchange would have been consummated, we think the evidence sustains the finding that the neglect of

the telegraph company to deliver the message was the proximate cause of the loss and damages sustained."

The same rule was recognized in *Schneider v. Patterson, Murphy & Co.*, 38 Neb. 680. *Thorne v. McVeagh*, 75 Ill. 81, was a case where a lot of hams were sold in Chicago, with a warranty that they were first class in every respect, the purchaser not seeing them, and the seller knowing that they were bought for a customer in Salt Lake City under a contract with the latter. They were shipped by the seller to Salt Lake City for the purchaser. The hams not being of the quality represented the purchaser lost the benefit of his resale. On these facts it was held that he was entitled to recover, among other items, the profits which might be reasonably expected on the resale. In *Griffin v. Colver*, 16 N. Y. 489, it was held that loss of profit not speculative or contingent may be considered in estimating the damages for a breach of contract. This is a leading case on this question, and the opinion fully discusses the general principle, together with the exceptions thereto. In *Schile v. Brokhahus*, 80 N. Y. 614, it was held that the loss of profits consequent upon a trespass is properly allowed as an item of damages, provided they are such as might naturally be expected to follow from the wrongful act, and are certain both as to their nature and their cause. It may be stated as a broad, general rule, that a party injured by a breach of contract is entitled to recover all his damages, including gains prevented as well as loss sustained, subject to the conditions and limitations that it must appear that the profits were reasonably certain to have been realized by performance; that they must have been in the contemplation of the parties when they made the contract, not speculative or contingent, and the loss must appear to have resulted proximately and naturally from the breach. To which may be added that they must not have proceeded from the injured party's own neglect, inattention or mismanagement. Note to *Griffin v. Colver*, reported in 69 Am. Dec. (N. Y.) 718, 725. Indeed this rule was recognized and commented on in *Silurian Mineral Springs Co. v.*

Kuhn & Co., 65 Neb. 646, where we cited and discussed *Messmore v. New York Shot and Lead Co.*, 40 N. Y. 422, and other cases holding the same doctrine, but concluded that the facts in that case brought it within the rule of anticipated profits on conjectured, expected or hoped for sales, rather than profits on completed sales where the damages are certain, fixed and capable of proof. In our former opinion in this case it was said:

"The plaintiff knew the purpose for which the goods were bought, and must have known that the carrying out of such purpose would entail certain expenses, and that the alleged defects in all probability would not be discovered until after the delivery of the goods to the defendant's customers."

To this we may add, that it was known by the plaintiff at the time of the purchase and sale that the defendant was a jobber; that the machines would not be sold at retail, but would be sold and delivered to the trade, to wit, to dealers; that they were purchased for the sole purpose of resale, and it having been understood that they were to be resold at an advance over the contract price of $4 each, that sum must have been in the contemplation of both the seller and purchaser as the amount of damage which would be sustained on each machine in case of a breach of the warranty.

It is claimed by the plaintiff that the facts in this case bring it within the rule announced in *Alpha Checkrower Co. v. Bradley & Co.*, 105 Ia. 537, and it is true that as to certain facts the cases seem to be alike; but in that case the machines were not actually resold, and the decision was in fact based on the insufficiency of the answer. In the case at bar all of the cultivators were actually resold, and if they had been of the kind and quality they were represented and warranted to be, the defendant would have received a profit of $4 on each one of them, or $168 as the result of its resales. It had fully earned this profit, and was deprived of it solely because of the breach of the warranty. The measure of damages having been based on the fully completed resales of the cultivators, the amount

thereof being fixed, certain and capable of accurate proof, and evidently within the contemplation of the parties when the contract was made, it follows that the judgment of the district court was right, and we recommend that it be affirmed.

ALBERT and GLANVILLE CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. RUTH BROWN ET AL.

FILED JANUARY 6, 1904. No. 13,435.

1. **Accord and Satisfaction.** An accord, even between the plaintiff and a third party, as to the subject matter of an action, and a satisfaction moving from such third party to the plaintiff, are available in bar of the action, if the defendant has authorized or ratified the settlement.
2. ———: RATIFICATION. A plea interposing such defense is of itself a ratification of the settlement.
3. ———: CONSIDERATION. That it is uncertain which of two parties, both of whom deny liability, is liable for a debt of a fixed and certain amount, is a sufficient consideration to support a settlement between one of such parties and the creditor, whereby the creditor accepts a part of the amount due in discharge of the debt.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

W. F. Evans, Lorenzo W. Billingsley, Robert J. Greene and *Richard H. Hagelin,* for plaintiff in error.

Benjamin F. Johnson, contra.

ALBERT, C.

The plaintiff in error, hereinafter called the company, began proceedings in the county court for the condemna-

tion of certain real estate, a part of which was owned by the defendants in error, the rest by another party. The damages were assessed at $1,700 and the amount was deposited by the company with the county judge. On appeal the award was set aside. A new commission was then appointed, who assessed the damages at $950. Thereupon it was agreed between the parties that the award should be increased to $1,200, one-half of which should be paid to the defendants in error, the remainder to the other owner. The company permitted the county judge to retain the amount it had deposited with him, directing him to apply it, so far as requisite, to the satisfaction of such amount as should be awarded the owners as damages. As to the share of the defendants in error, it was stipulated between them and the company that it should not be paid until they should convey the fee title to that part of the land belonging to them to the company by good and sufficient deeds. Such conveyances were afterwards made. The damages due the defendants in error were not paid, and they brought this action against the company for the recovery thereof.

The district court held that, by the deposit of the amount of the award with the county judge, the company had discharged its liability to the defendants in error, and gave judgment accordingly. The defendants in error then brought the case to this court for review. The opinion is reported under the title of *Brown v. Chicago, R. I. & P. R. Co.*, 64 Neb. 62. In disposing of the case this court held:

"The deposit of money by a railway company with a county judge, during the progress of proceedings to obtain a right of way, does not, unless it is withdrawn by the property owner, discharge the obligation of the company to make just compensation for the property taken or damaged."

The judgment of the district court was reversed and the cause remanded for a new trial.

After the case had been remanded the company filed

a supplemental answer, which, so far as is material at present, is as follows:

"The defendant further and as supplemental to the defense set forth in its answer heretofore filed, and arising since said answer was filed, alleges that on or about the 6th day of January, 1899, the plaintiffs herein demanded of one Isaac M. Raymond payment of the sum of $600 and interest accrued, claiming that the said Raymond, by reason of the fact that he was surety on the bond of I. W. Lansing, county judge of Lancaster county, Nebraska, at the time alleged in the answer of the defendant, and the further fact that said Lansing had failed to pay said sum to the parties entitled thereto, or to his successor in office, was liable to pay said sum of $600 to plaintiffs; that said Raymond denied the liability of said railway company, of said Lansing, and of said Lansing's bondsmen upon the claim of the plaintiff herein sued on; that the facts were disputed by the parties, and finally as a settlement, compromise, accord and satisfaction, it was agreed by and between the parties that the said Raymond should pay to the said plaintiffs, in full discharge of all liability of all the parties resulting from the appropriation by the Chicago, Rock Island & Pacific Railway Company of the east 42 feet of the south half of lot C, subdivision of lots 4, 5 and 6, in block 28, Kinney's O Street Addition to the city of Lincoln, Lancaster county, Nebraska, and said Raymond thereupon paid to said plaintiffs the sum of $475, and, as evidence of the acts of the parties in the premises, received from said plaintiffs the discharge and release of all the parties from all liability sued for herein, as follows, to wit:

"'In the Matter of the Claim of Ruth Brown and B. F. Johnson, against the bondsmen of I. W. Lansing, late county judge of Lancaster county, Nebraska.

"'In consideration of the payment of $475, the said Ruth Brown and B. F. Johnson hereby release I. M. Raymond,

one of the bondsmen of the said I. W. Lansing, from all liability resulting from the appropriation by the Chicago, Rock Island & Pacific Railway Company of the east forty-two (42) feet of the south half (S. ½) of lot C, subdivision of lots four (4), five (5) and six (6), Kinney's O Street Addition to the city of Lincoln, Lancaster county, Nebraska, and hereby acknowledge the receipt of the said $475 in full satisfaction of said above claim.

"'(Signed) RUTH BROWN,
"'By B. F. JOHNSON, *her Attorney.*
"'(Signed) B. F. JOHNSON.'

"That thereby and as above pleaded and set forth, the matters disputed between plaintiffs and defendant and the said bondsmen of said I. W. Lansing, county judge, were fully settled and compromised and full payment, accord and satisfaction of the debt herein sued on made. Wherefore, having fully answered, the defendant prays that it recover its costs herein laid out and expended."

From the pleadings and the evidence in the present case it conclusively appears that, while the former appeal was pending in this court, the defendants in error made the settlement shown by the release set out in the supplemental answer, executed the release and received the amount therein specified. The court directed a verdict in favor of the defendants in error, and gave judgment accordingly. The company brings error.

Although presented by different assignments, there is but one question presented by the record now before us, and that is, whether the settlement had between the defendants in error and the surety on the official bond of the county judge is a defense to this action.

We think this question must be answered in the affirmative. It is well settled that an accord, even between the plaintiff and a third party, as to the subject matter of suit, and a satisfaction moving from such third party to the plaintiff and accepted by him, are available in bar of the action, if the defendant has either authorized or rati-

fied the settlement. *Leavitt & Lee v. Morrow,* 6 Ohio St. 71. The case cited contains an elaborate discussion of the principles underlying the doctrine, which is also supported by the following: *Jackson v. Pennsylvania R. Co.,* 66 N. J. Law, 319; *Bennett v. Hill,* 14 R. I. 322; *Porter v. Chicago, I. & D. R. Co.,* 99 Ia. 351; *Snyder v. Pharo,* 25 Fed. 398; *Gray v. Herman,* 75 Wis. 453; Beach, Modern Law Contracts, p. 452. The supplemental answer of itself is a ratification of the settlement. *Leavitt & Lee v. Morrow, Bennett v. Hill and Snyder v. Pharo, supra.*

But the defendants in error contend that the amount due was fixed and certain, and that an agreement to accept a less amount in discharge thereof was without consideration. At the time the settlement was made both the company and the party who made settlement of the claim denied any and all liability therefor. It was uncertain whether the defendants in error would recover of the company, or would be forced to proceed against the county judge or his sureties. That of itself shows a sufficient consideration for the settlement. *Chicago, R. I. & P. R. Co. v. Buckstaff,* 65 Neb. 334; *Chicora Fertilizer Co. v. Dunan,* 91 Md. 144, 50 L. R. A. 401; *Emerson v. Slater,* 22 How. (U. S.) 43; *Fuller v. Kemp,* 138 N. Y. 231.

It is next contended that there is no averment in the supplemental answer to the effect that the defendants in error accepted the $475 in satisfaction of the claim. The pleading referred to is set out at length, and we do not think it is open to the criticism urged against it.

The plaintiffs also contend that the court was justified in directing a verdict because the defendants introduced no evidence save the release. It is hardly true that the defendants introduced no evidence but the release. They introduced evidence showing that one of the plaintiffs who was present when the release was signed stated that at the time of the settlement the liability of the surety was in dispute. Besides, the plaintiffs in rebuttal showed that they had received the $475 at the time of the execution of the release. It was also shown on the cross-examination

of one of the plaintiffs that he knew what was in the release before he signed it, and that it stated the facts; its execution was admitted. In short, we think the material facts pleaded as accord and satisfaction were conclusively established by the evidence.

It follows, therefore, that the judgment of the district court is erroneous, and we recommend that it be reversed and the cause be remanded for further proceedings according to law.

BARNES and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings according to law.

REVERSED.

W. J. MOSS v. DAVID L. MARKS ET AL.

FILED JANUARY 6, 1904. No. 13,256.

1. **Election of Remedies.** One who by action pursues one remedy without being chargeable with notice of facts entitling him to a different one, is not thereby estopped to pursue the latter upon discovery of such facts, if he then discontinues his action for the former.
2. **Remedies: ESTOPPEL.** An action for the conversion of chattels and one for the possession thereof are not inconsistent remedies; and one who has sued for conversion may dismiss such action and recover in replevin, if his right is otherwise good.

ERROR to the district court for Jefferson county: CHARLES B. LETTON, JUDGE. *Affirmed.*

W. J. Moss, pro se.

John Heasty and *C. H. Denney, contra.*

GLANVILLE, C.

The plaintiff in error was, by the district court for Jefferson county, allowed to intervene as defendant in a replevin action for the purpose of protecting his so-called attorney's

lien upon the replevied property for the value of services rendered to the original defendants in the action, who had attempted to dismiss their appeal to that court from a judgment against them in county court, and absconded. The plaintiff had judgment, and the intervener brings error. A full history of the case would be somewhat tedious and will be omitted, because, in the view we take, which is the same as that taken by the plaintiff in error, he can not prevail, unless he is correct in his interpretation of the law applied to a few simple facts. The defendant in error commenced an action against the same parties, who were the original defendants in the replevin case, upon a claim for damages for the wrongful conversion of a buggy. Afterwards it was found that the buggy in question was within reach of process, and the action for conversion was dismissed, and this action for the recovery of the buggy commenced. The plaintiff in error's contention is that the bringing of the first suit was such an election of remedies as estops the defendant in error to claim title to the buggy, and this is his only claim and reliance. If he is not right in this, he can not prevail in this action and, in fact, does not expect to prevail. He says in his brief, "It became necessary to rely upon the rights which are his by operation of law. These rights arise from the law of election of remedies." We think his contention as to the law governing the case is wrong, and it will therefore be unnecessary for us to discuss other questions argued at some length in his brief, touching his right to such a lien as he claims, and his right to intervene. Many citations of authorities are contained in the brief to support the proposition that, "After bringing assumpsit for the purchase price of chattels, the plaintiff can not bring replevin for the same chattels, though the action in assumpsit has been voluntarily discontinued." It should be apparent that this proposition, however firmly established in law, has no application to this case, because the defendant in error did not bring assumpsit. The following proposition is also stated with citation of author-

ities in support thereof: "At law, in many cases, if the property be tortiously taken or converted, the tortfeasor may be sued in tresspass or trover, or the injured party may waive the tort and sue in assumpsit. In the latter case the same results follow as if there has been an implied contract." In this case the defendant in error did not waive the tort, but sued for conversion; and if he was not thereby precluded from dismissing such action and retaking his property when discovered within reach of process of law, the plaintiff in error must fail.

In *Locke, Huleatt & Co. v. Shreck,* 54 Neb. 472, it is expressly held that, to maintain an action for conversion of chattels, a party must have actual possession of the property, or the right of immediate possession. In *Depriest v. McKinstry,* 38 Neb. 194, this court expressly held that an action of replevin will not lie against one who, at the time the action was instituted, was neither in the actual nor constructive possession or control of the property, unless he has concealed, removed, or disposed of the same for the purpose of avoiding the writ, and in *Peterson v. Lodwick,* 44 Neb. 771, it is said:

"The facts necessary to be established to entitle a plaintiff in replevin to recover must be shown to have existed at the time the action was commenced."

In the case before us the defendant in error, at the time the action was commenced to recover for the conversion of the buggy, did not know that the one fact necessary to a right of action in replevin, that was not necessary to sustain his action of conversion, that is, *possession of the buggy by the defendant,* then existed. As we have seen, his right to immediate possession of the property must exist to support his action of conversion as fully as is required to support replevin. There was then no election to pursue the action in conversion with knowledge of his right to the action of replevin, and, even if the remedies were inconsistent, he was not estopped to bring replevin, because he dismissed the other action as soon as he discovered he had the right of replevin.

Again, as a wrongful detention of the property by the defendant would constitute an act of conversion, there is no inconsistency between the remedy in conversion and the remedy in replevin. In *Pyle v. Warren,* 2 Neb. 241, it is held that possession of chattels, with claim of title adverse to the owner, is evidence of conversion. To succeed in replevin the defendant in error would not be required to disprove any fact which he must rely upon in his action for conversion, nor to succeed in conversion would he be required to disprove any fact which he must rely upon in replevin. The defendant in error had as complete a right to his action in replevin as though he had not commenced and dismissed the other action, because he had done nothing to divest him of his title to the buggy, nor alleged any fact inconsistent with his claim of such title. Indeed, it has been repeatedly held that judgment for plaintiff in trespass or trover, without satisfaction, will not pass the title of the property involved to the defendant. *Lovejoy v. Murray,* 3 Wall. (U. S.) 1; *Elliott v. Hayden,* 104 Mass. 180; *Bell v. Perry & Townsend,* 43 Ia. 368. This is said to be the accepted doctrine in this country. Cooley, Torts (2d ed.), 458. When the owner has elected to waive the tort and sue upon an implied contract to pay for the chattels, the rule is different. In 7 Ency. Pl. & Pr. p. 370, it is said, speaking of assumpsit in such cases:

"As the theory of it is a transfer of title to the converted property from the owner to the wrongdoer or his vendee, it is the opposite of the theory upon which are predicated the remedies of trespass, trover and replevin, which is that of continued title in the injured party."

The alternative remedies are assumpsit on the one side, and trespass, trover, and replevin on the other, and these latter are concurrent, provided the wrongdoer still has the property so as to allow replevin. The only theory upon which plaintiff in error bases his claim of right to a reversal is wrong, and it appears that the judgment of the district court is the only one justified by the record.

We therefore recommend that the judgment of the district court be affirmed.

BARNES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOSHUA E. GOSNELL ET AL. V. JOHN R. WEBSTER.

FILED JANUARY 6, 1904. No. 13,310.

1. **Replevin:** PLEADINGS. Petition and amended petition examined, and *held* to state the same cause of action.

2. **Chattel Mortgage:** DESCRIPTION. Evidence examined, and *held* not to justify the contention of plaintiffs in error that the mortgage in question was void as to the chattels in question, because of insufficient description or identification thereof in the mortgage.

3. **Evidence.** Where one party to an action has introduced letters constituting a part of a correspondence between the other party to the action and a third party, such other party is entitled to show the entire correspondence upon the same subject.

4. **Sale of Mortgaged Chattels:** RATIFICATION. Where a mortgagor, without authority from the mortgagee, sold property covered by a chattel mortgage, and paid a debt to the mortgagee, other than the one secured by the mortgage, with a portion of the purchase money, which was received and credited by the mortgagee without knowledge of the fact that the money had been so obtained, the failure of the mortgagee to refund the money so received, upon learning the source from which it was derived after commencing an action against third parties to whom the mortgagor's vendee had sold the chattels, does not thereby ratify the sale and deprive himself of the right to recover possession of the chattels. *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68, distinguished.

5. **Evidence.** Evidence examined, and *held* to be sufficient to sustain the verdict.

ERROR to the district court for Harlan county: ED L. ADAMS, JUDGE. *Affirmed.*

Samuel P. Davidson, for plaintiffs in error.

Riley L. Keester, John C. Wharton and *William Baird, contra.*

GLANVILLE, C.

Plaintiffs in error were defendants in a replevin action tried in the district court for Harlan county, and bring error, seeking to reverse a judgment against them. The writ was issued from the county court and, after appraisement of the property taken, the case was certified to the district court under the provisions of section 9, chapter 20 of the Compiled Statutes. The defendant in error claimed title to the cattle in question by virtue of a chattel mortgage and in his petition and affidavit filed in the county court described the mortgage as, "A certain chattel mortgage executed on the 27th day of December, 1900, in Deuel county, Nebraska, by Wm. E. Colvin to the above named plaintiff to secure the payment of one note for the sum of $31,000." After the case had been certified to the district court he filed an amended petition wherein he described the mortgage as, "A chattel mortgage executed by Wm. E. Colvin to John R. Webster, the above mentioned plaintiff, and Alfred B. De Long, bearing date the 27th day of December, 1900, and given by the said Colvin to the plaintiff and said De Long * * * to secure the payment of one promissory note for the sum of $8,000, * * * payable to the order of Alfred B. De Long, and the payment of one promissory note executed by the said Wm. E. Colvin and payable to the order of the plaintiff John R. Webster for the sum of $31,000." The petition, and also the evidence in the case, shows that the debt secured to Alfred B. De Long had been fully paid. The affidavit was amended in the same manner. The plaintiffs in error made a motion to strike the amended petition from the files because of a change of the issues. This was overruled and alleged as error. There is no merit in

the contention; the same mortgage is referred to and relied upon, and the same lien is made the basis of the mortgagee's right in all the pleadings. There is a more accurate description, perhaps, in one than in the other, but the amendment was proper both in the petition and in the affidavit.

The second contention touches the sufficiency of the evidence and the refusal of the one instruction, and is to the effect that the description of the cattle in the mortgage is insufficient because, it is claimed, there were seven head of cattle upon the ranch in the herd with the cattle in question, bearing the same description at the time the mortgage was given, which were not covered thereby. The cattle in question were, in the mortgage, included in the description "600 yearlings, mixed steers and heifers, all branded ᔕ C on the left hip." The brand is called the "lazy S C" brand. The mortgage also covered 295 two-year-old heifers and 230 two-year-old steers, all branded in the same way, and purported to cover all the cattle only so branded kept on the Colvin ranch. It seems that just prior to the date of the mortgage in question a part of the herd of cattle upon the Colvin ranch, owned by Spalding & Clements, were sold to the mortgagor Colvin, and a part were retained and left upon the Colvin ranch by Spalding & Clements. In cutting out the Spalding & Clements cattle, and branding them with a tally brand to distinguish them from the cattle sold to Colvin, a mistake in the number was made, so that Spalding & Clements got seven head less than they were entitled to under the contract, and when they removed their cattle from the ranch, which was after the date of the sale by Colvin through which plaintiffs in error claim title, seven head of cattle branded only with the "lazy S C" were delivered to Spalding & Clements to make up the supposed shortage. There is no evidence tending to show that more than 600 yearlings so branded were upon the ranch when the mortgage was made, nor is there any evidence to show that any of the seven head of

cattle cut out for Spalding & Clements were of that class. Moreover, the evidence will justify a holding that, as against the defendant in error, Spalding & Clements would be estopped to claim any of the cattle upon the ranch not bearing their tally brand, and that, in fact, the seven head turned over to them as stated were covered by the mortgage and could have been held by the mortgagee. There is no contention that the mortgage otherwise fails to sufficiently identify the cattle covered thereby, and we think the steers recovered by the mortgagee in this action were sufficiently identified and described in the mortgage. The instruction upon this issue, asked and refused, was based upon the presence in the herd of "seven head of *cattle* branded with the ∽ C brand" not covered by the mortgage, and was properly refused.

A third contention is that the defendant in error was allowed, as a witness, to explain his own letters which had been introduced by the plaintiffs in error. We have examined the record carefully in this regard and are satisfied that there is no prejudicial error shown. Many of the letters were introduced by plaintiffs in error over the objections of the defendant in error, and were written at such times, and in such form, as to have no bearing upon the issues being tried, except as certain inferences might be drawn therefrom, and there was no error in allowing the defendant in error to so explain the letters.

Complaint is made that certain questions asked defendant in error upon cross-examination were ruled out. The object of certain of these questions is stated in the brief, as follows: "These puestions were asked for the purpose of securing an admission from Mr. Webster that he held a mortgage on the entire herd of Mr. Colvin's cattle, or, if he denied having such a mortgage, for the purpose of laying a foundation for his impeachment by the testimony of Mr. Noleman." What other mortgage was held by Mr. Webster, or what was covered thereby, has no bearing upon the issues in this case, and the questions were irrelevant, and the answers would not

be a good foundation for impeaching testimony. Besides, the information as to the other mortgage, and what it covered, was obtained by plaintiffs in error by the answer to a subsequent question which they sought to strike out. The other questions referred to in the brief as ruled out were all allowed later in the examination, and the error, if any, was amply cured.

The fourth contention relates to the admission of portions of a letter written by Colvin. Part of the letter was introduced by plaintiffs in error, and defendant in error was allowed to put in other parts. In the same connection, complaint is made because certain letters written by Colvin to Webster, and by Webster to Colvin, were allowed to be put in evidence after plaintiff had introduced a part of the correspondence on the same subject, between the same parties. There is no error in this regard. The letters introduced by plaintiffs in error were numerous, extending over some period of time, and those put in by defendant in error were a part of the same correspondence and related to the same subjects and matters. Section 339 of the code reads as follows:

"When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; thus, when a letter is read, all other letters on the same subject between the same parties may be given. And when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence."

The next contention is that there are 143 head of cattle involved, and the jury found for the defendant in error as to but 120, and for the plaintiffs in error as to the remainder; and that the verdict can not stand because it appears to have been a compromise verdict, there being, as it is claimed, no proof upon which such a finding could be based. During the course of the trial it was stipulated by the parties that there were 120 head of cattle in

the herd, taken upon the writ, branded with the "lazy S C" brand. The witness Riley, who purchased the cattle from Colvin and sold them to the plaintiffs in error, testified that there were 120 head of cattle in the bunch, taken upon the writ in the action, that he bought from the mortgagor Colvin. There is no testimony clearly identifying more than the 120 head of these cattle as covered by the mortgage in question, and the verdict in this regard is clearly proper under the evidence.

Complaint is made of the form of the verdict. It is in exact accordance with an instruction of the court, which was not objected to or complained of, and appears to be in proper form to respond to the issues and support the judgment.

Another contention is that there is no proof in the record that the mortgagor Colvin was a resident of Deuel county at the time the mortgage was given, in which county, only, the mortgage was on file at the time the mortgagor sold the cattle in question. While it may be true that no direct statement of that fact is contained in the record, yet we think it sufficiently appears. The mortgage itself so describes him. An extended correspondence between the defendant in error at Omaha and the mortgagor in Deuel county is shown in the record, and several of the witnesses refer to the time when Mr. Colvin "left" or "went away." The witness Noleman, one of the attorneys for plaintiffs in error, testified to being at Mr. Colvin's ranch, which is located in Deuel county, and said "Mr. Colvin had gone away." He stated that he got certain letters "out of Mr. Colvin's desk. I didn't have the permission of any one, except Mrs. Colvin told me, 'there were his books, and to go and examine them.'" In reference to another matter he states, "That was at the Colvin ranch house, at the home ranch." The jury were told that, in order to recover, the plaintiff in the action must satisfy them, among other things, "that his mortgage was duly filed for record in the county where the mortgagor resided at the time the said mortgage was

given." We think the evidence fully justifies a finding for defendant in error upon that issue.

There is but one other ground for reversal urged. It appears from the evidence that a check given by Riley for a portion of the purchase money for the bunch of cattle he purchased from Colvin, which included those in question, was sent to the defendant in error, and the proceeds thereof received and applied by him in payment of a debt of Colvin's to him, other than the debt secured by this mortgage; and it is urged that he can not prevail in this action because he has been informed, since its commencement, that such check was given in part payment for the bunch of cattle so sold, and he has not offered to refund the money. It is contended that this brings the case within the rule announced in *Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb. 68, wherein it is held:

"The acceptance or retention by the principal, after knowledge of the facts, of the fruits of an unauthorized act of an agent is a ratification of the agent's act, and it relates back to the time of the act and makes it as if the agent had been empowered to perform it at its date, and the principal is bound in all respects as if he himself had been the actor."

In that case, Adams, who made the sale, made it as agent of his employer, the owner of the cattle sold, and of the ranch of which he was manager. In the present case, there was no pretense of agency, nor was there any understanding on the part of Riley when he bought the cattle that Colvin sold as agent for any one. In the *Johnston* case, Adams used the proceeds of the sale for his employer, by paying for supplies used, but in this case, Colvin used the money for his own benefit, in paying his own debt, and he got credit for the amount upon his debt.

We think this case falls within the principle of *Thacher v. Pray*, 113 Mass. 291, discussed and distinguished in the *Johnston* case, wherein it is said:

"One without authority sold the plaintiff's chattel to

the defendant, receiving in payment a bank check, which he indorsed and gave to plaintiff in payment of a debt he owed him. The plaintiff in ignorance of the sale collected the check, and applied the proceeds to the payment of that debt. In an action to recover the value of the chattel, *held,* that the plaintiff's receipt and collection of the check were not a ratification of the sale; and that he had a right to appropriate the check to the extinguishment of the debt in payment of which it was given him."

In distinguishing the case, this court said:

"There is a very important and an essential element of the Massachusetts case, and one upon which, to a large extent, the decision hinges, that is entirely lacking in this case, *i. e.,* the payment of an indebteddness by the agent to the principal with the funds derived from the sale of the horse."

In the course of the opinion in *Thacher v. Pray, supra,* it is said:

"It does not affect the rights of the parties that the same check which the defendant gave Gray was given to the plaintiff, if it was applied to the settlement of an existing account between them, without any notice that it was a part of the proceeds of the unauthorized sale of the horse. Being indorsed by Gray, it was in the plaintiff's hands payable to bearer, transferable by delivery, and subject to the same rules as bank bills, coupons, or other instruments payable in money to bearer. It is as if Gray had cashed the check and sent the identical or other bills to the plaintiff."

In this case the equities are more with the mortgagee than they were with the owner in the Massachusetts case.

It appears from Mr. Riley's testimony that he purchased 200 head of steers from Colvin, but he thinks he actually got only 189, and that 120 of the same steers were among those taken upon this writ. What became of the others is uncertain, but he is quite positive that some of them were shipped and sold on the market. They were all undoubtedly covered by Webster's mort-

gage. Mr. Riley has placed beyond the reach of the mortgagee a very considerable portion of the herd, only in part paid for with the check which Colvin used in paying his debt to Webster. None of the plaintiffs in error furnished any of the money which was paid by Riley for these cattle, and yet they claim that before Webster may take the cattle he must pay, or offer to pay, to them the money paid by Riley to Colvin and used by him, while Mr. Riley still retains an unknown amount received from the sale of other cattle covered by Mr. Webster's mortgage. In this we think they are wrong.

In view of the facts established by the evidence, we think the defendant in error has not ratified the sale through which plaintiffs in error claim title, and that the court did not err in refusing the instruction asked directing a verdict for them, "if, after such sale was made, said Webster received a portion of the purchase price of said cattle from Colvin and retained the same after he had reasonable grounds to believe it was a portion of such purchase price." The verdict is supported by the evidence, and we find no error in the record.

We therefore recommend that the judgment of the district court be affirmed.

BARNES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HIRAM A. LUSK, TRUSTEE IN BANKRUPTCY, APPELLANT, v. ZACHARIAH H. RIGGS ET AL., APPELLEES.*

FILED JANUARY 6, 1904. No. 13,225.

1. **Fraudulent Conveyance: BURDEN OF PROOF.** Where a conveyance of real estate is presumptively fraudulent, the burden is on those

* Rehearing allowed. See opinion, p, 718, *post.*

claiming under such conveyance to show the *bona fides* of the transaction. In such case, when the grantee attempts to show payment of a consideration for the conveyance, he must also show that the money used was his own.

2. **Incorporation: COLLATERAL ATTACK.** Where a collection of persons claim to have organized themselves into a corporation, the invalidity of their organization may be shown, even when questioned collaterally, by evidence that no articles of incorporation were filed as required by statute.

APPEAL from the district court for Clay county: GEORGE W. STUBBS, JUDGE. *Reversed.*

J. L. Epperson, Charles H. Epperson and *Ambrose Epperson,* for appellant.

Thomas H. Matters, contra.

DUFFIE, C.

On a former appeal the case was reversed and remanded with directions to the district court to try the issues made relating to the *bona fide* character of the conveyance of the W. ½ of the N. W. ¼ of section 33, township 5 N. of range 7 W. of the 6th P. M., it being alleged in the petition that a conveyance of said land to the defendant Edward R. Cornelison was fraudulent as to creditors. The former opinion contains a full statement of the facts. See 65 Neb. 258.

On the second trial it was shown that the land in controversy was conveyed by W. T. Cornelison and wife to the Fairfield Grocery Company, June 4, 1898, and that on December 14, 1898, the Fairfield Grocery Company, by W. T. Cornelison, manager, conveyed the land to Edward R. Cornelison. It further appears that on the date of said conveyance Edward R. Cornelison executed his note for $800, the alleged consideration for said conveyance, to the Fairfield Grocery Company, which note, with ten per cent. interest thereon, was payable thirty days after date; and about January 18, 1899, a draft for $800, said to have been purchased by R. W. Cornelison & Company, was drawn by

the Morrill & James Bank of Hiawatha, Kansas, in favor of E. R. Cornelison, and by him indorsed to W. T. Cornelison and forwarded to Fairfield, Nebraska, in payment of this note. This draft was indorsed over to the Fairfield Grocery Company by W. T. Cornelison, and by said company deposited to its account in the Citizens Bank of Fairfield, Nebraska, and the proceeds thereof used in payment of accounts due to its creditors. Upon this showing the district court dismissed the petition of the plaintiff, who has taken a second appeal.

On the former hearing it was held that the conveyance of this land to the Fairfield Grocery Company, and by that company to Edward R. Cornelison, was presumptively fradulent, and that the burden was upon the defendants to show the *bona fides* of the transactions. We do not think that this has been done. It is true that Edward R. Cornelison, the present holder of the legal title, executed his note for $800 in payment for this land. It is further true that a draft payable to the order of Edward R. Cornelison was sent to W. T. Cornelison in payment of this note. Whose money purchased the draft is not shown. The written application for the draft is signed by R. W. Cornelison & Company, and the bank undoubtedly charged the amount of the draft to the account of that company; but there is no evidence whatever to show that the money with which the draft was purchased had not in fact been furnished by W. T. Cornelison or the Fairfield Grocery Company, or, if purchased with the money of R. W. Cornelison & Company, that they had not been reimbursed for the amount. The note in payment of which the draft was sent drew interest at ten per cent. per annum, and no attempt is made to show that interest due upon the note was paid. The vice-president of the Morrill & James Bank of Hiawatha testified that shortly after this transaction, and on March 12, 1900, W. T. Cornelison deposited in that bank the sum of $1,800, and this, together with the fact that but three days prior to this deposit he had received his discharge in bankruptcy, is a circumstance

giving rise to the suspicion that he might have had money in that bank in the name of his father, or a firm with which his father was connected, prior to that date, and was the party who, in fact, furnished the money for the purchase of the draft. Another suspicious circumstance is the fact that Edward R. Cornelison, although summoned to give his deposition at the same time that the deposition of the vice-president of the Morrill & James Bank of Hiawatha was taken, gave notice by his attorney that he refused to appear and testify in obedience to the subpœna served upon him. It has long been a rule in this state that, when transfers like these in question have been made between near relatives, the burden is on the defendants to show a sufficient consideration and good faith in the transaction. *National Bank of Commerce v. Chapman,* 50 Neb. 484; *Plummer v. Rummel,* 26 Neb. 142; *Knudson v. Parker,* 3 Neb. (Unof.) 481; *Bartlett v. Cheesbrough,* 23 Neb. 767. That a note was given by Edward R. Cornelison in consideration of the conveyance to him, and that said note was taken up by a draft drawn to Edward R. Cornelison, is plain enough, but the material and important question, who furnished the money that purchased the draft, is a question upon which the record is entirely silent. The burden being upon the defendants, it was incumbent upon them to show that the money received for the purchase of this land was the money of Edward R. Cornelison, and upon this point there was an entire failure.

One other question needs consideration. Appellant insists that the Fairfield Grocery Company was not legally incorporated and authorized to transact business, for the reason that its articles of incorporation were never filed in the office of the secretary of state. Section 126, chapter 16, Compiled Statutes, 1901 (Annotated Statutes, 4119), provides, among other matters:

"Every corporation, previous to the commencement of any business, except its own organization, when the same is not formed by legislative enactment, must adopt articles of incorporation and have them filed in the office of the

secretary of state and recorded in a book kept for that purpose, and domestic corporations must also file with the county clerk in the county where their headquarters are located," etc.

It is insisted that there is no evidence that the articles were not duly filed with the secretary of state, and that a certificate from the secretary to the effect that no articles of the kind were on file in his office is not competent evidence of that fact. This we must concede, but the articles themselves were introduced in evidence and, while they show a filing in the office of the county clerk, they do not bear a certificate of the secretary of state to the effect that they were filed in his office. It is well known that the secretary of state files and retains the original articles and, when occasion requires, furnishes the company, or other parties who may desire, with certified copies thereof. This proceeding relating to the conduct of a public office is a matter which needs no proof, as the wording of the statute requires that method to be adopted. The fact, then, that the articles offered in evidence fail to show that they had been filed in the office of the secretary of state is evidence conclusive that no filing had been made there. Until such filing was had the company, under the terms of our statute, was not authorized to transact business. Thompson in his Commentaries on the Law of Corporations (vol. 1, sec. 219), says:

"It has already been seen that a number of individuals, by the mere act of uniting and calling themselves a corporation, can not constitute themselves such, but that a corporation can only be created by the sovereign power. It will hereafter be pointed out that the principle which validates irregularities in the organization of corporations, when their corporate existence is questioned in collateral proceedings, applies only in cases where the corporation might have existed. If we attend to these principles, we shall see that a corporation can not be deemed to exist, even *de facto,* where the adventurers never had any charter at all. * * * It must follow, from a consider-

ation of these premises, that where a collection of persons claim to have organized themselves into a corporation under a general law, their claim will not be good, even when questioned collaterally, provided they file *no articles* of association at all; and such is the adjudged law."

In *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb. 416, it was held that until articles were filed as required by statute, a corporation *de facto* did not exist, and this ruling was followed in *Capps & McCreary v. Hastings Prospecting Co.*, 40 Neb. 470. And the rule is firmly established in this state that a corporation has no legal existence until the statute has been complied with in filing with the proper officers the articles of incorporation. We think, therefore, that the Fairfield Grocery Company never had any legal existence and that such fact may be shown in any controversy where the matter is brought in question. We recommend that the judgment of the district court be reversed and the cause remanded for another trial.

LETTON and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for another trial.

REVERSED.

THE following opinion on rehearing was filed January 5, 1905. *Reversed:*

1. **Evidence.** Evidence examined, and *held* not sufficient to sustain the judgment of the trial court.
2. **Corporation:** COLLATERAL ATTACK. Where the law authorizes a corporation and there has been an attempt in good faith to organize, and the requirements of the statute have been colorably complied with and corporate functions thereafter exercised, there exists a corporation *de facto*, which can not ordinarily be called in question collaterally. *Haas v. Bank of Commerce*, 41 Neb. 754, followed and approved.
3. **Overruled.** Paragraph 2 of the syllabus of the original opinion in this case examined, and overruled.

OLDHAM, C.

An opinion by Commissioner DUFFIE was filed in this cause. *Ante,* p. 713. In this opinion there is a careful and accurate statement of all issues arising under the pleadings and proofs, consequently no additional statement is requisite to the conclusion about to be reached. We find, on a reexamination of the evidence contained in the bill of exceptions, that the conclusion reached by the learned commissioner in support of the first paragraph of the syllabus of the original opinion is well founded and should be adhered to, and as this will necessitate a retrial of the cause in the court below, we deem it well to further examine the doctrine announced in paragraph 2 of the syllabus of the former opinion. In this latter paragraph it is held, in substance, that, where a collection of persons claim to have organized themselves into a corporation, the invalidity of their organization may be shown even when questioned collaterally, when no articles of incorporation have been filed with the secretary of state. In support of this conclusion the learned commissioner says:

"The articles themselves were introduced in evidence and, while they show a filing in the office of the county clerk, they do not bear a certificate of the secretary of state to the effect that they were filed in his office."

The question then arises, does the failure of a domestic corporation, organized under the general laws of the state, to file its articles of incorporation with the secretary of state, when it has filed them in the office of the clerk of the county in which its place of business is situated, render its proceedings a nullity for the purpose of transacting business other than its own organization? Section 126, chapter 16, Compiled Statutes (Annotated Statutes, 4119), which is quoted in the original opinion, provides in substance that every corporation, when the same is not formed by legislative enactment, shall adopt articles of incorporation and have them filed in the office of the secretary of state, and it also provides that domestic corpora-

tions must also file them with the county clerk in the county where their headquarters are located. This section of the statute was adopted in 1897 as an amendment to section 126, chapter 25, Revised Statutes, 1866, which only provided for the recording of the articles with the county clerk in the county in which the business of the corporation is to be transacted. Section 132, chapter 25 of the Revised Statutes of 1866, however, has never been amended or repealed by direct enactment and remains as section 132, chapter 16, Compiled Statutes (Annotated Statutes, 4124), and this section provides that any corporation formed without legislative enactment may commence business as soon as its articles of incorporation are filed with the county clerk of the county, as required by this subdivision, and shall be valid if a copy of its articles be filed in the office of the secretary of state, etc. This latter section of the statute is now in full force and effect, unless repealed by implication by the enactment of section 126, *supra*, and if repealed by implication it must be because of a clear and irreconcilable conflict between the two sections. If the question of the conflict of these sections of the statute and the consequent repeal of section 132 by the adoption of section 126 had been raised in a direct attack by a quo warranto proceeding, instituted by the state to prevent the corporation from transacting business, other than its organization, without filing its articles with both the county clerk and the secretary of state, we would consider the question one worthy of grave consideration, for in such proceeding the corporation would be compelled to show its right *de jure* to transact business; but when collaterally attacked, as in the case at bar, it is only necessary to show a *de facto* existence.

Prior to the amendment of 1897 it was held by this court that the filing of articles with the county clerk is a condition precedent to the right to do business other than the organization of the company. *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb. 416; *Capps & McCreary v. Hastings Prospecting Co.*, 40 Neb. 470, 477. These

cases go to the question that the mere adoption of articles of incorporation, without filing the same as required by statute, gives no right as even a *de facto* corporation to transact business; but in the case of *Haas v. Bank of Commerce,* 41 Neb. 754, where the right of a corporation was collaterally attacked, IRVINE, C., speaking for the court, said:

"Where the law authorizes a corporation, and there has been an attempt in good faith to organize, and corporate functions are thereafter exercised, there exists a corporation *de facto,* the legal existence of which can not ordinarily be called in question collaterally. It would be intolerable to permit in any civil action, to which such a body was a party, an inquiry into the legal right to exercise corporate functions—a right which it is for the state alone to question in appropriate proceedings for that purpose. On this there is a substantial unanimity in the authorities. Among other cases may be cited, *Williamson v. Kokomo Building & Loan Fund Ass'n,* 89 Ind. 389; *Pape v. Capitol Bank,* 20 Kan. 440; *Lessee of Frost v. Frostburg Coal Co.,* 24 How. (U. S.) 278; *Society Perun v. Cleveland,* 43 Ohio St. 481. The evidence here shows that articles of incorporation were adopted, acknowledged and filed for record in the office of the county clerk, and that the bank acted under such articles and conducted business thereunder for some years. This was sufficient evidence of a corporate existence. *Abbott v. Omaha Smelting & Refining Co.,* 4 Neb. 416; *Merchants Nat. Bank v. Glendon Co.,* 120 Mass. 97."

It seems to us, in view of the apparent existence of the two sections of the statute, it may be said that the Fairfield Grocery Company has colorably complied with the requirements of the law, and this is all that is necessary to show to constitute it a *de facto* corporation, and secure it against a collateral attack. 1 Clark & Marshall, Private Corporations, sec. 80, p. 227, and authorities there cited.

We therefore conclude that the second paragraph of the syllabus of the original opinion should be overruled, and

that the cause should be reversed and remanded because of the insufficiency of the testimony to sustain the judgment as set forth in the first paragraph of the original opinion.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the second paragraph of the syllabus of the original opinion is overruled, and the cause is reversed and remanded because of the insufficiency of the testimony to sustain the judgment as set forth in the first paragraph of the original opinion.

REVERSED.

D. B. MCMAHON ET AL. V. STATE OF NEBRASKA.

FILED JANUARY 6, 1904. No. 13,242.

1. **Game Laws:** MISDEMEANOR: EVIDENCE. The law does not recognize the distinction between principals and accessories in misdemeanors; so that where the evidence shows that a defendant was one of a party engaged in a common unlawful enterprise—that of shooting game in the closed season—it is sufficient upon which to base a conviction of such defendant upon the charge of having in his possession game protected by the statute, although the game when taken is shown to have been in a buggy not occupied or being driven by the defendant.

2. ———: PENALTY. The law not recognizing the distinction between principals and accessories in misdemeanors, it is not error to impose a fine of $5 against each of several defendants, who composed a party in whose possession a number of prairie chickens were found, for every chicken so found.

3. ———: ———: CONSTITUTIONALITY. A large discretion is vested in the legislature in the fixing of penalties designed to prevent the commission of certain prohibited acts; and a penalty imposed by statute will not be held unconstitutional as excessive, unless it is so excessive as to shock the sense of mankind.

4. ———: ———: ———. A penalty of $5 for each prairie chicken found in possession or under the control of the defendant during the closed season, *held* not excessive in a constitutional sense.

5. **Laws:** CONSTITUTIONALITY. It is not a violation of the provision of the constitution, inhibiting the incorporation in the title of an

act of more than one subject, for the legislature to provide in one act for the protection of fish, fowl and quadrupeds under the general denomination of game.

6. Evidence. Evidence examined, and *held* sufficient to sustain the judgment.

ERROR to the district court for Boone county: JOHN R. THOMPSON, JUDGE. *Affirmed.*

Henry C. Vail and *S. S. McAllister,* for plaintiffs in error.

Frank N. Prout, Attorney General, Norris Brown and *C. E. Spear,* for the state.

KIRKPATRICK, C.

This is a proceeding in error prosecuted from a judgment of the district court for Boone county by D. B. McMahon, W. E. Harvey and P. E. McKillop, who were convicted of having in their possession, contrary to law, certain prairie chickens during the closed season. It is contended first, that the judgment is not sustained by sufficient evidence; second, the defendants were found jointly guilty of having in their possession five prairie chickens, and the court imposed a fine of $25 against each defendant, making $75 in all, and it is claimed this fine is excessive; third, it is contended that the act under which the conviction was had violates that portion of the constitution which provides, "all penalties shall be proportioned to the nature of the offense"; fourth, that the act is unconstitutional, in that it contravenes the constitutional provision that no act shall contain more than one subject, which shall be clearly expressed in the title; fifth, that the act is in violation of section 26, article V, which declares, "No other executive state officer shall be continued or created, and the duties now developing upon officers not provided for by this constitution shall be performed by the officers herein created."

These objections, so far as necessary, will be considered

in their order. It is disclosed by the record that the deputy game warden came upon the plaintiffs in error in Boone county, while they were engaged in shooting chickens. While still some distance away from them, he saw three men shooting, and saw some prairie chickens fall, and upon coming up to the party he found three guns in possession of the party and five prairie chickens in one of the buggies. It seems that two other persons were present in the party besides plaintiffs in error, and that they had two buggies. One of the men in the party seems to have been a man residing in the neighborhood, who departed on foot. The others took their departure in the buggies. All of the chickens were found in the buggy occupied by plaintiffs in error McMahon and Harvey. No testimony was offered by any of the plaintiffs in error, and it was upon the testimony of the deputy game warden that the conviction was had. We have examined the testimony carefully and are of the opinion that it is sufficient to sustain the judgment. There can be no possible question as to McMahon and Harvey, and as to McKillop, there is no question that he was present in the party, and was engaged with the other parties in the unlawful hunting of the chickens. We do not think that the mere circumstance that he was not in the buggy in which the game was found is sufficient to exculpate him. "Possession," as stated in *Redfield v. Utica & Syracuse R. Co.*, 25 Barb. (N. Y.) 54, "is the detention or enjoyment of a thing which a man holds or exercises by himself, or by another who keeps or exercises it in his name." To the same effect is *State v. Washburn*, 11 Ia. 245. In offenses of this grade, the law does not distinguish between principals and accessories, and all who participated in any degree are alike guilty. *Wagner v. State*, 43 Neb. 1. The evidence can not be said to be insufficient to convict McKillop.

A fine of $5 was imposed upon each defendant for each of the five chickens found, and it is contended that this is excessive. The settled rule, as we understand, is that, where two or more persons concur in the commission of an

offense, then each offender is liable to a separate punishment. *Curtis v. Hurlburt,* 2 Conn. 309. The distinction between principal and accessory not being recognized in this grade of offense, each defendant is, in legal contemplation, found guilty of having in his possession, contrary to law, 5 chickens, and accordingly a fine of $25 against each is not excessive.

We do not think the objection that the act, in providing for a fine of $5 for each chicken, violates the constitutional provision against excessive fines. The fixing of penalties for the violation of statutes is primarily a legislative function, and the courts hesitate to interfere, unless the fine provided for is so far excessive as to shock the sense of mankind. In *Southern Express Co. v. Walker,* 92 Va. 59, as also in *State v. Rodman,* 58 Minn. 393, and in *State v. De Lano,* 80 Wis. 259, this rule is adhered to. In Minnesota, an offense like that under consideration, in addition to a fine, was punishable by a sentence to the county jail for not less than 10 or more than 30 days for each bird found in possession or under control of the defendant. Discussing the question in *State v. Rodman, supra,* the court said:

"While the fines imposed are certainly large, yet we can not say that they are excessive in a constitutional sense. A large discretion is necessarily vested in the legislature to impose penalties sufficient to prevent the commission of an offense, and it would have to be an extreme case to warrant the courts in holding that the constitutional limit had been transcended."

It is next contended that the act is violative of the constitution in that the title contains more than one subject, namely, first, the protection of game, by which is understood quadrupeds; second, the protection of song, insectivorous and other birds. Or, in other words, "song and insectivorous birds, and "deer having horns and antelope having horns" are not cognate subjects. A careful consideration of this objection has led us to the conclusion that it is without merit. It is manifest to us that the

single subject of this act is the protection of game, and that with this central idea before it, the legislature could constitutionally legislate in one act with reference to all those creatures which are customarily pursued by man for amusement or profit. The word game is comprehensive, and it appears to have been used by the legislature, and will readily be understood by the public, as including beasts, fowl and fish.

It is finally urged that the act creates a new executive office, and is thereby in violation of the constitutional provision in that regard. The question here raised is identical with that passed upon and settled by this court in many prior decisions. *State v. Eskew,* 64 Neb. 600; *Merrill v. State,* 65 Neb. 509. We do not think that a reexamination of the question is called for at this time. It is recommended that the judgment be affirmed.

DUFFIE and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

RILEY M. TIDBALL, APPELLEE, V. EMMA J. HOLYOKE ET AL., APPELLANTS.

FILED JANUARY 6, 1904. No. 13,286.

1. **Mechanic's Lien: FILING.** In an action to foreclose a mechanic's lien, it must appear in evidence that the statement of the claim therefor has been filed with the proper officer in the county, within the time prescribed by statute; if not, there is a failure of proof of the existence of the lien.
2. **Evidence.** Evidence examined, and *held* not to support the findings and decree.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed.*

Adolphus R. Talbot and *Thomas S. Allen,* for appellants.

John M. Stewart and *Thomas C. Munger, contra.*

LETTON, C.

This action was brought by Riley M. Tidball to foreclose a materialman's lien upon certain property in the city of Lincoln. Emma J. Holyoke, Robert A. Holyoke, Oliver P. Harrison and the Phœnix Mutual Life Insurance Company were made defendants. The allegations of the petition material to the controversy are that the plaintiff entered into an oral contract with the defendant Oliver P. Harrison to furnish lumber and building material for the defendants Emma J. Holyoke and Robert A. Holyoke for the erection of a dwelling house; that in pursuance of this contract the plaintiff furnished lumber and building material to the extent of $1,776.58, on which amount there was now due and unpaid $829.86; that Emma J. Holyoke was, at that time, the owner of the premises, and that the lien was duly filed in the office of the register of deeds of Lancaster county. The defendant Emma J. Holyoke and Robert A. Holyoke each filed separate answers, making general denials of the allegations of the petition; the other defendants made no appearance. At the trial the court found due the plaintiff from Emma J. Holyoke and Robert A. Holyoke $826.86 on the account; that a lien existed for that amount on the premises of Emma J. Holyoke, and rendered a personal judgment against the defendants Emma J. Holyoke and Robert A. Holyoke for the amount found due, and a decree for the foreclosure and sale of the real estate. From this judgment and decree an appeal was taken to this court.

The evidence in the case is meager. In substance it is that a contract was made by Mr. Tidball with the contractor Harrison for lumber for "the Holyoke residence"; that the lumber and other material described in the bill was delivered to Harrison at, and was used in the building of, "the Dr. Holyoke house," and that the original of the lumber bill was given to Dr. Holyoke. It was admitted that Emma J. Holyoke was the owner of the fee title to the lot upon which the lien was sought to be enforced. The

evidence fails to show with whom the contractor Harrison made the contract for the erection of the house, whether with Robert A. Holyoke or Emma J. Holyoke. In fact it is only by implication that it can be said there ever was any contract made by him with any one for the erection of the house, the only evidence on the matter being as follows in the testimony of Oliver P. Harrison:

Q. Were you the contractor that had charge of the Doctor Holyoke building?

A. Yes, sir.

There is no evidence to show any relation existing between Emma J. Holyoke and the contractor, beyond the bare fact that the building was erected upon her real estate. For all that appears, Emma J. Holyoke might be a person whose only relationship to the Robert A. Holyoke, or Doctor Holyoke, mentioned was the possession of the same surname. There is nothing in the record to show that Emma J. Holyoke ever knew that the building was being erected upon her real estate, that she ever saw the contractor, or had any dealing with him, or that any one was authorized to act for her. The proof is almost as defective as to the defendant Robert A. Holyoke, the only direct evidence as to him is the statement that the original bill was given to "Dr. Holyoke," and this court can only presume that "Dr. Holyoke" is the defendant Robert A. Holyoke. In order for a subcontractor to acquire a lien upon real estate for material furnished a contractor for the erection of a building thereupon, it is essential that a contract either express or implied be shown to exist between the contractor and the owner of the property. This may be proved like any other fact by circumstances; but, unless it is proved in some manner, the owner can not be held liable for a personal judgment, nor can his real estate be subjected to a lien.

We are further of the opinion that there is no competent proof in the record of the filing of the lien. The evidence as to this point is as follows: "By Mr. Allen: We offer Exhibit 115 in evidence. Mr. Munger objects, as in-

competent, immaterial and no foundation laid. Overruled. Exception." Exhibit 115 is the original bill and claim of lien sworn to by Mr. Tidball. On the back of the original bill is a stamp and signature of the register of deeds of Lancaster county, reciting the recording of the papers in that county. Under the rule laid down in *Cummins v. Vandeventer,* 52 Neb. 478, and *Noll v. Kenneally,* 37 Neb. 879, this offer and ruling did not receive in evidence the filing mark on the back of the papers, and there was no further evidence offered to show the fact of filing.

We are of the opinion that the decree is not supported by the evidence, and that it should be reversed and the cause remanded for further proceedings.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and cause remanded for further proceedings.

REVERSED.

WALTER J. LAMB, APPELLANT, V. HENRY H. WILSON ET AL., APPELLEES.*

FILED JANUARY 21, 1904. No. 11,483.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Rehearing denied.*

Walter J. Lamb and *Robert Ryan,* for appellant.

Ricketts & Wilson, contra.

BY THE COURT.

It is ordered that the judgment of reversal heretofore entered in this case be so modified as to direct the district court to hear such additional evidence as may be requisite

* See former opinions, 3 Neb. (Unof.) 496 and 505.

for a complete statement of the accounts between the parties, and restate such accounts and render judgment accordingly in accordance with the law as stated in the syllabus of the opinion upon the last hearing, without regard to the findings of fact, or distribution of items, and partial statement of accounts, contained in said opinion. Both motions for rehearing are overruled.

REHEARING DENIED.

JOHN L. GRANDIN ET AL., APPELLANTS, V. FIRST NATIONAL BANK OF CHICAGO ET AL., APPELLEES.

FILED JANUARY 21, 1904. No. 12,161.

1. **Attachment:** FRAUDULENT CONVEYANCE: ACTION. A plaintiff who has obtained an attachment upon specific real estate in this state, and recovered judgment thereon, may maintain an action in equity to set aside a fraudulent conveyance of the real estate by the judgment defendant, without the issuing and return of a general execution upon such judgment.
2. ———: FOREIGN ASSETS: JURISDICTION. In an action in equity to set aside a fraudulent conveyance of real estate in this state, and enable the plaintiff to enforce his attachment and judgment thereon against the land, amendments to the petition, alleging that the judgment defendant had also fraudulently transferred to the same grantee all his property situated beyond the jurisdiction of the court, but not describing any of the property so transferred or otherwise identifying it, will not give the court jurisdiction to subject property and assets outside of this state to the payment of the judgment, no general execution upon such judgment having been issued and returned unsatisfied.
3. ———: DISCHARGE IN BANKRUPTCY. After plaintiff in attachment has recovered judgment, and an order for the sale of the attached real estate, and has begun an action in equity to set aside a fraudulent conveyance of the real estate, the discharge in bankruptcy of the judgment defendant will not defeat such action.
4. **Action:** ABANDONMENT: DEFENSE. If such action to set aside a fraudulent conveyance is pending for several years, it is not a defense that the holder of the legal title has made valuable improvements thereon, while the action was pending, being led by the delay in bringing the action to trial to suppose that plaintiff's claim would be abandoned.

5. **Appeal:** TRIAL DE NOVO. Upon an appeal in equity this court will try the the issue *de novo*, and will not be influenced in its decision by the findings of the trial court based upon depositions or other written evidence. The conclusions of the trial court, derived from the consideration of the evidence of witnesses examined in the presence of the court, will not be regarded unless, upon the whole record, in view of the position of the trial court in weighing such evidence, they appear to be right. *Faulkner v. Simms*, 68 Neb. 295.

6. **Evidence.** Evidence in this case found to support the general finding of the trial court.

APPEAL from the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Affirmed.*

Hall & McCulloch and *Geo. L. Loomis*, for appellants.

William V. Allen and *Bartlett, Dundy & Martin, contra.*

SEDGWICK, J.

In the year 1891, Spooner R. Howell was engaged as a sole trader in the lumber business in Chicago, under the name of S. R. Howell & Company. He was also engaged in the same business with one Herbert N. Jewett in Atchison, Kansas, under the name of Howell, Jewett & Company, and in Omaha, Nebraska, under the name of the Howell Lumber Company.

In July, 1891, Mr. Howell, being largely indebted to the First National Bank of Chicago, transferred his property to that bank, including a valuable piece of real estate in Omaha. In payment for this real estate the bank surrendered to Mr. Howell his promissory notes, which the bank held, amounting to $150,000.

In May, 1891, the firm of Howell, Jewett & Company gave certain drafts to these plaintiffs, amounting to something over $12,000. The plaintiffs began an action upon these drafts and procured the Omaha real estate to be attached. Judgment was obtained in that action. This action was brought to set aside the conveyance of the real estate from Mr. Howell (through an intermediary) to the

bank, and enable the plaintiffs to sell the land under their attachment lien in satisfaction of their judgment.

These interveners, the First National Bank of Punxsutawney, Pennsylvania, the Lincoln National Bank of Lincoln, Illinois, and the Commercial National Bank of Fremont, Nebraska, having claims against the Howell Lumber Company, and having procured attachments upon said real estate in actions on their respective claims and having obtained judgments thereon, intervened herein to obtain satisfaction of their several judgments out of the proceeds of the real estate. In May, 1900, the plaintiffs and the interveners, with leave of court, filed amended petitions herein.

The original petitions were disregarded and are not included in the transcript. In their amended petition the plaintiffs, in addition to the facts relied upon to subject the Omaha real estate to the lien of their attachment and the satisfaction of their judgment, made general allegations that Mr. Howell conveyed to the defendant bank "all his property of whatever kind or description, and all of the property of the Howell Lumber Company, Howell, Jewett & Company and Herbert N. Jewett, all aggregating an amount of $1,600,000, and that the "various conveyances made by said Spooner R. Howell to the First National Bank of Chicago, and particularly the conveyance made by Spooner R. Howell of the land above named, were made with the intention to hinder and delay these plaintiffs," etc, and prayed that the conveyance of the Omaha real estate to the bank be held as fraudulent and void as against the plaintiffs, and be set aside and held of no effect as against the judgment and attachment of these plaintiffs. The prayer also contained the following: "That the said First National Bank be held to account for the various properties received by it, and that it be compelled to show all of the property received by it from said Spooner R. Howell as aforesaid set out, and that it be held that such transactions were fraudulent and void as against the creditors of Spooner R. Howell, the Howell

Lumber Company, Howell, Jewett & Company, Herbert N. Jewett and George W. Howell, and that the money derived from the property so received by the said First National Bank be applied on the debt due from said Howell to these plaintiffs," with a general prayer for equitable relief. The various petitions for intervention contained substantially the same allegations and the same prayer.

The answer of the defendant bank contained specific denials of these allegations and alleged pertinent facts, showing the defendant to be the owner of the Omaha land by purchase from Mr. Howell in good faith, for full value, in notes of Mr. Howell held by the bank. This answer also objected to the jurisdiction of the court over all transactions between the defendant bank and Mr. Howell, other than that of the conveyance of the Omaha real estate. Upon these allegations, and the evidence, the plaintiffs and interveners insist that the trial court had jurisdiction of all of the transactions between Mr. Howell and the defendant bank, although made in another state and not relating to any property in Nebraska; and insist that their amended petition should be treated as a general creditors' bill, to subject to the payment of their claims all money and all property that Mr. Howell transferred to the bank in his settlement with the bank.

1. It seems to us that it is unnecessary to determine whether the bill might have been so framed as to have allowed of such an investigation and order on the part of the court. It seems clear that the general allegations of the bill, without specifying any property so transferred by Mr. Howell, are not sufficient to justify such action on the part of the court. The most that can be claimed for these allegations is that they lay sufficient foundation for such evidence of other transactions as may throw light upon the good faith of the transfer of the Omaha real estate.

2. The defendant bank insists that this action can not be maintained to subject the attached real estate to the lien of the attachment and to the satisfaction of their judg-

ment obtained thereon, because no execution had been issued on such judgment before the commencement of the proceedings. This contention is unfounded. The reverse has frequently been held by this court. *Kennard, Daniel & Co. v. Hollenbeck,* 17 Neb. 362; *Keene v. Sallenbach,* 15 Neb. 200; *First Nat. Bank v. Hollerin,* 31 Neb. 558; *Gillespie v. Cooper,* 36 Neb. 775.

3. It appears that before the trial of this case in the court below, the defendants Howell and Jewett were discharged in bankruptcy, and the defendant bank insists that this fact is a defense to the bank in this action. This contention can not be sustained. The discharge in bankruptcy could not have the effect to destroy the rights in this land, which had accrued to the plaintiffs and interveners by virtue of their attachments and judgments long before the proceedings in bankruptcy were begun.

4. It appears that neither party urged this action for trial for many years after it was begun, and, in the meantime, the judgments upon which the claims of the plaintiffs and interveners are founded became dormant, and were revived under the statute. The defendant bank appears to urge this circumstance as a defense in this action, insisting that the plaintiffs and interveners, by this delay, led the bank to suppose that they did not intend to try the case upon its merits, and that, in the meantime, the bank, relying upon its title in the attached land, made large improvements thereon at great expense, and urging other similar circumstances as affecting the right of the plaintiffs and interveners to recover in this action. Such contentions can hardly be supposed to be serious. It was the right of either party to urge the case to an early disposition, and, in the meantime, all parties interested in the land must take notice of the pendency of the action and of the claims of the various parties in the land as shown by their pleadings.

5. The trial court determined the issues in favor of the defendant bank and the plaintiffs and interveners have brought the case here upon appeal. The question in this

case is as to the validity and good faith of the conveyance of the Omaha real estate by Mr. Howell, through an intermediary, one of the officers of the bank, to the defendant bank; and we have found this a most difficult and perplexing question. Notwithstanding the findings of the trial court, it is the duty of this court upon appeal to investigate the merits of the controversy as presented by the pleadings and evidence, and to render such decree as ought to be rendered in the case. The duty of this court in this regard is set forth fully in the case of *Faulkner v. Simms*, 68 Neb. 295. We think that the opinion in that case, in view of the action of the legislature of 1903 (sec. 681*a* of the code), and the former adjudications of this court, correctly declares the duty of this court upon such appeals.

The evidence shows that Mr. Howell had formed a partnership with Mr. Jewett to carry on the lumber business at Omaha. The name of the partnership was the Howell Lumber Company. The transaction of the purchase of this land was carried on in the name of the Howell Lumber Company. The check that paid for it appears to have been in the partnership name. It was carried on the books of the company as partnership property, but the title was taken in the name of Mr. Howell alone. Mr. Jewett had very little, if any, real financial interest in the partnership business. Money loaned by the defendant bank to Mr. Howell was used by him indiscriminately in the different branches of the lumber business in which he was the principal owner. The trial court found that all parties interested knew that this land appeared upon the records and was held out to the public to be the property of Mr. Howell; that the defendant bank supposed, and was justified in supposing, that this land was a part of the assets of Mr. Howell upon which his creditors might rely as available for their claims; and concluded that, under such circumstances, Mr. Howell might use it to pay his personal creditors. We have been referred to no authority for holding a contrary doctrine.

It is not disputed that this land had been deeded to Mr. Howell, and that the title was in him, as shown by the records of Douglas county; that on the 13th day of July, 1891, Mr. Howell by a sufficient deed of conveyance conveyed this land to one Lawrence; and that the consideration named in the deed was $150,000. Lawrence was then an officer of the bank, took the deed for the bank and, afterwards, duly conveyed the land to the bank; nor is it disputed that, at that time, Mr. Howell was indebted to the bank in a sum largely in excess of $150,000; that at least $150,000 of this indebtedness was covered by promissory notes executed by Mr. Howell to the bank; and that, in consideration of the conveyance in question, these promissory notes to the amount of $150,000 were surrendered by the bank to Mr. Howell. It is contended by the plaintiffs and interveners that, after Mr. Howell and the several companies in which he was interested had become insolvent, Mr. Howell, with the advice and assistance of certain counsel in Chicago, determined to reduce his assets as far as possible to cash, in order to defraud his creditors, and, for this purpose, borrowed additional money from the defendant bank and gave his notes therefor; and, while he personally obtained the benefit of this money, he proposed to make the bank good for advancing it to him, by turning over all of his assets, including this Omaha land, to the bank before his other creditors should be able to attach the property or otherwise realize their claims therefrom; and that the bank, with the knowledge of this purpose and intention on the part of Howell, or, at least, with a knowledge of sufficient facts to amount in law to notice of such a purpose and intention, advanced the money to Mr. Howell, and took the promissory notes in question therefor; and that, afterwards, when it became apparent that Mr. Howell could no longer continue his business, the bank took transfers of all of his property, which it is claimed was much more than sufficient to pay all of the claims of the bank; and that the conveyance of this land to the bank by Mr. Howell was in pursuance of

the plan so formed by Mr. Howell. On the other hand, the bank insists that it had no specific knowledge of Mr. Howell's indebtedness outside of his indebtedness to the bank, and had no knowledge of any intention of Mr. Howell to defraud his creditors, or of any facts which would lead a reasonable man to suppose that Mr. Howell had such intention; and that, pursuant to the course of business which had existed through many years between Mr. Howell and the bank, the bank advanced money from time to time to Mr. Howell; and that, at the time of the conveyance of the land in question, Mr. Howell was indebted to the bank in more than the sum of $700,000; and that the bank, in good faith, took the conveyance in question for the sum of $150,000 and canceled that much of the indebtedness of Mr. Howell to the bank. As long as Mr. Howell continued the business, and while the business was a "going concern," the bank might lawfully advance him money to be used in the business, or to settle with his creditors, and Mr. Howell's agreement to transfer his assets to secure money so advanced would not be unlawful. If Mr. Howell obtained this money with the purpose and intention of keeping it from his creditors, and so prevent them from securing their claims, such intention would be fraudulent on his part. If this fraudulent intention was known to the bank, any securities that the bank might obtain pursuant to such transactions would undoubtedly be subject to attachment upon the claims of Mr. Howell's creditors. Did the bank know of this fraudulent purpose of Mr. Howell? Was the bank possessed of such facts as would have suggested to a prudent man that the action of the bank in advancing this money was assisting Mr. Howell in carrying out a fraudulent plan?

Upon these issues a mass of testimony was taken, embraced in a bill of exceptions in three volumes and covering over 1,000 pages of closely typewritten matter. A part of this evidence is in depositions, and other written matter, and a considerable portion of it is the evidence of witnesses orally examined before the trial court. In studying this

mass of testimony, we have been strongly convinced of the soundness of the opinion in *Faulkner v. Simms, supra.* We must, upon this evidence, try the question of fraud in this transaction *de novo.* In considering the depositions and other written evidence that appears before this court in the same form and condition that it appeared before the trial court, we are not aided by the conclusions of the trial court. We have equal, if not better, opportunity to examine this evidence with care and deliberation than had the trial court. In reading the written evidence of the witnesses who were examined in the presence of the court, and in considering and weighing their conflicting and inconsistent statements, and expressions that are sometimes doubtful as to the real meaning of the witness, we are impressed with the importance of hearing the testimony of the various witnesses and of observing their demeanor upon the stand, their apparent candor and fairness, or their want thereof, and many other circumstances that might be of assistance in determining the truth of the matter. The trial court had these advantages. We are not bound by the conclusions of the trial court, even where it is manifest that they are derived from this evidence, the weight and probative force of which might depend largely upon the apparent candor of the witness, and the circumstances and surroundings under which he is testifying, unless, from the whole record, it impresses us that, in view of all of these circumstances, the conclusion of the trial court is more probable than the converse would be. The trial court made a general finding for the defendant bank and also found that when Mr. Howell made the conveyance to the bank he was indebted to the bank over $600,000; that he was then the owner in fee simple of the real estate described in the plaintiffs' petition, and had good right to sell and convey the same; that the conveyance to the bank was made by him in good faith, without any intention to delay or defraud the creditors of Mr. Howell, Howell, Jewett & Company, the Howell Lumber Company, Herbert N. Jewett, George W. Howell, or any other person or per-

sons or corporation; that the conveyance was taken by the bank in consideration of $150,000, being a part of the indebtedness of Mr. Howell to the bank, for "that much money loaned and advanced by said defendant bank to said Howell"; that this indebtedness was covered by promissory notes of said Howell to the bank and was a part of all of the indebtedness of Howell to the bank. We can not wholly or partially give an analysis of the mass of testimony from which these conclusions are derived. The evidence, to our minds, shows clearly that Mr. Howell and his advisers expected and intended to defraud Mr. Howell's creditors; that he borrowed money from the bank while he knew himself to be insolvent, and did not apply, and never intended to apply, this money in payment of his just debts; and that the notes given by Mr. Howell for this identical money, that he so procured with the intention to defraud his creditors, were soon afterwards returned to Mr. Howell as the consideration for this land. The circumstances of this transaction are to be derived largely from the conflicting testimony of the various witnesses orally examined in the presence of the court. If the evidence of these witnesses is believed, and the meaning to be derived from their language upon the witness stand is correctly shown in the transcript of their reported testimony, the plaintiff and interveners have not furnished sufficient evidence to establish guilty knowledge on the part of the bank. The burden is upon them to show that the officers of the bank participated in the fraud of Mr. Howell. The evidence of the president of the bank is contained in depositions, and it is insisted that from this evidence it should be found that the bank had knowledge of the purposes and intention of Mr. Howell or, at least, had knowledge of such facts as ought to have restrained the bank from advancing him money upon the security of the property afterwards by him transferred to the bank. But this contention is not well founded. The evidence of this witness is consistent with honor and fair dealing upon the part of the bank. The evidence of other witnesses, notably that of Mr. Howell

and Mr. Jewett, has given us much trouble, in the light of the transactions of the bank as detailed in the deposition of its president. The difficulty arises, not from serious doubts of the honorable intentions of the officers of the defendant bank, but in determining the weight of the evidence tending to establish facts which, in law, would amount to notice to the bank of the fraudulent intent of Mr. Howell.

Upon the whole record we are inclined to the view that the general finding of the trial court in favor of the defendant bank is right. This requires an affirmance of the judgment.

AFFIRMED.

WILLLIAM ALBIN, BY GEORGE N. LA RUE, GUARDIAN, APPELLEE, V. CHARLES C. PARMELE ET AL., APPELLANTS.*

FILED JANUARY 21, 1904. No. 13,244.

Will: REMAINDER. A remainder in fee may be limited to the heirs at law of one to whom, by the same instrument, is given the precedent freehold.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Decree modified.*

Jesse L. Root and *Samuel M. Chapman,* for appellants.

Matthew Gering, contra.

AMES, C.

On the 20th day of October, 1894, Benjamin Albin died, a citizen of this state and a resident of Cass county, leaving a will, soon afterwards duly admitted to probate, and made of record in the office of the register of deeds of the county, and containing the following devise:

"I give, devise and bequeath to my son, William Albin, the east half of the northeast quarter of section 12, in

* Rehearing denied. See opinion, p. 746, *post.*

township 10, range 13, in Cass county, Nebraska, subject to the same conditions as that imposed upon the land hereinbefore devised to David, to have and to hold said land during the term of his natural life, and enjoy the use and proceeds thereof. The fee of the land to pass to his heirs, at his death or at any time before when he shall sell or encumber said land in any manner different than he shall receive it. The intention being to give him a life estate therein without the power to sell or dispose of it. Provided, if he shall have a surviving wife, at his death she shall in no event inherit less than one-third thereof, which is hereby devised to her, and if the statutes of descent in force at the time of his death shall give her a larger share than one-third, she shall have such share as the statutes shall give her, the remainder to be divided equally among his heirs. Provided further, that such share as his wife shall receive hereby shall by her be forfeited in the event of her again marrying, and the title thereto shall immediately vest in his brothers and sisters equally, or their issue by representation if dead, if he die without issue, but if he have issue, then said interest to be divided equally between his issue."

On the 26th day of September, 1901, William Albin, for a consideration of $1,000, executed to Charles C. Parmele a deed purporting to convey the fee of the premises above mentioned, and on the 22d day of January following Parmele, for a consideration of $4,000, executed a like deed to Laurena A. Carey. Both deeds were made of record at about the date of their execution, as was also a mortgage of the lands from Mrs. Carey to Parmele for $1,000 to secure the payment of part of her purchase money. Subsequently, this action was begun by Albin to obtain a decree setting aside the mortgage and both of the deeds, and quieting title in the lands in himself.

The first thing to be done is to ascertain, if possible, and unvexed by legal technicalities, the intent of the testator as expressed, or attempted so to be, by the clause of the will above quoted. What estate did William take under

the will? Section 53 of chapter 73 of the Compiled Statutes (Annotated Statutes, 10256), entitled "Real Estate," is the following:

"In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

It will be seen, with but slight reflection, that that which the statute expressly requires shall be consistent with the general rules of law, is not the construction of the instrument, but the intent of the parties. In a general sense, doubtless, the construction must also have a like consistency. That is to say, the language used in the instrument will be understood as intended to express a lawful purpose, rather than an unlawful one, and technical words and phrases will, in the absence of anything indicative of the contrary, be presumed to have been chosen for their technical meaning; but nevertheless in instruments, especially wills, which are often drawn by persons not "learned in the law," language such as is in common use will be presumed to have been employed in its ordinary and popular sense. It follows that if such language, manifestly so used, is inconsistent with the technical signification of particular words and phrases, the former ought, so far as it is necessary to effect the "true intent" of the parties or testator, to prevail over the latter. It can not be pretended that an intent to limit a remainder in fee to the heirs at law of one to whom is given the precedent freehold, is inconsistent with any general rule of law, because the authorities are united in saying that this very thing may be done. A condition that some of them prescribe, in case of the use of but one instrument, is that the grantor or devisor shall abstain from the use of the word "heirs," and adopt some, in most cases, practically equivalent expression, such as "issue," or "children," or "deced-

ents," or "next of kin," supplemented with more or less circumlocutory phraseology; or the desired end may be accomplished by creating a life estate by deed, and devising the reversion. In our opinion, the force of the statute is such that the employment of the tabooed word need not bereave either the language of the instrument or the court construing it of plain and ordinary common sense. Counsel for the defendant, with commendable learning and industry, have collected and cited a large number of authorities holding that the use of the word "heirs," in substantially the same connection as in the will under consideration, will defeat the emphatically expressed intent of a testator, and convert that which he plainly designed should be a life estate into an estate in fee. *Carpenter v. Van Olinder,* 127 Ill. 42; *McCray v. Lipp,* 35 Ind. 116; *King v. Utley,* 85 N. Car. 59.

It is not doubted that these decisions announce the correct rule of law in the jurisdictions in which they were rendered, but their introduction here would be in violent conflict with the above quoted statute, and with the established doctrine of this court that the first canon of construction of wills is to ascertain the intent of the testator. *Eiseley v. Lyman,* 23 Neb. 470; *Rupert v. Penner,* 35 Neb. 587; *Leavitt v. Bell,* 55 Neb. 57; *McCulloch v. Valentine,* 24 Neb. 215; *St. James Orphan Asylum v. Shelby,* 60 Neb. 796.

The contention that the doctrine contended for by counsel is requisite to prevent restraints upon alienation is of no force, because, as has already been noted, the same object may be effected in another way, and such restraints, within reasonable limits, have been held by this court to be valid and enforceable. *Arlington State Bank v. Paulsen,* 57 Neb. 717, 729; *Weller v. Noffsinger,* 57 Neb. 455. In the case last cited the court say:

"No rule of law is better settled, or more in accord with good sense, than that which requires the intention of the testator to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the will. No

particular words, no conventional forms of expression, are necessary to enable one to make an effective testamentary disposition of his property. The court, without much regard to canons of construction, will place itself in the position of the testator, ascertain his will, and, if lawful, enforce it."

We do not wish to be understood as saying that the rule in Shelley's case is wholly abolished. It would, perhaps, be more correct to say that it exists in a restricted and qualified form, and will be enforced in those instances in which it is not in conflict with the otherwise expressed intention of the instrument; but the question is not now before the court and need not be decided. What the reason or origin of the rule may have been Mr. Washburn is unable to tell us. 2 Washburn, Real Property (6th ed.), sec. 1603. Apparently it grew, in some manner, out of the system and law of feudal tenures which, in this state, never existed.

Applying the above quoted language of Chief Justice SULLIVAN to the case at bar, the intent of the testator to devise to his son William a life estate only, without the power of alienation, can not be more unequivocally expressed than is done in the will itself, and as such intent is not inconsistent with any rule of law, general or other, the duty of the court to enforce it is not open to debate.

The conclusion thus reached dispenses with, as immaterial, the greater part of the pleadings and a bulky bill of exceptions touching the mental capacity of the plaintiff. The trial court found the plaintiff incapacitated and, for that reason, set aside the mortgage and conveyances, but adjudged to the defendant Parmele a lien upon the rents and revenues of the premises to reimburse him the moneys paid as a purchase price. The latter part of the decree can not be upheld. Parmele dealt with constructive, if not actual, notice of the record in the office of the register of deeds, as did also Mrs. Carey. His deed was equally as ineffectual to charge the premises with a lien, as to convey the title to them. It is not alleged that he was misled

or deceived by anything but his own want of caution. There is, therefore, nothing to call for the interposition of equity in his behalf. The same is true of Mrs. Carey, who testified that she bought in ignorance of the title and in sole reliance upon the covenants of her deed from Parmele. The plaintiff, by a guardian, brought the case here by a petition in error, and the defendants appealed. Both proceedings present the same question, and by consent of counsel the former is treated as having been merged in the latter. The decree quiets the title in the plaintiff and his heirs. The heirs are not before the court, and have no estate vested in possession, and, for aught we know, may be yet unborn, and, besides, the will contemplates a contingent remainder in at least one-third, possibly the whole, of the premises in the wife of the plaintiff, with a limitation over in the nature of an executory devise in favor of his brothers and sisters.

It is recommended that the decree be so modified as to cancel, set aside and hold for naught, both of the deeds so far as they purport to affect title or right of possession, but without impairing their covenants, and the mortgage so far as it purports to be a lien upon the premises, but without affecting the mortgage debt, and that as against all said instruments the plaintiff be quieted in the title and possession of the life estate devised to him by the will.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the decree be so modified as to concel, set aside and hold for naught both of the deeds so far as they purport to affect title or right of possession, but without impairing their covenants, and the mortgage so far as it purports to be a lien upon the premises, but without affecting the mortgage debt, and that as against all said instruments the plaintiff be quieted in the title and possession of the life estate devised to him by the will.

JUDGMENT ACCORDINGLY.

The following opinion on motion for rehearing was filed May 5, 1904. *Motion denied:*

Conveyance: SUIT TO SET ASIDE: DECREE FOR POSSESSION. In a suit in equity to set aside a conveyance of real estate, where the right of possession is in issue and depends upon principles of equity that must necessarily be determined by the court, it is the duty of the court to determine the right of possession and, if all parties interested are before the court, to put the party who is entitled thereto in possession.

SEDGWICK, J.

Upon this motion for rehearing the appellants, who were defendants below, insist that the court had no jurisdiction to "adjudge the right of possession of the real estate in controversy." They cite *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440, as authority for the proposition that, "Appellant Carey, being in possession of the real estate, had the absolute right to have that right passed on by a jury, should she so demand"; but that case is not authority for plaintiff's proposition. It was decided in that case that one who had commenced an action in ejectment for the possession of real estate, could not be deprived of a jury trial by an answer setting up equitable defenses. This being a case in equity, where the right to the possession of the real estate involved depends upon principles of equity that must necessarily be determined by the court, it is the duty of the court to determine all the issues including the right of possession.

It being insisted that the defendant Carey was in possession of the premises under a lease which does not appear to have been adjudicated below, and evidence upon questions affecting the right of possession having been excluded by the trial court, we think that the judgment of this court should not determine that question; and, to remove any doubt or uncertainty in that regard, the judgment heretofore entered in this court is modified so as to remand the cause to the district court with instructions

to determine the right of possession in accordance with the opinion and judgment of this court.

The motion for rehearing is overruled.

MOTION DENIED.

FRANK E. VAN ANTWERP ET AL. V. G. W. LATHROP ET AL.

FILED JANUARY 21, 1904. No. 13,254.

1. **New Trial:** PETITION. Although it is only inferentially alleged that the issue of payment was raised in a foreclosure case, yet a petition for a new trial states good ground for such action, which sets forth a fraudulent erasure of a cancelation of a mortgage, and perjury by the prevailing party as to the cancelation and the erasure of it, and due diligence by the other party, and inability to discover it in time for the trial.

2. ———: FRAUD: EQUITY. Where such a petition fails to set forth that the facts were not discovered within two years of the trial, and fails to show any reason for extending the two years allowed by statute for setting aside judgments for fraud, equity is powerless to relieve.

ERROR to the district court for Custer county: HANSON M. GRIMES, JUDGE. *Affirmed.*

H. M. Sullivan, for plaintiffs in error.

Mockett & Polk and *R. E. Brega, contra.*

HASTINGS, C.

The plaintiffs in this case complain of a sustaining of a demurrer to their petition in the district court. They allege that they are husband and wife, and that defendants are brothers of the wife; that her father obtained title by a homestead entry made in 1881 to land in Custer county; that from 1881 until his death in 1893 he made his home with the plaintiffs most of the time, but at his death was in Wisconsin and had there all of his papers and effects; that in 1885 plaintiffs mortgaged 160 acres of land in Cus-

ter county to the Lombard Investment Company for the sum of $500; that, during the time the father lived with the plaintiffs, it was the understanding that they were to care for and maintain him during his lifetime, and at his death his land should be devised to them; that in 1890 the $500 mortgage upon plaintiffs' land fell due, and they had no means to meet it; that they were negotiating for a new loan, when defendants' father proposed that defendants should take up and satisfy the mortgage, and that he, the father, would take care of it; that defendants paid the mortgage, with the understanding and agreement that they should have the father's land in consideration of it; that the father's land in Custer county was shortly afterwards, in pursuance of the agreement, deeded to the defendants to indemnify them for the mortgage payment; that plaintiffs had no indication, until late in the year 1898, that the mortgage was not paid; that defendants then demanded deed of plaintiffs' land, and threatened foreclosure proceedings if it was not made; it was refused, and the foreclosure proceedings begun in March, 1899; plaintiffs' only knowledge of the arrangements between the defendants and their father was through the latter, and the further fact that no demand was ever made upon them for principal or interest for nearly nine years; that plaintiffs never saw the note and mortgage from its execution in 1885 until the trial on October 3, 1900, at which time it was disclosed that there had been written in ink across the note and mortgage, in different places, the word "paid," and it had been sought to be erased; that the note and mortgage, from the time of payment to the investment company in 1891, had been in the possession of the defendants and of their father. Defendants each testified by deposition at the hearing in the foreclosure case, in substance, that they bought the mortgage, and that the word "paid" was written by mistake by some agent of the investment company, at the time the defendants acquired the note and mortgage; that plaintiffs had no facts at that time to disprove said statement, and a decree of foreclosure was rendered for

the sum of $1,135, and $40 costs; that plaintiffs at the trial were able only to testify to statements made to them by the father, as to the agreement between him and the defendants for the satisfaction of the mortgage, and that no demand was made by them from 1891, when the defendants obtained it, until 1898, and if they could have sworn that the word "paid" was written by defendants' father or by one of the defendants at his request, when he deeded his land to them, the decree would have been in plaintiffs' favor. The plaintiffs allege that, when their father deeded the land to the defendants in pursuance of the agreement, he caused the word "paid" to be written across the note and mortgage, and that the defendants fraudulently attempted to erase it that it might not be evidence against them; that their testimony given at the trial, that the words were written by some agent of the investment company before it was delivered to them, was not true and that they knew it was untrue, and if the writing had not been erased, and defendants had not made this false statement, the decree would have been in plaintiffs' favor; that the Lombard Investment Company, prior to the institution of this action, was dissolved, and its employees, agents and officers long ago scattered; that plaintiffs had no personal acquaintance with any of such employees, agents or officers and had no means to disprove defendants' false statements; that, for a long time after the trial, plaintiffs could gain no knowledge of the whereabouts of the mortgage company's agents or officers; that it was finally ascertained that one of the officers, who was familiar with the handwriting of the employees in the office, was in the state of New York, and it was finally ascertained from him that the word "paid" on the note and mortgage was not written by any person connected with said office; that plaintiffs have only lately, and much less than two years ago, learned that said words were not written at the time the note and mortgage were transferred to defendants, and that plaintiffs are now able to say that the handwriting of the word "paid" on the note and mortgage is that of one of the defendants; that such

erasures were so skillfully made that it was impossible to identify the handwriting, until the idea was suggested to have the words photographed by a powerful instrument, which was done, and the handwriting of the word "paid" was made so plain in the picture that plaintiffs are able to identify it as that of one of the defendants; that this was only recently done. Plaintiffs say that the father's land was worth much more than the amount of the mortgage; that order of sale has been issued on the decree, and plaintiffs' premises are about to be sold under it, and they ask an injunction against the enforcement of the decree, and that it might be vacated and set aside, and for equitable relief. Demurrer was filed to this petition, that it did not state facts sufficient to constitute a cause of action; that it showed upon its face that the decree had been rendered more than two years before the commencement of the action, and that the latter is barred by the statute of limitations, and that there was not sufficient showing to entitle plaintiffs to equitable relief.

The petition was filed April 8, 1903, and alleges, as above indicated, that the decree complained of was rendered on October 3, 1900. The trial court found that the petition stated no cause of action; that the judgment sought to be set aside was rendered more than two years before it was filed, and that action to have that judgment opened up on the ground sought was barred by the statute of limitations. Judgment of dismissal was entered, and plaintiffs bring error.

The question presented here is, does the petition, above summarized, present facts sufficient to warrant the interposition of a court of equity to set aside the decree two years and six months after its rendition?

It is objected by the defendants that this petition is defective in not setting out what the pleadings were in the answer to the foreclosure action. It is true that this is only inferentially alleged. It is alleged that the defense of payment by the father was known to the parties, and it is alleged that the evidence of the unlawful erasure and of the

handwriting of the original indorsement of payment would have secured to the plaintiffs a favorable decree. It certainly appears by fair intendment from the petition that the payment by the father, or through the conveyance of his land in Custer county, was set up in the former action, sufficiently so to require any defect in that particular to be remedied by request for a more distinct allegation rather than subject the whole petition to a demurrer.

It is also complained that the allegations that the indorsement on the note and mortgage of the word "paid" was not written by any employee of the investment company, but was written by one of the defendants, are only upon information and belief. A fair interpretation of the petition will not bear this construction. It is true that there is an allegation that some of these facts were learned by correspondence, but there is also a distinct allegation that they can identify the handwriting, and that they were positively informed that the investment company did not place the canceling words on the instruments.

A more serious objection, perhaps, is that the evidence alleged would not avail to establish perjury. It is not, however, claimed that the pleader who alleges the fact of perjury is bound, at the same time, to set up all the evidence at his command to establish it. It would seem sufficient that he alleges in positive terms perjury by the party prevailing, and alleges a sufficient degree of diligence on his part to guard against the consequences of such statements. In the comparatively few cases which can be found of the setting aside of a decree or judgment for perjury by the prevailing party, the element of surprise is usually present, or else that of the complete lack by the other party of the information on that particular point. The latter seems to be what is relied upon in the present instance. It would seem that there is sufficient in this petition, if these statements were all admited to be true, to call for the setting aside of this decree. A case fully as strong is *Marshall v. Holmes,* 141 U. S. 589, and is somewhat similiar in its facts, only in that case a forged letter, instead of

a fraudulent erasure, is the ground of relief. In *Marshall v. Holmes,* however, the allegations of the petition expressly cover one point, which is not covered in the present case, namely, it alleged a failure to discover the falsity of the evidence until after the lapse of the time in which a motion for new trial could have been made. The petition in the present case entirely fails to allege that the facts set forth were not all discovered before the two years had run, which the statute gives for an application to set aside a judgment for fraud of the prevailing party. Code, sec. 609. This statute is peremptory, and while its provisions, and that of section 602, to which it refers, have been many times held cumulative and in addition to general equity powers, such general equity powers can only be invoked where good reason is shown why the special remedies provided by the code have not been resorted to. No such reason appears in this case. No cause is given why application was not made under the fourth clause of section 602 of the code to set aside this judgment within the two years allowed by section 609 for such purpose. Under this state of affairs it seems clear that the finding of the district court, that the action is barred by the statute, must be affirmed.

It is recommended that the decree of the district court dismissing plaintiffs' petition be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

STATE SAVINGS & LOAN ASSOCIATION ET AL. V. BENJAMIN F. JOHNSON.

FILED JANUARY 21, 1904. No. 13,318.

1. **Appeal:** BOND: JURISDICTION. An appeal bond signed only by the judgment debtors, if approved by the justice rendering the judgment, is sufficient to confer jurisdiction on the appellate court to have the defect corrected.

2. ———: DISMISSAL. The sustaining of an objection to jurisdiction in the appellate court and dismissal of the appeal on that account is harmless error, where the objection was pending for at least twelve days, and appellants made no offer or application to be allowed to furnish a sufficient bond.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Strode & Strode, for plaintiffs in error.

Benjamin F. Johnson, contra.

HASTINGS, C.

In this case the plaintiffs in error attempted to appeal from a judgment rendered on May 26, 1903, in favor of Benjamin F. Johnson for $186.40, and costs taxed at $12.15, by P. F. Green, justice of the peace of Lancaster county. They filed an appeal bond signed only by themselves, and, probably, because one of the defendants was a surety company, the justice failed to observe that they had no surety, and indorsed upon it his approval. June 9, 1903, a transcript of the judgment, together with this bond, was filed in the district court for Lancaster county; June 17, Johnson filed amended objections to the jurisdiction of the district court in the following terms: (1) No appeal bond was filed in the court below as required by section 1,007 of the code. (2) That the filing of the purported appeal bond, signed only by the judgment debtors, and the approval of such purported appeal bond by the justice of the peace before whom said case was tried, was not such

a compliance with the requirements of section 1,007 of the code as would confer jurisdiction of the subject matter upon this court in attempted appeal proceedings from the judgment of said justice. (3) A purported appeal bond, signed only by joint judgment debtors, does not confer jurisdiction on an appellate court in attempted appeal proceedings. (4) That the purported appeal bond filed in the court below was signed only by defendants, they being joint judgment debtors, against whom judgment was rendered in the court below, no security of any kind being given. On June 29 the court sustained the objections to jurisdiction and dismissed the case at the costs of the defendants, to which they excepted. They now bring the matter here on error, alleging this dismissal, and citing sections 144 and 145 of the code, permitting amendments and directing the disregarding of all defects not affecting substantial rights, and section 1016, permitting correction of appeal proceedings when they are insufficient in form or amount. It is alleged that the two defendants, plaintiffs in error here, who signed the bond are amply able to respond to any liability on it, and the absence of a surety did not affect any substantial rights of Johnson. They cite *Bazzo v. Wallace,* 16 Neb. 293, holding that an appeal bond after approval is not void, even if defective, and the similiar holding in *Jacobs v. Morrow,* 21 Neb. 233. In *Deere, Wells & Co. v. Hodges,* 59 Neb. 288, an appeal bond was given, signed by one of the defendants, but one against whom the judgment did not run, and for an amount too small; motion to dismiss was overruled in the trial court, and a motion to require a sufficient bond was also overruled. The judgment for defendants was reversed in this court because of error in the overruling of this last motion, but it was held that the trial court had jurisdiction and should have ordered a conditional dismissal, giving time for the filing of a sufficient bond. In *Chase v. Omaha Loan & Trust Co.,* 56 Neb. 358, also cited, a dismissal of the appeal because the bond was signed by an attorney at law was held error: "The district court gave no opportunity to the

appellant to give a new bond, but peremptorily dismissed the appeal. This was a substantial error." *Rube v. Cedar County,* 35 Neb. 896. In this last case a peremptory dismissal of a taxpayer's appeal from allowance of a claim against a county, because of informalities in the wording of the undertaking, was held error. The bond was held sufficient to confer jurisdiction and amendable. *McClelland Bros. v. Allison,* 34 Kan. 155, is also cited. This case was one of a judgment against a partnership; one of the partners, who was also an attorney at law, signed as sole surety on the bond; it was held to be amendable. *Voss v. Feurmann,* 23 S. W. (Tex. Civ. App.) 936, expressly holds that a bond signed by one of the defendants as surety, which had been approved by the justice, conferred jurisdiction on the appellate court.

None of these cases, except the last, seem to be directly in point as to the present bond. It would seem, however, that the reasoning of the Texas case, namely, that the approval of the bond by the justice determines its sufficiency until some further action is taken, is sound, and in this instance the presentation of the bond with the justice's approval indorsed, seems sufficient to give jurisdiction to the district court until some further action with regard to that bond was taken. Section 1016 of the code seems ample authority for the district court to deal with the situation, and it seems, therefore, that the dismissal for lack of jurisdiction was error.

Are the defendants in a position to complain of it? The objection to this bond seems to have been on file 12 days before it was acted on, and the objection seems itself to have been amended once. The record does not disclose any application for leave to amend or to file a new bond, but simply the exception on the part of the defendants. It is clear that they were not entitled to maintain the appeal without a bond signed by some surety. It is clear that they did not have it. It seems to us that the dismissal of their appeal, in the absence of any application on their part to correct this bond, must be held to be error without prejudice.

It is therefore recommended that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ELSIE E. HULL v. KANSAS CITY & OMAHA RAILWAY COMPANY.

FILED JANUARY 21, 1904. No. 13,263.

1. **Railroad Company: USE OF LANDS PURCHASED.** Where a railroad company purchases land by warranty deed and uses it for right of way and depot purposes, it has the exclusive right to the possession and use of all of such lands as against the owner of adjacent lands.
2. ———: ———. It is for the railroad company and not for the adjacent owner to determine how much of these lands is necessary for depot and right of way purposes.

ERROR to the district court for Kearney county: ED L. ADAMS, JUDGE. *Affirmed.*

Joel Hull, for plaintiff in error.

G. L. Godfrey, J. W. Deweese and *F. E. Bishop, contra.*

OLDHAM, C.

This is an action in ejectment to recover the possession of a strip of land 32 feet wide in McCool's addition to the village of Minden, Nebraska. The facts underlying the controversy are these: In 1887, the defendant, the Kansas City & Omaha Railway Company, purchased, by deed of warranty, from the owners, blocks 1, 2, 3 and 4 of McCool's addition to Minden; after the purchase of these lands the company constructed its right of way through the middle of this strip of land, erected its switches, railroad track and depot grounds thereon; the strip of ground conveyed

by deed was 264 feet in width, leaving 132 feet on each side of the railroad track. The plaintiff in this action was the owner of lots adjacent to the right of way, and in May, 1901, procured a quitclaim deed from the company's grantor of 32 feet of the land formerly conveyed to the company, alleging that this much of the right of way was in excess of the needs of the company and had been abandoned by nonuser. On this claim and that of being an adjacent owner, the plaintiff undertook to take possession of the lands and cultivate the same. After taking possession, she appears to have been evicted by the officers of the company, whereupon a criminal action for malicious trespass was begun against two of the defendant's employees, and a suit in ejectment for the recovery of the lands was filed in the district court. The two cases were tried together, by agreement, to the court, a jury being waived. The court found the defendants not guilty of malicious trespass, and found for the defendant in the ejectment action, and plaintiff brings error to this court. In the brief filed we are asked to review the findings of the trial court in the criminal cases. This we can not do, as the requisite steps necessary to a review prescribed by section 515 of the criminal code have not been complied with. In the ejectment suit the evidence introduced at the hearing showed that the railway company had purchased by deed of warranty from the owner all the lands contained in the blocks. The evidence also strongly tended to show that plaintiff's alleged quitclaim deed from the grantor had been procured, without consideration, by misrepresentation and fraud.

The company having taken possession of the lands under a fee simple title from the owner, was clearly entitled to the exclusive right to use these lands as against an adjacent owner, and under such circumstances it was the right of the company and not of the adjacent owner to determine how much land was reasonably necessary for depot grounds and right of way purposes. *Struve v. Republican V. R. Co.*, 2 Neb. (Unof.) 585; *McLucas v. St. Joseph & G. I. R. Co.*, 67 Neb. 603, 612.

We are therefore satisfied that there is no merit in plaintiff's petition, and recommend that the judgment of the district court be affirmed.

AMES and HASTINGS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARY J. SHARP ET AL. V. CITIZENS BANK OF STANTON, NEBRASKA, ET AL.

FILED JANUARY 21, 1904. No. 13,319.

1. **Decedent's Estate: ACTION BY HEIRS.** The heirs of an insolvent estate can not prosecute an action in their individual capacity to recover newly discovered assets of the estate until the debts and costs of administration have been paid.
2. **Allowance of Claim: DORMANT JUDGMENT.** The allowance of a claim against an insolvent estate is not a judgment which becomes dormant by lapse of time as against newly discovered assets of such estate.
3. **Insolvent Estate: ASSETS.** Newly discovered assets of an insolvent estate are a trust fund in the hands of an administrator for the payment of debts and costs of administration, and do not descend to the heirs and distributees until such claims are paid.
4. **Limitation of Actions.** The statute of limitations does not begin to run against a bank on a certificate of deposit payable on demand until a demand has been made.
5. **Subrogation.** "A person seeking the benefit of subrogation must have paid a debt due to a third party before he can be substituted to that party's right; and in doing this he must not act as a mere volunteer, but on compulsion to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt. The right of subrogation is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another." *Rice v. Winters*, 45 Neb. 517, followed and approved.
6. ———: **EVIDENCE.** Evidence examined, and *held* insufficient to show a right of subrogation of the sureties on notes of an intestate to a lien on money of the estate deposited in a bank to which the notes were payable.

ERROR to the district court for Stanton county: GUY T. GRAVES, JUDGE. *Reversed.*

A. R. Olson, for plaintiffs in error.

W. A. Meserve, W. P. Cowan, W. W. Young, G. A. Eberly and *John A. Erhardt, contra.*

OLDHAM, C.

In the years 1886, 1887, 1888, and 1889 William T. Sharp was the duly elected, qualified and acting treasurer of Stanton county, Nebraska; in the year 1890 he was the duly elected, qualified and acting clerk of the same county; on July 6, 1891, he was drowned in a stream of water, and left an insolvent estate; on August 17, 1891, an administrator was appointed over his estate and on September 12, 1892, the administrator made his final report and was discharged; at the time of the discharge a large number of claims had been filed against the estate, including the claims of all the cross-petitioners in this action; these claims aggregated about $4,000, no part of which were paid on account of the insolvency of the estate. In the year 1900 it was discovered by the heirs of the deceased that he had to his credit in the Citizens Bank of Stanton the sum of $938.10, which fact was unknown to the administrator of the estate, and consequently had never been collected and applied to the debts allowed against the estate. There is some dispute in the record as to whether the credit in the bank was a special deposit evidenced by a certificate payable on demand or a general check and deposit account. In view of the conclusion we shall presently reach, it is immaterial in which form this credit existed; the deposit, however, in whichever form made, was in the name of William T. Sharp, individually, and not as treasurer of the county. The deposit was made February 4, 1888, and while the deceased was acting as county treasurer. It clearly and indisputably appears that the deposit was made by a draft received from A. E. and S. A. Kent, in

payment of taxes due on a large body of real estate in said county, and that the draft was payable to the order of the county treasurer. Soon after the discovery of this credit, plaintiffs, who are the heirs at law of William T. Sharp, deceased, instituted this action against the Citizens Bank to recover the amount of the deposit. The bank filed an answer to plaintiffs' petition equivocally denying the deposit; pleading the statute of limitations, and alleging that there were many creditors of the estate who had an interest in the fund, if it should be found that there was a deposit in the bank, and asking that the other creditors be made parties defendant. Without determining the right of the defendant bank to the order to have the other parties made defendants, in view of its denial of liability it will suffice for the conclusion reached to say that other parties did appear and file intervening petitions claiming the deposit. These different cross-petitioners may be classified from the nature of their claims into: (1) The sureties on the official bond of William T. Sharp, as county treasurer, who alleged that they had been compelled to pay as sureties some $700 to the county of Stanton in settlement of the defalcation of their principal as treasurer of said county, and that, for this reason, they were subrogated to the rights of the county in the money on deposit in the bank; (2) a class of interveners, whom we will designate as special creditors, who alleged that they had paid certain sums of money to the Citizens Bank on notes which were owed by the deceased to the said bank on which they were sureties, and that these sums were paid while the money of deceased was on deposit in said bank, and that they were therefore subrogated to the lien of the bank on money on deposit when the several notes became due; (3) the general creditors of the estate, who alleged the filing and allowance of their various claims, and that the money was an unadministered asset of the estate and should be divided *pro rata* among all creditors whose claims had been properly allowed. On a trial of these issues to the court, a judgment was rendered in favor of cross-peti-

tioners Lamb and Schauble, who were sureties on the official bond of the deceased as county treasurer of Stanton county, awarding them equal shares of the amount on deposit in defendant bank, and dismissing the petition of plaintiffs and the cross-petitions of both the special and general creditors of the estate, and, for the purpose of reviewing this judgment, the plaintiffs, the defendant bank and both classes of cross-petitioners have separately brought error to this court.

Each of the contending claimants have filed carefully prepared briefs and offered oral arguments in support of their various contentions, and have urged that, if this case be reversed, we make such findings as to their various rights as will enable the lower court to finally dispose of the matter at another hearing. Agreeably to this suggestion, we will examine, first, the claim of plaintiffs who are heirs of the deceased to the right to maintain this action in their individual capacity. This right is predicated upon two facts: (1) That administration on the estate had been ended; (2) that all the claims allowed in the probate court against the estate had become dormant by lapse of time before the discovery of the additional asset of the estate. After an examination of the brief filed in support of these contentions, we find ourselves unable to concede either claim. The right of the heirs at law to maintain a personal action in their individual capacity against debtors of a deceased ancestor depends upon two propositions: (1) That the estate has been fully administered; (2) that all the debts of the estate have been paid. For, as was said by NORVAL, J., in *Cox v. Yeazel,* 49 Neb. 343:

"It is only the residue of the personalty remaining after such debts and expenses are paid that descended to the heirs or distributees."

Now as the admitted facts in this case show that there are about $4,000 of unpaid claims allowed against the estate, and the newly discovered asset amounts to less than $1,000, it is plain that there is nothing in the estate, even

after the allowance of this claim, that can descend to the heirs or distributees. With reference to the second contention, that the claims allowed in the probate court are now dormant judgments, we can not agree. Claims properly allowed in the probate court are in the nature of audited and adjudged demands, which are a lien on the assets of the estate in the hands of the administrator or executor. There is no provision of our statute permitting an execution, in the first instance, for the collection of a claim allowed against the estate of a deceased person. It is only where the court has allowed claims against the estate, and made a finding that there are assets in the hands of the administrator for the purpose of paying such claims, and has made an order directing the administrator to distribute the assets, that the order of distribution creates a personal liability against the administrator and has the effect of a judgment. *Lydick v. Chaney,* 64 Neb. 288. Consequently, the mere allowance of a claim against an insolvent estate does not operate as a judgment, which will become dormant in five years as contemplated by section 482 of the code. In *Dexter v. Arnold,* 3 Mason (U. S.), 284, it is said:

"Where an estate is insolvent, and distribution of assets is decreed * * * and afterwards new assets come into the hands of the administrator, more than sufficient to pay all the debts, a suit will lie against the administrator for payment, in behalf of creditors, notwithstanding the statute of limitations precludes an original suit against the administrator; for the new assets are a trust fund for the creditors, and the heirs can claim distribution only after all the debts are paid."

If, as here held, the newly discovered assets of the estate are a trust fund in the hands of the administrator for the payment of all claims against the estate, it follows that the cross-petitioners, who are general creditors, have no right of action in their individual capacity to recover these assets. In this view, the petition of plaintiffs and the cross-petitions of the general creditors were properly dismissed.

Passing then to the contention of the defendant bank that the court erred in finding that the indebtedness to the deceased was in the form of a check and deposit account, instead of a special deposit evidenced by a demand certificate, as shown by the books of the bank, we would say that we do not think it material to determine whether or not the clear weight of the evidence showed the indebtedness to have been in one form or the other. It is plain and indisputable, and now conceded by the bank, that they have in their possession the amount of money which was left there on deposit by the deceased, and, so far as the defense of the statute of limitations is concerned, we think it makes no difference in which form the indebtedness existed. In neither instance would the statute begin to run until demand was made for the payment of the money by the depositor or his assignee. As between a bank and its customers, either on a check and deposit account or as holders of demand certificates, there is no promise to pay until demand is made, and consequently a demand is necessary to put the statute in operation. *Citizens Bank of Humphrey v. Fromholz,* 64 Neb. 284.

With reference to the sufficiency of the testimony to support the judgment in favor of the cross-petitioners, Lamb and Schauble, a much more serious question arises. This judgment is bottomed on the theory that these cross-petitioners paid the amount, or a portion thereof, as surety of their principal on his indebtedness as treasurer to Stanton county, and that, having done so, they should be subrogated to the rights of the county against the money on deposit in the defendant bank. As already stated, it was clearly proved that the money deposited in defendant bank by the deceased was the proceeds of a draft which he had received as treasurer for the payment of taxes, but that this money was deposited to his individual credit, and that the transaction took place before the depository law was enacted. The proof shows that the deceased served two terms as county treasurer, and that the cross-petitioners were sureties on his official bond only during his second term of

office. It appears that the money alleged to have been advanced by cross-petitioner Schauble was loaned by him on May 1, 1890, and that this loan was evidenced by a note for $350, which the deceased gave to the cross-petitioner, and that this note was afterwards probated and allowed as a claim against the estate. It further appears from the testimony that an investigation was begun of the accounts of the deceased by the county board of Stanton county in July, 1890, two months after the money had been loaned to the deceased by Schauble. It further appears that the investigation extended over the books and accounts of the deceased during both his terms of office as treasurer; that the result of the investigation showed a shortage of between $2,000 and $3,000 for both terms, and that on March 31, 1891, this shortage for both terms was compromised by the deceased by the payment of $1,200. There is no evidence in the record that traces one dollar of the money borrowed from Schauble to the settlement of the account of the deceased with Stanton county. No suit seems to have been brought on either of the official bonds of deceased. The evidence wholly fails to show that the money was paid under compulsion to protect against the superior right of the principal of the bond. In *Rice v. Winters,* 45 Neb. 517, it is said:

"A person seeking the benefit of subrogation must have paid a debt due to a third party before he can be substituted to that party's right; and in doing this he must not act as a mere volunteer, but on compulsion to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt. The right of subrogation is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another."

The same doctrine was approved by this court in *Aultman, Miller & Co. v. Bishop,* 53 Neb. 545. The testimony in support of the claim of cross-petitioner Lamb is practically the same, the difference being that, instead of loaning the deceased money, he signed a note for the deceased as surety for the sum of $350; this note appears to have

been renewed from time to time and was finally paid by the cross-petitioner. There is no testimony that one cent of the proceeds of this note went to the payment of the obligation of the account of the deceased. We therefore conclude that the evidence is wholly insufficient to show a right of subrogation in cross-petitioners, Lamb and Schauble, to the money on deposit in defendant bank, even if Stanton county had a lien on this money at the time of its settlement with the deceased.

Proceeding then to an examination of the claim of the cross-petitioners whom we have designated in this opinion as "special creditors," we find their claim to subrogation based on the theory that they had signed certain notes as sureties for the deceased, which were owned by the defendant bank, and none of which fell due until after the death of the intestate, and which they, as sureties, paid to the bank. These claims were subsequently filed and allowed against the estate of the intestate. The contention urged is that the bank had a lien on the money of the intestate on deposit against the notes owed by him to the bank, and that, by the payment of these notes as sureties, they were subrogated to the lien of the bank against the money on deposit. The doctrine of what is commonly called a banker's lien on deposits made by one indebted to the bank stands on the principle of the right of set-off of mutual accounts; the deposit is an indebtedness of the bank to the depositor, and a note signed by the depositor and owned by the bank is an indebtedness to the bank which, when matured, may be set off against the bank's indebtedness. Consequently the right of set-off depends on the maturity of the debt owned by the bank. If then we treat the money on deposit in the bank as an indebtedness to the deceased in his individual, rather than his representative, capacity, and such indebtedness had matured before any other rights intervened, the bank might have applied the deposit as a credit on the note; but where the indebtedness to the bank has not matured until after the death of the depositor the right of set-off does not exist. Boone, Banking, secs. 65,

281; *Jordan v. Bank*, 74 N. Y. 467, 30 Am. Rep. 319; *Commercial Nat. Bank v. Proctor*, 98 Ill. 558.

The general lien of a bank for a balance of account is not favored by the courts, and does not exist if there are any circumstances, in any case, inconsistent therewith. Boone, Banking, sec. 278; *Appeal of Liggett Spring & Axle Co.*, 111 Pa. St. 291. On this principle, even had the debt matured in the lifetime of the intestate, the knowledge of the bank of the trust relation in which the deposit was made would, as against the claim of Stanton county, have prevented a set-off of this deposit against the indebtedness of the intestate to the bank; hence we are of the opinion that the evidence offered by cross-petitioners is insufficient to establish a lien by subrogation to the rights of the bank.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded.

AMES and HASTINGS, CC., concur.

By the Court: For the reasons stated in the above opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. LEO KRAYENBUHL.

FILED JANUARY 21, 1904. No. 13,339.

1. **Review:** CHALLENGING JUROR. It is only where all peremptory challenges have been exhausted by the party complaining that a ruling of the trial court upon a challenge of a juror for cause can be reviewed.

2. **Evidence.** Rulings of the trial court in the admission of evidence examined, and *held* not prejudicial.

3. **Depositions.** Where from the deposition of a witness it appears that he is a nonresident of the county, it is unnecessary for the party offering the deposition in evidence to prove that such witness is not present in court or in the county.

4. **Trial.** In an action for personal injury, it is not error to permit plaintiff to exhibit his injured limb to the jury.

5. ———: ARGUMENT OF COUNSEL. It is customary to permit attorneys to comment upon the absence of witnesses, or their nonproduction, when they are shown to be cognizant of the facts in issue. It is a mere matter of argument, and may be discussed by either side, trusting to the good sense of the jury to properly estimate the value of such arguments.

6. ———: ———: EXCEPTIONS. Alleged misconduct of counsel in addressing the jury must be objected to when the language is used, and a ruling of the trial court procured on such objection, and an exception saved to the ruling, to make the objection available in this court.

7. **Instructions.** Action of the trial court in giving and refusing instructions examined and approved.

8. **Remittitur.** In an action for personal injuries, where substantial damages are proved, but the verdict of the jury appears to be excessive, the error may be corrected by a proper remittitur of the excess directed by the district court, or by this court on a proceeding in error.

9. ———. Quantum of damages examined, and *held* excessive, and a remittitur of $3,000 directed.

ERROR to the district court for Merrick county: CONRAD HOLLENBECK, JUDGE. *Affirmed upon condition.*

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

Matthew Gering, contra.

OLDHAM, C.

This same case was heard in this court on a former trial, and the opinion is reported in 65 Neb. 889. On a retrial plaintiff again had judgment and defendant brings error a second time to this court. The opinion, *supra,* contains a careful and concise statement of every material fact involved in the controversy and renders a further statement unnecessary. The evidence at the last hearing differs on no material question from that reviewed and commented on in the former opinion. It is true that at the last hear-

ing the testimony did not show that a cow owned by plaintiff's father was picketed in close proximity to the turntable. This, however, was but one circumstance commented upon for the purpose of showing that children were accustomed to resort to the turntable and the lack of this circumstance is fully supplied by other and positive testimony of numerous witnesses that children did, and for two or three years before the injury complained of had been resorting to the turntable and playing at, around and upon it with the knowledge of the foreman of the roundhouse whose duty it was to keep the turntable securely locked when not in use; consequently, the question of the liability of defendant under plaintiff's testimony for the injury received is no longer an open one, but is now within the rule of the "law of the case" as determined by this court at the former hearing. We will therefore confine ourselves in this opinion to the question of alleged errors occurring in the trial of the cause.

The first question called to our attention is of the alleged incompetency of a juror because of his ignorance of the English language. Without expressing an opinion as to whether the examination of this juror showed such an imperfect knowledge of the English language as to disqualify him from service as a juror, it is only necessary to say that the record does not show that all peremptory challenges were exhausted by the defendant, and in the absence of such a showing the ruling of the trial court upon a challenge of a juror for cause can not be reviewed here. *Bartley v. State*, 53 Neb. 310, 331; *Burnett v. Burlington & M. R. R. Co.*, 16 Neb. 332.

Complaint is next made of the action of the trial court in permitting witness Krayenbuhl and others to testify from a map of the ground that had been drawn showing the location of the tracks, turntable and other structures by giving the distances on the map. The map in question appears from the testimony of Krayenbuhl to have been made by himself and his attorney. Krayenbuhl testified that he made the actual measurements from the different

points and knew them independently of the map. He did not, however, make the scale nor actually draw the map. We are not pointed to any prejudice that resulted from this testimony nor is it claimed that the map was incorrect or misleading in any respect; consequently, even if the rule of the court permitting Krayenbuhl and Fiddler to testify from the map were technically erroneous, which we do not decide, it would be at most error without prejudice.

Another objection is urged to the action of the trial court in permitting one of plaintiff's witnesses to testify that it was the duty of William Young, the roundhouse superintendent, to lock the turntable and in his absence it was the duty of the station agent, Green, to do so. The evidence was but a repetition of the rule of the company with reference to locking the turntable which had been admitted in evidence without objection; consequently, while the evidence was cumulative and unnecessary it was in no wise prejudicial; besides this, other witnesses testified to substantially the same facts without objection.

It is next urged that the court erred in admitting the deposition of Nellie Kennedy, one of plaintiff's witnesses, because there was no showing that she was not present in the court room or in the county at the time of the trial. The deposition of this witness was taken at Sioux City, Iowa, and in it she states that she did not expect to reside in Merrick county, Nebraska. The rule is well established in this state that where from the deposition of the witness it appears that he is a non-resident of the county, it is unnecessary for the party offering the deposition in evidence to first prove that the witness is not present either in the court room or the county. *Sells v. Haggard & Co.*, 21 Neb. 357.

It is next urged that the court erred in permitting plaintiff to exhibit his injured limb to the jury and in permitting him to sit near the jury and weep during the close of the argument of his counsel. It is contended that as defendant did not deny that the plaintiff had sustained a loss of

his foot that it was entirely unnecessary to exhibit the maimed limb to the jury. Such action, however, regardless of the issues, is permitted in nearly all jurisdictions, and this court has looked with approval on this practice. *Omaha Street R. Co. v. Emminger,* 57 Neb. 240. We think it would be indeed a very harsh rule that would compel a plaintiff to withdraw from the presence of a jury during the closing argument of his counsel, even though a reference to his maimed condition might naturally cause him to weep. Objections of this nature are little favored in American courts. *Hess v. Lowery,* 122 Ind. 225; *Selleck v. Janesville,* 100 Wis. 157, 41 L. R. A. 563; Abbott, Trial Brief, p. 308.

It is next urged that the verdict reached was a quotient verdict. The evidence, however, preserved on this question clearly fails to sustain the objection. The affidavits of the jurors filed on this question deny specifically any agreement in advance to be bound by any quotient verdict or that the quotient found was the verdict finally rendered. In fact the testimony shows that the jurors did divide by 12 the total found by adding together the amount each one proposed as a verdict, but without any agreement to be bound by the quotient; that when this division was made the quotient found was $16,000, and that objection was made in the jury room to returning this verdict and it was raised by common consent from $16,000 to $18,000. *Cortelyou v. McCarthy,* 37 Neb. 742.

Complaint is next urged against the conduct of plaintiff's counsel in addressing the jury. It appears from the record that in the opening address plaintiff's counsel said to the jury: "I want to ask these gentlemen why they do not produce this man Young?" Defendant objected to these remarks, and plaintiff's counsel reiterated the interrogatory, saying, "So these gentlemen will have their record, I will repeat it again, why do they not produce this man Young?" The court said in ruling on the objection: "I think it is fair that it be tried according to the evidence, still it is hard to remember all the evidence in the trial of a

case." It is contended in defendant's brief that the use of this language by plaintiff's attorney and the refusal of the court to rebuke counsel and withdraw the language from the consideration of the jury was highly prejudicial to defendant. The question to be determined is: Had plaintiff's counsel a right to comment on the fact of defendant's failure to produce the witness Young? It will be remembered that Young was the foreman of the roundhouse near the turntable, and was primarily charged under the rules of the company with keeping the turntable locked when it was not in use. Plaintiff proved without objection on the part of defendant that Young had testified at the former trial of the case. He also proved the position held by Young at the time of the injury and that Young was residing in Merrick county at the time the last trial was had. We think the correct rule with reference to the privilege accorded attorneys in arguing a case to a jury to comment on the nonproduction of witnesses by the adverse party is well stated by the supreme court of Texas, in *Missouri P. R. Co. v. White,* 80 Tex. 202, when it says: "It is customary to permit attorneys to comment upon the absence of witnesses or their nonproduction, when they are shown to be cognizant of the facts in issue. It is a mere matter of argument, and may be discussed by either side, trusting to the good sense of the jury to properly estimate the value of such arguments." Of like effect are the holdings in *Huckshold v. St. Louis, I. M. & S. R. Co.*, 90 Mo. 548; *Sesler v. Montgomery,* 78 Cal. 486; *Cook v. Standard Life & Accident Ins. Co.,* 86 Mich. 554. Other alleged misconduct of plaintiff's counsel in his address to the jury is criticised in defendant's brief, but no objection appears to have been made to the language said to have been used during the time counsel addressed the jury. The language was first called to the attention of the trial court by affidavits filed in support of the motion for a new trial. To have obtained a review of this conduct there should have been an objection made at the time, a ruling thereon, exception thereto, and the proceedings preserved in the bill

of exceptions; otherwise such alleged error is not available on review in this court. *Summers v. Simms*, 58 Neb. 579; *Bankers Life Ass'n v. Lisco*, 47 Neb. 340.

Objection is urged to the action of the trial court in giving the 6th paragraph of the instructions on its own motion. The objection, however, is founded on an error in copying the instruction into the original transcript; an additional transcript was filed which corrected this error, and the corrected copy of the instruction is conceded to be correct.

Instruction No. 7 is criticised for its definition of the term negligence, but the definition contained in the instruction has been approved by this court in numerous cases. *McGraw v. Rock Island & P. R. Co.*, 59 Neb. 397; *Omaha Street R. Co. v. Craig*, 39 Neb. 601, 617; *Kearney Electric Co. v. Laughlin*, 45 Neb. 390, 404.

Technical objections of much the same nature as these just considered are urged against most of the instructions given by the court, but we have examined the instructions carefully and believe that they fairly and fully presented to the jury every question involved in the controversy; that they submitted defendant's theory of the case as favorably as the law and evidence would warrant; that in directing the jury, the learned trial judge carefully followed the former opinion in this case, and that there is neither technical nor reversible error in the court's action in this particular.

It is finally urged that the verdict of the jury awarding plaintiff $18,000 damages is so excessive as to suggest that it was the result of passion and prejudice, and for this reason the verdict should have been set aside by the trial judge instead of having it reduced by a remittitur. When the verdict of the jury was returned the court in disposing of defendant's motion for a new trial directed a remittitur of $6,000 from the amount found by the jury, and on a remittitur being entered, judgment was rendered against the defendant for $12,000, and it is urged that the judgment, even after the remittitur, is still so clearly excessive

that a new trial should be granted. No authority, however, is cited to sustain this contention. In fact the rule seems to be so well settled in this state that where an actual and substantial damage is proved in an action for personal injuries and the amount of the verdict of the jury appears to be excessive, a remittitur may be directed either in the district court or in this court on error proceedings, that a search for authorities in this state to sustain defendant's position would be a fruitless one.

The rule of curing an excessive judgment for damages where actual damages have been proved by reversing the judgment unless a remittitur be entered has the approval of courts of last resort in nearly every state in this union, and in none is the rule more firmly established than in the decisions of our own court. The rule in this state is well set forth in the language of SULLIVAN, J., in delivering the opinion in *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713, when he says:

"It is the settled doctrine of this court, even in actions *ex delicto*, that a judgment based on a verdict which is excessive, but which was not given under the influence of passion or prejudice, will be permitted to stand on condition that the excess be remitted."

In the case just quoted from, a remittitur of $3,000 was directed on a judgment rendered for $7,000, or almost half the judgment was directed to be remitted. In *Fremont, E. & M. V. R. Co. v. French*, 48 Neb. 638, the verdict of the jury awarded $10,000 damages; the trial court reduced this verdict to $6,300, and this court directed a further remittitur of $1,300, but refused to set aside the judgment as excessive, if the remittitur was entered. In *Fremont, E. & M. V. R. Co. v. Leslie*, 41 Neb. 159, the verdict of the jury was for $5,000 damages; the trial judge compelled a remittitur of $2,350 of the verdict awarded, and this court directed a further remittitur of $1,450, leaving a judgment of $1,200, or less than one-fourth of the amount awarded by the verdict of the jury. In the still more recent case of *Swift & Co. v. Holoubek*, 62 Neb. 31, on rehearing a judg-

ment for $11,500 awarded plaintiff for the loss of his hand was by order of this court reduced by a remittitur to $7,500. There is a certain similiarity in the nature of the injury in the Holoubek case and the case at bar; the difference being that one injury was for the loss of a hand and the other for the loss of a foot. In the one case the plaintiff had a less expectancy of life but was shown to have been a day laborer capable of earning $1.25 a day; in the instant case the plaintiff is an infant and might be capable of following any avocation or profession in life. Each of these cases was twice tried to a jury and in each the verdict in the first instance was for $5,000. In the Holoubek case on a retrial the first verdict was increased to $11,500, and in the instant case, as already stated, in the retrial the jury awarded $18,000, which was reduced by the trial court to $12,000. We readily can see that there is no fast and loose rule to establish a monetary value of the injury received in either of these cases; but this thing is certain, that the loss of a foot by a healthy four year old child with an expectancy of 51 years of life is a serious injury which should be responded to in substantial damage from the party whose negligence inflicted it. But as punitive and exemplary damages are not allowed in this state, we are impressed with the idea that, as compared with judgments approved by this court in cases of partial similarity, the judgment for $12,000 under all the facts and circumstances surrounding the injury is somewhat excessive, and in view of the holding of this court in *Swift & Co. v. Holoubek, supra,* we think that a further remittitur of $3,000 should be entered by plaintiff within 30 days, and that if such remittitur be entered the judgment of the district court for $9,000 as of the date thereof should be affirmed; otherwise the judgment be reversed and the cause remanded for further proceedings.

It is therefore recommended that, if plaintiff enter a remittitur of $3,000 within 30 days, the judgment of the district court be affirmed; otherwise, the judgment be reversed and the cause remanded for further proceedings.

HASTINGS and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, if the plaintiff enter a remittitur of $3,000 within 30 days, the judgment of the district court is affirmed; otherwise, the judgment is reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

JOHN REED, APPELLANT, V. MATHILDA A. REED, APPELLEE.

FILED JANUARY 21, 1904. No. 13,270.

1. **Actions:** JOINDER. An action to determine property rights not growing out of the marriage relation can not be joined with an action for divorce.
2. **———:** DEMURRER. Where such causes of action are joined in a petition, a demurrer thereto for misjoinder of causes of action should be sustained.
3. **Witness:** COMPETENCY. In a suit by a married man against his wife to declare a trust in his favor in real estate of which she is in possession and to which she holds the legal title, and to quiet the title thereto in himself, the husband is not a competent witness.

APPEAL from the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Affirmed.*

David Van Etten, for appellant.

E. T. Farnsworth and *W. R. Patrick, contra.*

BARNES, C.

On the 14th day of December, 1900, appellant filed a petition in the district court for Douglas county against his wife, Mathilda A. Reed, charging her with adultery, and also alleging, as a second cause of action, that she held certain real property in trust for him, the same having been purchased with his money, and the title thereto having been taken in her name. The petition concluded with a prayer for an injunction restraining the appellee from

incumbering or conveying the property *pendente lite*, and for a divorce, together with a decree confirming and quieting the title to the real estate described therein, in the plaintiff. To this petition an answer was filed, which in effect denied all of its allegations except the one of the marriage relation. It also contained an affirmative allegation that the property was purchased by the appellee, with her own separate money and means; that the appellant had no right, title or interest therein, and never contributed anything to the purchase price thereof. It also contained counter charges of infidelity and cruelty on the part of the plaintiff, and prayed that defendant be granted a decree of divorce. A reply was filed, and on the issues thus joined a trial was had which resulted in a decree denying both parties a divorce, and a dismissal of the divorce proceedings, together with a refusal of the court to pass on the question of the property rights of the parties. The appellant prosecuted error to this court where so much of the decree as denied him a divorce was affirmed. And it was held that two causes of action were improperly joined in his petition, but no objection thereto having been made in the district court it was the duty of that court to try and adjudicate his property rights. The cause was remanded to the district court for a trial and determination of that question. See 65 Neb. 849. On a return of the mandate to the district court appellant filed therein what he denominated as an amended and supplemental petition, which contained all of the allegations of his original petition, including his cause of action for a divorce. Thereupon the appellee demurred to the new pleading for a misjoinder of causes of action. The demurrer was sustained, and the appellant thereafter prepared another petition for a divorce, which he had docketed as a separate and distinct action, and prepared and filed another amended petition herein in which he again persisted in stating all of the facts alleged in his original petition, together with other matters, as grounds for a divorce. On a motion for that purpose the trial court ordered so much of the peti-

tion as related to the divorce proceedings stricken from the record. Thereafter an answer was filed to which the the appellant replied, and the cause came on for trial on the question of the property rights of the parties. At such trial the appellant offered himself as a witness to prove his ownership of the property as against his wife. His evidence was objected to on the ground that the husband can in no case be a witness against a wife, nor the wife against the husband except in a criminal proceeding for a crime committed by one against the other. The objection was sustained, and appellant's testimony was excluded, to which ruling an exception was duly taken. Thereupon one H. W. Barnum was called as a witness for the appellant, and testified in substance that he entered into a contract to lower the house called Reed's Hotel, situated in South Omaha, it being a part of the property described in the petition, to grade; that the contract was signed by Mrs. Reed, but that the negotiations leading up to it were made with Mr. Reed; that he never had any conversation with Mrs. Reed about the matter at any other time than when the contract was signed. With this evidence the appellant rested his case, and the trial court rendered a judgment in favor of the appellee, dismissing the petition. From that judgment the case comes here on appeal.

Many reasons are urged for a reversal of the judgment, but two of which are entitled to our consideration.

1. It is contended that the court erred in sustaining the demurrer to the last amended petition. This contention can not be sustained. As stated in our former opinion in this case, the rule without exception is, that property rights not growing out of the marriage relation can not be joined with an action for a divorce. *Reed v. Reed,* 65 Neb. 849; 2 Nelson, Divorce, sec. 736; *Uhl v. Uhl,* 52 Cal. 250. Equitable relief can not be prayed for in a divorce proceeding. 1 Am. & Eng. Ency. Pl. & Pr. 199; *Dunbar v. Dunbar,* 1 Clev. Law Rep. (Ohio) 148. Indeed, it is believed that no well considered case can be found where such joinder

has been permitted. When the appellant, in total disregard of our former judgment, filed a supplemental and amended petition it was proper for the defendant to demur to it for a misjoinder of causes of action and it was the duty of the trial court to sustain the demurrer. So appellant's contention, on this point, must fail.

2. It is strenuously urged by appellant that the court erred in sustaining the defendant's objection to his evidence offered on the trial of the question of property rights, put in issue by the pleadings. Section 331 of the code provides that "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other." At common law neither husband nor wife could testify one against the other in any case. Section 331 is simply a modification of the common law rule which permits them to testify only in criminal proceedings for a crime one against the other. From the very necessity of the case they are permitted to testify against each other in divorce proceedings, but these are the only modifications of the rule which otherwise remains the same as at common law. *Solomon v. Solomon,* 3 Neb. (Unof.) 540; *Greene v. Greene,* 42 Neb. 634; *Skinner v. Skinner,* 38 Neb. 756; *Niland v. Kalish,* 37 Neb. 47.

It follows that the court properly excluded this evidence. We have quoted, above, all of the evidence offered and received by the court, and it is clearly insufficient to sustain a decree for the appellant. The only judgment which the court could have rendered, under these circumstances, was one of dismissal.

We therefore recommend that the judgment of the district court be affirmed.

ALBERT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN REED, APPELLANT, V. MATHILDA A. REED, APPELLEE.

FILED JANUARY 21, 1904. No. 13,271.

1. **Divorce**: TEMPORARY ALIMONY. What sum the husband may be required to pay his wife during the pendency of a divorce suit as temporary alimony, expense money and counsel fees, to enable her to properly defend the action, are matters within the discretion of the district court.

2. **Misjoinder**: DEMURRER. Where a petition for a divorce contains a second cause of action for the settlement and adjudication of property rights, not growing out of the marriage relation, a demurrer thereto for misjoinder of causes of action should be sustained.

3. ———: ———: MOTION TO STRIKE. After a demurrer for a misjoinder of causes of action has been sustained, and the plaintiff files a new petition, and again inserts therein allegations relating to the second cause of action, a motion to strike such allegations should be sustained, and the objectionable matter thus eliminated from the pleading.

4. **Temporary Alimony**: CONSTITUTIONAL LAW. It is entirely within the sound discretion of the district court to require the husband to pay the sums of money allowed the wife as temporary alimony and counsel fees in a divorce case, to enable her to make a proper defense, as a condition precedent to the right to further prosecute his action. And an order requiring such payment does not conflict with any right guaranteed him by our constitution.

APPEAL from the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Affirmed.*

David Van Etten, for appellant.

E. T. Farnsworth and *W. R. Patrick, contra.*

BARNES, C.

The plaintiff commenced an action in the district court for Douglas county to obtain a divorce from the defendant, and also to have her declared trustee for him to certain property, to which she held the title. The district court refused, after a full and fair trial, to grant a divorce to either party and dismissed the cause of action relating to

the property, without prejudice. Error was prosecuted to this court, and that part of the decree refusing a divorce was affirmed, while the judgment of the court dismissing the suit as to the property interests was reversed. In our opinion it was held that the two causes of action were improperly joined in the petition filed in the lower court, but, owing to the absence of any objection on that ground, the misjoinder was waived, and the court erred in not determining the whole controversy. *Reed v. Reed,* 65 Neb. 849. After the cause was remanded to the district court for a trial of the property rights, the plaintiff sought to reinstate and retry both causes of action by filing a so-called amended and supplemental petition, in which he reiterated all of his former charges against the defendant, and made an ineffectual attempt to plead new grounds for a divorce. The defendant thereupon made an application for an order requiring the plaintiff to pay her temporary alimony, attorneys' fees and suit money in order to enable her to properly defend the action, and upon a full hearing the court ordered that the plaintiff pay to the clerk of the court, within five days, the sum of $200 as attorneys' fees, together with the sum of $50 as suit money; and it was further ordered that the plaintiff should pay to the clerk of the court, for support and maintenance of the defendant during the pendency of the action, the sum of $10 a week, on each Monday morning, beginning Monday, January 12, 1903. To this order the plaintiff excepted, and on January 12, 1903, moved the court to set aside its said order, which motion after due hearing was overruled. The defendant thereupon demurred to the amended and supplemental petition, for a misjoinder of causes of action. The demurrer was sustained, and the plaintiff took leave to separate his causes of action and had them docketed as separate cases. After docketing the divorce case, which is the one at bar, plaintiff filed another petition in which he reiterated all of the statements contained in his original petition, and on the defendant's motion the court struck out of the petition all that part of it which related to the

property claims, after which an answer was filed and the cause came on in due time for trial. At the commencement of the trial the court was advised by the defendant that its order in relation to alimony, suit money and attorneys' fees had not been complied with; and the defendant objected to the plaintiff being permitted to proceed with the trial of his cause until he should comply with the order of the court. It appears from the record that an ineffectual attempt was made to collect the money specified in the order of the court by execution; that the plaintiff had neglected and refused to comply with the court's order, although nearly three months had elapsed after it was made, and after his motion to set aside the order had been denied before the cause came on for trial. The plaintiff still refused to comply with said order, and on the hearing of the defendant's objection to the plaintiff being allowed to further proceed with the trial, a lengthy discussion took place between counsel for the plaintiff and the court, and although this discussion, or dialogue, is set forth in full in the bill of exceptions, we deem it unnecessary to quote it. It is sufficient to say that the court informed the plaintiff's counsel that he could proceed with the trial whenever he complied with the order of the court, and that until he should so comply with the court's order, or show his inability to do so, the trial would be held in abeyance. Counsel for the plaintiff thereupon stated that he would not comply with the order, that that question might as well be settled first as last; and ordered the clerk to make a transcript for the purpose of prosecuting error to this court. The court thereupon dismissed the case, and from said judgment of dismissal the plaintiff prosecutes error.

Counsel persists in rearguing the original charges and allegations of adultery contained in his former suit, and attacks our judgment therein. But these matters are foreclosed by that judgment, and the only questions which we can properly consider, are: First, the order of the court allowing temporary alimony, attorneys' fees and suit money, and its refusal to set aside said order. Second, the

order sustaining the demurrer. Third, the order striking out of the petition the allegations relating to property interests. Fourth, the refusal of the court to allow plaintiff to proceed with the trial and the dismissal of the cause for the absolute refusal of the plaintiff to comply with its order for the payment of temporary alimony.

1. It is provided by section 12, chapter 25 of the Compiled Statutes of 1903 (Annotated Statutes, 5335), that "In every suit brought, either for a divorce or for a separation, the court may in its discretion require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency; and it may decree costs against either party, and award execution for the same; or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver." It thus appears that there was ample statutory provision for the order complained of. In the case of *O'Brien v. O'Brien,* 19 Neb. 584, it was held that the court may order the husband to pay into court a reasonable sum of money to enable the wife to prosecute the action, where she seeks a modification of a decree of divorce alleged to have been obtained by fraud of the husband. In *Callahan v. Callahan,* 7 Neb. 38, it was held that a reasonable allowance of alimony, during the pendency of an action for divorce, brought into the supreme court upon appeal, will be made. In *Brasch v. Brasch,* 50 Neb. 73, it was held within the power of the court to order the husband to pay a certain sum of money to his wife during the pendency of a divorce suit for her expenses in prosecuting or defending the action. See, also, *Cochran v. Cochran,* 42 Neb. 612. It thus appears that the power of the court to make the allowance, complained of in this case, is no longer an open question; and after a careful examination of the record we are unable to say that the court erred, or was guilty of an abuse of discretion in refusing to set aside its order.

In *Brasch v. Brasch, supra,* it was held that allowances made in a divorce suit by a district court, for the temporary

support of the wife, for expenses and attorneys' fees, will not be disturbed unless it appears that the court abused its discretion. It was further held that "What sum a husband may be required to pay to his wife for her support during the pendency of a divorce suit for her 'expenses' in prosecuting or defending the action, for counsel fees, * * * are matters within the discretion of the district court." The record discloses that the question of the allowance of temporary alimony, together with its amount, was litigated on affidavits and evidence produced on both sides, upon consideration of which the court made the order complained of. It seems proper in all respects, and appears to have been the exercise of a sound discretion by the trial judge.

2. It is contended that the court erred in sustaining the demurrer to the plaintiff's so-called amended and supplemental petition. This contention can not be sustained. It was stated in our former opinion in this case that the rule, without exception, is that property rights not growing out of the marriage relation can not be joined with an action for a divorce. It may be further stated that equitable relief can not be prayed for in a divorce proceeding. When the case was sent back to the district court for trial on the question of the property rights of the parties, the plaintiff sought to avoid the consequences of the former trial and judgment by filing what he called an amended and supplemental petition, in which he again joined the two causes of action in utter disregard of our former opinion. When this pleading was filed it was proper for the defendant to attack it in the same manner as though it was an original petition filed in a suit just commenced. The way to reach the misjoinder was by a demurrer, and the court properly sustained the same.

3. After the demurrer was sustained the plaintiff filed another petition in which he again embodied the same objectionable matter. It was proper practice for the defendant to move to strike these allegations out of the pleading, and the court, by an order sustaining the motion, finally

eliminated it, and left the petition standing as one for divorce alone.

4. We come now to the question as to whether or not the court erred in refusing to allow the plaintiff to proceed with the trial of his case without complying with the order for the payment of temporary alimony, and in dismissing the action because of an absolute refusal on plaintiff's part to comply with that order. This question seems to have been settled in the case of *Brasch v. Brasch, supra,* where it was held that "It was entirely within the discretion of the district court when the sums allowed for temporary alimony should be paid, whether before the final hearing of the action and as a condition precedent to the right of the husband to further prosecute or defend, or to postpone such payment until the final hearing."

It is contended, however, that the order of the court was a violation of the rights of the plaintiff as defined by section 9, article 1 of the constitution of 1875. An examination of that section convinces us that counsel has made a mistake in his citation, and that he intended to cite section 13, article 1, which provides that "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." Counsel seems to think that this section of the constitution guaranteed him a trial of his case, whether he complied with the reasonable orders and rules of the court or not. In this he is mistaken. Due process of law, as specified in this section, has been defined as follows: "Law in its regular course of administration through courts of justice." "Due process of law, in each particular case, means such an exertion of the powers of the government as the settled maxims of law permit and sanction, under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." *Ex parte Ah Fook,* 49 Cal. 402. "Due process of law, * * * is a course of legal proceedings, according to those rules and principles which

have been established in our systems of jurisprudence for the protection and enforcement of private rights." *South Platte Land Co. v. Buffalo County*, 7 Neb. 253. Due process of law may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained.

The court in this case was open to the plaintiff for the trial of his cause whenever he complied with its reasonable rules of practice, and its orders properly made in the process of the litigation. It can not be successfully contended that a plaintiff may have a trial of his cause without regard to rules of practice, to forms or precedents, or the reasonable methods of procedure adopted by the courts. In order to guarantee the plainitff a speedy trial, and that justice should be administered to him without denial or delay, our courts must be held to have the inherent power to enforce their reasonable orders, for without such power an attempt to administer justice would inevitably result in a failure to accomplish the end sought. It was within the power of the court to require the plaintiff to comply with its order before permiting him to proceed with the trial, and his refusal to comply with this order was the only thing which prevented him from having his case adjudicated upon its merits. If he had complied with this order, or if he had shown to a reasonable certainty that he was unable to comply with it, no doubt the court would have permitted him to try his case instead of dismissing it without a hearing.

The plaintiff alone is to blame for the situation in which he finds himself, and we recommend that the judgment of the district court be affirmed.

ALBERT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SAMUEL BRUMBAUGH, APPELLANT, V. THOMAS H. JONES ET AL., APPELLEES.

FILED JANUARY 21, 1904. No. 13,282.

1. **Creditors' Suit:** INJUNCTION. A creditor whose claim has not been reduced to judgment, and who has neither a general nor specific lien on his debtor's property, is not entitled to have such property impounded as security for the claim, nor is such creditor entitled to an injunction restraining his debtor from disposing of some or all of his property.
2. ———. Mere insolvency and inability to reach a particular fund by garnishee process are not sufficient to take a case out of the general rule above stated.
3. ———: REMEDY AT LAW: DISMISSAL. Whenever, on the trial of a creditor's action, it appears that the plaintiff has a remedy at law, the equitable proceedings should be dismissed.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Affirmed.*

Mockett & Polk, for appellant.

Frederick Shepherd, contra.

BARNES, C.

The appellant commenced this action, in the nature of a creditor's bill, against Augusta May Jones, Elizabeth C. Jones, executrix of the last will and testament of Maurice Edward Jones, deceased, and Thomas H. Jones, and E. E. Page, a copartnership, doing business as the Forest City Novelty Company, in the district court for Lancaster county, for a so-called accounting and to recover judgment on a certain promissory note for the sum of $600 executed and delivered on the 15th day of February, 1900, by Thomas H. Jones, and E. E. Page, doing business as the Forest City Novelty Company, and signed by Augusta May Jones as surety, to the Handy Wagon Company, and of which the appellant is the owner. In addition to the accounting, the object and purpose of the suit was to restrain Eliza-

beth C. Jones, as executrix aforesaid, from paying over to Augusta May Jones a legacy of $1,000 left her by the will of Maurice Edward Jones, and to require her, as such executrix, to pay the money, or so much thereof as might be necessary, into the court for the satisfaction of the sum found due the appellant from Augusta May Jones, on the promissory note aforesaid. The trial resulted in a decree for the defendants, dismissing the plaintiff's petition, and he brings the case here by appeal.

It appears that the note above mentioned was executed at Cleveland, Ohio, was due six months after the date thereof, and was payable to the order of the Handy Wagon Company at the First National Bank of Canton, Ohio; that it was signed by the Forest City Novelty Company as principal, and by Mrs. May Jones as surety; that the Handy Wagon Company had been dissolved, and the note turned over to the appellant as his sole property; that the surety, Augusta May Jones, is the wife of Thomas H. Jones, and now resides, and at all times since the making of the said note, has resided in the state of Ohio, of which state the appellant is also a resident; that E. E. Page and Augusta May Jones were both insolvent, except for her interest in the estate of Maurice Edward Jones. As to the solvency or insolvency of her husband, Thomas H. Jones, the record is not exactly clear.

It further appears that on the 19th day of February, 1899, Maurice Edward Jones, then a resident of the city of Lincoln, Nebraska, departed this life, leaving a last will and testament; that by the terms of said will Elizabeth C. Jones was named as executrix thereof; that she duly qualified and accepted said trust on the 2d day of May, 1889; that the deceased left an estate in Lancaster county, Nebraska, also in the states of Kansas, Texas and Alabama, the total value of which was $15,000; that by the terms of the will it was provided that after five years from the date of the death of the testator, enough of the property left by him should be sold to realize $3,000; $1,000 of which was to be paid to the defendant, Augusta May Jones, as

a specific legacy; that Elizabeth C. Jones was the residuary legatee of the entire estate, except the $3,000 above mentioned.

This action was commenced on the 10th day of May, 1901, and it further appears that on or about the 1st day of September, 1899, Augusta May Jones entered into an oral agreement with Elizabeth C. Jones in her individual capacity, and not as executrix, by which Elizabeth agreed to take Augusta's minor son into her family in the city of Lincoln where she resided, and to board, clothe and educate him in the schools of said city, and was to receive in payment therefor the $1,000 legacy left Augusta by the will aforesaid; that said agreement was partly performed at the time of the commencement of this suit, in this: that Elizabeth had taken her said nephew into her family; had boarded, clothed and sent him to school from the 1st day of September, 1899, until the 10th day of May, 1901, and had expended, for that purpose, about half of the $1,000 due from her to his mother; and that said arrangement was entered into in good faith, without any knowledge on the part of Elizabeth of any liability on the part of Augusta by reason of the note in question; that there was no intention or purpose on the part of either of them in making such arrangement to evade the payment of any liability on the note, or in any way to hinder, delay or defraud any creditors of the said Augusta May Jones.

It further appears that some six months before the commencement of this action the persons interested in the estate of Maurice Edward Jones desiring to have the estate settled and procure the money due them therefrom without the delays incident to the final proceedings in probate court, entered into an agreement with the said executrix by which she paid, or agreed to pay them, and each of them, forthwith their respective legacies, and to receive the estate described in the will as her own private property; that said agreement and settlement had been carried out so far as Augusta May Jones was concerned, and before the commencement of this action she had executed a full

release of all her right, title and interest in said estate to the said Elizabeth C. Jones; that such release, however, was not fully completed as to all of the other legatees, but was at that time in the process of execution, and was being sent from place to place for proper acknowledgment; that in due time said settlement was approved by the probate court, and the executrix was discharged. It further appears that no action at law had ever been commenced by the appellant against any of the signers of the note in question; that no judgment had ever been obtained against them, or any of them, and of course no execution had ever been issued and returned *nulla bona*. Such, in effect, were the findings of the trial court. Appellant excepted to one of the findings, but in this instance we are not required to pass on the exception, because the appeal brings the case here for trial *de novo*, and according to the act of 1903 providing for appeals to this court, and our present rules, we are required to retry the issues and reach independent conclusions.

The first question for our determination is, whether or not, under the circumstances disclosed in this record, a creditor's bill can be maintained; in other words was it necessary for the appellant, who is simply a general creditor of Augusta May Jones, to obtain a judgment at law against her on his note, issue an execution on such judgment, and have it returned unsatisfied as a condition precedent to the maintenance of this action. We are fully committed to the rule that a creditor whose claim has not been reduced to judgment, and who has neither a general nor specific lien on his debtor's property, is not entitled to have such property impounded as security for the claim; nor is such creditor entitled to an injunction restraining his debtor from disposing of some or all of his property; neither is he entitled to a decree canceling a fraudulent transfer already made. *Missouri, Kansas & Texas Trust Co. v. Richardson*, 57 Neb. 617. Even an attaching creditor before obtaining judgment can not maintain an action to have an alleged fraudulent conveyance set aside. *Wein-*

land v. Cochran, 9 Neb. 480. Such an action can only be maintained by a judgment creditor. *Weil & Cahn v. Lankins,* 3 Neb. 384; *Crowell v. Horacek,* 12 Neb. 622; *Keene v. Sallenbach,* 15 Neb. 200; *Kennard, Daniel & Co. v. Hollenbeck,* 17 Neb. 362; *Sayre v. Thompson,* 18 Neb. 33; *Warren v. Peabody,* 27 Neb. 224. Appellant claims, however, that because of the nonresidence of the parties, their insolvency, and the fact that the legacy in the hands of the executrix was not subject to garnishment, this case is an exception to the rule, and that he can maintain the action. The record discloses that the appellant and his debtor are both residents of the state of Ohio. No reason is shown why he did not obtain a judgment against her in an action at law before coming here and resorting to this proceeding. From an examination of the defenses interposed it may be possible that the appellant could not have obtained a judgment against Mrs. Jones in an action at law where the issues could have been tried to a jury unincumbered by equitable considerations, and this is one of the very best reasons why he should be required to reduce his claim to a judgment in the jurisdiction where both parties reside before attempting to invoke the aid of equity in a foreign jurisdiction. Again, insolvency and the fact that the fund was not subject to garnishment in the hands of the executrix, are not sufficient to take the case out of the general rule. This question was very fully considered in the case of *Crowell v. Horacek,* 12 Neb. 622. In that case the plaintiff in his petition, after setting forth the cause of action against Horacek, stated "That for the purpose of defrauding his creditors, Horacek sold his personal property, including 21 road scrapers, afterwards sold to Stanton county, to his wife Mary Horacek; that he is wholly insolvent, and has no means to pay the plaintiff's claim, except such as may be derived from the sale of the personal property sought to be applied in this case; that on the 20th day of June, 1881, Mary Horacek sold and delivered the road scrapers to Stanton county; that the clerk of said county drew a warant in favor of the said Mary

Horacek for the sum of $88, which warrant was duly signed and sealed, and said clerk, unless restrained, will deliver said warrant to said Mary Horacek; that the plaintiff has no adequate remedy at law," etc. And it was held that a court of equity will not, at the suit of a mere creditor who has not reduced his claim to judgment, interfere by injunction to restrain a debtor from any disposition of his property which he may see fit to make. The reason of the rule seems to be that until the creditor has established his title he has no right to interfere, and it would lead to an unnecessary and perhaps a fruitless and oppressive interruption of the exercise of his debtor's rights. Unless he has a certain claim upon the property of the debtor he has no concern with his frauds.

The foregoing case and the one at bar are alike in their general features; there, as here, was the question of insolvency; there, as here, was the question of the want of power to reach the property by garnishment. For it is well settled that a county is not subject to garnishment. *State v. Eberly,* 12 Neb. 616. We have examined the authorities cited by the appellant as far as possible, and find that they are not in point. In some of them there was a judgment but no execution, while in others the action was sustained because the creditor had obtained, in some manner, a specific lien on the property sought to be subjected to the payment of his claim. It is contended, however, that the case of *Fairbanks, Morse & Co. v. Welshans & Co.,* 55 Neb. 362, affords grounds which would authorize us to depart from the general usages and precedents of equity, but we do not so understand it. In that case the relief was denied to the non-judgment creditor, and the discussion in the opinion was mere dictum. The law of each case decided by this court is found in the syllabus and reasons therefor contained in the body of the opinion are not always binding on the court. In *Holliday v. Brown,* 34 Neb. 232, it was said: "There is an unwritten rule in this court that the members thereof are bound only by points decided in the syllabus of each case. Each

judge in the body of an opinion necessarily must be permitted to state his reasons in his own way, without binding the members of the court to assent to all such reasoning, although they may concur in the conclusions reached." We therefore hold that under the facts established by the record, the action can not be maintained. If this were not sufficient to dispose of the case there is another reason why the judgment of the trial court must be affirmed. It is contended by the appellant that there were $500, or more, due from Elizabeth C. Jones to Augusta May Jones at the commencement of this action; and that the fund so unpaid should be held liable for the satisfaction of the appellant's claim. This fact alone was sufficient, as soon as its truth was ascertained, to deprive the court of jurisdiction, if it ever had any, because it conclusively appears that Elizabeth was simply a debtor to Augusta May Jones for the amount of the unpaid balance of the debt incurred by her in the settlement of the legacy; that she owed this money to Augusta May, as an individual, and did not hold it as a trust fund, or in her capacity as executrix. It follows that Elizabeth C. Jones was liable to garnishment in an attachment suit, and could have been required to pay the money into court on garnishee process. It thus appeared that the appellant had an adequate remedy at law, and that fact alone justified the district court in dismissing the action.

For the reasons above given we recommend that the judgment of the district court be affirmed.

ALBERT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE H. VRADENBURG, APPELLEE, V. FRANK A. JOHNSON ET AL., APPELLANTS.

FILED JANUARY 21, 1904. No. 13,369.

Foreclosure Sale: OBJECTIONS TO CONFIRMATION. Technical objections on the confirmation of a judicial sale, where the matters complained of are not shown to have resulted in any prejudice to the rights of the person making the objections, should be disregarded.

APPEAL from the district court for Douglas county: JACOB FAWCETT, JUDGE. *Affirmed.*

E. W. Eller, for appellants.

George A. Magney, contra.

BARNES, J.

This is an appeal from a decree of the district court for Douglas county confirming the sale of real estate in satisfaction of a judgment of foreclosure rendered in that court. The objection to the sale and confirmation is, that the successful bidder was not present at the sale. The sheriff's return to the order was in the usual form, and it was certified therein, among other things, as follows: "On the 30th day of December, A. D. 1902, at 10 o'clock A. M. of said day, after having so advertised the sale for more than thirty days, and at the time and place stated in said notice, I offered the lands and tenements for sale, at public auction, and sold the same to George H. Vradenburg, the owner of the decree herein, as follows: to wit, lot 12, in block 1, in what is known on the map or plan of the city of Omaha as 'Comer' in the city of Omaha, county of Douglas and state of Nebraska, for the sum of eleven hunded and no 100 dollars; said sum being the highest amount offered, and not less than two-thirds the appraised value thereof."

Appellant offered in support of his objection, his own affidavit, in which he says: "That he was present at the

door of the court house all the time the deputy sheriff was there from 10 to 11 o'clock A. M.; that no person was present and bid upon said property at said sale; that about the hour of 11 o'clock A. M. the deputy sheriff again offered said premises for sale and no person bid thereat; yet, notwithstanding that no person was present and bid upon said property at said sale, said deputy sheriff declared the premises sold to George H. Vradenburg. Affiant says that George H. Vradenburg was not present, neither was any person for him present at said sale on said day, and no one at said time and place of sale bid upon said premises."

This was all of the evidence offered by said appellant, and so the question presented is, was the unsupported affidavit of the appellant sufficient to overthrow the return of the officer? In our opinion it was not. Even if the affidavit of the appellant were true it would not be sufficient to defeat the confirmation of sale; we do not think it absolutely necessary for a bidder to be present at the time of sale, either in person or by his agent. He could submit the amount of his bid to the sheriff before the property was offered for sale. In other words, he could inform the sheriff that at the sale he would bid a certain sum for the premises, and if no one made a higher or better bid the sheriff would be authorized to declare a sale on said offer. Especially is this true where it is not made to appear that the amount bid was less than the real value of the premises, and where no showing is made of prejudice or injury to the appellant's rights. Again, the district court having passed upon this question on the return of the officer and the affidavit in question, and having by his findings sustained the officer's return as against the appellant's affidavit, there is no reason why we should disturb such finding.

For the foregoing reasons, the judgment of the district court confirming the sale is

AFFIRMED.

NEBRASKA LAND & FEEDING COMPANY V. ISAAC G. TRAUERMAN ET AL.

FILED JANUARY 21, 1904. No. 13,375.

1. **Pleading:** AMENDMENT. The matter of permitting the filing of amended pleadings at any time during the trial is confided to the sound discretion of the district court and, unless it clearly appears that the court has been guilty of an abuse of such discretion, its orders in that behalf will not be disturbed.
2. **Contract:** PAROL EVIDENCE. Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and in absence of fraud, mistake, or ambiguity of expression in the contract itself, parol evidence is inadmissible to change or vary its terms.
3. **New Trial.** If an instruction be given, not called for by the evidence, and which appears to have a tendency to prejudice the party complaining, a new trial will be granted.

ERROR to the district court for Cherry county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

Albert W. Crites, for plaintiff in error.

Allen G. Fisher, contra.

BARNES, J.

On the 3d day of September, 1900, the parties to this suit entered into the following contract:

"A contract made and entered into this 3d day of September, by and between the Nebraska Land & Feeding Company of Chadron, Nebraska, party of the first part, and I. G. Trauerman & Company of Sioux City, Iowa, party of the second part. The party of the first part hereby sells and agrees to deliver to the party of the second part one thousand steer calves, all born in the year 1900. Each calf to have a white or brockle face, the calves to be delivered at Irwin, Nebraska, in two deliveries of five hundred each. The first delivery to be October 12, 1900, and the second delivery to be October 27, 1900. It is

understood and agreed that no calf shall be so delivered that is not old enough to be weaned; also that black, roan, red and white, or red calves with red or brockle faces may be delivered and accepted. The party of the second part agrees to accept the calves delivered as above, and pay for the same as follows: $21 for each calf so delivered; $2,000 to be paid on signing this contract, the balance at the time of delivery. After first delivery $1,000 shall be left with the parties of the first part till final settlement.
"Signed in duplicate.

"NEBRASKA LAND & FEEDING COMPANY,
"By WILL G. COMSTOCK, *V. Pres.*
"Witness: C. J. BEACHMIN.

"I. G. TRAUERMAN & Co."

On or before the time for the first delivery, fixed by this contract, at the instance and request of Trauerman & Company, the Nebraska Land & Feeding Company sold the 500 calves to be delivered at that time, to a third party for them and on their account. Such sale was satisfactory, and asettlement was made of the matters mentioned in the contract, so far as the first mentioned delivery was concerned, and the feeding company returned $1,000 of the money paid to it at the time the contract was entered into, but retained $1,000, according to the provisions of the contract. On the 27th day of October the feeding company delivered, or tendered delivery, of 500 head of calves of the age, kind and quality described in the contract, to Trauerman & Company at Irwin, Nebraska, strictly in accordance with its agreement. Neither Trauerman & Company, nor any one for them, was there present to receive the calves so tendered, and after waiting one day the feeding company drove them back to its range, a distance of some 60 miles, and at all times thereafter retained possession of the $1,000. Some correspondence was had between the parties in relation to the matters in controversy, but no settlement was ever effected. The foregoing facts are stated at the outset of this opinion because they are undisputed. On or about the 20th day of July, 1901,

Trauerman & Company commenced this action in the district court for Cherry county against the feeding company to recover the money still in its possession, together with interest thereon.

In order to state a cause of action it was alleged in the petition that "On the same day the contract was entered into for the same consideration, and after the execution thereof, it was stipulated by and between the parties thereto that upon the request of the plaintiff (Trauerman & Company) and notice of their request, the date of either delivery, or both, should be postponed for their convenience a week or ten days, and thereafter by wire the defendant proposed the cancelation of said contract, which was accepted by the plaintiffs; that subsequent to the agreement mentioned the defendant waived the performance on behalf of these plaintiffs of their portion of said contract; that long prior to October 27, 1900, the plaintiffs informed the defendant of their inability to be present and receive a delivery of 500 calves on October 27, 1900, and claimed a period of ten days wherein to make preparations for their receipt, which was not refused to them by the defendant; that on November 1, 1900, plaintiffs notified the defendant of their readiness on and after that day to receive a delivery thereof, but the defendant wholly failed and refused on that day, and ever since, to deliver said 500 head of calves, and still refuses to deliver the same down to the present time, although often requested so to do. And plaintiffs thereupon requested from defendant a final settlement of the transaction, but said defendant has wholly failed and refused to meet the plaintiffs, and failed and refused to make any settlement of their dealings and transactions above described, whereby plaintiffs have become entitled to the return to them of their said $1,000." For which amount, with seven per cent. interest, the plaintiffs prayed judgment.

The answer of the feeding company admitted the execution of the contract; admitted that by the agreement of the parties thereto so much of the contract as provided

for the sale and delivery of cattle on the 12th day of October, 1900, was rescinded, and that $1,000 of the money mentioned therein and paid over to the defendant on the execution of said contract were returned to the plaintiffs, and thereafter denied each and every other allegation contained in the petition. In addition to these facts the answer contained the following:

"And this defendant further answering said petition, respectfully avers and shows the court, that on the 27th day of October, A. D. 1900, at Irwin, Nebraska, this defendant, by its officers, agents, and servants, was present during the daytime, with five hundred head of calves agreed to be there delivered in and by said contract and ready, willing and able to make delivery thereof in pursuance of said contract, and then and there offered to make delivery of the same pursuant thereto, but neither the said plaintiffs, nor any of them, were there present to receive the same and make payment therefor in accordance with the terms of said contract, and the said plantiffs then and there wholly failed, omitted and refused to comply with the terms of said contract on their part to be done and performed, but this answering defendant has, in all respects, fully complied therewith; that by reason of the premises, this defendant has been greatly damaged and injured, and was thereby put to and incurred great loss and damages, loss of time, labor, expenses and disbursements, in gathering up said calves, and in driving them to Irwin, and holding them there, and returning them to the range of this defendant, and injury to said calves thereby, and depreciation in value, to wit, in the sum of two thousand dollars and more. Defendant denies that there ever was any agreement, arrangement or understanding whereby the time for delivery was, or might be delayed, for any cause whatever, and denies each and every allegation in said petition."

The answer concluded with a proper prayer for relief. For reply the plaintiffs filed a general denial. On these issues the cause was tried to a jury; the plaintiffs had a

verdict and judgment for the sum of $1,181.37; the defendant company prosecuted error, and will hereinafter be called the plaintiff.

1. Counsel for the plaintiff contends that the court erred in permitting the plaintiff below to file the third amended petition after the jury were empaneled, and by which the name of Amanda K. Trauerman was dropped as a member of the plaintiff company, and that of Barney S. Trauerman was substituted. This contention can not be sustained, because the record fails to disclose that such amendment resulted in any prejudice to the rights of the plaintiff. To permit the filing of an amended pleading at any time during the trial is a matter which rests within the sound discretion of the district court. In order to constitute reversible error it must be shown that the court was guilty of an abuse of such discretion. No such showing appearing of record, the order of the court on that question will be affirmed.

2. It is next contended that the court erred in receiving the evidence of the witness Trauerman for the purpose of showing that at the time of the making of the contract it was further verbally agreed between the parties that the plaintiff below should not be held to exact dates for a week or ten days as to the delivery of the calves, for the reason that the terms of a written contract can not be changed or varied by parol. We think this point is well taken. The general and well established rule is, that the terms of a valid written contract can not be contradicted, altered, added to, or varied by parol evidence. To be sure there are certain exceptions to this rule. For example, evidence of fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that the contract is wrongly dated, want or failure of consideration, mistake in fact or law, or any other matter which, if proved, would affect the validity of the contract, or any part of it; the existence of any separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms, if,

from the circumstances of the case, the court infers that the parties did not intend the document to be a complete and final statement of the whole transaction between them; the existence of any separate oral agreement constituting a condition precedent to the attaching of an obligation under such a contract; the existence of any distinct subsequent oral agreement to rescind or modify any such contract, provided that such agreement is not invalid under the statute of frauds, or otherwise; by any usage or custom by which incidents not expressly mentioned in the contract are annexed to contracts of that description, unless the annexing of such incident to the contract would be repugnant to, or inconsistent with the express terms thereof. The matter in question does not fall within any of the foregoing exceptions. On the other hand it constituted a direct attempt to change the time of the delivery clearly set forth in the contract itself. Again, it appears from the allegations of the petition that there was no consideration for the supposed oral agreement, it having been averred that the consideration therefor was the same as that on which the written agreement was based. It may be further stated that where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and parol evidence is inadmissible to change or vary its terms. *Brewster v. Potruff,* 55 Mich. 129; *Exhaust Ventilator Co. v. Chicago, M. & St. P. R. Co.,* 69 Wis. 454; *McClure v. Jeffrey,* 8 Ind. 79; *Proctor v. Cole,* 66 Ind. 576; *Robinson v. McNeill,* 51 Ill. 225.

"Where negotiations take place between parties which result in their reaching an agreement in reference to the subject matter of the negotiations, and the parties subsequently reduce their agreement to writing, and sign and deliver the same, then, in the absence of fraud or mistake, or an ambiguity in the writing, it constitutes the best and only competent evidence of the contract originally made." *State Bank of Ceresco v. Belk,* 56 Neb. 710; *Sylvester v. Carpenter Paper Co.,* 55 Neb. 621.

"Parol evidence is incompetent to prove a contemporaneous oral agreement by which it is sought to change or alter the terms of a written contract and the result of which would be to change the effect of the written contract in a material portion and to insert or read into it a condition or reservation not contained in it, or implied by its terms." *Mattison v. Chicago, R. I. & P. R. Co.*, 42 Neb. 545.

We therefore hold that the court erred in receiving this evidence, and for such error the judgment should be reversed.

3. Among other errors assigned it is alleged that the court erred in giving his own instruction numbered 3 to the jury, which reads as follows:

"The jury are instructed that if the defendant has established by a preponderance of the evidence that on October 27, 1900, it brought, and had for delivery, at Irwin, Nebraska, 500 head of calves, of the character and description required by the contract, and that the defendant was ready, willing and able to make a delivery of said calves to the purchaser in accordance with the contract, then your verdict should be for the defendant, unless the plaintiff has established by a preponderance of evidence that on the day the contract was made, it was agreed between the purchaser and seller that if the purchaser so desired he might have an extension of time to receive said calves at a date later than October 27, and that within the time extended, if you find by preponderance of evidence that the time was extended, the plaintiff was ready and willing to receive and pay for said calves at Irwin, Nebraska, and perform all the conditions of said contract upon his part, and that the defendant failed, refused and neglected to perform said contract upon its part, then you should find for the plaintiff; or, if the plaintiff has established by a preponderance of the evidence that said contract was, by mutual agreement between the parties, canceled, then you should find for the plaintiff."

Under our view of the law it was error to instruct the

jury that they might consider the question of the change of time of delivery, attempted to be shown by oral evidence. But the plaintiff particularly contends that the court erred in giving the last clause of this instruction, by which the jury were told that if they should find by a preponderance of the evidence that the contract was, by mutual agreement betwen the parties, canceled, they should then find for plaintiff, for the reason that there was no evidence of any kind introduced to support that issue. A careful examination of the record fails to disclose a word of evidence showing or tending to show that there was ever any attempt made on the part of either of the parties to cancel the contract. On the other hand the record discloses that the plaintiff herein, when it returned the $1,000 to the defendant upon the completion or rescission of that part of the contract relating to the first delivery, informed the defendant that it would be ready to deliver the 500 calves mentioned as the second delivery, at Irwin, Nebraska, on the day specified in the contract, and demanded that the defendant should be there ready to receive them and pay for them, even going so far as to suggest the kind of payment desired. In addition to this it appears that on the 26th day of October, 1900, the plaintiff telegraphed the defendant as follows: "Calves will be in Irwin tomorrow. Will you be there to receive them?" The defendant paid no attention to these notifications, but on the 1st day of November following, and after delivery was tendered, they wrote the plaintiff that it ought not to hold them strictly to the date of delivery fixed by the contract, and asked if at some future time they would be ready to make delivery.

The rule is well settled in this court that "If an instruction be given not called for by the evidence, and which had a direct tendency to prejudice the party complaining, a new trial will be granted." *Matthewson v. Burr*, 6 Neb. 312; *Harrison v. Baker*, 15 Neb. 43; *Fremont, E. & M. V. R. Co. v. Waters*, 50 Neb. 592.

Such we think was clearly the effect of the instruction

complained of, and therefore the judgment should be reversed.

The petition in error contains many other assignments, but being compelled, for the foregoing reasons, to reverse the judgment, it will be unnecessary for us to consider them.

For the errors above mentioned, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

FARMERS & MERCHANTS INSURANCE COMPANY OF LINCOLN, NEBRASKA, v. ASHER D. WARNER.

FILED JANUARY 21, 1904. No. 13,330.

Insurance: OPTION TO REPAIR. Where a policy of insurance contains a clause permitting the company to repair an injured building instead of paying the damages sustained in money, its option to repair to be exercised within 60 days from the receipt of proof of loss, and where the company by its conduct waives the proof of loss stipulated by the policy, in such case, the option to repair must be made within 60 days from the date of its waiver of proof of loss.

ERROR to the district court for Boone county: JAMES N. PAUL, JUDGE. *Affirmed.*

Halleck F. Rose, for plaintiff in error.

J. S. Armstrong and *M. W. McGan, contra.*

DUFFIE, C.

This suit was brought to recover for a loss under a tornado policy for $1,800 written upon a barn. The policy contains the following stipulation: "It is provided further that it shall be optional with the company to repair, rebuild or replace the property lost or damaged with other of like kind or quality within a reasonable time, giving notice of their intention so to do within 60 days after re-

ceipt of proofs herein required; and, in case this company elects to rebuild, the insured shall, if required, furnish plans and specifications of the building destroyed." The loss occurred July 5, 1902. Warner notified the company's local agent, who gave notice to the company of the loss, and on July 17 or 18 a special agent or adjuster of the company visited the premises and attempted to make a settlement of the loss. Warner communicated to this adjuster all the information he possessed concerning the building and the loss, whereupon the adjuster filled out formal proofs of loss which he requested Warner to sign, but as the proof of loss so made out by the adjuster contained a clause acknowledging payment in full of the loss in the sum of $1,500, Warner refused to sign it and requested that the agent furnish him with blanks upon which to make proofs of loss, which was refused. Further negotiations between Warner and the company were had, and on October 9, 1902, the following letter was addressed by the secretary of the company to defendant in error:

"*A. D. Warner, St. Edward, Nebraska.*—DEAR SIR: We have just received a communication from our Mr. Burr stating that you were willing that Mr. Lawrence or some reliable contractor should rebuild the barn destroyed by wind some short time ago. We have consulted Mr. Lawrence, who is present while this is being dictated, and he states that he will be perfectly willing to accept the proposition to rebuild the barn for $1,500, using the salvage which was left and which he has a list of. So kindly accept this as notice that we will proceed as soon as possible to rebuild this barn as near as possible as it was before the catastrophe. Kindly advise us if this proposition is accepted by you by return mail and oblige. Of course we would prefer to be rid of the annoyance necessary to the rebuilding of this and would be willing in lieu thereof to allow $1,500 in cash. However you seem adverse to accept this and we will proceed as above.

"Yours very truly,

"L. P. FUNKHOUSER, *Secretary.*"

October 15, 1902, Mr. Warner replied as follows:

"Replying to your letter of recent date I will say that under no circumstances will I accept your proposition of $1,500 in cash. I further say, as I have told each of your representatives, I would gladly have you rebuild my barn providing it is built under the terms of the policy, viz., built under the same plans and specifications as the old barn was built, out of new material equally as good as that which was in the old barn, and constructed by competent mechanics, providing the same can be done and completed within 30 days. This will close the matter so far as I am concerned and further correspondence upon the proposition will be unnecessary.

"Very truly yours, A. D. WARNER."

Some 6 days after the date of this letter one Swanson, with a force of men, went to the site of the insured barn for the purpose of restoring it, but Warner, upon being informed that Swanson proposed to use some of the original material in the barn in rebuilding the same, refused to let him proceed, and in its answer the company claimed damage in the sum of $100, on account of payment made to Swanson and the men employed by him, for the time spent in going to the premises and returning therefrom, and expenses of the trip. In the petition filed Warner claimed that the building had been entirely destroyed and that he was entitled to recover the full amount of the policy. The company controverted this claim, alleging in its answer that the building was not totally destroyed within the meaning of our insurance laws and that under its policy it had a right to rebuild. Plaintiff in error in its brief cites authorities to the effect that, under the valued policy law of this state, the company has the option to rebuild where the loss is not total, where the policy contains a condition similar to the one in suit, and complaint is made of the sixth instruction given by the court in the following language: "You are further instructed that the burden of proof is on the defendant herein to prove by a

preponderance of the evidence that a subsequent contract to rebuild the building was entered into other than that mentioned under the terms of the policy and that it complied with all the terms and conditions of said subsequent contract." This instruction, it is said, took from the jury any right to consider the claim made by the company that it had a right under the policy to rebuild if it elected so to do. In other words, it is urged that the court refused to allow the jury to consider any evidence of the claimed right of the company to exercise its election to rebuild instead of paying the actual damage suffered if the building was not totally destroyed. Conceding this to be true, we do not think that the company was in any wise prejudiced thereby. Under the holding in *Home Fire Ins. Co. v. Hammang Bros. & Co.*, 44 Neb. 566, *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, and in other cases referred to in these instructions, we are compelled to hold that, when the company sent its adjuster to the premises to make an examination, and ascertained for itself the amount of the loss and the cause thereof in response to a request from Warner, it was a waiver of any formal proof of loss which by the terms of the policy were required to be made by Warner. This occurred on the 17th or 18th of July. No election to rebuild was made by the company until October 9, more than 60 days after this waiver, and consequently not within the time when its election to rebuild could be made. An examination of the record discloses that, while the letters above set forth were not pleaded as a contract between Warner and the company for rebuilding the barn, it is evident the company assumed the attitude on the trial of the case that such a contract did exist, and the court, out of abundant caution and that the jury might not be misled, gave the sixth instruction of which plaintiff in error now complains. We are also firmly impressed with the conviction that the jury, as it well might from the evidence, found that the loss was total and that the insured was entitled to recover the full amount of the policy. In its fourteenth instruction the

court directed the jury as follows: "You are instructed that if you should find from a preponderance of all the evidence in this case that the building insured was not wholly destroyed as in these instructions defined, then and in that case the plaintiff will not be entitled to any sum in excess of actual and immediate loss or damage to the barn at the time of the tornado, with interest on said amount at the rate of seven per cent. from the 5th day of July, 1902." This instruction is in exact accord with instruction numbered 1 asked by the plaintiff in error, and is a full answer to the complaint now made, that the court refused to accept the theory of the plaintiff in error that it was liable only for the actual damage done by the storm in case the building was not totally destroyed. The case was not, perhaps, tried strictly upon the issues made by the pleadings, but we do not discover any prejudicial error which calls for a reversal of the judgment and therefore recommend its affirmance.

LETTON and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

H. F. CADY LUMBER COMPANY, APPELLEE, v. PETER M. CONKLING ET AL., APPELLANTS.

FILED JANUARY 21, 1904. No. 13,322.

1. **Mechanic's Lien: SUBCONTRACTOR.** Where materials are fuurnished by a subcontractor to the head of a firm having the contract for the erection of a building, and in its statement for a lien such subcontractor names only the individual member of the firm with which it dealt as the contractor, and where there is nothing to indicate that the owner or other parties claiming liens on the premises were misled or injured by the failure of the subcontractor to correctly state the firm name of the contractors, such subcontractor's lien will not be held invalid because of such error.

2. **Pleading.** A subcontractor's petition to foreclose a mechanic's lien need not allege that there is anything due from the owner to the original contractor.

APPEAL from the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed.*

T. B. Dysart and *Charles S. Lobingier,* for appellants.

Baldrige & De Bord, contra.

DUFFIE, C.

Z. Taylor Turner and son are partners and contractors residing in the city of Omaha. In 1901 said partnership of Turner & Son entered into a contract with Peter M. Conkling to erect a dwelling house on lot 14, block 3, in Bemis Park, an addition to the city of Omaha. The H. F. Cady Lumber Company furnished certain material entering into the construction of said dwelling house, and on November 7, 1901, and within 60 days from the time of furnishing the last of said material, made out an account in writing of the material so furnished and, after making oath thereto, filed the same in the office of the register of deeds of Douglas county, Nebraska, claiming a mechanic's lien for the amount then due said company. The material was ordered by Z. Taylor Turner, and the account made out, verified and filed in the office of the register of deeds was an account against Z. Taylor Turner individually. The amount due on said account not being paid, the appellee commenced this action May 7, 1902, to establish and foreclose its mechanic's lien. On the trial it developed that Conkling's contract for the erection of the dwelling house was made with the firm of Z. Taylor Turner & Son, and it is now insisted that the sale of the materials having been made to Z. Taylor Turner and the account made out in that form, that the appellee is not entitled to a lien upon the premises. During the progress of the trial, and upon it becoming known that Conkling's contract was with the partnership and not with Z. Taylor Turner, the plain-

tiff obtained leave to amend its petition and inserted therein the following allegation: "That on or about the 27th day of May, 1901, the defendant Conkling entered into a contract with Z. Taylor Turner & Son for the construction of a frame building, as specified above, upon the premises above named; and Turner, being the head of the firm of Z. Taylor Turner & Son, which said firm was composed of the said Z. Taylor Turner and son, Archie Turner, contracted for and on behalf of the said Z. Taylor Turner & Son that the plaintiff should furnish to them, for the construction of the said building, lumber and mill work used in the construction thereof; that in pursuance of said contract the plaintiff did, at the times mentioned heretofore in his petition and in the amount heretofore stated, furnish said material as aforesaid. The plaintiff had no knowledge before the trial of this cause that said contract was with Z. Taylor Turner & Son. Plaintiff was informed by Z. Taylor Turner, the head of said firm of Z. Taylor Turner & Son, that he, the said Z. Taylor Turner, had a contract with the owner of the premises, Peter M. Conkling, for the construction of said building, and the other member of the said firm, Archie Turner, and the said Peter M. Conkling, owner of the said premises, knew at and before this plaintiff had furnished said material that the plaintiff understood and believed that the said Conkling's contract was with the said Z. Taylor Turner, and they, and each of them, failed and neglected to disclose to this plaintiff that the contract on behalf of the said Conkling was with Z. Taylor Turner & Son, and permitted this plaintiff to furnish said material resting in such belief." Plaintiff was allowed to make the partnership of Z. Taylor Turner & Son parties defendant, and said partnership appeared and consented to be made parties without issue and service of summons. Judgment went in favor of the plaintiff and appellee for the amount of its claim, which was declared a first lien upon the premises. A mortgage held by the defendant James W. Davis was made a second lien, and a mortgage held by the Payne-Knox

Company was established as a third lien thereon. The question principally discussed is whether the affidavit and claim for a lien, filed by the Cady company, were sufficient under our statute to entitle the appellee to a mechanic's lien upon the premises. Section 2 of our mechanic's lien law (art. 1, ch. 54, Compiled Statutes; Annotated Statutes, 7101) provides as follows:

"Any person or subcontractor who shall perform any labor for, or furnish any material or machinery or fixtures for any of the purposes mentioned in the first section of this act, to the contractor or any subcontractor who shall desire to secure a lien upon any of the structures mentioned in said section, may file a sworn statement of the amount due him or them from such contractor or subcontractor for such labor or material, machinery or fixtures, together with a description of the land upon which the same were done or used within sixty days from the performing of such labor or furnishing such material, machinery or fixtures, with the register of deeds of the county wherein said land is situated."

This clearly contemplates that the statement and affidavit shall show to whom the material, machinery or labor was furnished, and the question is: Does a statement and affidavit showing material furnished to one member of a partnership, where the contract of the owner runs to the partnership itself, come within the provisions of our statute so as to entitle the claimant to a mechanic's lien? This question was before the supreme court of Kansas in *Presbyterian Church of Hutchinson v. Santy & Co.*, 52 Kan. 462. In that case Thompson, Hanna & Co. had the contract for erecting the church, but the account filed ran against George E. Thompson individually. The court said:

"It appears that the materials furnished by the hardware company were in fact sold and charged to Thompson, but were so sold to be used in the erection of the church building, and the items charged were entered on the daybook as for the church. Thompson, alone, was not the

contractor, but he was the head of the firm who were the contractors. He, in fact, bought all the hardware from the company for the purpose of using it in the erection of the building. It was so used. The plaintiff in error had the full benefit of it, and unless the defendants in error have failed to comply substantially with the law, they should be protected in their lien. The object of naming the contractor would seem to be to apprise the owner and other persons by what authority and under whom the subcontractor claims a right to his lien. Now, it might happen, doubtless often does, that subcontractors are not informed as to the names of all persons interested in the original contract and the firm name in which the contract is taken. It would not be just, nor does the spirit of the statute require, that subcontractors should be defeated of their liens if they make a mistake by incorrectly naming the original contractors, where the name is given of the contractor with whom they dealt, and he was, in fact, in charge of the work of erecting the buliding as a contractor." Citing *Tibbetts v. Moore,* 23 Cal. 208; *Davis v. Livingstone,* 29 Cal. 283; *Putnam v. Ross,* 46 Mo. 337. To the same effect is *McDonald v. Backus,* 45 Cal. 262.

It is further objected that the petition does not state a cause of action because it fails to allege that any amount was due from Conkling to the contractors. Whether it would be a defense by the owner of the property to allege and show that at the time the lien was filed nothing was due from him to the contractor is not a question necessary to be discussed in this case. If a defense, it is an affirmative defense which must be alleged and proved by the owner of the building. The law presumes that the owner will withhold from the contractor an amount sufficient to pay laborers and subcontractors, and they need not allege in their petition to foreclose their lien that an amount sufficient to pay them is still in the hands of the owner.

We discover no reversible error in the record, and recommend an affirmance of the decree appealed from.

LETTON and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree appealed from is

AFFIRMED.

WILLIAM VOGT, APPELLANT, V. CHARLES DAILY, SHERIFF, ET AL., APPELLEES.

FILED JANUARY 21, 1904. No. 13,241.

Judgment: EXECUTION: REVIVOR. If the plaintiff in an action die after judgment, but before satisfaction thereof, no valid execution can be had upon the property of the judgment defendant until the judgment has been revived in the manner provided for in section 472 of the code.

APPEAL from the district court for Thurston county: GUY T. GRAVES, JUDGE. *Reversed with instructions.*

Curtis L. Day and *T. L. Sloan*, for appellant.

John M. Curry, contra.

KIRKPATRICK, C.

This is an appeal from a judgment of the district court for Thurston county dissolving a temporary injunction, theretofore granted on the application of appellant, restraining appellees, Nick Fritz and Charles Daily, from attempting to execute certain judgments upon the property of appellant. The judgments, two in number, had been obtained in justice court of Thurston county, in actions in which Henry F. Hattenhauer was plaintiff, and one Melcher Emmington and appellant were defendants. The judgments had never been transcribed, the executions being issued by the justice. Fritz claimed to be the assignee of said judgments, while Charles Daily appears by the record to be the sheriff of Thurston county, in whose hands the executions were placed for levy. In the petition of appellant it was alleged that Henry F. Hattenhauer, the judgment creditor, had departed this life many months prior to the attempted execution; that his estate was in

process of settlement, an administrator having been appointed, who was engaged in administering upon the estate; that neither of the appellees was in any sense an heir at law or personal representative of the judgment creditor, Hattenhauer, and that the judgments sought to be enforced had never been revived. These facts are all shown by the record to be true, and the sole question involved in this proceeding is whether, under this state of facts, it was error for the district court to dissolve the temporary injunction theretofore granted restraining appellees from attempting to execute the judgments in the name of Hattenhauer, deceased.

Section 472 of the code is as follows:

"If either or both the parties die after judgment, and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same, in the same manner as is prescribed for reviving actions before judgment; and such judgment may be rendered and execution awarded as might or ought to be given or awarded against the representatives, real or personal, or both, of such deceased party."

It seems to us apparent from the several provisions of the code, that quoted and those therein referred to, that actions at any stage of the proceedings, whether before judgment or after judgment and before execution, should be prosecuted in the name of the real party in interest, and that this party should be a living, breathing entity, a person of legal responsibility. Manifestly, if before judgment a party plaintiff die, the action can no longer proceed in his name, but must be revived in the name of his representative or successor. Sec. 458 of the code. It would seem that the legislature assumed that it would be equally incongruous to permit the execution of a judgment after the death of the judgment creditor in the name of the latter, and accordingly made a provision essentially similar for the revivor of the judgment in the names of the same parties who would have succeeded the plaintiff under section 458, if the death had occurred before judgment.

While by our code the writ of *scire facias* has been abolished, the procedure provided in lieu thereof is governed essentially by the same general principles. In the case of *Baker, Fry & Co. v. Ingersoll,* 37 Ala. 503, it is said:

"On the death of the nominal plaintiff in a judgment, a *scire facias* to revive it must be prosecuted in the name of his personal representative, and can not properly be issued in the name of the beneficial plaintiff alone, nor in the name of the deceased nominal plaintiff."

Section 438 of the code of Kansas is identical with our section 472, and passing upon that section the supreme court of Kansas in the case of *Seeley v. Johnson,* 61 Kan. 337, said:

"A sale of real estate made upon a special execution issued after the death of the plaintiff in the decree, without a revivor of the judgment, is void." In the opinion it is said: "A defendant whose property is levied upon under an order of sale or general execution ought to be able to ascertain from an inspection of the record in the case to whom payment of the debt may be made, and when the death of the owner of the judgment occurs, all proceedings for its enforcement ought to be held in abeyance until some person in being is substituted with whom the debtor may treat regarding the satisfaction of the judgment."

The language just quoted seems to be especially pertinent to the reason and spirit of the provision for revivor after death of the judgment creditor, and it is apparent to us that the order of the district court dissolving the temporary injunction in this case was erroneous. It is therefore recommended that the judgment of the district court be reversed, and that this cause be remanded with directions to the district court to enter a judgment permanently enjoining appellees from attempting to execute the judgments mentioned until they are properly revived.

DUFFIE and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing

opinion, the judgment of the district court is reversed, and the cause remanded with direction to the district court to enter a judgment granting a permanent injunction as prayed for in the petition of appellant.

REVERSED.

BANKING HOUSE OF A. CASTETTER, APPELLEE, V. E. A. STEWART, IMPLEADED WITH BERTHA M. DUKES, APPELLANT.

FILED JANUARY 21, 1904. No. 13,283.

1. **Appeal:** ISSUES. A cause must be tried upon appeal upon the same issues as in the lower court.
2. **Acknowledgment:** IMPEACHMENT. The evidence to impeach successfully the certificate of acknowledgment of a notary public must be clear, convincing and satisfactory that the certificate is false and fraudulent.
3. ———: NOTARY, INTEREST OF. Under the facts in this case, *held*, that the notary public, who took the acknowledgment to the mortgage foreclosed, was not disqualified by reason of interest.

APPEAL from the district court for Washington county: IRVING F. BAXTER, JUDGE. *Affirmed.*

Lysle I. Abbott and *Frank H. Stradling,* for appellant.

Jefferis & Howell, contra.

LETTON, C.

This is an action brought by the Banking House of A. Castetter to foreclose a mortgage purporting to be executed by E. A. Stewart and Bertha M. Stewart, his wife, in favor of the plaintiff upon certain real estate in Washington county. A number of parties were made defendants, but the only person complaining of the decree is Bertha M. Stewart. At the trial she applied for leave to file an amended answer, which was refused by the court. She insists that the district court erred in this and,

though admitting that we can not test the correctness of this ruling on appeal, asks us to consider the amended answer as having been filed and the case tried upon the issues raised by it. This we can not do, for, unless appeals are tried upon the same issues as the case is tried upon in the lower court, there is no appeal, but a new controversy.

In the answer, Mrs. Stewart admits that she signed the mortgage, alleges that she was induced to do so by her husband, E. A. Stewart, who had entered into a conspiracy with A. Castetter, the mortgagee, through his employee F. H. Claridge, who was cashier of plaintiff's bank, to deprive her of her homestead and dower right in lot 17, block 27, in the city of Blair, which was her homestead, and that she did not acknowledge the execution of the mortgage to be her voluntary act and deed. That though she did not appear before F. H. Claridge, a notary public, he executed a fraudulent certificate of acknowledgment and affixed the same to the mortgage. That afterwards she was divorced from E. A. Stewart, and by decree of the district court for Washington county she became the owner of the homestead described. She asks that the certificate of acknowledgment be set aside, and that the premises be declared to be her homestead, and the title be quieted in her. A reply was filed admitting the homestead character of the premises, and that F. H. Claridge was related by marriage to A. Castetter, and denying generally all other allegations of the answer. Trial was had, and a decree rendered foreclosing the mortgage.

Under these issues, the only question before us is whether or not there was sufficient evidence before the trial court to sustain its findings that the mortgage was duly acknowledged before a proper officer. There is a sharp conflict in the testimony as to whether or not Mrs. Stewart ever acknowledged the execution of the mortgage. Mr. Claridge, the notary public, and Mr. F. M. Castetter, both testify that Mrs. Stewart acknowledged the mortgage in the bank upon the same day, or the next day after, it bears date, while Mrs. Stewart swears she was not in the

bank during the year 1894. The rule is settled in this state that a certificate of acknowledgment of a deed or mortgage in proper form can be impeached only by clear, convincing and satisfactory proof that the certificate is false and fraudulent. *Pereau v. Frederick,* 17 Neb. 117; *Phillips v. Bishop,* 35 Neb. 487; *Barker v. Avery,* 36 Neb. 599. There was sufficient evidence to justify the finding of the district court that Mrs. Stewart acknowledged the mortgage.

The evidence shows that at the time the mortgage was executed A. Castetter was the owner of a private bank at Blair; that F. H. Claridge was his son-in-law; that he was employed by Mr. Castetter upon a salary, as clerk, and that he acted as manager of the bank; that he signed his name as cashier, and that his name appeared upon the stationery of the bank as cashier. He had no pecuniary interest in the bank, however, except to the extent of his monthly salary. Did his relations to Mr. Castetter, as thus disclosed, disqualify him from acting as a notary public in matters wherein Castetter was interested?

In *Horbach v. Tyrrell,* 48 Neb. 514, the cases in regard to the interest which a notary public must sustain to the parties to an instrument in order to disqualify him to act are collected and reviewed. In that case this court held that the secretary and treasurer of a corporation was not disqualified to take an acknowledgment of a mortgage to the corporation, there being nothing to show that he was a stockholder in the corporation, and further, that whether or not a notary public was disqualified from taking an acknowledgment must be determined from the circumstances of each particular case.

In *Havemeyer v. Dahn,* 48 Neb. 536, it appeared that an acknowledgment had been taken by an attorney at law, who held for collection the claim to secure which the mortgage to which he took the acknowledgment had been given. Since it did not appear that the attorney had any beneficial interest in having the mortgage made, or that the amount of his compensation depended in any manner

upon the mortgage being made, it was held he was not disqualified. In the case at bar the notary had no pecuniary interest whatever in the debt secured by the mortgage, and, under the principles enunciated in the cases cited, he was not disqualified to take the acknowledgment by reason of being an employee of the mortgagee.

We recommend that the judgment of the district court be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

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30. Where, on an appeal in equity from a judgment of the district court, the record contains no bill of exceptions and the pleadings are sufficient to support the judgment, it will be affirmed. *Stansbury v. Storer*..... 603

31. An application on the part of appellant to amend his petition, having been made after the entry of the final judgment dismissing the case, came too late and was properly refused. *Stansbury v. Storer*..... 603

32. Where defendant's plea to the jurisdiction only inferentially alleges a service of summons in another county, the facts of service appearing in the record will be considered, when his pleading is attacked for the first time in this court. *Stull Bros. v. Powell*..... 152

33. Unless there is material error in the record, the judgment of the trial court will be affirmed regardless of the theory upon which it was defended. *Woodmen Accident Ass'n v. Hamilton*..... 30

34. The refusal to allow the introduction of evidence to dispute the testimony of a witness upon an immaterial matter is not reversible error. *Campion v. Lattimer*..... 245

35. Upon an appeal in equity this court will try the issue *de novo*. *Grandin v. First Nat. Bank*..... 730

36. It is only where all peremptory challenges have been exhausted by the party complaining that a ruling of the trial court upon a challenge of a juror for cause can be reviewed. *Chicago, B. & Q. R. Co. v. Krayenbuhl*..... 766

37. In an action for damages for personal injuries, rulings of the trial court rejecting testimony, *held* to be reversible error. *Nielsen v. Cedar County*..... 637

38. Rulings of the trial court in an action for personal injuries, in the admission of evidence, *held* not prejudicial. *Chicago, B. & Q. R. Co. v. Krayenbuhl*..... 766

39. An order directing the payment of the unearned premium on an insurance policy to a redemptioner of real estate, *held* proper. *Courtright v. Eno*..... 333

40. In reviewing the action of a trial court in directing a verdict,

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this court will regard as conclusively established every fact favorable to the unsuccessful party which the evidence proves or tends to establish. *Preston v. Stover*..... 632

41. Rulings of the trial court on the admission and rejection of evidence *held* to be without prejudicial error. *Warder, Bushnell & Glessner Co. v. Myers*..... 15

42. Action of the trial court in the admission and exclusion of evidence in an action for attorneys' fees, *held* not error. *Linton v. Cathers*..... 601

Transcript.

43. If a transcript filed in this court is incomplete or incorrect in some particular, the appropriate remedy is to procure an additional or corrected transcript, duly certified. *Keeley Institute v. Riggs*..... 134

44. If it appears that a party has wilfully filed an incomplete and incorrect transcript or has altered the transcript certified and furnished him, for the purpose of deceiving this court, the transcript will be stricken from the files. *Keeley Institute v. Riggs*..... 134

45. This court will not try the correctness or completeness of a transcript upon affidavits, nor require the clerk of the lower court to produce the original record. *Keeley Institute v. Riggs*..... 134

46. When a rehearing has been allowed, the cause stands for hearing as though no former decision had been made, and the court will not consider papers appearing with the transcript but not authenticated as a part of the record. *Palmer v. Mizner*..... 200

Verdict.

47. Where a verdict exceeds the amount claimed in his pleadings, by the party gaining it, it is error to enter judgment for the full amount found. *Davis v. Hall*..... 678

48. Where such a verdict has been rendered, and the evidence would support one for the correct amount, the party should be allowed to remit the excess. *Davis v. Hall*..... 678

49. Where disputed questions of fact are determined by a jury on fairly conflicting evidence, its findings thereon become conclusive. *Warder, Bushnell & Glessner Co. v. Myers*.... 15

50. Where the record contains competent evidence from which the jury may have reasonably arrived at their verdict, the judgment of the trial court will not be reversed for want of evidence to sustain it. *Campion v. Lattimer*..... 245

51. The finding of a jury will be set aside where there is not sufficient evidence to support it. *Sovereign Camp, Woodmen of the World, v. Hruby*..... 5

Appeal and Error—*Concluded.*

52. A verdict of a jury whose finding is based upon conjecture and not on the evidence, can not be permitted to stand. *Sovereign Camp, Woodmen of the World, v. Hruby*..... 5

53. A verdict of a jury from conflicting evidence will not be disturbed in this court; and the weight and credibility of testimony is for their determination exclusively. *Oelke v. Theis*..... 465

54. If a verdict is the only one justifiable by the evidence, instructions to the jury will not be examined. *Kielbeck v. Chicago, B. & Q. R. Co*..... 571

Assignments.

An attorney to whom claims are unconditionally assigned may prosecute an action in his own name for a recovery on such claims, without joining the original claimants. *Huddleson v. Polk*..... 483

Assignments for Benefit of Creditors. See APPEAL AND ERROR, 1.

1. The provision of section 6, chapter 6, Compiled Statutes, 1899, requiring the filing of a deed of assignment for record in the clerk's office of the county in which the assignee resides, within 24 hours after its execution, is mandatory. *Huddleson v. Polk*..... 483

2. The fact that the assignor requests a sheriff, acting as assignee, to withhold a deed from record the statutory time, is no excuse for such neglect. *Huddleson v. Polk*..... 483

3. The claims of creditors who stand in a hostile attitude to an assignment can not be prorated with the claims of those who have complied with the act, in a distribution of the proceeds of the assigned property. *Huddleson v. Polk*..... 483

4. Evidence examined, and *held* not sufficient to show a compliance with the statute in the matter of recording an assignment deed. *Huddleson v. Polk*..... 483

5. Where a deed of assignment is rendered void because of failure to have the same filed and recorded, it is not a prerequisite to the maintenance of an action and the recovery of damages by a creditor, that he have his claim against the insolvent estate filed with, and approved by, the county court. *Huddleson v. Polk*..... 492

6. In an action against a sheriff for failure to file a deed of assignment, the measure of damage is the *pro rata* share of the creditor with all other creditors who would be entitled to participate in the assets of the insolvent estate had the assignment not been invalidated. *Huddleson v. Polk*..... 492

7. In such an action, it may be shown in mitigation of damages that there are other creditors entitled to participate in the

Assignments for Benefit of Creditors—*Concluded.*
assets of the insolvent estate, but, to be available, this fact must be affirmatively pleaded in the answer. *Huddleson v. Polk.* 492

Assumpsit.
Wherever one person has money to which in equity and good conscience another is entitled, the obligation may be enforced by assumpsit. *Estate of Devries v. Hawkins*..... 656

Attachment.
One can not amend an affidavit in attachment so as to state a cause of action different from that stated in the original affidavit on which the writ was issued. *Westover & Co. v. Van Dorn Iron Works Co*..... 415

Bankruptcy. See RESTITUTION, 3.
1. In an action by a trustee in bankruptcy to recover assets paid to a judgment creditor in completed attachment proceedings in his favor, it must be alleged in the petition that the preference was received by the creditor having reasonable cause to believe that the bankrupt was insolvent, and, by suffering the attachment proceedings and judgment to be taken against him, thereby intended to make a preference. *Johnson v. Anderson*..... 233
2. Evidence *held* insufficient to sustain a judgment in favor of the plaintiff under the provisions of subdivision *f* of section 67 of the national bankruptcy act of 1898. *Johnson v. Anderson* 233
3. The trustee in bankruptcy may recover money paid by the bankrupt as a preference, only, when the person receiving it had reasonable ground to believe that a preference was intended. *Johnson v. Anderson*..... 233
4. The court, in the exercise of a reasonable discretion, properly refused to allow the plaintiff to amend his petition, where the amendment tendered failed to allege that the defendant had reasonable ground to believe that the bankrupt intended a preference. *Johnson v. Anderson*..... 233
5. After judgment and an order for the sale of attached real estate, a suit was begun to set aside a fraudulent conveyance thereof, *held*, the discharge in bankruptcy of the judgment defendant will not defeat such action. *Grandin v. First Nat. Bank*..... 730

Bastardy.
Complaint in a bastardy proceeding, *held* sufficient to sustain a verdict of guilty and a judgment thereon, when assailed for the first time in the appellate court. *Campion v. Lattimer* 245

Beneficial Associations. See INSURANCE.

Bills and Notes. See GIFT.

1. A note was signed "Globe Loan & Trust Co., H. O. Devries, Presdt., W. B. Taylor, Secy." *Held*, That such note on its face shows no personal liability on the part of Devries or Taylor. *English & Scottish American Mort. & Invest. Co. v. Globe Loan & Trust Co*..... 435
2. A promissory note in the hands of the payee is, even after maturity, evidence of the existence of a debt. *Goff v. Byers Bros. & Co*..... 1

Bonds. See COUNTIES AND COUNTY OFFICERS, 5. ESTOPPEL. INSURANCE, 10-13. JUSTICE OF THE PEACE, 1. REPLEVIN. SHERIFFS AND CONSTABLES.

1. A bond in pursuance of a statute afterwards held unconstitutional is not valid as a statutory bond, but may be valid as a common law contract, if supported by a consideration independent of the statute. *United States Fidelity & Guaranty Co. v. Ettenheimer*..... 147
2. A bond, given in an attempted appeal in an action of forcible entry and detention, conditioned for the payment of rent, is valid as a contract, if the obligor has by reason of the bond retained possession of the premises, though the statute authorizing such appeal is afterwards held unconstitutional. *United States Fidelity & Guaranty Co. v. Ettenheimer* 147

Bridges.

1. When the legislature speaks of "streams which divide counties," in section 87, chapter 78, Compiled Statutes, it must be taken as referring, not to the entire stream but to some part of or line therein. *County of Dodge v. County of Saunders*..... 442
2. The banks of a river are essential parts thereof, and when a county boundary is fixed at "the south bank," the river may be said to divide the county from the one on the opposite side, within the meaning of section 87. *County of Dodge v. County of Saunders*..... 442
3. The purpose of said section, and the ones immediately following, is to provide for bridges which are rendered necessary in order to travel from one county into an adjacent one, and to divide the cost between the two, and the statute should be construed, if possible, so as to give effect to the apparent intent of the legislature. *County of Dodge v. County of Saunders*..... 442
4. The fact that a resolution, passed by the board of one of such counties, calling upon the other to join in making bridge repairs, designates two bridges, while, after the latter's refusal, a contract is let and recovery sought as to

Bridges—*Concluded.*

one only, is not fatal. *County of Dodge v. County of Saunders* 442

5. Under the provisions of section 87, chapter 78, Compiled Statutes, 1901, a county may be required to contribute toward the repair of a bridge abutting in such county although it is located mainly within the territorial jurisdiction of an adjoining county. *County of Dodge v. County of Saunders* 451
6. The word "stream" as used in said section is used in a general sense, and includes rivers and smaller courses of running water. *County of Dodge v. County of Saunders*.... 451

Carriers.

1. Where the conditions of a valid chattel mortgage have been broken, a common carrier is not liable to the mortgagor for a diversion of a shipment of such property and a delivery of the same to the mortgagee demanding possession thereof while it is still in the carrier's hands. *Johnston v. Chicago, B. & Q. R. Co*..... 364
2. In order to recover damages for delay in the shipment of live stock, it is necessary to show the length of time required for the shipment, and that a longer time was actually consumed than was necessary for that purpose. *Johnston v. Chicago, B. & Q. R. Co*..... 364
3. Where a mortgagee consigned a shipment of cattle to a commission firm in order to protect the payment of his mortgage debt, and as soon as payment thereof was made directed the delivery of the shipment to the firm designated by the mortgagor, no action will lie against the carrier for nondelivery to the party designated by such mortgagor. *Johnston v. Chicago, B. & Q. R. Co*..... 364
4. Facts stated and carrier *held* liable for negligence for injuries to a shipper of live stock in its yards. *Chicago, B. & Q. R. Co. v. Troyer*..... 287
5. A shipper of live stock riding on a free pass assumes such risks as necessarily attend upon caring for stock, and, modified accordingly, the liability of the railroad company to such shipper for personal injuries is that of a common carrier for hire. *Chicago, B. & Q. R. Co. v. Troyer*..... 287
6. A shipper of live stock traveling on a freight train on a pass sustains the relation to the carrier of passenger, but in a restricted and modified sense. *Chicago, B. & Q. R. Co. v. Troyer*..... 293
7. A shipper of stock assumes such risks as necessarily attend upon caring for stock. As thus modified, the liability of the railway company to such shipper is that of a carrier for hire. *Chicago, B. & Q. R. Co. v. Troyer*..... 293

Carriers—*Concluded.*

8. A shipper traveling on a freight train carrying live stock does not assume the risk of negligence by the carrier. *Chicago, B. & Q. R. Co. v. Troyer*..... 293

9. A duty devolves upon a carrier to exercise the highest degree of care, skill and diligence for the safety of the passenger practically consistent with the efficient use and operation of the mode of transportation adopted. *Chicago, B. & Q. R. Co. v. Troyer*..... 293

Chattel Mortgages. See CARRIERS, 1, 3. TAXATION, 23.

1. Where a mortgagor, without authority, sold property covered by a chattel mortgage, and paid a debt to the mortgagee, other than the one secured by the mortgage, the failure of the mortgagee to refund the money, upon learning the source from which it was derived, does not ratify the sale and deprive himself of the right to recover possession of the chattels. *Gosnell v. Webster*..... 705

2. Description in a chattel mortgage, *held* sufficient. *Gosnell v. Webster*..... 705

3. Where mortgaged stock are described as being upon a certain farm owned by the mortgagor in the county of his residence, the mortgage is not void for uncertainty, if the description of the animals is not applicable to any others kept on such farm. *Goff v. Byers Bros. & Co*..... 1

Collateral Attack. See CORPORATIONS, 2, 3. EXECUTORS AND ADMINISTRATORS, 2. JUDGMENT, 1, 2.

Compromise and Settlement.

The burden of proof is upon the party admitting a settlement to establish the facts relied on in avoidance thereof. *Linton v. Cathers*..... 598

Constitutional Law. See BONDS. CRIMINAL LAW, 9-11. DIVORCE, 3. LICENSES. MUNICIPAL CORPORATIONS, 3. TAXATION, 15. WATERS, 14.

1. The office of police judge or police magistrate of an incorporated city is called into existence by the constitution. *State v. Moores*..... 56

2. An election provided for and required to take place by the constitution, may be held at the required time without special legislation providing therefor. *State v. Moores*.... 48

3. Section 509*a* of the criminal code, which provides that this court may reduce an excessive sentence, is not violative of the provision of the constitution, which forbids the exercise by the judiciary of any power properly belonging to the executive branch of the government. *Palmer v. State*.... 136

4. An act of the legislature which regulates a county office, and

Constitutional Law—*Continued.*

which by its terms limits its operation to counties having a population of 50,000 "according to the census of 1900," is local and special in its application. *State v. Scott*..... 685

5. Chapter 32, laws of 1903, entitled "An act to constitute the county surveyor ex officio county engineer in addition to his powers and duties of county surveyor," etc., is in violation of section 15, article III of the constitution, which prohibits the passage of local or special laws regulating county or township offices. *State v. Scott*..... 685

6. "Changes or modifications of existing statutes, as an incidental result of adopting a new law covering the whole subject to which it relates, are not forbidden by section 11, article III of the constitution." *Weston v. Ryan*..... 211

7. It is for the legislature to determine as to the applicability of a general law to a given emergency, and as to the consequent propriety or otherwise of a special law. *Weston v. Ryan*. 211

8. This court will not undertake to say as to the act of February 23, 1887, under which the ballots as to the adoption of the amendment to section 4, article III of the state constitution, were counted, and the result declared, that a general law would have been applicable, and that the act in question was therefore unconstitutional. *Weston v. Ryan*..... 211

9. Something more than mere irregularities and improprieties in declaring the result of an election should appear, to warrant this court in setting aside the acts of the legislative bodies and the executive of the state as to the fundamental law of the state. *Weston v. Ryan*..... 211

10. In the submission of a proposed constitutional amendment, the legislature act in a capacity analogous to that of a constitutional convention. *Weston v. Ryan*..... 218

11. An act is not obnoxious to the constitutional inhibition against special legislation, if the subject with which it deals is special and particular in its nature. *Weston v. Ryan*.... 218

12. When a proposed constitutional amendment has been submitted to the people, the legislature may provide the manner of ascertaining the result of the election. *Weston v. Ryan*. 218

13. Under the old as well as under the present constitution, where the title to a bill is to amend a particular section of an act, no amendment is permissible which is not germane to the subject-matter of the original section. *Preston v. Stover*. 632

14. Previous to the act of 1903, section 1021 of the code, as amended by an act of 1875, p. 43, entitled "An act to amend

Constitutional Law—*Concluded.*
section 1021 of the code of civil procedure, Revised Statutes, 1873," was obnoxious to the foregoing rule, and unconstitutional. *Preston v. Stover*..... 632

15. A general revenue law will not be declared unconstitutional on account of discriminative provisions if such provisions may be rejected and the law enforced without them. *State v. Fleming*..... 523

Contracts. See EVIDENCE, 13. HOMESTEAD, 3-5. HUSBAND AND WIFE, 1, 2.

1. The validity of a contract assailed for illegality is not determined by its formal incidents but by the nature of the transaction and the intent of the parties. *Corn Exchange Nat. Bank v. Jansen*..... 579

2. A contract, void for illegality in its inception, is not validated by being sued upon in a foreign jurisdiction. *Corn Exchange Nat. Bank v. Jansen*..... 579

3. The evidence by which a contract shall be proved is governed by the *lex fori* and not by the *lex loci contractus*. *Marvel v. Marvel*..... 498

Corporations. See RECEIVERS. RESTITUTION, 3. TAXATION, 2.

1. An officer or agent of a corporation is not liable personally to third persons for mere failure to perform some duty which the corporation may have owed them. *Penney v. Bryant*..... 127

2. Where there has been an attempt in good faith to organize a corporation and the requirements of the statute have been colorably complied with and corporate functions thereafter exercised, there exists a corporation *de facto*, which can not ordinarily be called in question collaterally. *Lusk v. Riggs*. 718

3. The invalidity of a corporation may be shown, even when questioned collaterally, by evidence that no articles of incorporation were filed. *Lusk v. Riggs*..... 713

4. The state may impose such conditions and limitations as it sees fit upon foreign corporations seeking the privilege of doing business in this state. *State v. Fleming*..... 523

Counties and County Officers. See BRIDGES. CONSTITUTIONAL LAW, 4, 5. QUO WARRANTO. TAXATION.

1. A county officer is not required to account to the county for money received by him in payment for services performed for another, by private agreement, which are no part of the duties of his office. *State v. Holm*..... 606

2. It is no part of the official duties of a register of deeds to search the records of his office, to ascertain whether persons signing a petition to obtain a liquor license are freeholders. *State v. Holm*..... 606

Counties and County Officers—*Continued.*

3. Such officer may, by agreement, perform such services for persons who are required to make proof of the qualifications of such signers by his certificate, and may collect and receive such compensation as may be agreed upon therefor. *State v. Holm* 606

4. In such a case, he must place the fee for his certificate and seal on his fee book, and account for and pay the same over to the county, if in excess of the salary allowed him by law. *State v. Holm* 606

5. The fact that an official bond of a county officer is joint, instead of joint and several as required by statute, is not an objection thereto of which the obligors upon the instrument can avail themselves as a defense. *Wilcox v. County of Perkins* 139

6. Where a settlement of a county officer with the county commissioners has been made, such settlement is final and conclusive, unless there is fraud, mistake or imposition in making the same. *Wilcox v. County of Perkins* 139

7. The board of county commissioners in allowing claims made for salaries of county officers and other claims against the county, where the amounts to be allowed therefor are fixed by law and where no judicial inquiry is required to determine the amount, act in a mere ministerial capacity and have no power or jurisdiction to allow an amount in excess of the fixed statutory compensation. *Crouch v. Pyle* 60

8. Where judicial discretion is called for in the allowance of a claim presented, the board then acts as any other judicial body, and its findings can be questioned and set aside only by an appeal taken from the decision as provided by statute. Neither can the members of the board be made liable for a mere mistake made in passing judgment on the claim, the commissioners, in such case, being entitled to the same immunity as other judicial officers. *Crouch v. Pyle* 60

9. Unless the statute regulating the letting of contracts for the furnishing of county supplies is strictly complied with, the proceeding and consequent contract will be void. *Woodruff v. Welton* 665

11. A resident taxpayer, without showing any interest or injury peculiar to himself, may enjoin illegal expenditures by a public board or officer. *Woodruff v. Welton* 665

12. In an action by a resident taxpayer to enjoin an illegal expenditure by a public board or officer, the plaintiff will not be required to show what the amount of the expenditure would have been if the law had been obeyed. *Woodruff v. Welton* 665

Counties and County Officers—*Concluded.*

13. For purposes of taxation and revenue, a precinct actually formed and organized will be deemed a *de facto* organization, whether the meeting of the county commissioners at which it was made was lawfully adjourned and held or not. *City of South Omaha v. O'Rourke*..... 479

Courts. See JUDGMENT, 3. JURISDICTION. PROCESS.

1. A county court has jurisdiction, within the statutory limit of amount, in actions to recover damages for breach of covenant against incumbrances. *Brass v. Vandecar*..... 35
2. The designation of cases in which the supreme court has original jurisdiction is a prohibition of it in other cases. *Edney v. Baum*..... 159
3. Consent of the parties can not confer jurisdiction of the subject matter. *Edney v. Baum*..... 159
4. This court can not attempt, prior to an actual controversy arising, to direct the officers charged with the enforcement of a law relating to their duty in putting it in operation. *State v. Fleming*..... 523

Creditors' Suit.

1. A creditor whose claim has not been reduced to judgment, and who has no lien on his debtor's property, is not entitled to have such property impounded as security for the claim, nor to an injunction restraining his debtor from disposing of his property. *Brumbaugh v. Jones*..... 786
2. Mere insolvency and inability to reach a particular fund by garnishee process are not sufficient to take a case out of the general rule above stated. *Brumbaugh v. Jones*..... 786
3. Whenever, on the trial of a creditor's action, it appears that the plaintiff has a remedy at law, the equitable proceedings should be dismissed. *Brumbaugh v. Jones*..... 786

Criminal Law.

1. In prosecutions for larceny, nonconsent of the owner of the property alleged to have been stolen may, in a proper case, be inferred from circumstances. *Palmer v. State*..... 136
2. The unexplained possession of stolen property, shortly after the theft of it, is a fact which may justify the jury in inferring that the person so in possession is the thief. *Palmer v. State*..... 136
3. The owner of a ranch is not in possession of an estray running with the cattle of his lessee upon the ranch, when such cattle are in the immediate charge of the lessee's servant. *Palmer v. State*..... 136
4. It is not error to instruct the jury that they must give the testimony of the defendant in a criminal case "only such weight" as they think it deserves. *Palmer v. State*..... 136

Criminal Law—*Concluded.*

5. A sentence of seven years for the larceny of a steer, *held* excessive and reduced to two years. *Palmer v. State*..... 136

6. The conduct and behavior of bloodhounds, after being set upon the trail of a fugitive criminal, may not be given in evidence by the state, for the purpose of proving that the scent of the accused and the scent of the person who perpetrated the crime which is being investigated are identical. *Brott v. State*..... 395

7. The law does not recognize the distinction between principals and accessories in misdemeanors. *McMahon v. State*, 722

8. It is not error to impose a fine of $5 against each of several defendants, who composed a party in whose possession a number of prairie chickens were found, for every chicken so found. *McMahon v. State*..... 722

9. A penalty imposed by statute will not be held unconstitutional as excessive, unless it is so excessive as to shock the sense of mankind. *McMahon v. State*..... 722

10. A penalty of $5 for each prairie chicken found in possession or under the control of the defendant during the closed season, *held* not excessive in a constitutional sense. *McMahon v. State*..... 722

11. It is not a violation of the provision of the constitution, inhibiting the incorporation in the title of an act of more than one subject, for the legislature to provide in one act for the protection of fish, fowl and quadrupeds under the general denomination of game. *McMahon v. State*..... 722

Damages. See ALIENATION OF AFFECTIONS. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 6, 7. DEEDS, 3, 4. HUSBAND AND WIFE, 3. MASTER AND SERVANT, 4. NEW TRIAL, 3. REMITTITUR, 2. TELEGRAPHS AND TELEPHONES.

Deeds. See MORTGAGES, 1.

1. An unexpired term or lease, which prevents the grantee in a deed from recovering possession of the land described therein, is an incumbrance. *Brass v. Vandecar*..... 35

2. In such a case the covenant does not run with the land, but is broken as soon as made. *Brass v. Vandecar*..... 35

3. When the breach of covenant consists of the existence of an unexpired term or lease, the measure of damages, at least in absence of any special circumstances, will be the value of the use of the premises for the time during which the grantee has been deprived of such use. *Brass v. Vandecar*.. 35

4. Where the grantor requests the grantee to take proceedings for the purpose of recovering possession, which fail, and agrees to pay the expenses thereof, such expenses, being

Deeds—*Concluded.*

actually incurred, may be recovered, in addition to the value of the use of the premises. *Brass v. Vandecar*..... 35

5. A condition in a deed that no liquors shall be kept or disposed of on the premises conveyed, and that any violation of this condition shall render the conveyance void, and cause the premises to revert to the grantor, is a valid condition subsequent which, until broken, runs with the land. *Jetter v. Lyon*..... 429
6. On a breach of such condition the grantor, if living, or, if dead, his heirs may claim a reversion of the estate and can maintain an action in ejectment to recover it. *Jetter v. Lyon* 429
7. Record *held* not to show that a right of reversion had been waived by either the grantor or the plaintiffs. *Jetter v. Lyon* 429

Demurrer. See PLEADING AND PRACTICE.

Depositions.

Where from the deposition of a witness it appears that he is a nonresident of the county, it is unnecessary for the party offering the deposition in evidence to prove that such witness is not present in court or in the county. *Chicago, B. & Q. R. Co. v. Krayenbuhl*..... 766

Descent and Distribution.

1. The heirs of an insolvent estate can not prosecute an action in their individual capacity to recover newly discovered assets of the estate until the debts and costs of administration have been paid. *Sharp v. Citizens Bank*..... 758
2. Heirship may be established by the testimony of any one who knows the facts constituting such relation. *Jetter v. Lyon* 429
3. Evidence *held* sufficient to uphold finding of oral relinquishment of further share in father's estate by appellant's father. *Riddell v. Riddell*..... 472

Divorce.

1. An action to determine property rights not growing out of the marriage relation can not be joined with an action for divorce. *Reed v. Reed*..... 775
2. Where such causes of action are joined in a petition, a demurrer thereto for misjoinder of causes of action should be sustained. *Reed v. Reed*..... 775
3. It is within the discretion of the district court to require the husband to pay temporary alimony and counsel fees in a divorce case, to enable the wife to make a proper defense, as a condition precedent to the right to further prosecute his action. And an order requiring such payment does not con-

Divorce—*Concluded.*

flict with any right guaranteed him by our constitution. *Reed v. Reed*..... 779

4. Temporary alimony and suit money are matters within the discretion of the district court. *Reed v. Reed*..... 779

Duress. See PLEADING AND PRACTICE, 9. SPECIFIC PERFORMANCE, 1.

Ejectment. See DEEDS, 6.

Election of Remedies.

1. One who is entitled to a choice of remedies, and takes such action as in law amounts to an election, is, by such election, precluded from pursuing the other remedy, but a mistaken and unsuccessful attempt to do so will not annul the former election, nor bar the right to pursue the remedy first selected. *Chicago, B. & Q. R. Co. v. Olsen*..... 559

2. The right given a member, by the regulations of the relief department of a railroad company, to elect to accept the benefits in pursuance of these regulations, or to prosecute a claim at law against the company, requires the application of the rule in regard to election of remedies. *Chicago, B. & Q. R. Co. v. Olsen*..... 559

3. One who by action pursues one remedy without being chargeable with notice of facts entitling him to a different one, is not thereby estopped to pursue the latter upon discovery of such facts, if he then discontinues his action for the former. *Moss v. Marks*..... 701

4. One who has sued for conversion may dismiss such action and recover in replevin. *Moss v. Marks*..... 701

Elections. See CONSTITUTIONAL LAW. JUDGMENT, 5.

Equity. See FRAUDULENT CONVEYANCES, 4. JUDGMENT, 3, 4. SUBROGATION.

A court of equity will not grant relief against a judgment taken by default, where the applicant, shown to have been duly served with summons, failed to avail himself of an opportunity to defend, such failure not being the result of fraud, accident or mistake, unmixed with laches on his part. *McHale v. Metz*..... 106

Estoppel. See APPEAL AND ERROR, 1, 2. ELECTION OF REMEDIES. MANDAMUS, 3. WATERS, 15.

1. Principles of estoppel are mutual and reciprocal. One who successfully attacks appellate proceedings, upon the ground that they are unauthorized by law and wholly void, is estopped afterwards to assert that they are in any respect valid. This rule applies to an appeal undertaking by which such proceedings were begun. *United States Fidelity & Guaranty Co. v. Ettenheimer*..... 144

Estoppel—*Concluded.*

2. One who executes a bond, under circumstances that would estop him to assert its invalidity for want of consideration, can not, in an action upon the bond, avoid liability on the ground that plaintiff is estopped to assert that there was any consideration for the bond. Estoppel against estoppel sets the matter at large. *United States Fidelity & Guaranty Co. v. Ettenheimer*..... 147

Evidence. See ACKNOWLEDGMENT, 1. APPEAL AND ERROR, 18, 34, 50. BANKRUPTCY, 2. BILLS AND NOTES, 2. CARRIERS, 2. COMPROMISE AND SETTLEMENT. CONTRACTS, 3. CORPORATIONS, 3. CRIMINAL LAW, 6. DESCENT AND DISTRIBUTION, 2. FRAUDULENT CONVEYANCES, 5. GIFT. INSURANCE, 14, 16. LANDLORD AND TENANT, 3. MECHANICS' LIENS, 1. MORTGAGES, 2-4. NEGLIGENCE, 1. PRINCIPAL AND AGENT, 5, 6. SALES, 3, 5. STREET RAILWAYS, 3. TRIAL. WITNESSES.

1. A preponderance of the evidence is all that is required to maintain an issue of fact in a civil action. *Estate of Davidson v. Davidson*..... 584
2. Evidence of the *bona fides* of a transfer of property, *held* to support the findings. *McNerney v. Hubbard*..... 331
3. In an action by a shipper against a carrier for personal injuries, *held*, that the evidence sustained a verdict against the carrier. *Chicago, B. & Q. R. Co. v. Troyer*..... 293
4. Evidence in an action of replevin, *held* sufficient to sustain the findings of the trial court. *Byrnes v. Eley*..... 283
5. Evidence in a replevin action *held* sufficient to sustain the verdict. *Gosnell v. Webster*..... 705
6. Evidence of an ordinance of a city, regulating the rate of speed of street railway cars, is admissible under a general averment of negligence. *Omaha Street R. Co. v. Larson*.. 591
7. Proof of an experiment, without establishing the fact that the person who made the experiment is competent to do so, and that the apparatus used was suitable for the experiment, and that it was honestly and fairly made, is without probative force. *Omaha Street R. Co. v. Larson*..... 591
8. Evidence in an action to foreclose a mechanic's lien *held* not to support the findings and decree. *Tidball v. Holyoke*.. 726
9. Where one party has introduced letters constituting a part of a correspondence the other party is entitled to show the entire correspondence. *Gosnell v. Webster*..... 705
10. Evidence as to the invalidity of a mortgage on a homestead *held* sufficient to support the judgment. *Norbury v. Harper*, 389
11. Evidence *held* not to show any parol waiver or release of contract by vendee. *Johnson v. Weber*..... 467

Evidence—*Concluded.*

12. Evidence in an action to set aside fraudulent conveyances found to support the finding of the trial court. *Grandin v. First Nat. Bank*..... 730

13. In the absence of fraud, mistake, or ambiguity, parol evidence is inadmissible to change or vary the terms of a written contract. *Nebraska Land & Feeding Co. v. Trauerman.* 795

14. Evidence *held* insufficient to show a right of subrogation of the sureties on notes of an intestate to a lien on money of the estate deposited in a bank to which the notes were payable. *Sharp v. Citizens Bank*..... 758

15. Evidence under a plea of duress *held* sufficient to sustain the verdict. *Nebraska Mutual Bond Ass'n v. Klee*..... 383

Exceptions, Bill of. See APPEAL AND ERROR, 3, 4.

This court will, on its own motion, refuse to consider a document appearing in the record and purporting to be a bill of exceptions but in no way authenticated as such by the certificate of the clerk of the lower court. *Palmer v. Mizner*.. 200

Execution.

If the plaintiff in an action die after judgment, no valid execution can be had upon the property of the judgment defendant until the judgment has been revived in the manner provided for in section 472 of the code. *Vogt v. Daily*..... 812

Executors and Administrators.

1. In a petition for administration on the estate of a deceased person, the averments essential to jurisdiction are, that such person died intestate, and was at the time of his death a resident or inhabitant of the county where the petition is filed; or, in case of a nonresident that he left an estate in such county to be administered. *Larson v. Union P. R. Co*.. 261

2. Section 178, chapter 23, Compiled Statutes, provides the order in which persons shall be entitled to administer on the estate of an intestate. *Held*, That an appointment made contrary to such provisions is not open to collateral attack. *Larson v. Union P. R. Co*..... 261

3. An executor or administrator may resign or may be removed for cause, but a county court has no authority to discharge such officer from his trust, merely upon the settlement of what is called a final account. *Hazlett v. Estate of Blakely*..... 613

4. The discharge of an administrator in a decree upon final accounting, merely discharges him from liability for the past. *Hazlett v. Estate of Blakely*..... 613

5. A contingent claim does not become absolute, within the

Executors and Administrators—*Concluded.*
meaning of the decedent's act, until it becomes a claim proper to be presented to the county court for final adjudication as a claim against the estate. *Hazlett v. Estate of Blakely.* 613

6. An order allowing an alleged widow a certain sum each month pending administration, for her maintenance, is subject to modification during administration as circumstances may require. *Estate of James v. O'Neill*..... 132

7. The allowance of a claim against an insolvent estate is not a judgment which becomes dormant by lapse of time as against newly discovered assets of such estate. *Sharp v. Citizens Bank*..... 758

8. Newly discovered assets of an insolvent estate are a trust fund in the hands of an administrator for the payment of debts and costs of administration and do not descend to the heirs and distributees until such claims are paid. *Sharp v. Citizens Bank*..... 758

9. The fact that a stock of hardware belonging to an estate is alleged to have been traded by the plaintiffs, as executors, for real estate, does not prevent the vendees getting title to the hardware stock delivered to them by the executors. *Edney v. Baum*..... 159

10. A bond executed by the administratrix of an estate, conditioned that she will reimburse a proposed purchaser of certain lots belonging to the estate, upon which a mortgage was being foreclosed, any amount in excess of twelve thousand dollars which he might be compelled to bid at the foreclosure sale, is void as against public policy. *Beatrice Creamery Co. v. Fitzgerald*..... 308

11. The rule of *caveat emptor* applies to purchasers or mortgagees of property from trustees, executors or other persons acting in fiduciary capacities. *Neary v. Neary*..... 319

12. In an action to cancel a mortgage and quiet title to lands devised it appeared that the will was probated and recorded, and was shown upon the abstract of title upon which the mortgagee relied in making a loan. *Held*, That the mortgagee and his assignee were charged with notice of the want of power in the executor to place the legal title in the wife, and to mortgage any of the property of the estate. *Neary v. Neary*..... 319

Forcible Entry and Detainer. See LANDLORD AND TENANT, 4. TRIAL, 9.
Under a lease containing the provision that if the rent, or any part thereof, shall be in arrears and unpaid at any time, it shall be lawful for the landlord to retake poses-

Forcible Entry and Detainer—*Concluded.*

sion without any formal notice, a right to maintain an action of detention accrues after default and statutory notice to the tenant. *Cochran v. Philadelphia Mortgage & Trust Co.* 100

Fraud.

Vendees having got title to goods, are liable to an action for damages by reason of fraud used in getting the goods, if the vendors elect to affirm the contract and sue for such damages. *Edney v. Baum*..... 159

Fraudulent Conveyances. See EVIDENCE, 2.

1. A plaintiff who has obtained an attachment upon specific real estate and recovered judgment thereon, may maintain an action in equity to set aside a fraudulent conveyance of the real estate without the issuing and return of an execution. *Grandin v. First Nat. Bank*..... 730
2. In a suit to set aside a fraudulent conveyance of real estate, amendments to the petition, *held* not to give the court jurisdiction to subject property and assets outside of this state to the payment of the judgment. *Grandin v. First Nat. Bank*..... 730
3. If a suit to set aside a fraudulent conveyance is pending for several years, it is not a defense that the holder of the legal title has made valuable improvements thereon, while the action was pending. *Grandin v. First Nat. Bank*..... 730
4. In a suit to set aside a conveyance of real estate, where the right of possession is in issue, it is the duty of the court to determine the right of possession and, if all parties interested are before the court, to put the party who is entitled thereto in possession. *Albin v. Parmele*..... 746
5. Where a conveyance of real estate is presumptively fraudulent the burden is on those claiming under such conveyance to show the *bona fides* of the transaction. *Lusk v. Riggs*..... 713

Game Laws. See CRIMINAL LAW, 7-11.

Gift.

That a promissory note was found in the possession of the payee at the time of his death, is evidence that he had not made a present of it to the maker. *Oelke v. Theis*..... 465

Herd Law. See ANIMALS.

Homestead. See SPECIFIC PERFORMANCE, 1.

1. A contract to convey a homestead was signed only by the husband. *Held*, That the vendee was not entitled to a specific performance of his contract as to such homestead. *Watkins v. Youll*..... 81

Homestead—*Concluded.*

2. Where real estate, the legal title to which is in the husband, has been selected and is occupied as a family homestead, it can not be conveyed or incumbered except the instrument conveying or incumbering the same be signed and acknowledged by the wife. *Teske v. Dittberner*..... 544

3. A contract to convey the property embraced in a homestead, which reserves to the homestead claimants the right of use and occupancy until the death of the parties, or until abandonment, is an incumbrance of the title thereto. *Teske v. Dittberner*..... 544

4. A parol agreement made by the husband with a third party to devise property embraced within a homestead is in conflict with the provisions of the homestead act and is not specifically enforceable, even though substantial performance of the contract by the promisee may have taken place. *Teske v. Dittberner*..... 544

5. When such an agreement includes other land than that included within the homestead, the contract may be specifically enforced except as it affects the homestead property. *Teske v. Dittberner*..... 544

6. A mortgage executed on a homestead, by one acting under a power of attorney which has been signed only by the husband, is void. *Norbury v. Harper*..... 389

Husband and Wife. See ALIENATION OF AFFECTIONS. HOMESTEAD, 2. SPECIFIC PERFORMANCE, 1.

1. Indorsing on the back of a contract by husband and wife for the sale of the wife's real estate of an extension of time for making the first payment, which extension was not authorized by the wife, does not destroy the contract. *Johnson v. Weber*..... 467

2. A payment which is to bind a bargain, and to be deposited with a contract in a bank, until a conveyance is made upon payment in full by a certain date, is in time if it gets into the bank before the contract is presented there. *Johnson v. Weber* 467

3. In an action for personal injuries by a married woman, she is not entitled to recover the value of medical services rendered, in the absence of proof that she has paid for such medical services, or that she is the owner of a separate estate which might become liable therefor. *Pomerene Co. v. White*..... 177

Incumbrances. See DEEDS, 1-4.

Injunction. See COUNTIES AND COUNTY OFFICERS, 11. CREDITORS' SUIT. WATERS, 4.

Insolvency. See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

Instructions. See APPEAL AND ERROR, 5-16. CRIMINAL LAW, 4. NEW TRIAL, 4. WITNESSES, 4.

Insurance. See CONSTITUTIONAL LAW, 15. CORPORATIONS, 4. TAXATION, 3-5.

1. Where a policy of insurance contains a clause permitting the company to repair a building instead of paying the damages sustained in money, its option to repair to be exercised within 60 days from the receipt of proof of loss, and where the company waives the proof of loss, the option to repair must be made within 60 days from the date of its waiver of proof of loss. *Farmers & Merchants Ins. Co. v. Warner* 803
2. A permanent waiver of a condition in a policy of insurance will not be inferred from occasional indulgences shown a policyholder. *Parker v. Knights Templars & Masons Life Indemnity Co* 268
3. No implication of a waiver of the terms of a contract can arise from acts which may be construed as a compliance with such terms. *Parker v. Knights Templars & Masons Life Indemnity Co* 268
4. Where the agent of an insurance company undertakes to act for and on behalf of the assured, as to such acts, he is to be regarded as the agent of the assured and not of the company. *Parker v. Knights Templars & Masons Life Indemnity Co* 268
5. Where an insurance agent, in taking the application for insurance, agrees with the assured to make the payment falling due on the policy for the assured, for a specified time, such agreement is not binding on the company, and in making payments in pursuance thereof, the agent acts on benalf of the assured and not for the company. *Parker v. Knights Templars & Masons Life Indemnity Co* 268
6. Under the facts stated, *held* that there was a waiver of the place of payment, but that payment, in order to prevent a suspension, was required to be made on or before the date it fell due. *Parker v. Knights Templars & Masons Life Indemnity Co* 268
7. In this state, by express statute, members of mutual benefit associations have the right, at any time, with the consent of the association, to substitute one beneficiary for another. *Woodmen Accident Ass'n v. Hamilton* 30
8. A certificate issued by such an association providing for the payment of indemnity in case of accidental death, gives to the beneficiary named therein a vested interest, not when the accident happens, but when death occurs in consequence of the accident. *Woodmen Accident Ass'n v. Hamilton* 30

Insurance—*Concluded.*

9. An allegation of settlement of all claims which a certificate holder had against an accident association, *held* to state no defense to a death claim beyond the amount of the payment alleged. *Woodmen Accident Ass'n v. Hamilton*..... 24

10. A fidelity bond which contains on its face a provision that it shall not be binding on the obligor unless signed by the employee, is not binding on the obligor unless thus signed, in the absence of a showing that the signature of the employee had been waived by the obligor. *United States Fidelity & Guaranty Co. v. Ridgley*..... 622

11. The signing of the bond by the obligor and its delivery to to the employee, does not constitute the employee the agent of the obligor, with authority to bind the latter by a waiver of such signature. *United States Fidelity & Guaranty Co. v. Ridgley*..... 622

12. The fact that the obligor retained the premium paid by the employee does not constitute a waiver of the signature of the employee to the bond. *United States Fidelity & Guaranty Co. v. Ridgley*..... 622

13. Statements made by an employer in support of his employee's application for such bond, as to the nature of the duties of the employee, are in the nature of warranties, and a breach thereof will avoid the bond. *United States Fidelity & Guaranty Co. v. Ridgley*..... 622

14. Evidence in an action on an accident insurance policy, *held* to support verdict that death resulted from accident, as claimed. *Woodmen Accident Ass'n v. Hamilton*..... 24

15. The decision of the medical examiner that plaintiff is "not entitled to any further disability benefits" is a mere conclusion, and is not binding upon the parties. *Chicago, B. & Q. R. Co. v. Olsen*..... 559

16. In an action on a benefit certificate, the defense was suicide. The verdict of the jury, *held* to be unsupported by the evidence. *Sovereign Camp, Woodmen of the World, v. Hruby* 5

Intoxicating Liquors. See DEEDS, 5.

1. It is not necessary to republish the notice of application for license to sell intoxicating liquors after additional names are permitted to be added to the petition. *Thompson v. Eagan* 169

2. Infant children, although residents and heirs to estates of inheritance in real estate in the precinct, are not qualified signers of a petition for the sale of intoxicating liquors in such precinct. *Thompson v. Eagan*..... 169

Irrigation. See WATERS.

Judgment. See EQUITY. EXECUTORS AND ADMINISTRATORS, 7. MANDAMUS, 2. TAXATION, 9, 10.

1. All preumptions are in favor of the regularity of the proceedings of courts of record, when collaterally assailed. *Banking House of A. Castetter v. Dukes*..... 648
2. Where the steps by which a court of general jurisdiction is supposed to have acquired jurisdiction are all shown by the record, and it appears from the face of the record that the court acted without jurisdiction, the judgment is a nullity and may be attacked collaterally. *Banking House of A. Castetter v. Dukes*..... 648
3. Every proceeding to set aside an order of a county court made in the course of probate or administration proceedings, on the ground that it was obtained by fraud, is not of necessity equitable in its nature. *Estate of James v. O'Neill*..... 132
4. It is only where a final judgment has been procured by fraud, or some order which by reason of the lapse of the term and its finality can not be set aside by the ordinary powers of the court, that its equity powers come into play. *Estate of James v. O'Neill*..... 132
5. A judgment establishing the invalidity of an election attempted to be made at the general election in 1899, does not render *res judicata* between the same parties the power to make such an election at the general election in 1901, even if there be no change in the law affecting the validity of such election. *State v. Moores*..... 48

Jurisdiction. See APPEAL AND ERROR, 32. COURTS. JUSTICE OF THE PEACE.

The courts of this state are without jurisdiction to compel the conveyance of lands, subject to entry and settlement under the homestead laws of the United States, to a person who has been denied the privilege of making such entry and settlement by the officials of the United States land department. *McDonald v. Union P. R. Co*..... 346

Justice of the Peace.

1. An appeal bond signed only by the judgment debtors, if approved by the justice, is sufficient to confer jurisdiction on the appellate court to have the defect corrected. *State Savings & Loan Ass'n v. Johnson*..... 753
2. The jurisdiction of a justice of the peace in an action of trespass to lands extends no further than to enable him to try the fact of possession. He has no jurisdiction to inquire into the title to lands or into the right of possession as between the parties to such action. *Dold v. Knudsen*..... 373
3. The statute provides that, in case of arrest or attachment, the justice shall render judgment immediately on the con-

Justice of the Peace—*Concluded.*

clusion of the trial. By taking such a case under advisement by consent of parties to a future day, the justice does not lose jurisdiction to render judgment. *Westover & Co. v. Van Dorn Iron Works Co*..... 415

Landlord and Tenant. See FORCIBLE ENTRY AND DETAINER.

1. A tenancy from year to year will not be created against the contrary intention of both parties, and payment of rent is merely an evidential fact bearing upon the question of the intent of the parties. *Pusey v. Presbyterian Hospital*..... 353
2. The receipt of rent by the landlord is not conclusive as to the continuance of the term. *Pusey v. Presbyterian Hospital*..... 353
3. Evidence *held* sufficient to prove an intent to renew or continue the term of a lease. *Pusey v. Presbyterian Hospital*.. 353
4. Where a lease provides that, upon failure of the lessee to keep and perform certain covenants and agreements therein contained, the lessor may terminate the lease and recover possession by action of forcible entry and detainer, such action may be maintained upon a breach of such covenants and agreements by the lessee, although the lease has not terminated by efflux of time. *Preston v. Stover*..... 632
5. The acceptance and retention by the landlord of a check, does not waive the forfeiture in a lease, in the absence of a showing that the landlord or his agent received the check with actual knowledge of a proposed limitation in its application to accruing rent. *Cochran v. Philadelphia Mortgage & Trust Co*..... 100

Larceny. See CRIMINAL LAW, 1-5.

Licenses.

Sections 62, 63 and 64, article I, chapter 77 of the Compiled Statutes of 1903, providing for the licensing of peddlers, and denouncing a penalty for their violation, are not void as being in contravention either of the constitution of this state, or of the constitution of the United States, but they are inapplicable to transactions constituting interstate commerce. *Menke v. State*..... 669

Limitation of Actions. See TAXATION, 20-22.

1. The statute of limitations does not begin to run against a bank on a certificate of deposit payable on demand until a demand has been made. *Sharp v. Citizens Bank*..... 758
2. The fact that the statute of limitations had barred a personal action against an assignor on his guarantee of payment when suit was commenced by an assignee to establish her claim to the proceeds of the policy, does not in any manner release or impair her equitable lien upon such proceeds. *Hyde v. Hartford Fire Ins. Co*..... 503

Liquors. See INTOXICATING LIQUORS.

Mandamus.

1. Mandamus is a discretionary writ and will be allowed only in furtherance of justice upon a proper case presented. It will not be allowed where it is apparent that it is applied for to gratify the spite of a private individual, nor where the relator has instigated, authorized or approved the acts complained of. *Donahue v. State*..... 72
2. In mandamus proceedings, the hearing upon an order to show cause why the money obtained by the relator from the respondent under such proceedings should not be returned to the respondent is summary in its nature, and an order therein is not a final adjudication of the rights of the parties to the money in controversy. *State v. Horton*..... 343
3. Where one assumes to fill a public office he is amenable to process commanding him to perform any act which the duties of his office dictate, and is estopped to plead a private contract inconsistent with his duty to all. *Mockett v. State*, 518
4. M. was employed by one of the parties to a proceeding had before a board of equalization to take the evidence in shorthand. *Held*, That mandamus would lie to compel him to deliver a transcript of the evidence to all parties to the proceeding. *Mockett v. State*..... 518
5. On an application for writ of mandamus to compel payment of salary as police judge, *held*, writ prayed for was properly denied. *State v. Moores*..... 48

Married Women. See HUSBAND AND WIFE. TRIAL, 10.

Master and Servant.

1. Before recovery can be had against an employer based on the ground of negligence in not informing the employee of the danger attending the operation of a machine and instructing her how to avoid injury thereby, it must appear that the injury complained of occurred because of the want of such instruction. *Fronk v. Evans City Steam Laundry Co.*..... 75
2. The master is liable for the negligent act of a servant committed within the scope of, or as a necessary incident of, his employment. *Pomerene Co. v. White*..... 171
3. Where as an incident of employment, it is necessary for a servant to open a trap-door to perform his labor and he carelessly and negligently leaves the trap-door open after performing the work, and one to whom such duty is owed is injured by such negligence, the master is liable. *Pomerene Co. v. White*..... 171
4. $1,000 damages for a broken arm *held* not excessive. *Pomerene Co. v. White*..... 171

Mechanics' Liens.

1. In an action to foreclose a mechanic's lien, it must appear in evidence that the statement of the claim therefor has been filed with the proper officer in the county, within the time prescribed by statute. *Tidball v. Holyoke*..... 726

2. A subcontractor's lien will not be held invalid because of failure to correctly state the firm name of the contractor. *Cady Lumber Co. v. Conkling*..... 807

Misdemeanors. See CRIMINAL LAW, 7-11.

Mortgages. See ACKNOWLEDGEMENT, 2. HOMESTEAD, 6. TAXATION, 24.

1. Where a deed, absolute in form, is given to secure payments of an indebtedness existing between the grantor and grantee therein, and the relation of debtor and creditor continues after the execution of the conveyance, the deed should be treated as a mortgage. *Tanhyhill v. Pepperl*..... 31

2. Evidence *held* sufficient to sustain the judgment of the trial court. *Tannyhill v. Pepperl*..... 31

3. A mortgage bearing a certificate of the proper officer showing that it was duly acknowledged before him by the mortgagor may be read in evidence without further proof. *McKenzie v. Beaumont*..... 179

4. To entitle the holder of a real estate mortgage to a decree of foreclosure, it is not necessary to show that the mortgage has been duly recorded. *McKenzie v. Beaumont*..... 179

5. Where the owner of real estate binds himself to keep the premises insured for the protection of the mortgagee, such mortgagee will have an equitable lien upon the money due on a policy taken out by the mortgagor. *Hyde v. Hartford Fire Ins. Co*..... 503

6. Where a mortgagee assigns a mortgage, containing a covenant on the part of the mortgagor to keep the premises insured, and agreeing that the mortgagee may procure such insurance, and guarantees the payment of the mortgage indebtedness, and, thereafter, such assignor becomes the owner of the mortgaged premises and takes out insurance thereon in his own name, the owner of the mortgage will have an equitable lien on the proceeds of the policy in case of loss. *Hyde v. Hartford Fire Ins. Co*..... 503

7. Technical objections on the confirmation of a judicial sale should be disregarded. *Vradenburg v. Johnson*..... 793

Municipal Corporations. See TAXATION, 28, 29.

1. The provisions of section 144, article 1, chapter 77, Compiled Statutes, 1901, apply to special assessments as well as taxes levied for general purposes. *City of Omaha v. Hodgskins*.. 229

Municipal Corporations—*Concluded.*

2. The provisions of this section are made applicable to cities of the metropolitan class by the repeal of section 69 of the charter of metropolitan cities in 1891. *City of Omaha v. Hodgskins.* 229
3. The title, "An act to provide a system of revenue," is broad enough to include provisions for special assessments. *City of Omaha v. Hodgskins*..... 229
4. A taxpayer who has complied with the provisions of section 144, article 1, chapter 77, Compiled Statutes, 1901, may bring an original action against a city or county to recover illegal taxes paid, without filing his claim before the city council or board of county commissioners. *City of Omaha v. Hodgskins*..... 229
5. Physical incapacity is not available to extend the time for the fixing of a statutory liability upon a city. *Schmidt v. City of Fremont*..... 577
6. Unless the notice required by section 39, article 3, chapter 13, Compiled Statutes of 1901, has been given within the prescribed time, there can be no recovery of damages against a city. *Schmidt v. City of Fremont*..... 577

Negligence. See CARRIERS, 4. MASTER AND SERVANT, 1. STREET RAILWAYS, 1, 3. TELEGRAPHS AND TELEPHONES.

1. Where plaintiff makes out his case without disclosing contributory negligence, the burden is on defendant to establish its existence, as an affirmative defense. *Pomerene Co. v. White* 171
2. Negligence and contributory negligence are questions for a jury. *Chicago, B. & Q. R. Co. v. Troyer*..... 293

New Trial.

1. A petition states good ground for a new trial, which sets forth a fraudulent erasure of a cancelation of a mortgage, perjury by the prevailing party as to the cancelation and the erasure of it, due diligence by the other party and inability to discover it in time for the trial. *Van Antwerp v. Lathrop*..... 747
2. Where such a petition fails to set forth that the facts were not discovered within two years of the trial, and fails to show any reason for extending the two years allowed by statute for setting aside judgments for fraud, equity is powerless to relieve. *Van Antwerp v. Lathrop*..... 747
3. In an action for personal injuries, a new trial will not be granted on account of smallness of damages. Code, sec. 315. *O'Reilly v. Hoover*..... 357
4. If an instruction be given, not called for by the evidence, and which appears to have a tendency to prejudice the party

New Trial—*Concluded.*

complaining, a new trial will be granted. *Nebraska Land & Feeding Co. v. Trauerman*..... 795

5. A motion for a new trial on the ground of newly discovered evidence is properly overruled, where it appears that the facts offered in support of the motion are only cumulative or relate to matters already established. *Norbury v. Harper*, 389

6. A failure to give one day's notice in writing of the hearing on a motion for a new trial, *held*, not error. *Cochran v. Philadelphia Mortgage & Trust Co*..... 100

7. Where the alleged newly discovered evidence is merely cumulative, a new trial will be refused. *Campion v. Lattimer* 245

Notice. See ANIMALS, 3. EXECUTORS AND ADMINISTRATORS, 12. MUNICIPAL CORPORATIONS, 6. NEW TRIAL, 6.

Officers. See COUNTIES AND COUNTY OFFICERS. MANDAMUS, 3.

The right to an office occupied by one claiming title thereto under a certificate of election, can not be determined in a suit instituted by an adverse claimant for the salary of the position. *State v. Moores*..... 56

Parties.

To authorize a joinder of parties as defendants, they must be under a joint liability or must be claiming some right in the subject matter of the action. *Stull Bros. v. Powell*..... 152

Payment.

The burden of proof is on defendant to establish payments, and on plaintiff to show that an admitted payment was properly applied on another debt. *Davis v. Hall*..... 678

Pleading and Practice. See APPEAL AND ERROR, 17-26, 31. BANKRUPTCY, 1, 4. BASTARDY. DIVORCE, 1, 2. EXECUTORS AND ADMINISTRATORS, 1. INSURANCE, 9. NEW TRIAL, 1, 2. RECEIVERS, 5. VENUE. WILLS, 9.

1. It is not an abuse of discretion for the district court to refuse to permit the plaintiff to file an amended reply where it changes the issues made up in the county court, where the case was originally commenced and tried, and where the right to recover on the new matter contained in such amended reply is barred by the statute of limitations. *Johnston v. Chicago, B. & Q. R. Co*..... 364

2. If, after the issues are made up, an amended answer is filed, and the cause is tried on the theory that the reply stands as a reply to the amended answer, it will be so considered by this court. *Palmer v. Mizner*..... 200

3. It is not error for the district court to permit answers to be withdrawn and a general demurrer to be filed, if the petition

Pleading and Practice—*Concluded.*

fails to state a cause of action, even if the case has been four times under consideration in this court, if no objection has been made to its sufficiency. *Edney v. Baum*..... 159

4. By pleading to the merits, without raising them, a party waives all defects by way of misjoinder or defect of parties, but not the lack of jurisdiction in the court, nor that the petition does not state a cause of action. *Edney v. Baum*... 159
5. Where a petition for a divorce contains a second cause of action for the settlement and adjudication of property rights, not growing out of the marriage relation, a demurrer thereto for misjoinder of causes of action should be sustained. *Reed v. Reed*..... 779
6. After a demurrer for a misjoinder of causes of action has been sustained, and the plaintiff files a new petition, and again inserts therein allegations relating to the second cause of action, a motion to strike such allegations should be sustained. *Reed v. Reed*..... 779
7. A nonresident defendant may join a plea to the merits with a plea to the jurisdiction, where the facts as to the latter are not apparent on the face of the record. *Stull Bros. v. Powell* 152
8. Where the question of jurisdiction is thus litigated, the nonresident defendant does not, by appealing from a county court's adverse decision, waive his plea to the jurisdiction. *Stull Bros. v. Powell*..... 152
9. The plea of duress as a defense to an action upon a contract is sufficient if it shows that, by reason of threats or other unlawful means, the defendant was deprived of his free will and understanding, and that the contract sued upon was not his free and voluntary act. *Nebraska Mutual Bond Ass'n v. Klee*..... 383
10. A subcontractor's petition to foreclose a mechanic's lien need not allege that there is anything due from the owner to the original contractor. *Cady Lumber Co. v. Conkling*..... 807
11. Petition in a suit to enjoin a sale of land, *held* insufficient to state a cause of action. *McHale v. Metz*..... 106
12. Petition and amended petition in replevin, *held* to state the same cause of action. *Gosnell v. Webster*..... 705
13. Answer setting up a breach of warranty, *held* to state a defense to the cause of action set forth in the petition. *Warder, Bushnell & Glessner Co. v. Myers*..... 15

Pledges.

1. Where personal property is pledged to secure the payment of a debt, the pledger can not recover the property in a replevin action without paying or tendering the whole amount

Pledges—*Concluded.*

of the debt and keeping good the tender. *Wilkins v. Redding* 182

2. Where the amount of a debt is not in dispute, a tender of the amount is not bad because coupled with a demand for the return of the property, but must be kept good; but where the amount of the debt is in dispute, a tender of any sum less than that claimed by the pledgee, though equal to the amount actually due, is not good if coupled with such a condition. *Wilkins v. Redding*..... 182

3. A pledgee does not forfeit his lien by unsuccessfully contending that the equity of redemption has been extinguished by contract or by a sale under his right as pledgee. *Wilkins v.. Redding*..... 182

Presumptions. See ADVERSE POSSESSION. APPEAL AND ERROR, 21. JUDGMENT, 1.

Principal and Agent. See INSURANCE, 4, 5. TAXATION, 5.

1. The unauthorized acts and representations of an agent, not within the apparent scope of his authority, and in the absence of ratification by the principal, can not bind the principal. *Spies v. Stein*..... 641

2. In replevin, false representations of an agent can not be shown to disprove the principal's evidence that he owned and was entitled to the possession of the goods. *Spies v. Stein* 641

3. One of three persons who are appointed attorneys in fact by power of attorney may act for the principal, if the power of attorney contains no provision requiring more than one to join in the act. *United States Fidelity & Guaranty Co. v. Ettenheimer*..... 147

4. One is not permitted to ratify an unauthorized act in so far as it operates to his advantage and repudiate it in so far as it imposes burdens. If one avail himself of the fruits of an act, he thereby charges himself with the burden of all the instrumentalities employed by the agent to effect his purpose. *Warder, Bushnell & Glessner Co. v. Myers*..... 15

5. Agency can not be proved by the acts or declarations of the alleged agent not brought home to the principal. *Blanke Tea & Coffee Co. v. Rees Printing Co*..... 510

6. Evidence of agency *held* not to support the finding and judgment. *Blanke Tea & Coffee Co. v. Rees Printing Co*..... 510

Process.

1. Section 11, chapter 20, Compiled Statutes, providing for rules of practice in the county court, *held* to authorize a summons in the form allowable in district court in such cases. *Farmers Banking & Loan Co. v. Mauck*..... 586

Process—*Concluded.*

2. It is not necessary to state the nature of the action in a district court summons. *Farmers Banking & Loan Co. v. Mauck* 586

3. To authorize summons to another county in a merely personal action for money, there must be an actual right to join the resident and nonresident defendants. *Stull Bros. v. Powell* 152

Public Policy. See EXECUTORS AND ADMINISTRATORS, 10.

Quieting Title. See EXECUTORS AND ADMINISTRATORS, 12.

Quo Warranto.

An information in the nature of quo warranto will not lie to inquire into the right of county surveyors, in counties having more than 50,000 population, to perform and exercise the duties of county engineer, as provided for by chapter 32 of the laws of 1903. *State v. Scott*..... 681

Railroads. See CARRIERS. INSURANCE, 15. STREET RAILWAYS.

1. Where a railroad company purchases land by warranty deed and uses it for right of way and depot purposes, it has the exclusive right to the possession and use of all such lands as against the owner of adjacent lands. *Hull v. Kansas City & O. R. Co*..... 756

2. It is for the railroad company and not for the adjacent owner to determine how much of these lands is necessary for depot and right of way purposes. *Hull v. Kansas City & O. R. Co*..... 756

3. The proprietor of an elevator, built upon the right of way of a railroad company by permission of the company, is a licensee upon the premises and must operate his elevator loading cars therefrom, subject to the right of the company to handle its trains and use the track for switching purposes in the ordinary and usual way of doing such work. *Chicago, B. & Q. R. Co. v. Giffen*..... 66

4. Negligence is a question for the jury. *Chicago, B. & Q. R. Co. v. Giffen*..... 66

Receivers.

1. The holder of a contract in a so-called tontine company is not a stockholder in such company, and can not secure the appointment of a receiver for such company because of the mismanagement of its affairs by its officers. *Mann v. German-American Investment Co*..... 454

2. The holder of such a contract who has not reduced his claim to judgment, and who has no lien upon the property of the company, has no standing in a court of equity in an action to sequester or impound the assets of such company. *Mann v. German-American Investment Co*..... 454

Receivers—*Concluded.*

3. An order of the district court appointing a receiver for a corporation, in an action wherein such relief is the only relief sought, will be vacated for want of authority in such court to make the same. *Mann v. German-American Investment Co*..... 454

4. A prayer for general relief, coupled with one for the appointment of a receiver, only, will not be considered as a prayer for relief other than such appointment, unless the petition states a good cause of action for other relief. *Mann v. German American Investment Co*..... 454

5. An application for a receiver is addressed to the sound discretion of the trial court, which discretion does not appear to have been abused in this case. *McKenzie v. Beaumont*... 179

Redemption. See TAXATION, 12-18, 24, 25, 27.

Remittitur. See APPEAL AND ERROR, 48.

1. In an action for personal injuries, where substantial damages are proved, but the verdict of the jury appears to be excessive, the error may be corrected by a proper remittitur of the excess. *Chicago, B. & Q. R. Co. v. Krayenbuhl*..... 766

2. Quantum of damages *held* excessive, and a remittitur of $3,000 directed. *Chicago, B. & Q. R. Co. v. Krayenbuhl*..... 766

Replevin. See CHATTEL MORTGAGES, 1. ELECTION OF REMEDIES, 3, 4. EVIDENCE, 4. PLEDGES. PRINCIPAL AND AGENT, 2.

1. Under section 189 of the code, exceptions to the sufficiency of sureties upon a replevin undertaking must be taken within twenty-four hours from the time the undertaking is given; the defendant is not entitled to the whole of the day after that on which the undertaking is given in which to except thereto. *Barton v. Shull*..... 324

2. Such period of twenty-four hours should be held to begin on the expiration of the twenty-four hours from the taking of the property, allowed the plaintiff for the purpose of furnishing the undertaking. *Barton v. Shull*..... 324

3. Where no exception is taken to the sufficiency of the sureties within the time fixed by section 189 of the code, all objections as to sufficiency are waived. *Barton v. Shull*..... 324

Rescission. See SALES, 4, 6.

Res Judicata. See JUDGMENT, 5.

An interlocutory order entered on a former appeal, *held* not to be *res judicata* as to the rights of the parties to redeem land from a decree rendered in the action and sale made in pursuance thereof so as to become the law of the case. *Carly v. Boner*..... 674

Restitution.

1. Restitution, upon the reversal of a judgment which has been executed, is not a matter of absolute right; it rests in the sound discretion of the court. *State v. Horton*..... 334
2. Ordinarily, an order of restitution will not be made against a solvent party, where the result will be to deprive him of an opportunity to be heard in the courts of this state as to the merits of his claim. *State v. Horton*..... 334
3. A corporation neglected to issue stock to a subscriber therefor and ordered the money paid upon subscription returned to the subscriber. The order allowing the writ was afterwards reversed. The corporation having gone into bankruptcy, and the relator being solvent, it is *held* that the trustee in bankruptcy is not entitled to an order requiring the relator to return the money, so obtained, to the trustee in bankruptcy. *State v. Horton*..... 334

Review. See APPEAL AND ERROR.

Sales.

1. C. S. & Co., in pursuance of a contract of sale with C. & A., consigned certain goods to the latter, drew a draft for the amount due, and negotiated it, with the bill of lading attached, to a bank, which delivered the goods and bill of lading, and collected the draft from C. & A. *Held*, The transaction did not, of itself, operate to substitute the bank for C. S. & Co., as a party to the contract of sale, in such a way as to render it liable for breach of warranty as to the quality of the goods. *German-American Bank v. Craig*, 41
2. In an action to recover the purchase price of cultivators sold by a manufacturer to a jobber for the purpose of resale the jobber may, on a counterclaim for damages for a breach of warranty, recover the profits on resales actually made and completed. *Punteney-Mitchell Mfg. Co. v. Northwall Co.* 688
3. Evidence *held* sufficient to sustain the finding of the trial court of a breach of warranty. *Punteney-Mitchell Mfg. Co. v. Northwall Co*..... 688
4. To warrant the rescission of a sale on the ground of false representation, it must appear, not only that the representations were false, but that the injured party believed them and acted upon them to his injury. *Korbel v. Skocpol*.... 45
5. Evidence *held* sufficient to sustain the verdict. *Korbel v. Skocpol* 45
6. The vendor of personal property can not rescind the contract of sale and recover possession from the vendee on the ground of fraud and deceit, in the absence of fraudulent representations made by the vendee respecting some matter

Sales—*Concluded.*

material to the contract, and upon which the vendor relied in making the sale and extending credit for the purchase price. *Moyer v. Richardson Drug Co* 190

Schools and School Districts.

1. A school district board has no authority to purchase or lease a schoolhouse site, unless directed by the electors of the district at an annual or special meeting. *Ladd v. School District* 438
2. That the electors of a school district have lawfully designated a particular site to which to move the schoolhouse is not an implied direction to the board to purchase or lease such site. *Ladd v. School District* 438

Sheriffs and Constables.

The sureties on the official bond of a sheriff are liable for his misconduct when acting as assignee under the provisions of section 7, chapter 6, Compiled Statutes. *Huddleson v. Polk*, 483

Specific Performance. See HOMESTEAD, 1, 4, 5.

1. The fact that the signature and acknowledgment of a wife to a contract of sale of a homestead was made under threat of her husband to "leave" her if she did not execute it, is not ground for refusing specific performance of the contract, where the vendee is entirely innocent of any participation in or knowledge of the threat. *Johnson v. Weber* 467
2. A contract for personal service, where full performance rests upon the will of the contracting party, is not specifically enforceable, but when such services have been rendered the contract may be enforced. *Teske v. Dittberner* 544
3. A vendee in a contract for the sale of land, *held* entitled to specific performance. *Watkins v. Youll* 81

Statute of Frauds. See TRUSTS. WILLS, 7.

1. A relinquishment to be effectual as to lands must be in writing signed by the party to be charged. *Riddell v. Riddell* 472
2. Receipt and retention of lands from the father in consideration of an agreement to relinquish all interest in other lands of the father is not such a part performance of it as to take it out of the statute of frauds. *Riddell v. Riddell* 472

Statutes. See CONSTITUTIONAL LAW.

Street Railways.

1. Negligence of plaintiff in driving across a street railway track without stopping to look and listen, will not excuse the company from its duty to use reasonable diligence to stop its car after discovering his peril. *Omaha Street R. Co. v. Larson* 591

Street Railways—*Concluded.*

2. Where the evidence is fairly conflicting, the question as to the direct and proximate cause of an alleged injury is one of fact for the jury. *Omaha Street R. Co. v. Larson*..... 591

3. In an action for personal injuries due to the frightening of plaintiff's team by the alleged negligent operation of a street car, *held*, that a judgment for plaintiff be reversed for want of evidence to sustain it. *Lincoln Traction Co. v. Moore* 422

Subrogation.

The right of subrogation is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another. *Sharp v. Citizens Bank*..... 758

Summons. See PROCESS.

Taxation. See CORPORATIONS, 4. MUNICIPAL CORPORATIONS, 1-4.

1. In making a return of his taxable property under the provisions of chapter 73 of the laws of 1903 the taxpayer may deduct from the credits due him all just debts by him owing at the time of such return. *State v. Fleming*..... 529

2. Section 56 of said chapter 73 is a provision, not for taxing the corporations therein named on their capital stock, but for taxing the shareholders on the value of the stock held by them, and requiring the corporation to pay the tax assessed against the shareholders. *State v. Fleming*..... 529

3. Unearned premiums do not constitute any part of the gross receipts of an insurance company, and need not be included in its return of gross receipts under the provisions of section 58, chapter 73, laws of 1903. *State v. Fleming*..... 529

4. The tax imposed upon the gross receipts of insurance companies is not in lieu of all other taxes. *State v. Fleming*.. 529

5. Chapter 73, laws of 1903, is not objectionable in that it makes a bank responsible for the payment of the tax levied upon the shares of stock held by its stockholders, or an agent for the tax levied on the property of his principal. *State v. Fleming*..... 529

6. The gross receipts required by the provisions of section 78, chapter 73, laws 1903, to be returned for taxation by express, telegraph and telephone companies, refers to gross receipts for business done in this state, and does not include receipts for interstate business. *State v. Fleming*.. 529

7. It is no objection to chapter 73, laws 1903, that, on an appeal from the board of equalization, no jury is provided or allowed on the trial of such appeal. *State v. Fleming*..... 529

8. In an action by a county to foreclose a tax lien the question whether the county could maintain such action with-

Taxation—*Continued.*

out an antecedent administrative sale by the county treasurer and the issuance to the county of a tax sale certificate, goes to the existence of a cause of action and not to the jurisdiction of the court. *County of Logan v. McKinley-Lanning Loan & Trust Co*..... 399

9. A decree in a foreclosure of a tax lien, barring the equity of redemption of the owner of such property, is an adjudication of that question which can not be inquired into on objection to confirmation of sale. *County of Logan v. McKinley-Lanning Loan & Trust Co*..... 399

10. A decree foreclosing a tax lien can not be assailed for irregularity, upon a motion to set aside a sale made in pursuance of such decree. *County of Logan v. McKinley-Lanning Loan & Trust Co*..... 399

11. Where a decree foreclosing a tax lien denies to the owner of the equity of redemption the time to redeem from sale which is allowed by law, his remedy is by a direct proceeding to obtain a reversal of the decree. *County of Logan v. McKinley-Lanning Loan & Trust Co*..... 399

12. In a suit to foreclose a tax lien, a decree barring the equity of redemption does not adjudicate the right of redemption from tax sale given by the statute or the constitution. *County of Logan v. McKinley-Lanning Loan & Trust Co*.... 406

13. The statutory right of redemption from tax sale differs essentially from the equity of redemption proper. *County of Logan v. McKinley-Lanning Loan & Trust Co*..... 406

14. A statutory right of redemption from sale as distinguished from the equity of redemption is self-executing, and no proceedings are required to make such right effective. *County of Logan v. McKinley-Lanning Loan & Trust Co*..... 406

15. Section 3, article IX of the constitution, giving the right of redemption from tax sales, is self-executing and can not be defeated by foreclosure proceedings. *County of Logan v. McKinley-Lanning Loan & Trust Co*..... 406

16. The sale of lands for taxes contemplated by the constitutional provisions above mentioned refers to and embraces both administrative and judicial sales. *County of Logan v. McKinley-Lanning Loan & Trust Co*..... 406

17. The equity of redemption, only, being barred by a decree foreclosing a tax lien, the right to redeem from tax sale may be raised by an objection to a motion to confirm a sale made in pursuance of the decree. *County of Logan v. McKinley-Lanning Loan & Trust Co*..... 406

18. An absolute order of confirmation of a sale, made in pursuance of a decree for the sale of land for the satisfaction

Taxation—*Continued.*

of taxes over objections which deprives the decree debtor of the right of redemption from tax sale given by the statute or constitution, is erroneous. *County of Logan v. McKinley-Lanning Loan & Trust Co*..... 406

19. A county can not foreclose its lien for taxes without a sale first having been made by the county treasurer and a certificate of tax sale issued thereon. *County of Valley v. Milford*..... 313

20. A foreclosure proceeding by a county, upon a tax sale certificate, must be brought within the time limited by section 1, article 4, and section 2, article 5, chapter 77, Compiled Statutes. *County of Valley v. Milford*..... 313

21. The five-year limit, within which foreclosure proceedings upon a tax sale certificate must be brought, does not commence to run until the expiration of the two years within which the tax debtor may redeem from the sale. *County of Valley v. Milford*..... 313

22. The county's lien for taxes is not devested by the failure of the county to foreclose its tax lien within the time limited by statute, but the county may again purchase at tax sale for the years covered by its prior purchase. *County of Valley v. Milford*..... 313

23. While a lien of a tax upon personal property is inferior to a chattel mortgage given after the taxes were levied, but before the tax books came into the hands of the collector, such mortgage is inferior to the lien of taxes levied and assessed against the mortgagor, for subsequent years, upon the property mortgaged remaining in his possession. *Woolsey v. Chamberlain Banking House*..... 194

24. Redemption from a decree of foreclosure and from a sale thereunder for taxes by a mortgagor will both discharge the decree of foreclosure and the sale pursuant to it, and satisfy the lien of the tax. Redemption by the holder of such mortgage will discharge the decree of foreclosure and the sale thereunder; but a lien for the redemption money and interest will subsist for the protection of his security in accordance with the covenants of the instrument. *Carly v. Boner*..... 671

25. The right of redemption from tax sale is given by statute to the owner of the equity of redemption or his grantee. *Carly v. Boner*..... 674

26. In foreclosure proceedings by a county of a lien for taxes where no sale for such taxes has been made, a decree entered in favor of the county, while erroneous, is not void. *Russell v. McCarthy*..... 514

Taxation—*Concluded.*

27. One who redeems from a tax sale of real estate, when he has no title to or interest in such real estate, is a mere volunteer, and such redemption gives him no claim against the owner of the land nor any lien against the land itself for the redemption money. *McKenzie v. Beaumont*..... 179

28. Where a precinct, as formed, embraced four wards of a city, each of which was by statute made a precinct for taxing purposes, an assessor elected for and exercising his office in all four of them, without objection and with the acquiescence of the people, is a *de facto* assessor in each ward. *City of South Omaha v. O'Rourke*..... 479

29. City taxes paid under protest are not recoverable because based upon an assessment made by such a *de facto* assessor who was acting for all four wards. *City of South Omaha v. O'Rourke*..... 479

Telegraphs and Telephones.

Negligence in the delivery of a message resulting in the loss of a sale of a quantity of corn at a price above the market value is actionable, and the measure of damages is the difference in value between the price the plaintiff would have received for the corn, had the sale been made, and the market value of the corn at such time and place of delivery. *Western Union Telegraph Co. v. Nye & Schneider Co*..... 251

Tender. See PLEDGES, 2.

Transcript. See APPEAL AND ERROR, 43-46.

Trespass.

One in the actual peaceable possession of land may maintain trespass against a party forcibly invading such possession, even though the latter has the better title to the freehold. *Dold v. Knudsen*..... 373

Trial. See APPEAL AND ERROR. EVIDENCE. INSTRUCTIONS. NEGLIGENCE, 2. PLEADING AND PRACTICE. STREET RAILWAYS, 2. TAXATION, 7.

1. Action of the trial court in refusing a continuance *held* not error. *Linton v. Cathers*..... 601

2. If the trial judge fails to make a complete statement of the testimony, under section 287 of the code, the party who desires a fuller statement should make a request to that effect. *Barton v. Shull*..... 324

3. The trial court is not required to submit a case to the jury unless the evidence supporting it is of such a character that it would warrant the jury in basing a verdict upon it. *Kielbeck v. Chicago, B. & Q. R. Co*..... 571

Trial—*Concluded.*

4. It is customary to permit attorneys to comment upon the absence of witnesses, or their nonproduction, when they are shown to be cognizant of the facts in issue. *Chicago, B. & Q. R. Co. v. Krayenbühl*..... 766

5. Where a case has been submitted upon a demurrer to the evidence, plaintiff's absolute right to dismiss without prejudice is lost. *Fronk v. Evans City Steam Laundry Co*.... 75

6. Whether a guard rail attached to a mangle for the purpose of protecting the hand of the operator from being caught and drawn into the machine was properly attached and placed in position, is a question for the jury under the evidence. *Fronk v. Evans City Steam Laundry Co*..... 75

7. Permitting the filing of amended pleadings is confided to the sound discretion of the district court and, in the absence of an abuse of such discretion, its orders in that behalf will not be disturbed. *Nebraska Land & Feeding Co. v. Trauerman*. 795

8. Instructions in an action for fraud, *held* sanctioned by the former rulings of this court. *Korbel v. Skocpol*..... 45

9. Evidence in an action for forcible entry and detainer examined, and *held* that a peremptory instruction for plaintiff was properly given. *Cochran v. Philadelphia Mortgage & Trust Co*..... 100

10. In an action by a married woman for personal injuries, it is proper to show that she has been incapacitated by reason of her injuries from performing labor, for the purpose of showing the nature and extent of her injuries. *Pomerene Co. v. White*..... 171

11. Frequently the necessary inference from an undisputed state of facts is so certain that it is ruled upon as a question of law. *Sovereign Camp, Woodmen of the World, v. Hruby*..... 5

12. Fraudulent intent is a question of fact and not of law, yet, if from the uncontradicted evidence all reasonable men must reach but one conclusion, it is proper for the court to direct a verdict. *Wilcox v. County of Perkins*.... 139

13. Where evidence is introduced by an accused for the purpose of establishing an alibi, testimony which tends to dispute such evidence may be received in rebuttal. *Campion v. Lattimer*..... 245

Trusts. See EXECUTORS AND ADMINISTRATORS, 8. WILLS, 4.

1. A trust in personal property may be created by parol. *Estate of Devries v. Hawkins*..... 656

2. A parol agreement made at the time of executing a con-

Trusts—*Concluded.*

veyance of real estate, that the grantees shall hold the property in trust for the grantor and, when sold, pay the proceeds to him, the conveyance not being obtained by fraud or undue influence, is void, as an attempt to create an express trust in real estate by parol. *Marvel v. Marvel*..... 498

3. Where a grandfather receives insurance money of his grandchild, the fund still being in his possession at the time of his death, the same may be recovered from his estate by the grandchild in an action for money had and received. *Estate of Devries v. Hawkins*..... 656

Vendor and Purchaser. See SPECIFIC PERFORMANCE, 1.

1. A vendor under an agreement to convey real estate, on the day of performance of the contract appeared at a bank where he had placed a deed for the land in escrow and demanded the purchase money. He was tendered a check signed by the vendee, but refused it. The cashier then offered to cash the check and give him the money. *Held*, That the vendee was entitled to a conveyance. *Watkins v. Youll*..... 81

2. Contract for the conveyance of real estate between a vendee and three vendors, each owners of separate tracts of land, construed, and *held* to be severable and independent as to each vendor. *Watkins v. Youll*..... 81

3. Under the facts stated a vendor under an executory contract to convey real estate, *held* to be relieved from the obligation to perform. *Watkins v. Youll*..... 81

Venue.

Where a joint liability is asserted against several defendants, in order to maintain an action against one or more of them in a county other than that wherein they reside or are found, the latter are not to be held upon a different and several liability, even though it is disclosed by the pleadings and proof. *Penney v. Bryant*..... 127

Verdict. See APPEAL AND ERROR, 40, 47-54. EVIDENCE, 15. SALES, 5. TRIAL.

Waiver. See DEEDS, 7. EVIDENCE, 11. INSURANCE, 2, 3. PLEADING AND PRACTICE, 4, 8.

Warranty. See SALES, 1.

Waters.

1. A riparian owner has a right to make a reasonable use of a stream flowing over or along his lands for the purpose of irrigation. *McCook Irrigation & Water Power Co. v. Crews*..... 109

Waters—*Continued.*

2. This right is to be measured primarily by the amount of water in the stream available for such purposes, the number of persons who may use it, the size, situation and character of the stream, and the nature of the region. *McCook Irrigation & Water Power Co. v. Crews*..... 109
3. In case a reasonable use of the water, consistent with a like use by other riparian owners, can not be made, the injury of a riparian owner by reason of appropriation of the water by an irrigation enterprise is nominal only. *McCook Irrigation & Water Power Co. v. Crews*..... 109
4. A lower riparian owner can not enjoin an irrigation enterprise by an upper appropriator under the statutes, merely because his damages for injury to his riparian rights have not been paid; his remedy is to sue at law for such damages. *McCook Irrigation & Water Power Co. v. Crews*..... 109
5. If a lower appropriator under the statute is materially affected by diversions of water by upper riparian owners, he may bring a suit in equity to determine the rights of all claimants to use of the water and to quiet his title thereto, in which the damages to riparian rights may be ascertained and due compensation awarded. *McCook Irrigation & Water Power Co. v. Crews*..... 109
6. The lower appropriator may not maintain such a suit against upper riparian owners without offering to do equity by paying whatever damages accrue to such owners by reason of the appropriation. *McCook Irrigation & Water Power Co. v. Crews*..... 109
7. It will not be presumed that the damages in such case are nominal only. *McCook Irrigation & Water Power Co. v. Crews*..... 109
8. It is the policy of the law to regulate the diversion and use of waters; and the law of appropriation, as defined by the statute and administered by the state board of irrigation, is deemed an effective means to accomplish the desired results. *McCook Irrigation & Water Power Co. v. Crews*.... 115
9. Where an appropriator of water for purposes of irrigation has acquired a vested right to the use thereof, a riparian owner on the same stream can not enhance the damages he has sustained, by constructing irrigating ditches to irrigate his riparian lands under his common law right to a reasonable use of the water of such stream for such purpose. *McCook Irrigation & Water Power Co. v. Crews*..... 115
10. Where an appropriator has acquired a valid right to the use of water for purposes of irrigation, equity will restrain an upper riparian owner from subsequently diverting water,

Waters—*Concluded.*

the right to use which had been thus acquired. *McCook Irrigation & Water Power Co. v. Crews*..... 115

11. Where an appropriator has acquired a valid right to the use of water under the irrigation laws of the state, the right thus acquired is superior to that of a riparian owner to a reasonable use of the water of the stream under the common law, to irrigate riparian lands. *McCook Irrigation & Water Power Co. v. Crews*..... 115

12. A riparian owner whose property rights are appropriated or impaired is entitled to compensation for the injuries actually sustained, to be recovered in a suitable action or proceeding instituted for that purpose. *McCook Irrigation & Water Power Co. v. Crews*..... 115

13. Under the constitution and statutes of this state, condemnation is authorized of the right of the private riparian proprietor to the use and enjoyment of a natural stream flowing past his lands, or its impairment by an appropriation of such water for irrigating purposes, and such riparian proprietor may recover damages therefor. *McCook Irrigation & Water Power Co. v. Crews*..... 115

14. The statute governing the subject of the appropriation of water flowing in the streams, for the purpose of irrigation, is constitutional. *McCook Irrigation & Water Power Co. v. Crews*..... 115

15. Plaintiff under facts stated, *held* not estopped from asserting its superior right to the use of water for purposes of irrigation. *McCook Irrigation & Water Power Co. v. Crews.* 115

Wills. See HOMESTEAD, 4.

1. A testator devised certain lands located in Nebraska, to his daughter, M., upon the condition that she should not alienate the lands until she attained the age of thirty-three, with a devise over. M. died after attaining the age of thirty-three but without issue, devising the lands in Nebraska to her husband. *Held*, That the testator intended to give M. a fee simple estate in the Nebraska lands, with power of alienation after attaining the age of thirty-three. *Spencer v. Scovil*..... 87

2. Where a testator devises land to his daughter in fee simple, a subsequent clause in his will, by which he attempts to devise over to others so much of the land as his daughter has not alienated during her lifetime, if she dies without living issue, is void. *Spencer v. Scovil*..... 87

3. An agreement upon sufficient consideration to devise or bequeath property is valid and enforceable. *Teske v. Dittberner.* 544

Wills—*Concluded.*

4. In such case, equity will impress a trust upon the property, which will follow it into the hands of personal representatives of the promisor or grantees without consideration. *Teske v. Dittberner* 544

5. The agreement need not be in express terms to make a will; a promise that the promisee shall receive the property, or that it shall be left him at the death of the promisor, is sufficient. *Teske v. Dittberner* 544

6. If the promisor, after performance by the promisee, conveys the property in fraud of the latter, an immediate cause of action to cancel the conveyance arises. *Teske v. Dittberner.* 544

7. Performance of services is sufficient to take such an agreement out of the statute of frauds. *Teske v. Dittberner*.... 544

8. The proof and allowance of a will in another state, where the testator had his domicile at the time of his death, if duly authenticated, will be presumed to be in accordance with the laws of that state. *Martin v. Martin*..... 207

9. It is not necessary to specially allege the foreign statute, or to expressly prove that the proof and allowance of the will were in accordance with such statute. *Martin v. Martin*... 207

10. A remainder in fee may be limited to the heirs at law of one to whom is given the precedent freehold. *Albin v. Parmele* 740

11. A contract to leave property by will is not ambulatory or revocable, as being testamentary in character, after the promisee has performed his part of the contract. *Teske v. Dittberner* 544

Witnesses.

1. Since the amendment of 1883, section 329 of the code does not render a party adversely interested to the representative of a deceased person incompetent as a witness in the action, but only renders his testimony as to transactions and conversations with the deceased incompetent. *Riddell v. Riddell* 472

2. A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed at which the car was moving. *Omaha Street R. Co. v. Larson*..... 591

3. In a suit by a married man against his wife to declare a trust in real estate, and to quiet the title thereto in himself, the husband is not a competent witness. *Reed v. Reed*..... 775

4. Where an effort is made to impeach a witness by showing that he has made statements at variance with those made on

Witnesses—*Concluded.*

the witness stand, and the jury are told: "You are instructed that if a witness in the case has at another time and place made statements, material to the issue in this case, at variance with his testimony while on the witness stand, before you, then you are at liberty to disregard the whole of such witness's testimony, except in so far as he is corroborated by other credible evidence," a verdict against the plaintiff will be set aside. *Nielsen v. Cedar County*..... 637

5. In laying the foundation for impeachment of a witness, the witness may be questioned as to a statement, and also as to another conversation, by reason whereof he claimed to remember the fact stated, and, if he denies the whole, proof may be made, not only of the statement itself, but of the reasons he gave for remembering the fact in controversy. *Barton v. Shull*..... 324

6. It is not error to exclude testimony as to the conversation itself, the fact alone being material. *Barton v. Shull*..... 324

7. The matter of allowing interrogatories of a leading character to be put to a witness, rests in the sound discretion of the trial court. *Campion v. Lattimer*..... 245